

29 October 2021

DG TAXUD  
European Commission  
1049 Brussels  
Belgium

## Fighting the Use of Shell Entities and Arrangements for Tax Purposes

Dear Mr Angel,  
Dear Mr Biebel,

This joint industry paper has been developed by 12 associations, representing a broad alliance of stakeholders operating in the real estate investment, built environment, private equity and infrastructure sector. Alongside European and international associations, this initiative is supported by national associations from France, Germany, Italy, Luxembourg and the UK.

Along with the public consultation of the European Commission on 'fighting the use of shell entities and arrangements for tax purposes' which closed on 27 August and to which several of the associations involved contributed individually, this industry paper should serve as a unified call for a fundamental rethink of the Commission's approach, based on the following four key points:

**1. Whilst we fully support the Commission's fight against tax avoidance, we oppose any new initiative focused on abusive tax practices through shell entities at this stage. Such an initiative would be premature and risk resulting in incoherent legislation, as a number of significant measures in this domain have only recently been implemented and their impact has not yet been evaluated.**

The shell entities proposal is based on assumptions that predate and ignore several initiatives to counter base erosion and profit shifting. In the context of the EU, the shell entities initiative does not take into account in particular:

- the Anti-Tax Avoidance Directives (I&II)
- the Directive on Administrative Cooperation (DAC)
- the fourth Anti-Money Laundering Directive
- EU-list of non-cooperative jurisdictions for tax purposes
- the end of several national tax practices and the introduction of safeguards as a result of the OECD Base Erosion and Profit Shifting (BEPS) action plans, in particular the introduction of minimum standards (e.g. the principal purpose test of BEPS Action 6).

**2. Furthermore, there is currently no EU-wide or universal definition of what a 'shell entity' is. A suitably nuanced EU-wide definition of 'shell entity' would lead to better data on their presence and avoid targeting companies with fewer employees or other factors than might normally be expected which were established for legitimate business purposes.**

**3. A thorough and balanced evaluation of the existing legal landscape and the need for a proposed new initiative must precede any legislative proposal and would be in line with the better regulation-principle. Therefore, we strongly encourage the European Commission to initialise a 'fitness check' procedure which – dependent on its results – could feed into an impact assessment for any potential new initiative on action against shell entities.**

4. **If additional measures are indeed shown to be necessary, the European Commission needs to ensure that any new initiative is targeted exclusively on the use of shell entities for tax avoidance practices, and not on companies with legitimate business purposes.** Any measures would need to be designed carefully to recognise the broad diversity of business contexts in which potential shell entities are used, and the ways they are used – **there must not be a ‘one size fits all’ approach.** Furthermore, it must be made clear that ‘economic substance’ in terms of employees, offices, etc. is not the only relevant indicator for determining whether an entity is a shell entity or not. Likewise, certain categories of income must not systematically be considered as ‘passive’ if they constitute the main income of a company’s or group’s core business (i.e. interest for banking activities, rents for real estate operators, etc.). The commercial purpose and commercial rationale for establishing the entity is an at least equally important indicator, and must thus be taken into account. **It is essential that the Commission makes clear that there are different types of intermediaries such as asset holding companies, and that their use in sectors such as real estate and investment management more broadly is driven by entirely legitimate commercial considerations.** In particular, they are sometimes used for legitimate legal, regulatory, accounting or social law reasons as well as due to human resources constraints.

For example, in the institutional real estate investment industry, where two or more investors pool their investments and hold them in specific vehicles, these reasons include protecting the real estate vehicle and its investors from the liabilities of and potential claims against other immovable property assets (a practice commonly known as ‘ringfencing’). Also, as a capital-intensive asset class, real estate often requires significant debt to support equity investment – and banks often insist on such ringfencing to protect their mortgage security. These structures ensure isolation of the liabilities of and potential legal claims against each asset or relevant portfolio of assets. It is important that the interposition of such structures does not cause an additional tax burden that would not arise if the investments were held directly, and that it does not subject investment income to double taxation. This is also the case for the wider investment industry, such as private equity and infrastructure. It is a fundamental concept of many investment management business models that the staff, premises and other business needs of the venture are not provided by the investment holding vehicle itself but by an investment/asset manager under an investment/asset management agreement. **It would be detrimental and counter-productive for investment in the European economy for that globally accepted approach to trigger the application of punitive measures targeting the use of ‘shell entities’.**

The undersigned associations are active in diverse parts of Europe’s commercial real estate (CRE), private equity and infrastructure sectors.

The CRE industry directly contributed EUR 452 billion<sup>1</sup> to the European economy in 2019, representing about 3.1% of the total economy, which is nearly equal the size of the European automotive manufacturing industry and telecommunications sectors combined. The CRE sector also employs 4.2 million people, which, again, is not only more than the auto manufacturing industry and the telecommunications sectors combined, but is also greater than banking.

The private equity and venture capital industry invested in 2019 over EUR 94 billion into 7,900 European companies, a large majority of which (84%) are SMEs. Private equity and venture capital funds thereby play a key role in connecting providers of capital from across the EU and beyond with companies in search of financing.

Beyond these figures, these sectors play a vital role in every aspect of the European economy, society and environment. For example, businesses and society cannot function without the services of CRE, including the provision of offices, shops, logistics facilities and many other parts of the built environment. CRE straddles finance and the real economy, because CRE needs investment in the form of equity and debt to deliver and maintain the buildings our towns and cities need.

We would welcome a personal dialogue with you on this subject and remain available to discuss this further at your convenience.

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<sup>1</sup> INREV/EPRA Real Estate in the Real Economy, 2020

