

Introduction

- Philippe Arraou, President of ETAF

Professional Law

- Standstill in the notification procedure
- Whistle-blower Directive in process
- Conformity of national legislations with EU rules of professional qualifications

Tax Law

- European Commission's plan to shift away from unanimity principle in tax
- Taxation of the digital economy: the ECOFIN discussions and the new Franco-German approach
- Financial Transaction Tax and CCCTB to be discussed in 2019
- TAX3 committee: draft of final report and hearings on aggressive tax planning and cum-ex scandal
- New VAT measures proposed and adopted

Miscellaneous

- ETAF Conference on "Will digitalisation make taxation easier?"

INTRODUCTION

Philippe Arraou, President of ETAF

Dear ETAF Members,
dear friends,



regarding European fiscal policy, the year 2019 began with a highly political proposal of the European Commission, no less than to shift away from the unanimity principle towards a qualified majority voting in tax matters. Under such a new system – presented by EU Tax Commissioner Pierre Moscovici on 15 January – a tax initiative could become EU law as long as 16 out of the 28 countries agree on it, at the same time representing 65% of the population.

This proposal can have far-reaching consequences on the EU policy making in taxation. Currently, as we know, the Treaties provide that any legislative measure in taxation requires unanimity. This stands in contrast to most other policy areas, where the ordinary legislative procedure has increasingly been used, and tax policy is in fact remaining one of the last political areas where unanimity is obligatory.

The arguments of the Commission may not be entirely dismissed: The unanimity principle stems from a time when the Union was smaller and unanimity therefore easier to achieve. In particular, in today's EU, the progress in tax policy is sometimes hampered by the unanimity requirement which makes it often difficult for the Union to keep pace with rapid economic, societal and technological developments. We need only to think of the CCCTB and the Digital Services Tax.

However, the objections raised by several national governments – namely the concern of losing fiscal sovereignty rights – should neither be ignored. Tax policy is also always budgetary policy, and we will surely face interesting discussions about the question how the general EU interests should stand vis-à-vis the requirements of national sovereignty.

On the professional level, the review on the legislative year 2018 reveals that the engagement of ETAF in the Services Package of the Commission was worth it: First, we were able to book the failure of the Services e-card as a professional success because it prevented us from a hidden introduction of the country-of-origin-principle. Then, the Member States furthermore achieved a blocking minority against the proposal for a notification procedure in October 2018, as a result of which the risk of a reversal of the burden of proof could – at least in the foreseeable future – be removed.

I am looking forward to working with all our partners in 2019 and I hope you will enjoy reading our Newsletter!

Yours sincerely,
Philippe Arraou

PROFESSIONAL LAW

Standstill in the notification procedure

The legislative process on the notification procedure is still at a deadlock in the Council. In October 2018, a blocking minority against the proposal was formed in the Council, leaving the Austrian Presidency with no mandate to continue the trilogue negotiations on the basis of the original General Approach of May 2017. A mid-November 2018 scheduled trilogue appointment had to be cancelled. The most controversial issue is whether the Commission shall have the possibility to issue binding decisions against the Member States, requiring them to refrain from adopting a specific measure or, if a Member State has already adopted a measure, to remove it. This possibility should, according to the Commission's proposal, apply to certain regulatory areas under Article 15 (2) of the Services Directive, which include the reserved activities and the shareholding requirements amongst other.

ETAF has pointed out soon after the publication of the proposal in 2017 that the reversal of the burden of proof, as the European Commission proposed it, would de facto replace the national legislator. As a result, the national legislator would be deprived of the legislative competence in professional law and would only have the possibility to reach out to the European Court of Justice. Many Member States realised the problem after an inconsistent Council legal opinion of May 2018 was published, causing considerable uncertainty among Member States over the legality of such a construction. In particular, elementary questions have been raised regarding the legal consequences of such a binding decision.

In the meantime, yet another proposal made by the Member States is currently under discussion. This proposal does not provide a binding decision anymore, but a new "strengthened recommendation" procedure instead, which would basically leave it up to the Member States if they follow a recommendation or not. However, if a Member State would decide not to follow a recommendation, this proposal foresees that the Member State concerned would have to justify its decision before an expert committee specifically created for addressing contentious recommendation procedures. It did not take long for the Commission to express its disapproval of this proposal.

