Deutscher Bundestag

DECISION

The German Bundestag, at its 221st sitting, held on 9 March 2017,

acting on the basis of Bundestag printed paper 18/11442, decided,

a) on the communication from the Federal Government
– printed paper 18/11229, point A.8 –
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

Opinion pursuant to Protocol No 2 to the Treaty of Lisbon (application of the principles of subsidiarity and proportionality)

b) on the communication from the Federal Government
– printed paper 18/11229, point A.9 –
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, Council document 5281/17

Opinion pursuant to Protocol No 2 to the Treaty of Lisbon (application of the principles of subsidiarity and proportionality)

c) on the communication from the Federal Government
– printed paper 18/11229, point A.10 –
Proposal for a Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by Regulation ....[ESC Regulation]
COM(2016) 823 final, Council document 5283/17

Opinion pursuant to Protocol No 2 to the Treaty of Lisbon (application of the principles of subsidiarity and proportionality)

d) on the communication from the Federal Government
– printed paper 18/11229, point A.11 –
Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities
COM(2016) 824 final, Council document 5284/17

Opinion pursuant to Protocol No 2 to the Treaty of Lisbon (application of the principles of subsidiarity and proportionality)

in awareness of the communication contained in points A.8, A.9, A.10 and A.11 of printed paper 18/11229, to adopt the following resolution pursuant to Protocol No 2 to the Treaty of Lisbon, taken in conjunction with section 11 of the Responsibility Integration Act (*Integrationsverantwortungsgesetz*):

To implement the single-market strategy, the European Commission has presented a package of measures relating to service provision. The package comprises a proposal for a directive establishing 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 directive on the European services e-card (COM(2016) 823 final, Council document 5283/17, and COM(2016) 824 final, Council document 5284/17, respectively).

The proposed directive laying down a notification procedure contains provisions for the notification of Member States on matters falling within the scope of Directive 2006/123/EC on services in the internal market (the Services Directive). The procedure would be applied whenever the federal, *Länder* or local authorities or other self-governing bodies (Chambers of Industry and Commerce and Chambers of Skilled Crafts) introduced new provisions or amended existing provisions that fell within the scope of the Services Directive. The proposal provides for an obligation to give notice of the national legislative process before its completion. If a notified measure were amended in the subsequent course of the legislative procedure, a new notification would be required. The intention is that Member States would demonstrate, on the basis of 'specific evidence', that less restrictive means of regulation are not available. As soon as the European Commission had informed the Member State that it had received all of the necessary notification documents, a three-month consultation period would begin. The planned national regulatory measures could not be enacted until the end of the consultation period. The European Commission and the other Member States would have the first two months of the three-month period to submit comments on the notified provisions. The notifying Member State would then respond to those comments within one month of receiving them. If the European Commission had concerns about the compatibility of the proposed provision with Services Directive 2006/123/EC, it could alert the notifying Member State to those concerns, as a result of which the Member State would not be permitted to enact the measure for another three months after the end of the consultation period. If, by the end of this moratorium period, the European Commission had found the draft measure to be incompatible with Services Directive

2006/123/EC, Article 7 of the proposed directive would empower it to adopt a Decision to that effect, requiring the Member State to refrain from adopting the measure or to repeal it. Member States would then have to bring an action before the European Court of Justice against that Decision before they could exercise their legislative rights.

The proposed directive on the proportionality test would lay down an obligation for Member States to conduct such an assessment before introducing new provisions restricting access to or pursuit of regulated professions, or amending existing provisions. The proposal for a directive sets out detailed criteria to be used in assessing the proportionality of all new provisions, regardless of the circumstances of each specific case. The national authorities responsible for enacting the provisions would be required to furnish qualitative and, wherever possible, quantitative evidence to substantiate their view that the planned rules were proportionate.

Proposals for a directive and a regulation have been presented with a view to the introduction of a new facility, the European services e-card. The Member States would be required to accept this card as proof that its holder was established in the territory of his or her home Member State and was entitled, in that territory, to provide the service indicated on the e-card. The services e-card would initially apply to selected business services, such as those of architects, engineers, accountants and tax consultants, to the construction industry, including specific trades, and to other service entities which are not specifically regulated in Germany, such as travel agencies. Each Member State would be required to designate or create a coordinating authority to implement the e-card scheme. Applications for a services e-card would be made to the coordinating authority of the home Member State, which would examine them to verify the completeness of the information provided, the validity of accompanying documents, etc., and would forward them to the coordinating authority of the host Member State. For the provision of temporary services, the e-card would be issued by the coordinating authority of the home Member State if the host Member State raised no objections within four weeks of receiving the application. In the case of an application for permanent establishment, the host Member State would have six weeks to identify any approval and registration requirements that might apply and ask the applicant to submit the requisite proof of compliance. In so doing, the host Member State would have to take account of requirements with which the applicant had already complied in the home Member State, provided that these were equivalent to the approval and registration requirements of the host state. On receiving proof of compliance, the latter would have one week to examine the documentation. If the host Member State did not respond within the relevant aforementioned time limit, the services e-card for which the application was made would be deemed to have been issued (notional authorisation). It would not be possible for a services e-card which was valid for an indefinite duration to be revoked on account of circumstances that could have been verified at the time of application. No additional requirements, such as prior approvals or registrations, could be imposed on holders of issued services e-cards. The service provider's use of the card would be voluntary. It would cover the entire territory of the host Member State.

