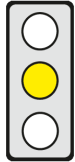


KEY ISSUES

Objective of the Directive: Common criteria are to be brought in regarding a proportionality test for the introduction or amendment of national legislation to regulate professions.

Affected parties: Members of regulated professions and professional chambers.



Pro: (1) The regulation of professions must strike a fair balance between protection of consumers and the freedom to choose an occupation. The proportionality test is a suitable instrument for this.

(2) The duty of Member States to provide proof of proportionality imposes tighter limits on the anti-competitive misuse of professional regulation than previously existed.

Contra: (1) It should be specified that the requirements for assessing proportionality must be proportionate to the extent and importance of the respective professional regulation provisions.

(2) The duty to involve independent scrutiny bodies in the legislative procedure is unlawful.

CONTENT

Title

Proposal COM(2016) 822 of 10 January 2017 for a **Directive** of the European Parliament and of the Council **on a proportionality test before adoption of new regulation of professions**

Brief Summary

► Context and objectives

- In the EU, about 50 million people (22% of the labour force) work in one of around 5600 “regulated professions”, i.e. professions where access thereto or exercise thereof is regulated by national legislation.
- Professional regulation requirements include:
 - protected professional titles that can only be held by persons with specific professional qualifications such as engineers (Art. 3 (a)),
 - reserved activities which can only be carried out by members of a specific profession such as legal advice which is reserved for lawyers (Art. 3 (b)),
 - compulsory qualifications such as the completion of a degree or professional training or the obligation to undergo professional development,
 - compulsory membership of a professional association or chamber and
 - practising requirements such as restrictions on legal form or requirements relating to the shareholding of a company providing the service [COM(2016) 820 p. 9].
- Member States can restrict free movement of labour (Art. 45 TFEU), freedom of establishment (Art. 49 TFEU) and the freedom to provide a service (Art. 56 TFEU), by way of professional regulation provisions, only
 - if they pursue overriding public interest objectives and
 - if that is proportionate, i.e. if they are appropriate to ensuring the attainment of these objectives, and do not go beyond what is necessary to attain the objectives pursued (cf. CJEU, Judgement of 17 December 2015, X-Steuerberatungsgesellschaft/Finanzamt Hannover-Nord, EU:C:2015:827, C-342/14, para. 52)).
- The Professional Qualifications Directive [2005/36/EC] and the Services Directive [2006/123/EC, see [cepPolicyBrief](#)]
 - contain requirements for the assessment of the proportionality of national professional regulation and
 - provide for a reciprocal evaluation of national provisions on professional regulation by the Member States.
- According to the Commission, many Member States fail to examine or justify the proportionality of their professional regulation sufficiently or objectively [SWD(2016) 463, p. 19 et seq.]. This results in obstacles to the Single Market for services which have “widespread negative effects” on the economy and the mobility of members of the professions [SWD(2016) 462, p. 2].
- The Directive aims to further clarify the existing duty of Member States to assess whether legislation regulating the professions pursues overriding public interest objectives and is proportionate.

► Scope

- The Directive applies to all provisions falling under the Professional Qualification Directive [2005/36/EC] and restricting access to, or the pursuit of, a profession (Art. 2 (1)).
- The Directive does not apply to legislation on professional regulation established under EU law (Art. 2 Abs. 2).

► **Ex-ante assessment and ex-post monitoring of professional regulation**

- Prior to the introduction or amendment of professional regulation legislation Member States must assess, “in an objective manner” and with the “involvement of independent scrutiny bodies”, whether these provisions pursue overriding public interest objectives and are proportionate (Art. 4 (1) and (5)).
- Member States must provide a detailed statement and submit qualitative and, wherever possible, quantitative evidence showing that professional regulation provisions comply with both requirements (Art. 4 (2) and (3)).
- Member States must monitor, on a regular basis, whether the professional regulation legislation satisfies the requirements of the Directive (Art. 4 (4)).

► **Professional regulation must pursue overriding public interest objectives**

- Professional regulation provisions must pursue overriding public interest objectives (Art. 5 (1)). Such objectives may be deemed to include (Art. 5 (2)):
 - the protection of public policy, public security or public health,
 - preserving the financial equilibrium of the social security system and
 - protection of consumers and workers.
- Objectives of a “purely economic” and “essentially protectionist” nature cannot justify professional regulation (Art. 5 (3)).

