UNIVERSITY OF AMSTERDAM
Amsterdam Centre for Tax Law



Pressing Issues in EU Tax law – 4 November 2022

# Unshell Directive - ATAD3

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# Agenda

- ATAD 3 presentation
- ATAD 3 insights from the European Commission
- Three observations / comments
  - ✓ Impact of ATAD 3 on HNWI
  - ✓ Definition of ATAD 3 terms
  - ✓ Mutual recognition through ATAD 3?

# ATAD 3 in a nut…shell

- 7 step approach
- Indicators of minimum substance for undertakings in EU Member States
- New documentation and reporting requirements for undertakings
- Automatic exchange of information between EU Member States
- Concrete tax consequences
- Transposition by 30 June 2023 – application as per 1 January 2024.



# Broad scope

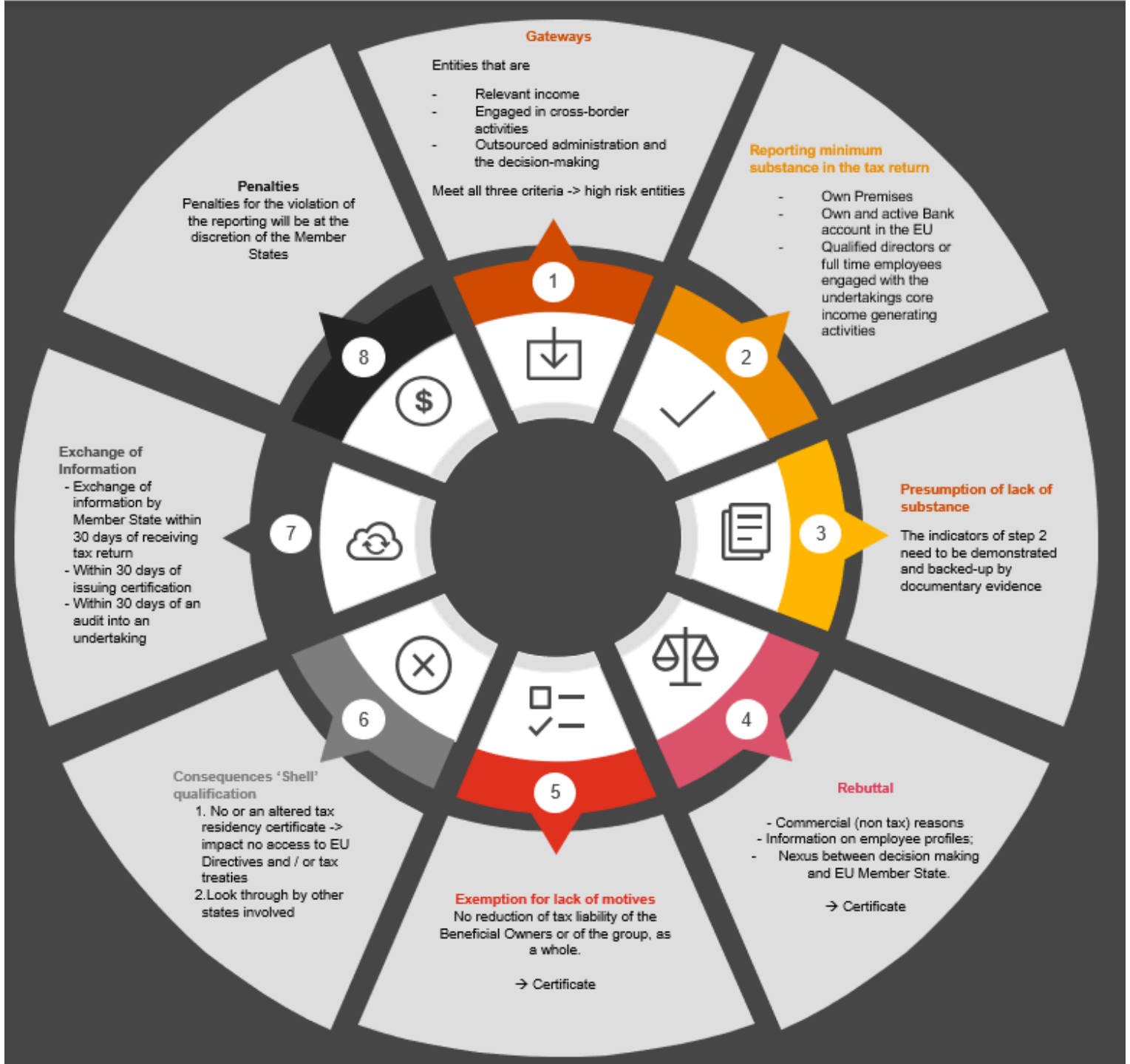
## Scope

- The directive applies to all undertakings that are considered tax resident and eligible to receive a tax residency certificate in an EU Member State.

## Undertaking

- Any entity engaged in an economic activity, regardless of its legal form, that is tax resident in a Member State.
- This also captures legal arrangements, such as partnerships, that are deemed residents for tax purposes in a Member State.

