



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Reasoned 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}.

This proposal forms part of a broader package of ambitious measures designed to make it easier for companies and professionals to provide services to a potential customer base of 500 million people in the European Union. This fresh boost to the services sector is supposed to benefit consumers, jobseekers and businesses, and to contribute to generating economic growth across Europe.

Almost 50 million people – 22% of the European labour force – work in professions to which access is conditional upon the possession of specific qualifications or for which the use of a specific title is protected, for example pharmacists or architects. Regulation may well be warranted for a number of professions, for example those linked with public health and safety. However, unnecessarily burdensome and outdated rules can create obstacles to the mobility of professionals and can create difficulties for qualified candidates to access these jobs. This is also to the detriment of consumers. The objective of the proposed directive for a proportionality assessment is not to regulate or deregulate professions – this remains a national prerogative. It aims at ensuring coherent and consistent compliance by all Member States with existing obligations under Union law that national professional requirements are justified, suitable and necessary. The Commission is proposing to streamline and clarify how Member States should undertake a comprehensive and transparent proportionality test before adopting or amending national rules restricting access to or the pursuit of regulated professions.

The Commission takes seriously the views expressed by the Bundesrat as regards the principles of subsidiarity and proportionality.

*Ms Malu Dreyer
President of the Bundesrat
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In the view of the Commission, the proposal on a proportionality test before adoption of new regulation of professions fully respects the principles of subsidiarity and proportionality. The legal bases [(Articles 46, 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU))] allow for coordinating measures to reach a certain degree of harmonisation of national regulation regarding access to or the exercise of professions, as has already been achieved at the level of the European Union for some professions. The current proposal does not aim at such a harmonisation of rules, but merely coordinates how Member States should assess whether requirements that are to be adopted are in line with the principle of proportionality. It does not in any way prejudge the outcome of the national legislative process. Experience has demonstrated that non-binding measures did not lead to the desired objective of comparable and transparent assessments. The proposal leaves ample discretion for the Member States to integrate the proportionality test in the existing structures and should therefore not be problematic or burdensome to implement for Member States that have already similar procedures in place.

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 the issues raised by the Bundesrat in its Reasoned Opinion and would like to offer the following detailed observations on the issues of subsidiarity and proportionality of the proposal.

The Bundesrat states that the legal bases (Articles 46, 53(1) and 62 TFEU) of the proposal do not allow for regulating the issues dealt with by the proposal, but only for reducing obstacles in cross-border situations, like setting out the rules for the recognition of professional qualifications.

However, these provisions (Articles 46, 53(1) and 62 TFEU) do not only allow for measures for the recognition of professional qualifications, but also 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 principle of proportionality.

The Bundesrat also argues that the objectives could be achieved by means of a less restrictive measure, namely by a recommendation of non-binding character, and a less detailed assessment grid, which would not extensively increase the administrative burden, and therefore the proposal would not respect the principle of proportionality.

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.¹ The results of the transparency and mutual evaluation exercise, based on Article 59 of Directive 2005/36 and carried out by the Member States and the Commission from 2014 to 2016, demonstrate that Member States do not meet this obligation, although ample guidance has been provided by the Commission. It became apparent that many national proportionality assessments lack proper reasoning and the results of the exercise furthermore hint at an underlying problem concerning how the need for regulation and its effects are evaluated.² 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.

¹ Case C-55/94 *Gebhard*, EU:C:1995:411, paragraph 37.

² 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.

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 including authorities operating at both the regional and local level. The analysis of the responses revealed 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 European Union level obligations.

Thus, the objectives cannot be sufficiently achieved by the Member States individually. Continued divergences in approach and comprehension would result in an escalation of market fragmentation, exacerbating the economic problems identified in the Impact Assessment accompanying the proposal as well as the complexity ultimately confronting job seekers. 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 performs the proportionality test, as long as it is done prior to the adoption of the envisaged measure. It does therefore not 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 Court jurisprudence 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 the obligation to ensure that national regulation is proportionate exists already, the proposal would create additional burdens only for those Member States which were not in compliance. The better use of information obligations envisaged 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. The proposed directive fully respects and allows for using already existing national structures and procedures, and its implementation should certainly not be a problem for Member States like Germany that have solid ex-ante assessment procedures already in place.

Last but not least, 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 the settled jurisprudence of the Court of Justice of the European Union.