ETAF is pleading for the Commission's legal acts to be issued as recommendations. This would provide clarity on the burden of evidence and proof, avoiding anti-systemic application and enforcement of European legislation and prevent long-term litigation over procedural issues.

Whistle-blower Directive in process

On 23 April 2018, the European Commission published a [Proposal of Directive on the protection of persons reporting on breaches of Union law](#). The proposal seeks to better protect 'whistle-blowers' not only against law enforcement actions but also against employers' labour-law sanctions.

According to the proposed directive, a whistle-blower is someone who discloses internal information about violations of EU law, including violations in the area of corporate tax law. Tax arrangements should also be considered a violation if "their purpose is to obtain a tax advantage that is contrary to the object or purpose of the applicable corporate tax law". The directive foresees a prohibition for whistle-blowers to disclose sensitive information directly to the public. They have to follow a specific course of action. First, they must contact an internal reporting channel (specifically created by the company); if the company does not respond or does not respond adequately, they may contact State authorities or ombudsmen. Only as a final step, it is allowed to address the public, via journalists and media. If the whistle-blower adheres to these rules, he should not fear dismissal or other forms of retaliation. In case the whistle-blower undergoes a salary decrease or any other kind of reprisal, the company must prove that it is not related with the publication of sensitive information. ([Report on the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.](#))

The European Parliament fully welcomed this proposal from the Commission, as it had already required an EU-wide protection of whistle-blowers via two reports published by the PANA and JURI committee.

The EU Council's Legal Service made an oral presentation to the Member States on Wednesday 12 December 2018 on a proposal to divide the directive to protect whistle-blowers into five pieces of legislation. The proposal would thus provide for a directive on the protection of whistle-blowers in the field of weapons security, a second on nuclear-related aspects, a third on competition and state aid, a fourth which would be more horizontal and a fifth on taxation. The directive on taxation would have a new legal basis, namely Article 115 of the Treaty on the Functioning of the European Union (TFEU), which has the particular feature of providing for a unanimous decision in the Council.

In the Parliament, the Council's approach would be "unacceptable", as it contradicts the cardinal logic behind the proposal, namely a horizontal and cross-sectoral approach.

It is now to the Romanian Presidency of the Council to continue the negotiations. The legal basis will be analysed in the competent working group from 10 January. The Presidency would like to submit a proposal shortly to the Permanent Representatives Committee (Coreper).

ETAF welcomes this proposal from the Commission and is conscious about the importance of whistle-blower protection. Nevertheless, it is concerned about how the directive would affect the professional secrecy of Tax Advisers pleading, therefore, to maintain it as it is.

Conformity of national legislations with EU rules of professional qualifications

On 19th of July 2018, the Commission sent letters of formal notice to 27 Member States (all Member States except Lithuania) regarding the conformity of their national legislation and practice with EU rules on the recognition of professional qualifications (Directive 2005/36/EC as amended by Directive 2013/55/EU). Amongst others, a formal notice signed by

Commissioner Bienkowska was sent to the Federal Republic of Germany stating that the Commission considers that certain exceptions within the reserved activities which are granted and regulated by German law (Steuerberatungsgesetz), would render the system of reserved activities incoherent and disproportionate. It states that German legislation is incoherent in this aspect because, according to the law, other persons who are not subject to any specific requirement for professional qualifications are also authorized to provide assistance in tax matters.

The German Federal Chamber of Tax Advisers exchanged opinions on this matter with the Director of the General Directorate GROW, Directorate E "Modernization of the Internal Market", Mr. Hubert Gambis and explained why it is actually reasonable and justified to maintain the abovementioned exceptions regarding the reserved activities.

The main argument was that these exceptions do only grant authorization to provide auxiliary assistance in specific tax matters which must be highly related to the main activity of certain professionals. Therefore, requiring the full qualification of a tax adviser for this type of activities would be disproportionate.

After the German Federal Chamber of Tax Advisers explained the logic behind the German system of reserved activities, the Commission's representatives admitted that there is an undeniable justification for a certain amount of reserved activities.