► **Professional regulation must be proportionate**

- Before introducing or amending legislation on professional regulation, Member States must assess whether this legislation is justified by overriding public interest objectives.
- In carrying out this assessment, Member States “consider” in particular:
 - the risks arising from the legislation to consumers, professionals and third parties (Art. 6 (2) (a)),
 - whether existing rules, such as product safety legislation or consumer protection law, are already sufficient to achieve overriding public interest objectives (Art. 6 (2) (c)),
 - “the link” between the complexity of activities and the professional qualification required (Art. 6 (2) (e)),
 - the scientific and technological developments which may reduce the asymmetry of information between professionals and consumers (Art. 6 (2) (h)),
 - less restrictive means to achieve the overriding public interest objective (Art. 6 (2) (j)) and
 - the cumulative effect of the following requirements (Art. 6 (2) (k)):
 - reserved activities in conjunction with protected professional titles (Art. 6 (4) (a)),
 - continuous professional development requirements (Art. 6 (4) (b)),
 - “rules relating to the organisation of the profession, professional ethics and supervision” (Art. 6 (4) (c)),
 - compulsory chamber membership (Art. 6 (4) (d)),
 - specific legal form requirements or requirements which relate to the shareholding or management of a company (Art. 6 (4) (f)),
 - incompatibility rules relating to the exercise of a profession, such as that lawyers are not permitted to practise as solicitors and patent attorneys at the same time (Art. 6 (4) (h)), and
 - requirements concerning personal or collective professional liability insurance and similar protective schemes (Art. 6 (4) (i)).

► **Transparency and dialogue**

- Before introducing or amending professional regulation provisions,
 - Member States inform
 - the members of the affected profession and their associations
 - service recipients and citizens
 and give them the opportunity to express their views (Art. 7).
 - Member States encourage the exchange of information with other Member States (Art. 8 (1)).
- Member States publish, in a database, the reasons why they consider that the legislation on professional regulation satisfies the requirements of the Directive (Art. 9 (1)).

Statement on subsidiarity by the Commission

The comparability of the assessment of whether professional regulation legislation pursues overriding public interest objectives and is proportionate, could be improved by clarifying the criteria of the assessment.

Policy Context

The draft Directive is part of the Services Package. This also contains a Directive and a Regulation on the introduction of an electronic service card (E-Card) [COM(2016) 823 or COM(2016) 824; s. [cepPolicyBrief 12/2017](#)] and a Directive on the notification procedure [COM(2016) 821] for authorisation schemes and requirements related to the provision of services. In the Commission’s view, regulation creates obstacles for the Single Market for services and “holds back the potential for growth and job creation in the EU economies” [COM(2016) 820 p. 2]. The Services Package aims to remedy the situation. Both the German Bundestag and Bundesrat have brought a subsidiarity objection against this Directive.

Legislative Procedure

10 January 2017	Adoption by the Commission
29 May 2017	Council's General Approach
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Internal Market, Industry, Entrepreneurship and SMEs
Committees of the European Parliament:	Internal Market and Consumer Protection (leading); Rapporteur: Andreas Schwab (EVP Group)
Federal Ministries:	Ministry of Economic Affairs, Labour and Housing Construction (leading)
Committees of the German Bundestag:	Economic Affairs and Energy (leading);
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 46, 53, 62 TFEU (Single Market for labour, business and services)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The Commission's proposal does not contain new rules on professional regulation but aims to remove problems with the implementation of existing rules.

Disproportionate qualification requirements, an excessive number of reserved activities or other measures, on the one hand, sometimes have expressly protectionist objectives and impede members of professions - and the companies that employ them - from pursuing their profession across borders. As a result, members of a profession are either unable to work at all in certain Member States or first have to undergo time-consuming and costly procedures in order to be able to offer their services on the market. For consumers, this may mean that prices for services in regulated professions are unnecessarily high due to a low level of competition and that the choice of available services is unnecessarily low.

On the other hand, professional regulation does not always have a detrimental effect on the "potential for growth and the creation of jobs". In particular where the consumer is unable to judge the quality or reliability of a service ex ante - or even ex post - legislation on professional regulation can reduce informational asymmetries and increase consumer confidence. This may promote growth.

Professional regulation must therefore strike a fair balance between public interest objectives – especially the **protection of consumers** – on the one hand **and the freedom to choose an occupation** on the other.

The proposed proportionality test is a suitable instrument for this because Member States still have sufficient scope to determine which objectives are in the public interest based on national preferences. At the same time, however, it ensures that "purely economic" and "essentially protectionist" objectives are excluded.

