



Commissioner Didier Reynders
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1049 Brussels
Belgium

Copy: Salla Saastamoinen, Maija Laurila, Susanne Knöfel

The 12th of May 2022,

Dear Commissioner Didier Reynders,

ecoDa would like to draw your attention to the draft of the Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, commonly known as the “Anti-Tax Avoidance Directive III” or the “Unshell Directive” (hereinafter “ATAD III”) - [COM 2021 565 1 EN ACT part1 v7.pdf \(europa.eu\)](#) - which poses problems from a Corporate Governance point of view.

If ecoDa understands the will of the European Commission to counter the misuse of shell entities for tax purposes and to bring some consistency in the criteria used at national levels to qualify an organization as such, we would like to bring to your attention the significant consequences that article 7 of the draft directive could have on Corporate Governance in Europe, namely on what concerns future Board compositions.

In its Article 7 (please refer to the full text of this article in Appendix 1), ATAD III proposes the introduction of “indicators of minimum substance for tax purposes”, such as:

- 1) owning premises in the Member State, or premises for its exclusive use;
- 2) having at least one own and active bank account in the Union;
- 3) having one or more directors or having the majority of the full-time employees of the undertaking resident for tax purposes in the same Member State.

On what concerns this last criteria – “Directors requirements” - it is requested that the directors be resident in the Member State where the entity is based, that they are qualified and authorised to take decisions in relation to activities that generate relevant income, actively and independently using the authorisation mentioned on a regular basis, that they are not employees of an enterprise that is not an associated enterprise and **that they do not perform the function of director or equivalent of other enterprises that are not associated enterprises – Article 7, point (1) (c) (4)**

This last requirement effectively means that, for the purposes of granting substance to an undertaking, only corporate directors – within the same group - will be considered as an indicator of minimum substance. For the purposes of ATAD III, an independent non-executive director will not be considered as providing substance to an undertaking.

This provision seems to us to be contrary to the spirit that has driven the European Commission for many years by advocating the presence and the added value of independent non-executives. In its 2005 recommendation, the European Commission considered that the presence of independent directors was a good way to foster that role in order to restore confidence in financial markets. More recently, the European Commission, through its new initiatives, expects non-executives to exercise critical thinking and challenge management on many issues, including sustainability and ESG matters.

ecoDa is surprised that the European Commission calls into question the principles it advocates for the sole purpose of attacking shell companies which represent only a reduced proportion of the businesses operating in Europe. This provision is also counterproductive to the search for talent for director profiles across Europe.

We would kindly suggest that Article 7, point (1) (c) (4) is modified in a way that reflects the invaluable role of non-executive directors to the boards of European undertakings or simply to delete it from the final wording¹.

We hope that you can take these concerns into account. We remain at your disposal should you wish to discuss this subject further.

Sincerely yours,



Béatrice Richez-Baum
Director General



Leena Linnainmaa
Chair

¹ Some EU regulations (CRD) not only recommend but even impose the presence of "independent directors". The EU Commission cannot consider that independent directors can add value only for some entities and that for others they are detrimental in the context of an international tax analysis

Article 7 Indicators of minimum substance for tax purposes (ATAD III)

1. Member States shall require that undertakings meeting the criteria laid down in Article 6(1) declare in their annual tax return, for each tax year, whether they meet the following indicators of minimum substance:

- (a) the undertaking has own premises in the Member State, or premises for its exclusive use;
- (b) the undertaking has at least one own and active bank account in the Union;
- (c) one of the following indicators:
 - (i) One or more directors of the undertaking:
 - (1) are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member State insofar as such distance is compatible with the proper performance of their duties;
 - (2) are qualified and authorised to take decisions in relation to the activities that generate relevant income for the undertaking or in relation to the undertaking's assets;
 - (3) actively and independently use the authorisation referred to in point (2) on a regular basis;
 - (4) are not employees of an enterprise that is not an associated enterprise and do not perform the function of director or equivalent of other enterprises that are not associated enterprises;
 - (ii) the majority of the full-time equivalent employees of the undertaking are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member States insofar as such distance is compatible with the proper performance of their duties, and such employees are qualified to carry out the activities that generate relevant income for the undertaking.

2. Undertakings referred to in paragraph 1 shall accompany their tax return declaration with documentary evidence. The documentary evidence shall include the following information:

- (a) address and type of premises;
- (b) amount of gross revenue and type thereof;
- (c) amount of business expenses and type thereof;
- (d) type of business activities performed to generate the relevant income;
- (e) the number of directors, their qualifications, authorisations and place of residence for tax purposes or the number of full-time equivalent employees performing the business activities that generate the relevant income and their qualifications, their place of residence for tax purposes;
- (f) outsourced business activities;
- (g) bank account number, any mandates granted to access the bank account and to use or issue payment instructions and evidence of the account's activity.