



European Services Package

Position Paper of the Bavarian State Government

The Bavarian State Government acknowledges the EU Commission's efforts to improve trade in services within the EU. The package submitted on 10 January 2017, however, far surpasses this goal by both providing questionable interventions in national legislative procedures and creating cost-intensive and human resource-intensive bureaucratic dual structures.

Proposal for a notification procedure¹

According to the proposal, all draft rules relating to services must be submitted to the EU Commission for review before they are adopted. This does not just apply to parliaments, but also to municipalities and other public bodies. The area of application is very broadly defined and can, for example, encompass regulations pertaining to civil law or corporate law. During the review, which may take up to six months and the starting time of which the commission determines, the draft may not be adopted. There are no exceptions for urgent cases or for parliamentary bills or amendments of individual Members of Parliament. At the end of the review, the EU commission can also prohibit the draft from being adopted, thereby further blocking it.

Any violation of this duty to notify leads to the inapplicability of the corresponding regulation. No means of remedy is provided.

Besides being incommensurate with the requirements of Democratic legislative procedures in the Member States, the proposal would lead to massive legal uncertainties. Projects that are unproblematic in terms of contents and materially clear and lawful according to European Law would be rendered inapplicable due to minimal formal violations of the duty to notify.

Nor does the proposal comply with higher-ranking law:

- » The duty to notify de facto results in a situation where the Commission reserves itself the right to final approval, thus placing Democratically legitimised parliaments under the control of the EU Commission - an executive organ.

¹ COM (2016) 821 final.

- » The proposal with its far-reaching interventions in national legislative processes cannot be supported by the cited legal bases. Article 53(1) TFEU merely makes it possible to adopt directives for the mutual recognition of diplomas and, in this context, for the “coordination” of regulations pertaining to the Member States. A legal act adopted on the basis of Article 114 TFEU must actually contribute to the elimination of existing barriers in the completion of the internal market or eliminate noticeable distortions of competition². In comparison, merely demanding harmonization of national regulations, as the EU Commission aspires to do with its proposal, is not enough. The EU is not entitled to a general competence to regulate the internal market.
- » Nor does the proposal comply with the principle of proportionality. Even if there were deficits in execution in the current notification procedure in individual Member States, this would indicate a need for informal Commission guidelines or– as provided in Article 258 TFEU –infringement proceedings.

CONCLUSION

The proposal should be withdrawn. At the very least, however, the following amendments are necessary:

- » Introduce a provision for exceptions in urgent cases and for legislative acts of mere local relevance, as well as of a means of remedy.
- » Amend the draft to the effect that non-notification does not lead to inapplicability.
- » Eliminate the blocking power of the Commission.
- » Select a suitable legal basis.

Proposals for the introduction and establishment of a European services e-card³

The proposals call for the introduction of a new instrument to promote the freedom of services (a so-called “Services Card”) in the construction industry, as well as in other service sectors. The holder of a Services Card should no longer need any other approval or registration of their services in the

² cf. ECJ decision of 5 October 2000, Case No. C-376/98, Federal Republic of Germany vs. European Parliament and Council of the European Union.

³ COM (2016) 824 final and COM (2016) 823 final.

host Member State or be subject to any requirements that had to be reviewed beforehand.

The Services Card is to be issued by a central national coordinating authority. The approval is deemed to be given if the authority does not refuse granting of the Services Card by a short deadline.

The Bavarian State Government views the proposal critically and rejects it in this form. In any case, it needs to be significantly revised:

» Review deadlines and the approval fiction:

The decision-making power that the proposal allows the host Member State will be rendered meaningless. With review deadlines partially of only one week, the state will de facto not have time to even review the prerequisites for admission. Combined with the approval fiction, the Services Card can lead to justified requirements of the host Member State being circumvented.

» Establishment of cumbersome parallel structures:

The establishment of a central coordinating authority contradicts the federal state structure of the Federal Republic of Germany. At the same time, it contradicts the system of single points of contact – introduced just a few years ago. Now – ultimately for the same purpose and as a cumbersome parallel structure – a completely new system with a coordinating national authority is supposed to be set up again.

» Incompletely developed procedures:

The procedures for issuing a Services Card vary, depending on whether one is dealing with a cross-border service or a subsidiary. This makes implementation in the Member States difficult and can appear irritating to service providers, thereby hampering acceptance of the Services Card.

CONCLUSION

The proposal should be withdrawn. At the very least, though, it must be fundamentally revised, particularly with regard to the following points:

- » Selection of realistic review and processing deadlines.
- » Elimination of the approval fiction.
- » Clarification of the relationship between the planned Services Card and the established system of single points of contact in order to prevent the development of cumbersome parallel structures.
- » Harmonisation and simplification of procedures.

Proposal for a proportionality review⁴

According to the proposal, all regulation projects relating to access to or the exercise of regulated professions must undergo a comprehensive proportionality review in which independent control agencies participate. For this purpose, in addition to comprehensive procedural specifications, the proposal establishes a total of 21 individual criteria that must be reviewed, substantiated in detail and proved by qualitative and quantitative evidence for every project. The resulting red tape is by no means commensurate with the potential benefits. This holds true all the more when considering that the review obligation also includes legal provisions that have already been adopted and must be carried out continuously.

This cost-intensive bureaucratic procedure does not appear to make sense: The mobility of independent self-employed persons and dependent employees is guaranteed by the Directive on the Recognition of Professional Qualifications. Article 59(3) of this directive, which was inserted in November of 2013, already provides for a uniform legal framework that national lawmakers have had to review and observe since the transposition deadline lapsed on 18 January 2016.

If the proposal regarding the proportionality review, which has now been presented not even one year after the transposition deadline lapsed, states that "approximately one third of the proportionality reviews have still not been carried out," this can perhaps also be attributed to the difficulties inherent to the introduction of new procedures. These can readily be countered by recommendations of the Commission and do not justify the introduction of additional procedures.

CONCLUSION

The proposal should be withdrawn. The EU commission can adopt assistance in carrying out the proportionality reviews in the form of recommendations to the Member States – insofar as an evaluation of Article 59(3) of the professional qualification directive actually produces a need for action. At the very least, though, the following should be ensured:

- » the criteria to be reviewed will not go further than the restrictions imposed on the Member States in the regulation of professions by European Law and the ECJ and
- » only new requirements and, in case existing requirements are changed, only the introduction of new restrictions will be subject to a duty to review.

⁴ COM (2016) 822 final.