Bundesrat **Official Document 6/17 (Decision)**

10.03.17

Decision
Of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council 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

In its 954th session on 10th March 2017 the Bundesrat adopted the following Opinion pursuant to Article 12, Letter b, TEU:

1. The Bundesrat is of the opinion that the draft Directive in its current form does not comply with the subsidiarity principle as laid out in Article 5, Sub-section 3, TEU and with the proportionality principle as laid out in Article 5, Sub-section 4, TEU. The draft Directive contains a procedure that leads to preemptive scrutiny, to be conducted solely by the Commission, concerning the compatibility of national law with EU law. The changes to the existing notification procedure that are envisaged in the draft Directive constitute a substantial encroachment on the prerogatives of national sovereignty and it is highly questionable whether these changes are compatible with democratic principles.

2. To date the Member States have only been obliged to notify new national provisions falling within the ambit of the EU Services Directive 2006/123/EC (Services Directive) pursuant to the provisions of Article 15, Sub-section 7 and Article 39, Sub-section 5, Sub-sub-section 2. In particular, the existing notification procedure does not prevent Member States from adopting the

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provisions in question and bringing them into force immediately. The draft Directive envisages that a three-month standstill period will always apply before national draft legislation can be adopted (Article 3, Sub-section 3 and Article 5, Sub-section 2 of the draft Directive). No exceptions are envisaged, for example for urgent cases, for draft legislation proposed by parliament or for draft amendments from parliamentarians. The Member States will henceforth be obliged, as part of a prior scrutiny process, to provide comprehensive substantiation of the draft provisions to be notified and must provide tangible evidence that the provisions are proportionate (Article 3, Sub-section 5 of the draft Directive). Breaches of the notification obligation shall constitute a substantial procedural defect of a serious nature as regards its effects vis-à-vis individuals (Article 3, Sub-section 4 of the draft Directive), which will preclude application of the provision in question. Should the Commission consider that the draft provisions are not compatible with the Services Directive, it may adopt a Decision (Article 7 of the draft Directive) requiring the Member State to refrain from adopting the measure in question or to repeal it.

3. The Bundesrat takes the view that the proposed Directive gives rise to concerns in terms of its compatibility with the principle of democracy, which numbers among the fundamental values of the EU pursuant to Article 2, Sentence 1, TEU. In the light of the proposed Directive's broad scope of application, any parliamentary activity with a link to services will in future be subject to prior approval by the Commission. That means that democratically legitimated parliaments will be placed under the control of the Commission - an executive body - as a consequence of the draft Directive. This would undermine Member States' legislative powers and responsibilities in the field of services.

4. The question of EU competence in a particular policy area also falls within the scope of issues examined in reasoned opinions on the non-compliance of a legislative act with the principle of subsidiarity pursuant to Article 12, Letter b, TEU - c.f. on this point the Bundesrat Opinions of 9th November 2007, BR Official Document 390/07 (Decision), Section 5, of 26th March 2010, BR Official Document 43/10 (Decision), Section 2, and of 16th December 2011, BR Official Document 646/11 (Decision), Section 2. The subsidiarity principle concerns the exercise of powers and responsibilities. There is also a breach of the subsidiarity principle if EU action is envisaged in a policy area

that does not fall within the scope of EU competences. Scrutiny of compliance with the subsidiarity principle must therefore in the first instance examine whether there is a legal basis for the EU to take action in the policy area(s) pertaining to the measures envisaged.

5. The draft Directive states that it is based on Article 53, Sub-section 1 in conjunction with Article 62, TFEU and on the Single Market competence enshrined in Article 114, TFEU. Article 53, Sub-section 1, TFEU however authorises only adoption of Directives on mutual recognition of certificates and on “coordination” of Member States’ provisions. Pre-emptive prior scrutiny for all provisions pertaining to services extends far beyond purely coordination-related activities in connection with mutual recognition of certificates. Article 114, TFEU cannot provide a legal basis either: pursuant to the ECJ's established case law, Article 114, TFEU does not accord the European Union legislator general powers and responsibilities to adopt provisions governing the Single Market. A legislative act adopted on the basis of Article 114, TFEU must instead genuinely contribute to overcoming existing barriers to the establishment of the Single Market or eliminate significant distortions of competition (c.f. ECJ, Judgement of 5th October 2000, Case C-376/98, Federal Republic of Germany v. European Parliament and Council of the European Union). With reference to the present issue, it has neither been demonstrated nor is it apparent that any specific imminent measures envisaged by Member States could justify such a grave encroachment on the regulatory powers and responsibilities of national legislators. The proposed Directive merely states that the measures envisaged 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”. Article 114, TFEU does not provide authorisation for the EU to adopt such measures.

6. Furthermore, allocating the Commission responsibility for deciding whether proposed measures are compatible with the Services Directive signifies intervening in the relationship between the European institutions as enshrined in EU treaty provisions, in such a manner as to alter the nature of this relationship. The TFEU contains nuanced, detailed regulations on treaty infringement proceedings, which in practice and intent are tantamount to

binding ex-post "scrutiny of legislation" by the ECJ. In this context the Commission may, pursuant to Article 258, TFEU, initiate infringement proceedings against a Member State if the Commission considers that the Member State has failed to comply with a treaty obligation; in such proceedings the ECJ ultimately determines whether there has been a breach of EU law. Treaty amendment would be required to effect the fundamental changes to this relationship that are envisaged in the draft Directive.

7. Furthermore the proposal is also not compatible with the proportionality principle. Pursuant to Article 5, Sub-section 4, TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. In particular such action must be necessary and appropriate.

8. The objective of the draft Directive is more effective scrutiny of Member States' legislation in the realm of the EU Services Directive and improved enforcement thereof. However, there are already procedures for legally binding scrutiny of national legislation's compatibility with EU law (infringement proceedings). The Commission does not provide a convincing substantiation of the need for action. In addition, the Commission does not give a sufficiently comprehensive explanation as to why the existing notification regime should be made more stringent. There is no robust evidence to support the Commission's assertion that the existing notification procedure is inefficient.

9. The proposal constitutes a significant encroachment on the sovereignty of the Member States, by placing constraints on national legislative procedures, imposing substantial obligations to provide evidence and introducing a requirement for prior Commission approval of planned national measures. In particular in the light of these considerations, the Bundesrat also deems the draft Directive to be disproportionate.

10. In conclusion, the proposed changes will lead to considerable increased administrative effort at the level of the Member States without offering any added value. It is merely asserted that the associated costs would be offset by savings on the expense of infringement proceedings.