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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a proportionality test before adoption of new regulation of professions

(Text with EEA relevance)

{SWD(2016) 462 final}
{SWD(2016) 463 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

A deeper and fairer internal market is a top priority of the Commission: "to put policies that create growth and jobs at the centre of the policy agenda".[1] The European Council considered that "delivering a deeper and fairer Single Market will be instrumental in creating new jobs, promoting productivity and ensuring an attractive climate for investment and innovation"[2]. The significant role of professional services in the EU economy cannot be over-estimated and there are numerous studies demonstrating the untapped benefits to furthering the Single Market in services.

In the absence of harmonised requirements at EU level, the regulation of professional services remains a prerogative of the Member States. It is up to each Member State to decide whether there is a need to intervene and impose rules and restrictions for the access to or pursuit of a profession, so long as the principles of non-discrimination and proportionality are respected. In the majority of cases, regulation is justified and even welcome, as for example when it comes to health and safety issues. However, to ensure regulation is fit for purpose and does not create unjustified burdens, it ought to be thoroughly considered so as to fully appreciate its effect upon stakeholders and the broader business environment. In line with the Commission's jobs and growth priorities, ensuring an optimal regulatory environment is key. This is why steps to introduce an ex-ante 'proportionality test' when reforming the regulation of professional services was announced under the Single Market Strategy[3].

The right to work in the sense of the freedom to pursue one's chosen profession or to conduct a business is enshrined in the Charter of Fundamental Rights of the EU. The key benefits of the EU Single Market include the freedom of establishment and the freedom to provide services. Limitations to these freedoms are particularly burdensome for SMEs to overcome. As such, regulatory measures must be duly justified as achieved through a thorough proportionality assessment.

'Regulated professions' refer to activities where a specific professional qualification is required and such professions are present throughout all sectors of the economy. Over time different regulations have been introduced by each Member State reflecting long established traditions, either in the form of State regulation or as self-regulation by professional associations. Generally there have been good reasons for regulation, based on the need to protect essential public interest objectives and this brings value to society by, for example, clarifying the technical knowledge, training and competences which professionals should have to ensure citizens are protected. However, inappropriate regulation can place a burden on the professional, business and consumer; these burdens can include disproportionate qualification requirements, extensive reserved activities, compulsory membership in professional associations or other measures. In this regard, the Court of Justice has consistently held that, even if applied without any discrimination, national regulation of professions and any requirements concerning qualifications are liable to hinder or make less

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1 https://ec.europa.eu/priorities/index_en.

2 http://www.consilium.europa.eu/en/press/press-releases/2016/06/28-euco-conclusions/.

3 https://ec.europa.eu/growth/single-market_en.

attractive the exercise of fundamental freedoms by EU citizens and companies, guaranteed to them by the Treaty[4]. The Court also held 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 incompatible with EU law. It is for the Member States to assess on a case-by-case basis, taking into account the entirety of the regulatory context for that profession, whether it is necessary to place restrictions on the access to and conduct of professional activities and what restrictions are best fit to address the specific public interest concerns.

In 2013, Directive 2005/36/EC, the Professional Qualifications Directive, was amended by Directive 2013/55/EU with the view to modernise Union law in the area of regulated professions. It also introduced a transparency and mutual evaluation exercise between the Member States of all their regulated professions. Based on the information submitted by the relevant competent authorities during the mutual evaluation process, it appears that conducting such an assessment presented a challenge to many Member States[5]. The fact that the majority of the assessments lacked proper reasoning suggests an underlying problem concerning how the need for regulation and its effects on the broader business environment are evaluated. The mutual evaluation process revealed that regulatory decisions are currently not always based on sound and objective analysis or carried out in an open and transparent manner. Further, and despite the in-depth discussions and the guidance provided by the Commission so far, it has not prevented the introduction of new restrictive measures without objective and comprehensive analysis since. Member States have introduced new regulations such as for instance for the exercise of the legal profession, or have introduced or broadened reserves of activities for instance for tax advice or for tourist guides without or with only a very superficial assessment of proportionality.

The current uneven scrutiny of the regulation of professions across the EU has a negative impact on the provision of services and the mobility of professionals. Action by individual Member States alone will not ensure a coherent EU legal framework for assessing the proportionality of envisaged national regulation and address the existing problems faced by national authorities. The main objectives of the action to introduce more clarity to the applicable criteria, strengthening reliability, transparency and comparability across Member Stares and ensuring that rules are applied in an equal manner so as to prevent further burdening and fragmenting the Single Market, could be achieved more successfully at EU level by virtue of its scale and effects through the introduction of a common EU-wide assessment mechanism, applied by all Member States and in a comparable way. In view of frequent changes to professional regulation, without EU action, there is the risk that the gap between those who already apply good regulatory practices and properly assess proportionality before deciding whether to adopt regulation[6] and those who do not will widen, thus increasing divergence in the quality of regulation. This ultimately has a negative effect on access to professions and negative consequences for consumers and economics alike.

To address the issue, the Commission announced in the Single Market Strategy an initiative laying down a proportionality test to be used by Member States before adopting or amending

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4 see Cases C-340/89 Vlassopoulou and C-55/94 Gebhard.

5 As more fully explained in the accompanying Impact Assessment; around a third of proportionality assessments are still not conducted almost a year since transposition. Of those that were received around 70% took the decision to maintain the status quo based on underdeveloped conducted assessments.

