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AK Position Paper

Directive on a proportionality test before adoption of new regulation of profession

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Christoph Klein
Director

Executive Summary

National scope for action would be severely restricted by the proposed directive on a proportionality test before adoption of new regulation of professions. It would significantly limit the possibility for the public administration of the given Member State to respond quickly to country-specific issues if action is needed. Instead, the new provisions would significantly increase the administrative burden.

Pursuant to Article 6 (2), eleven criteria would have to be considered when assessing the necessity and the proportionality of new legislative, regulatory or administrative provisions, or the amendment of existing provisions. A further ten criteria are set out in Article 6 (4). The set of criteria is far too extensive. Furthermore, some of the criteria challenge the legitimate interests of employees and consumers.

In the BAK's opinion, the proposed directive is in conflict with the principle of proportionality. Moreover, the proposed directive does not provide any additional benefit, since even now individuals can freely select the Member State in which to pursue their commercial activities. They are subject to the same rules on regulated professions as all other individuals in the given Member State. They are neither restricted in their mobility, nor discriminated against. The BAK therefore rejects the proposed directive.

The AK's position in detail

The proposal for a directive on a proportionality test before adoption of new regulation of professions is part of the "services package", which includes the proposal for introduction of a European services e-card and a notification procedure for national regulations related to services. The BAK rejects both proposals because they provide no apparent additional benefit, because of concerns about pseudo-self-employment, wage dumping and social dumping, and due to interference with the sovereignty of the Member States.

"Regulated professions" are understood as activities where a specific professional qualification and training are required. However, national legislation (such as the Austrian Trade, Commerce and Industry Regulation Act (GewO)) not only governs the right for self-employed persons to practise certain professions, but also contains provisions that protect the legitimate interests of employees and consumers, including provisions that restrict access – in order to protect health, lives, safety and assets, a business licence for certain professions cannot be obtained without providing evidence of training or professional experience. Provisions that come under the broad term of "requirements" used in the proposed directive and that may likewise serve to protect the public – such as requirements applicable to free promotional trips during which goods are offered for sale to participants – also fall into this category. It is therefore certainly necessary to provide for regulation.

The regulation of professional services is a prerogative of the Member States. They are entitled to decide whether there is a need to impose rules and restrictions for access to regulated professions.

Article 46, Article 53 (1) and Article 62 of the Treaty on the Functioning of the European Union (TFEU), however, also provide for the possibility of issuing directives for coordination of the laws and regulations of the Member States to facilitate the take-up and pursuit of self-employed activities. Moreover, Directive 2013/55/EU facilitates the greatest possible transparency, mutual evaluation and improved information about regulated professions.

The proposed directive that has now been published would require Member States to conduct a proportionality test according to the set of criteria specified in the directive before adopting national regulations on professions. That requirement also extends to amendments to existing provisions.

National scope for action would therefore be severely restricted. The possibility for Member States to respond quickly to country-specific issues if action is needed would be significantly limited. The CJEU and the Austrian courts would be bound by the fixed criteria of the new test framework in their future case-law. In addition, the new provisions would significantly increase the administrative burden.

Remarks on specific articles and recitals

Ex-ante assessment of new measures:

- Pursuant to Article 4 (1), even very minor amendments would require assessment. That is disproportionate. Existing provisions and amendments should not come under the scope of the directive.
- In Article 4 (3) it is not clear what the European Commission accepts as evidence. In some fields, evidence may not be possible. We therefore recommend the deletion of this passage (together with Recital 9).
- Pursuant to Article 4 (5), independent scrutiny bodies should be involved in the assessment. It is not clear what form the Commission intends such scrutiny bodies to take. Such scrutiny bodies would place an additional burden on the Member States. It is debatable to what extent the provision, which governs a national procedure, is in conflict with the exclusive competence of the Member States and should therefore be deleted.

Justification on grounds of public interest objectives:

- With respect to Article 5 (2), the BAK wishes to note that it should be ensured throughout the legislative process that grounds for justification are only listed by way of example, since otherwise the reasoning of the case-law of the CJEU or national courts might be restricted.

Proportionality:

Pursuant to Article 6 (2), eleven criteria would have to be considered when

assessing the necessity and the proportionality of new legislative, regulatory or administrative provisions, or the amendment of existing provisions. A further ten criteria are set out in Article 6 (4).

The fixed criteria, which in some cases extend beyond the case-law of the CJEU, not only severely restrict the scope of action and scope of assessment of the respective national legislatures but, together with the involvement of additional scrutiny bodies and the requirement for quantitative and qualitative evidence, pose an additional bureaucratic burden, without proportionate additional benefit.

- Pursuant to Article 6 (2) lit c, the relevant competent authorities should consider whether existing rules, such as product safety legislation or consumer protection law, are sufficient to protect the objective pursued. It should also be noted that, from a consumer perspective, accompanying provisions are required, such as those set out in the Austrian Trade, Commerce and Industry Regulation Act (GewO), to prevent negative impacts on consumers by all available means.