# The 7 steps

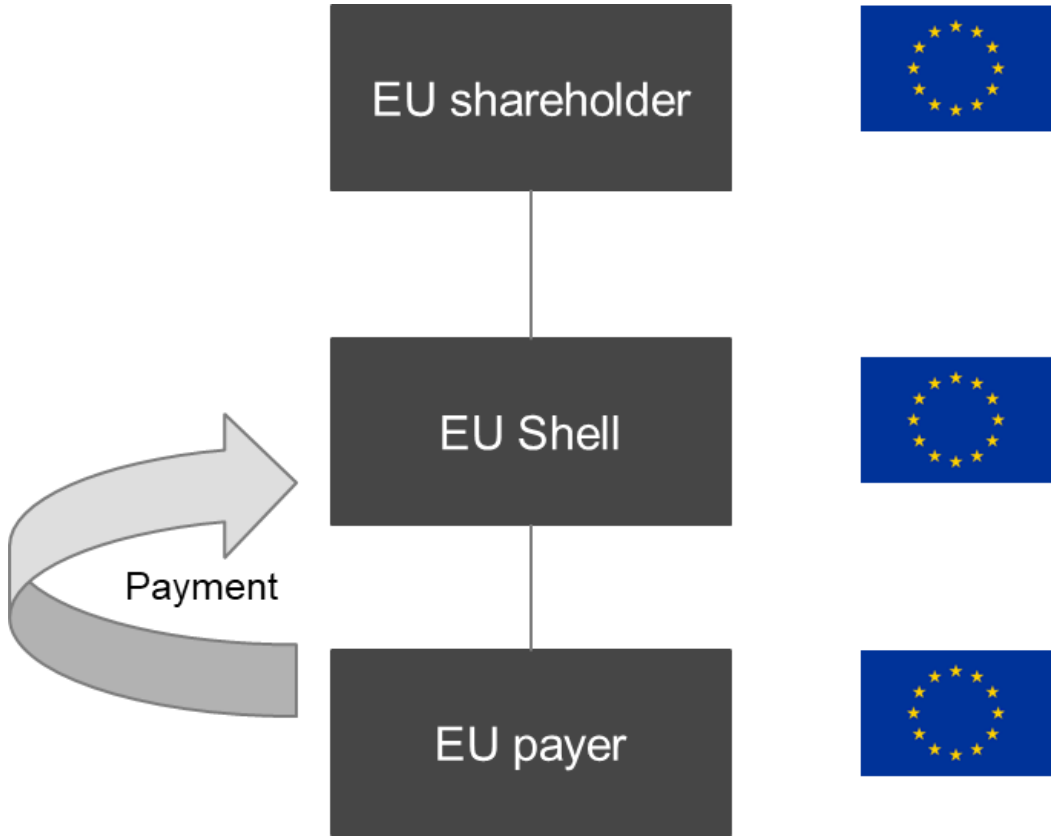

Gateways
Entities that are
- Relevant income
- Engaged in cross-border activities
- Outsourced administration and the decision-making
Meet all three criteria -> high risk entities
1
Reporting minimum substance in the tax return
- Own Premises
- Own and active Bank account in the EU
- Qualified directors or full time employees engaged with the undertakings core income generating activities
2
Presumption of lack of substance
The indicators of step 2 need to be demonstrated and backed-up by documentary evidence
3
Rebuttal
- Commercial (non tax) reasons
- Information on employee profiles;
- Nexus between decision making and EU Member State.
→ Certificate
4
Exemption for lack of motives
No reduction of tax liability of the Beneficial Owners or of the group, as a whole.
→ Certificate
5
Consequences 'Shell' qualification
1. No or an altered tax residency certificate -> impact no access to EU Directives and / or tax treaties
2. Look through by other states involved
6
Exchange of Information