6 The World Bank Regular Economic Report Fall 2016: Growth, Jobs and Integration: Services to the Rescue, http://www.worldbank.org/en/region/eca/publication/eurer.

national regulations of professions. There is considerable potential to enhance the creation of growth and jobs by Member States through increasing the transparency of their regulated professions and completing a more thorough analysis of their proportionality before adopting any new rules while simultaneously completing reforms in their regulated professions to modernise their requirements. As described in the impact assessment accompanying this proposal, numerous studies show how poor regulatory choices are liable to distort competition by restricting market entry and thus may result in substantial lost employment opportunities, higher prices for consumers and hinder free-movement. In terms of job creation alone, an academic study suggests around 700 000 more jobs[7] could be created in the EU through addressing unnecessary and disproportionate regulations.

The proportionality test is therefore designed to support better regulatory practices and ultimately their outcomes. It applies to newly introduced or reviewed requirements on access to or the pursuit of a regulated profession. It consolidates the case-law of the Court of Justice on the proportionality of requirements restricting access to or pursuit of regulated professions but leaves the decision of what to regulate and how to Member States, this decision is evidence-based following a thorough, transparent and objective assessment. It takes full account of the specificity of each profession and its regulatory environment. The benefits of this initiative for professionals, consumers and public administrations lie largely in the fact that it would ensure the better regulation of professions by preventing disproportionate rules from being adopted. The objective of this proposal is to a large extent the codification of established case-law of the Court of Justice. Departure from this case-law could denature the proposal. The Commission may withdraw a proposal if it is denatured.

An EU Directive would significantly facilitate the obligation for Member States to comply with the proportionality principle and would guarantee that Member States implement the proportionality test in an equivalent manner at all levels of regulation in order to avoid fragmentation of the Single Market.

The initiative aims at introducing clarity and promotes objective, reliable and comprehensive proportionality tests in order to increase confidence and innovation through regular reviews of national regulation of professions. Underlying this action is the aim of not only supporting the Member States accomplish these shared objectives but to do so in a structured and streamlined way so as to ease their administrative duties.

- **Consistency with existing policy provisions in the policy area**

The proposal is consistent with and complements the existing provisions of Directive 2005/36/EC.

- **Consistency with other Union policies**

The proposal is consistent with the Commission's priorities as set out in its Single Market Strategy (SMS) as well as the EU objectives of creating growth and jobs, ensuring the free movement of professionals, improving the environment for businesses and offering choice to consumers.

Another action announced in the SMS is the periodic guidance on specific needs. This initiative aims at identifying problems per country and per profession where the reform of the regulatory framework would be economically beneficial, and based on which the Commission

[7] "Measuring Prevalence and Labour Market impacts of Occupational Regulation in the EU", Maria Koumenta, Queen Mary University of London and Mario Pagliero, Collegio Carlo Alberto Torino.

will recommend Member State level action. These two actions are complementary, in the sense that the proportionality test will provide the general framework of criteria to be used when assessing the proportionality of envisaged regulation, a 'sunrise' clause, whilst the periodic guidance on reform needs will focus on specific issues, identified in the existing regulation of certain professions or sectors.

The present proposal is consistent with and complements the initiative to improve notifications under the Services Directive. Whereas the latter complements the existing notification procedure applicable for restrictions under the Services Directive, the present proposal provides clarity on the criteria to be used by Member States when assessing the proportionality of draft national laws regulating professions and falling under the Professional Qualifications Directive. Some requirements in national regulation of professions (such as legal form or shareholding requirements) fall under both the Professional Qualifications Directive and the Services Directive. In such cases, the proportionality assessment would follow the rules in this proposal and the information to be provided in the notification procedure falling under the Services Directive would have to be based on and reflect this assessment. Consistency between these instruments is being ensured and this proposal does not introduce any new notification procedures.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposal is based on Articles 46, 53(1) and 62 TFEU.

The European Union has the right to act in the field of regulation of professions for the achievement of the Internal Market objectives based on the articles in the TFEU on the free movement of persons and services. In particular, Article 46 TFEU provides for specific provisions to be adopted in the area of the free movement of workers, Article 53(1) TFEU provides for issuing Directives concerning the taking-up and pursuit of activities as self-employed persons and Article 62 of the TFEU is the basis for legal acts on the exercise of the freedom to provide services.

• Subsidiarity (for non-exclusive competence)

According to the subsidiarity principle, the EU should only act where the objectives of the proposed action cannot be achieved sufficiently by Member States and where the objectives can be better achieved by the EU. As evidenced by the information obtained in the mutual evaluation, the criteria used and the intensity of assessments vary significantly between Member States. This current uneven scrutiny of the proportionality of regulation of professions across the EU, and the impacts stemming from this, has a substantial impact on the wider economy of the EU, the provision of services and the mobility of professionals. Studies, independently conducted as well as those contracted by the Commission show that disproportionate regulation has a negative impact upon job creation, growth, consumer choice, prices, innovation, investment and trade[8]. In addition we have seen what benefits may