TAX LAW

European Commission's plan to shift away from unanimity principle in tax

On 15 January 2019, the European Commission has published a [Communication proposing a plan to shift away from unanimity principle in tax](#). The Communication points out that taxation is the last area where decision-making exclusively relies on unanimity and highlights the very high cost of non-action in EU tax policy (e.g. the Commission assessed EUR 50 billion per year due to VAT frauds). The Commission suggests to use the passerelle clauses of article 48 (7) of the Treaty on European Union (designed for general topics, including taxation) and of article 192 (2) of the Treaty of Functioning of the European Union (specifically designed for measures in the environmental field). The way forward proposed by the Commission includes a four-step progression towards decision-making based on Qualified Majority Voting (QMV):

- In Step 1, Member States would agree to move to QMV decision-making for measures that have no direct impact on Member States' taxing rights, bases or rates but are critical for combatting tax fraud, evasion and avoidance. This includes measures to improve administrative cooperation between Member States, the conclusion of international agreements between the EU and third countries and initiatives primarily designed to facilitate tax compliance for businesses in the Single Market (such as harmonized reporting obligations);
- Step 2 would introduce QMV in measures of a fiscal nature designed to support other policy goals (fight against climate change, protecting the environment or improving public health or transport policy).
- In Step 3, QMV would be introduced in areas of taxation that are already largely harmonized, such as VAT and excise duties.
- Step 4 provides for the introduction of QMV on other initiatives in the taxation area which are necessary for the Single Market, such as CCCTB and the taxation of the Digital Economy.

The Communication suggests that Member States should decide swiftly to converge on a decision to develop Steps 1 and 2, while considering to introduce Steps 3 and 4 by the end of 2025.

The Communication follows the [Roadmap](#) published by the Commission on 20 December 2018, which included a request for feedback addressed to organisations and individuals. ETAF welcomed the possibility to [express its view](#), highlighting that the unanimity principle stems from a time when the Union was smaller and unanimity easier to achieve. In particular, in today's EU, the progress in tax policy is sometimes hampered by the unanimity requirement which makes it often difficult for the Union to keep pace with rapid economic, societal and technological developments. In ETAF's view, qualified majority voting could, for instance, help advancing the CCCTB and Digital Services Tax and at the same time, reduce the influence of certain Member States that are blocking reforms in European tax policy. Therefore, the discussion about how we can cautiously move on to qualified majority in some selected tax areas should not be refused. At the same time however, ETAF acknowledges that the objections raised by several national governments – namely the concern of losing fiscal sovereignty rights – shall neither be ignored.

Taxation of the digital economy: the ECOFIN discussions and the new Franco-German approach

On 4 December 2018, the ECOFIN Council has basically rejected the proposals of the European Commission to tax the digital economy, due to a lack of agreement among the Member States. The two legislative proposals have been published on 21 March 2018 by the European Commission to ensure a fair taxation of the digital economy and they have been discussed controversially in the last months within the Council and by the ECON and TAX3 Committees of the European Parliament.

France has always been the strongest supporter of introducing this new form of taxation, whereas Germany has been vague for long time and certain countries, in particular Ireland, Sweden and Denmark, have firmly opposed the proposed directive since the very beginning.

The decision of the Council was taken the day after the approval of the two reports on the [Digital Services Tax](#) (rapporteur Paul Tang, S&D, the Netherlands) and on the [Significant Digital Presence](#) (rapporteur Dariusz Rosati, EPP, Poland) within the ECON committee of the European Parliament. Compared to the original proposal from the Commission, the Tang report even included an extension of the scope to include the provision of video, audio, games or text using a digital interface (covering in particular Netflix and YouTube) and a revision clause to assess certain elements two years after the entry into force of the Directive. The report of Rosati was approved with minor amendments including a clear link of the text with the CCCTB.

Despite the decision of the ECOFIN, France and Germany have wasted no time and [relaunched the idea of a minimum taxation of the digital economy](#), though only scoping-in the revenue from online advertising. The two countries have asked the European Commission to deeply modify the proposal according to this new compromise and urged the Council to adopt it before March 2019. This new proposal is also based on a reverse sunset clause, meaning that the directive to be drafted should enter into force on 1 January 2021, if no international solution has been agreed upon at OECD level.