- Exchange of information by Member State within 30 days of receiving tax return
- Within 30 days of issuing certification
- Within 30 days of an audit into an undertaking
7
Penalties
Penalties for the violation of the reporting will be at the discretion of the Member States
8

# Consequences - Example fully EU

- **EU source / payer**: No right to tax the payment

- **EU shell**:
  - Remains resident for tax purposes
  - Obliged to fulfil relevant obligations as per national law, including by reporting the payment received
  - May be able to provide evidence of the tax applied on the payment

- **EU shareholder(s)**:
  - Will include the payment received by the shell undertaking in its taxable income
  - Will take into account and deduct any tax paid by the shell
  - May be able to claim relief for any tax paid at source, including by virtue of EU directives.

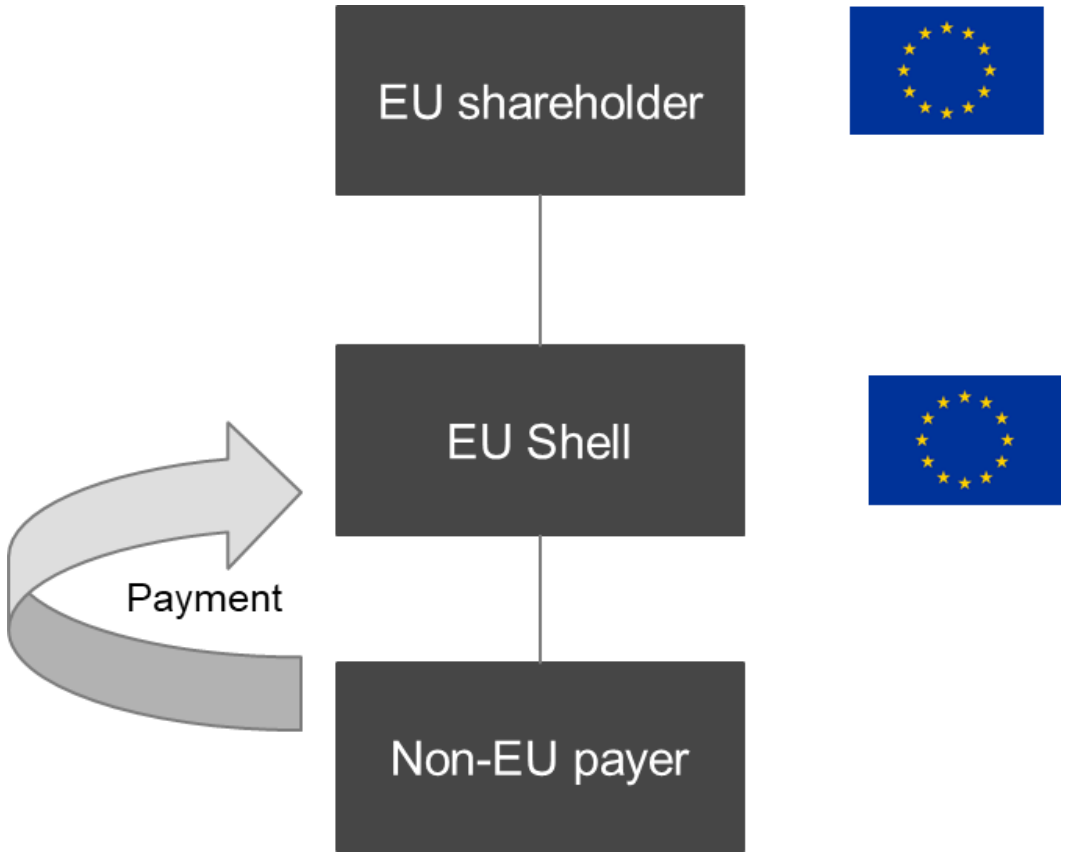


# Consequences - Example third country payer

- **Third country source / payer:**
  - May apply domestic tax on the outbound payment or
  - May decide to apply the treaty with the EU shareholder

