

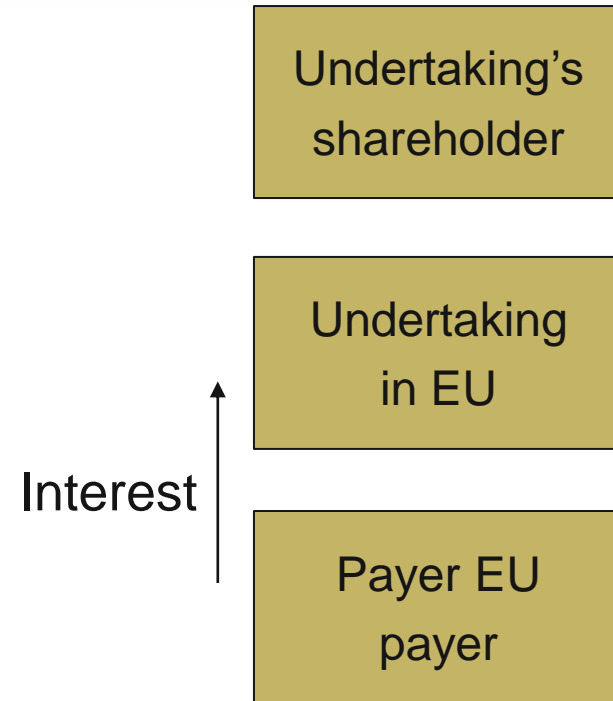
Unshell Directive (ATAD3)

MGI/CPA

Dublin, 14 September 2022

Hans Pijl

Regimes affected by ATAD3



- ▶ **Parent-Subsidiary Directive, Interest Royalty Directive**
- ▶ **Double Taxation Conventions**

Other related measures

- ▶ **DAC: Directive on Administrative Cooperation** (2011/16/EU of 15 February 2011)
- ▶ **ATAD 1 and 2: Anti-Tax Avoidance Directive** (2016/1164 of 12 July 2016)
- ▶ **EU List of non-cooperative jurisdictions** in tax matters (2017)
- ▶ **Communication on Business Taxation for the 21st Century** (COM(2021) 251 final)
 - ▶ Recover from COVID-19
 - ▶ Abusive use of shell companies: ATAD3
 - ▶ Debt-equity bias: DEBRA
 - ▶ Greater transparency
- ▶ **Pillar 1 and 2**

ATAD3, Shell Directive, Unshell Directive

- ▶ **Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (COM(2021) 565 final, 22 December 2021)**
 - ▶ To be transposed 30 June 2023, to be effective 1 January 2024 (Art. 18) **[EP: 1 January 2025]**

Subject matter (Art. 1)

- ▶ **“This Directive lays down indicators of minimum substance for undertakings in Member States regarding the treatment for tax purposes of those undertakings that do not meet the indicators” (Art. 1)**
 - ▶ Targets undertakings presumably *engaged* in certain economic activities without *conducting* economic activities
 - ▶ Substance test: presumption of minimum substance
 - ▶ Identify the “shell”

- ▶ **The tax treatment of undertakings that do not meet the indicators**
 - ▶ Tax advantages neutralized
 - ▶ Information automatically exchanged
 - ▶ Requests for tax audits are honoured

Personal scope (Art. 2 and Art. 3-1)

- ▶ **“The Directive applies to all undertaking that are considered tax resident and are eligible to receive a certificate of tax residency certificate in a Member State” (Art. 2)**
- ▶ **“ ‘[U]ndertaking’ means any entity engaged in an economic activity, regardless of its legal form, that is a tax resident in a Member State” (Art. 3(1))**
- ▶ **Undertakings**
 - ▶ Undertaking
 - ▶ “considered tax resident” in a Member State (Art. 2)
 - ▶ “is a tax resident” (Art. 3(1))
 - ▶ Eligible to receive a tax residency certificate
 - ▶ Any entity
 - ▶ Regardless of its legal form
 - ▶ Engaged in an economic activity

The seven “steps”

