

Verband der steuerberatenden und
wirtschaftsprüfenden Berufe



DEUTSCHER STEUERBERATERVERBAND e.V. · Littenstraße 10 · D-10179 Berlin
Brussels Office: Rue Jacques de Lalaing 4 · B-1040 Brussels

German Association
of Tax Advisers

Mrs./Mr.
Member of the European Parliament
Member of the Committee for the Internal Market
and Consumer Protection (IMCO)
Rue Wiertz 60
1047 Brussels

Reference	Phone	Telefax	E-Mail	Date
Pe/JT E11/17	+49 30 27876-310	+49 30 27876-799	trommer@dstv.de	13.11.2017

Concerning the planned Reform of the Notification Procedure (COM(2016)821 final)

Dear Mrs./Mr. Member of the European Parliament,

the German Association of Tax Advisers (DStV) is the representative organisation of the members of the liberal profession of tax advisers in the Federal Republic of Germany. The DStV consists of 16 member associations, within which more than 36,500 tax advisers, auditors, certified accountants or professional companies are voluntarily organised.

With regard to the current debate in the Committee for the Internal Market and Consumer Protection of the European Parliament (IMCO-Committee) concerning the Proposal for a Directive laying down a notification procedure for authorisation schemes and requirements (COM(2016)821 final) we are reaching out to you as a member of the Committee on this matter. We would like to take this opportunity to express our opinion on the state of affairs and recent developments concerning the proposal in the IMCO-Committee and offering an alternative wording for Article 7(1) of the Proposal.

1. Reading of the DStV of Article 7(1) of the Proposal

Without hesitation, the DStV supports the initiative to improve the notification procedure if this means that an early exchange of information and the establishment of a constructive dialogue between the responsible authorities and institutions at national and EU level is the objective. Also, we acknowledge that there may be cases where national professional regulations can have a damaging effect on the internal market *if* they are enforced contrary to an alert issued by

the Commission. For these cases, the role of the EU Commission must be strengthened. This cannot be done, however, at the expense of the competence order of the European Union.

Thus, the Commission's proposal for Article 7(1) cannot be supported as it stands. To clarify our standpoint we would like to bring in the following:

Within the framework of the notification procedure, Article 7(1) of the Proposal (COM(2016)821 final) empowers the EU Commission, after the consultation period has expired, to adopt a Decision, stating the incompatibility of the notified measure with European law and to thereunder *require* the Member State responsible to refrain from adopting the measure or to withdraw it if necessary.

This means, where the consultation phase does not result in a compromise solution eradicating the Commission's doubts within the meaning of Articles 5 and 6 of the Proposal, the Commission can unilaterally prohibit the Member State to adopt the measure notified. This reading of Article 7(1) of the Proposal is founded on the combination of *coercive powers* vested in the Commission and the capacity to adopt a *unilateral and legally binding Decision* addressed to the Member State. This direct power vis-à-vis the Member State is critical. The Commission can issue a *legally binding Decision* and *require* (i.e. *aufgegeben* (DE) and *exiger* (FR)) the Member State to comply with it. There is no choice left, Member States must act and comply. This turns the "notification" procedure into a "command" procedure used by the Commission against the Member States. Amongst many other issues, this raises concerns with the democracy principle and with the rule of law (in Germany, for example, Article 20 (3) of the Basic Law requires authorities to apply laws that are lawfully adopted). Eventually, secondary law confers to the Commission the power to issue Decisions for automatic repeal of certain national measures.

Member States become dependent on the Commission's opinion about what notified measures are compatible with European law. The reversal of the burden of proof requires that the Member States must, on the one hand appeal to the European Court of Justice (CJEU) and on the other hand must prove that the notified measure is in conformity with European law. This asymmetric dependency between the Member States and the Commission is contrary to the general principles of the treaties under which it is the Commission task to initiate infringement proceedings in such cases and to prove the illegality of the notified measure. In plain terms, thus, we can say that Article 7(1) of the Proposal grants the Commission a temporary legislative competence vis-à-vis the Member States.

Although there are some examples in the treaties where the Commission is conferred implementing powers or enforcement powers, these must be distinguished from the coercive powers the Commission would be entrusted with pursuant to Article 7(1) of the Proposal.

