

# The Unshell Directive under Primary EU Law and Relationship with Art. 6 ATAD

“ATAD 3 and Abuse” IFA Austria  
21 November 2023  
Dr. Ivan Lazarov, IBFD Academic

Visit us at [www.ibfd.org](http://www.ibfd.org)

## Relationship with primary law

- ▶ **The Proposed Directive introduces minimum harmonization.**
  - ▶ “The Directive does not [...] prescribe full harmonization but only a minimum protection for Member States' tax systems.”
- ▶ **What do we test against primary law – the directive itself or the (future) domestic implementation?**
  - ▶ The directive itself up to the level of the minimum standard [UPC DTH, para. 70], domestic law in case of overimplementation.
- ▶ **Different judicial review when tested against primary law:**
  - ▶ Secondary law – manifest incompatibility (except in some circumstances when fundamental rights are at stake).
  - ▶ Domestic law – full scrutiny.

- ▶ Article 115:
  - ▶ Removing obstacles to the free movement

or

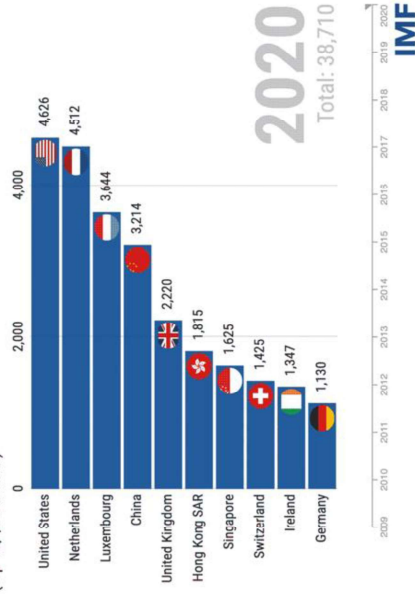
- ▶ **Removing appreciable distortions to competition**

[*Tobacco Advertising I*, para. 84]

- ▶ Once there is a ground to harmonize, broad discretion to make political, economic and social choices [*RPO*, para. 54]

### Inward direct investment position

The US took the leadership position as the largest recipient of direct investment in 2019 and maintained that position in 2020.



## Possible frictions with primary law (1)

- ▶ **Discrimination**
  - ▶ In the ultimate source country – no, with respect to DTTs and other secondary law (PSD, IRD). Is the shell entitled to non-discrimination under the TFEU anyway?
  - ▶ In the country of the shareholder – taxation on a flow-through basis and possible discrimination (some overlap with the ATAD's CFC rule).
  - ▶ Directors at no greater distance... - possible discrimination against non-residents.
  - ▶ Bank account in the EU – possible infringement on the free movement of capital with third-countries.
  - ▶ Administrative burden as discrimination in its own right.

## Possible frictions with primary law (2)

- ▶ **Burden of proof**
  - ▶ Initial *prima facie* standard of proof -> reversal of the burden to the taxpayer -> but based on individual examination [Eqiom, para. 31]
  - ▶ Although the substance criteria might lead to conclusion of *prima facie* instances of abuse, no individual examination.
- ▶ **Penalties**
  - ▶ 5% on the turnover might be in substance a sanction of a criminal nature (*Engel* criteria).
  - ▶ Potentially infringing on the Charter's right to fair trial and the distribution of the burden of proof. Moreover, the penalty applies irrespective of any revenue forgone (proportionality?)

© 2023 IBFD

## Relationship with Article 6 ATAD

- ▶ **Can Member States apply to an entity, that meets the minimum substance requirements under the Unshell Directive, Article 6 ATAD to deny EU benefits?**
  - ▶ Regarding PSD/IRD, 'yes' based on:
    - (i) The general principle on the prohibition of abusive practices [Danish cases] that should guide the interpretation of Article 6 ATAD.
    - (ii) The fact that Unshell introduces only a minimum level of harmonization.
  - ▶ No (explicit) safe harbour even for substance based anti-avoidance rules such as ATAD's CFC and its substance carve out.

© 2023 IBFD

**Thank you for your attention**

*[i.lazarov@ibfd.org](mailto:i.lazarov@ibfd.org)*