

# UEAPME<sup>1</sup> note on the proposal for a directive on a proportionality test before adoption of new regulation of professions

## Context:

UEAPME members strongly support a good functioning of the Internal Market and the free movement of persons and services.

The recognition of regulated professions in the European Union is among the very important legal tools for the free movement of professional services, be it for the sake of service provision or for establishment purposes.

In this context, the Directive 2005/36/EC, amended by Directive 2013/55/EU on professional qualifications, provides the current legislative framework on regulated professions and on recognition of diplomas or professional experience within the European Union.

According to Article 13 of the 2013/55/EU Directive on conditions for recognition *“if access to or pursuit of a regulated professions in a host Member State is contingent upon the possession of specific professional qualifications, the competent authority of that Member State shall permit applicants to access and pursue that profession, under the same conditions as apply to its nationals, if they possess an attestation of competence or evidence of formal qualifications referred to in Article 11, required by another Member State in order to gain access to and pursue that profession on its territory”*.

According to Article 59 of the same Directive related to transparency *“Member States shall examine notably: requirements must be neither directly or indirectly discriminatory on the basis of nationality or residence; requirements must be justified by overriding reasons of general interest; requirements must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective”*.

To have a comprehensive overview of regulated professions in the EU and conditions to access these professions, EU countries participated in a transparency and mutual evaluation exercise between 2014 and 2016.

[http://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition\\_en](http://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition_en)

**For the transparency exercise**, each Member State had to report the list of professions it regulates, including those at regional level, which leading to the establishment of a database of regulated professions.

<http://ec.europa.eu/growth/tools-databases/regprof/>.

**For the mutual evaluation exercise**, each Member State was invited to conduct a mutual evaluation of the respective barriers they have in place limiting access to certain professions, taking into account that conditions to access professions can vary significantly between EU countries.

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<sup>1</sup> UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

The main objectives of the transparency and mutual evaluation were the **simplification and improvement of citizens' access to information** on regulated professions and the **commitment of EU countries to review the requirements they impose** with regards to access to and pursuit of regulated professions.

As a follow-up to the transparency and mutual evaluation exercise undertaken, **the European Commission published on 10 January 2017 a proposal for a Directive on a proportionality test before adoption of new regulation of professions**, as part of the Services Package.

The proportionality test is a common EU-wide assessment mechanism of regulation of professions. It aims at introducing more clarity to the applicable criteria, strengthening reliability, transparency and comparability across Member States and ensuring that rules are applied in an equal manner across the EU.

The Directive lays down rules on a common framework for conducting proportionality assessment before adopting or amending national regulations of professions. It covers “protected professional title” and “reserved activities”.

In the case of new measures, restricting access to or pursuit of regulated professions, Member States should undertake an ex ante assessment of their proportionality in accordance with Directive 2013/55/EU.

When assessing the necessity and proportionality of provision, the relevant competent authorities shall consider in particular 11 criteria related to national legal, regulatory and administrative rules, including the cumulative of restrictions to access and pursuit of the professions. As part of this last criteria, 10 additional criteria are listed in Article 6, among others the compulsory chamber membership or quantitative restrictions.

On transparency, the new directive requires that the reasons for considering that provisions are justified, necessary and proportionate and which are communicated to the EC in accordance with Dir 2013/55/EC, have to be recorded in the database of regulated provisions.

UEAPME members have presented diverse reactions:

➤ **One group of UEAPME members takes note of the new proposal for a directive on a proportionality test of new regulation of professions**

- They do not support a systematic deregulation of professions, but they are keen to further assess the proportionality of certain existing rules in the Member States.
- National rules and laws differ amongst Member States and this is often not transparent for companies and professional services, due to lack of translation and fragmentation amongst different authorities. This lack of transparency forms a great barrier for SMEs to provide cross-border services or establishment. Strengthened cooperation between national authorities is needed to create more transparency on which rules or regulation applies for which kinds of professions.
- They see it as a continuity of what has been started with the transparency and mutual evaluation exercise which in their view does not create an interference with national prerogatives.
- There is a need for a continuous process to tackle some unjustified discriminatory behaviours or protectionist trends for some professions or sectors which can hamper the free movement of services. They acknowledge that in different cases, there may be valid reasons for policy makers to justify regulated professions. Proper criteria are needed to guarantee public security, public safety and consumer protection. Access to a profession to people with the required skills needs to be ensured to perform well. However, criteria are not always proportionate in all Member States. Proposing a proportionality test before adopting or reforming national regulations of professions, is therefore seen as justified and it can help identify and remove unnecessary regulatory barriers in the cross-border provision of services and also domestic services.

