

# EU Taxation Globe, Unshell & Related Issues

Recent TAX Changes on Shell & Holding Companies

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# The EU Implications Arising in Connection with the Proposals made by the EU Commission

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# OUTLINE

- EU Commission objectives and EU Current and Past Proposals
- ATAD 3
  - Principles Subsidiarity and Proportionality
  - Compatibility proposal – International/EU Tax Developments
  - Compatibility proposals -Double tax treaties
  - General Principle of EU Legal certainty?
- What's is next?

## ACTION PLAN: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action [COM [2015] 302 final]

- CCCTB: A holistic approach to profit shifting
- Ensuring Effective Taxation where profits are generated
- Creating an environment which encourages business and fosters growth and jobs in the Single Market [cross-border losses, improve dispute resolution mechanisms]
- Tax transparency: EoI rulings, list of non-cooperative jurisdictions and exchange CbC reporting.
- EU Coordination: Improving MSTs coordination and reform code of business taxation and EU Platform on Tax Good Governance

## EU Parliament and FISC Committee

- 2015 report condemned aggressive tax policy - common approach in order to tackle tax fraud and tax avoidance.
- 2015 Two resolutions [TAXE and TAXE 2]: Tax Rulings.
- 2018 Committee of Inquiry [Pana Committee] –Panama Papers: money laundering, tax avoidance and tax evasion.
- 2018 Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance [TAX3] was established by Parliament in March 2018. Following the work of the TAX3 Committee, Parliament adopted a report in March 2019.
- FISC Subcommittee on tax matters was set up to assist the ECON Committee on tax-related matters and particularly the fight against tax fraud, tax evasion and tax avoidance, as well as financial transparency for taxation purposes. 18 [Public Hearings](#)

## Business Taxation for the 21<sup>st</sup> century [COM (2021) 251 final]

- Enabling fair and sustainable growth [support Energy, Green Deal, Capital Markets, Digital Agenda].
- Ensuring effective taxation
  - Supporting ongoing global tax discussions [Pillar One and Pillar Two]
  - Targeted solutions beyond OECD
    - Transparency: effective corporate tax rate of larger companies – methodology used for Pillar Two.
    - Prevent abuse of shell companies
    - Payment of fair share of tax including enforcement of State Aid rules.
- Enabling productive investment and entrepreneurship [e.g. domestic tax treatment of losses].

## Business Taxation for the 21<sup>st</sup> century [COM (2021) 251 final]

- Replace CCTTB with BEFIT: Business in Europe: Framework for Income Taxation or BEFIT]. BEFIT will be a single corporate tax rulebook for the EU, based on the key features of a common tax base and the allocation of profits between Member States based on a formula [formulary apportionment]
- It will build on progress in the global discussions, where these concepts are already present, through the use of a formula for the partial reallocation of profits under Pillar 1, and common rules for calculating the tax base for the purposes of applying Pillar 2.

## The EU's new business tax agenda: ensuring sustainable growth and public revenues

18 May 2021



### The world is changing Tax should too

#### A common rulebook for a better business environment in the Single Market

“Business in Europe: Framework for Income Taxation” (or BEFIT) will cut red tape, reduce compliance costs and minimise tax avoidance.

#### Ensuring greater public transparency

New proposal requiring certain large companies to publish their effective tax rates.

#### Supporting businesses to recover from COVID-19

Member States recommended to allow companies to offset their 2020 and 2021 losses against taxes they paid before 2020.

#### Tackling the abusive use of shell companies

New monitoring and reporting requirements for shell companies so tax authorities can better respond to aggressive tax planning.

#### Addressing the debt-equity bias in corporate taxation

Encouraging companies to seek finance through equity rather than debt.

#### On the road to 2050: Rethinking the EU tax mix

A comprehensive tax agenda, in line with global discussions, promoting fairness and supporting EU's green and digital transitions.



