

Real Estate Tax Services News

Keeping you informed

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ATAD 3 update: Opinion of the European Parliament

In brief

On 22 December 2021, the European Commission proposed the so-called [Unshell Directive](#) (also known as 'ATAD 3' or hereafter, 'the proposed Directive'). ATAD 3 introduces measures to counter the misuse of shell entities for tax purposes in the EU. The proposed Directive needs to be unanimously adopted by all 27 EU Member States as per Article 115 TFEU. For further details, please refer to earlier [Tax Policy Bulletin](#).

On 12 May 2022, the European Parliament (EP) issued an opinion in a [draft report](#) and proposed several amendments to ATAD 3.

In detail

The most important amendments that have been proposed by the EP are as follows:

- Gateway 1 (relevant income): increase of the percentage from 75% to 80% regarding the relevant income (more lenient provision),
- Gateway 2 (cross-border activities): i) reduction of the percentage from 60% to 55% of the book value of the undertaking's assets located outside the Member State (stricter provision) and ii) increase of the percentage from 60% to 65% regarding relevant income that shall be earned or paid out via cross-border transactions (more lenient provision),
- Gateway 3 (outsourcing): an undertaking should be in scope if it has outsourced the administration of day-to-day operations and the decision-making on significant functions in the preceding two tax years, only to an entity that is not an associated enterprise within the same jurisdiction as the reporting undertaking (more lenient provision). This would mean that outsourcing to an associated enterprise in the same EU Member State should not put the undertaking at risk and would also suggest that having directors/employees on the payroll that also perform activities for associated enterprises, does not need to be an issue for the Gateway 3. This is a very relevant amendment for taxpayers that are externally

managed by associated enterprises in the same jurisdiction. Real estate entities that have outsourced administration of day-to-day operations and decision-making to an associated management company in the same jurisdiction would benefit from this amendment.

- Carve-outs:
 - a) extension of the regulated financial undertakings exemption also to entities owned by them and which have as their objective the holding of assets or the investment of funds (more lenient provision). Therefore, undertakings that perform similar activities and are affiliated to regulated financial undertakings could also fall out of scope of ATAD 3. This is a very important extension of the care-out for taxpayers held by regulated financial undertakings such as an AIF. Holding and real estate companies forming part of a regulated fund structure should not be considered a shell entity according to the proposed Directive.
 - b) the exception for undertakings with at least five full time employees exclusively carrying out the income-generating activities is amended, in such a way that these employees should be working in the jurisdiction where the undertaking is resident for tax purposes (stricter provision).
- Minimum substance indicators: it is suggested to remove the condition that the authorisation of a director should be used 'actively and independently'. Since the terms 'actively' and 'independently' leave quite some room for interpretation, we suppose this amendment is suggested to take away any ambiguities.
- Residency certificate: where the proposed Directive determines that a shell undertaking that does not have minimum substance for tax purposes shall either (i) not receive a residency certificate or (ii) receive a residency certificate with a warning statement prescribing that the entity is not eligible for treaty/convention benefits, the EP proposes that the only option will be not receiving a residency certificate, accompanied with an official statement justifying the grounds for not issuing a residency certificate.
- Penalties: reduction of the penalties for non-compliance with ATAD 3 from 5% to 2.5% of the undertaking's turnover (more lenient provision)
- Entry into force: amendment of the entry into force of ATAD 3 from 1 January 2024 to 1 January 2025 (more lenient provision).

Our view

As the European Parliament is considered merely a consultative body under Article 115 TFEU, its opinions are not legally binding. This is also the case with ATAD 3. Based on experience with suggestions of the European Parliament on previous EU directives, we have seen that the European Commission and the Council (the 27 Ministers of Finance, 'ECOFIN') may not follow its advice. However, in our view, the draft EP report at least shows a trend in relation to the ongoing discussions on the proposed ATAD 3 Directive. What's more, the European Commission is of the view that the EP report provides „contributions in the right direction”.

Next to the opinion of the EP, the Economic and Social Committee gave its opinion on ATAD 3. This is also required under Article 115 TFEU. The Committee is in principle supportive of the proposed Directive but suggested, amongst others, that the European Commission issue appropriate guidelines regarding the substance test set forth by the proposed Directive, with particular reference to the meaning of specific terms such as 'residence', 'resident director' and 'premises'.

Once an official compromise text on ATAD 3 is published, we will inform you separately on the changes made to the proposed Directive and will provide you more insights into the ATAD 3 negotiation process. What we know is that before the FISC Subcommittee of the European Parliament, the European Commission stated (through the EU Commissioner for Economy) that it is „quite satisfied” with the draft EP report on ATAD 3 that provides „contributions in the right direction”. In addition, the Czech presidency of the Council (starting as of 1 July 2022) is currently working on and plans to table a text for a general agreement/approach in September 2022. According to the European Commission, the evolution of the discussions with the EU Member States is going in a good direction but a lot of work needs to be done for a compromise solution. Meanwhile, the European Commission is working on the third-country dimension of the ATAD 3 initiative (i.e., in the case of shells resident in a third country).

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