[8] See for example in COM(2013)676; "The Cost of Non-Europe in the Single Market for services", European Parliament Research Service, 2014; "Estimation of service sector mark-ups determined by structural reform Indicators", European Commission, 2015; "Regulatory heterogeneity as obstacle for international services trade", H. Kox, A. Lehour, 2005; "The discriminatory effect of domestic regulations on international services trade: evidence from firm-level data", EFIGE, 2012; "Business services – Assessment of Barriers and their Economic Impact", European Commission, 2015; "The Economic Impact of Professional Services Liberalisation", European Commission, 2014, http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8525&lang=en.

be brought by steps taken to reform regulation and which, in addition, were found to have no direct impact upon the protection of legitimate public interests:

- In Italy, the Bersani reform of 2006 brought new entrants into the market, leading to higher overall employment of young pharmacists.[9]
- In Poland, the reform of lawyers introducing objective access rules led to almost a tripling of the number of lawyers between 2005 and 2015 and almost a doubling of the number of legal advisers without negative effects on wages and quality.[10]
- In Greece reforms resulted in lower prices for consumers of services of real estate agents, legal professions, accountants, tax consultants and physiotherapists which were liberalised by the reform enacted in 2011. The number of start-ups for notaries, auditors, tourist guides and chartered valuers has more than doubled in 2014 compared with the yearly average before the liberalisation.[11]

However, isolated action by individual Member States alone will not ensure a coherent EU legal framework for assessing the proportionality of national regulation and address the existing problems faced by national authorities. Therefore, the objectives of the action, namely the reliability and comparability of proportionality assessments could be achieved more successfully at the Union level through the introduction of a common EU-wide assessment mechanism applied by all Member States in a similar way, by virtue of its scale and effects. National law would hence reflect the criteria set out in the proposed action and which would have to be considered by national authorities when assessing the proportionality of national regulation in the professions.

An EU approach would thus enable national authorities to perform comprehensive and comparable proportionality checks through creating a transparent and predictable legal framework to assess barriers to regulated professions. The European Council has repeatedly called for action on this front. In February 2015 the European Council called for guidance[12], following this the Council welcomed the proportionality test's inclusion in the Single Market Strategy saying that it 'reiterates that the Single Market is Europe's main engine for growth and job creation and a key to investment and increasing European competitiveness. Emphasises that strengthening and deepening the Single Market requires urgent and ambitious actions, both at Union and national level, to deliver concrete and pragmatic results which directly benefit consumers and businesses, in particular SMEs[13]. Most recently in June 2016 the Council called upon the Commission to take steps 'to vigorously pursue efforts towards better regulation'[14].

- **Proportionality**

This proposal is in line with the principle of proportionality, as set out in Article 5(4) TEU. The selected policy option seeks to strike the right balance between securing public interest objectives and the quality of services on the one hand alongside improving the access to and exercise of regulated professions for the professionals themselves, whilst ensuring a wider choice for consumers on the other. This proposal respects the principle of proportionality

9 http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8525&lang=en.
10 Ibid.
11 Ibid.
12 Council Conclusions on Single Market Policy 2/3 March 2015 https://eu2015.lv/images/notikumi/2015_03_02_COMPET_conclusions_ST_6197_2015_INIT_EN.pdf.
13 http://data.consilium.europa.eu/doc/document/ST-6622-2016-INIT/en/pdf.
14 http://www.consilium.europa.eu/en/meetings/european-council/2016/06/28-29/.

since the solutions imply cost-efficiency and reduce the overall burden on public administration as it provides clear criteria to conduct proportionality assessments of the regulation of professions and should prevent the introduction of implementation burdens brought by unnecessary future measures. The administrative burden of conducting a proportionality test was already assessed in the context of the revision of the Professional Qualifications Directive of 2013. In line with this assessment, costs stemming from the current proposal, to impose proportionality testing for future regulatory impositions, should be of limited impact[15]. This effect may be slightly higher for those Member States not currently in compliance with implementation of the Directive. However it is expected that there will be an overall positive effect in terms of administrative costs, because Member States will be less likely to be faced with infringements procedures as the result of an improved system. The Commission intends to work alongside Member States to further assist them in implementing this directive and with a view to further limiting costs. The proposal does not go beyond what is necessary to achieve the objectives pursued and indeed is best suited to its objectives. The mutual evaluation followed a 'guidance' route, it revealed a scarcity of evidence to suggest that regulatory decisions are currently being based on sound and objective analysis or in an open and transparent manner. Nearly three years since launching the mutual evaluation around a third of proportionality tests are still not submitted and of those received around 70% put forward the conclusion to maintain their regulatory status quo despite a weak accompanying proportionality test. In addition to this, the rate of regulatory change in the professions is high and the Commission is aware of a continued drive to place new regulatory burdens on professionals without conducting proper prior proportionality based analysis into the need, value or impact of such burdens.

- **Choice of the instrument**

The instrument chosen is a new Directive, giving Member States a degree of flexibility in terms of transposition and implementation so as to be able to capture the legal essence and the multi-faceted nature of the proportionality principle. A Directive is binding as to the result to be achieved and thus constitutes an appropriate instrument for the achievement of the Internal Market from the point of view of the free movement of workers, the freedom of establishment and the freedom to provide services. As well as these being objectives of the European Union, the Treaty also places legal expectations upon Member States so that whereas the choice as to whether and how to regulate a profession remains their competency it must remain within the remits of justification, proportionality and necessity.