ETAF had actively contributed to shape the proposals by participating in the consultation and submitting a position paper supporting a fair taxation of digital companies on a long-term basis. ETAF shares the Commission's view that international tax rules are not keeping pace with the current economic scenario and in particular with the ever-increasing relevance of digital activities. However, the two-step approach with a short-term and a long-term solution raised doubts within ETAF Members. ETAF believes that focusing on the long-term solution and working within the OECD framework would contribute to the principle of better regulation and, at the same time, supports the EU taking on a leadership role in taxing the digital economy.

Financial Transaction Tax and CCCTB to be discussed in 2019

2019 could be a disruptive year not only because of the European elections in May. Indeed, we expect in the course of the year the European Commission to launch tax-related proposals that would strongly impact the European tax framework.

Financial Transaction Tax

An important proposal that has been recently discussed by the Finance Ministers of 10 countries (France, Germany, Belgium, Portugal, Austria, Slovenia, Greece, Spain, Italy and Slovakia) is the relaunch of the project of a financial transaction tax. According to the news, the tax should be based on the French model (0,2% on purchases of shares of listed companies with a market capitalization of more than 1 billion). France and Germany are expected to submit a formal proposal for a legal text in January 2019.

Common Consolidated Corporate Tax Base

Furthermore, France and Germany are trying to revitalize the discussion around the taxation of the digital economy by launching a new proposal that should be discussed in January and February. However, several MEPs are pushing to connect the topic of the fair taxation of the digital sector with a broader one, the Common Corporate Tax Base and its Consolidated version (CCTB and CCCTB). The [last proposals are dated October 2016](#) but the discussion around the need for a modernized legal framework for a fairer taxation probably going to revamp them.

TAX3 committee: draft of final report and hearings on aggressive tax planning and cum-ex scandal

On 27 November 2018, the co-rapporteurs Jeppe Kofod (S&D, Denmark) and Luděk Niedermayer (PPE, Czech Republic) presented the [final draft report on financial crimes, tax evasion and tax avoidance](#) to the TAX3 committee. The report stresses the importance of the fight against tax evasion and anti-money laundering and the progress made in these areas at EU level (in particular with the adoption of the Anti-Tax Avoidance Directive, Anti-Money Laundering Directive and the work-in-progress on the VAT and on the taxation of the digital economy). They have also highlighted that the cooperation between Member States should be further enhanced in these areas and underlined the importance of a harmonized approach to some of the most relevant topics (e.g. C(C)CTB and crypto-assets).

On the same day, after the presentation of the report, Sophie Maddaloni (Tax Director at the Kering Group), Adam Cohen (Head of Economic Policy EMEA at Google) and Alan Lee (Tax Public Policy Manager at Facebook) answered several questions from MEPs on the tax structures of their respective businesses in a hearing titled “Aggressive tax planning schemes within the European Union”. Maddaloni explained that the Swiss headquarter of the Kering Group (LGI) was set up 20 years ago and carries out logistics and distribution activities, that represent the core business of the company. Cohen and Lee described the peculiarities of digital economy companies and how the allocation of their profits was the result of the application of the OECD transfer pricing rules.

On 26 November, Dr. Gerhard Schick (Member of the German Bundestag and co-rapporteur of the former Bundestag Inquiry committee on the Cum-Ex scandal), Prof. Dr. Christoph Spengel (ZEW Research Associate and the Chair of Business Administration and Taxation II at the University of Mannheim) and Mr Oliver Schröm (founder and head of the international collaboration of the project “The CumEx Files” and the Editor-in-chief of the German non-profit newsroom CORRECTIV) participated to a joint hearing of the ECON and TAX3 committees of the European Parliament on Cum-Ex scandal. Answering to several questions of the MEPs, they explained the loopholes in the tax law that have permitted massive tax fraud and cost taxpayers across 11 European countries (in particular Germany, France, Spain, Italy, Denmark and Belgium) around €55 billion. The malpractice involved banks and stockbrokers trading shares with (‘cum’)

and without ('ex') dividend rights to conceal the real identity of the actual owner, allowing both parties to claim tax rebates on capital gains tax that had only been paid once. Following the hearing, the European Parliament [issued a resolution](#) calling for the perpetrators of these trading schemes (tax advisers, lawyers, accountants, banks) to be brought to justice. MEPs call on the European Commission to include transparency in dividend arbitration schemes within DAC6 and to establish a *“European financial police within the framework of Europol as well as a European framework for cross-border tax investigations”*.

