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On the European Commission consultation on the regulation of professions: proportionality and Member States' National Action Plans

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The Bundesrechtsanwaltskammer (The German Federal Bar, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 164,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

1. Preliminary remarks

On 28 October 2015 the European Commission published its new Single Market Strategy for goods and services in which it expressed, among other things, its intention to support the Member States in their efforts to modernize the regulated professions while maintaining existing quality standards and taking into consideration proven traditions.

In order to do so the European Commission proposes two measures. Firstly, it intends, through periodic guidance, to identify the individual Member States' reform needs and to make concrete reform proposals. This exercise is to be based on the mutual evaluation of the regulations regarding the access to and the exercise of the professions which was carried out in the framework of the transparency initiative. In the framework of this initiative, the individual Member States have established action plans which show if and how they evaluate their national professional regulations and if they want to change them.

The second proposed measure concerns proportionality assessments of existing and planned professional regulations in the services sector. The European Commission intends to provide an analytical framework for Member States to use in this exercise.

With respect to these two measures the European Commission launched a public consultation on 27 May 2016: "Regulation of professions: proportionality and Member States' National Action Plans". In addition to its response to the questionnaire, The German Federal Bar submits the following complementary comments.

2. Position

The German Federal Bar welcomes the European Commission's objective to improve the cross-border provision of services through the present Single Market Strategy for goods and services. It emphasizes the fact that existing quality standards have to be maintained and that proven traditions have to be taken into consideration.

2.1 National Action Plan Germany

Within the framework of Article 59 of the revised Directive on recognition of professional qualifications (Directive 2005/36/EC), the EU Member States, including the Federal Republic of Germany, have undertaken to review not only the free movement of professionals, but also of domestic regulations (transparency initiative). The German Federal Bar welcomes the fact that this initiative aims at achieving a serious assessment of the advantages of existing regulations on the one hand and possible advantages of the abolishment of excessive regulatory restrictions on the other.

The German Federal Bar would like to point out that the regulations on access to and exercise of the profession of lawyer in Germany are evaluated regularly and that the regulations' impact on the market and on quality assurance and consumer protection are reviewed regularly and comprehensively. This is already a requirement under the German constitution, as demonstrated by the judgments of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) of 14.01.2014 (1 BvR 2998/11, 1 BvR 236/12) and 12.01.2016 (1 BvL 6/13) regarding the regulations pertaining to the exercise of the legal profession, which are referred to in the National Action Plan Germany.

The judgment of 14.01.2014 concerns the German regulation regarding shareholding requirements and the exercise of voting rights in *Rechtsanwaltsgesellschaften* and *Patentanwaltsgesellschaften* in the legal form of a *Gesellschaft mit beschränkter Haftung* (GmbH), i.e. a limited liability company, or an *Aktiengesellschaft* (AG), i.e. a public limited company, according to which the majority of shares and voting rights must be held, respectively exercised, by the professional group after which the grouping is named. The BVerfG found these requirements to be inadmissible where *Rechtsanwaltsgesellschaften* and *Patentanwaltsgesellschaften* are concerned. In its reasoning, the Court stated that the professional law applying to lawyers was broadly in accordance with the law applying to patent lawyers. In its judgment, the Court underlines the great importance of the lawyers' independence. In a multidisciplinary collaboration between lawyers and patent lawyers this independence is not at risk since the members of both professions not only deal equally with legal advice and representation, but because they are aware that their respective professional law underlines the importance of professional independence in their field of activity.

With the second judgment of 12.01.2016, the BVerfG declared inadmissible the prohibition of professional collaboration between lawyers and pharmacists or doctors since these professions are subject to similar obligations prescribed by their professional laws as are the other professions which are permitted to practice jointly with lawyers (patent lawyers, tax consultants and auditors).

Multidisciplinary associations between lawyers and other professions which are enumerated in § 59a of the Federal Lawyers Act (*Bundesrechtsanwaltsordnung*, BRAO) have been permitted in Germany ever since the Federal Lawyers Act was adopted in 1959. The precondition for joint practice with non-lawyers is that the other professions are subject to similar professional duties as lawyers. This is the only way to protect the lawyers' clients from an interference with the lawyers' independence, violations of the obligation of professional secrecy and violations of the prohibition to represent conflicting interests. This is the only way to ensure an effective protection of the client.

