Euro Tax Flash from KPMG's EU Tax Centre

KPMG responds to European Commission public consultation on "Unshell" Directive proposal

Tax Avoidance – Unshell – EU Implementation – Substance – Unanimity

On April 5, 2022, KPMG[1] member firms in the EU submitted a response to the European Commission's (EC's) public consultation on the proposed EU Directive on rules to prevent the misuse of shell entities for tax purposes. This follows the submission of a KPMG response to the initial public consultation held on the proposal in August 2021.

While KPMG believes that the potential misuse of entities lacking economic substance for tax purposes should be given further consideration, we are of the view that the need for EU-wide action should be assessed in the context of the current tax landscape, i.e. following the entry into force and impact of rules such as the EU Anti-Tax Avoidance Directive (ATAD) and the EU Mandatory Disclosure Rules for Intermediaries and Taxpayers (MDR / DAC6), as well as in light of further expect changes, such as the entry into force of the OECD Global Anti-Base Erosion (GloBE) Model Rules.

Background

On December 22, 2021, the European Commission published a proposed EU Directive aimed at fighting the use of shell entities and arrangements for tax purposes (the "Unshell" Directive). Although the term "shell entity" is not formally defined in the proposed text of the Directive, the Commission describes on its dedicated Unshell webpage that shell entities are those that have no or minimal economic activity and that benefit from tax advantages. The proposal comes in the form of amendments to Council Directive 2016/1164/EU – the EU Anti-Tax Avoidance Directive (ATAD) and to Council Directive 2011/16 on administrative cooperation in the field of taxation (DAC) and applies to EU-based entities only. For more information on the proposed EU Directive, please refer to Euro Tax Flash 464.

[1] This comment paper is produced on behalf of KPMG member firms located in the EU forming part of KPMG's Europe, the Middle East & Africa (EMA) region. Throughout this submission, "we", "KPMG", "us" and "our" refer to the network of independent member firms operating in the EU.

The proposed Directive is open for public consultation. The deadline for providing comments is April 6, 2022.

KPMG's contribution

In addition to the recommendation that a period of monitoring and evaluation of existing measures should be undertaken before a determination is made as to whether additional specific anti-shell company rules are required, the KPMG contribution also attempts to highlight areas where we believe the proposed rules should be reconsidered should the European Commission decide to move forward with the proposed Directive.

In this regard, our comments address the following concerns:

- Consistency of the rules with case law from the Court of Justice of the European Union;
- The need to safeguard the principle of proportionality, bearing in mind the administrative burden created for taxpayers and also the need to provide tax authorities with a framework that allows the targeted investigation of relevant cases.
- Practical issues that this strain on resources may create (e.g. in terms of the application of withholding tax relief);
- The impact that the new rules may have on the competitiveness of EU Member States.

We have also noted open questions regarding the interpretation of the rules due to the absence of specific definitions, lack of clarity of proposed provisions and discrepancies between the Explanatory Memorandum accompanying the proposal and the text of the proposed Directive. Specific examples provided in the consultation response include the lack of clarity surrounding the outsourcing gateway test and each of the substance indicators in the proposed Directive.

Finally, we also call for dispute resolution procedures to be added to the proposal and for the penalty provisions – which currently propose a five percent penalty based on turnover – to be revised to allow Member States to set the level of penalties in accordance with domestic legislation.

Next steps

The Commission proposes that Member States should transpose the rules into domestic law by June 30, 2023 and that the provisions of the Directive should apply as of January 1, 2024. The legal basis for the Commission's proposal is Article 115 of the Treaty on the Functioning of the EU (TFEU), which requires unanimity in the Council. Once the Council working groups agree on a compromise text that all Member States can support, the proposal will be submitted to the European Parliament for consultation and to the Council for formal adoption. The legislative procedure for amendments to ATAD and the DAC is consultation, meaning that the Council will adopt the text once the Parliament and any relevant Committees have given their (non-binding) opinions.

ETC Comment

The proposed Directive to tackle shell entities was released on the same day as the minimum tax Directive proposal (see Euro Tax Flash Issues 463 and 467). The minimum tax Directive proposal has been a priority of the French Presidency of the Council of the EU and has therefore been the focus of work in the Council in the first quarter of 2022. However, we expect discussions on the Unshell proposal to pick up speed now that the technical work on the Minimum Tax Directive has mostly been completed. The text proposed by the European Commission may therefore suffer changes based on feedback provided by Member States in the Council working groups and potentially also to reflect responses received as part of the public consultation process.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.


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