

May 2017

Proportionality test before adoption of new regulation of professions

Impact Assessment (SWD (2016)463, SWD (2016)462 (summary)) of a Commission 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)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above Commission [proposal](#), submitted on 10 January 2017 and referred to Parliament's Committee on Internal Market and Consumer Protection.

The Professional Qualifications Directive¹ provides for a system of recognition of professional qualifications in the EU in order to facilitate the free movement of people and services within the single market. In 2013 this directive was amended to require Member States to undertake and complete by January 2016, a 'mutual evaluation' exercise. Under this exercise, Member States were required to give information to the Commission regarding all the regulated professions at national level and to give their evaluation as to whether these regulatory requirements were compatible with the principles laid down in the directive.² They were also required to submit, by the same deadline, national action plans with information on the regulations they intended to maintain and the reasons for considering that those regulations are compatible with the said principles. The directive then required the Commission to report on its findings, based on the information provided by the Member States and, if appropriate, propose further initiatives. The current proposal is the result of that process.

According to the IA, the mutual evaluation exercise exposed shortcomings in the processes Member States use to take regulatory decisions on professional qualifications, their decisions not being open and transparent and not based on sound and objective analysis. In its 'Single Market Strategy'³ the Commission undertook a two-pronged approach to address the issue. Firstly, it undertook to provide guidance to specific Member States, identifying specific reform needs to improve access to, and the exercise of, regulated professions at national

¹ [Directive 2005/36/EC](#) of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. For more information on this directive see: Kyrieri, K.M., '[The modernised Directive on professional qualifications and its impact on national legislations](#)', *Eipascope*, Bulletin 2014, European Institute of Public Administration, Maastricht, 2014, pp. 43-46;

² The principles laid down in Article 59(3) are the following:

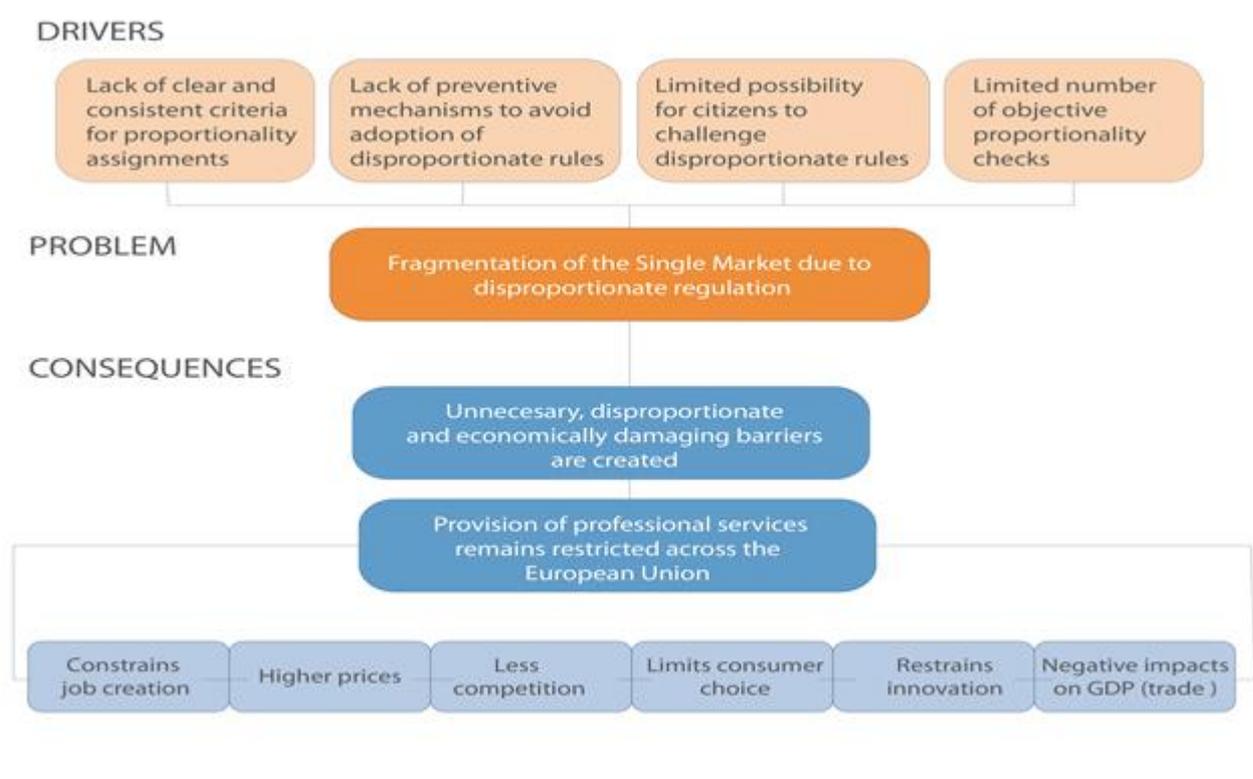
(a) requirements must be neither directly nor indirectly discriminatory on the basis of nationality or residence;
(b) requirements must be justified by overriding reasons of general interest;
(c) requirements must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective.