The impact assessment describes fully the scale of the issue in the regulation of professions and the effects that unnecessary regulation has on the wider European economy as well as underlining the issues Member States face in appropriately addressing it. A Directive will allow Member States to assimilate a comprehensive proportionality assessment into their own existing legislative procedures, and since no one methodology is being enforced by the Commission, this allows the Member States to operate with a level of discretion that accommodates their own structures and without affecting the ultimate objective of the Directive: to have a comparable, transparent, reliable, objective, evidenced based decision making process. For these reasons the Commission has judged a Directive to be the most appropriate and effective response.

[15] See accompanying impact assessment.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Prior to its substantial revision in 2013, Directive 2005/36/EC was the subject of a thorough evaluation on the shortcomings of the existing process for facilitating the free movement of professionals. Based on those findings, Directive 2013/55/EU, amending Directive 2005/36/EC introduced, among other requirements, an obligation for Member States to assess the proportionality of their professional regulations. On the basis of these assessments, pursuant to Article 59(9), by January 2017 the Commission is expected to submit its final findings on the overview of national regulations of professions and on the proportionality assessments conducted by Member States to the European Parliament and the Council, accompanied where appropriate by proposals for further initiatives. This proposal has not been developed from an overall assessment of the Directive as it was revised only recently however, it does stem from the Commission's assessments and is part of the follow-up initiatives prefigured under Article 59(9) of Directive 2013/55/EU as a conclusion to the Commission's assessment. The possibility for a further proposal was therefore foreseen as part of follow-up steps to improve implementation and efficacy of the new provisions.

- **Stakeholder consultations**

A public consultation was carried out between 27 May and 22 August 2016. A total of 420 responses were received. These included submissions from individuals, members of regulated professions, professional associations, regulatory bodies, government authorities and academics. There was a broad consensus across stakeholders that action should be taken at EU level to introduce clarity and a common approach as regards proportionality tests. Across respondent demographics we received majority support for a binding (Directive) solution: users; providers, both large and small business; public authorities and unions all endorsed the proposal. Some professional associations were less positive. Specifically the German and Austrian crafts sector, who organised identical responses across 100 craft associations, to reject the idea of any action at an EU level either through a directive or a guidance approach. We decided to maintain the organised response[16] in collating the results of the consultation and in doing so we are still able to maintain a majority support for our proposal. In addition the consultation showed the need for action since a disparity of approaches to analysis was uncovered not only across the EU but also within individual Member States. It found a lack of clarity on the existence of any analytical and proportionality based expectations when designing regulation as well as a sporadic approach to consultation and transparency.

A summary of the results can be found on: http://ec.europa.eu/internal_market/consultations/.

In addition, a high level conference held by the Commission on 18 May 2016 allowed for a further exchange of views.

The issues were also discussed with Member States at the High Level Group meeting of 3 May 2016 and 10 November 2016.

- **Collection and use of expertise**

The results of the mutual evaluation of regulated professions, conducted by the Member States, together with the Commission contributed to the preparation of this proposal.

[16] Accepted practice in such cases would be to count the organised responses as just one.

OECD studies show that labour mobility is a key determinant of productivity which enhances economic growth[17]. Furthermore, the Commission contracted economic studies on the effects of reforms to the regulatory requirements for accessing selected professions in four different countries: Germany, Greece, Italy and the United Kingdom[18].

In addition, according to a recent survey carried out in April 2015 in all 28 Member States, at least 21% of the labour force in the European Union (50 million people) can be considered as working in a regulated profession[19].

- **Impact assessment**

In line with its "Better Regulation" policy, the Commission services conducted an impact assessment analysing the different policy options and their impact on stakeholders.[20]

The different options examined in the impact assessment were:

Option 1 - issuing proportionality guidelines and in-depth information exchange between authorities establishing an EU wide proportionality test for regulated professions which could encompass several options.

Option 2a - Laying down the minimum criteria for conducting proportionality checks, based on and complementing the case-law and by introducing transparency on Member States' assessments through a binding instrument (Directive).

Option 2b - Implementing the same approach as 2a but through the means of a Recommendation.

Option 3a - Further including procedural aspects to those of option 2a, such as public consultations and periodic review through a binding instrument (directive).

Option 3b - As with those same aspects of option 3a but through the instrument of a Recommendation.

Drawing on the consultation, experience and evidence presented through an impact assessment the Commission concluded that the best option to improve the existing situation is Option 3a:

Option 1 - A guidance approach has already been tested: first through the issuing of a Communication in 2013 then through a grid and guidance provided to support the two yearlong mutual evaluation and which proved to be unable to adequately address the regulatory issues it uncovered. As well as this the Commission has been working intensively with the Member States to encourage them to attend better to issues of proportionality (through visits to Member States, a Conference, Single Market Forums, and workshops).

Option 2a - This would address the issues faced by Member States in interpreting the case law as well as clarity on the criteria to be evaluated and would thus go some way to improving the quality of the assessments and their ultimate outcomes.

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17 http://www.oecd.org/eco/growth/OECD-2015-The-future-of-productivity-book.pdf.

18 http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8525&lang=en.

19 M. Koumenta and M. Pagliero (2016), "Measuring Prevalence and Labour Market Impacts of Occupational Regulation in the EU". See: http://ec.europa.eu/DocsRoom/documents/20362.