- **EU shell:**
  - Remains resident for tax purposes
  - Obliged to fulfil relevant obligations as per national law, including by reporting the payment received
  - May be able to provide evidence of the tax applied on the payment

- **EU shareholder(s):**
  - Will include the payment received by the shell undertaking in its taxable income
  - Will take into account and deduct any tax paid by the shell.
  - May be able to claim relief for any tax paid at source, by virtue of the tax treaty.

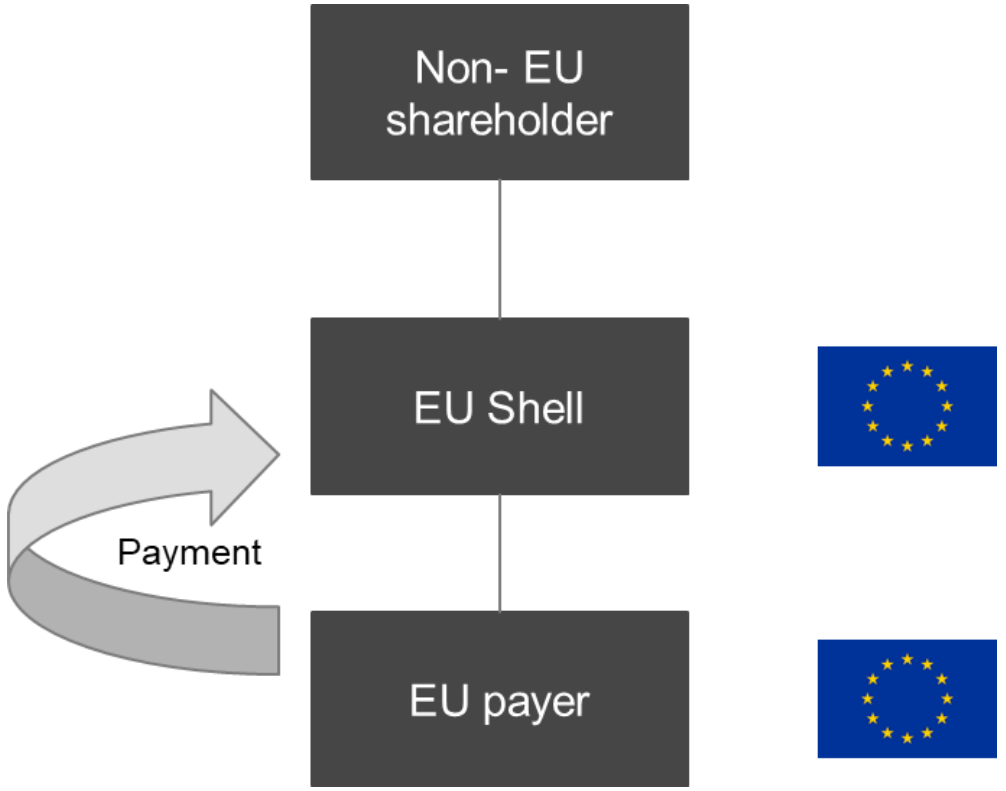


# Consequences - Example third country shareholder

- **EU source / payer**:
  - Will tax the outbound payment according to treaty in effect with the third country jurisdiction of the shareholder(s) (if applicable)

- **EU shell**:
  - Remains resident for tax purposes
  - Obliged to fulfil relevant obligations as per national law, including by reporting the payment received
  - May be able to provide evidence of the tax applied on the payment

