



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Assemblée nationale for its Reasoned Opinion on the proposal for a Directive of the European Parliament and the Council on a proportionality test before adoption of new regulation of professions {COM(2016) 822 final}.

This proposal forms part of a broader package of ambitious measures designed to make it easier for companies and professionals to provide services to a potential customer base of 500 million people in the European Union. This fresh boost to the services sector is supposed to benefit consumers, jobseekers and businesses, and to contribute to generating economic growth across Europe.

Almost 50 million people – 22% of the European labour force – work in professions to which access is conditional upon the possession of specific qualifications or for which the use of a specific title is protected, for example pharmacists or architects. Regulation may well be warranted for a number of professions, for example those linked to public health and safety. However, unnecessarily burdensome and outdated rules can create obstacles for mobility of professionals and can create difficulties for qualified candidates to access these jobs. This is also to the detriment of consumers. The objective of the proposed Directive for a proportionality assessment is not to regulate or deregulate professions – this remains a national prerogative. It aims at ensuring coherent and consistent compliance by all Member States with existing obligations under Union law that national professional requirements are justified, suitable and necessary. The Commission is proposing to streamline and clarify how Member States should undertake a comprehensive and transparent proportionality test before adopting or amending national rules restricting access to or pursuit of regulated professions.

In the view of the Commission, the proposal on a proportionality test before adoption of new regulation of professions fully respects the principles of subsidiarity and proportionality.

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The legal bases [Articles 46, 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU)] allow for coordinating measures to reach a certain degree of harmonisation of national regulation regarding access to or exercise of professions, as it has been achieved already with some professions at European Union level. The current proposal does not go as far as to aim at such a harmonisation of rules, but merely coordinates how Member States should assess whether requirements that are to be adopted are in line with the principle of proportionality. It does not in any way prejudge the outcome of the national legislative process. Past experience has demonstrated that non-binding measures did not lead to the desired objective of comparable and transparent assessments. The proposal leaves ample discretion for the Member States to integrate the proportionality test in the existing structures and should therefore not be problematic or burdensome to implement for Member States that already have similar procedures in place.

The Assemblée nationale states that the reserve of activities may only be used by Member States for professions, if the measure addresses a serious risk covered by a public interest objective. Indeed, it is an established principle that measures that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions, one of which is the justification by an imperative requirement in the general interest. The proposal does however not require that a risk be particularly serious for the purposes of reserving activities. It is in accordance with established jurisprudence of the Court of Justice of the European Union that when national authorities assess the necessity and proportionality of a measure to be introduced, the nature of the risks related to public interest objectives has to be considered.

The Assemblée nationale states that the Commission assumes that suppression of disproportionate restrictions for the access or pursuit of regulated professions cannot be sufficiently achieved by Member States themselves. In this context, it has to be emphasised that it is settled jurisprudence of the Court of Justice of the European Union that the principle of proportionality is one of the general principles of Union law and that it needs to be applied in a systematic and consistent manner by Member States.

The results of the transparency and mutual evaluation exercise based on Article 59 of Directive 2005/36, and carried out by the Member States and the Commission from 2014 to 2016, demonstrate that Member States do not meet this obligation, although ample guidance has been provided by the Commission. It became apparent that many national proportionality assessments lack proper reasoning and this suggests an underlying problem concerning how the need for regulation and its effects are evaluated. The regulatory decisions are currently often not based on sound and objective analysis or carried out in an open and transparent manner. In-depth discussions and guidance provided by the Commission have not prevented the introduction of new restrictive measures without sound analysis.

In addition, in preparation for the impact assessment of the proposal, the Commission carried out a public consultation. 420 contributions were received from public as well as private respondents and which included authorities operating at both the regional and local level. From analysing the responses it could be seen that often even basic but necessary steps, or at least knowledge of such steps, vital to evaluating regulation according to the principle of proportionality were lacking. Indeed, many of the administrations that responded to the consultation were unaware of any pre-existing national or Union-level obligations.

Continued divergences in approach and comprehension would result in an escalation of market fragmentation, exacerbating the economic problems identified in the impact assessment of the proposal as well as the complexity ultimately confronting job seekers. Thus, it is the Commission's view that the objectives cannot be sufficiently achieved by the Member States individually.

The Assemblée nationale is of the opinion that the proposal would extend the scope of control of the proportionality of regulated professions which fall in the scope of Directive 2005/36/EC. In particular, in the Assemblée nationale's view this could have as effect that Member States are not free to regulate health professions and professions in the tourism sector.

Pursuant to Article 168(7) TFEU it is the Member States' competence to regulate their health care systems. The same is valid for the tourism sector under Article 195 TFEU. Yet, this does not mean that when acting within these competences, the basic principles of European Union law, such as the principle of non-discrimination and proportionality, can be disregarded by the Member States. Therefore, already now, for all professions covered by the proposal, which coincides with the scope of Directive 2005/36/EC on the recognition of professional qualifications, Member States have to respect the principles of non-discrimination and proportionality when regulating the access or pursuit of a profession. This applies equally to the health professions and professions in the tourism sector.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Assemblée nationale and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Elżbieta Bienkowska
Member of the Commission*