³ Communication from the Commission of 28 October 2015: Upgrading the Single Market: more opportunities for people and business ([COM\(2015\)550](#)). The Single Market Strategy was published in October 2015, while the evaluation exercise in respect of the Professional Qualifications Directive had a deadline of January 2016. One must therefore keep in mind that in drafting the Single Market Strategy the Commission did not have at its disposal the final results of the evaluation.

level. Secondly, it undertook to set out a methodological framework for comprehensive proportionality assessment for Member States to use when proposing new professional regulations or reviewing existing ones. In its resolution on the Single Market Strategy,⁴ the European Parliament expressed support for the Commission's initiative to review the regulated professions and welcomed its proposal to address regulatory barriers.

Problem definition

According to the IA, the problem is the fragmentation of the single market due to disproportionate regulation. It explores in considerable depth the drivers contributing to this problem and also identifies the consequences that derive from it. It illustrates this with the aid of the problem tree below:



Source: IA (adapted by author)

The problem drivers were largely identified through the mutual evaluation exercise, which exposed insufficient justification of the proportionality of professional regulation and 'a disparate and disorganised approach to regulatory assessments'.⁵ There appears to be a substantial overlap between the problem drivers and at times it is not easy to distinguish between them.

To explore the problem and its consequences, the IA refers to the results of the EU Survey of Regulated Occupations⁶ and to an external study undertaken on behalf of the Commission to analyse the data gathered from the survey (the Koumenta/Pagliari study).⁷

The problem definition section of the IA seems to devote much of its energy to elaborating on the problem drivers, but very little to the problem itself and its consequences, which are better explained earlier, in the

⁴ European Parliament resolution of 26 May 2016 on the single market strategy (P8_TA(2016)0237).

⁵ IA, p. 19.

⁶ The survey was conducted by TNS Opinion for the Commission between 31 March and 14 April 2015; 26 640 EU citizens were interviewed covering the labour force in all the Member States.

⁷ Koumenta, M., Pagliero, M., Measuring Prevalence and Labour Market Impacts of Occupational Regulation in the EU, Brussels, 2015.

section describing the economic context of the proposal. In this respect the problem tree reproduced above serves to organise the problem definition aspect of the IA – which seems otherwise not to be presented in a systematic and intuitive fashion – and provides a clear logical link between the drivers, the problem and the consequences.

Objectives of the legislative proposal

The *general* objective of the Commission proposal is to improve the provision of, and access to, professional services across the EU by preventing the introduction of disproportionate regulation when amending existing or introducing new regulation. The IA emphasises the *ex-ante* aspect of the objective, seeking action when regulation is enacted or amended, and not *ex-post* control of existing disproportionate regulations.

The *specific* policy objectives are defined as follows:

- Clarify and systemise the minimum criteria to be used for proportionality analysis;⁸
- Make proportionality assessments more transparent, reliable, comparable, objective and comprehensive across the Member States to ensure that the regulation they approve is best fitted for their objectives and that all relevant interests are served;
- Ensure that the rules are applied in an equal manner by all Member States at all levels of regulation to avoid fragmentation of the single market.