- **Third country shareholder(s)**:
  - Not compelled to apply any consequences
  - may be asked to apply a tax treaty in force with the source Member State

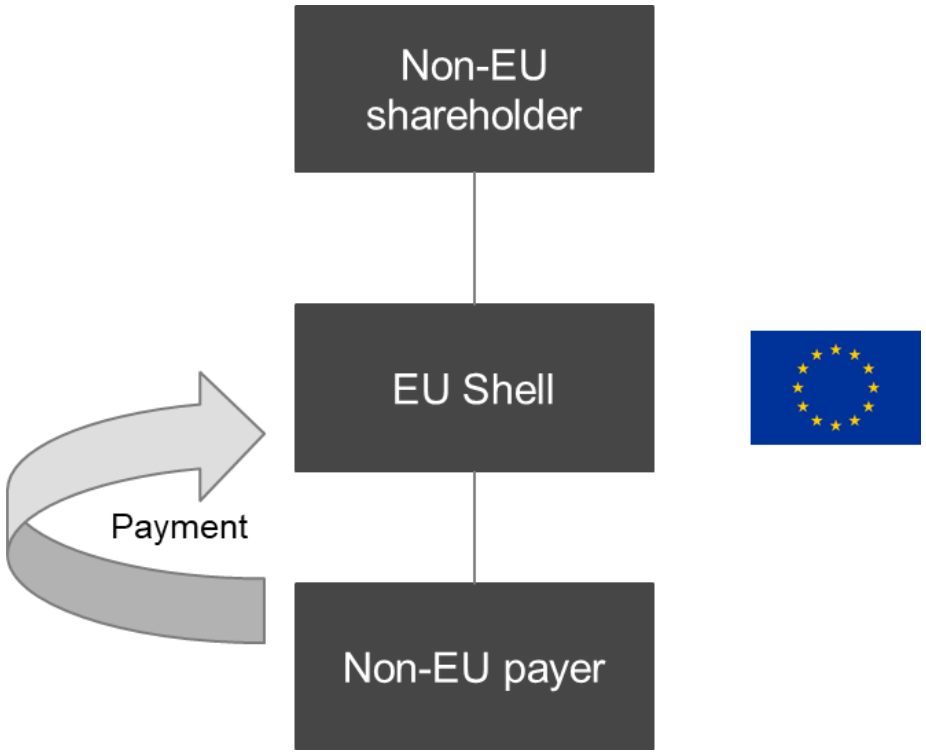


# Consequences - Example third country payer & shareholder

- **Third country source / payer:**
  - May apply domestic tax
  - May decide to apply the tax treaty with the third country jurisdiction of the shareholder(s)

- **EU shell:**
  - Remains resident for tax purposes State
  - Obliged to fulfil relevant obligations as per national law, including by reporting the payment received
  - May be able to provide evidence of the tax applied on the payment

- **Third country shareholder(s):**
  - Not compelled to apply any consequences
  - May consider to apply a tax treaty in force with the source Member State



# ATAD 3 insights from the European Commission



- The Directive is expected to be amended.
- One reporting (merging of articles?)
- Outsourcing and perhaps bank account repealed
- Look back period shortened
- No group approach at the rebuttal (unless fiscal unity and one taxpayer)
- Unclear tax consequences (hardcore or soft exchange of information)



# ATAD 3 and High-Net-Worth Individuals (HNWI)

- Non-professional rental of artwork generating income?
- Capital gains from the sale of artwork?
- Mere ownership of the artwork?
- Gold for investment purposes?