20 Commission Staff Working Document - Impact Assessment accompanying this proposal (SWD(2016) 463).

Option 2b - Both this option and 3b have the same drawbacks as option 1. An 'optional' route would not address the issue of Member States disregarding the practice of conducting a proportionality test and thereby cannot be foreseen as preventing the future introduction of unnecessary burdens, or as an effective mechanism for removing issues identified through such reviews. Finally these same constraints would limit the possibility for information to be shared more transparently with citizens and stakeholders.

Option 3a - periodic reviews would ensure that regulation which is no longer appropriate is removed whilst the inclusion of consultation would support that the better involvement of all stakeholders, including consumer bodies and citizens, to ensure that their interest are also accounted for.

Option 3b - as with 2b, an elective approach cannot ensure these steps are taken.

Given experience and the assessments made in preparing this proposal it can be concluded that a discretionary route, a Recommendation, would not compel the analysis necessary and especially in the most difficult cases. The general obligation to conduct periodic reviews, to inform all interested parties and an obligation to ensure a minimum of objectivity and impartiality can only be addressed if implemented legally and this can only be guaranteed by a directive.

On 9 October 2016 the Regulatory Scrutiny Board issued a positive opinion on this initiative. The Board's main recommendations were that the proposal should further expand upon its concurrence with other initiatives, explain more the scale of the problem and why current structures are not capable of addressing it, develop further how the provisions in the proposal will operate and expand upon the views of stakeholders as well as the impacts on SMEs, consumers and national authorities. This was duly taken into account.

The opinion can be found at:
http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm#grow.

The different policy options and their impact on stakeholders are analysed in detail in the impact assessment which is available at the following website:
http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8827.

- **Regulatory fitness and simplification**

A mutual evaluation carried out by the Member States, together with the Commission in 2014-2016 revealed the uneven scrutiny of national regulatory measures and the lack of clarity as to the criteria to be used for proportionality assessments. The conclusion is that proportionality assessments carried out at national level and based on the case-law of the Court of Justice and on national approaches in their current form are not achieving their potential for adding value to the achievement of the Single Market.

- **Fundamental rights**

The proposal is promoting rights enshrined in the EU Charter of Fundamental rights, namely the freedom to choose an occupation and the freedom to conduct a business.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission would regularly report to the Council and the European Parliament on the implementation and performance of the proportionality test at national level. This evaluation is planned to be performed at the same time as the evaluation of the Professional Qualifications Directive.

- **Explanatory documents (for directives)**

This proposal does not require additional explanatory documents to accompany the transposition into national law, given it is based on the existing case-law and basic better regulation principles. Nevertheless, where necessary, the Commission may present further guidance.

- **Detailed explanation of the specific provisions of the proposal**

Articles 1 and 2 deal with the subject matter and the scope of the Directive, namely to create a legal framework for conducting proportionality assessments before introducing new or modifying existing legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions. Proportionality tests covering the regulation of specific professions, introduced by other EU instruments are not covered by this Directive.

Article 3 sets out the definitions used in the proposal, which are to a large extent common to the definitions under Directive 2005/36/EC. In addition, definitions are provided for the two main types of regulation of professions, namely "reserved activities" and "protected professional title".

Article 4 lays down an obligation for Member States to conduct an ex-ante proportionality assessment, substantiated by qualitative and, wherever possible, quantitative evidence.

Article 5 lists the justifications on grounds of public interest objectives on the basis of the TFEU or recognised as such by the Court of Justice. Based on settled case-law, grounds of a purely economic nature having essentially protectionist aim or effects, or purely administrative reasons cannot constitute overriding reasons in the public interest.

Article 6 (1) lays down a general obligation for Member States before introducing new or modifying existing provisions restricting access to or pursuit of regulated professions, to assess whether these provisions are necessary and suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective. Article 6 (2) also sets out the main criteria, which have be considered by the competent authorities, such as the nature of the risks, the scope of the activities, reserved to a profession, the link between the qualification and the activities, the economic impact of the measure etc. Article 6 (3) specifies the use of less restrictive means to achieve the objective pursued, such as the use of protected professional title, without reserving the activities to specific profession. Article 6 (4) gives an overview of the elements to be taken into account when examining the cumulative effect of all the existing measures, restricting access to or pursuit of professions.

Article 7 sets out an obligation to inform all interested parties before introducing new measures and give them the possibility to express their views.

Article 8 provides for exchange of information between competent authorities of different Member States, allowing the Member State which intends to reform a profession to gather the information on the experience of other Member States.

Article 9 provides for transparency of the proportionality assessments.

Article 10 foresees a periodic review of the Directive.

Article 11 deals with the transposition of the Directive.

Article 12 specifies the entry into force of the Directive.

Article 13 sets the addresses of the Directive.

2016/0404 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a proportionality test before adoption of new regulation of professions

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 46, Article 53(1) and Article 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[21],

Having regard to the opinion of the Committee of the Regions[22],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The freedom to choose an occupation is a fundamental right. The Charter of Fundamental Rights of the European Union guarantees the freedom to choose an occupation, as well as the freedom to conduct a business. The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty. National rules organising access to regulated professions should therefore not constitute any unjustified and disproportionate obstacle to the exercise of those fundamental rights.

(2) In the absence of specific provisions harmonising the requirements on access to a regulated profession or its pursuit laid down in Union law, it is the Member States' prerogative to decide whether and how to regulate a profession within the limits of the principles of non-discrimination and proportionality.