- 1. Undertakings that should report (those “at risk”) – the “gateways”: art. 6-1**
 - ▶ Except those undertakings carved-out: art. 6-2
- 2. Reporting: Art. 7**
- 3. Presumption of lack of minimum substance: Art. 8**
- 4. Possibility of rebuttal: Art. 9**
- 5. Possibility of exemption from reporting for lack of tax motives: Art. 10**
- 6. Tax consequences: Art. 11 and 12**
 - ▶ Non-applicability of double tax conventions and Parent-Subsidiary Directive and Interest Royalty Directive (Art. 11)
 - ▶ Denial of a request for a certificate of residence or issuance of a qualified certificate (Art. 12)
- 7. Automatic exchange of information (Art. 13), Requests for tax audits honoured (Art. 15)**

Undertakings that should report – “at risk” (Art. 6-1): the three gateways

1. More than 75% **[EP: 80%]** of the revenues accruing to the undertaking in the preceding two years is relevant income, and
2. The undertaking is engaged in cross-border activities on any the following grounds:
 - ▶ More than 60% **[55 %]** of the book value of the undertaking’s assets that are immovable property or movable property (with certain limitations) is located outside the Member State of the undertaking in the preceding two years; **or**
 - ▶ At least 60% **[65 %]** of the undertaking’s **relevant income (Art. 4)** is **earned or paid out** via cross-border transactions, and
3. In the preceding two years, the undertaking outsourced **[EP: that is not an associated enterprise in the same jurisdiction]** the administration of day-to-day operations and the decision making on significant functions

Carve-out of the reporting obligation (Art. 6-2)

- ▶ **Generally described (Art. 6-2, 1st subpar)**
 - ▶ Listed companies (letter a)
 - ▶ Undertakings that have the main activity of holding shares in operational businesses in the same Member State while their beneficial owners are also resident for tax purposes in the same Member State (letter c)
 - ▶ Undertakings with at least five own full-time equivalent employees or members of staff exclusively carrying out the activities generating the relevant income (letter e))
- ▶ **A list of “regulated financial undertakings” (Art. 6-2, 1st subpar, letter b, further specified in Art. 6-2, 2nd subpar):**
 - ▶ An Alternative Investment Fund (AIF) and its Alternative Investment Fund Manager (AIFM)
 - ▶ An undertaking for collective investment in transferable securities (UCITS) and its management company

Reporting on three indicators (Art. 7-1) ... when the three gateways passed

- ▶ **Declare in the annual tax return whether the undertaking meets the following indicators of minimum substance:**
 - ▶ The undertaking has own premises in the Member State or premises for its exclusive use
 - ▶ The undertaking has at least one own and active bank account in the Union
 - ▶ One of the following indicators:
 - i. One or more directors are:
 - 1. Tax resident in the Member State of the undertaking or living nearby
 - 2. Qualified and authorised
 - ~~3. Actively and independently use the authorisation on a regular basis [EP]~~
 - 4. Not employees or director of other non-associated (**Art. 5**) enterprises
 - ii. The majority of the full-time equivalent employees are tax residents or living nearby, and qualified to carry out the activities that generate the relevant income

Reporting to be accompanied with documentary evidence (Art. 7-2)

- 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) Details about directors and full-time equivalent employees**
- f) Outsourced business activities**
- g) Bank account number, mandates granted to access the bank account and payment instructions, evidence of the account's activity**

Presumption of lack of minimum substance (Art. 8)...when one of the three indicators are not met

- ▶ **Minimum substance is presumed if (Art. 8-1):**
 - ▶ Declaration that all indicators of Art. 7-1 are met, **and**
 - ▶ The satisfactory supporting documentary evidence (Art. 7-2) is provided

- ▶ **No minimum substance presumed if (Art. 8-2):**
 - ▶ Declaration that one or more of the indicators are not met, **or**
 - ▶ The satisfactory supporting documentary evidence is not provided

Rebuttal (Art. 9)

