

Proposal for a Directive on a notification procedure:

Avoid unclear legal consequences for the Member States;

Respect the principles of EU Law

I. Background

The proposal for a directive on a **notification procedure** for authorisation schemes and requirements related to services [COM (2016) 821 final] is part of the Services package of the European Commission presented on 10 January 2017.

Currently, the **trilogue negotiations** on this proposal between the Council, the Parliament and the Commission are under way. One of the disputed questions is if the Commission should be entitled to address **binding decisions** to the Member States **obliging them to refrain** from adopting the concerned regulation or, in case the regulation has already been adopted, obliging the concerned Member State **to cancel** the measure.

II. The problem

The European Tax Adviser Federation points out that such a competence of the Commission to adopt legally binding decisions against a Member State would lead to an **extensive reversal of the burden of proof to the detriment of the Member States**.

This is a controversial question not only in the trilogue but also within the Council. A recent legal opinion from the Legal Service of the Council of 15 May 2018 – due to its contradictory statements – once again produced uncertainty regarding the lawfulness of such a construct and raised fundamental questions about the legal consequences such a binding decision would have – in particular about the further legal action to take if necessary.

On the one hand, the Legal Service declares that a competence of the Commission to adopt binding decisions is in line with European law. On the other hand, however, it states at the same

time that in the case of a legal dispute, the Commission should nevertheless be the one to use the instrument of an infringement procedure in order to seek an assessment by the Court of Justice and to oblige the Member State to cancel the envisaged measure if necessary.

This brings up **two major problems**:

- If the European Commission – in accordance with the principles of EU Law – shall remain the one who takes legal action against a Member State, a binding decision would be a **useless instrument** because the same legal consequence would be triggered as it is the case with a recommendation. Furthermore, this could lead to the undesired effect that the legal instruments provided for in the Treaties (art. 288 TFEU) would be **generally weakened** or treated inflationary if they do not have the legal consequences which correspond to their legal nature.
- Furthermore, this would introduce a manifest contradiction with the Directive on a proportionality test: According to its article 1, it lies within the **competence** and the **discretion of the Member States** whether and how to regulate a profession. A power of the Commission to adopt binding decisions would be contradictory to this principle, because a binding decision would mean that the Commission would be awarded a de facto **legislative competence** vis-à-vis the Member States.

III. The solution

As the Legal Service of the Council correctly observes in its opinion, the Court of Justice of the EU will always have the final say. For this reason, nothing prevents the Commission from seeking an ECJ decision by launching an infringement procedure if the Commission takes the view that there is evidence of an infringement of European law.

However, it would be contradictory – particularly in terms of the legal system – to establish a legally binding decision if this decision would afterwards not entail the corresponding legal effects, especially concerning the further legal action to take.

Therefore, the legal acts of the Commission in this respect should generally be designed as **recommendations**. This would create legal clarity concerning the burden of proof, would avoid incoherence with the overall EU law system concerning the enforcement of legal acts and would avoid legal disputes over purely procedural matters. The Commission's role would nevertheless be strengthened, because the recommendation made to a Member State can serve as a basis for the assessment of the disputed national rule by the Court of Justice.