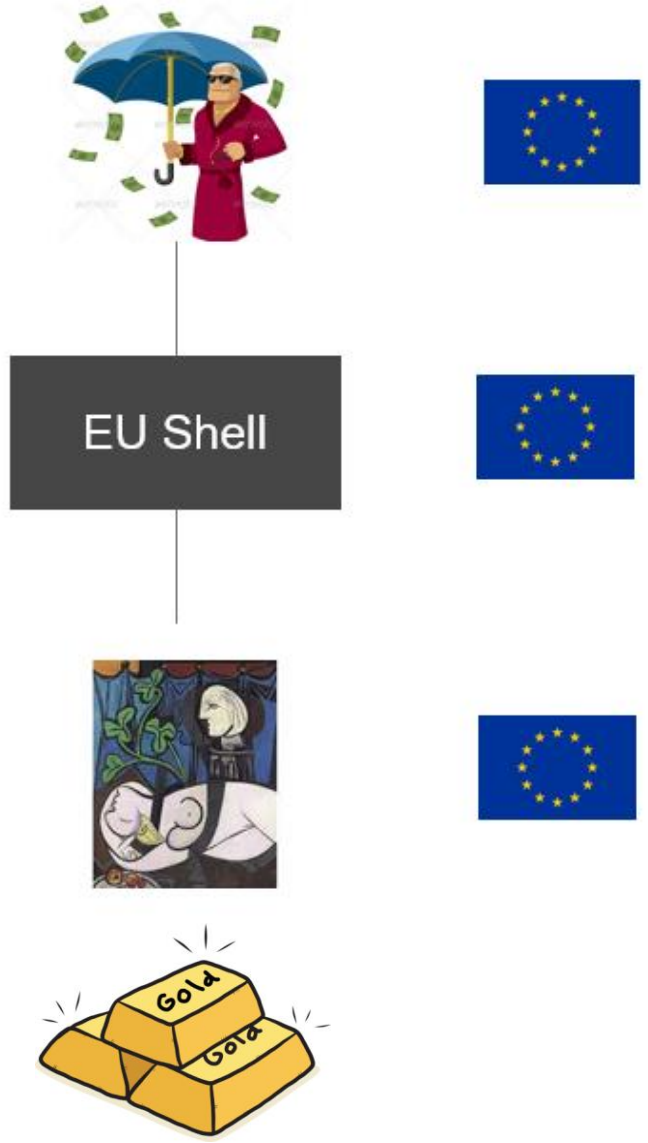
Gateway criteria

→ *75% relevant income (article 6 par. 1 a) – 4* (f) income from movable property, other than cash, shares or securities, held for private purposes and with a book value of more than one million euro.

*NB: Deeming rule if the book value of the asset is more than 75% of the total book value of the undertaking's assets*

→ *Cross-border activity: 60% book value of the assets was located outside the EU Member State of the undertaking (article 6 par. 1 b)*

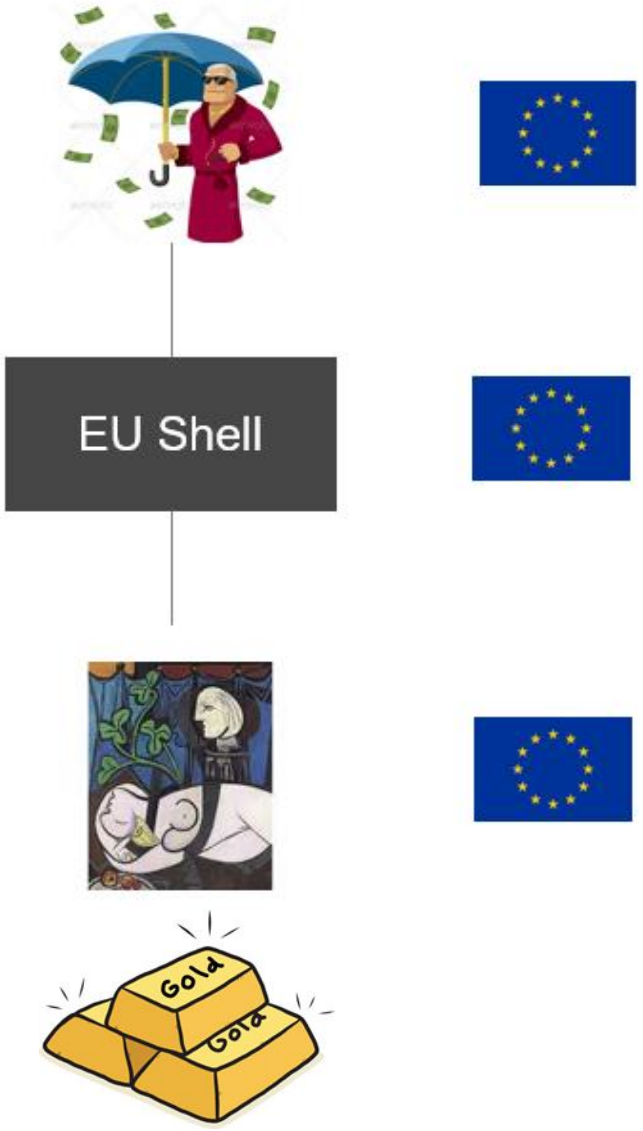
→ *Outsourced administration and decision making (article 6 par. 1 c)*



