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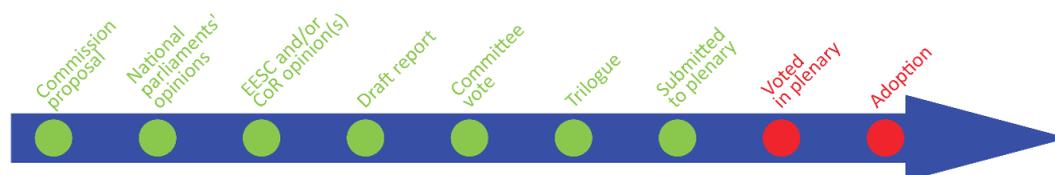
Proportionality test for new national regulations for professions

In the EU, professions are regulated at either Union or Member State level. In the latter case, qualification requirements can differ widely between Member States, due to their respective historical development and experience. This can lead to a lack of clarity on the criteria used, and result in fragmentation of the single market. The proposed directive on a proportionality test before adoption of new regulation of professions, tabled by the European Commission, intends to harmonise the way in which proportionality tests are carried out before Member States introduce new regulation on professions. The directive will supplement provisions of Directive 2005/36/EC on the recognition of professional qualifications, last amended by Directive 2013/55/EU. The European Parliament proposes a specific status for healthcare services, and explicitly addresses gold-plating practices (unnecessary national requirements). With a text agreed between Parliament and Council in trilogue in March, Parliament is due to vote on whether to confirm this text in June.

Proposal for a directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions

COM(2016) 822, 10.1.2017, 2016/0404(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Internal Market and Consumer Protection (IMCO)
Rapporteur:	Andreas Schwab (EPP, Germany)
Shadow rapporteurs:	Sergio Gaetano Cofferati (S&D, Italy); Richard Sulík (ECR, Slovakia); Jasenko Selimovic (ALDE, Sweden); Jiri Mastalka (GUE/NGL, Czech Republic); Julia Reda (Greens/EFA, Germany); Marco Zullo (EFD, Italy); Mylene Troszczynski (ENF, France)
Next steps expected:	First-reading vote in plenary



8 June 2018
 Second edition
 The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

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Introduction

One of the fundamental rights in the European Union is the right to choose an occupation and to exercise a regulated profession. The regulation of professional services is, in the case of some professions (such as doctors, nurses or architects), harmonised at EU level but in other cases remains a competence of the Member States, meaning that they are permitted to decide individually and without consultation whether there is a need to adopt rules on a regulated profession or restrictions on access to it. This is allowed provided that the principles of proportionality and non-discrimination are respected. 'Regulated' professions are those that may be exercised or accessed only by people who hold certain qualifications. The activities and qualification requirements applicable differ very widely between Member States on account of their respective historical development and experiences. An [evaluation](#) published in January 2017 concluded that there is 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. According to the majority of stakeholders participating in a [public consultation](#) carried out in 2016, it is necessary to establish a common approach at EU level, in order to avoid fragmentation of the single market and eliminate barriers to the taking-up and pursuit of certain employed or self-employed activities, as well as to prevent disproportionate measures from being adopted.

Context

As part of the roadmap laid out in the single market strategy, on 10 January 2017, the European Commission adopted several proposals that were in line with President Juncker's political commitment to unlock the full potential of the single market to make it a launch pad for European companies to prosper in the global economy. These proposals, also known as the '[Services Package](#)', aim to make it easier for services providers to deal with administrative formalities and to help Member States identify excessively burdensome or outdated requirements on professionals operating internally or across borders. The package contains four legislative initiatives: first, a proposal for a new European services e-card; second, a proportionality assessment of national rules on professional services; third, guidance for national reforms in the regulation of professions; and fourth, improved notification of draft national laws on services. Instead of amending existing EU rules in the area of services, the Commission focuses on improved application, as [evidence](#) shows that implementing them to their full potential would provide a significant boost to the EU economy.

Existing situation

Professional services are regulated by [Directive 2005/36/EC](#) of the European Parliament and of the Council on the recognition of professional qualifications. This directive established the obligation for Member States to assess the proportionality of their requirements restricting access to or pursuit of regulated professions and to communicate the results of the assessment to the Commission afterwards, launching the 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.