# EU DIRECTIVES AND PROPOSALS

Directives to  
prevent  
double  
taxation

Administrative  
Cooperation  
Directives

Directives to  
prevent tax  
avoidance  
ATAD, 1, 2 and  
Proposal ATAD  
3

Pillar 2  
Proposal  
(Global  
Minimum Level  
of Taxation)



“The current international corporate tax system was designed more than a century ago and is based on outdated principles of tax residence and source. Developments in globalisation and digitalisation have left these principles increasingly out of synch with the economy of today and the made tax rules increasingly difficult to apply to modern business realities”

“While corporate income is taxed at the national level, business models continue to become ever more international, complex and digital. This creates high compliance costs for business and risks of double taxation. At the same time, some companies exploit loopholes between tax systems through aggressive tax planning strategies. This also makes it difficult for citizens to know how much companies are actually paying in tax, which risks undermining trust in the tax system as a whole [[EU Comm. Website](#)]”

***New business models, digitalisation: How does this fit in the current proposal of ATAD 3?***

## Some observations

- From CCCTB to BEAFIT [CCCTB since early 2000, despite changes no yet successful, will BEAFIT be the adopted solution?]
- Change role of the EU Parliament: EU FISC and hearings: Political pressure on countries- revisiting the role of the EU Commission in the initiatives to tackle tax fraud, aggressive tax planning and tax transparency.
- Still Member States in the process of implementing BEPS, ATAD 1 and 2, and also Directives on Administrative Cooperation. Also discussion of Proposals: Pillar 2 Directive, ATAD 3 Directive, Efficient management of resources? Which choices?
- EU Coordination through Directives is not possible. Still type of instrument will result in countries adopting stricter measures/penalties [e.g. DAC 6 and penalties]
- EU Platform on Tax Good Governance, and Standard of Tax Good Governance: Non-EU countries required to comply with transparency, exchange of information, fair taxation, BEPS [positive review]. Will this Standard include ATAD 3 and Pillar 2 EU Directive [Proposals].

## Pillar One

- Proposals: 2018 DTS (interim) to significant economic presence, to digital levy:
- Objectives: EU Commission: Shaping Europe's Digital Future and Fair Taxation and Need to obtain revenue to overcome the COVID19 crisis

To keep in mind

- Scope and definition of digital activities or companies subject to digital levy
- Relation with the EU and Mst obligations including double tax conventions and also WTO compliant
- Fairness considerations: SMEs, digital companies with a dominant/weak position

What is different from the EU 2018 Directive proposals?

- A proposal as an add-on to any OECD Pillar 1 framework. The Commission has also proposed [COM(2021) 570 final to amend the Own Resources Decision so that the following revenue would be allocated to the EU budget:

*15% of the share of the residual profits from multinationals that would be re-allocated to EU Member States under the recent OECD/G20 agreement on a re-allocation of taxing rights ["Pillar One"].*

## Pillar Two

Resolution Parliament December 2019:

*Welcomes the GloBE proposal, which aims at ensuring that a minimum level of tax is paid where value is being created and where economic activity is taking place; considers that the ultimate aim of the Pillar Two measures should be to address remaining BEPS issues while preventing damaging tax competition, notably by reducing pressures to grant unjustified tax incentives without any positive economic impact, on top of existing measures aimed at tackling tax evasion, aggressive tax planning and tax avoidance.*

*Recommends that all of the harmful tax practices contained in BEPS Action 5 are covered by the GloBE proposal*

See proposal [Directive COM\[2021\] 823 final](#)

- Some differences with the Pillar Two Proposal
- Compatibility Pillar Two Directive and CFC rules [ATAD]. Commission no amendment of ATAD necessary.
- Dispute Resolution Mechanisms will be important.
- To adopt it based on unanimity [Poland Package deal]

## Proposal ATAD 3: rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU [COM 2021 [565] final].

- Art. 115 TFEU Ensure Proper Functioning of the Internal Market
- Shared competence: Commission and the Member States
- The rules of this Directive aim to tackle cross-border tax avoidance and evasion practices and provide a common framework to be implemented into Member States' national laws in a coordinated manner.

Principle of subsidiarity [Commission Working Document SWD[2021] 577 final].

The nature of the subject requires a common initiative across the internal market

ATAD 3 aims “cannot be sufficiently achieved through action undertaken by each Member State while acting on its own. Such an approach would in fact only replicate and possibly worsen the existing fragmentation in the internal market and perpetuate the present inefficiencies and distortions in the interaction of distinct measures”

Anti-abuse rules with cross border dimension, thus common objectives and common solutions should be identified.

*Certain types of abuse, without complete definitions [e.g. shell entity, etc] so still coordinated approach? Limitations of a Directive, however use of tax concepts, and also definitions could contribute to less fragmentation of the internal market .  
No EU Legislation defining economic substance requirements. Is this necessary?  
And if so how to ensure that it is being done in a coordinated way?*

Principle of proportionality [Commission Working Document SWD(2021) 577 final].