(3) The principle of proportionality is one of the general principles of Union law. It follows from the case-law[23] that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty should fulfil four conditions: they should be applied in a non-discriminatory manner; they should be justified by public interest objectives; they should be suitable for securing the attainment of the objective which they pursue; and they should not go beyond what is necessary in order to attain it.

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21 OJ C , , p. .

22 OJ C , , p. .

23 Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.

(4) Directive 2005/36/EC of the European Parliament and of the Council[24] established the obligation for Member States to assess the proportionality of their requirements restricting access to or pursuit of regulated professions and to communicate to the Commission the results of the assessment, launching the so-called mutual evaluation process. That process meant that Member States had to carry out a screening of all their legislation on all professions regulated in their territory.

(5) The results of the mutual evaluation process revealed a lack of clarity as regards the criteria to be used by national competent authorities when assessing the proportionality of requirements restricting access to or pursuit of regulated professions, as well as uneven scrutiny of such measures at all levels of regulation. To avoid fragmentation of the internal market and eliminate barriers to taking-up and pursuit of certain employed or self-employed activities, it is therefore necessary to establish a common approach at Union level, preventing disproportionate measures from being adopted.

(6) In its Communication of 28 October 2015: 'Upgrading the Single market: more opportunities for people and businesses'[25], the Commission identified the need to adopt an analytical proportionality framework for Member States to use when reviewing existing regulations of professions or proposing new ones.

(7) The activities covered by this Directive should concern the regulated professions falling within the scope of Directive 2005/36/EC. This Directive should apply in addition to Directive 2005/36/EC and without prejudice to other provisions laid down in a separate Union act concerning access to, and the exercise of a given regulated profession.

(8) Member States should be able to rely on a common regulatory framework based on clearly defined legal concepts concerning the different ways to regulate a profession across the Union. There are several ways to regulate a profession, for instance by reserving access to or the pursuit of a particular activity to holders of a professional qualification. National provisions may also regulate one of the modes of pursuit of a profession in laying down conditions for the use of professional titles.

(9) The burden of proof of justification and proportionality lies on the Member States. The reasons for regulation invoked by a Member State by way of justification should thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments.

(10) It is appropriate to monitor the proportionality of the provisions restricting access to or pursuit of regulated professions on a regular basis and with a frequency appropriate to the regulation concerned. A review of the proportionality of restrictive national legislation in the area of regulated professions should be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation, assessed after its adoption. The assessment of the proportionality of the national legislation should be based on developments found to have occurred in the area since the legislation was adopted.

(11) Member States should carry out proportionality assessments in an objective and independent manner, including where a profession is regulated indirectly, by giving a particular professional body the power to do so. In particular, while the assessment of

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[24] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p.22).

[25] COM (2015)550 final.

the local authorities, regulatory bodies or professional organisations, whose greater proximity to local conditions and specialised knowledge could in certain cases make them better placed to identify the best way of meeting the public interest objectives, there is particular reason for concern in cases where the policy choice made by those authorities or bodies provides benefits to established operators at the expense of new market entrants.

(12) Where the taking-up and pursuit of certain employed or self-employed activities are conditional on complying with certain provisions relating to specific professional qualifications, laid down directly or indirectly by the Member States, it is necessary to ensure that such provisions are justified by public interest objectives, such as those within the meaning of the Treaty, namely public policy, public security and public health or by overriding reasons of general interest, recognised as such in the case-law of the Court of Justice. It is important to ensure that public interest objectives are adequately identified in order to determine the intensity of the regulation. For example, in order to ensure a high level of protection of public health, Member States should enjoy a margin of discretion to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. It is also necessary to clarify that among the overriding reasons of general interest, recognised by the Court of Justice, are preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; the safeguarding of the proper administration of justice; fairness of trade transactions; combating fraud and prevention of tax evasion and avoidance; road safety; the protection of the environment and the urban environment; the health of animals; intellectual property; the safeguarding and conservation of the national historic and artistic heritage, social policy objectives and cultural policy objectives. According to settled case-law, purely economic reasons, having essentially protectionist aims, as well as purely administrative reasons, such as carrying out controls or gathering statistics cannot constitute an overriding reason of general interest.

(13) Where a Member State intends to regulate a profession or to amend existing rules, account should be taken of the nature of the risks related to the public interest objectives pursued, in particular the risks to consumers, to professionals or third parties. It should also be borne in mind that, in the field of professional services, there is usually an asymmetry of information between consumers and professionals. Professionals display a high level of technical knowledge which consumers may not have and consumers therefore find it difficult to judge the quality of the services provided to them.

(14) To meet the requirement of proportionality, the measure should be suitable for securing the attainment of the objective pursued. A measure should only be considered suitable for securing the attainment of the objective pursued, if it genuinely reflects a concern to attain that objective in a consistent and systematic manner, for instance where similar risks related to certain activities are addressed in a comparable way and where any exceptions to the restrictions involved are applied in line with the stated objective. Furthermore, the national measure should contribute to achieving the objective pursued and therefore, where it has no effect on the ground for justification, it should not be considered as suitable.

(15) Requirements linked to professional qualifications should be considered as necessary only where existing measures, such as consumer protection law, cannot be regarded as being suitable or genuinely effective to achieve the aim pursued.