For example, a provision is required in the Austrian General Civil Code (ABGB), stating that debt collection costs must be proportionate to the collected debt and must be necessary and relevant to the purpose. However, restricted access to practising the profession of debt collection is also necessary. We therefore reject Article 6 (2) lit c from a consumer perspective.

- In view of the diversity of and differences between education and training systems within Europe, Article 6 (2) seeks to establish criteria that would ensure proportionality between a specific activity and a specific professional qualification. A fairly general requirement for the link between the “scope” of “activities” and the “professional qualification required” to be considered is set out in lit. d, while lit. e refers to consideration of proportionality of the “complexity” of the “tasks” and the necessary possession of “specific professional qualifications”, as defined by “the level, the nature and the duration of the training or experience required, as well as the existence of different routes to obtain the professional qualification”.

The BAK wishes to note that some of the terms used in lit. d to f can barely be distinguished from one another. In addition, there are considerable similarities between the content of the various criteria. That merely contributes to the ambiguity and confusion. Moreover, there is widespread agreement among researchers and policy-makers in the field of European vocational training that information about the level, type, duration and nature of the training can only provide valid information about the actual knowledge, skills and abilities of those who have completed the training to a limited degree. The BAK therefore recommends that the principle of “focus on learning outcomes” should be used in addition or as an alternative. The legal and methodological framework for that is set out in the EQR recommendation, “Recommendation of the European Parliament and of the Council on

the establishment of the European Qualifications Framework for life-long learning” (2008/C 111/019).

- In the BAK’s option, Article 6 (2) lit. i should be deleted, because it is not an assessment criterion per se. Impact on the free movement of persons and services within the Union is a prerequisite for a Member State to be required to conduct a proportionality test.
- Article 6 (3) states that, where the risks concern the relationship between the professional and the consumer, the relevant competent authorities shall assess in particular whether the objective can be attained by less restrictive means, such as by protected professional title. However, it is not clear at all how a protected professional title would suffice to prevent potential damage to the health, lives or assets of consumers. This paragraph should therefore be deleted.
- Pursuant to Article 6 (4) lit. d, compulsory chamber membership, registration or authorisation schemes, in particular where those requirements imply the possession of a particular professional qualification, should also be assessed. However, the fact that mandatory membership is tied to registration of a business, rather than a professional qualification, is entirely overlooked. Nor is consideration given to the fact that the professional chambers perform numerous public tasks, such as supervision of compliance with professional duties and quality control. It should also be noted that not only the members of the profession concerned, but also other sections of

the population, benefit significantly from membership of professional chambers. For example, mandatory membership of the Austrian Federal Economic Chamber ensures that over 90% of employees in Austria are covered by a collective agreement. Moreover, mandatory chamber membership for companies ensures that trade unions have a representative negotiating partner. We therefore firmly reject the attempt of the Commission to present mandatory chamber membership as a potential burden. Article 6 (4) lit. d should be deleted.

- The territorial restrictions, in particular where the profession is regulated in parts of a Member State's territory in a different manner, referred to in Article 6 (4) lit. g are justified in countries with a federal structure. In contrast to the entirely centralised approach of the European Commission, these take regional circumstances and differences into account.

According to the proposal of the European Commission, such a proportionality test (see Article 4 (1)) would be required even for the modification of maximum rates or changes to the training curricula for professions subject to the Austrian Trade, Commerce and Industry Regulation Act (GewO). Even temporary legislation, such as the Austrian Petrol Station Regulation, would have to be reassessed according to the provisions of the directive if the measures are extended in time.

Information for stakeholders:

- It is unclear what form of information the European Commission is thinking of in Article 7. Are the existing systems in the Member States sufficient?

Concerning Recital 15:

- Finally, with respect to Recital 15, it should be noted that ex-post measures are not necessarily a better option than ex-ante regulation. This recital should therefore be deleted.

Overall, it should be noted that the set of criteria for the proportionality test is far too extensive and would therefore entail considerable bureaucracy. The proposed directive is therefore in conflict with the Commission's aim of better regulation for the purpose of greater efficiency and a reduced administrative burden.

Summary

In the BAK's opinion, the proposed directive clearly runs counter to the principle of proportionality. Even now individuals can freely select the Member State in which to pursue their commercial activities and are neither restricted in their mobility, nor discriminated against. They are subject to the same rules on regulated professions as all other individuals in the given Member State or region. There is therefore no need for this directive.

For the aforementioned reasons, the BAK rejects the proposal for a directive on a proportionality test before adoption of new regulation of professions.

Should you have any further questions
please do not hesitate to contact

Frank Ey

T: +43 (0) 1 501 65 2768
frank.ey@akwien.at

and

Petra Völkerer

(in our Brussels Office)
T +32 (0) 2 230 62 54
petra.voelkerer@akeuropa.eu

Bundesarbeitskammer Österreich

Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

AK EUROPA

Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73