

Introduction

- Philippe Arraou, President of ETAF

Professional Law

- JURI committee discusses whistleblower protection
- Notification procedure re-evaluated in the Council

Tax Law

- Moscovici puts unanimity principle in question
- Debate on Digital Services Tax on the move
- The Parliament seeks simplifications for SMEs and enhanced administrative cooperation in VAT
- Three important VAT Directives approved by the ECOFIN
- Tax and EU State aid rules

Miscellaneous

- ETAF Conference 20 November - Invitation

INTRODUCTION

Philippe Arraou, President of ETAF

Dear ETAF Members,
dear friends,



One thing is for sure in the field of tax policy at European Level: in the future, the EU will not have less competencies than today, but rather will get more responsibility in this challenging area. For the beginning of 2019, EU Tax Commissioner Pierre Moscovici announced a proposal to shift away from the unanimity principle in Tax matters towards the regular legislative procedure, as it is already the case with most other policy areas.

This would mean a significant change in the legislative procedure in taxation, because the “yes” of all the 27 Member States would no longer be required, and the European Parliament would become a real co-legislator, whereas it is currently limited to a consulting function.

We can certainly be curious how this proposal will look like. The most probable scenario – since it is the most easily enforceable approach – is that certain suitable tax areas will be identified for such a move. This corresponds to what Jean-Claude Juncker stated in his September “state of the Union”

speech, in order to make law-making in the field of taxation more efficient and to give a perspective for the future of the Union.

When it comes to **professional law**, the legislative project of the notification procedure is still being controversially discussed among the European legislators. After the Trilogue in June, the Council took some time for further considerations, and the Member States were not able to reach a common line until today. However, this gave ETAF time to approach our respective governments and MEP's of the IMCO-Committee and to argue in favor of our positions.

The core problem is that the **European Commission wants to have more control over the professional regulations** within the Member States. This affects not only state legislation, but also professional regulation set by the self-regulatory bodies such as Chambers/Ordres or other professional organizations. The main concern for ETAF Members is the possibility of the European Commission to issue binding decisions against a Member State in the course of the Notification procedure.

ETAF has therefore spread a short position paper in its networks in order to prevent that the European Commission would be awarded a de facto legislative competence vis-à-vis the Member States.

I hope you will enjoy reading our Newsletter!

Yours sincerely,
Philippe Arraou

PROFESSIONAL LAW

JURI Committee discusses whistleblower protection proposals

In April 2018, the European Commission had presented a new legislative proposal for the protection of so-called "whistleblowers". The objective of the proposals is to raise the level of protection for whistleblowers who report breaches of EU law by setting EU-wide standards. The areas covered shall be, among others, the abuse of corporate tax rules, damage to the EU's financial interests, financial services, money laundering and terrorist financing.

According to the proposals, "channels" for reporting shall be established both within organisations and to public authorities, and whistleblowers shall be protected against dismissal, demotion and other forms of retaliation. National authorities shall be required to inform citizens and provide training for public authorities on how to deal with whistleblowers.

Although the objectives of this proposal may be useful, the text currently under way has to be regarded very critically because, once again, the confidentiality principle of certain professions such as tax advisers and auditors is endangered: According to art. 15 d) of the proposal, persons reporting externally to competent authorities or making a public disclosure in accordance with this Directive shall not be considered to have breached any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision.

ETAF believes that such a directive has to take thoroughly into account the professional secrecy and the high level of privacy protection which is particularly important in the relation between the tax adviser and the client.

In the European Parliament, the report of rapporteur MEP Virginie Rozière (S&D) is controversially discussed in the competent JURI Committee. She proposed, inter alia, to extend the scope of application on "general interest" and not only areas of illegality, and furthermore to extend it to European officials.

ETAF supports an amendment launched by several MEP's which aims at integrating an already existing recital (Nr. 69) into the text of the Directive where it is stated that "this Directive should not affect the protection of legal and other professional privilege as provided for under national law".

The vote in the JURI Committee can be expected in the week from 22nd to 26th October 2018, a vote in plenary possibly mid-November. The Austrian Presidency is aiming for an agreement by the end of the year.

