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Editorial

Dynamic References to International Soft Law Agreements: Flexibility with Limits

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The European Union relies increasingly on non-binding international agreements as a blueprint for its legislation on direct taxation. This implies converting a flexible soft law instrument into hard law that is subsequently difficult to amend due to the unanimity principle. A nascent trend to ensure that such Union legislation nevertheless stays in sync with future developments of the underlying soft law agreement are dynamic references to the latter. However, the scope for this approach is limited by the requirements of sufficient democratic legitimacy and legality of taxation, and respect for the institutional balance of the Union. Dynamic references to international soft law standards should therefore primarily be used as a source of interpretation or illustration for the concretization of already executable rules in the relevant EU legal act. They do not normally allow to incorporate also amendments and supplements of the original soft law agreement, unless additional safeguards exist that ensure compliance with the aforementioned Union law principles – at the expense of the desired flexibility, however. In this regard, the better approach would be the conferral of delegated powers upon the Commission to ensure a timely yet controlled alignment of the relevant Union tax legislation with new soft law standards.

Keywords: soft law, dynamic reference, democratic legitimacy, legality of taxation, institutional balance

1 Implementing international soft law agreements through EU directives: In need of flexibility

In recent times, the EU Commission and the Union legislator increasingly rely on internationally agreed soft law standards[1] as a blueprint for Union legislation on direct taxation. The implementation of key recommendations of the 2015 (BEPS) Reports has been made mandatory for EU Member States by virtue of the Anti-Tax Avoidance Directive (ATAD).[2] Subsequently, the Model Rules endorsed by the OECD/G20 Inclusive Framework to substantiate the 'common approach' towards an international effective minimum tax have been transformed into a Minimum Tax Directive (MTD).[3] Last year, the Council has adopted DAC-8,[4] which requires EU Member States to enact, i.a., legislation to effectively transpose the OECD Crypto-Asset Reporting Framework (CARF) into domestic law. Moreover, the Commission has reacted to the apparent failure of its attempt to ensure compliance of national transfer pricing regimes with the OECD Transfer Pricing Guidelines (TPG) through State aid control, by proposing a Directive to this effect.[5] It has also announced its intention to propose a Directive in order to implement the outcome of the ongoing negotiations on Pillar 1 of the BEPS 2.0 project.[6]

The reasons for this development are multifaceted. Presumably, the main underlying political calculation of the Commission and interested – often: larger – Member States is to rely on prior soft law negotiations as a trailblazer for political compromise in Council, especially where the national interests of the 27 Member States are not aligned. However, this strategy also has its pitfalls and drawbacks. In particular, once adopted as Union legislation, the flexibility inherent to any soft law standard tends to be lost for EU Member States. They may

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1 For the purposes of this editorial, the notion of 'soft law' is understood as a set of norms that is not legally binding but also more than a mere declaration of political intent. Agreements on 'soft law' are endorsed with the expectation that the norms will eventually have some legal ('hard law') effect, either as a means of interpretation of already existing legal provisions or by guiding the design of new legal rules, regimes, or systems. Moreover, this editorial is limited to an analysis of soft law created by international organizations or other public sector entities. Soft law that is issued by private standard-setters (such as the IFRS) is not covered; see in this regard, Blanluet, Fiscalité Internationale 2022, 135 (at 142 et seq.).

2 Council Directive 2016/1164, of 12 Jul. 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market ('ATAD').

3 Council Directive 2022/2523, of 14 Dec. 2022, on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union ('MTD').

4 Council Directive 2023/2226, of 17 Oct. 2023, amending Directive 2011/16/EU on administrative cooperation in the field of taxation ('DAC-8').