The involvement of independent scrutiny bodies reduces the influence of stakeholders in the regulated professions. This increases the likelihood that the proportionality test will be based primarily on overriding public interest objectives rather than the vested interests of the affected professions.

The duty of Member States to provide qualitative and – if possible – quantitative **proof of proportionality imposes tighter limits on the anti-competitive misuse of professional regulation than previously.** The Directive should, however, specify that the duty to involve independent scrutiny bodies and to submit proof must be relative to the extent and importance of the respective amendment to professional regulation provisions because it results, in some circumstances, to significant additional red-tape for the Member States.

Legal Assessment

Legislative Competency

The Directive can, in principle, be based on **the EU powers to realise free movement of labour** (Art. 46 TFEU), **the freedom of establishment** (Art. 53 (1) TFEU) **and the freedom to provide services** (Art. 62 in conjunction with Art. 53 (1) TFEU). Art. 46 TFEU permits the EU to adopt "the measures required" to bring about free movement of labour. Art. 53 (1) TFEU permits the "coordination", i.e. harmonisation, of national provisions not only for the mutual recognition of certificates of competence but generally to facilitate the taking-up and pursuit of self-employed activities. Art. 46 and Art. 53 (1) TFEU allow for the harmonisation of national legislation which is detrimental to the free movement of labour but justified on the basis of overriding public interest objectives. Art. 46, Art. 53 (1) and Art. 62 TFEU only allow requirements for coordinating the content of national legislation but **do not allow any requirements for coordinating the procedures for adopting national professional regulation provisions.** Therefore the EU can only prescribe criteria for assessing

content. **The duty to involve independent scrutiny bodies** in the legislative procedure **is thus** – irrespective of the positive economic assessment – **unlawful**.

According to Art. 166 (4) TFEU, the EU has no power to harmonise national legislation on vocational training. This matter must therefore be excluded from the scope of the Directive.

Subsidiarity.

The joint evaluation under Art. 59 of the Professional Qualifications Directive [2005/36/EC] showed that the assessment of the proportionality of national professional regulation differs substantially between the Member States. The comparability of the assessments in the Member States can therefore be improved by stipulating common criteria for the assessment.

Proportionality with Respect to Member States

The easing of cross-border mobility for members of regulated professions is a legitimate objective. It should be specified that Member States basically have a margin of appreciation when determining the overriding public service objectives to be pursued by way of national professional regulation. In principle, stipulating common criteria for assessing the proportionality of professional regulation is appropriate in order to prevent disproportionate restriction of basic freedoms by Member States. Some of the criteria should, however, be more clearly formulated in order to ensure their uniform implementation, such as the duty to examine the cumulative effect of “rules relating to supervision” (Art. 6 (4) (c)).

To choose a Directive is - irrespective of higher standards in some Member States - necessary because non-binding instruments such as e.g. Communication COM(2013) 676, which contains recommendations on the assessment of the proportionality of national professional regulation, have overall proven to be unsuitable.

Applicable law already requires national professional regulation to pursue the achievement of overriding public interest objectives and to be proportionate (cf. Professional Qualifications Directive [2005/36/EC] and the Services Directive [2006/123/EC], CJEU, X-Steuerberatungsgesellschaft/Finanzamt Hannover-Nord, EU:C:2015: 827, para. 52)).

The duty of the Member States to involve scrutiny bodies in the ex-ante assessment and **to provide** qualitative and where possible quantitative **proof of proportionality, is** however **disproportionate and thus unlawful because it applies**, irrespective of the circumstances, **to every amendment of legal and administrative provisions**. These requirements are additionally disproportionate because the Directive also obliges Member States to carry out regular ex-post supervision of professional regulation, in addition to ex-ante assessment. **It should therefore be specified that the ex-ante requirements for assessing proportionality must be proportionate to the extent and importance of the respective amendment** to provisions on **professional regulation**.

Conclusion

Professional regulation must strike a fair balance between protection of consumers and the freedom to choose an occupation. The proportionality test is a suitable instrument for this. The duty of Member States to provide proof of proportionality imposes tighter limits on the anti-competitive misuse of professional regulation than previously. It is, however, disproportionate and therefore unlawful because it applies to any amendment of legal and administrative provisions. It should be specified that the requirements for assessing proportionality must be proportionate to the extent and importance of the respective professional regulation provisions. The EU powers to realise free movement of labour, freedom of establishment and freedom to provide a service do not allow requirements for coordinating the procedures in which national legislation on professional regulation are adopted. The duty to involve independent scrutiny bodies in the legislative procedure is thus unlawful.