

ATAD III Directive Proposal legislative process: Vote of the EU Parliament Report

Executive Summary

- The EU Parliament has adopted, on 17 January 2023, its final Report on the ATAD III Proposal in the framework of the consultation procedure
- The amendments proposals to the Directive have sought to channel the EU Parliament’s position: “Balance, transparency and toughness”
- The EU Council is now to adopt the final version of the Directive Proposal

This Update will focus on the contribution of the European Parliament to the Proposal, which was concluded on Tuesday 17 January 2023 with the adoption of the report to the Council (the “Report”).

I. ATAD III Directive Proposal: the status quo

More than a year ago, the proposal for a Council Directive 2021/0434 (CNS) (“ATAD III” or the “Proposal”) was published. Its current status is not yet final and is potentially subject to significant change.

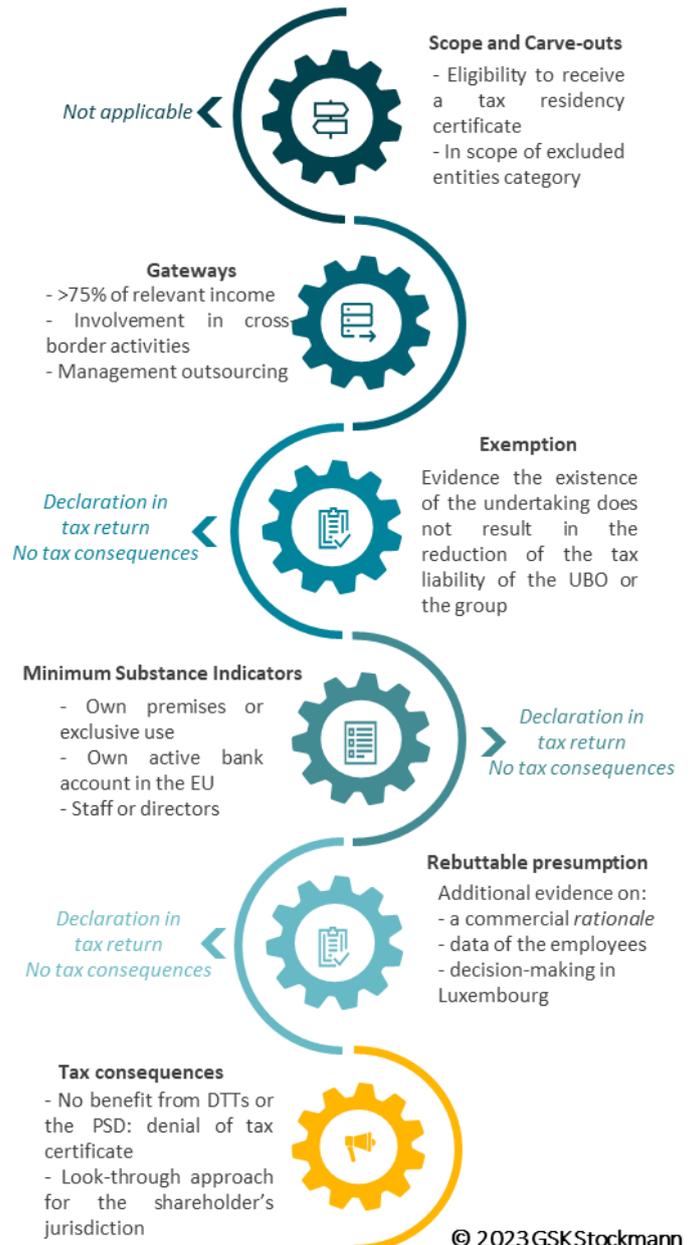
The Proposal lays down a so-called “substance test”, to be performed by in-scope entities via self-assessment, allowing Member States to identify undertakings without minimal substance.

EU entities shall qualify as “shells” if they:

- do not perform any economic activity, and
- can be misused for tax avoidance or evasion purposes.

II. Steps proposed by the ATAD III

Please see below the steps and relevant consequences of the proposed framework by the European Commission:



III. The EU Parliament and ATAD III

As part of the special legislative procedure, the European Parliament does not act as co-legislator, but merely provides a non-binding opinion to the Council.