5 Proposal for a Council Directive on transfer pricing, COM(2023) 529 final ('TPD-P').

6 Report from the Commission to the Council: Progress Report on Pillar One, 30 Jun. 2023, COM(2023) 377 final.

neither deviate nor withdraw unilaterally from the 'hardened' version of the standard, and they also tend to be collectively locked into the original compromise by the unanimity principle. Admittedly, such a lock-in effect and ossification risk are inherent to any EU tax legislation. However, they are particularly problematic where a Directive implements an international soft law agreement, because the latter can be expected to continue to evolve over time. It may then become desirable or even necessary to adapt to such changes, not only for material reasons, but also for the sake of continued international compatibility – and, possibly, the recognition as compatible – of Member States' tax regimes with the international standard.

2 The emerging flexibility instrument of choice: Dynamic references

A variety of flexibility-enhancing mechanisms are conceivable that could free individual Member States from permanent strict adherence to the Unionized version of the soft law agreement, or facilitate the subsequent modification or adaptation of the Union law transposing it below the threshold of an amending Directive.[7] Until recently, EU Member States have shown very little enthusiasm for any such techniques. However, the Minimum Tax Directive and also the proposal of the Transfer Pricing Directive have now endorsed one specific legal instrument in order to ensure that Member States' harmonized tax regimes stay in sync with the relevant international soft law standard, namely a dynamic reference to its future amendments, refinements or interpretative materials. In this regard, different defining elements of such references can be distinguished:

The first distinction concerns the intended legal effect of the reference to the international soft law standard. In most instances, Union law provisions refer to the relevant standard as a 'source of illustration or interpretation' of the provisions that transpose it into hard law. This could already be observed in earlier amendments of the Directive on Administrative Cooperation ('DAC'), specifically in DAC-2.[8] However, such early referrals and also the more recent one in DAC-8[9] have arguably been conceived as merely static references to a particular, already existing version of the relevant soft law agreement or instrument.[10] By contrast, the Minimum Tax Directive and also the proposal for a Transfer Pricing Directive make express reference also to 'further' guidance or amendments as a source of interpretation.[11] Some referrals go even beyond mere rules on interpretative guidance, and potentially also require the incorporation of new rules that reflect future developments of the relevant soft law standard,[12] or the direct application of the latter.[13] Second, references are sometimes found in the preamble to the Directive, and sometimes in the Directive itself. Third, the referral to future soft law developments is mostly unconditional, but in some instances, it is contingent upon the fulfilment of material and/or procedural requirements. The latter have been conceived as safeguards against an automatic application that has not been approved by all Member States.[14] Fourth, most references relate to how EU Member States should implement the Directive and design their domestic tax systems, whereas a few others concern the compliance of third-country tax regimes with international soft law standards.[15]

3 Limitations on grounds of democratic legitimacy and legality of taxation

The reference to not yet existing international soft law standards and guidance raises a number of – interrelated – issues. First and foremost, it implies that an external standard-setter that is not, in itself, democratically accountable (only) to the peoples of the EU Member States can nevertheless create norms that shall have legal effects in the Union. Pursuant to Article 2 and 10 TEU, the Union is founded on democratic principles.[16] All normative prescriptions emanating from the Union must therefore have sufficient democratic legitimacy from institutions that represent the European peoples. In the area of taxation, this requirement is closely intertwined with the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law.[17] It requires 'that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law'; as a consequence, 'parameters and rules external to the [law laying down the] tax system at

[7] For a detailed analysis, *see Joachim Englisch*, (Raymond Luja ed., National (Tax) Autonomy and the European Union, IBFD (forthcoming)).

[8] *See* recital (13) of the preamble to Council Directive 2014/107/EU, of 9 Dec. 2014, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ('DAC-2').

[9] *See* recitals (9) and (26) of the preamble to DAC-8.

[10] In recital (9) of the preamble to DAC-8, reference is made to the date of the release of the relevant standard; in recital (26) of the preamble to DAC-8, it is expressly stated that the references 'now includ[es] the latest amendments to the [relevant] Standard'; and in recital (13) to DAC-2, it is made clear that 'future developments at OECD level' should to be taken into account – only – through additional Union action.

[11] *See* recitals (11), (22) and (24) of the preamble to the MTD; recital (15) of the preamble to the TPD-P, read together with Art. 3 point (18) TPD-P.

