To: European Commission,
DG TAXUD,
Unit D1 secretariat,
SPA3 08/015,
B-1049 Brussels,
Belgium

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Zurich CH-8027
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Ref KPMG Response to the European Commission Consultation 'Fighting the use of shell companies and arrangements for tax purposes'

Dear Madam/ Sir,

KPMG[1] member firms in the EU (hereafter 'we') are pleased to provide comments on the European Commission's (EC's) consultation on "Fighting the use of shell entities and arrangements for tax purposes."

KPMG supports the aims of the European Commission set out in the Inception Impact Assessment "fighting the use of shell companies and arrangements for tax purposes" (The Assessment) of ensuring fair and efficient taxation and combating tax abuse and aggressive tax planning.

The Assessment states that shell companies continue to pose a risk of being used in aggressive tax planning structures and defines 'shell companies' as legal entities with no or minimum substance and no real economic activities, used by taxpayers operating cross-border to reduce their tax liability. KPMG believes that it is appropriate that this issue is kept under review, but notes that the concerns raised by the EC in substance relate to tax planning of the past. In recent years the international tax coordination efforts, driven by G20/OECD BEPS and the EU fight against aggressive tax planning, have led to ground-breaking results that have significantly changed the taxation landscape, especially in respect of shell companies. KPMG especially notes the following developments:

1. The implementation of the GAAR as a result of ATAD1. This is especially relevant in view of the ECJ's recent decisions regarding the EU concept of abuse of law. In this respect we refer to e.g. the Deister-Juhler decision and the decisions in the so-called Danish beneficial ownership cases.
2. The introduction of the principal purpose test in the vast majority of tax treaties as a result of the MLI.
3. The aligning of economic substance and income generating activities under BEPS action 5 as well as the transfer pricing related BEPS actions 8-10.

[1] KPMG is a global organization of independent professional services firms providing Audit, Tax and Advisory services. KPMG operates in 147 countries and territories and has more than 219,000 people working in member firms around the world. Each KPMG firm is a legally distinct and separate entity and describes itself as such. This comment paper is produced on behalf of KPMG member firms located in the EU forming part of KPMG's Europe, the Middle East & Africa (EMA) region.

4. The introduction of CFC rules as a result of ATAD 1 in combination with EU's crack down on non-cooperative jurisdictions.
5. The disclosure requirements on aggressive tax planning as a result of DAC6.
6. The implementation of anti-hybrid and reverse anti-hybrid rules as contained in ATAD 1 and ATAD 2 which apply to arrangements involving companies, trusts and partnerships.

KPMG's Recommendations

In our experience, these developments in practice already have had a significant and profound impact on the use and potential tax advantages of shell companies and continue to do so. In view of these developments we make the following recommendations.

1. Monitoring and evaluation period for existing new rules

Given the recent introduction of the anti-abuse measures which would significantly impact the potential abuse of shell companies, we believe that it is appropriate to adopt a period of monitoring and evaluation before a proper determination is made to determine whether additional specific anti-shell company rules are required. This would include consideration of how Member States have implemented new anti-avoidance rules both technically and in practice.

2. Principles for new rules if required

If after the monitoring and evaluation period, it is considered that there is a need for additional specific anti-shell company rules, then as a matter of principle, such rules:

(a) should use very precise terms which leave no room for multiple interpretations from member states;
(b) minimise any undue administrative burdens for taxpayers;
(c) provide a high level of certainty for taxpayers;
(d) should facilitate normal commercial practices undertaken for bona fide commercial reasons.

3. Any new rules should contain specific carve-outs

Any specific anti-shell company rules should recognise that there are widespread and legitimate non-tax reasons why Special Purpose Entities are used. This should be clearly enunciated to minimise uncertainty. These circumstances can include, but are not limited to:

(a) Regulated investment funds which are required to separate management from pooling vehicles;
(b) Holding and financing companies set up by Alternative Investment Funds which are used to aggregate investors, segregate assets and create legal protection;
(c) Custodians which are required to keep assets held for clients separate from operational entities;
(d) Securitisation vehicles designed to raise funds;
(e) Asset holding companies designed to mitigate commercial risk.

4. **Existing ECJ case law should lay foundation for any new rules**

Any anti-shell company rules to be introduced should be founded on existing settled ECJ case law on whether an operation pursues an objective of fraud and abuse including a case by case analysis and should not go beyond what is necessary to achieve the objectives pursued.

5. **Bona fide commercial exemption or principal purpose test.**

There should be a specific safeguard so that legitimate arrangements which are grounded in non-tax reasons for the arrangement are protected.

KPMG appreciates the opportunity to contribute to the EU public consultation and is ready to elaborate on the above and discuss this topic at any future occasion.

Yours faithfully,

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