- Many activities are regulated in only a few Member States. The high number of regulated professions and specialisations is fragmenting labour markets and hampering cross-border services provision or establishment. They therefore support the approach chosen by the Commission to ensure that rules are applied in an equal manner so as to prevent further burdening and fragmenting the Single Market for professions.
- Regarding Article 6, they do not oppose the introduction of common criteria to assess the proportionality related to national legal, regulatory and administrative rules as long as they still guarantee that for certain professions, national requirements are justified (e.g. to guarantee consumer protection and public health and safety).
- Regarding Article 7, they welcome the involvement of stakeholders. This element of transparency gives stakeholders, such as representative business associations and consumer organisations, access to see and alert their perspective of possible problems with a new legislative, regulatory or administrative provision restricting access to or pursuit of regulated professions, or amending existing ones. This should prevent special national requirements to become barriers to cross-border movement of professional services and before they could discourage professional service providers to go cross-border. Additionally, they would also plead for stakeholder involvement in accessing existing regulation and deregulation of professions. Stakeholder views are needed to assess whether the Member States are applying the right regulation in terms of proportionality, but also in terms of correctness and in terms of consumer protection.

➤ **Another group of UEAPME members considers that the current legislative framework on regulated professions is largely sufficient for ensuring a good functioning of the Single Market**

- They have serious concerns about the legal approach and content of the new EC initiative.
- Mobility of self-employed and workers in the field of regulated professions is ensured by the European rules on recognition of professional qualifications, as set out in Directive 2005/36/EC, amended by Directive 2013/55/EU. This system relies to a large part on automatic recognition. Thus, the fact of having regulated professions is no real hindrance to cross-border mobility. The system works well for a long time.
- The introduction of a new compulsory and preventive procedure in addition to those planned by directives 2013/55/EU and 2006/123/EC and those contained in the "services package", will slow down legislative, regulatory and administrative procedures of Member States.
- The proportionality test does not appear able to reduce the restrictions on the internal market. Indeed, as already experimented in the application of the previously mentioned procedures, the Member States may implement the test in a "bureaucratic" way, leaving the situation unchanged (as in the mutual evaluation exercise).
- Therefore, it would be preferable to undertake a different approach aimed at reducing the diversity among the regulated professions. A possible path in this direction was introduced in 2013 by the Directive 2013/55/EU (Article 49a - common training framework), according to which individual professions could identify a common training path that allows automatic recognition of their qualifications. The possibility of starting - for certain professions - such an approach should be carefully considered.
- They do not see the need for a proportionality test made compulsory to all Member States before adoption of new regulation of professions as this test is already foreseen in the Service Directive.
- They consider that with this new proposal for a directive on proportionality test for regulated professions, the Commission does not respect the subsidiarity principle.

- By introducing eleven criteria and ten sub-criteria to assess the proportionality related to national legal, regulatory and administrative rules, the EC clearly interferes with Member States' competences as the proposed criteria exceed those established in the ECJ jurisprudence.  
The introduction of eleven criteria on proportionality and an additional ten sub-criteria on the cumulative effects of existing regulations goes far beyond the proportionality assessment of the European Court of Justice. In its case law, the ECJ requires that national legal measures having negative effects on cross-border mobility must be justified by overriding reasons of general interest which are proportionate (suitable for securing the attainment of the objective pursued and not going beyond what is necessary to attain that objective). This excessive regulatory approach disrespects national competencies and conflicts with the principles of subsidiarity and proportionality, set out in Article 5 TEU.
- The new proposal foresees 21 criteria or choices of elements to assess the proportionality whose formulation is rather unprecise and sometimes even arbitrary.
- Compulsory membership to a chamber does not represent a relevant obstacle to the freedom of provision of services or establishment since it is first the competent national authority or designated professional body which decides on the pursuit of a profession and affiliation to a chamber is a direct consequence and not a precondition of this decision.
- The current proposed Article 7 about information and involvement of stakeholders is going way too far. This new obligation on information of citizens as well as on taking into account their views are disproportionate. It will make the procedure incredibly heavy, increase its length and generate important additional costs for public authorities.
- Furthermore Chambers and notably Skilled Crafts Chambers are extremely pro-active in providing quality vocational education and training pathways notably apprenticeship which is key for ensuring quality services. With this new proposal which tends to decrease the level of qualification entry, there is a legitimate fear for losing quality assurance for qualifications and consequently for services provisions.

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