In presenting the Report to the debates, Rapporteur Pereira synthesised the objectives of the amendment propositions and thus of the European Parliament's position on the Proposal: "balance, transparency and toughness".

Balance

Proportionality is a key concept of the Parliament Report, as it pointed out that not all entities with minimal substance are automatically used for aggressive tax planning purposes. Rapporteur Pereira's statements confirmed the Parliament's intention to expand the scope of the Proposal, in particular by increasing the thresholds for the gateway criteria. However, in order to implement such a broad coverage, legal certainty is essential in order not to place an undue burden. This is achieved through transparency.

Further, the Report stresses that the Proposal's provisions must consider the digital and post-Covid reality, which has outdated the traditional substance criteria.

Among the changes proposed, the entity's group for certain criteria such as employee count and use of premises should be taken into consideration.

Furthermore, as one of the most anticipated clarifications by market players, outsourcing would be understood as only related to third parties.

Transparency

Transparency is made possible by a clear legal definition of the used terms, a correct implementation by the Member States and *in fine*, a uniform understanding of the provisions by the market players, all leading to the main goal: legal certainty.

Clarifications on definitions such as "beneficial owner", "tax benefit" and "documentary evidence" were provided for in the Report.

Further, the self-assessment approach of the substance test is confirmed for potentially in-scope entities.

The Report also introduces a nine-months deadline for the assessment by the relevant tax administrations of rebuttal or exemption requests. After this deadline, the requests will be considered approved.

Toughness

Tax consequences are more defined and scaled based on the proposals of the Report.

In the Proposal drafted by the Commission where a substitute tax certificate could be issued, any tax residency certificate request should be denied to "shell entities".

The Report provides for several amendments as to penalties, introducing a differentiation between non-compliance and false declaration, and referring to entities' revenue. For undertakings with zero or low revenue, the penalty should be based on the total assets held.

Finally, the introduction of "joint audits" in the Report pulls a bridge between the DAC framework and ATAD III. Such proposition should be heavily monitored.

IV. Confirmation of the standalone approach

Even if the carve-out based on the number of employees is deleted in the Report, most-carve-out categories are unchanged. In particular, regulated financial undertakings (including but not limited to UCITS and AIFs managed by an AIFM) remain covered.

Although the Members of the European Parliament had considered a new carveout for holding entities owned by regulated financial undertakings in their preliminary report, such proposition was removed in the final report. Therefore, SPVs widely used in the financial sector should remain in-scope, and would need to perform an ATAD III analysis on a standalone basis.

In such context, the EU Parliament explicitly confirms the standalone approach of the Proposal as to the assessment of an entity, while still considering group entities for some specific criteria.



V. A valuable input with a yet uncertain effect

Although Commissioner Vestager sought to highlight the consistency between the Parliament's amendments and the Commission's objectives, the extent to which the Parliament's report will be incorporated into the final version of the Proposal as to be adopted by the Council remains unclear.

VI. What next?

The Proposal is now exclusively in the hands of the EU Council. Its role is therefore to finalise the draft with the support of the Commission.

As for the timing, it is difficult to project a clear timetable for the adoption of the Proposal, as the Council does not communicate its agenda in advance.



Mathilde Ostertag

Partner
GSK Stockmann SA
mathilde.ostertag@gsk-lux.com

Katharina Schiffmann

Counsel
GSK Stockmann SA
katharina.schiffmann@gsk-lux.com

Elise Boscher

Associate
GSK Stockmann SA
elise.boscher@gsk-lux.com

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www.gsk-lux.com

GSK STOCKMANN

BERLIN

Mohrenstrasse 42
10117 Berlin
T +49 30 203907-0
F +49 30 203907-44
berlin@gsk.de

HEIDELBERG

Mittermaierstrasse 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

FRANKFURT/M.

Taunusanlage 21
60325 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

MUNICH

Karl-Schornagl-Ring 8
80539 Munich
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

HAMBURG

Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

LONDON

Queens House, 8-9 Queen Street
Cheapside
London EC4N 1SP
United Kingdom
london@gsk-uk.com

LUXEMBOURG

GSK Stockmann SA
44, Avenue John F. Kennedy
L-1855 Luxembourg
T +352 2718 02-00
F +352 2718 02-11
luxembourg@gsk-lux.com

