

Mr. Andreas Schwab
Member of the European Parliament
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Sent by email:
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Brussels, 22 June 2017

Subject: Comments on the Proportionality test

Dear Mr. Andreas Schwab,

Accountancy Europe is pleased to provide you with comments on the proposal of Directive on a proportionality test before adoption of new regulation of professions (the proposed Directive)¹ that is part of the so-called Services Package issued by the European Commission on 10 January 2017.

Accountancy Europe appreciates all attempts to facilitate the cross-border provision of services and therefore welcomes the initiative adopted by the Commission to further develop and enhance the single market for services.

We appreciate that a Member State should establish whether new national professional requirements are necessary and balanced when regulating or deregulating professions. The proposed Directive can help Member States to undertake a comprehensive and transparent proportionality test before adopting or amending national rules on professional services.

Nevertheless, we identified some critical points and shortcomings about which we would like to inform you. They are explained in Annex I, whereas Annex II contains suggestions for the wording in the Directive. In brief, the following issues may require further consideration:

The proportionality test should only be applicable when introducing new provisions or stricter requirements to existing provisions.

It should be considered, whether setting up independent scrutiny bodies is essential or whether the proportionality test can simply be integrated in the existing legislative procedure.

The list of examples of aspects of public interest could include a reference to cases where regulated professions are mandated to fulfil certain tasks.

¹Proposal 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.

Member States should consider the cumulative effects of national rules when assessing their necessity and proportionality, but it could be considered whether this needs to be enshrined in EU law.

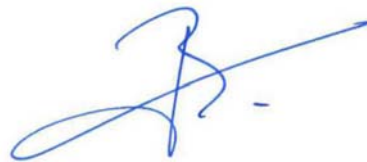
Informing and consulting citizens, service recipients, representative associations and relevant stakeholders in the legislative process is good practice, but it could be considered whether a reference to interested parties with relevant expertise and experience is useful.

We will be pleased to provide any clarification that may be required.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Edelfried Schneider'.

Edelfried Schneider
President

A handwritten signature in blue ink, appearing to read 'Olivier Boutellis-Taft'.

Olivier Boutellis-Taft
Chief Executive

ANNEX I

1. PROPORTIONALITY TEST WHEN AMENDING EXISTING PROVISIONS

The Commission wants Member States to apply the proportionality test not only prior to introducing new provisions that restrict access to regulated professions but also when amending existing ones.

In order to meet the objective of the Directive, i.e. to prevent Member States from creating disproportionate rules, it should be clarified that “amending” existing rules means “tightening” them. Member States might amend existing legislation with a neutral or alleviating result. Those cases are beyond the objective of the directive and should not be covered by EU legislation.

2. INDEPENDENT SCRUTINY BODIES

The Commission wants Member States to involve “independent scrutiny bodies” in the proportionality assessment (article 4 para 5 of the proposed Directive). Since the assessment of proportionality is regularly part of a national legislative procedure, the proposed Directive does not explain what kind of scrutiny body is meant as an addition to the democratically legitimated legislator. Other bodies than bodies of the democratically legitimated legislator should not interfere in the legislative process (unless the legislator deliberately invites additional scrutiny bodies to participate in the process). The reference to the scrutiny bodies should therefore be deleted.

3. PROTECTION OF LEGAL RELATIONSHIPS AS ASPECTS OF PUBLIC INTEREST

The list of examples of aspects of public interest in article 5 para 2 of the proposed Directive should explicitly include the protection of legal relationships in general. Regulated professions are often mandated by law to fulfil certain tasks to protect legal relationships in general and, thus, the public in general; they are mostly not designed to protect particular groups of interested parties such as consumers or investors.

4. CUMULATIVE EFFECT OF RESTRICTIONS

The Commission wants Member States to consider the cumulative effect of national rules when assessing their necessity and proportionality (article 6 para 2 lit. k and para 4 of the proposed Directive).