(16) Among the elements to be taken into account by national authorities, the following are of most relevance: the link between the scope of professional activities covered by a profession and the professional qualification required; the complexity of the tasks in particular as regards the level, the nature and the duration of the training or experience required; the existence of different routes to obtain the professional qualification; the scope of the professional activities, reserved to holders of a particular professional qualification, and in particular whether the activities reserved to certain professionals can be shared with other professionals; the degree of autonomy in exercising a regulated profession in particular where the activities relating to a regulated profession are pursued under the control and responsibility of a duly qualified professional.

(17) Where a Member State regulates a profession, account should be taken of the fact that technological developments may reduce the asymmetry of information between consumers and professionals. In view of the speed of technological change and scientific progress, up-dates in access requirements may be of particular importance for a number of professions.

(18) The economic impact of the measure, including a cost-benefit analysis with particular regard to the degree of competition in the market and the quality of the service provided, as well as the impact on the right to work and on the free movement of persons and services within the Union should be duly taken into account by the competent authorities. Based on this analysis, Member States should ascertain, in particular, whether the extent of the restriction of access to or pursuit of regulated professions within the Union is proportionate to the importance of the objectives pursued and the expected gains.

(19) Member States should carry out a comparison between the national measure at issue and the alternative and less restrictive solutions that would allow the same objective to be attained but would impose fewer restrictions. Where the measures are justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties, the objective could be attained by less restrictive means than reserving activities to professionals, such as protection of the professional title or enrolment on a professional register. Regulation by way of reserved activities should be used only in cases where the measures aim at preventing a risk of serious harm to public interest objectives.

(20) The national authorities should carry out a global assessment of the circumstances in which the restrictive measure is adopted and implemented and examine in particular the cumulative effect of imposing several requirements in addition to the specific professional qualification. The taking-up and pursuit of certain activities may be conditional on complying with certain provisions such as rules relating to the organisation of the profession, compulsory membership of a professional body, professional ethics, supervision and liability. Therefore, when assessing the cumulative effect of the measures, the competent authorities should also take into account other existing requirements, such as continuous professional development, compulsory chamber membership, registration or authorisation schemes, quantitative restrictions, specific legal form requirements and shareholding requirements, territorial restrictions, multidisciplinary restrictions and incompatibility rules, requirements concerning insurance cover as well as language knowledge requirements, to the extent necessary to practise the profession. A measure introduced by a Member State cannot be regarded as necessary to achieve the objective pursued if it essentially duplicates

requirements which have already been introduced in the context of other rules or procedures.

(21) It is essential for the proper functioning of the internal market to ensure that Member States provide information to citizens, representative associations or other relevant stakeholders before introducing new measures restricting access to or pursuit of regulated professions and give them the opportunity to make known their views.

(22) To facilitate the exchange of best practices, each Member State should encourage the relevant competent authorities to share adequate and regularly updated information with other Member States on the regulation of professions.

(23) In order to increase transparency and promote proportionality assessments based on comparable criteria, it is important that the information submitted by Member States be easily accessible in the database of regulated professions to allow all interested parties to submit comments.

(24) Since the objectives of this Directive, namely the removal of disproportionate restrictions on access to or pursuit of regulated professions cannot be sufficiently achieved by the Member States but can rather, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive lays down rules on a common framework for conducting proportionality assessments before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, with a view to ensuring the proper functioning of the internal market.

Article 2

Scope

1. This Directive shall apply to requirements under the legal systems of the Member States restricting access to a regulated profession or its pursuit, or one of its modes of pursuit, including the use of professional titles and the professional activities allowed under such title, falling within the scope of Directive 2005/36/EC.

2. Where specific arrangements concerning the regulation of a given profession are established in a separate Union act, the corresponding provisions of this Directive shall not apply.

Article 3

Definitions

For the purpose of this Directive, the definitions of Directive 2005/36/EC shall apply.

In addition, the following definitions shall apply:

(a) "protected professional title" means a form of regulating a profession where the use of the title in a professional activity or group of professional activities is subject to a particular professional qualification in the relevant field by virtue of legislative, regulatory or administrative provisions, either directly, or indirectly, and where the improper use of this title is subject to sanctions or other measures.

(b) "reserved activities" means a form of regulating a profession where the access to a professional activity or group of professional activities is reserved, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to members of a regulated profession, including where the activity is shared with other regulated professions.

Article 4

Ex ante assessment of new measures

1. Member States shall ensure that before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, the relevant competent authorities undertake an assessment of their proportionality in accordance with the rules laid down in this Directive.

2. Any provision referred to in paragraph 1 shall be accompanied by a detailed statement making it possible to appraise compliance with the principle of proportionality.

3. The reasons for considering that a provision is justified, necessary and proportionate shall be substantiated by qualitative and, wherever possible, quantitative evidence.

4. Member States shall monitor the proportionality of legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions on a regular basis and with a frequency appropriate to the regulation concerned, having due regard to any developments that have occurred since the measure concerned was adopted.

5. Member States shall take the necessary measures to ensure that the assessment of proportionality referred to in paragraph 1 is carried out in an objective and independent manner including through involvement of independent scrutiny bodies.

Article 5

Justification on grounds of public interest objectives

1. Member States shall ensure that legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions they intend to introduce and amendments they intend to make to existing provisions are justified by public interest objectives.

