AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Feedback on the directive laying down rules to prevent the misuse of shell entities for tax purposes

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2021, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's proposal to tackle the misuse of shell entities for improper tax purposes to create an equitable and stable business environment, which can boost sustainable, job-rich growth in the Union and improve the current tax system with a focus on ensuring fair and effective taxation. We also welcome the opportunity to provide feedback on the proposed Directive to allow the business community and other stakeholders to inform and support the legislative debate both at a policy and technical level.

Whilst tackling abusive tax structures, we believe it is of key importance to not hamper atypical valid business models generating value in the Single Market. After careful consideration of the EU Commission's proposal, we believe a tailored and proportionate approach should be undertaken to effectively target fraudulent actors. There is a concern that the proposed Directive will place a heavy and resource-intensive administrative burden on genuine and compliant EU companies and that the Directive is insufficiently tailored to target abusive structures. In addition, the 'gateway' indicators and safe harbors include areas of ambiguity that will drive additional complexities for businesses needing to comply with the rules.

Specifically, we would like to raise to your attention the following considerations relating to the effectiveness, gateway test provisions and safe harbors of the directive:

- Companies carrying out real economic activity can fall within the scope, so clarity and effectiveness of safe harbors is important for tax authorities and businesses to minimize compliance burden. Currently, some of the safe harbors are ambiguous and not specific enough to be effective. For example, the mechanics of the application of the five-employee safe harbor is not sufficiently clear for businesses to reply upon it effectively. Furthermore, the exemption in article 10 of the proposed Directive is too generic and lacks specific objective criteria necessary for it to be relied upon in practice, resulting in legal uncertainty and additional compliance burden for genuine businesses. We have provided specific suggestions to modify the respective provisions in the second part of this document.
- As a result of implementing the Pillar 2 directive at EU and OECD level, all companies within scope will pay a minimum level of tax in each jurisdicition based on a newly defined tax base with the aim to ensure that 15% minimum tax applies in every jurisdiction to the most realistic tax base possible. This will be introduced in addition to a number of existing anti-avoidance measures (ATAD, DAC). This in our view raises the query what risk remains for the companies within scope that has not already been addressed through other measures to protect the tax base. We therefore recommend for the EU Unshell proposal to only apply to companies that are not in scope of the Pillar 2 implementing EU directive with gateway provisions applied as of implementation to eliminate the material retroactive effect to 2022 and 2023.
- If mis-calibrated, EU Unshell Proposal risks undermining competitiveness of EU Member States and businesses operating in the EU and their financing, at a time when it is crucial for the EU to attract business and investment to drive recovery from the COVID 19 pandemic and successfully face new, severe challenges to EU security. It is important to ensure the EU continues to have a level playing field with the rest of the world without creating new barriers interfering with smooth functioning of EU internal market.
- It is critical for successful implementation, that local transposition will happen in clear, harmonised and consistent terms across EU with sufficient lead time for companies and tax authorities. To achieve this, we believe several important technical details need to be specified in the proposed Directive more clearly to reflect business reality. We would like to highlight that it is of upmost importance that the clarifications set out below are made at the level of the Directive to avoid different interpretations by 27 EU Member States and the need for businesses to comply with 27 varying sets of rules.

Specific Suggestions

Further clarification is needed to ensure that safe harbors and gateway test provisions are:

- Appropriately focused to capture real economic activity,
- Can be easily assessed by businesses and tax authorities so efforts can be targeted at specific situations with deemed insufficient economic substance.
- Examples:

- *Two-year look back period (article 6):*
  - We propose to clarify at EU level the mechanics of the application of the two-year look-back period such that it is applied as of date of implementation of directive on a year-by-year basis. By way of example, if an undertaking does not meet the more-than-75%-of-the-revenue test in art. 6(1)(a) in Year 1 and does meet the requirements of this test in Year 2, then such undertaking shall be considered to not meet the test during the two-year look-back period.
- *Five fulltime employees (FTEs) exclusively carrying out activities related to the relevant income (article 6(2)(e)):*
  - We propose to clarify that it is sufficient to have five FTEs that are generating all types of relevant and other income of the undertaking combined. By way of example, if an undertaking earns three types of relevant income that combined meet the more-than-75%-of-the-revenue test in article 6(1)(a) and has five FTEs whose activities generate the three types of relevant income combined, such undertaking shall meet the requirements of this test.
  - Furthermore, we recommend to set out objective criteria to prove the activities of the FTE generate relevant income (e.g. time spent, etc.).
  - We further propose to clarify whether this test has to be met during the majority of time throughout the two-year look-back period.
  - In addition, we propose to clarify what is meant by members of staff versus FTE employees.
- *Outsourced management of day-to-day operations and the decision-making on significant functions (article 6(1)(c)):*
  - We propose to exclude outsourcing of the referred activities to related parties from the scope of this test. We do not see a policy reason why multinational companies should not be permitted to centralize management functions for the benefit of multiple entities within a single entity, which occurs commonly for valid, non-tax, commercial purposes within the context of the OECD Transfer Pricing Guidelines.
  - We propose clarifying that these requirements are cumulative.
- *Exclusive office use as indicator of minimum substance for tax purposes (article 7(1)(a)):*
  - We propose to remove the exclusive use of premises for each company from the scope of this test or to add a safe harbor that allows companies within the same group to share one office. We do not see a policy reason why companies should not be permitted to share their offices within their business especially with the current hybrid way of working both remotely and in the office.
- *Own bank account as indicator of minimum substance for tax purposes (article 7(1)(b)):*
  - We propose to clarify that this requirement is also met if internal group bank accounts/banking services are used for companies within the same group.
- *Same member state exemption (article 6 (2) (c and d)):*
  - We welcome the same member state exemption that considers to a certain extent the total operating activities of companies within the same EU member state. We propose to expand this to related parties operating in same country instead of the current limited scope of companies owned by the same country parent.
- *The existence of the undertaking does not reduce the tax liability of its beneficial owner(s) or of the group, as a whole, of which the undertaking is a member (article 10):*
  - Further clarity is required as to the intended meaning of this test.
  - For the sake of uniformity, the Directive should set out objective criteria to determine whether a tax liability has been reduced, including a de minimis safe harbor, and a direct nexus between the presumptive shell company and the potential reduction in tax liability.
- *Quantification of the relevant income that is undertaking's income from services that are partially outsourced to other associated enterprises (article 4(h)):*
  - We propose clarifying that in cases where the undertakings receive income from services which they (partially) outsource to other associated enterprises, only a portion of the undertaking's

income from services equal to the amount of expenses for outsourcing shall be considered to be relevant income. Alternatively, it can be considered to exclude income when the outsourcing happens within the same country.

- *Further clarity is required on*:
  - What is deemed as "geographically close" when assessing the tax residence of a qualifying Director or employee. We propose to include objective criteria for this assessment with a focus on the effective place of management of the company.
  - The Directive should set out objective criteria to initiate the peer review and request by Member States to challenge the position taken by other Member States with request for tax audit.

We remain at your disposal to discuss this further in the context of the feedback process and beyond.