The last revision of the Professional Qualifications Directive ([Directive 2013/55/EU](#)) brought substantial modernisation to the field of the regulated professions. An improvement in transparency was achieved by

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means of mutual evaluation (between Member States) and improved information about those professions. At that time, criteria were also introduced for the evaluation of proportionality, in particular: non-discrimination, regulation in the public interest, and necessity for the purpose of attaining the objective.

According to a [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 (activities where a specific professional qualification is required). 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 addition, the survey identified inconsistent application of the principle of proportionality. There is therefore, according to the survey, a need for a harmonised approach.

Parliament's starting position

On 15 November 2011, the European Parliament adopted a [resolution](#) on the implementation of the Professional Qualifications Directive ([Directive 2005/36/EC](#)), in which it called for the modernisation and improvement of that directive. The Parliament also encouraged the use and introduction of efficient and appropriate technologies, such as the European professional card, which should be an official document recognised by all competent authorities, in order to facilitate the recognition process. In response to Parliament's resolution, the Commission presented a [proposal](#) for a revision of the Professional Qualifications Directive on 19 December 2011. After successful trilogue negotiations, Parliament safeguarded the changes it had called for, including introduction of a professional card on a voluntary basis, creation of an alert mechanism, clarification of the rules regarding partial access to a regulated profession and regarding language skills, as well as the creation of a mechanism for mutual evaluation of regulated professions to ensure greater transparency. This led to the adoption on 20 November 2013 of [Directive 2013/55/EU](#) of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications.



Proposal

Preparation of the proposal

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

Between 27 May and 22 August 2016, the Commission carried out a [public consultation](#) with the participation of individuals, members of regulated professions, professional associations, regulatory bodies, government authorities and academics. There was a broad consensus among stakeholders that action should be taken at EU level to introduce clarity and a common approach concerning proportionality tests. The issues were also discussed with Member States at high-level group meetings on 3 May and 10 November 2016.

In line with its 'Better Regulation' approach, the Commission conducted an [impact assessment](#), analysing the different policy options and their impact on stakeholders. This impact assessment has shown fragmentation of the single market due to disproportionate regulation characterised by the lack of consistent criteria, preventive mechanisms and proportionality checks. This restrains competition, innovation, consumer choice and job creation. The preferred policy option set out was a legally binding instrument (a directive) that would include a procedural framework comprising periodic review of existing regulation, consultation of interested parties, and requirements to ensure the objectiveness and impartiality of national authorities.

The changes the proposal would bring

On 10 January 2017, the European Commission adopted a [proposal](#) for a directive on a proportionality test before adoption of new regulation of professions. The proposed directive aims 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.

The main objectives of the action are to: introduce more clarity to the applicable criteria; strengthen reliability, transparency and comparability across Member States; and ensure that rules are applied equally, so as to prevent further burdens and fragmentation of the single market. Furthermore, free movement of professionals across the EU has to be granted by avoiding the introduction of unjustified and disproportionate rules hindering access to professions.

The Commission proposed an expanded list of mandatory criteria for the regulated professions. Article 6(2) of the proposal lists a total of 11 assessment criteria, and Article 6(4) lists several restrictions to be checked.

The proposal sets out the main criteria to be taken into account by the competent authorities, such as the nature of the risks, the scope of the activities reserved for a profession, the link between the qualification and the activities, or the economic impact of the measure. It also underlines the obligation to inform third parties before introducing new measures and give them the possibility to express their views, as well as the mandatory exchange of information between competent authorities of different Member States, allowing



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the Member State that intends to reform a profession to gather the information on the experience of other Member States.

More specifically, the proposal:

- > obliges Member States to conduct an ex-ante proportionality assessment, substantiated by qualitative and, wherever possible, quantitative evidence;
- > lists the justifications on grounds of public interest objectives on the basis of the Treaty on the Functioning of the European Union (TFEU), or recognised as such by the Court of Justice of the European Union. Based on settled case law, neither grounds of a purely economic nature having essentially protectionist aims or effects, nor purely administrative reasons can constitute overriding reasons in the public interest;
- > 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 attaining the objective pursued and do not go beyond what is necessary to attain that objective;
- > sets out an obligation to inform all interested parties before introducing new measures and give them the possibility to express their views; and
- > provides for transparency of the proportionality assessments as well as a periodic review of the directive.