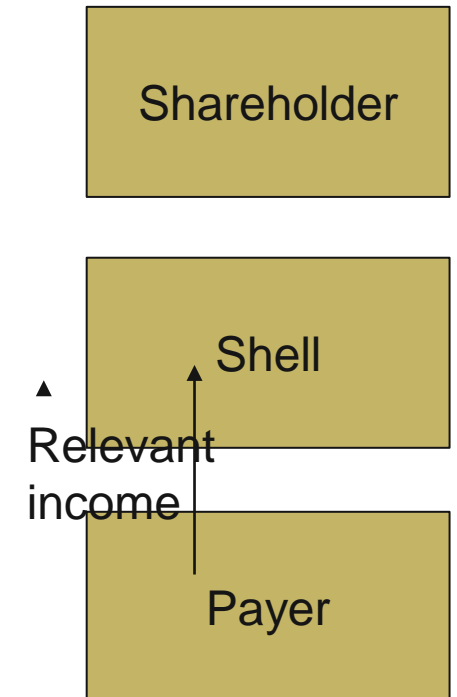
- ▶ **Undertakings may rebut the presumption of minimum substance (Art. 9-1)**
- ▶ **Counter-evidence to be provided:**
 - ▶ Of a mandatory kind, e.g. commercial rationale, employee profiles, decisions made in the Member State of the undertaking (Art. 9-2)
 - ▶ Any other supporting evidence (Art. 9-1)
- ▶ **Rebuttal successful if proven that (Art. 9-3):**
 - ▶ Control over the relevant business activities, and
 - ▶ The risks borne of the relevant business activities
- ▶ **Extension of the rebuttal for five years (Art. 9-4)**

Exemption (Art. 10)

- ▶ **Ex ante exemption from the obligations under the Directive (Art. 10-1)**
- ▶ **Sufficient and objective evidence that the undertaking does not lead to a tax benefit for its **beneficial owners or the group as a whole** (Art. 10-2)**
 - ▶ Comparison of the amount of tax with and without the interposition
- ▶ **Extension of the exemption for five years (Art. 10-3)**

Tax consequences (Art. 11)

- ▶ Art.11-1: DTCs, Art. 4, 5 and 6 PSD and Art. 1 IRR in relation to shell State are disregarded in EU, **but not by the shell**
- ▶ Art. 11-2, 1st subpar (all EU): EU shell's **relevant income** is taxed with the Undertaking's EU shareholder: CFC
- ▶ Art. 11-2, 2nd subpar necessary?
- ▶ Art. 11-2, 3rd subpar: If payer not EU, then in the EU shareholder state:
 - ▶ CFC
 - ▶ DTC between payer state and shareholder State applied (Art. 11-2, 3rd subpar)
- ▶ Art. 11-2, 4th subpar: if shareholder not EU:
 - ▶ WHT by the EU payer without prejudice to the DTC between the payer EU State and the shareholder state (Art. 11-2, 4th subpar)
- ▶ Art. 11-1 does not de-activate DTCs and PSD/IRR in the Shell State



Tax consequences for the undertaking (Art. 12)

- ▶ **No certificate of residence is issued (Art. 12-a), or**
- ▶ **A qualified certificate of residence with a warning statement is issued (Art. 12-b)**
- ▶ **The EP proposes to eliminate Art. 12-b and to duly justify the refusal of the certificate**

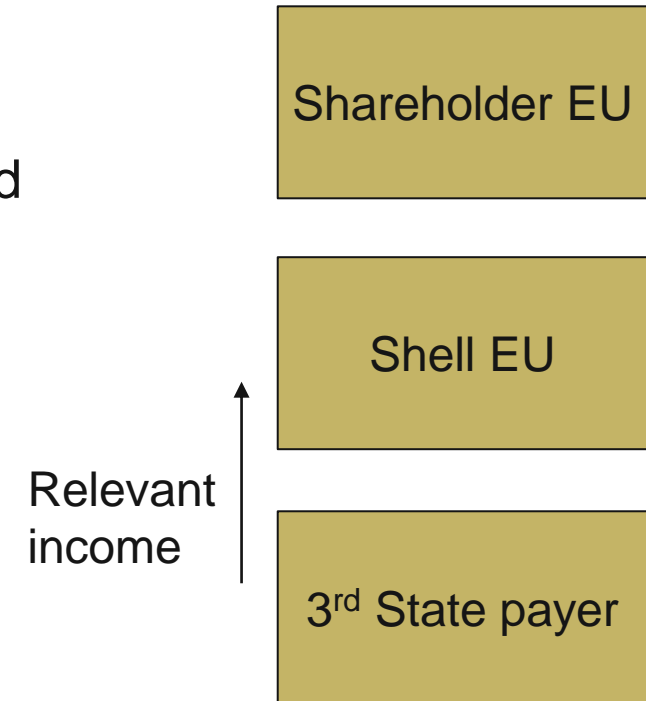
Scenario 1

► For Shell:

