

# GRAHAM, SMITH & PARTNERS

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International Tax Counsel

Proposed EU rules on tackling the use of shell entities: overkill and avoiding excess anti-avoidance rules?

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# 1. Introduction

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- 18 May 2021 – EC: Communication on Business Taxation for the 21<sup>st</sup> Century
- Fighting the use of shell entities and arrangements for tax purposes
  - Plan;
  - OpenLux: the secrets of Luxembourg, a tax haven at the heart of Europe, Le Monde, 8 February 2021;
  - Open for public comments (closed 27 August 2021)
    - STEP
    - CFE



**European  
Commission**

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## 2. EC Proposal (1)

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- Issue at stake

Use of entities without substance and no real economic activities to reduce tax liability

- Basis for intervention

No EU legislative measures which define tax related substance requirements that can be enforceable at EU level.

- Objectives

Equipping tax administrations with new targeted instruments to prevent, identify and penalise abusive practice of shell entities

Defining common tax related substance requirements to be met by legal entities in the EU

## 2. EC Proposal (2)

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- Costs

EC claims compliance costs of the initiative are in any case limited, both for taxpayers and for the tax administrations

- Data collection

There is lack of precise evidence pointing to the scale of abuse through shell entities

Lack of a common definition of “shell entity”

- No implementation plan

# 3. Responses from the field (1)

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- Is there a need for further anti-abuse legislation?

Measures already taken to date include:

- Numerous Directives on Administrative Assistance, including automatic exchange of information in various areas, including the Common Reporting Standard (CRS), Exchange of rulings, and DAC6;
- The two ATADs;
- Increased focus on transfer pricing principles;
- MLI, and in particular the principal purpose test;
- Rules on deductible payments made to non-cooperative jurisdictions;
- Beneficial owners registers;
- Withholding taxes for payment to entities registered in zero tax jurisdictions.

# 3. Responses from the field (2)

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- Introducing rules on substance creates artificial situations



# 3. Responses from the field (3)

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- Substance should not be the single basis for determining whether an entity is abusive or not
  - Lack of substance is not necessarily an indication of abuse.
    - Examples:
      - Bond;
      - Registration for licence requirements;
      - VAT;
      - Reporting issues;
      - Splitting operational activities from investments;
      - Moving funds without having to use loans;
      - Forming a group for tax purposes;
      - ... etc.
  - Domestic vs. another EU country holding company
  - First identify the “bad” users

# 3. Responses from the field (4)

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- Concerns about the increasing costs of doing business:
  - Lack of clear definition will increase compliance costs for tax administrations (monitoring, analysing, exchanging and assessing a large amount of data);
  - But also complex legislation (DAC6);
  - Correlation between the ease of doing business and wealth generation.



# 4. Personal View

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- Lack of Data:
  - No data available about the impact of the EU anti-tax avoidance policy
  - Most studies, if there are, used data until 2019, while:
    - ATAD 1 was implemented in most EU countries on 1 January 2019;
    - ATAD 2 implemented in most EU countries on 1 January 2020 (1 January 2022)
    - MLI entered into force during 2019, but most in 2020 and 2021.

Thank you for your attention!

Any questions?