ETAF is closely following the work performed by the TAX3 committee, in particular in the last months when the above-mentioned report is due to be amended, finalised and voted on in plenary. Furthermore, ETAF had several meetings with leading MEPs from the TAX3 committee, who have showed their interest in understanding how the profession of tax adviser is regulated within the various EU Member States.

New VAT measures proposed and adopted

On 11 December 2018, the European Commission has proposed [new implementing measures designed to facilitate electronic commerce and combat VAT fraud](#). The proposed rules will ensure that a new VAT system is ready for businesses that sell goods online, once the agreed new framework comes into force in 2021. The electronic business portal for VAT (‘One-Stop Shop’) put in place by these measures will allow companies which sell goods online to their customers to deal with their VAT obligations in the EU through an online portal. Without the portal, VAT registration would be required in each EU Member State into which they want to sell. Furthermore, from 2021, large online marketplaces will become responsible for ensuring that VAT is collected on sales of goods by non-EU companies to EU consumers taking place on their platforms.

On 12 December 2018, the European Commission proposed [two new measures which would help to establish better cooperation between tax authorities and Payment Service Providers](#), such as credit card and direct debit providers. The objective of the measures is to reduce e-commerce VAT frauds by providing tax authorities with efficient and effective instruments for detecting non-compliant businesses. The proposed Directive and Regulation introduce new record-keeping obligations for payment service providers. The proposal sets up a new central electronic system of payment information (CESOP) for storing VAT related payment data and processing this information by anti-fraud officials in the Member States within the Eurofisc framework.

Both these new proposals need to be approved by the EU Council after consultation with the European Parliament.

Finally, during the ECOFIN of Tuesday 6 November 2018, the Council adopted a directive allowing [alignment of VAT rules for electronic and physical publications](#). As a consequence of the adoption, Member States will be able to apply reduced, super-reduced or zero VAT rates to electronic publications, as well.

ETAF Conference on “Will digitalisation make taxation easier?”

On 20 November 2018, over 80 participants from the EU institutions, multiple Member States and several organisations joined the Conference on “Will digitalisation make taxation easier?” hosted by the European Tax Adviser Federation (ETAF) in Brussels. The ETAF event offered an excellent outlook to better understand how digital technologies are being implemented in the tax systems of various EU Member States and beyond, looking at best practices and possible new developments.

The main subject of the Conference was the impact of digitalisation on the various European tax systems. In his welcoming address, ETAF President *Philippe Arraou* highlighted that digitalisation is an opportunity for many Member States and that tax professionals will continue playing a key role in this new scenario.

In his keynote, *David Boubllil*, member of the cabinet of Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, highlighted the massive changes that the digitalisation brought within the economy and the opportunities connected with the use of digital technologies within the tax system. He stressed that new digital technologies can be useful for tax administration to process large amount of data in a more efficient way and the fundamental and evolving role played by tax advisers in our tax systems.

In the first panel *David Boubllil*, *Elo Madiste* (Counsellor for Taxation, Permanent Representation of Estonia to the EU), *Michel Van Hoegaerden* (Programme manager at the Federal Public Service of Finance of Belgium) and *Luigi Carunchio* (Dottore Commercialista, Italian chartered accountant) discussed the “Impact of digitalisation on the relation between taxpayers and tax authorities”.

In the second panel “New digital technologies: challenges and opportunities”, *Caroline Malcolm* (Senior Advisor – Tax and Digitalisation at Centre for Tax Policy Administration, OECD), *Prof. Dr. Robby Houben* (Associate Professor at University of Antwerp and counsel Baker McKenzie) and *Riccardo Lambri* (Dottore Commercialista, Tax expert on Digital Assets) offered a very interesting discussion about the possible impact of blockchain in the tax systems and on the risks associated with the flourishing market of cryptocurrencies.

[Summary ETAF Conference 20 November 2018](#)





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.