- Art. 12: no or a qualified Certificate of Residence issued by Shell State to 3rd state
- Art. 11: no specific taxation rules for Shell MS

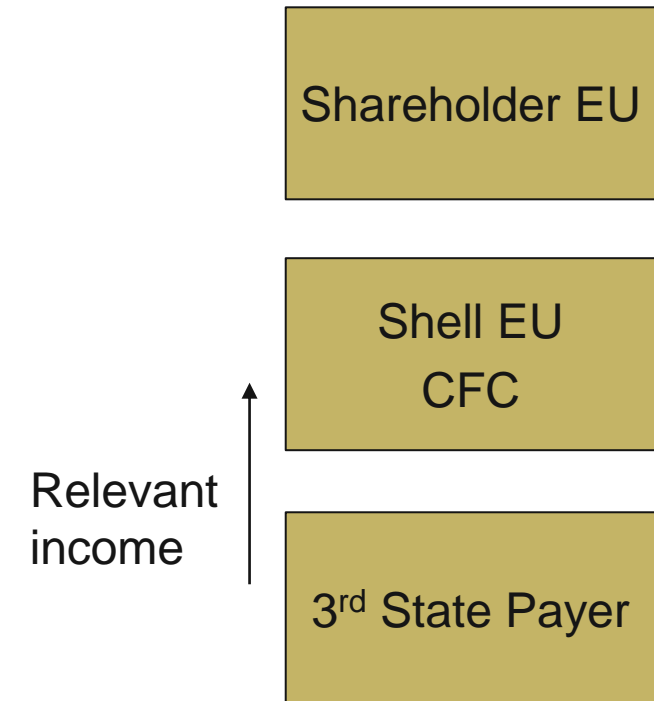
► For shareholder:

- Art 11-1: Shareholder State disregards DTC and PSD/IRR in relation to Shell State
 - NB for all income
- Art. 11-2, 3rd subpara.:
 - Shareholder includes **relevant income** of Shell
 - DTC Shareholder State and 3rd State applies
 - No deduction of Shell MS tax mentioned



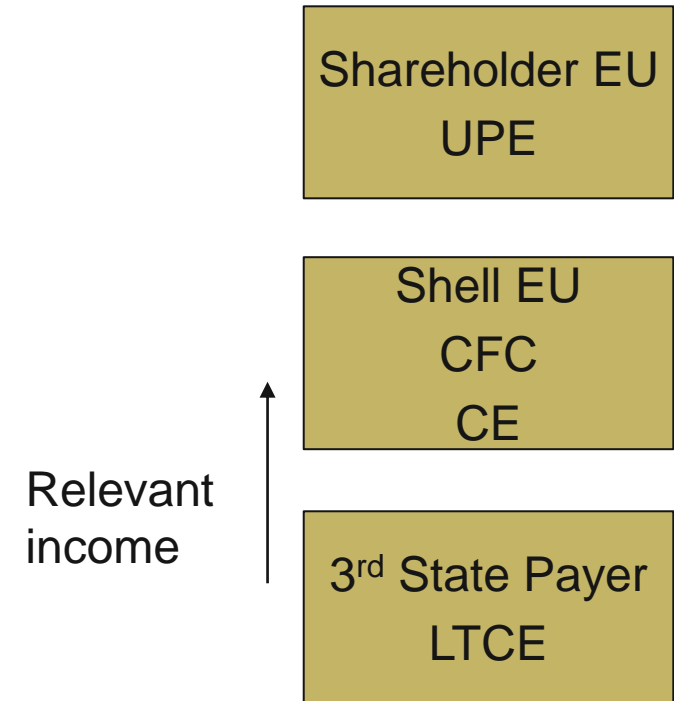
Interaction ATAD3 and ATAD1 (CFC)