(a) Under Articles 290 and 291 TFEU the EU Council and the European Parliament may delegate to the Commission the power to adopt non-legislative acts of general

application to supplement or amend certain non-essential elements of the legislative act concerned. The coercive power established under Article 7(1) of the proposal does not fall within the scope of implementing powers pursuant to Articles 290 and 291 TFEU.

(b) Further, the coercive power pursuant to Article 7(1) of the Proposal cannot be compared to or justified by the enforcement powers the Commission has under competition law since it is primary law through which the enforcement powers are granted to the Commission (reflecting a unanimous Member State approval).

Thus, a conferral of a coercive power pursuant Article 7(1) of the Proposal has no legal basis in European law, and, moreover, it cannot be justified on the basis of Article 15(7) of the Services Directive. Article 15(7) of the Services Directive does not vest coercive powers in the Commission. Instead, the Commission is entrusted with powers reserved for the Court of Justice under the treaties (Article 19 TFEU, also see Case C-415/93, C-176/96, C-325/08, C-309/99).

The coercive power of the Commission described above renders meaningless the margin of discretion granted to the Member States under the treaties. Thereunder, Member States are free to determine the legal framework within which liberal professions should operate. This also interferes with the competences of national courts.

The arguments referred to above make the incompatibility of Article 7(1) of the Proposal with the treaties and their constitutional order evident. Article 7(1) of the Proposal, brought into force through secondary law, confers to the Commission a coercive power, which is unconstitutional and disproportionately interfering with the competence order of the EU and the Member States right of self-determination. Such a competence shift requires an amendment of the treaties and cannot be brought about by a Directive.

2. Proposal of the DStV for Article 7(1):

1. Where the Commission has issued an alert in accordance with Article 6 on authorizations or requirements falling under the scope of Article 4 and still has concerns about the measures notified in accordance with Article 3(1) and (2), it may, within three months from the expiry of the consultation period, request the Member State (i.e. *auffordern* (DE) or *demandeur* (FR)) to refrain from adopting the notified measure or to repeal it.

1a. In the case, where a Member State fails to comply with the request, and the Commission deems it necessary, the Commission may initiate infringement proceedings and call on the Court to order interim measures pursuant to Article 279 TFEU to suspend the application of the measures concerned.

3. Advantages of our proposal

Our proposal set out above mitigates the needs and concerns of the Commission, the Council of the EU and of the European Parliament on the one side and equally gives due account to the needs and concerns of the Member States:

First, in contrast to the existing notification procedure, the role of the Commission is strengthened. For example, within three months after the consultation period, the Commission may request the Member State concerned to refrain from adopting the notified measure or to repeal it. This initiates a constructive dialogue between the Commission and the Member State concerned. As a fallback, in the case the Member State does not comply with the Commission's request, Paragraph (1a) empowers the Commission to call on the Court of Justice to order interim measures pursuant to Article 279 TFEU to suspend the application of the measures concerned.

Thus, the advantages of our proposal are that

- (1) the role of the Commission in the notification procedure is strengthened;**
- (2) the sovereignty of the Member States to determine the legal framework within which liberal professions should operate is ensured;**
- (3) the constitutionally guaranteed order of competences within the EU is upheld;**
- (4) the CJEU, as the responsible institution under the treaties, carries out the legal review and assess the conformity of notified measures with European law, and**
- (5) the judicial action referred to under (4) is carried out within a time-frame, which prevents a direct negative impact on the internal market through the measure adopted at national level.**

4. Concluding remarks

We would like to reiterate that the German tax advisers and the German Association of Tax Advisers (e.V.) are *fully committed* to the European idea and the European Union. In this regard, we would welcome if our Proposal for an alternative Article 7(1) is considered as a sustainable alternative within the on-going debate in the IMCO-Committee.

Without asking, we will be happy to provide further information or explanation and be available for a meeting in Brussels if needed.

Kind regards,

RA FAStR Prof. Dr. Axel Pestke
(Chief Executive Officer)

Dr. Jan Trommer, LL.M.
(European Law Expert)