[12] *See* recital (22) of the preamble to the MTD ('Member States might choose to incorporate [the soft law] guidance into domestic law'); recital (27) of the preamble to the MTD; Art. 32 MTD.

[13] *See* Art. 3 point (13) MTD; Art. 18 (2) MTD; Art. 14 (1) TPD-P, read together with Art. 3 point (18) TPD-P.

[14] *See* Art. 32 MTD and Art. 3 point (18) TPD-P.

[15] *See* Art. 3 points (18), (28), and (43), Art. 16 (1) (a) (iv) MTD.

[16] *See also* CJEU 19 Dec. 2019, case C-418/18 P, Puppinck, ECLI:EU:C:2019:1113, para. 64.

[17] *See* CJEU, 8 May 2019, case C-566/17, Związek Gmin Zagłębia Miedziowego w Polkowicach, ECLI:EU:C:2019:390, para. 39; 8 Nov. 2022, joined cases C-885/19 P and C-898/19 P, Fiat Chrysler, ECLI:EU:C:2022:859, para. 97.

issue cannot […] be taken into account […] unless that […] tax system makes explicit reference to them'.[18]

Against this backdrop, a differentiated assessment of referrals to international soft law guidance is required. Obviously, static references of the kind found in the amending Directives to the original DAC do not present any problems, because the European legislator endorses the standards that it refers to in full knowledge of their regulatory content. This is different, however, in the case of dynamic references. Admittedly, the CJEU has seemingly accepted them, too, in the so-called *Danish* cases. The Grand Chamber of the CJEU held that the Union law concept of 'beneficial owner' could be interpreted in the light of versions of the OECD Model Tax Convention and of the commentaries relating thereto that were issued after the Union legislation had been adopted.[19] The CJEU dismissed the objection of a lack of democratic legitimacy, arguing that the relevance of the OECD Model Tax Convention could be derived from the legislative history of the directive 'reflecting the democratic process of the EU'.[20] However, the Court's approach in this regard was not fully convincing,[21] and in any event, it needs to be qualified.

The Court did not explain and defend its position any further, despite the contrary opinion of the Advocate General,[22] and it did not properly reflect on the underlying tensions with the principle of democratic accountability that have rendered the admissibility of dynamic references a highly controversial issue in international tax law.[23] In the author's view, dynamic references in Union law to international soft law standards should not generally be regarded as *a priori* incompatible with the principle of democratic legitimacy of taxation. This principle may be realized to a lesser degree for the sake of an efficient and timely transposition of the technical expertise of external standard-setting bodies into Union law. However, the broader Union law framework clearly indicates that limits or safeguards must exist with respect to the transfer of responsibility regarding the creation or specification of norms which, by virtue of Union law, are legally binding for Union institutions and/or EU Member States. Pursuant to the *Meroni* doctrine, the delegation of executive powers to Union agencies and similar bodies must be precisely delineated and must not involve discretionary policy-making powers.[24] In a similar vein, Articles 290 and 291 TFEU permit the attribution of certain delegated and executive powers to the Commission only with the explicit exclusion of amendments of essential elements of the original legislative act. Moreover, any supplementation or amendment of a legislative act requires the conferral of delegated powers under Article 290 TFEU; this implies veto rights for Council and/or Parliament. *A fortiori*, dynamic references to soft law standards that have been issued by non-Union bodies, which cannot be held accountable by any Union institution, must be similarly limited in scope where they are meant to have legal effects in the Union, unless additional mechanisms to provide democratic legitimacy exist. Finally, it is also likely that such limits must exist in the light of the common constitutional traditions of EU Member States that inform the Union law concept of democratic legitimacy, as can be inferred from Article 2 TEU.[25]

In the light of the above considerations, an unconditional dynamic reference to international soft law standards without any further safeguards as to the involvement of EU Member States or Union institutions is acceptable only where the Union legislator can clearly delineate and anticipate the substance of future soft law developments, and where the latter are merely 'technical' in nature and do not amount to the exercise of political discretion. This essentially reduces the scope of legitimate referrals to references that rely on future soft law guidance and clarification as a mere 'source of illustration and interpretation' of soft law standards or concepts that have already been incorporated into Union law. This position can also be reconciled with the CJEU judgment in the *Danish* cases, which dealt with such a situation.

