

31.3.2017**Decision****of the Bundesrat**

Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions**COM(2016) 822 final**

At its 956th session on 31 March 2017, the Bundesrat adopted the following opinion pursuant to § 3 and § 5 EUZBLG^{**)}:

1. The Bundesrat shares the Commission's view that the free movement of services should be further facilitated and the European internal market further developed.

The Bundesrat fundamentally welcomes the fact that the Commission wishes to reduce the current uneven scrutiny of the regulation of professions in the Member States and the concomitant negative impact on the provision of services and the mobility of professionals.

The Bundesrat can fundamentally understand why the Commission wishes to use the description of test criteria as a means of clarifying and standardising the way in which the proportionality of national regulations is evaluated.

2. However, the Bundesrat cannot accept the Proposal for a Directive on a proportionality test before adoption of new regulation of professions.
3. The proposal constitutes an encroachment on the right of the Member States to regulate regulated professions. It is up to each Member State to impose rules on access to or pursuit of a profession, as long as the principles of non-discrimination and proportionality are respected. Moreover, there is the risk that such a far-reaching encroachment on the national system of adopting regulations on access to professions will also have an impact on quality standards in education and on consumer protection.
4. There is also the question of the added value of the proposed measure. The Member States already assess possible discriminatory effects as regards the regulation of professions. This raises the question of why an additional procedure must be made legally binding.
5. It is hard to see the reasoning behind the detailed requirements for tests and comprehensive rules on methodology, even given the need for deregulation and the

^{*)} First Decision of the Bundesrat of 10.3.2017, Official document 45/17 (Decision)

^{**)} EUZBLG = *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* [Act on cooperation between the Federal Government and the *Länder* in matters concerning the European Union]

reduction of red tape. The enormous cost involved is out of all proportion to the possible benefit.

6. The Proposal for a Directive runs counter to the Bundesrat's desire to reduce red tape. The testing of proportionality is to take place in future through a complicated and costly process. Article 59 of Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications already lays down provisions on a transparency procedure which could have been extended if necessary. The Bundesrat takes the view that a new Directive is not needed. The new Directive would also lead to additional and unnecessary administrative costs.
7. The Bundesrat doubts whether the setting of EU-wide criteria for the proportionality test and the methodology proposed for this purpose is proportionate in its content and in particular is necessary and appropriate.
8. The Bundesrat therefore takes the view that other measures which encroach less on the rights of the Member States than the adoption of a legal act (recommendation to the Member States, etc.) would be an option. An effective examination of Member State legislation and thus of compliance with the proportionality principle can be achieved by means of existing control mechanisms (such as pilot schemes and Treaty infringement proceedings).
9. The Bundesrat would ask the Federal Government to seek to ensure, in the negotiations in the Council, that the Commission either withdraws the Proposal for a Directive for a proportionality test on the grounds of the concerns held by a number of Member States regarding proportionality and subsidiarity, or presents it again in the form of a non-binding recommendation.
10. In its opinion of 10 March 2017 (Bundesrat official document 45/17 (Decision)) pursuant to Article 12(b) TEU, the Bundesrat nevertheless already made it clear that the Proposal for a Directive encroaches on national sovereignty and is incompatible with the principles of subsidiarity and proportionality.
11. The Bundesrat would stress that the subsidiarity principle and the Member States' legislative powers must be respected. In the Bundesrat's view, the Proposal for a Directive goes beyond the relevant case law of the ECJ and thus restricts the discretion granted by it. The Bundesrat fears that the planned Directive will create additional red tape for the business sector and opposes a binding test methodology.
12. The Member States are currently transposing the requirements of the amended Directive on the recognition of professional qualifications (Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications) into national law. The Directive made it necessary in Germany to adopt comprehensive amendments to the horizontal recognition legislation of the Federal Government and the *Länder* and to specialist laws on the professions. The Directive's newly created procedures and instruments must now prove their worth in practice. For the legislation on the internal market to be enshrined in the Member States in a sustained fashion, there is therefore a need not only for more and more new legal provisions but above all for a careful and sustained transposal of measures which have already been decided upon.

