

**REASONED OPINION**

**of the European Affairs Committee of the Federal Council**

**pursuant to Article 23g (1) of the Austrian Constitution in conjunction with Article 6 of Protocol  
No.2 on the application of the principles of subsidiarity and proportionality**

**15 March 2017**

**COM (2016) 822 final**

**Proposal for a Directive of the European Parliament and of the Council on a proportionality test  
before adoption of new regulations of professions**

**A. Reasoned Opinion**

The project under consideration is incompatible with the principle of subsidiarity.

**B. Grounds for Reasoned Opinion**

On 10 January 2017, the European Commission submitted a proposal for a directive on the assessment of the proportionality of regulations of professions within the framework of its Single Market Strategy. In the Federal Council's opinion, the proposal is not compatible with the principles of subsidiarity and proportionality. The draft directive is based on Articles 46, 53 (1) and 62 TFEU. According to Article 46 TFEU, the European Union takes all the measures required to bring about the freedom of movement of workers. According to Article 53 and Article 62 TFEU, directives can be adopted for the coordination of legal and administrative provisions of the Member States governing the take-up and pursuit of professional activities in order to make it easier for persons to take up and pursue activities as self-employed persons. As the aforementioned provisions concern shared competences between the EU and the Member States, the proposed directive has to be checked for compliance with the principles of subsidiarity and proportionality. The concerns expressed by the

Federal Council primarily relate to the proportionality check. The shared competence relates to the non-discrimination of employees and self-employed persons as well as the mutual recognition of their qualifications, as provided for in Articles 46, 53 and 62 TFEU, but is not aimed at harmonising the qualifications required in the individual Member States.

The regulation of regulated professions remains within the competence of the Member States, which are free to decide individually and without mutual consultation whether any rules or restrictions of access to a regulated profession are to be adopted or not. The adoption of such rules is possible, provided the principles of proportionality and non-discrimination are respected. In its line of argumentation, the European Commission refers to the right to work in the sense of the freedom to pursue one's own profession or to conduct a business enshrined in the Charter of Fundamental Rights of the European Union. Therefore, in the Commission's opinion, regulatory measures must be duly justified through a thorough proportionality assessment.

'Regulated professions' are activities where a specific professional qualification is required as a prerequisite for access to or the exercise of such professions. Over time, different regulations have been introduced by the Member States, which reflect historical developments and traditions. The reasons for regulation are based on the need to protect public interests, such protection being guaranteed by the quality of services provided by the members of the profession. Directive 2013/55/EU significantly modernized European Union law in the area of regulated professions. Greater transparency was introduced through mutual evaluation and improved information on regulated professions. The criteria to be applied in the assessment of proportionality introduced at that time included non-discrimination, reasons of general interest and the need for regulation in order to attain the desired objective.

The Commission has now submitted an extended list of binding criteria for regulated professions. Article 6 para.2 sets out eleven criteria to be considered in the evaluation; another ten criteria are set out in Article 6 para.4 of the proposal. In the Federal Council's opinion, the introduction of additional criteria does not require the adoption of a directive, as the less stringent measure of recommendations would be equally appropriate. In view of the fact that regulation is also intended to protect the interests of consumers and employees, the proposed directive appears to be an additional and unnecessary obstacle to regulation by national law. The requirements and control mechanisms laid down in Union law are sufficient to prevent over-regulation (Services Directive, Unfair Commercial Practices Directive, proportionality checks pursuant to the Directive on the Recognition of Professional Qualifications). Moreover, the question of compliance with the principle

of proportionality arises in this context. It is difficult to understand why the introduction of so many binding criteria, to be assessed on a cumulative basis, and such detailed methodological provisions should be necessary to ensure an efficient and proportionate assessment for a regulated profession. The Federal Council regards the catalogue of criteria as too extensive and excessive. The Federal Council fails to see the added value of such assessment, as compared with the impact analysis provided for in Austria. The Federal Council's concerns over the issue of proportionality are corroborated by the fact that even minor and simplifying changes in the area of professional regulation are to be subjected to an ex-ante assessment.

In conclusion, the Federal Council refers to the case law of the Court of Justice of the European Union. On the one hand, the CJEU states that, as long as the prerequisites for access to a profession have not been harmonized, Member States are free to decide which skills and qualifications are required for the exercise of this profession. On the other hand, the CJEU holds that the mere fact that one Member State adopts less stringent requirements than another Member State does not mean that its rules are disproportionate and therefore incompatible with Union law. At any rate, the Federal Council is of the opinion that the proposal tabled by the European Commission constitutes a disproportionate interference in the area of regulated professions.