# ATAD 3 and High-Net-Worth Individuals (HNWI)

The allocation of taxing rights should take into account all jurisdictions that may be affected by transactions involving the shell. Such jurisdictions, except for the Member State of the shell, are:
(i)…
(ii)…
(iii) In case of valuable movable assets, such as art collections, yachts etc.: The jurisdiction of the owner, i.e. of the shareholder of the undertaking

Article 11 par. 2 → taxation at the level of the shareholder



# Definition of ATAD 3 terms

- Concepts in ATAD 3: Union, Quasi-national or quasi-Union?

  - Union notions ("beneficial owner" – reference to the UBO Directive)
  - Quasi-national notions ("premises", "bank account")
  - Quasi-Union notions ("undertaking", "qualifying directors")

- "interest" (as relevant income): Union, Quasi-national or quasi-Union?

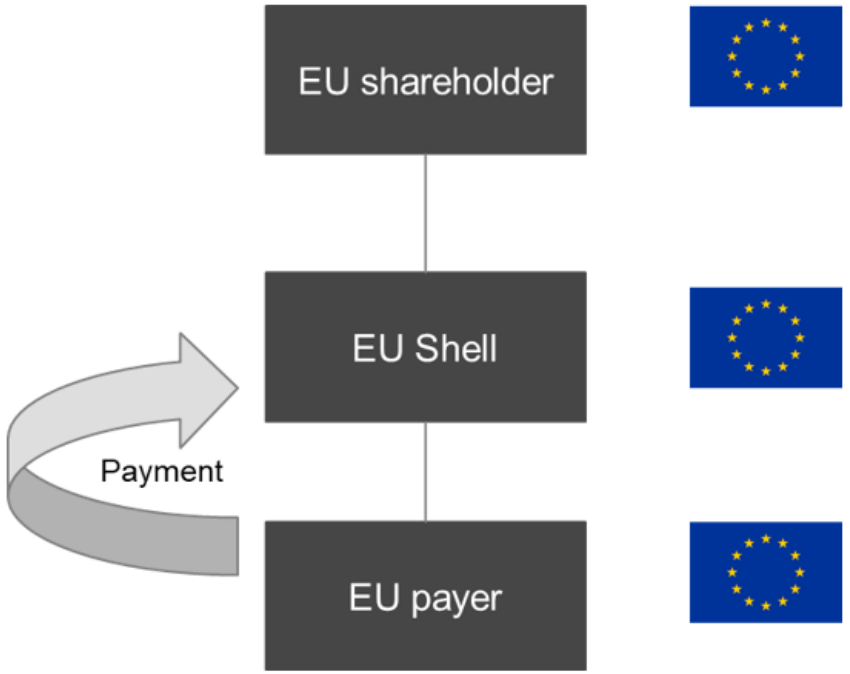
- Unclear wording

"at no greater distance from the Member State"
"in the preceding two tax years, the undertaking outsourced the administration […] and the decision-making…"

→ Legal certainty?

# Status of the rebuttal/exemption certificate (mutual recognition or not)

- View nr. 1: mutual recognition + principle of sincere cooperation between EU Member States, legal certainty
- View nr. 2: Directive does not harmonise the certificate form (cf. social security and A1 document/ Social Security Regulation)
- View nr. 3: mutual recognition within ATAD 3 but possible challenge under double tax treaties



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# Thank you




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