By contrast, unconditional referrals that would imply a supplementation or amendment of Union legislation through subsequently agreed soft law instruments cannot produce legal effects due to a lack of democratic legitimacy. If the Union legislator cannot even confer such authority upon the Commission without reserving a veto position, although the Commission represents at least indirectly the European peoples and their common interests, it certainly cannot delegate such law-making powers upon an external body outside the system of Union institutions without any further involvement of the latter. For example, the Minimum Tax Directive cannot oblige Member States to implement future administrative guidance of the OECD/G20 Inclusive Framework on BEPS regarding a 'common methodology'

[18] CJEU, 8 Nov. 2022, joined cases C-885/19 P and C-898/19 P, Fiat Chrysler, ECLI:EU:C:2022:859, paras 96–97.

[19] CJEU 26 Feb. 2019, joined cases C-115/16 et al., N Luxembourg 1 et al., ECLI:EU:C:2019:134, para. 90; *see also* the prior decision CJEU 16 May 2017 – case C-682/15, Berlioz Investment Fund, ECLI:EU:C:2017:373, para. 67.

[20] *See* CJEU 26 Feb. 2019 – joined cases C-115/16 et al., N Luxembourg 1 et al., ECLI:EU:C:2019:134 para. 91.

[21] *See also* the criticism in the *CFE Opinion Statement*, 59 European Taxation 10 (2019), 487 at (497 et seq.); and by *Luc de Broe / Sam Gommers*, EC Tax Review 6/2019, 270 (at 292).

[22] *See* AG *Kokott* 1 Mar. 2018, case C-115/16, *N Luxembourg 1*, ECLI:EU:C:2018:143, para. 53.

[23] *See* e.g., *Klaus Vogel / Alexander Rust* in Klaus Vogel on Double Taxation Conventions (5th ed. 2022), Introduction paras 122–123, with further references.

[24] *See* CJEU 13 Jun. 1958, case 9/56, Meroni, ECLI:EU:C:1958:7; confirmed regarding the above mentioned findings by, i.a., CJEU 22 Jan. 2014, case C-270/12, 'ESMA', ECLI:EU:C:2014:18, paras 41 et seq. (esp. para. 53).

[25] Regarding Germany, *see* e.g., German Constitutional Court, 1 Mar. 1978, 1 BvR 786/70, BVerfGE 47, 285 (at 315), with further references.

for the allocation of non-qualifying minimum top-up taxes – such as those levied by the US on Global Intangible Low-Taxed Income (GILTI) – to particular jurisdictions, contrary to what is stated in the preamble to the Directive. Likewise problematic are the references to future amendments of the OECD Model Tax Convention in Article 3 point (13) and in Article 18 (2) of this Directive.

It is furthermore important to point out that the delineation between a reference that merely renders the authentic interpretation or substantiation of a soft law rule legally binding, and one that would imply giving legal force to new specifications of mere conceptional frameworks, to additional rules, or to rule amendments, must be based on an autonomous assessment that is rooted in Union law.[26] Specifically in the context of the Minimum Tax Directive that quintessentially transposes the GloBE Model Rules[27] of the OECD/G20 Inclusive Framework, it is not decisive whether successive soft law is labeled as 'commentary' or 'guidance' to the Model Rules, but whether it is a mere concretization also in substance. This is highly questionable in some instances, for example regarding the extension of the concept of Qualified Refundable Tax Credits (Article 3.2.4 of the GloBE Model Rules) to 'Marketable Transferable Tax Credits' in later Administrative Guidance.[28] In reality, this Guidance introduces privileged treatment for a new category of tax credit that was not contemplated in the Model Rules but was instead subsequently added in order to accommodate for the prevailing type of tax credit relied on by the United States in its Inflation Reduction Act.

