Statement

by the European Tax Adviser Federation

ETAF

on the proposal for a Directive on a notification procedure for authorisation schemes and requirements related to services

[COM(2016) 821 final]

I. Background

The European Commissions' proposal for a directive on a notification procedure for authorisation schemes and requirements related to services [COM(2016) 821 final] is part of the Services package presented to the public on 10 January 2017. With this proposal, the Commission aims at enhancing the legislative and administrative provisions, which are already fixed in the existing Services Directive, in a more effective and coherent way.

Member States today are already required by applicable law [Article 15 (7) in conjunction with Article 15 (6) and (3) of the Services Directive] to notify every new regulative measure, especially regarding the legal form, shareholding requirements, minimum/maximum tariff regulations and the reasoning behind the laws. The Commission criticizes that some Member States do not observe these requirements. Furthermore, according to the current legislation, it is not required by law that new regulations have to be notified already in the draft version, nor is it mandatory that this notification is accompanied by a proportionality test. In addition, Article 15 (7) determines explicitly that "such notification shall not prevent Member States from adopting the provisions in question". The ETAF members would like to emphasize this section in particular, because this is where the Commission's proposal comes into play.

The Commission wants to ensure that all intended new regulations in professional law and amendments to existing ones correspond to the requirements of the Services Directive. This entails that the regulations are non-discriminatory, in accordance with the principle of proportionality and justified by overriding reasons relating to the public interest.

II. Content

According to this proposal, the Member States would be obliged to notify every relevant provision to the Commission in a very early drafting stage (Article 3 (1)). This shall be valid for any new introduction and amendment of professional regulations and requirements which fall under the scope of the Services Directive: Any kinds of admission schemes, legal form rules, shareholding requirements, reserved activities and minimum fees.

The information to be notified to the Commission by the Member State would have to contain the grounds of justification for the legal measure and an explanation as to why it is proportionate. Then, the Commission proposes the following steps for further procedures:

- After the notification, a **three month consultation period** for further remarks shall take place between the Member States and the Commission (Article 5).

- In case of objections concerning the compatibility with the Services Directive, the Commission could issue an **early warning towards the Member State** (Article 6).

- This early warning would have the effect that the **Member State would not be allowed** to implement the legal measure in question (Article 6, section 2).

- In case the Member State does not react, the Commission could issue a **legally binding decision**, stating that the targeted legal measure is not compatible with the Services Directive. The Member State would then **be obliged to refrain from the draft** and, in case the law has already been passed, be obliged to abolish it (Article 7).

- It would then **lie with the Member State to bring action** before the ECJ in order to have reviewed the validity of such a decision. This constitutes a **full reversal of the burden of proof** to the charge of the Member State.

III. Impact on Professional Law

Article 4 of the draft regulates which authorisation schemes and requirements would be subject to the notification obligation by the Member States. According to this, the Member States would be obliged to notify every intended new law in the drafting stage and every planned amendment of existing laws before their implementation. This would have a massive impact on any of the following provisions in the ETAF Member States:

Any kind of admission schemes, requirements on legal structure, shareholding requirements, reserved activities, tax advisers' minimum/maximum tariff regulations, the principle of proportionality, overriding reasons relating to the public interest, professional liability insurance and restraints on multidisciplinary collaboration.

IV. Evaluation

The proposed notification procedure would allow the Commission to prohibit the concerned Member State from implementing an intended regulation. Thus, the national legislators would not be able to draft laws on professional matters anymore. As a result, the Commission would factually replace the national legislator, ignoring the principle of democracy. Furthermore, there is reason to fear considerable attack on the self-government of the profession because the Commission could at any time block any amendments to the professional code or the tax adviser's fee regulation. Extensive interventions like these into the national legislative process are not acceptable and to be rejected.

In order to justify this proposal, the Commission refers to a similar notification procedure which was determined in the so-called Transparency Directive[1] (see page 3 of the proposal). However, this argument is not convincing, because this Directive almost exclusively tackles certain *goods* (industrial, agricultural and fishery products) as well as technical regulations and rules on Information Society services. This has nothing in common with the independent, highly personal and quality based provision of services by tax professionals. The individual work of a tax consultant cannot at all be compared with the mere technical requirements of the Transparency Directive.

Besides this, the public legitimacy of the proposal is highly questionable. In the consultation which was held between January and April 2016 by the Commission, only 50% of the public authorities argued for a binding notification in the early stages of an intended law. Furthermore, only 50% of the companies welcomed proportionality criteria in the notification.

[1] EU Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services

What appears to be a particular problem is the intended interaction between the notification procedure and the simultaneously proposed proportionality test. This interplay of both initiatives would enable the Commission already within the framework of the notification procedure to warn a Member State if a proportionality test of a planned regulation has, in the Commission's view, not been carried out properly. Thus, the Commission could interfere up to the most thorough detail into the proportionality test of the Member States. The scrutiny of the proportionality of a professional regulation would then lie in the hands of the Commission, and it should be noted that that the Commission is **an executive** and not a legislative **body**.

The legal consequences of this proposal mean a far-reaching shift of the burden of proof to the disadvantage of the Member States. Up to now, the Commission, in its role as guardian of the Treaties, only intervenes ex post, for instance in infringement procedures. This principle would be completely undermined by the proposed Directive.

Since the Commission could issue a binding regulation against a Member State, it would then be the Member States who would have to bring action against this decision before the ECJ. The Member State would have no single other choice, or the decision would automatically become binding.

In such a law suit, given the situation that it's the Member State who would demand the nullity of the Commission's decision, the burden of proof would be **entirely carried** by the relevant Member State.

V. Core positions of ETAF

In view of the above-mentioned reasons, ETAF concludes on behalf of its members:

- The proposal is to be rejected because it is **extensively interfering with the legislative powers of the Member States** and the self-governance of the profession.

- The proposal itself is disproportionate because it goes **far beyond what is necessary** to achieve the objective pursued by the Commission.

- A notification **must not prevent** a Member State from passing the concerned law.

- **Under no circumstances shall the burden of proof be reversed** to the disadvantage of the Member States.

- ETAF members therefore **support the subsidiarity complaints** and serious proportionality concerns raised by France, Germany and Austria according to Art. 5 TEU and Art. 6 of the Protocol on the application of the principals of subsidiarity and proportionality against the proposal.
