

EU Parliament revises “gateway” tests in Unshell Directive

Following a review of the proposed “[Unshell directive](#)” (also referred to as to as “Anti-Tax Avoidance Directive 3” or “ATAD3”) published by the European Commission on 22 December 2021, the European Parliament Committee on Economic and Monetary Affairs agreed on January 17, 2023, on changes to the directive.

In particular, the EU Parliament adopted the EU Commission’s proposal (with the proposed changes) and calls on the EU Council to adopt the proposed amendments by the above EU Parliament Committee.

The essential purpose of the Unshell Directive is to thwart the use of intermediary companies in the EU that purportedly engage in an economic activity but in reality, do not conduct any economic activities and do not have minimal substance. Such intermediary companies are often used in order to enable certain tax advantages to flow to their beneficial owners or to the group to which they are members. In order to prevent abuse of these structures, the Directive contains measures that would disregard entities that are considered as “shell entities” for cross-border purposes.

The most significant changes to the proposed Unshell Directive made by the EU Parliament’s Committee on Economic and Monetary Affairs relate to the gateway criteria. Quite importantly, this revised version lowers the thresholds below which an entity is not subject to reporting requirements, which now have as follows:

- More than 65% (previously 75%) of the revenue in the preceding two years is “relevant income,” which broadly covers passive income (e.g., dividends, interest, royalties);
- More than 55% (previously 60%) of the book value of the entity's assets has been located outside the undertaking's member state for at least two years, or more than 55% (previously 60%) of the entity's relevant income is earned through cross-border transactions; and
- The entity has outsourced the administration of its day-to-day operations and decision-making **to a third party** (bold is added in the proposal).

If an entity responds affirmatively to all three tests, it would be subject to new tax reporting obligations related to economic substance, specifically with respect to its premises, whether it has its own active bank account in the EU and the tax residence of its director(s) and the majority of its full-time employees. If an entity lacks substance based on one or more of these indicators, it would be presumed to be a shell entity for purposes of the Directive and would not be eligible for benefits under the above directives or applicable tax treaties and no tax residence certificate would be issued. Failure to comply with the rules would result in a penalty of at least 5% of the entity's turnover for the relevant year. Regardless of whether the entity qualifies as a shell entity, the information reported would be exchanged automatically.

An entity still would be able to rebut the presumption of shell company status by providing additional evidence at least on the commercial rationale for the undertaking.

While the EU Council should not necessarily adopt the version of the Unshell Directive as revised by the EU Parliament, the aim remains for EU Member States to implement ATAD3 into national legislation by June 30, 2023, while January 1, 2024 to be the effective date.

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