

Proposed amendments to ATAD 3

Introduction

In December 2021, the European Commission proposed the ATAD 3 Directive (“**Directive**”). The Directive, also known as the Unshell Directive, aims preventing the misuse of shell companies lacking economic substance. In May 2022, the Committee on Economic and Monetary Affairs of the European Parliament (the “**EP Committee**”) published a [draft report](#) with several amendments to the Directive. This draft report of the EP Committee provides welcome suggestions, among others with respect to internal outsourcing and postpones implementation of the Directive to 1 January 2025.

Background

In December 2021, the European Commission published the [draft Directive](#) text, with the goal to prevent the misuse of shell entities for tax purposes. For more background on ATAD 3, we refer to our [newsflash](#).

This draft report of the EP Committee is a next step in the legislative process that should lead to the final version of the Directive. With this report, the EP Committee aims at:

1. Safeguarding taxpayer’s rights, in particular in the fields of privacy and data protection;
2. Protecting a level playing field for companies within the EU; and
3. Avoiding an excessive administrative burden and compliance cost.

To achieve these objectives, various changes are proposed to the Directive text.

Proposed key changes

Gateway criteria

The EP Committee suggests two key changes to the gateway criteria.

First of all, the thresholds are amended as follows:

- » **80%** instead of 75% of the **revenues** should be relevant income (passive/geographically mobile income); while
- » **65%** instead of 60% of the relevant income should be earned or paid out via **cross-border transactions**; or
- » **55%** instead of 60% of the relevant **assets** were situated outside the Member State of the entity.

In addition, the EP Committee proposes to amend the last gateway criterion such that it is only met if the administration of day-to-day operations and decision-making on significant functions is outsourced ‘*to an entity that is not an associated enterprise within the same jurisdiction*’. This would be a welcome amendment, as it clarifies that outsourcing these activities to group entities in the same country would in principle be acceptable and result in the relevant entity not qualifying as a misused shell entity (and thus be out of scope of the Directive).

Excluded undertakings

The Directive provides for a list of undertakings that, by definition, are out of scope because they are already subject to increased transparency requirements. For the so-called “regulated financial undertakings”, the carve-out is extended to entities owned by such undertakings and which have as their objective the holding of assets or the investment. Strangely enough, does not seem to be required that the entities are located in the same jurisdiction as the regulated financial undertaking.

At the same time, it is clarified that the exemption for companies with at least 5 full-time employees only applies if they work in the undertakings’ jurisdiction.

Certificate of residence

Should an undertaking be in-scope according to the Directive, a certificate of tax residence could either be denied or, alternatively, issue a special certificate with a warning that it should not be used to obtain a tax benefit. The EP Committee now suggests to eliminate this latter alternative. When refusing a tax certificate, countries should instead issue a statement with the grounds of the decision.

Administrative pecuniary sanction

The EP Committee proposes to lower the sanction for non-compliance with the Directive from at least 5% of the undertaking's turnover to at least 2.5%.

Entry into force and stat lookback period

The EP Committee proposes to postpone the effective date of the Directive by one year and apply the Directive provisions from **1 January 2025**. The lookback period for the gateway criteria remains two years and should start on 1 January 2023. This means that entities effectively have approximately half a year to implement further amendments, if necessary.

Next steps

The European Parliament approved the amendments proposed by the EP Committee on the Directive and calls on the European Commission to alter its Directive proposal accordingly. It is expected that the Directive will be on the agenda of an ECOFIN meeting later this year.

Of course, we would be more than happy to discuss with you the suggested changes by the EP. To learn more about the Directive, do not hesitate to reach out.

Contact information

Ivo Kuipers

ik@atlas.tax

M: +31 627 034 97

Steven Vijverberg

E. sv@atlas.tax

M: +31 648 279 433

Dennis Kamps

E. dk@atlas.tax

M: +31 653 208 763

Roelof Gerritsen

E. rg@atlas.tax

M: +31 612 541 987

Lennart Wilming

E. lw@atlas.tax

M: +31 391 939 15