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Committee on Legal Affairs

31.3.2017

NATIONAL PARLIAMENT REASONED OPINION ON SUBSIDIARITY

Subject: Reasoned opinion by the German Bundestag on the proposal for a Directive of the European Parliament and of the Council 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)0821 – C8-0011/2017 – 2016/0398(COD)(COD))

Under Article 6 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, national parliaments may, within eight weeks of the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why they consider that the draft in question does not comply with the subsidiarity principle.

The German Bundestag has submitted the attached reasoned opinion on the aforementioned proposal for a directive.

In accordance with the European Parliament's Rules of Procedure, the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

ANNEX

German Bundestag

Decision

At its 221st sitting on 9 March 2017, on the basis of Bundestag document 18/11442,

regarding the notification by the Federal Government
- Bundestag document 18/11229 No A.8 -
on the proposal for a Directive of the European Parliament and of the Council 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, Council document 5278/17),
in this instance: opinion pursuant to Protocol (No 2) to the Lisbon Treaty (application of the principles of subsidiarity and proportionality)

following referral of the matter to the Bundestag (Document 18/11229, Nos A.8, A.9, A.10 and A.11), the German Bundestag decided to adopt the following resolution pursuant to Protocol (No 2) to the Lisbon Treaty in conjunction with Section 11 of the Responsibility for Integration Act:

For the implementation of the Internal Market Strategy, the European Commission has presented a ‘services package’. This includes a proposal for a Directive on a notification procedure (COM (2016)821 final; Council document 5278/17), a Directive on a proportionality test (COM (2016)822 final; Council document 5281/17) and a Regulation and a Directive on the European services e-card (COM (2016)823 final; Council document 5283/17 and COM (2016)824 final; Council document 5284/17).

The proposal for a Directive on a notification procedure includes provisions concerning notification by Member States within the scope of application of Directive 2006/123/EC on services in the internal market (the ‘Services Directive’). The procedure would be applied if the Federation, Länder, municipalities or self-governing bodies (chambers) introduce new rules or amend existing rules within the scope of the Services Directive. The proposal provides for a notification obligation before the conclusion of the national legislative process. If a previously notified measure is amended in the course of the legislative procedure, notification thereof must be given again. Member States are expected to provide clear evidence to show that less restrictive instruments are not available. As soon as the Commission has indicated that it has received all the documents required for notification purposes, a three-month consultation period begins. National draft regulations may be adopted only upon expiry of that period. Within the three-month period, the Commission and the other Member States will have two months in which to comment on the notified measures. The notifying Member State will then have one month in which to respond to any comments submitted. Should the Commission have

any doubts as to the compatibility of a measure with the EU Services Directive (Directive 2006/123/EC), it may alert the notifying Member State as a result of which the Member State may not adopt the measure for a further three months. Following this standstill period, should the Commission finally decide that the draft is incompatible with the EU Services Directive (Directive 2006/123/EC), it may adopt a decision under Article 7 of the proposed Directive requiring the Member State to refrain from adopting the measure in question or to repeal it. Member States would have to bring an action before the European Court of Justice against such a decision before they can exercise their right to legislate.

The proposal for a Directive on the proportionality test provides for the obligation to carry out such a test before new national provisions restrict access to or pursuit of regulated professions or amend existing provisions. The proposal for a Directive sets out detailed criteria requiring compliance with the principle of proportionality to be assessed regardless of individual cases. The national authorities responsible for the adoption of the provisions must provide qualitative and, where possible, quantitative evidence for the proportionality of the proposed measures.

A new instrument, the European services e-card, is to be introduced through proposals for a Directive and a Regulation. The Member States are expected to accept the card as proof that its holders are established in the territory of their home Member State and are entitled to provide the services covered by the e-card within that territory. The services card is initially intended to cover a certain number of business services (including architects, engineers, accountants and tax consultants), the construction sector (including individual trades) and some other sectors that are not specifically regulated in Germany (such as travel agents). The Member States are to implement the legislation by appointing or establishing a coordinating authority to cover each sector. Applications for services cards are to be lodged with the relevant coordinating authority in the home Member State. That authority checks the application (making sure, amongst other things, that the documents are complete and authentic) before passing it on to the coordinating body in the host Member State, which also checks it. The services card is issued by the coordinating authority in the home Member State to enable the temporary provision of services unless the host Member State refuses the application within four weeks of the date on which the application was transmitted to it. In respect of applications for permanent establishment, the host Member State has six weeks to establish which authorisation and notification schemes may apply and to ask the applicant to provide the relevant supporting documents. In doing so, the host Member State will have to take into account the requirements that the applicant has already fulfilled in its home Member State, which have the same validity as domestic authorisation and notification schemes. Having received the supporting documents the host Member State has one week in which to check them. If the host State fails to respond within the set deadlines the services card is deemed to have been issued in accordance with the application (assumption of authorisation). A services card issued for an unlimited period may not be withdrawn at a later stage for reasons that could have been tested when the application was lodged. Holders of a services card may not be subjected to any further requirements (such as prior authorisation or notification). The service provider’s use of the card is to be on a voluntary basis. It covers the entire territory of the host State.