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Views

Advisory committees

The Economic and Social Committee adopted an [opinion](#) on the whole services package on 31 May 2017. In this opinion, the EESC expressed the view that the concept of a proportionality test could improve national procedures. It stressed, however, that the proportionality check will require the close cooperation of Member States' authorities and professional organisations. In addition, the EESC believes that an obligation to use the test before any new professional regulation is not the best approach to enforcing its effective and engaged application; and that the test system could considerably slow down or even hinder any reforms in regard to professional regulation. It thus believes that non-obligatory guidelines or an offer to consult could lead to similar effects without the negative impacts.

The Committee of the Regions (CoR) adopted an [opinion](#) on the whole services package on 11 October 2017. In its opinion, the CoR underlines that it is a matter for Member States at national, regional or local level, to decide whether and how to regulate a profession, within the limits of the principles of non-discrimination and proportionality. It recognises, however, that it is desirable to ensure a more coherent legal framework at EU level for assessing the proportionality of new or amended requirements on access to, or the pursuit of, a regulated profession. The proportionality assessments must be thorough, objective and evidence-based, and should also be commensurate, as a 'one size fits all' approach could be unnecessarily burdensome in many circumstances. The CoR is concerned that the proportionality test will impose additional administrative burdens on competent authorities in the Member States, including regional and local authorities, with consequential administrative capacity and budgetary implications.

National parliaments

The [scrutiny deadline](#) for national parliaments passed on 20 March 2017. [Reasoned opinions](#) were presented by the German Bundesrat on 30 March 2017, by the German Bundestag on 31 March 2017, by the French Senate on 29 March 2017, the French National Assembly on 4 April 2017, and by the Austrian Bundesrat on 3 April 2017. The [opinion](#) of the German Bundestag states that there are already procedures monitoring whether national provisions are in line with EU law. In addition, the Commission proposal does not allow for derogations (for instance, in urgent cases). The [opinion](#) of the German Bundesrat states that the proposal constitutes an encroachment on the right of Member States to regulate regulated professions, although the EU has no comprehensive powers to legislate or to harmonise legislation in this area. The reasoned [opinion](#) of the French Senate states that the proposal does not respect the principle of subsidiarity, because the TFEU excludes harmonisation at EU level in different domains, such as tourism, transport or healthcare services. The French National Assembly [highlighted](#) that the proposal extends the scope of the proportionality test to cover regulated professions falling within the scope of [Directive 2005/36/EC](#) which could undermine the Member States' ability to implement rules in the health and tourism sectors. The Austrian Bundesrat also expressed [concerns](#) regarding proportionality. The Bundesrat does not see the need for the proposed directive in order to establish additional criteria; in its opinion, the less binding instrument of a recommendation would be sufficient for this purpose. EU law already includes adequate provisions and arrangements for scrutiny to prevent over-regulation (the provisions of

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the Services Directive and the Unfair Commercial Practices Directive, and the proportionality test provided for by the Professional Qualifications Directive).

Stakeholders' views¹

In its [position](#) adopted at its executive meeting of 13 and 14 June 2017, the European Trade Union Confederation finds the wording of the proposal on the proportionality test problematic, arguing that it is not clear whether the proportionality assessment applies to draft legislation only or also to amendments to existing legislative provisions. It is also uncertain when the proportionality assessment should be made and by which public authorities (institutions responsible for drafting the legislative proposals, legislators or specifically established scrutiny bodies at national level). It should be clarified how the completed proportionality test followed by notification of its results to the Commission and assessment of comments sent by other Member States will be combined in practice with the ongoing legislative process at national level. Moreover, in ETUC's opinion, 'sensitive' regulated health and social care professions should be fully excluded from the directive. In addition, ETUC disapproves of the fact that the proposal does not impose an obligation to involve social partners and professional organisations when regulation of professions is made by them or with their close involvement.

The members of the Union européenne de l'artisanat et des petites et moyennes entreprises (UEAPME), an employers' organisation representing the interests of European craftworkers, have presented different [positions](#). One group of UEAPME members did not support systematic deregulation of professions, but encouraged the further assessment of the proportionality of certain existing rules in Member States. Another group of UEAPME members considered the current legislative framework on regulated professions largely sufficient for ensuring a good functioning of the single market and expressed serious concerns about the legal approach and content of the Commission proposal concerning the respect of the subsidiarity principle. They also considered that the introduction of a new compulsory and preventive procedure will slow down the legislative, regulatory and administrative procedures of Member States.

