EUROPEAN COMMISSION

Brussels, 10.7.2017
C(2017) 4619 final

Dear President,

The Commission would like to thank the Bundestag for its Reasoned Opinion on the proposals 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}, for a Directive on a proportionality test before adoption of new regulation of professions {COM(2016) 822 final}, for a Directive on the legal and operational framework of the European services e-card {COM(2016) 823 final} and for a Regulation introducing a European services e-card and related administrative facilities {COM(2016) 824 final}.

These proposals 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for service providers to navigate administrative formalities and to help Member States identify overly burdensome or outdated requirements on professionals operating domestically or across borders.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 focuses 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 careful note of the views expressed by the Bundestag as regards the principles of subsidiarity and proportionality. The Commission is of the opinion that the proposals fully respect these principles and will address these views in detail in the annex to this letter.

Prof. Dr. Norbert Lammert
President of the Bundestag
Platz der Republik 1
D – 11011 BERLIN

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

Yours faithfully,

Frans Timmermans
First Vice-President

Elżbieta Bieńkowska
Member of the Commission

ANNEX

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

1. Proposal for a Directive on the enforcement of 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}

The Commission is of the opinion that its legislative proposal for an improved services notification procedure is in line with the principles of subsidiarity and proportionality laid down in the Treaty on European Union. 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 Directive[1].

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 provides the European Union with a general competence to adopt 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, quoted in the letter of the Bundestag (judgment of 5 October 2000 in Case No C-376/98), the 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 a 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 would also like to highlight that, according to its assessment prior to the adoption of the legislative proposal (impact assessment), it has been shown that Member States continue to adopt national measures which are not compliant with the Services

[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.

Directive, in particular as regards their proportionality to the declared public interest objective, which create barriers on the Single Market for services.

In respect of the possible infringement of the proposal with the principle of democracy, the Commission does not share the opinion of the Bundestag. Not every parliamentary activity bearing any relation to services would be subject to approval by the Commission. Firstly, the proposal limits the notification obligation to some of the barriers which are targeted by the Services Directive. Furthermore, the assessment, which the Commission will make also in light of comments by other Member States, is limited to the compatibility of the notified measures with the Services Directive. The obligations set out in this Directive were supposed to be transposed into national legislation by 28 December 2009.

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) 2015/1535[2]*. The procedure of that Directive requests Member States to suspend for a period of three months the adoption of the notified measure. Moreover, the possibility for the Commission to adopt binding Decisions on draft regulatory measures notified by Member States is already provided for in other legislative acts of the European Union, such as the existing Services Directive (unchallenged so far), the Product Safety Directive*[3] [4] *and Article 21 of the EC Merger Regulation.*[5] *The latter provision in particular is analogue to Articles 3(1), 6(2) and 7 of the proposal for a Services Notification Directive in that it confers this power to the Commission by secondary law. Indeed, unlike Article 106 and Article 108 TFEU, no Treaty provision explicitly sets out the Commission's power provided for in Article 21(4) EC Merger Regulation, which is the power to decide on the compatibility of planned national rules pursuing public interests with European Union law as regards concentrations having a European Union dimension.*

As to the alleged 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 draft notified measures with the Services Directive, the Commission would like to state the following.

Article 258 TFEU provides the Commission with the power to bring a Member State before the Court of Justice of the European Union for violations of Union law. As regards Article 21 EC Merger Regulation, the Court of Justice of the European Union has rejected several challenges, based inter alia on Article 258 TFEU, to the Commission's power to adopt a Decision on the compatibility with Union law of certain national restrictions before their adoption.[6] *In light thereof, the existence of a circumscribed and limited power in the*

---

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, 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.

4 Case C-359/92, *Germany v Council ("product safety directive")*, ECL1:EU:C: 1994:306.

5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

6 Case C-42/01, Portugal vs. Commission ("Cimpor-Cimentos de Portugal"), ECL1:EU:C:2004:379.

European Union's secondary legislation for the Commission to decide about the compatibility of national rules with certain provisions of EU law does not encroach upon the Court of Justice of the European Union's jurisdiction under Article 258 TFEU. The Commission would like to underline in this respect that its power to adopt a Decision on the compatibility with the law of the European Union 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 or keep a barrier to the European Union's fundamental freedoms to prove that such a barrier is non-discriminatory on the ground of nationality or residence, justified on the ground of a legitimate overriding reason of the general interest and proportionate. 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, that is to say that the national measure constitutes a restriction and that it is discriminatory on the ground of nationality or residence, unjustified or disproportionate. This Decision could be challenged by Member States and would be subject to a complete judicial review by the European Union's judicature.

The Commission does not share the opinion of the Bundestag that the current possibility for the Commission to open infringement proceedings addresses the problem in a sufficient manner.

The existing notification procedure for services falling within the scope of the Services Directive was established by that Directive with the objective of ensuring that certain new barriers introduced by Member States comply with the Services Directive. An evaluation of the practice of this procedure summarised 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 discriminatory on the ground of nationality or residence, unjustified or disproportionate regulatory barriers to the Single Market for services.

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.

Commission assessments undertaken in preparation of the current legislative proposal did not show any evidence that would have justified the inclusion in the legislative proposal of an emergency procedure derogating from the general procedure to notify a measure at least three months prior to its adoption. In light of this assessment, it was decided not to include a provision providing for an emergency procedure in the proposal.

