

10.03.17**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**

In its 954th session on 10th March 2017 the Bundesrat adopted the following Opinion pursuant to Article 12, Letter b, TEU:

1. The Bundesrat is of the opinion that the envisaged codification, in the form of a Directive, of EU-wide standards concerning scrutiny of proportionality prior to adoption of new national regulation of professions or amendment of existing regulations encroaches upon prerogatives of national sovereignty and is not compatible with the principles of subsidiarity and proportionality.
2. The Bundesrat doubts whether it is possible to find a legal basis for the draft Directive that would authorise EU action on this matter. Reasoned opinions on the non-compliance of a legislative act with the principle of subsidiarity pursuant to Article 12, Letter b, TEU also entail considering the question of EU powers and responsibilities in the policy area in question (c.f. on this point the Bundesrat Opinions of 9th November 2007, BR Official Document 390/07 (Decision), Section 5, of 26th March 2010, BR Official Document 43/10 (Decision), Section 2, and of 16th December 2011, BR Official Document 646/11 (Decision), Section 2.
3. The proposed Directive would encroach on the Member States' right to develop and enforce provisions on regulated professions. It is incumbent on each Member State to introduce regulations pertaining to access to or exercise of a profession, provided that the principles of non-discrimination and

proportionality are respected. The EU does not have comprehensive competences to legislate and harmonise in this area.

4. The Commission bases its proposal on Article 46, Article 53, Sub-section 1 and Article 62, TFEU. If this legal basis is to be utilised, the planned legislation must genuinely aim, through harmonization of legislation, to facilitate transfer from the country of origin to the country of destination for workers, service providers or persons wishing to establish themselves in another Member State, and thereby to improve the exercise of cross-border activities. A positive Single Market effect must be demonstrated. Mobility of freelances and salaried employees is guaranteed through the Directive on Recognition of Professional Qualifications. Action is therefore not required to ensure mobility. The proportionality criteria developed in ECJ case law are already cited by the European legislator in Article 59, Sub-section 3, Directive on Mutual Recognition of Qualifications.
5. The legal basis chosen for this Directive seeks to overcome existing admissible barriers in national legislation by means of recognition or coordination of such national legislation in the interest of providing legal security. Codifying case law on scrutiny of proportionality in a Directive does not provide any added value and serves at most to harmonise scrutiny of barriers to exercising fundamental freedoms, yet does not ensure that these restrictions are overcome. The proposed introduction of binding provisions on this matter therefore does not tally with the proclaimed objectives of the legal basis selected.
6. Pursuant to Article 5, Sub-section 3, TFEU, the EU may only act in areas that do not lie within its sphere of exclusive competence in as much as and to the extent that the objectives of the envisaged measures cannot be realised adequately by the Member States at the central, regional or local level, but can be better realised at the European Union level due to the scope or impact of such measures. A uniform EU legal framework for scrutinising the proportionality of national regulation of professions already exists in the form of established ECJ case law and Article 59, Sub-section 3 of the Directive on Recognition of Professional Qualifications. Compliance with these legal provisions can also be adequately ensured at the national level.
7. Compliance with the proportionality principle requires, pursuant to Article 5

Sub-section 4, TEU, that the scope or form of EU measures does not extend beyond what is required to attain the goals laid out in the EU Treaties.

8. The Bundesrat doubts for substantive reasons whether establishing EU-wide standards for scrutiny of proportionality prior to adoption of new national professional regulations or before amendments to existing regulations is proportionate, and whether the methodology stipulated is proportionate, and in particular would question whether these measures are necessary and appropriate. The proportionality principle is codified both in the EU Treaties and in EU legislation. It takes effect as an element of the material constitutional state principle pursuant to Article 2 and Article 5, TFEU. The proportionality of existing and future regulation of professions is already scrutinised in Germany (and also in the other EU Member States) for constitutional reasons.
9. The extremely detailed provisions of the proposed draft Directive extend considerably beyond the framework cited in established ECJ case law. It is neither necessary nor proportionate to establish more extensive requirements for scrutiny of proportionality by means of a Directive, and this is not compatible with the Directive's objective of facilitating scrutiny of proportionality for national authorities.
10. The Bundesrat takes the view that thought should be given to using other types of measure (voluntary self-regulation etc.), which impinge to a more limited degree on Member States' rights than adoption of a legislative act. Current legislation already requires proportionality to be scrutinised whenever provisions regulating the exercise of a profession are adopted or amended. In an era characterised by deregulation and endeavours to reduce bureaucracy, it is not clear why there should be any need for the detailed provisions concerning scrutiny, or for comprehensive stipulation of the methodology to be applied. The enormous effort this entails is out of all proportion to any possible utility. With a view to facilitating scrutiny of proportionality, the existing EU legal framework and the ECJ's established case law on scrutiny of proportionality could be also made available to national authorities - as proposed by the European Council in February 2015 - by means of a (non-binding) guideline. Effective verification of Member States' legislation and hence also of compliance with the principle of proportionality can be attained through existing monitoring mechanisms (such as for example the EU Pilot

scheme or treaty infringement proceedings). In the light of these considerations too, there is no need to adopt a new stand-alone Directive.