A more generous admission of unconditional dynamic references to international soft law standards can, however, be appropriate where the latter are not referred to for the purpose of substantiating or amending the harmonized system of taxation. This concerns, i.a., the attribution of legal consequences to the compliance of third countries with the latest version of an international soft law agreement,[29] if and because it can be assumed that the legal effects that such compliance has are intended irrespective of the details of the soft law regime to be complied with. EU Member States may also be authorized to implement new or complementary international soft law regimes at their discretion[30] – leaving these competences with the Member States ensures that any such incorporation is sufficiently legitimized by national institutions. As a caveat, this must not lead to inconsistencies with the relevant Union legislation, lest external standard setters predetermine the degree of harmonization within the EU legal order.

Besides, as the Court has rightly established in *Fiat*,[31] the principle of legality of taxation requires that even where legitimate, references to externally issued soft law standards and guidance must be explicit in order to have legal effects. The conscious choice of the Union legislator to make reference also to future versions or amendments of a soft law instrument must therefore clearly be inferred from the relevant EU tax legislation; this requirement was ignored by the CJEU in the *Danish* cases. However, considering that the preamble to a Directive is to be taken into account for its interpretation, it should be sufficient that the explicit referral also to future soft law guidance is made therein.

Apparently, the Commission and Member States are aware that references to future soft law standards that would complement or amend Union tax legislation rather than merely serve as interpretative guidance or substantiation of defined concepts raise issues of legitimacy. In some instances, the relevant Directives or legislative proposals have attached additional conditions to these categories of referrals. They are meant to act as safeguards for sufficient involvement of the EU Member States in the endorsement of the standard to be incorporated into the EU legal order. Specifically, Article 32 (2) MTD lays down that Member States shall – only – allow taxpayers to make use of a safe harbour regime specified in future international soft law agreements if all Member States have consented to it. In a similar vein, Article 3 (18) of the proposal for the Transfer Pricing Directive stipulates that future amendments to the OECD TPG will only have legal effects in the context of the Directive if they coincide with a Union position previously adopted under Article 218 (9) TFEU. In the light of Article 114 (2), 115, 218 (8) [2] TFEU, and settled CJEU case law,[32] this would require prior unanimous agreement in Council. Finally, in November 2023 the Commission and the Council considered it necessary to each issue an ad hoc statement, not provided for in the Minimum Tax Directive, in which they declare that they 'welcome and support' all the guidance issued by the OECD/G20 Inclusive Framework after the adoption of the Minimum Tax Directive.[33] This includes an explicit reference also

[26] Regarding the similar challenge of delineating the scope of Art. 290 TFEU and Art. 291 TFEU, *see Joachim Englisch*, Yearbook of European Law 2021, 111.

[27] OECD, Tax Challenges Arising from the Digitalisation of the Economy: Global Anti-Base Erosion Model Rules (Pillar Two) 2021, https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm (accessed on 9 Dec. 2023).

[28] *See* OECD, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) (Jul. 2023), www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-july-2023.pdf (accessed on 9 Dec. 2023).

[29] *See* e.g., Art. 3 points (18), (28), and (43) of the MTD.

[30] *See* e.g., recital (22) of the preamble to the MTD.

[31] *Supra* n. 17.

[32] *See* e.g., CJEU, 4 Sep. 2018, case C-244/17, Commission/Council, ECLI:EU:C:2018:662, paras 27 et seq., with further references.

[33] *See* the note from the Presidency to COREPER, 30 Oct. 2023, 14732/1/23 REV 1 and the information on its adoption in the ECOFIN meeting of 9 Nov. 2023, https://www.consilium.europa.eu/en/meetings/ecofin/2023/11/09/ (accessed on 9 Dec. 2023).

to certain new regimes that have been flagged as particularly problematic above.