[Commission press release](#)

[Legislative proposal on whistleblower protection](#)

Services Package: Notification procedure re-evaluated in the Council

After the failure of the “services e-card”, which represents a success in our professional law politics, and after we managed to successfully integrate two justification clauses concerning the obligatory chamber membership (performance of public functions) and the shareholding requirements (ban of outside capital in order to protect professional independency) into the proportionality directive, there is still one legislative file of the Services Package left: the proposal for a directive putting in place a **notification procedure**.

The trilogue negotiations on this proposal are more controversial and have a slower pace than the ones on the proportionality test. One of the disputed questions – and a key issue from the standpoint of the profession – is if the Commission should be entitled to address **binding decisions** to the Member States **obliging them to refrain** from adopting the concerned regulation or, in case the regulation has already been adopted, obliging the concerned Member State **to cancel** the measure. According to the previously debated texts – even the Council version – this possibility shall be given for certain regulatory areas under article 15 (2) Services Directive, amongst others *reserved activities* and *shareholding requirements*.

Threat of reversal of burden of proof

This would mean de facto that the European Commission would take the place of the national legislator. As a result, professional law matters would factually be removed from the legislative competence of the national parliaments, and the only remaining possibility for the Member States would be to appeal to the European Court of Justice.

ETAF has pointed out early that such a possibility of the European Commission to adopt a binding decision against a Member State would lead to an extensive **reversal of the burden of proof** at the expense of the Member States.

The subject has recently been re-opened within the Council and thus also within the trilogue. It was a legal opinion from the Legal Service of the Council of May 2018 which contained contradictory statements, hence raised uncertainty regarding the lawfulness of such a construct and brought up fundamental questions about the legal consequences of such a binding decision – in particular about legal remedies and appeal procedures.

On the one hand, the Legal Service declared that a competence of the Commission to adopt binding decisions is in line with European law. On the other hand, however, it stated at the same time that in the case of a legal dispute, the Commission should nevertheless be the one to use the instrument of an infringement procedure in order to seek an assessment by the Court of Justice and to oblige the Member State to cancel the envisaged measure if necessary.

ETAF has therefore once again seized the opportunity to give an understanding of the problem to the relevant decision-makers in Brussels. ETAF calls on the legislators to design the measures against the Member States as recommendations. This would create clarity concerning the burden of proof, would avoid incoherence in the application and enforcement of the legal acts provided in the treaties and would also avoid long legal disputes about procedural questions.

[ETAF Statement on the Proposal for a Directive on a notification procedure](#)

Moscovici puts unanimity principle in question

In a speech at the inter-parliamentary conference on stability, economic coordination and governance in the EU in Vienna on 18 September 2018, the EU Tax Commissioner Pierre Moscovici announced a proposal for January/February 2019 in order to shift away from the unanimity principle towards the regular legislative procedure in tax matters, as it is already the case with most other policy areas. This would mean a significant change in the legislative procedure in tax matters, because a “yes” of all the 27 Member States would no longer be required, and the European Parliament would become a “real” co-legislator, whereas it currently only has to be heard.

The most probable scenario is that certain suitable tax areas will be identified for such a move. This is how Jean-Claude Juncker stated it in his speech on [the State of the Union](#) on 12 September 2018, in order to make law-making in the field of taxation more efficient and to give perspective for the future of the Union.

Debate on Digital Services Tax on the move

The two legislative proposals published on 21 March 2018 by the European Commission to ensure a fair taxation of the digital economy have been discussed controversially in the last months within the Council (ECOFIN) and by the ECON and TAX3 Committees of the European Parliament.

The position of the various Member States is evolving following the [proposal advanced by the French finance minister](#) Bruno Le Maire of a “sunset clause” to be applied to the digital services tax (i.e. the 3% tax on certain revenues from digital activities). As soon as there is a decision at OECD level, the 3 % European solution would be replaced by the OECD solution. The sunset clause has caught the attention of several Member States, who were initially opposing the Commission’s proposal, favouring a global agreement at OECD level. The Netherlands, the United Kingdom and Luxembourg are now prepared to get behind a scheme based on a sunset clause. Italy also took position in favour of this solution, while the position of Germany is still vague. However, it is worth noting that some countries are still opposed to the taxation of digital services, including Ireland, Sweden and Denmark, while Finland and Malta have expressed scepticism, hoping to push forward at OECD level.