The German Federal Bar takes the view that the aforementioned case law of the BVerfG should also be used as a basis for the assessment of any possible forms of association between lawyers and non-lawyers as well as forms of outside capital participation, including so-called Alternative Business Structures. For the restriction to certain professions is justified by the concern for the common good and thus by an overriding requirement relating to the public interest. German lawyers are prohibited – and rightly so - to practice jointly with professionals who are not subject to their own professional obligations to ensure independence and to avoid conflicts of interest; who do not have the right to refuse to give evidence and whose documents are not exempt from confiscation. This differentiation between authorized collaboration with certain professions on the one hand and the prohibition of professional collaboration with members of any other professions, is justified since it is the only way to protect the lawyers' clients effectively from any kind of interference.

The German rules on access to and exercise of the legal profession are – not only with respect to multidisciplinary collaboration – more liberal than in most other EU Member States. For example, in Germany, lawyers can choose to practise in the framework of all legal forms of partnerships (*Personengesellschaft*) and corporate entities (*Kapitalgesellschaft*), with the exception of the

Kommanditgesellschaft. This applies *mutatis mutandis* to similar companies formed under foreign law. In particular, a legal form provided under English law, the LLP, is a common legal form found in Germany. Not only European lawyers who practice their profession in this legal framework in the LLP's home country can use it. German lawyers, too, can form an LLP abroad and then practice within this structure in Germany.

2.2 Proportionality in regulation

The second part of the consultation concerns the analytical framework used to assess the proportionality of existing and future regulations in the Member States' legislation.

In this context, The German Federal Bar would like to stress that not only the Member States' regulations *sub specie* potential effects on fundamental freedoms, but also the EU's actions *sub specie* the Member States' legislative competence according to the Treaties, have to pass the proportionality test.

Articles 49 (1) and 56 TFEU prohibit restrictions on the freedom of establishment and on the freedom to provide services. Pursuant to Article 49 (2) TFEU, freedom of establishment is granted by giving self-employed persons the right to take up and pursue their activities **under the conditions laid down for the host country's own nationals**. Pursuant to Article 57 TFEU the prohibition of restrictions on the freedom to provide services is implemented by granting persons providing a service the possibility to temporarily pursue their activity in another Member State **under the same conditions as are imposed by that State on its own nationals**.

With regard to the relation between the Union and the Member States, the proportionality principle is codified in Article 5 (4) TEU. According to this article, Union action must not exceed what is necessary to achieve the objectives of the Treaties. Article 5 (4) TEU is an independent third step in a three-step assessment of proportionality, together with the principle of conferral set out in Article 5 (2) TEU and the subsidiarity principle in Article 5 (3) TEU. In the framework of Article 5 (4) it is verified whether EU action is appropriate, required and necessary. When assessing the appropriateness of a particular EU action, it is examined whether the action does not obviously appear inappropriate to achieve the objective. An action is required when the objective cannot be achieved as effectively by other actions which affect the good that needs to be protected to a lesser extent. It is thus examined whether the proposed action is the "mildest" action. Finally, when assessing if a proposed action is necessary, the action's benefit for the public is weighed against the restrictions of protected EU citizens' rights.

Another codified regulation of the proportionality principle with regard to restrictions of EU citizens' rights caused by the application or implementation of EU law can be found in Article 52 (1), second sentence, of the Charter of Fundamental Rights. It states that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". On this point the Court of Justice held that national measures only qualify as compliant with fundamental rights if they "do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued" (CJEU 10 March 2005, C-96/03).

A first approach to testing the proportionality principle with regard to interference with fundamental freedoms caused by differing legal systems in the EU Member States can be found in early CJEU case law. The Court of Justice rightly posits that the Member States have to accept the competence conferred on them pursuant to Articles 49 (2) and 57 TFEU while taking into consideration the prohibitions set out in Articles 49 (1) and 56 TFEU. With regard to an assessment of the legitimate objective of regulations

which may render the exercise of fundamental freedoms more difficult, as well with regard to the assessment of appropriateness, the CJEU confers on the Member States a broad discretion. According to the CJEU's judgment in the *Gebhard* case (CJEU 30 November 1995, C-55/94) national measures which restrict the exercise of a fundamental freedom for overriding reasons relating to the public interest must fulfil four conditions:

1. They must be applied in a non-discriminatory manner;
2. they must be justified by imperative requirements in the general interest;
3. they must be suitable for securing the attainment of the objective which they pursue and
4. they must not go beyond what is necessary in order to obtain it.

Furthermore, the Court of Justice found in the cases of *Alpine Investments* (CJEU 10 May 1995, C-384/93) and *Reisebüro Broede* (CJEU 12 December 1996, C-3/95) that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (*Reisebüro Broede*, para. 42). This was expressly confirmed by the Court of Justice in the *Bogendorff von Woltersdorf* judgment (CJEU 2 June 2016, C-438/14, para. 73).

