

The “lost but not found” initiatives’ club: Unshell and others

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Overall, in the last few months, countless articles have been written on “hot” tax topics – such as [FASTER](#), [HOT](#), the [Minimum Taxation Directive \(2022/2523\)](#) and the [DACs](#) – probably due to the fact that they are being actively discussed by the European Union or have been recently adopted by the Council.

What happens, though, with all the initiatives which were once trending? Where do they stand, and should we expect them to progress any time soon? This note is intended to shed light to the “lost but not found” club of EU initiatives.

Unshell

The [Unshell proposal](#) was tabled by the European Commission in [December 2021](#) as a means to tackle the existence of entities with zero or little substance and that perform no actual economic activity – so-called shell companies. Broadly, Unshell proposes certain tests (gateways) which would indicate the level of substance the tested entity has. Depending on the test results, entities may be subject to additional reporting obligations which, if not met satisfactorily, may lead to the presumption that the entity is a shell. The consequence of this (rebuttable and frankly scary) presumption is that the entity cannot then obtain a tax residence certificate or that the certificate will state that the entity is a shell, which will prevent it from accessing benefits under tax treaties, the [Parent-Subsidiary Directive \(2011/96\)](#) or the [Interest and Royalties Directive \(2003/49\)](#).

The European Economic and Social Committee ([EESC](#)) and the [European Parliament](#) have issued their [supportive opinions](#) (with recommendations), but these seem neither sufficient nor representative of how the EU Member States feel about Unshell. Many [Council Presidencies](#) have continued the negotiations on this matter, recognizing the importance of nailing down a proposal which would help tackle tax avoidance through shell entities, but, at the same time, the delicacy of this matter (along with the unanimity rule on direct tax matters) has made it impossible to reach a solution and agree on a final text.

More recently, Unshell has been marked as “[blocked by the Council](#)” per an official EU database. This may indeed come as a shock to tax enthusiasts, but it only confirms the speculations and rumours of all these years around the feasibility of such an initiative.

The rumour has it though that Unshell may eventually become an amendment to the [DACs](#) and that this “new speculated version”, will bring much more flexibility for EU Member States. In any case, any Unshell scenarios are being discussed behind the closed doors of the Commission’s working groups. In fact, as per the [report on tax issues](#) during the Belgian presidency: a possible way forward was presented during a meeting of the Working Party on Tax Questions which took place on 11 June 2024 (no further details are available); however, further discussions will be needed in order to find compromise solutions on outstanding issues.

SAFE

The proposal for a Directive tackling the role of those who are enabling and involved in facilitating tax evasion and aggressive tax planning involving non-EU countries (leading to tax base erosion at the level of EU Member States) is merely an [idea](#) and not anything tangible in the absence of a tabled text by the European Commission.

The interconnection between Unshell and SAFE has been repeatedly [mentioned](#) by EU officials; practically, this means that unless negotiations progress on Unshell, SAFE will not materialize in the form of a legislative proposal any time soon.

DEBRA

The DEBRA proposal was tabled by the European Commission in [May 2022](#) for the purposes of restoring the balance between the debt or equity financing of investments. Almost 2 years ago (in December 2022), the Council announced that the technical examination of DEBRA was suspended in light of its many interlinkages with other pending corporate tax initiatives (for example, [BEFIT](#)). The [EESC](#) and the [European Parliament](#) have both issued supportive opinions, though with many technical recommendations (which, if followed through on, would most likely result in another version of the original DEBRA proposal).

Surprisingly, DEBRA is still marked as “[tabled](#)” per an official EU database and not “blocked”, so, depending on how BEFIT is approached by future Council presidencies, it cannot be entirely excluded that DEBRA will be somehow revived. This is also enhanced by the fact that the European Parliament’s report has been very recently issued (long after the ECOFIN announced that work on DEBRA has been suspended).

Digital services tax and significant digital presence

The DST and SDP proposals (both tabled in March 2018) set forth rules on taxing the revenues derived from the supply of certain [digital services](#) currently not effectively taxed in the European Union, how the existence of a PE should be established based on a [significant digital presence](#) and the attribution of profits to such PEs (respectively). The cornerstone of said proposals is that profits should be taxed where user value is created.

Despite the relevancy of the proposals, the Council could not reach a technical agreement. Both proposals have been marked as “blocked by the Council” per an official EU database and are not expected to ever make it through (this has been the status for significant digital presence since [October 2019](#), and since [August 2022](#) for a digital services tax) as Pillar 1 and Pillar 2 will encompass these topics.

For the sake of completeness, the Digital levy (which is also a concept aiming to tax companies operating in the digital sphere and was not backed-up with a legislative proposal) is expected to be technically covered by Pillar 1. If, however, work on Pillar One fails to progress, the Digital levy discussion will be back in the context of contributing to EU’s own resources.

Concluding thoughts

As of 1 July, and until the end of 2024, Hungary will preside over the Council of the European Union. The priorities of the Hungarian presidency were recently announced; closing the loops on specific outstanding direct tax initiatives is - as expected - not part of Hungary’s immediate action plan (approach which should not come as a surprise when looking back at Hungary’s recent actions regarding EU initiatives, and particularly Minimum Taxation Directive (2022/2523)).

Direct taxation, however, seems always to find a way to make it into any Council's presidency agenda, but it's EU Member States' conflicting views and right to express their reservations/objections over EU initiatives which, more often than not, act as a deal-breaker (in light of the unanimity rule applicable to direct tax matters).

Perhaps the silver lining in all this is a reconsideration of the limitations rooted in the unanimity rule. The European Council has [recently endorsed](#) a [report](#) which suggests that, in matters which require immediate EU intervention (e.g. tackling cross-border aggressive tax planning, tax avoidance and tax evasion), [article 116 of the TFEU](#) could be invoked (which technically works with the qualified majority threshold and does not require unanimity to be obtained). This would overrule any (potentially) unwilling Member State and allow the European Union to act swifter and faster. Ironically though in order to invoke an article which allows for a qualified majority shortcut – unanimity has to be obtained. Given this complex tax technical puzzle, it seems unlikely that Member States would ever agree to this.

IBFD references

- For an overview of legislative initiatives at the EU level on direct tax matters from the moment they are planned by the European Commission until their adoption by the Council of the European Union, see the [EU Direct Tax Law Initiatives Tax Dossier](#).
- J.J.A.M. Korving, [“BEFIT and HOT: FASTER and SAFE!” EU Law or Slogan for Slimming Pills?](#), 63 Eur. Taxn. 12 (2023), Journal Articles & Opinion Pieces IBFD.
- D. Ledure et al., [DEBRA: All That Glitters Is Not Gold](#), 76 Bull. Intl. Taxn. 11 (2022), Journal Articles & Opinion Pieces IBFD.
- EU tax law developments are reported in the daily IBFD [Tax News Service](#).