The Services Package is one of the measures the Commission intends to use to implement its internal market strategy (COM(2015) 550 final; Council document 13370/15). In its Opinion

on the Internal Market Strategy (Bundestag document 18/8867), the German Bundestag generally welcomed the Commission's objective of deepening the internal market, whilst asking it to:

- keep any recourse to the assistance offered by the Commission with the transposition of internal market provisions into national law voluntary;

- fully justify the introduction of a standstill period in the notification procedure in the amended notification procedure under the Services Directive, and establish its scope jointly with the Member States. Furthermore, the legislative procedure should not be disproportionately delayed or generate more red tape;

- design the services passport so that it reduces bureaucratic formalities linked to cross-border activities. Conversely, the services passport must not generate more bureaucracy or lead to the host State no longer being able to set any justified requirements for the service provider.

The German Bundestag has now checked the compatibility of the measures in the Services Package with the principles of subsidiarity and proportionality. The examination of the rest of the substance of the proposals has not been completed, however. In that respect, it is particularly questionable whether the requirement to establish a national coordinating authority in connection with the proposed services card is compatible with Germany's federal system and with the constitutional division of competence in Germany, since the implementation of laws and granting of authorisations theoretically fall within the competence of the Länder.

As regards the compatibility of the proposals presented under the Services Package with the principles of subsidiarity and proportionality, the German Bundestag maintains:

I. that the Commission's proposal for a Directive on the notification procedure violates the principles of subsidiarity and proportionality set out in Article 6 of Protocol (No 2) to the Lisbon Treaty. On the basis of that provision the national parliaments may set out, in a reasoned opinion, why they consider that the draft legislative act does not comply with the subsidiarity principle. The German Bundestag therefore clearly understands that the criterion for measuring compliance includes the choice of legal basis, as well as compliance with the narrower meaning of the subsidiarity principle under Article 5(3) TEU and with the proportionality principle under Article 5(4) TEU (see Bundestag documents 17/3239, 17/8000 and 17/11882).

1. The proposal cannot be founded on a legal basis enshrined in the EU Treaties.

a. Article 53(1) TFEU, which the Commission cites, provides only for the adoption of directives for the purposes of mutual recognition of certificates and other evidence of formal qualifications and 'coordination' of Member States' provisions. Whereas a precautionary scrutiny reservation covering all services-related regulations goes far beyond simple coordination related to mutual recognition of certificates.

b. Article 114 TFEU, which is also relied on by the Commission, is not an appropriate basis for the draft directive either. According to the settled case-law of the Court of Justice of the European Union, Article 114 TFEU does not confer on the Union legislator a general power to regulate the internal market. A legal act adopted on the basis of Article 114 TFEU must instead

make a genuine contribution to removing existing barriers to the completion of the internal market or appreciable distortions of competition (see ECJ judgment of 5 October 2000 in Case C-376/98). This proposal merely contains an assertion that it will 'have the effect of preventing the introduction of single market barriers resulting from a heterogeneous development of national laws and of contributing to the approximation of national laws, regulations or administrative provisions as regards the services covered by the Services Directive'. The proposal contains no evidence to support that assertion.

c. In addition there are doubts as to the compatibility of the draft Directive with the principle of democracy, which is one of the core values of the European Union as listed in the first sentence of Article 2 TEU. Given the broad scope of the Directive, every parliamentary activity connected with services will in future be subject to authorisation by the European Commission. Thus, under the terms of the draft Directive, democratically legitimate parliaments will be placed under the control of an executive body, the Commission.

d. Ultimately, the draft Directive is inverting the relationship between the Commission and the Member States laid down in the EU Treaties. According to the Treaties, the Commission may, if it perceives a breach of the Treaties by a Member State, ask the Court of Justice to institute a pre-litigation procedure. Conversely, the draft Directive requires Member States to overturn any negative decision by the European Commission in the Court of Justice before they are able to exercise their right to legislate. Such fundamental changes to that relationship as are proposed in the draft Directive would require a Treaty change.