Meanwhile, both the ECON and the TAX3 committees have started internal discussions around the two proposals of the European Commission. On 29 August, in the course of an exchange of view, the rapporteur of the “Corporate taxation of a significant digital presence” (the so-called comprehensive solution), MEP Dariusz Rosati (EPP, Poland), highlighted the necessity of acting in order to ensure a level playing field between traditional businesses and digital ones within the EU. Furthermore, he questioned the relevance of the thresholds (i.e. turnover, number of contracts and number of users) that should be used as criteria to determine the establishment of a digital presence, according to the proposal. With regard to the interim solution, the rapporteur Paul Tang (S&D, Netherlands) questioned if a rate of 3% was enough, given the huge revenues of the digital giants. Furthermore, he proposed to set a minimum rate, leaving the Member States to set up higher tax rates, if they wish to do so. The draft reports for the opinion are expected to be ready in early October, with a view to a vote at the ECON committee in December and a plenary of the European Parliament in January.

VAT: the Parliament seeks simplifications for SMEs and an enhancement in administrative cooperation

On 11 September 2018, the European Parliament adopted, by a large majority, the [legislative resolution](#) drafted by MEP Vandenkendelaere (EPP, Belgium) on measures to simplify the VAT for small and medium-sized enterprises. The report suggests that the simplification measures could be implemented before the definitive VAT system comes in, proposing to bring forward the application date to 31 December 2019, instead of 30 June 2022. Furthermore, the MEPs proposed to authorise SMEs to use the VAT exemption threshold currently applicable, for an extra two years (rather than one year) as long as their turnover does not exceed the national threshold applicable to SMEs by more than 33% during these two years (as opposed to 50% proposed by the Commission).

On 3 July 2018, another [report was adopted](#) by the European Parliament, namely the one on the proposed regulation on administrative cooperation in the fight against VAT fraud drafted by MEP Roberts Zīle (ECR, Latvia). The amendments included in the Commission's proposal are in the sense of strengthening the exchange of information between the Member States, that should implement a set of operational targets for reducing the percentage of late replies and improving the quality of requests for information. Furthermore, the approved report stresses that it is vital to introduce a two-way information exchange between Eurofisc and Europol, where Eurofisc working field coordinators may ask Europol and OLAF for relevant information. Finally, the report proposes the establishment of a common system of collecting statistics on intra-Community VAT fraud and the publication of national estimates of VAT losses resulting from that fraud, as well as estimates for the Union as a whole.

On 3 October, during the plenary of the European Parliament in Strasbourg, the [MEPs adopted three draft reports for opinions](#) concerning the VAT system. The report by Jeppe Kofod (S&D, Denmark) on the harmonisation and simplification of certain rules (that also proposed a VAT dispute settlement mechanism to be set in place by no later than 1 June 2020) was adopted by a vast majority. A similar majority voted for the adoption of the report of Tibor Szanyi (S&D, Hungary) who aims to set in place a clearer system of VAT rates also proposing a general lower limit of 15% and an upper limit of 25%. Finally, MEPs also approved the draft report by Sirpa Pietikäinen (EPP, Finland) on the optional reverse charge mechanism and the early warning mechanism to flag up VAT fraud.

Three important VAT Directives approved by the ECOFIN

On 2 October 2018, the Finance Ministers of the 28 EU Member States [reached an agreement on three extensively debated VAT directives](#).

The first approved Directive entails a temporary derogation from normal VAT rules in order to better prevent VAT fraud. The Directive allows Member States that are most severely affected by VAT fraud to temporarily apply a generalised reversal of VAT liability. This so-called generalised 'reverse charge' mechanism involves shifting liability for VAT payments from the supplier to the customer. The directive is expected to be adopted without further discussion once the European Parliament has delivered its opinion.

The second Directive approved by the ECOFIN grants Member States to apply reduced, super-reduced or zero VAT rates to electronic publications, thereby allowing the alignment of VAT rules for electronic and physical publications. The Directive will be adopted without further discussion once the text has been finalised in all official languages.