13. The mobility of self-employed persons and employees is guaranteed by means of the Directive on the recognition of professional qualifications. There is therefore no requirement to take action in order to guarantee mobility. The Bundesrat also fails to see a logical basis for the Commission's assessment that the current uneven scrutiny of the regulation of professions across the EU has a negative impact on the provision of services and the mobility of professionals. Rather, the Directive on the recognition of professional qualifications was not modernised until 2013 (Directive 2013/55/EU). This Directive already comprehensively guarantees cross-border mobility of workers and self-employed persons, thereby ensuring the free movement of workers and the freedom to provide services.
14. Through the existing Directive on the recognition of professional qualifications, it has been possible for years to facilitate entry to the single market for members of regulated professions. Rules on testing the proportionality of new legislation already exist. The Bundesrat takes the view that the Proposal for a Directive is not suitable for facilitating this process. The proposed rules will not make the process clearer but more complicated, by introducing excessive red tape.
15. The Proposal for a Directive constitutes an excessive encroachment on the professional regulations adopted by the Member States and their freedom to adopt regulations.

The Bundesrat underscores the Commission's observation that in the absence of harmonised requirements at EU level, the regulation of professional services remains a prerogative of the Member States.

It therefore supports the Commission's view that it is up to each Member State to decide whether there is a need to intervene and impose rules and restrictions for access to or pursuit of a profession, as long as the principles of non-discrimination and proportionality are respected.

16. The Bundesrat would point out that, as regards the recognition of professional qualifications, education policy considerations also play a major role. However, as laid down in Article 165(4) TFEU, these may not be harmonised. The ECJ has therefore also confirmed that the Member States have competence as regards the regulation of professions. The ECJ has, for example, ruled that, where professional qualifications are acquired in other EU Member States, evidence must be provided to show that they comply with criteria required in the home country concerning the recognition of professional qualifications.
17. The Bundesrat would also point out that Article 59(3) of the Directive on the recognition of professional qualifications already requires the testing of proportionality as regards the recognition of professional qualifications. These criteria correspond to those developed by the ECJ, with the help of which the proportionality of rules on the professions may be assessed. The Commission has not provided a convincing argument to explain why, in view of the test criteria which are already recognised, a further proportionality test might be necessary.
18. The Bundesrat assumes that the extremely detailed criteria which must be tested independently of individual cases go far beyond the established case law of the ECJ. This significantly restricts the freedom of national legislators to make their own decisions in autonomous areas of competence.

19. The Bundesrat recognises that the Commission, through the proposed Directive, is seeking to establish test criteria to be used consistently throughout the EU to determine the proportionality of new or amended legislative and administrative provisions which restrict access to or the pursuit of regulated professions. However, the Bundesrat observes that, in this endeavour, the Proposal for a Directive does not achieve any clarification or material improvement with regard to the existing rules on proportionality testing, as laid down in the Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market), but would create further uncertainties when testing proportionality.
20. The Bundesrat is convinced that the individual requirements of the Proposal for a Directive are not suitable for achieving their objectives. The list of test criteria in Article 6 of the Proposal for a Directive is very extensive. However, the individual criteria ultimately remain unclear and are not based on unambiguous qualitative or quantitative principles. Moreover, they are formulated overall in very general terms which do not make them sufficiently distinguishable.
21. The proposed Directive would also bring about a considerable extension of obligations as regards testing and justification, which in the Bundesrat's view are out of all proportion to the benefit. The introduction of a proportionality test for all regulations concerning professions would thus mean that even existing provisions would be covered by the procedure, as amendments to the law would also trigger the proportionality test. This means that whenever an adjustment had to be made to a currently regulated profession, 11 test criteria from Article 6(2) and a further 10 test criteria from Article 6(4) of the Proposal for a Directive would have to be observed and applied. This would result in the individual points of the test simply being worked through mechanically rather than the content of the corresponding applications being examined. At the same time, the granting of exemptions as well as entitlements to pursue certain professions constitutes, according to the established case law of the Federal Constitutional Court, an important instrument for guaranteeing occupational freedom under Article 12 of the Basic Law.
22. The Bundesrat criticises the fact that taking the catalogue of criteria into account would create excessive red tape without leading to the improved results the Commission desires.
23. The Bundesrat shares the Commission's assessment that regulation of professions is justified and even welcome in most cases, such as in matters concerning health and safety.
24. The Bundesrat also shares the Commission's conclusion that over time each Member State has introduced different regulations, reflecting long established traditions, either in the form of State regulation or as self-regulation by professional associations. There are good reasons for regulation, based on the need to protect essential public interest objectives and this brings value to society by, for example, clarifying the technical knowledge, training and competences which professionals must have to ensure citizens are protected when using services. In the Bundesrat's view, this applies in particular to the trades sector and to the master craftsman's certificate [*Meisterbrief*].
25. The Bundesrat does not agree with the Commission's assertion that, despite the in-depth discussions and the guidance provided by the Commission, the introduction of new restrictive measures without objective and comprehensive analysis has not been prevented, and that there has been only superficial testing of proportionality.