2. The relevant competent authorities shall consider in particular whether those provisions are objectively justified on the basis of public policy, public security or public health, or by overriding reasons in the public interest, such as preserving the financial equilibrium of the social security system, the protection of consumers,

recipients of services and workers, the safeguarding of the proper administration of justice, fairness of trade transactions, combating fraud and prevention of tax evasion and avoidance, road safety, the protection of the environment and the urban environment, the health of animals, intellectual property, the safeguarding and conservation of the national historic and artistic heritage, social policy objectives and cultural policy objectives.

3. Grounds of a purely economic nature having essentially protectionist aim or effects or purely administrative reasons shall not constitute overriding reasons in the public interest, justifying a restriction on access to or pursuit of regulated professions.

Article 6

Proportionality

1. Before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, Member States shall assess whether those provisions are necessary and suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.

2. When assessing the necessity and the proportionality of the provisions, the relevant competent authorities shall consider in particular:

   (a) the nature of the risks related to the public interest objectives pursued, in particular the risks to consumers, to professionals or third parties;

   (b) the suitability of the provision namely as regards its appropriateness to attain the objective pursued and whether it genuinely reflects that objective in a consistent and systematic manner and thus, addresses the risks identified in a similar way as in comparable activities;

   (c) the necessity of the provision and in particular whether existing rules of a specific or more general nature, such as product safety legislation or consumer protection law, are insufficient to protect the objective pursued;

   (d) the link between the scope of activities covered by a profession or reserved to it and the professional qualification required;

   (e) the link between the complexity of the tasks and the necessary possession of specific professional qualifications, in particular as regards 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;

   (f) the scope of the professional activities reserved to holders of a particular professional qualification, namely whether and why the activities reserved to certain professions can or cannot be shared with other professions;

   (g) the degree of autonomy in exercising a regulated profession and the impact of organisational and supervision arrangements on the attainment of the objective pursued, in particular where the activities relating to a regulated profession are pursued under the control and responsibility of a duly qualified professional;

   (h) the scientific and technological developments which may reduce the asymmetry of information between professionals and consumers;

(i) the economic impact of the measure, with particular regard to the degree of competition in the market and the quality of the service provided, as well as the impact on the free movement of persons and services within the Union;

(j) the possibility to use less restrictive means to achieve the public interest objective;

(k) the cumulative effect of restrictions to both access to and pursuit of the profession, and in particular how each of those requirements contributes to and whether it is necessary to achieve the same public interest objective.

3. For the purposes of paragraph 2(j), where the measures are justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties, the relevant competent authorities shall assess in particular whether the objective can be attained by protected professional title without reserving activities.

4. For the purposes of paragraph 2(k), the relevant competent authorities shall assess in particular the cumulative effect of imposing any of the following requirements:

(a) reserved activities, existing alongside protected professional title;

(b) continuous professional development requirements;

(c) rules relating to the organisation of the profession, professional ethics and supervision;

(d) compulsory chamber membership, registration or authorisation schemes, in particular where those requirements imply the possession of a particular professional qualification;

(e) quantitative restrictions, in particular requirements limiting the number of authorisations to practise, or fixing a minimum or a maximum number of employees, managers or representatives holding particular professional qualifications;

(f) specific legal form requirements or requirements which relate to the shareholding or management of a company, to the extent those requirements are directly linked to the exercise of the regulated profession;

(g) territorial restrictions, in particular where the profession is regulated in parts of a Member State's territory in a different manner;

(h) requirements restricting the exercise of a regulated profession jointly or in partnership, as well as incompatibility rules;

(i) requirements concerning insurance cover or other means of personal or collective with regard to professional liability;

(j) language knowledge requirements, to the extent necessary to practise the profession.

Article 7

Information and involvement of stakeholders

Member States shall, by appropriate means, inform citizens, service recipients, representative associations and relevant stakeholders other than the members of the profession before

introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, and give them the opportunity to make known their views.

Article 8

Exchange of information between competent authorities

1. For the purposes of the efficient application of this Directive, before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, Member States shall encourage the exchange of information with competent authorities of other Member States on matters covered by this Directive, such as the particular way they regulate a profession or the effects of regulation identified in similar sectors of activities, on a regular basis, or, where appropriate, on an ad hoc basis.

2. Member States shall inform the Commission of the competent authorities responsible for transmitting and receiving information for the purposes of applying paragraph 1.

Article 9

Transparency

1. The reasons for considering that provisions, assessed in accordance with this Directive, are justified, necessary and proportionate, and which are communicated to the Commission pursuant to paragraphs 5 and 6 of Article 59 of Directive 2005/36/EC, shall be recorded by the relevant competent authorities in the database of regulated professions, referred to in Article 59 paragraph 1 of Directive 2005/36/EC and thereafter made publicly available by the Commission.

2. Member States and other interested parties may submit comments to the Commission or to the Member State which has notified the provisions.

Article 10

Review

1. By 18 January 2024 and every five years thereafter, the Commission shall submit a report to the European Parliament and to the Council on the implementation and performance of this Directive, including, among other aspects, its scope and its effectiveness.

2. Where appropriate, the report referred to in paragraph 1 shall be accompanied by relevant proposals.

Article 11

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 12

Entry into force

This Directive shall enter into force on the [twentieth] day following that of its publication in the *Official Journal of the European Union*.

Article 13

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*