This package of measures relating to service provision is a means by which the European Commission intends to implement its single-market strategy (COM(2015) 550 final, Council document 13370/15). In its opinion on that strategy (Bundestag printed paper 18/8867), the Bundestag welcomed in principle the European Commission's aim of deepening the single market but at the same time called on the Commission:

- to ensure that the announced provision of assistance by the European Commission for the transposition of single-market provisions into national law is left on a voluntary basis;
- in connection with the reform of the notification procedure under the Services Directive, to provide a comprehensive justification for the introduction of a moratorium in the notification procedure and to explore its implications fully with the Member States; it remains the case that the legislative process must not be unduly retarded and that no additional red tape should be created;
- to design the services card in such a way that it results in a reduction of bureaucratic formalities for cross-border activities; the services card must not actually create more red tape or lead to host Member States being unable to make warranted expectations of service providers.

The Bundestag has now tested the measures in the services package against the principles of subsidiarity and proportionality. The further substantive examination of the proposals, on the other hand, has not yet been completed. In particular, it is questionable whether the obligation to establish a national coordinating authority in connection with the proposed services e-card is compatible with the federal system of government in Germany and the constitutionally prescribed distribution of powers and responsibilities. The fact is that competence for applying laws and issuing authorisations lies, in principle, with the *Länder*.

On the compatibility with the principles of subsidiarity and proportionality of the proposals presented in the package of measures relating to service provision, the Bundestag notes:

I. The proposal presented by the European Commission for a directive on the notification procedure breaches the principles of subsidiarity and proportionality as enunciated in Protocol No 2 to the Treaty of Lisbon. Under Article 6 of the said Protocol, national parliaments may present a reasoned opinion stating why they consider that the draft of a legislative act does not comply with the principle of subsidiarity. The Bundestag follows a broad interpretation of the assessment criteria to be used for this purpose, considering them to include the choice of legal basis and compliance with the subsidiarity principle in the narrower sense as defined in Article 5(3) TEU as well as with the proportionality principle as defined in Article 5(4) TEU (cf. Bundestag printed papers 17/3239, 17/8000 and 17/11882).

1. The proposal cannot have its legal basis in any of the provisions enshrined in the EU Treaties.

a. Article 53(1) TFEU, which is cited by the European Commission, merely permits the issuing of directives for the mutual recognition of diplomas, certificates and other evidence of formal

qualifications and for the ‘coordination’ of Member States’ provisions. A preventive scrutiny reservation on all service-related provisions, however, goes far beyond pure coordinating activity in connection with the mutual recognition of diplomas.

b. Article 114 TFEU, which is also cited by the Commission, is likewise unable to serve as a basis for the proposed directive. It is the settled case law of the European Court of Justice that Article 114 TFEU does not confer general competence on the Union legislature to regulate the single market. On the contrary, a legislative act adopted on the basis of Article 114 must actually contribute to the elimination of existing obstacles to the completion of the internal market or to the elimination of appreciable distortions of competition (cf. ECJ judgment of 5 October 2000 in Case No C-376/98). The present proposal, moreover, confines itself to the assertion that “the notification procedure 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 does not contain any evidence to substantiate this assertion.

c. In addition, there are doubts as to the compatibility of the proposed directive with the principle of democracy, which is cited in the first sentence of Article 2 TEU as one of the values on which the European Union is founded. In view of the broad scope of the proposed directive, every parliamentary activity bearing any relation to services would be subject in future to approval by the European Commission. In other words, under the proposed directive, democratically legitimised parliaments would be subjected to scrutiny by the European Commission, an executive institution.

d. Lastly, the proposed directive would invert the relationship between the Commission and the Member States which is regulated in the EU Treaties. Under the Treaties, if the European Commission believes that a Member State has infringed any provision of the Treaties, it may seize the European Court of Justice of the matter after conducting its own preliminary procedure. The proposed directive, by contrast, would require Member States to bring an action before the European Court of Justice to overturn an adverse decision of the European Commission before they could exercise their right to legislate. Fundamental changes to this relationship of the sort envisaged in the proposed directive would require a Treaty amendment.