<u>2. Proposal for a Directive on a proportionality test before adoption of new regulation of professions {COM(2016) 822 final}</u>

The Bundestag 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, in particular as Article 165(4) TFEU contains the obligation to fully respect the competence of the Member States to

organise their education systems and contents of teaching. The Commission would therefore overstep its powers granted under the principle of enumerated powers under the Treaty on the Functioning of the European Union.

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 States comply with the principle of proportionality. This is fully in line with Article 165(4) TFEU.

The proposal does not prejudge any outcome of this assessment and thus Member States fully retain the competence to decide whether to regulate a profession or not. Under the Treaty and relevant jurisprudence, Member States need to respect the principles of non-discrimination and proportionality. Therefore, the proposal is fully in line with Union law, in particular the principles of enumerated powers and the principle of subsidiarity.

The Bundestag further argues that the objectives could also be reached by 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.[7] The results of the transparency and mutual evaluation exercise, based on Article 59 of Directive 2005/36/EC[8] 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 the majority of national proportionality assessments lack proper reasoning and suggest an underlying problem concerning how the need for regulation and its effects on the broader business environment are evaluated.[9] 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

---

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

8 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance), OJ L 255, 30.9.2005, p. 22–142.

9 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.

levels. An 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 administrations were unaware of any pre-existing national or 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 proposal's impact assessment as well as the complexity ultimately confronting job seekers.

Therefore, in the Commission's view, 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 by whom the proportionality test is performed, as long as it is done before the envisaged measure is adopted. It does therefore not interfere with the national legislative process, nor pre-determine who has to be involved.

It should be emphasised that the result of the proportionality test is not pre-empted by the criteria listed in the proposal, 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 settled jurisprudence of the Court of Justice of the European Union.

3. Proposals for a Directive on the legal and operational framework of the European services e-card {COM(2016) 823 final} and for a Regulation introducing a European services e-card and related administrative facilities {COM(2016) 824 final}

The European Parliament[10], the European Council[11], the Council[12] and many stakeholders[13] have all called for a proposal for a European services e-card, in order to address the remaining barriers to the cross-border integration of the services markets, and enable entrepreneurs in key sectors to offer their services in other Member States without going through unnecessary procedures.

The proposal for a European services e-card establishes a procedure at the level of the European Union with enhanced administrative cooperation between Member States to support and frame the development of cross-border services in the sectors of business services and construction services.

---

[10] European Parliament Resolution on the Single Market Strategy (2015/2354(INI)), 26 May 2016 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0237+0+DOC+XML+V0//EN.

[11] European Council Conclusions, 28 June 2016 http://www.consilium.europa.eu/en/meetings/european-council/2016/06/European-Council-conclusions_pdf/.

[12] Council Conclusions on "The Single Market Strategy for services and goods", 29 February 2016 http://date.consilium.europa.eu/doc/document/ST-6622-2016-INIT/en/pdf.

[13] European services e-card - impact assessment, Annex 2, Stakeholder consultation, p. 81 http://ec.europa.eu/DocsRoom/documents/20863/attachments/1/translations/en/renditions/native.

The Commission does not share the opinion that the proposal is not in conformity with the principle of proportionality.

The proposal aims to make use of information technology infrastructures put in place at the level of the European Union (such as the Internal Market Information System 'IMI') without additional costs for national administrations. The Internal Market Information System is already known and used by national administrations including in Germany (at federal, regional and local levels). No further investments in information technology platforms will be requested from Member States. Nevertheless, in order to make this e-card procedure work in the Internal Market Information System and deliver for the service providers that apply for it, the proposal provides for an active involvement of national administrations of the Member State of establishment of a service provider, namely its home Member State, but also those in the Member State where he or she wants to expand his or her activities, either on a temporary basis or for a secondary establishment (via an agency or a branch). To keep the procedure streamlined, a single coordinating authority must focalise cross-border contacts between the home and host Member State. Member States remain fully free to define the appropriate body to perform this role, according to their administrative organisation at national level, including Member States with a federal structure, such as Germany. In this sense, Member States also remain fully free to make the best use of their existing administrative bodies. The Points of Single Contact could also be used, if identified by Member States as being the relevant administrative structure to operate this advanced administrative cooperation procedure.

The tacit approval and short deadlines are a strong message sent to the business community that procedures should be result-oriented, and time-effective in practice. Nevertheless, this is framed and balanced by two very important elements: first, this proposal fully builds on the provisions of the Services Directive as regards host Member States' prerogatives to decide if a service provider complies with requirements to be able to provide services in their territory. Second, this proposal contains a thorough supervisory mechanism making it possible at any time to launch revocation/cancellation procedures for an e-card. By no means is this proposal introducing a country of origin principle. The e-card will have no impact on rules concerning social protection (including workers' rights and employer obligations), consumer rights, health and safety or the environment.

The proposal for a European services e-card and the existing European Professional Card are complementary but different. The latter is a procedure for cross-border expansion of services by natural persons (professionals) through recognition of their professional qualifications, whereas the e-card is a procedure for cross-border expansion of services by natural persons (self-employed) and companies regarding all aspects normally governed by the Services Directive, thus excluding the recognition of professional qualifications.