- ▶ **ATAD1 Art. 7-2, option a: Shareholder includes certain income**
 - ▶ Similar to the relevant income of Arts. 4-a, 4-b, 4-c, 4-d and 4-g ATAD3
 - ▶ Credit for taxes in the CFC
- ▶ **ATAD3 Art. 11 Shareholder includes**
 - ▶ The "relevant income"
 - ▶ no credit for taxes in CFC
- ▶ **Later Directives have priority over older Directives (lex posterior rule)**
- ▶ **Application of ATAD3 exhausts ATAD1**



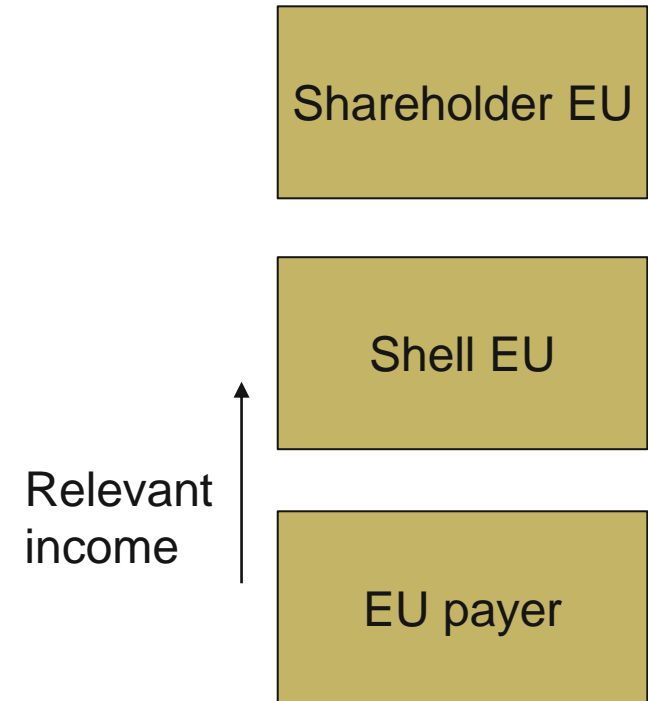
Interaction ATAD3 and Pillar Two

- ▶ **Pillar Two allocates CFC taxes relating to the Shell Constituent Entity for 15% to the Shell CE**
 - ▶ Art. 4.3.2-c Model Rules
 - ▶ Definition of Controlled Foreign Company Tax Regimes (Art. 10 MR) wide enough to cater Art. 11 ATAD3
- ▶ **Top-up tax relating to LTCE levied as IIR/UTPR under the normal rules of Chapter 2 MR - no special issue**