2. There are serious doubts about the proportionality of the proposed directive. The proportionality principle as enunciated in Article 5(4) TEU states that the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. To be consistent with this principle, draft legislative acts must be suitable, necessary and proportionate.

a. The argument against the necessity of the proposal is that procedures for reviewing national legislation for compatibility with EU law already exist in the forms of infringement proceedings and the EU Pilot procedure. The European Commission does not explain convincingly why these procedures do not suffice. Nor is an adequate case made for the alleged need to tighten the

existing notification procedure and to convert it into an authorisation procedure, and an inadmissible one at that.

b. Further doubt is cast on the proportionality of the proposed directive by the absence of provision for exemptions. This makes it impossible for legislatures to respond rapidly in urgent cases to abuses in the service sector. The implications would be particularly serious if the end of an electoral term were imminent and the notification procedure so delayed the legislation that it could no longer be adopted before Parliament was dissolved, and the legislative project therefore fell victim to discontinuity.

II. In the opinion of the Bundestag, exercising its right under Article 6 of Protocol No 2 to the Treaty of Lisbon, the proposal presented by the European Commission for a directive on the proportionality test breaches the principles of subsidiarity and proportionality.

1. The proposal cannot be based on any provision enshrined in the EU Treaties.

In the realm of regulated professions, the legislative competence of the European Union is derived from its power to enact directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications and to coordinate the Member States' legal and administrative provisions. The Community rules governing these matters have now been consolidated in Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU. The issue of regulating professions is also closely associated with considerations of vocational-training policy. In the field of vocational training, Article 165(4) TFEU prohibits any harmonisation of the Member States' laws and regulations. This is why the European Court of Justice, in its pertinent case law on the free movement of persons enshrined in Community legislation, has never challenged the authority of the Member States to regulate professions. Instead, it has ruled that professional qualifications obtained in other European countries must be checked for equivalence with the professional qualifications that are required in the host country.

It follows that any requirements which are made of national decisions on the regulation of professions and which go beyond the general proportionality criteria that may be inferred from primary law, in other words that such decisions must be suitable, necessary and proportionate, are not covered by the conferral of powers to the Community. Against this background, it must be doubted whether there is a sufficient basis of competence to enact this proposed directive.

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

The European Commission has not demonstrated why, given the assessment criteria that are already recognised, further binding criteria are required for the proportionality test. The proportionality test is already prescribed by Article 59(3) of Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU. These criteria correspond to those developed by the European Court of Justice for assessing the proportionality of rules governing the practice of professions.

The Bundestag, moreover, takes the view that other measures which interfere less with the rights of Member States than a directive are feasible. In particular, such measures include a recommendation to Member States that they conduct proportionality tests.

Lastly, the aim of the proposed directive is not commensurate with the additional red tape it would generate and its restriction of the decision-making powers of the national legislature. In Article 6(2) of the draft directive alone, eleven assessment criteria are proposed, and these are supplemented by another ten in Article 6(4). In practice, the large number of assessment criteria is likely to result in a rather mechanical routine in which the relevant lawmakers work their way through the catalogue of criteria, which would hinder instead of promoting a substantive examination of the proportionality of proposed rules.

III. The proposed directive and regulation on the European services e-card raise questions regarding their compatibility with the principle of proportionality.

With regard to the adherence of these draft instruments to the proportionality principle, it is questionable whether the proposed coordinating authority in the home country and the host country is necessary. There is a need to address the question whether the establishment of such an authority would be inconsistent with the 'points of single contact' approach pursued by the Services Directive. Even though optimum adherence to that approach may not always be achieved, it nevertheless seems logical that the authorities of the host country should be responsible for issuing authorisations. Their administrations are able to provide comprehensive information about existing requirements and to follow administrative procedures efficiently.

The planned rules in their current form, moreover, would effectively lead to the introduction of a country-of-origin principle, for the very short assessment periods available to host Member States and the fact that authorisation is deemed to be granted in the event of non-compliance with these time limits would mean in practice that host countries would be issuing the services e-card without actually conducting checks. As a result, national standards, such as those in the realm of social welfare, would be eroded and circumvented. This *de facto* circumvention of national requirements that are covered by existing European legislation likewise raises questions as to whether the means are commensurate with the ends and therefore casts doubt on the proportionality of the proposed measures.

Moreover, in the view of the Bundestag, the relationship between the planned services e-card and the European Professional Card established by Articles 4a to 4e of Directive 2013/55/EU on the recognition of professional qualifications has not been fully clarified. In this area too, duplication of structures must be avoided.

IV. The Bundestag reserves the right to express its views on other aspects of the services package in a separate opinion.

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