26. The Bundesrat does not accept the demand that the proportionality of legislative and administrative provisions be tested 'on a regular basis', nor the involvement of independent scrutiny bodies in the testing of proportionality. This again increases not only red tape but also uncertainty for business operators and tradespeople, as it does not ensure that the validity of regulations regarding professions is reliable in the long term. The Member States are obliged to transpose EU law through regular procedures to adopt laws and regulations. It is neither necessary nor constructive to introduce an additional obligation to carry out regular tests, as the Member States are required to transpose amendments to EU law anyway.
27. The regulated professions in Germany not only ensure the value of German products and services but also help small businesses within the trades sector continue to be able to provide training. Moreover, the success of dual training in Germany is closely associated with the acquisition of the master craftsman's qualification in the businesses which provide training. In the Bundesrat's view, professional rules and self-regulation by professional bodies in the trades sector and in the liberal professions do not pose an obstacle to the internal market. Rather, they create trust in the products and services offered within the EU. They ensure competition between quality and training standards, and thus professionalism, and thereby contribute to sustainable economic and employment growth.
28. The Bundesrat notes that the system of dual training in Germany and the current level of regulation make societal participation possible and help to create opportunities for young people. Dual training in Germany is one of the reasons why youth unemployment in Germany remains low.
29. The Bundesrat also notes that the regulations regarding the health care professions have proved their worth. Regulation of entry to professions, protection of particular professional designations through State recognition, regulation of the content of training and reserved activities (such as midwifery) and regulations on the pursuit of professions are required in future too, in order to ensure that patients receive sufficient protection.
30. Although the Commission, in the explanatory memorandum to the Proposal for a Directive, recognises that in the majority of cases regulation is justified – for example as regards health and safety issues – the Bundesrat is concerned that the proposed Directive will weaken health protection.
31. The Bundesrat would ask that either health professions be removed from the scope of the proposed Directive or the text of the Directive place greater focus on the protection of patients. Under the Proposal for a Directive, it would be possible to regulate reserved activities in future only if doing so prevented a risk of serious harm to public interest objectives.
32. Moreover, the principle of the proportionality of State intervention and regulation has constitutional status in Germany. The Bundesrat considers additional EU legislation specifically to regulate professions to be dispensable.
33. The Bundesrat notes that the question as to whether or how access to professions is regulated at national level falls within the exclusive remit of the Member States. In Germany, access to a professional activity is regulated where the professional activities in question are sensitive and where it is justified to make access to the profession, amongst

other things for reasons of consumer or patient protection, dependent on the possession of particular professional qualifications. It should be left to the Member States to decide which professions they wish to regulate for reasons of public interest and for which professions they do not consider this necessary.

34. The Bundesrat would ask the Commission seriously to consider putting this matter into practice in a subliminal manner, such as by supplementing the Directive on the recognition of professional qualifications with guidelines or recommendations for action in the form of a communication, allowing more scope for individual solutions at the level of the Member States without jeopardising acceptance of the overall objective (open coordination method). The Bundesrat cannot accept the measure in the form of a binding Directive.
35. The Bundesrat therefore calls on the Commission to withdraw the Proposal for a Directive.
36. It would also ask the Federal Government to push to ensure that the Proposal for a Directive is not pursued further.
37. The Bundesrat is sending this opinion direct to the Commission.