2. There are considerable doubts as to the proportionality of the proposal for a Directive. In accordance with Article 5(4) TEU, under the principle of proportionality the content and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties. To this end a draft legislative act must be appropriate, necessary and reasonable.

a. The necessity of the proposal is contradicted by the fact that procedures to check national law-making for its compatibility with EU law (infringement procedures and EU Pilot) already exist. The Commission does not justify in a comprehensible manner why these procedures are not sufficient. It is also not sufficiently explained why it is necessary to intensify the existing notification procedure and convert it into an - inadmissible - authorisation procedure.

b. In addition, there are doubts as to the proportionality of the proposed Directive, because no provision is made for exceptions. This makes it impossible for the legislator to react promptly in urgent cases to shortcomings in the services sector. This has particularly serious repercussions if, on account of a forthcoming change of legislative period, legislation is delayed by the notification procedure in such a way that conclusion is no longer possible before the legislative period expires and the legislative file is discontinued.

II. In the German Bundestag's view, the Commission's proposal for a Directive on a proportionality test violates the principles of subsidiarity and proportionality set out in Article 6 of Protocol (No 2) to the Lisbon Treaty.

1. The proposal cannot be founded on a legal basis enshrined in the EU Treaties.

In the field of regulated professions the European Union's legislative competence arises from the power to issue directives on the mutual recognition of diplomas, certificates or other qualifications and in the coordination of legal and administrative provisions of the Member States. Corresponding rules have meanwhile been consolidated at Community level in Directive 2005/36/EC on the recognition of professional qualifications, which was revised by Directive 2013/55/EU. In addition, the issue of regulating professions is closely connected with education policy considerations. Harmonisation in the field of education policy is prohibited in accordance with Article 165(4) TFEU. Therefore, in its relevant case law on the free movement of people laid down in Community law, the CJEU has not questioned the power of the Member States to regulate professions. Instead, there has been a requirement that professional qualifications acquired in another European country must be checked for equivalence with the professional qualifications called for under national law.

Requirements for national decisions to regulate professions which go beyond the general proportionality criteria, derivable from primary law, of appropriateness, necessity and reasonableness, are therefore not covered by the limited assignment of tasks to the Community level. Against this background, there must be doubts as to whether the basis for competence for the Directive is adequate.

2. The proposal is not compatible with the principle of proportionality.

The Commission has not explained why, in view of the test criteria already recognised, further binding criteria for the proportionality test are required. The proportionality test is already laid down in Article 59(3) of the Directive on the recognition of professional qualifications (2005/36/EC, amended by Directive 2013/55/EU). These criteria correspond to the criteria devised by the European Court of Justice by means of which the proportionality of professional rules can be assessed.

Furthermore, the German Bundestag takes the view that other measures, which are less intrusive in the rights of the Member States than a Directive, could also be considered. In particular, one such measure is a recommendation that the Member States carry out a proportionality test.

Finally, the objective pursued by the proposal for a Directive is not proportionate to the increased bureaucracy involved and the limitation of national legislators' autonomy of decision. In Article 6(2) of the draft Directive alone, 11 test criteria are proposed, supplemented by another ten in Article 6(4). The large number of test criteria should in practice lead to rather schematic processing by the respective regulating authorities, which would tend to hinder, rather than promote, a detailed examination of the proportionality of the regulations.

III. The Directive and the Regulation on the European services e-card raise questions in terms of their compatibility with the principle of proportionality.

With regard to compliance with the principle of proportionality, the question arises as to whether the proposed coordinating authority in the country of origin and in the host country is

necessary. In this context it should be ascertained whether such an authority is contrary to the concept pursued in the Services Directive, of Points of Single Contact, and whether unnecessary duplicate structures are created. Even if the concept of the Point of Single Contact may in part not be implemented optimally, it would still seem reasonable for the authorities of the host State to be responsible for issuing authorisations. Their administrations can give extensive information about existing requirements and deal efficiently with administrative procedures.

Furthermore, the regulations in the currently envisaged form lead de facto to the introduction of the country-of-origin principle. On account of the host States' very short test periods and the assumption of authorisation when these deadlines are not met, the services card would de facto be issued by the host State without any actual verification, resulting in national requirements concerning e.g. social standards being undermined and circumvented. Such de facto circumvention of national requirements, which are covered by existing European law, also raises issues of reasonableness and therefore proportionality.

Furthermore, in the German Bundestag's view, it has not been conclusively clarified how the planned services card relates to the European Professional Card introduced by Directive 2013/55/EU (Articles 4a to 4e of the Directive on recognition of qualifications). Here too, duplicate structures must be avoided.

IV. The German Bundestag reserves the right to comment on further aspects of the services package in a separate opinion.

V. The German Bundestag asks its President to forward this decision to the European Commission, the European Parliament and the Council of the European Union, and to bring it to the attention of the parliaments of the Member States.