From the perspective of democratic legitimacy, the aforementioned legal safeguards and even the ad hoc endorsement might appear as a viable compromise. All the peoples of Europe are directly or indirectly represented through their governments in the respective procedure, and each government has a veto position. Even where consensus is not formally established in Council, these requirements or practices do not differ in substance from the position that Member States have in Council in tax matters.[34]

4 Further limitations especially due to the principle of insitutional balance

However, these workarounds could still undermine the principle of institutional balance enshrined in Article 13 (2) TEU. It requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.[35] In particular, 'due consultation of the Parliament in the cases provided for by the Treaty […] represents an essential factor in the institutional balance intended by the Treaty [and] reflects [a] fundamental democratic principle'.[36] Likewise, the exclusive 'power of legislative initiative conferred on the Commission [under Art. 17 (1) TEU] is one of the expressions of the principle of institutional balance, characteristic of the institutional structure of the European Union'.[37] Any EU tax legislation requires a legal initiative by the EU Commission and prior consultation of the EU Parliament.

The quasi-legislative procedure chosen under Article 32 MTD disregards both of those requirements. Moreover, the Member State 'consensus' that it requires is not fully equivalent to the procedure of unanimous agreement in Council, either.[38] Deliberations in Council provide every Member State with an opportunity to influence the compromise that will eventually be endorsed for adoption as Union legislation. By contrast, a post-negotiation statement on the consensual acceptance of new soft law instruments will not have the same effect of democratic inclusion, but instead it puts some Member States in a mere take it or leave it situation. In fact, several Member States are not also member countries of the OECD,[39] and one is not even a member of the OECD/G20 Inclusive Framework.[40] The aforementioned deficiencies are all the more serious in the context of Article 32 MTD, because the admission and design of safe harbour rules has a profound impact on the effectiveness and efficiency of the international minimum tax and should therefore be regarded as an essential element of legislation.

For the same reasons, ad hoc statements of approval and support for a new international soft law standard or guidance, as they have been issued by the Commission and Council in November 2023, cannot substitute for a lack of respect for proper procedures. The Treaties are clear on which EU institutions need to be involved, and when and how, in the subsequent supplementation or amendment of EU tax legislation: either in the context of a special legislative procedure or based on the conferral of delegated powers upon the Commission within the constraints of Article 290 TFEU. It is not up to the EU institutions to replace this balanced and calibrated system with informal procedures that are more to their liking.

By contrast, the solution proposed for the Transfer Pricing Directive refers to a procedure that the European Treaties themselves provide, in Article 218 (9) TFEU, for the involvement of the Union in international law-making. Admittedly, based on a textual and contextual interpretation of this provision it is far from obvious that it should also apply to OECD guidance, even though the EU itself is not an OECD member,[41] and the relevant OECD TPG merely have the status of a recommendation without direct legal effects. However, pursuant to a Grand Chamber ruling of the CJEU, Article 218 (9) TFEU is also applicable where the Union itself is not a member of the international organization that issues the relevant legal acts; the EU Member States that are its members must then exercise their voting rights on behalf of the Union and in accordance with the Union position.[42] Moreover, according to the CJEU, the notion of 'acts having legal effects' for the purposes of that provision also cover international recommendations which are, in themselves, non-binding but have legal effects within the EU through references inserted into EU legislation that seeks to implement them.[43] The CJEU does moreover not

[34] Admittedly, Art. 32 (2) MTD requires mere 'consensus', whereas pursuant to Art. 115 TFEU, Council can adopt tax legislation only by 'unanimity'; however, in the light of Art. 238 (4) TFEU, there are no material differences in this regard.

[35] *See* e.g., CJEU 2 Sep. 2021, case C-928/19 P, EPSU/Commission, ECLI:EU:C:2021:656, para. 48; settled case law.

[36] CJEU 5 Jul. 1995, case C-21/94, Parliament/Council, ECLI:EU:C:1995:220, para. 17; 6 Sep. 2017, joined cases C-643/15 and C-647/15, Slovak Republic and Hungary / Council, para. 160; settled case law.