Finally, the Directive on four short-term quick fixes to the EU's current VAT rules has been adopted. The Council agreed on the 'quick fixes' initially presented by the Commission:

- call-off stock. The proposal provides for a simplified and uniform treatment for call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another Member State;
- VAT identification number. To benefit from a VAT exemption for the intra-EU supply of goods, the identification number of the customer will become an additional condition;
- chain transactions. To enhance legal certainty in determining the VAT treatment of chain transactions, the proposal establishes uniform criteria;
- proof of intra-EU supply. A common framework is proposed for the documentary evidence required to claim a VAT exemption for intra-EU supplies.

In the course of the same ECOFIN meeting, the finance ministers also agreed on a Regulation to strengthen administrative cooperation and to improve the prevention of VAT fraud. The Regulation will improve how tax administrations cooperate amongst themselves and with other law enforcement bodies. The regulation will enter into force twenty days after its publication in the Official Journal, with most of the provisions being applied as of 1 January 2020.

Tax and EU State aid rules

In the course of the last months the European Commission has opened several cases of State aid that relate to supposed improper competitive advantage given to companies through undue tax systems.

On 10 July 2018, the European Commission [required Spain to recover €167 million](#) from Correos, a postal operator. In particular, the Commission decided to ask Madrid to recover €166 million due to overcompensation awarded during the period 2004-2010 and approximately €0,9 million linked to a specific tax exemption that gave Correos an undue advantage.

On 20 June, the [European Commission has ordered Luxembourg to recover €120 million](#) from the Engie group. According to the Commission, the tax rulings issued by Luxembourg to two intra-group financing structures gave the Engie group a tax treatment that did not reflect the economic reality, resulting in a competitive advantage in Luxembourg which was incompatible with the EU State aid rules. The Commission estimated that the group was able to avoid tax on 99% of the profits made by the two entities (Engie LNG Supply and Engie Treasury Management).

Finally, on 6 July, the European Commission has opened an in-depth investigation to [examine the tax exemptions applied by Portugal](#) to companies established in the Madeira Free Zone. The Madeira Free Zone was created to support the economic development of the region by attracting investments. The Commission is now worried that the flexibility provided to Portugal in this context has been used to grant a fiscal aid scheme which is not in line with the EU rules on state aid.

INVITATION ETAF TAX CONFERENCE

on Tuesday **20 November 2018 at 14:00 p.m.**
at the Hotel NH Brussels EU Berlaymont
Boulevard Charlemagne 11, 1000 Brussels

Will digitalisation make taxation easier?

14:00 h | Registration and coffee

14:30 h | Welcome address

Philippe Arraou, President of ETAF

14:45 h | Panel I: Impact of digitalisation on the relation
between taxpayers and tax authorities

Maria Teresa Fabregas Fernandez, Director, DG TAXUD,
European Commission

Maurizio Grosso, Dottore Commercialista, CNDCEC National
Councillor responsible for Digitalisation

Elo Madiste, Counsellor for Taxation, Permanent Representation
of Estonia to the EU

15:30 h | Coffee break

16:00 h | Panel II: New digital technologies:
Challenges and opportunities

Miapetra Kumpula-Natri, Member of the European Parliament
(S&D, Finland) [tbc]

Prof. dr. Robby Houben, Associate Professor at University of
Antwerp, Counsel Baker McKenzie

Riccardo Lambri, Dottore Commercialista, Tax expert on
cryptocurrencies, ETAF

16:45 h | Closing remarks

17:00 h | Reception

Simultaneous interpretation: EN-DE-FR-IT

Registration under info@etaf.tax

Disclaimer:

European Tax Adviser Federation AISBL – ETAF
Rue des Deux Eglises 35 | 1000 Brussels
Phone: +32 2 2350-105 | Email info@etaf.tax | www.etaf.tax

Head of Office: Michael Schick

ETAF www.etaf.tax is a European umbrella organisation for 250,000 tax professionals from France, Germany, Italy and Belgium. ETAF was launched in January 2016 as an international non-profit organisation (AISBL), governed by Belgian law and located in Brussels. The main role and mission of ETAF is to represent the tax profession at European level in liaising closely with European policy makers to promote good legislation in tax and professional matters. ETAF is a registered organisation in the EU Transparency Register with the register identification number 760084520382-92.

If you wish to unsubscribe, please click [here](#)