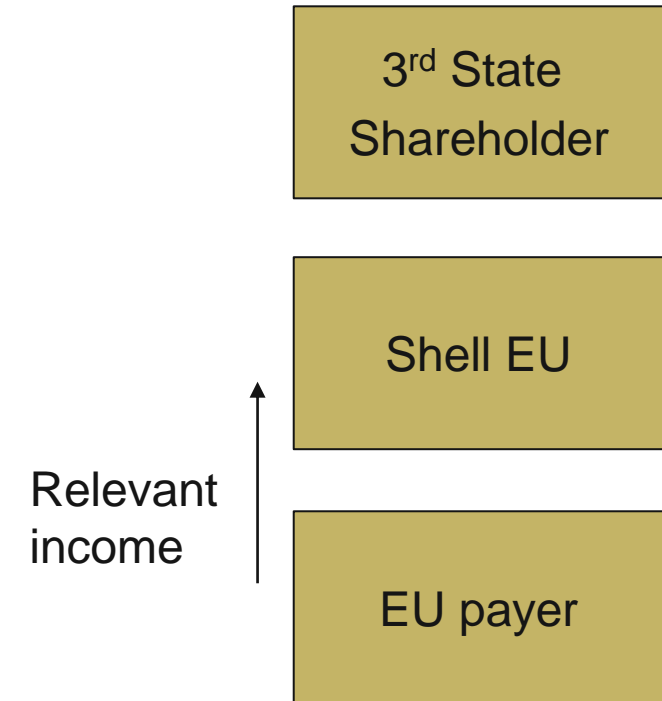
Scenario 2

- ▶ **For payer:**
 - ▶ Disregards the DTC/PSD/IRR as Shell is concerned (Art. 11-1)
 - ▶ DTC/PSD/IRR towards Shareholder depends
- ▶ **For Shell:**
 - ▶ No certificate, no special rules
- ▶ **For shareholder:**
 - ▶ Includes **relevant income** (Art. 11-2, 1st subpar)
 - ▶ PSD/IRR between shareholder and payer State may be applied
 - ▶ Deduction Shell tax



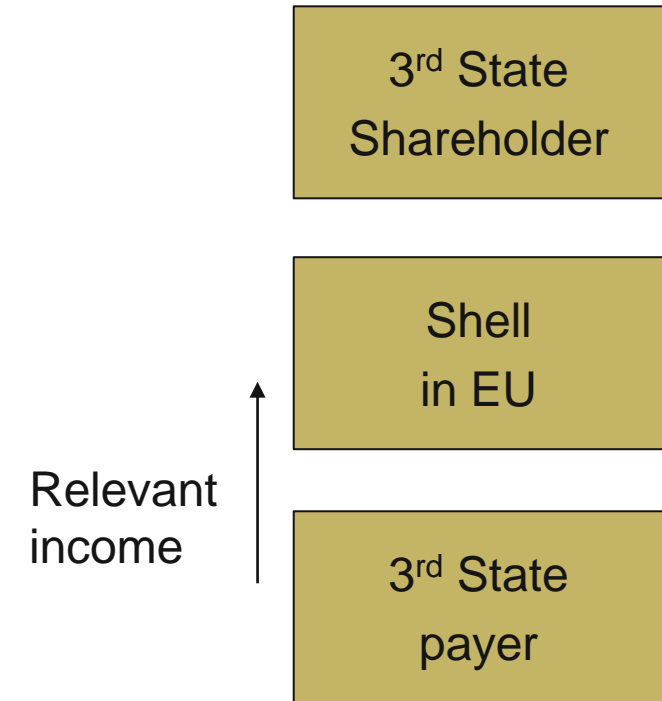
Scenario 3

- ▶ **Art. 11-1: payer disregards DTC with and PSD/IIR in relation to Shell**
- ▶ **DTC Payer State and 3rd country applied (Art. 11-2, 4th subpar)**



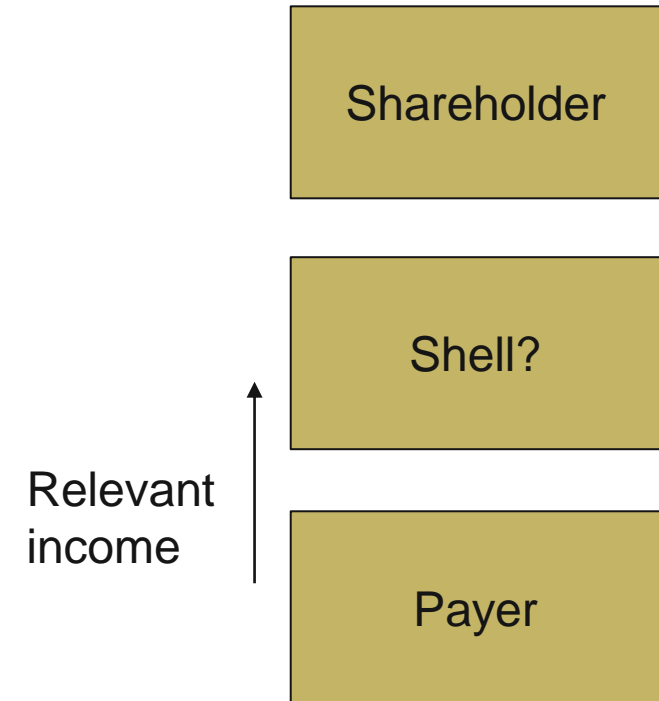
Scenario 4

- ▶ **3rd Countries free to act as they please**
- ▶ **Shell's DTCs not affected under Art. 11-1 "other than the Member State of the undertaking"**
- ▶ **Art. 12: no or qualified Certificate of Residence**



