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CCBE comments on the proposal for a Directive COM (2016) 821 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

31/03/2017

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers.

The CCBE wishes to provide its views regarding the proposal for a Directive COM (2016) 821 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.

1. The CCBE is aware that the proposed notification procedure is meant to follow-up on Article 15 para 7 of Service Directive of December 12, 2006 (2006/123/EC). The CCBE notes that the proposal in toto is subject to objections with respect to a lack of EU competency and subsidiarity. The CCBE does not wish to take a position on these issues. However, the CCBE is of the opinion that the proposal for a services notification procedure in certain respects goes too far.

2. Under Article 258 TFEU, the Commission may bring a case before the CJEU if the Member State in question does not comply with the Commission's reasoned opinion that the said Member State infringes an obligation under the treaties. The burden of litigation is on the Commission, and the Commission, according to the CJEU case law, has certain discretion whether it wants to bring infringement proceedings forward or not.

   Under Article 6 of the present proposal, the Commission may issue an alert to the Member State in question of its concerns over whether a draft measure notified by the Member State to the Commission is compatible with Directive 2006/123/EC (and of its intention to adopt a Decision referred to in Article 7 of the proposal). This is basically in line with Article 15 para 1 of the Directive 2006/123/EC.

   Upon receipt of the foresaid alert, the Member State shall not adopt the draft measure for the period of three months - in other words, the alert triggers a three-month suspension for the adoption of the notified draft measure ("standstill period"). The CCBE wonders why, in comparison to other existing notification procedures such as Directive 2015/1535/EC, there are no exemptions provided in the proposal for urgent national measures to be taken by the Member States.

After issuance of such an alert under Article 6 of the proposal, the Commission, according to Article 7 of the proposal, may adopt a decision finding the draft measure to be incompatible with Directive 2016/123/EC and requiring the Member State concerned to:

(i) refrain from adopting the draft measure or
(ii) repeal it if such a measure has already been adopted in breach of Article 3.3 of the proposal (lack of notification to the Commission at least three months prior to adoption) or of Article 6.2 of the proposal (adoption in spite of the three months "standstill"- effect of the alert by the Commission).

In **alternative (i),** there are no accompanying procedural violations that have occurred on the part of the Member State in question. Solely on the basis of the alleged incompatibility with the Directive 2016/123/EC, the Commission may under Article 7 of the proposal issue a decision requiring non-adoption of the notified draft measure by the Member State in question.

According to Article 7 of the proposal, the mere alleged treaty infringement is a sufficient basis for issuing such a decision. There are no requirements as to the urgency and importance of the matter. Thus, the Commission has the power to interfere with the legislative and executive processes at Member State level. Under the TFEU, it is only the independent CJEU, i.e. the judiciary in the meaning of Montesquieu's separation of powers, that has the authority to judge on the legality of acts by government and parliament. In this respect, the CCBE underlines that according to the existing notification obligation as laid down in Article 15 para 7 of Services Directive 2006/123/EC, notification shall not prevent Member States from adopting the national provisions in question. This is the crucial difference with the new proposal where Member States, even in cases of urgency, are prevented from adopting national provisions.

Article 7 of the proposal in fact shifts the burden of litigation to the Member States by giving the Commission pro tempore judicial powers. This is incompatible with the TFEU and the balance of power that has been found in the TFEU as between EU level and Member State level on the one hand and Montesquieu's separation of powers on the other hand.

In **alternative (ii**), the alleged incompatibility with Directive 2006/123/EC is accompanied by procedural violations. As regards the breach of the notification obligation under Article 3 para 3 of the proposal, the CJEU in CIA Security International (C-194/94) has held that the breach by a Member State of the notification obligation provided for in Directive 83/189 renders the non-notified national measure inapplicable, and that such inapplicability may be invoked by a private party in litigation (so called direct effect). CIA Security International does not give the Commission any rights in this regard.

As regards the breach of Article 6 para 2 of the proposal (adoption in spite of the alert by the Commission), it is likely that such breach on the basis of the CJEU in CIA Security International would have the same consequences.

Based on the CJEU in CIA Security International, the breaches of the procedural obligations under Article 3 para 3 and Article 6 para 2 of the proposal would justify the conclusion that the draft national measure that has been adopted by a Member State in violation of said obligations is inapplicable, and that such inapplicability may be invoked by a private party in litigation (direct effect), just like in the case of CIA Security International. However, it does not justify the Commission invoking the foresaid violation of procedural obligations by a Member State in order to upset the abovementioned balance established by the TFEU as regards the burden of litigation between EU and Member States and the separation of powers between executive and legislative branch.

3. In summary, the CCBE objects to Article 7 of the proposal because, leaving aside the relationship between EU law and national law, it reverses the burden of litigation as established by the TFEU and violates Montesquieu's principle of separation of powers. It is highly questionable whether a court may interfere with a legislative process although it can act only after the law has been enacted. In any case, it is clearly not for the executive branch to interfere with the legislative branch.