The [position](#) adopted by the professionals' and managers' organisation Eurocadres on 4 May 2017 welcomes the proposal overall. Eurocadres agrees that inappropriate regulation can create a burden to professionals and obstacles for mobility. Regulation of professions should be objectively justified on the basis of public policy, public security or public health, consumer protection, or by overriding reasons in the public interest. As an assessment has to be conducted not only when adopting regulation for new regulated professions, but also when amending regulation of existing regulated professions, the concern of Eurocadres is that this could become a driver against necessary modernisation of regulation. As a soft law instrument, periodic guidance will be issued on specific needs, identifying countries and professions where reform would be beneficial. This would be an important complement to the directive to reduce this potential counter-modernisation effect. It would also be important to clarify that, when amending existing regulation, not only should the change meet the assessment criteria but also the overall regulation. Social partners must have an important role in the regulation of professions and should be explicitly mentioned.

¹ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.



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In its [press release](#) of 10 January 2017, BusinessEurope, the leading overarching organisation representing European companies, supported the setting up of a proportionality test before adopting or reforming national regulations on professions as it could help to identify and to remove unnecessary regulatory barriers. At the same time, they recognised that there may be valid policy reasons (for instance, regarding security or safety) to justify regulated professions.

Legislative process

The Commission proposal was presented in the Council on 13 January 2017. In the European Parliament, the Committee for Internal Market and Consumer Protection (IMCO) is currently working on the proposal. The rapporteur is Andreas Schwab (EPP, Germany).

In the Council, the proposal was discussed at the meeting of the Permanent [Representatives Committee](#) on 10 May 2017 and a general approach was agreed by the [Competitiveness Council](#) on 29 May 2017. The following modifications were made:

- > the competence of Member States to regulate professions was strengthened;
- > the criteria to assess proportionality have been reduced;
- > the information and involvement of stakeholders in the regulatory process was limited; but
- > the obligation for Member States to consider the economic impact of the measures they introduce has been maintained.

The rapporteur presented his [draft report](#) to the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) on 23 June 2017. The draft report proposed the following changes:

- > exclude healthcare services from the scope of the directive in order to focus efforts on the remaining sectors of activities;
- > address gold-plating practices (unnecessary requirements imposed by Member States) explicitly where EU rules on regulated professions are used as an excuse to impose unjustified burdens on citizens and businesses;
- > let the Member States decide whether or not to consult any independent scrutiny body in order to save additional costs;
- > include the principle of non-discrimination on the basis of nationality or residence;
- > clarify the reasons for the introduction of additional requirements that might be suitable to attain public interest objectives (this could be for example ensuring continuous training in order to follow technical developments);
- > complete the list of overriding reasons of general interest with two additional reasons, namely guaranteeing the quality of craft work, as well as research and development;
- > provide for a judicial review by national courts of requirements, governing access to or pursuit of professions according to national procedures;



- > inform equally citizens, representative associations and other stakeholders, and in addition, introduce a possibility for wider public consultations in order to gather adequate evidence necessary for designing reforms of professional services; and
- > provide a central role for the Commission in receiving observations from national authorities, in order to avoid unnecessary bilateral conflicts between Member States.

The IMCO committee [report](#) was adopted on 4 December 2017. This report maintained the points suggested in the draft report, but proposed a specific status for healthcare services, instead of excluding them from the scope of the directive. The committee also voted on a mandate to open negotiations with the Council, a decision confirmed by the December plenary session.

During the trilogues, the [Council](#) sought to enhance the competence of Member States to regulate professions and limit obligations as to the transparency of the national regulatory process.

On 20 March, a compromise text was agreed, and this was presented for discussion during the Council meeting on 11 April. In the Parliament, the IMCO committee approved the text agreed in trilogue on 24 April 2018. The plenary is due to vote on the text at first-reading during the June plenary session.



References

EP supporting analysis

Dalli, H., [Proportionality test before adoption of new regulation of professions](#), Initial Appraisal of a European Commission Impact Assessment, EPRS, European Parliament, May 2017.

Szczepański, M., [A deeper and fairer Single Market](#), EPRS, European Parliament, December 2015.

Other sources

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