The general and specific objectives as defined in the IA appear to address the identified problems and are specific, measurable, achievable, relevant and amenable to be set within a timeframe. The IA does not, however, seem to set any *operational* objectives as required for legislative initiatives by the Better Regulation Guidelines.

Range of options considered

The IA considers the following options:

- Policy option 0: Baseline scenario.
- Policy option 1: Guidance approach, whereby the Commission would support the Member States in analysing the proportionality of national regulations. This could include the drawing up of a code of conduct, the establishment of a list of relevant case law and the facilitation of information exchange between regulatory authorities.
- Policy option 2: Common set of criteria for an EU proportionality test for regulated professions. This could take one of two forms:
 - Policy option 2a: Legally binding instrument – this would be a directive laying down specific obligations, to be transposed into national law, for a proportionality test for new regulations or the amendment of existing ones. This proportionality test would consolidate existing case law and best practice, creating also a transparency mechanism whereby information concerning new regulations and their proportionality assessment would be accessible to other Member States.
 - Policy option 2b: Non-legally binding instrument (a recommendation) – this would be an instrument covering the same aspects as in option 2a, but which would be of a non-binding nature.
- Policy option 3: Comprehensive modification of the existing system:
 - Policy option 3a: Legally binding instrument (a directive) – in addition to the aspects under option 2a, this option would include a procedural framework including in particular periodic review of existing regulation, consultation of interested parties, and requirements to ensure the objectiveness and impartiality of national authorities.

⁸ In the context of the IA, and based on the considerations therein, proportionality tests can be described as systematic assessments of the proportionality of regulation on professions to ensure the better development of regulation through objective *ex-ante* analysis and transparency and resist the introduction of unnecessary measures.

- Policy option 3b: Non-legally binding instrument (a recommendation) – this would cover the same elements as option 2a, but in the form of a non-binding instrument.

Of the five possible options for action, three are non-regulatory (options 1, 2b and 3b). The options appear to be set out in a clear manner and presented and analysed in a balanced way, and seem to be logically linked to the problem they need to address and the objectives they are intended to reach.

The preferred policy option is option 3a.

Scope of the impact assessment

For each option the IA analyses the economic impact, the impact on SMEs and micro-enterprises, the impact on Member States' public authorities and administrative costs, the impact on the Commission, and the social impact. The IA does not analyse the environmental impacts explaining that 'none of the specific policy objectives or the assessed policy options have environmental dimensions'.⁹

In the analysis, the three non-regulatory options are all found to suffer from the same drawback that their effectiveness is dependent on the willingness of the Member States to implement the actions recommended therein. In this context, the IA takes into account the experience with the Commission communication on mutual evaluation,¹⁰ which is judged to have been insufficient to promote the conduct of adequate proportionality assessments.

Subsidiarity / proportionality

In exploring the problem and its drivers, the IA dedicates a section to the EU right to act and subsidiarity. It argues that the objectives of the proposal cannot be sufficiently achieved by the Member States acting individually, as evidenced by the mutual evaluation exercise, and can be better achieved through the introduction of a common EU-wide assessment mechanism enacted by all Member States. The IA claims that excessive occupational regulation has 'negative and multi-layered impacts on the economy', having a substantial impact on the EU's competitiveness, and as such needs to be tackled at European Level.¹¹ Similar arguments are made in the section addressing the subsidiarity and proportionality of the preferred option, adding nothing to the points made earlier within the ambit of the definition of the problem and the objectives.

With regard to the proportionality of the preferred policy option, the IA states that the preferred option is in line with the principle of proportionality as it seeks to strike a balance, taking into account several competing considerations: securing public interest objectives, assuring quality of service, improving access to and exercise of regulated professions for professionals, and ensuring wider choice for consumers.

The explanatory memorandum of the proposal explains the choice of a directive as an instrument, stating that a directive allows the Member States to fulfil the objective of the proposal by assimilating a comprehensive proportionality assessment into their own systems in a way that accommodates their structures and procedures.

