



*Brussels, 10.7.2017
C(2017) 4579 final*

*Ms Malu Dreyer
President of the Bundesrat
Leipziger Straße 3-4
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Dear President,

The Commission would like to thank the Bundesrat for its second Opinion on the 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}.

The Commission carefully considered the views already expressed by the Bundesrat in its Reasoned Opinion, dated 10 March 2017, as regards the principles of subsidiarity and proportionality. As outlined in its reply to the Reasoned Opinion, the Commission would like to recall that its proposal fully respects these principles. The Commission welcomes the opportunity to answer to the additional issues raised by the Bundesrat in its second Opinion.

The Bundesrat argues that the proposal interferes with the regulatory competence of the Member States. However, Articles 46, 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU), which are the legal basis of the proposal, would allow for coordinating measures which harmonise national provisions for the purpose of eliminating obstacles laid down by law, regulation or administrative provisions in Member States concerning the taking-up and pursuit of activities as employed or self-employed persons. The current proposal does not even strive for a harmonisation of such rules, but rather establishes a common evaluation grid for the assessment as to whether requirements that are to be adopted by Member State comply with the principle of proportionality. This is fully in line with the distribution of powers and the principles of subsidiarity and proportionality.

The Bundesrat states that the benefit of the proposal is unclear, as potential discriminatory regulation is already assessed by the Member States. The Commission would like to emphasize that the current proposal does not only address discrimination, but aims at avoiding the introduction of barriers to free movement, which goes beyond the prohibition of discrimination. By keeping barriers low, the proposal facilitates free movement of professionals together with Directive 2005/36/EC.¹

¹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22–142.

The Bundesrat alleges that the objectives could also be reached by a less restrictive measure, such as a recommendation of non-binding character and a less detailed assessment grid. Yet, it is settled jurisprudence of the Court of Justice of the European Union that the principle of proportionality is one of the general principles of Union law and that it needs to be applied in a systematic and consistent manner by Member States.² The results of the transparency and mutual evaluation exercise, based on Article 59 of Directive 2005/36/EC and carried out by the Member States and the Commission in 2014-2016, demonstrate that Member States often do not meet this obligation, although ample guidance has been provided by the Commission in this exercise and before.³ The regulatory decisions are currently often not based on sound and objective analysis or carried out in an open and transparent manner. In-depth discussions and guidance provided by the Commission have not prevented the introduction of new restrictive measures without sound analysis.

In addition, in preparation for the Impact Assessment of the proposal, the Commission carried out a public consultation. 420 contributions were received from public as well as private respondents and which included authorities operating at both the regional and local level. From analysing the responses, it could be seen that often even basic but necessary steps, or at least knowledge of such steps, vital to evaluating regulation according to the principle of proportionality, were lacking. Indeed, many of the administrations that responded to the consultation were unaware of any pre-existing national or Union-level obligations.

Thus, the Member States cannot achieve the objectives individually. Continued divergences in approach and comprehension would result in an escalation of market fragmentation, exacerbating the economic problems identified in the Impact Assessment of the proposal as well as the complexity ultimately confronting job seekers and professionals. Therefore, in the view of the Commission, a non-binding instrument like a recommendation would not be suitable to attain the desired objective.

As to the claim that the administrative burden for a proportionality test as proposed would be disproportionate, it has to be emphasised that the proposal leaves it to the discretion of the Member States to decide when, how and who is performing the proportionality test as long as it is done before adoption of the envisaged measure. It does therefore not unduly interfere with the national legislative process, nor pre-determine who has to be involved.

The criteria according to which a proportionality test has to be performed are all thoroughly based on jurisprudence by the Court of Justice of the European Union and form part of the analysis of suitability and necessity. It depends on the individual measure which criteria from the list will have to be assessed and to which extent. A number of the criteria address specific types of requirements and are only relevant for such requirements. The extent of the assessment depends of course on the degree of impact a requirement would have. Given that

² Cases C-55/94 *Gebhard*, EU:C:1995:411, paragraph 37.

³ Nearly three years since launching the mutual evaluation around a third of proportionality tests are still not submitted and of those received around 70% put forward the conclusion to maintain their regulatory status quo despite a weak accompanying proportionality test.

the obligation to ensure that national regulation is proportionate exists already, the proposal would create additional burden only for those Member States which were not in compliance.

The better use of information obligations foreseen by the proposal is a light-touch requirement, not procedural, and hence expected administrative costs are very limited. The proposal does not bind Member States as to how they take account of such information obligations as regards their regulatory choices.

It has to be emphasised that the result of the proportionality test is not pre-empted by the listed criteria, as Member States are free to reason in the light of specific national circumstances and may attribute the level of protection in relation to a public interest according to their national circumstances, independent of whether other Member States have less restrictive rules, following jurisprudence by the Court of Justice of the European Union.

The Bundesrat claims that the proposal implies that Member States would no longer be free to regulate health and crafts professions. In its view, in particular as regards the two aforementioned professions, initiatives at Union level may only complement the ones of Member States. Indeed, pursuant to Article 165 (4) TFEU it is the Member States' competence to establish their education systems. Yet, this does not mean that when acting within these competences, the basic principles of European Union law, such as the principle of non-discrimination and proportionality, can be disregarded by the Member States. Therefore, already now, for all professions covered by the proposal, which coincides with the scope of Directive 2005/36/EC on the recognition of professional qualifications, Member States have to respect the principles of non-discrimination and proportionality when regulating the access or pursuit of a profession. This applies equally to health and craft professions.

In particular, the dual education system in the crafts sector and the existing 'Meisterprüfung' cannot be considered an obstacle when it comes to mobility between Member States. These would rather guarantee a high level of quality of products and services, which are essential for being competitive and thereby supporting economic growth and employment. In this respect, it has to be clearly stated that the proposal on a proportionality test nowhere interferes with the national education systems in the Member States. In particular, there is no intention to question the value of the 'Meisterprüfung'. The conditions for access and pursuit of a profession in the Member States are not put in question by the proposal.

The same is true for the alleged reduction of the protection of public health aspects or the protection of patients. Member States may choose the level of protection they want to give to a specific public interest objective, even if other Member States maintain a lower level. It is therefore not necessary to exclude specific professions from the scope of the proposal.

The Bundesrat explicitly rejects the monitoring obligation on newly introduced measures and the consultation of independent bodies before adoption of new legislation. The monitoring obligation is a logical consequence of the proportionality test, since assessing proportionality is not a one-off exercise but an ongoing process. Developments in society or technology may require adjustments over time to the regulation of professions.

As to the involvement of independent bodies, the proposal fully respects and allows for the use of already existing national structures and procedures. Its implementation should certainly not be a problem for Member States like Germany that already have solid ex-ante assessment procedures including scrutiny by an independent body (the "Normenkontrollrat").

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,

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First Vice-President*

*Elżbieta Bienkowska
Member of the Commission*