



EUROPEAN COMMISSION

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*Ms Malu Dreyer
President of the Bundesrat
Leipziger Straße 3-4
D-10117 Berlin*

Dear President

The Commission would like to thank the Bundesrat for its Reasoned Opinion on the proposal for a Directive on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System {COM(2016) 821 final}.

This proposal is part of a package of several proposals that should be seen in the light of President Juncker's political commitment to unleash the full potential of the Single Market. This goal was confirmed by the European Council in its December 2015, June 2016 and December 2016 conclusions. The proposed measures aim to make it easier for service providers to navigate administrative formalities and to help Member States identify overly burdensome or outdated requirements on professionals operating domestically or across borders. Rather than introducing new substantive rules at the level of the European Union in the area of services, the Commission's focus is on ensuring that they are applied better, as evidence shows that implementing them to their full potential could provide a significant boost to the European Union's economy.

The Commission takes the views expressed by the Bundesrat as regards the principles of subsidiarity and proportionality very seriously. The Commission is of the opinion that its legislative proposal for an improved services notification procedure is in line with the subsidiarity and proportionality principles established by the Treaties. The objective of the proposal is to improve the functioning of the internal market and protect the freedom of establishment and the free provision of services, which are among the foundations of the Union. To this end, the legislative proposal aims to put into place an effective mechanism to improve the implementation of the existing Services Directive¹.

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

In respect of the possible infringement of the proposal with the principle of democracy, the Commission cannot share the Bundesrat's opinion. Contrary to the opinion of the Bundesrat, not every parliamentary activity bearing any relation to services would be subject to approval by the Commission. The proposal limits the notification obligation to those requirements which are covered by the Services Directive and then only in case of certain provisions. Furthermore, the assessment which the Commission and other Member States will make is limited to the compatibility of the notified measure with the Services Directive adopted by the European Parliament and the Council. The obligations set in this Directive have been transposed into national legislation since 28 December 2009.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council.

In response to the more technical comments in the Opinion, the Commission would like to refer the Bundesrat to the attached annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Elżbieta Bienkowska
Member of the Commission*

ANNEX

The Commission has carefully considered each of the issues raised by the Bundesrat in its Reasoned Opinion and is pleased to offer the following clarifications.

The legislative proposal is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU). It is important to note that for the purpose of this proposal Article 53(1) should be considered in combination with Article 62. Those Articles give the European Union the competence to adopt acts for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons in the area of services in general. On the other hand, Article 114 TFEU gives the European Union a general competence to adopt Union legislation for the establishment and the functioning of the Single Market as defined in Article 26 TFEU, including the free movement of services. According to the case law of the Court of Justice of the European Union, (see judgment of 5 October 2000 in Case No C-376/98), recourse to those articles of the Treaty as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.

In this respect, the Commission would like to underline that the proposed notification procedure allows for the assessment of national measures and provides for an effective action in case of non-compliance with the relevant provisions of the Services Directive. The Commission's impact assessment showed that Member States continue to adopt national measures which are not compliant with the Services Directive, in particular as regards their proportionality to the declared public interest objective, which create barriers in the Single Market for services.

As to the inversion of the relationship between the Commission and the Member States due to the proposal containing the possibility for the Commission to adopt a Decision on the compatibility of notified draft measures with the Services Directive, the Commission would like to state the following.

Article 258 TFEU provides for the Commission power to bring a Member State before the Court of Justice of the European Union for violations of Union law. The Court of Justice of the European Union has rejected several challenges to the possibility for the Commission to adopt a Decision on the compatibility with Union law and the possibility for the Commission to open infringement proceedings. The presence of such powers in secondary legislation does not encroach upon the Court's jurisdiction under Article 258 TFEU.

The Commission would like to underline that its power to adopt a Decision on the compatibility with Union law does not entail a shift of the burden of proof to the detriment of Member States. Under existing Union law it is already the obligation of Member States wishing to introduce new regulation to show that such regulation would be justified and

proportionate to meet a legitimate overriding reason of the general interest. Moreover, if the Commission adopted a Decision under Article 7 of its legislative proposal, it would be obliged to prove that the Services Directive has been violated, i.e. that the national measure constitutes a restriction and that it is not justified or proportionate. This Decision can be challenged by Member States and would be subject to a complete judicial review of the Union judicature.

The Commission would also like to recall the existence of a similar notification obligation for the Member States in the area of information society services and goods, on the basis of Directive (EU) 2015/1535². The procedure of that Directive requests Member States to suspend for a period of three months the adoption of the notified measure. The possibility for the Commission to adopt binding decisions on draft regulatory measures notified by Member States is moreover already foreseen in other legal acts of the European Union, such as the existing Services Directive and the Product Safety Directive³ and under the merger procedure.

In respect of the proportionality principle of the proposal, the Commission unfortunately does not share the opinion of the Bundesrat that the current possibility of the Commission to open infringement proceedings addresses the problem in a sufficient manner.

The existing notification procedure for services falling within the scope of Directive 2006/123/EC (Services Directive) was established by that Directive with the objective to ensure that new measures introduced by Member States comply with the Services Directive. An evaluation of this procedure, summarized in the impact assessment accompanying the legislative proposal revealed important shortcomings as a result of which the existing procedure fails to contribute effectively to the prevention of the introduction of unjustified regulatory barriers to the services single market.

For this reason, not only the European Parliament and the European Court of Auditors but also the Council of the European Union have called on the Commission to improve the existing notification mechanism established by the Services Directive. In a public consultation, 80% of respondents considered the current notification procedure to be unsatisfactory, with almost three quarters of public authorities expressing the same opinion.

The purpose of the proposal is to promote a better implementation of provisions of the Services Directive, which aims specifically to eliminate or reduce the obstacles to the freedom of establishment and the provision of services in a cross-border context. The overall objective is to ensure a smooth functioning of the Single Market for services which is not limited to the territory of one Member State but covers the whole territory of the European Union.

² 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 (Text with EEA relevance), OJ L 241, 17.9.2015, p. 1–15.

³ Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L 228, 11.8.1992, p. 24–32.

Therefore, given the specificity and the transnational nature of the Single Market, an efficient and coherent preventive control of national regulatory measures in the field of services can only be achieved at the level of the European Union.

The Services Directive gives Member States the possibility to introduce requirements which affect the freedom of establishment and the freedom to provide services. However, in order to avoid these requirements creating barriers for service providers, the Services Directive obliges Member States to ensure that such requirements are proportionate and non-discriminatory, justified by an overriding reason relating to the public interest.

The proposal is designed as a tool whereby the compliance of new regulatory measures with Union law will be verified. This will reduce the need for costly and lengthy legal proceedings between the Commission and Member States for newly adopted national laws failing to comply with the law of the European Union (infringement proceedings) and regulatory uncertainty and unpredictability stemming from frequently changing regulation (for example where a recently introduced measure would have to be amended again as a result of an infringement procedure).