[37] CJEU 19 Dec. 2019, case C-418/18 P, Puppinck, ECLI:EU:C:2019:1113, para. 60.

[38] The European Treaties themselves make a clear distinction in this regard, as can be inferred, e.g., from Art. 254 (2) TFEU.

[39] Malta, Cyprus, Bulgaria and Romania.

[40] Cyprus.

[41] The EU Commission is nevertheless involved in OECD work, *see* Supplementary Protocol No. 1 to the OECD Convention, of 14 Dec. 1960, https://www.oecd.org/legal/europeancommissionstatus.htm (accessed on 9 Dec. 2023).

[42] CJEU, 7 Oct. 2014, case C-399/12, Rebe und Wein, ECLI:EU:C:2014:2258, paras 48 et seq.

[43] CJEU, 7 Oct. 2014, case C-399/12, Rebe und Wein, ECLI:EU:C:2014:2258, paras 56 et seq.

require any additional act of Union law to produce these effects, even where the future international soft law is 'capable of decisively influencing the content of [EU] legislation'.[44]

From an academic viewpoint, the above case law is not convincing.[45] Article 218 (9) TFEU is a simplification measure that limits the participation of the European Parliament[46] for the sake of efficiency of Union involvement in the making of international law; it should not be extended to the *de facto* creation of supranational Union law, which is governed by other procedures. However, from a pragmatic perspective, the CJEU judgment supports the mechanism of international soft law incorporation proposed in the Transfer Pricing Directive. As a caveat, this solution would not serve to make amendments of the proposed harmonized system of transfer pricing more flexible, because it would still require unanimous agreement in Council. It might moreover complicate and delay negotiations within the OECD.

Finally, a dynamic reference to an international soft law agreement that respects the principles of democratic legitimacy, legality of taxation and institutional balance still cannot produce any legal effects in the Union legal order to the extent that the agreement is incompatible with substantive requirements of primary Union law, such as the free movement rights or fundamental rights.[47] Moreover, this approach implies a curtailment of the Union's commitment to multilinguism, as it can be referred from, i.a., Article 3 (3) TEU and Article 22 CFR.

[44] CJEU, 7 Oct. 2014, case C-399/12, Rebe und Wein, ECLI:EU:C:2014:2258, para. 63.

[45] *See also* the Opinion of AG *Cruz Villalón*, 29 Apr. 2014, case C-399/12, Germany/Council, ECLI:EU:C:2014:289, paras 62 et seq. and 84 et seq.

[46] *See* CJEU, 4 Sep. 2018, case C-244/17, Commission/Council, ECLI:EU:C:2018:662, paras 25 et seq.

5 Dynamic references are not a panacea: know your limits and alternatives

To conclude, dynamic references to international soft law agreements in EU tax legislation that seeks to ensure their harmonized implementation can allow for a more flexible adaptation of this legislation to future developments of the relevant soft law, but only to a limited degree. The approach works reasonably well where a subsequent soft law instrument is relied on for the mere concretization of an already executable rule in the EU legal act transposing the original agreement. By contrast, where the referral assigns a role to future soft law that goes beyond such guidance on rule interpretation or substantiation, either in form or in substance, it cannot normally be reconciled with the principles of democratic legitimacy and EU institutional balance. The main exception is a reference that is conditional upon the consistency of the new soft law with a prior Union position adopted under Article 218 (9) TFEU; however, this solution hardly provides the desired flexibility. Member States should instead entrust the Commission with transposing posterior supplements or amendments to the original soft law agreement, by virtue of delegated powers under Article 290 TFEU. At least in such a scenario, their far-reaching reservations against this mechanism in the area of taxation[48] seem outdated. Where the use of delegated powers is predetermined by an international soft law agreement that has been endorsed by almost all Member States, the loss in national autonomy would be relatively minor, whereas gains in flexibility and legal certainty would be significant.

[47] *See also* the caveat in recital (24) to the preamble of the MTD.

[48] As illustrated, i.a., by recital (26) to the preamble of the MTD.