The envisaged measures do not go beyond ensuring the minimum necessary level of protection for the internal market. The Directive does not therefore prescribe full harmonization but only a minimum protection for Member States' tax systems.

The proposal aims to provide Member States with uniform objective substance criteria to identify shell entity and arrangement's abuse as well as establishing information exchange provisions that are not currently available to them.

ATAD 3 Proposal envisages automatic exchange of information as well as potential request by one Member State to another for tax audits for a broader group of undertakings that are treated as being at risk [as they fulfil certain conditions] but are not necessarily deficient in substance for the purposes of this Directive.

But what about the other Directives DAC that already allow tax authorities to get the information from the taxpayer? What can ATAD 3 do that DAC 6 is not doing?

Still important [i] to assess relevance of the information exchanged even in automatic exchange of information? And that [ii] the information being used for the purposes of the Directive?



## ATAD 3 PROPOSAL

- 1) To identify undertakings that should report since they are at risk for lacking substance and be misused for tax purposes. Following some gateway criteria [undertakings carrying out cross-border activities which are geographical mobile, no outsourcing, and and in addition rely on other undertakings for their own administration, in particular professional third party service providers or equivalents.]
  
- 2) These undertakings will be asked to report on their substance in their tax return. The focus is on specific circumstances that are normally present in an undertaking that performs substantial economic activity. Three elements are considered important: first, premises available for the exclusive use of the undertaking; second, at least one own and active bank account in the Union; and third at least one director resident close to the undertaking and dedicated to its activities or, alternatively, a sufficient number of the undertaking's employees that are engaged with its core income generating activities being resident close to the undertaking.

## ATAD 3 PROPOSAL

3) An undertaking that is a risk case, since it has crossed the gateway, and whose reporting also leads to the finding that it lacks at least one of the relevant elements on substance, should be presumed to be a 'shell' for the purposes of the Directive, i.e. lacking substance and being misused for tax purposes.

An undertaking that is a risk case but whose reporting reveals that it has all relevant elements of substance, should be presumed not to be a 'shell' for the purposes of the Directive.

4) Rebuttal. Right of the undertaking which is presumed to be shell and misused for tax purposes, for the purposes of the Directive, to prove otherwise, i.e. to prove that it has substance or in any case it is not misused for tax purposes.

Taxpayers should produce concrete evidence of the activities they perform and how. The evidence produced is expected to include information on the commercial [i.e. non-tax] reasons for setting up and maintaining the undertaking which does not need own premises and/or bank account and/or dedicated management or employees among others. Still possible that other tax authority ask for an audit of that undertaking even though it has already proof that it is not a shell entity.  
Validity of the rebuttal for one year, and extended for another 5 years.

## Compatibility ATAD 3 – Other tax initiatives

- Started in BEPS Action 5 (automatic exchange of rulings but these rulings were limited). Difficult to balance the need to achieve transparency and to tackle aggressive tax planning vs. the need to provide legal certainty, to build mutual trust and to facilitate compliance.
- If undertaking lacks of substance but it does not carry out cross-border activities ATAD does not apply
- Reporting obligations (if excessive) against the EU freedoms?
- If substance in a MsT, still audit from another MsT, legal certainty?

See Responses to Public Consultations [here](#)

## Compatibility ATAD 3 – Other tax initiatives

- Still review each year, and looking back two years [retroactive approach]. Excessive burden for taxpayer?
- Use non-tax reasons, why not use of tax reasons in ATAD 3?
- CFC, BEPS Pillar Two and ATAD 3? Compatibility?
- DAC 6, EU GAAR, EU PTT [BEPS Action 6] ? Compatibility?

## Compatibility ATAD 3 – Double Tax Treaties

Tax resident different features than tax treaties [5 employees, bank account, own premises, director in close proximity],

- Different that the current business models.
- Disregard concept of residence of tax treaties
- Differences in the approach to residence [place of incorporation, statutory seat- company law].
- Disregards the importance of treaty abuse rules [e.g. PTT] to deny tax treaty benefits [which is already complicated by itself].
- More documentation and additional compliance
- Lack of legal certainty if the other Member State may still ask for an audit of the undertaking that has passed the ATAD 3 test.

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