Extension of filing

- ▶ **Directive enters into force 1-1-2024**
- ▶ **CIT return tax year 2024 Shell normally due 1-6-2025, but Shell requests extension of filing until 1-1-2026**
- ▶ **At 1-1-2024 Payer needs a Certificate of Residence**
 - ▶ Denied under Art. 12 only if Shell
- ▶ **Shareholder does not request extension for its 2024 CIT return, due 1-6-2025**
 - ▶ Inclusion of income under Art. 11-2 only if Shell



Exchange of Information (Art.13)

- ▶ **New Art. 8ad added to the Directive on Administrative Cooperation (2011/16/EU) = DAC9**
- ▶ **Automatic Exchange of Information within 30 days:**
 - ▶ When an undertaking reports about the three indicators of minimum substance (Art. 8ad-1 DAC9)
 - ▶ About the rebuttal of the presumption of minimum substance (Art. 8ad-2 DAC9)
 - ▶ About the conclusion of a Member State that an undertaking does not meet the three indicators of minimum substance (Art. 8ad-3 DAC9)
- ▶ **Central directory (Art. 8ad-5 DAC9)**

► Penalties (Art. 14)

- To be effective, proportionate and dissuasive
- At least 5% [EP: 2.5%] of the undertaking's "turnover" (not defined)
 - If no reporting where due under Art. 6 (the three gateways)
 - If false declaration under Art. 7 (the indicators)

► Request for audits (Art. 15)

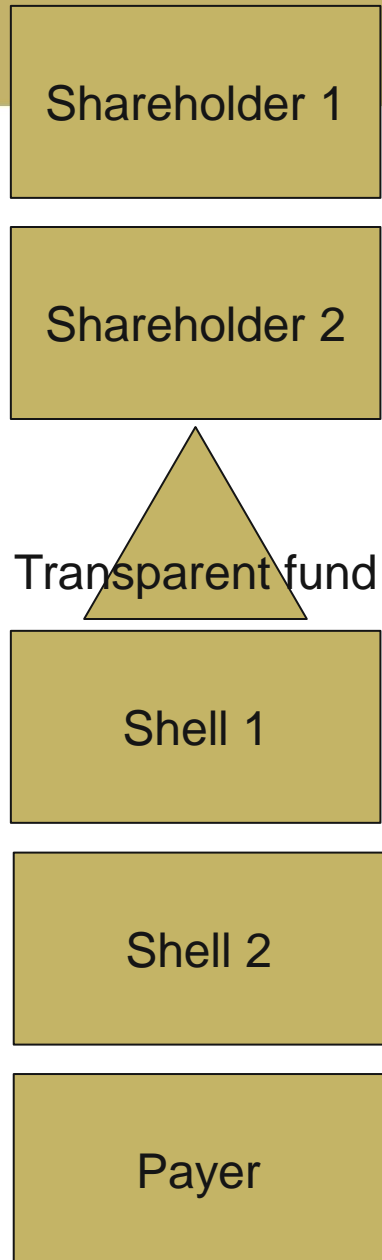
- Where another Member State has reason to believe that an undertaking has not met its obligations under this Directive

All in all

- ▶ **Intended to cope with tax evasion**
- ▶ **Complements ATAD and DAC**
- ▶ **Effect: greater WHT imposition, compliance burden for business, compliance burden for authorities**
- ▶ **Competition: other jurisdictions - UK**

“Undertaking’s shareholders” (Art. 3-6)

- ▶ “Individuals or entities directly holding shares, interest, stakes, participations, membership rights, entitlement to benefits or any equivalent rights or entitlements in the undertaking”
- ▶ “In the case of indirect holdings, those individuals or entities holding interest in the undertaking through one or a chain of undertakings none of which fulfils the indicators or minimum substance”



A typical investment fund