References to the proportionality principle can also be found in secondary law relating to the freedom to provide services. Article 16 of the Services Directive (2006/123/EC) sets out the Member States' possibilities to limit the freedom to provide services. According to the provisions of Article 16, a proportionality assessment requires that a national requirement must be suitable for attaining the objective pursued and must not go beyond what is necessary to attain that objective. This definition corresponds to the assessment of proportionality according to CJEU case law, so that it can be assumed that the same principles of interpretation apply.

2.3 Lawyers in particular

Regarding lawyers' cross-border provision of services the limitations of the Member States' legislative competence set out in Article 16 of the Services Directive (2006/123/EC) do not apply insofar as the service activities concerned are activities that are reserved to the members of this profession and are exempt from the application of Article 16 of the Directive pursuant to Article 17 (6) of the Directive. Therefore, in derogation of Article 16 (3) of the Directive, as far as the temporary provision of legal services is concerned, the grounds of justification for limiting and hindering free movement recognized by the CJEU apply, such as the protection of the public or consumers and third parties seeking justice, the protection of the legal profession's integrity, the defence of the legal profession's core values and the safeguarding of a functional administration of justice.

With regard to lawyers, exercising the freedom to provide services as well as the freedom of establishment is facilitated by Directives 77/249/EEC and 98/5/EC in a remarkably unbureaucratic way – and is much simpler than for other professions in accordance with the Professional Qualifications Directive. The German Federal Bar attaches great importance to recalling that this liberal regime, which has no equal, neither in the EU as far as other professions are concerned, nor anywhere in the world as far as lawyers are concerned, is made possible in particular by the fact that the regulation of the legal profession is carried by the core values shared by all lawyers across the Member States.

All of the Member States' jurisdictions are based on the conviction that only an independent legal profession can itself guarantee access to justice for the public and businesses, including the effective exercise of rights vis-à-vis the State. All Member States therefore provide for professional quality requirements to be fulfilled as a precondition for access to the profession, and they provide for the professional's duty of independence and for independent Bars to act as guarantors of the individual

professional's independence, when it comes to exercising the profession of lawyer. A common legal tradition is also the source of the professional rules governing the avoidance of conflicts of interest. According to this common tradition, the duty of professional secrecy has to be safeguarded by the professionals' right to refuse to give evidence and by the exemption of their documents from confiscation, so as to protect citizens and businesses. It is only because of this basis of legal principles, common to all Member States, that it was possible to establish the mutual recognition of a European lawyer's admission to the legal profession in another Member State through the Lawyers' Directives 77/249/EEC and 98/5/EC, despite considerable differences prevailing between the national legal regimes.

Where considerable differences regarding the conditions for access to the legal profession do remain – in particular with regard to the important role played by training in the national law of the respective host country – these do not hamper European lawyers' access to the legal services markets of other EU Member States from a legal point of view. It is rather the objective realities such as different languages and a lack of knowledge of the laws to be applied in other Member States which act as barriers.

2.4 Proportionality test in Germany

In Germany, existing and future professional regulations are continuously subject to proportionality tests for constitutional reasons; not only the regulations applying to lawyers, but also those governing other professions. Under German law, every regulation is an interference with the freedoms guaranteed by the constitution. Therefore, every single standard contained in a regulation has to be justified by a legitimate purpose and must always comply with the principle of proportionality in the pursuit of this purpose.

Due to the freedoms guaranteed by the German constitution (Basic Law), limitations of the free choice of an occupation or profession are only permitted where they are absolutely necessary in order to protect particularly important collective goods. Also with regard to constitutional requirements, the freedom to practice an occupation or profession can only be limited insofar as this appears to be useful and proportionate in the light of reasonable public interest considerations. In this regard, the assessment carried out by the German legislator and the courts prior to every action or decision is almost the equivalent of the requirements developed by the CJEU.

It follows from the above that, as far as the planned analytical framework is concerned, it should take up the criteria developed by the CJEU, but should not go beyond. The German Federal Bar welcomes the objective of introducing guidance containing common minimum criteria to assess the impact of regulations. As far as Germany is concerned, The German Federal Bar considers these criteria to be sufficiently precise. However, a uniform set of minimum criteria applied all over Europe would facilitate a comparison of the proportionality tests applied in the individual Member States and thus create more legal certainty.

To conclude, The German Federal Bar would like to refer to the European Parliament's own-initiative report of 26 May 2016 on the Single Market Strategy. In this report, the European Parliament recalls that proportionality requirements are clearly defined in Article 16 of the Services Directive and by CJEU case law. Furthermore, it points out that the fact that one Member State imposes less strict rules than another, does not mean that the latter's rules are disproportionate and therefore incompatible with European Union law.