The deadline for the submission of [reasoned opinions](#) by national parliaments on non-compliance with the principle of subsidiarity expired on 20 March 2017. Five Member State parliamentary chambers – the Austrian Bundesrat, the French Assemblée nationale and Sénat, and the German Bundesrat and Bundestag – have submitted reasoned opinions arguing that the proposal is not compatible with the principle of subsidiarity. The German Bundesrat followed its reasoned opinion with another opinion further outlining its position. Amongst the arguments raised by these chambers is the claim that the proposal is contradictory to certain articles of the

⁹ IA, p. 38.

¹⁰ Communication from the Commission of 2 October 2013: Evaluating national regulations on access to professions ([COM\(2013\)676](#)).

¹¹ IA, p. 13.

Treaty on the Functioning of the European Union and would encroach on Member States' competences, in particular in matters of public health and tourism. Another argument raised is that the measures in the proposal are disproportionate to the objectives sought.

Three parliamentary chambers (the Portuguese Assembleia da República, the Romanian Senat and the Spanish Cortes Generales), on the other hand, submitted contributions which state that the proposal does not raise any subsidiarity issues.

Budgetary or public finance implications

Budgetary and public finance implications are considered for each option in analysing the impact on Member States' authorities and administrative costs, and in the analysis of the impact on the Commission. For the preferred option, the IA estimates that Member States would incur between €600 and €700 in additional administrative costs for every investigated regulated profession. For the Commission, the IA expects the additional costs incurred in monitoring the transposition of the new legislation 'to be largely compensated by the lower number of infringements'.¹²

SME test / Competitiveness

For every option, the IA analyses the impacts on SMEs and micro-enterprises. However, perhaps suffering from the gaps in available data on the subject, this analysis does not appear to be based on specific data concerning SMEs, but merely adapts generally applicable arguments to SMEs. Likewise, the stakeholder consultation does not seem to capture the SME angle as required in [Tool 19](#) of the Commission's Better Regulation Toolbox. Not only is there no account of specific consultation actions for SMEs, but the analysis of the responses to the public consultation does not appear to extract specifically the positions of SMEs from amongst the respondents.

Simplification and other regulatory implications

Regulatory procedures are the primary object of the proposal and as such are analysed in the assessment of impacts for each option.

In its section 5, 'Consistency with other EU policies and with the Charter for fundamental rights', the IA examines how the proposal fits into the two-pronged approach adopted by the Commission in its single market strategy.¹³ It also tests the coherence of the proposal with the Services Directive,¹⁴ specifically regarding notifications under that directive. It underlines the difference in scope between the Services Directive and the proposal, but also acknowledges that there will be certain overlaps, which the Commission undertakes, in the IA, to address in the implementation phase.

Quality of data, research and analysis

The IA relies to a large extent on the findings of the Koumenta/Pagliari study, which observes that 'occupational regulation is an under-researched labour market institution in the EU'¹⁵ and that its execution was only possible with the data gathered in the EU Survey of Regulated Professions. This data enables the Koumenta/Pagliari study to provide 'estimates of the prevalence of regulation and some initial estimates of its labour market impact'.¹⁶ The study appears to recognise uncertainties in its findings and also suggests areas where more suitable data sources are to be sought. The IA could arguably have made a greater effort to use the research, assessments and argumentation made in the study to the best effect for its purposes, especially in terms of clarity and organisation.

¹² IA, p. 48.

¹³ See 'Background' section above.

¹⁴ [Directive 2006/123/EC](#) of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

¹⁵ Koumenta/Pagliari study, p. 128.

¹⁶ Ibid.

The IA also refers to other studies conducted at Member State level on the impact of regulated professions in specific sectors of the labour market.

Although, as acknowledged, there are still gaps in the data to be filled, the assessments and assumptions made appear to be reasonable and to be based on sound research and analysis.

Stakeholder consultation

The online open public consultation ran from 27 May to 22 August 2016 and drew 420 responses (corrected to 241 when considering multiple and coordinated responses). Respondents were categorised according to the Member State of residence or establishment, according to sector of activity and according to category (public authority, user or provider of professional services, etc.). The questionnaire was divided into three sections: (i) a section on the national action plans submitted by the Member States in accordance with the Professional Qualifications Directive, (ii) a section on proportionality analysis in regulatory design in general, and (iii) a section, directed only towards respondents identifying themselves as public authorities, on how they approach issues related to proportionality analysis.

The targeted consultation activities reported in regard to the proposal were the following: (i) twelve mutual evaluation workshops with the participation of representatives of the professions and of Member State administrations; (ii) three Single Market Forum workshops held between October 2014 and March 2016; and (iii) a high-level stakeholder conference held in May 2016 which was attended by 'around 300 participants representing professional associations, chambers, trade unions and national administrations'.¹⁷

The IA refers to the stakeholders' position for each of the policy options, and these views appear to be consistently reflected and considered throughout the IA. 51 % of stakeholders who answered the questionnaire think that there should be common guidance on the assessment of proportionality of regulation of professions, and of these 74 % are of the opinion that this guidance should be mandatory. When limiting the sample to the respondents that identified themselves as public authorities, 61 % are in favour of common guidance and, of these, 80 % think that the guidance should be mandatory. The IA highlights that, of all demographic groups, those who identified themselves under the category 'other'¹⁸ run contrary to the trend, not supporting the sharing of common guidance, whether voluntary or mandatory. The IA clarifies that this reversal of trend results only before organised responses are accounted for. According to the IA, 'the only category that did not support steps to clarify the current situation in either a voluntary or mandatory form came from within the German and Austrian crafts sector'.¹⁹

Annex 2 of the IA gives a general overview of the stakeholder consultation that served to feed into the IA.

Monitoring and evaluation

In the IA, the Commission undertakes to report regularly on the implementation of the proportionality test at Member State level. This undertaking is reflected in an obligation in the proposal for the Commission to submit, by 18 January 2024 and every five years thereafter, a report on the implementation and performance of the directive.

[Tool 8](#) of the Commission's Better Regulation Toolbox requires IAs to identify (i) core monitoring indicators for the main policy objectives, and also (ii) monitoring indicators corresponding to the operational objectives linked to the preferred policy option. In its section on monitoring and evaluation, the IA mentions three quantitative

¹⁷ [Stakeholder consultation](#) - Synopsis report accompanying the document 'Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions', p. 12.

¹⁸ The categories were: 'providers of services', 'users of services', 'public authorities' and 'other'.

¹⁹ IA, p. 46.

and qualitative measures that appear to be adequate as core monitoring indicators for the main policy objectives. These are:

- (i) the percentage of the economy covered by regulated professions in terms of people employed and value added;
- (ii) the cross border mobility of professions;
- (iii) the robustness of proportionality tests for existing and new professional regulations.

The IA, however, does not seem to identify either operational objectives,²⁰ or monitoring indicators that are sufficiently specific and precise to measure the operational deliverables of the preferred policy option.

Commission Regulatory Scrutiny Board (RSB)

The Board issued a positive opinion on 14 October 2016 on the understanding that the IA would be improved in certain aspects. The Board recommended (i) a clearer presentation of the regulatory context; (ii) better justification of the scope of the proposal and clarifications in the problem definition; (iii) a better explanation of the content and design of the options; and (iv) a more detailed and more evidence-based presentation of the assessment of impacts. The IA, in its Annex 1, lists how these adjustments were addressed in the final version. It appears, however, that while all these general recommendations were touched upon in the final version of the IA, they might not have been fully addressed. For instance, the changes made regarding the presentation of the assessment of impacts do not seem adequately to address the impacts on SMEs.

Coherence between the Commission's legislative proposal and IA

It appears that the proposal follows what has been identified in the IA as the preferred policy option (option 3a).

Conclusions

In general, the IA appears to set out logical reasoning linking the problem, its underlying drivers, the objectives and the policy options to tackle the problem. It seems to be based on sound research and analysis, while nevertheless recognising that there are still data gaps to be filled.

With regard to the analysis of impacts, a more targeted analysis of the likely impacts on SMEs might have been desirable. Also, the IA does not seem to identify operational objectives for its preferred policy option and corresponding monitoring indicators. More generally, a proof-reading of the final text, and different choices as to its organisation and presentation, would almost certainly have considerably improved the IA's clarity and readability and its effectiveness in supporting the policy choices made in the proposal.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament, analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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²⁰ See 'Objectives of the legislative proposal' section above.