In our view, this proposal exceeds the EU’s competence for similar reasons as set out in 1. An assessment of cumulative effects would lead to an assessment of national rules which are either independent of EU law or compatible with it. These national rules are, thus, beyond the EU Commission’s and the EU legislators’ reach. We would, therefore, request to delete article 6 para 2 lit. k and para 4 of the proposed Directive.

5. PUBLIC INFORMATION

The Commission requests that Member States shall inform citizens, service recipients, representative associations and relevant stakeholders other than the members of the profession before introducing new provisions (article 7 of the proposed Directive). In order to have an informed and efficient discussion in the course of the national legislative procedure, the group of consulted interested parties should be limited to those with relevant expertise and experience.

ANNEX II

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

Recital 10

Text proposed by the Commission

(10) It is appropriate to monitor the proportionality of the provisions restricting access to or pursuit of regulated professions on a regular basis and with a frequency appropriate to the regulation concerned. A review of the proportionality of restrictive national legislation in the area of regulated professions should be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation, assessed after its adoption. The assessment of the proportionality of the national legislation should be based on developments found to have occurred in the area since the legislation was adopted.

Amendment

deleted

Justification

A recurring review of national statutory rules for liberal professions exceeds the scope of application of this proposal for a directive and the competence of the EU.

Recital 19

Text proposed by the Commission

(19) Member States should carry out a comparison between the national measure at issue and the alternative and less restrictive solutions that would allow the same objective to be attained but would impose fewer restrictions. Where the measures are justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties, the objective could be attained by less restrictive means **than reserving activities to professionals**, such as protection of the professional title or enrolment on a professional register. **Regulation by way of reserved activities should be used only in cases where the measures aim at preventing a risk of serious harm to public interest objectives.**

Amendment

(19) Member States should carry out a comparison between the national measure at issue and the alternative and less restrictive solutions that would allow the same objective to be attained but would impose fewer restrictions. Where the measures are **solely** justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties **or other legal relationships**, the objective could be attained by less restrictive means, such as protection of the professional title or enrolment on a professional register.

Justification

Statutory rules for activities that are reserved to a particular profession (“reserved activity”) serve the purpose of protecting legal relations. This is one specific aspect of public interest and based on a legal mandate. This recital is too limited to consumer protection and does not cover appropriately the entire purpose of reserved activities. In addition, the recital – in contrast to the corresponding Article 6, para. 3 – only relates to reserved activities.

Recital 20

Text proposed by the Commission

(20) The national authorities should carry out a global assessment of the circumstances in which the restrictive measure is adopted and implemented and examine in particular the

Amendment

deleted

cumulative effect of imposing several requirements in addition to the specific professional qualification. The taking-up and pursuit of certain activities may be conditional on complying with certain provisions such as rules relating to the organisation of the profession, compulsory membership of a professional body, professional ethics, supervision and liability. Therefore, when assessing the cumulative effect of the measures, the competent authorities should also take into account other existing requirements, such as continuous professional development, compulsory chamber membership, registration or authorisation schemes, quantitative restrictions, specific legal form requirements and shareholding requirements, territorial restrictions, multidisciplinary restrictions and incompatibility rules, requirements concerning insurance cover as well as language knowledge requirements, to the extent necessary to practise the profession. A measure introduced by a Member State cannot be regarded as necessary to achieve the objective pursued if it essentially duplicates requirements which have already been introduced in the context of other rules or procedures.

Justification

Recital 20 corresponds to Article 6, Paragraph 2 (k) and Paragraph 4, whose deletion is recommended. For a cumulative consideration existing national and EU-compatible rules are to be taken into account, therefore Article 6, Paragraph 2 (k) exceeds the scope of application of this proposal for a directive. In addition, the member states' legislators should obviously consider any new professional regulations in a broader regulatory context. The evaluation of the overall context including the consideration of existing rules in the course of national legislative procedures falls under the responsibilities of the member states.

Recital 21

Text proposed by the Commission

(21) It is essential for the proper functioning of the internal market to ensure that Member States provide information to ***citizens***, representative associations or other relevant stakeholders before introducing new measures restricting access to or pursuit of regulated professions and give them the opportunity to make known their views.

Amendment

(21) It is essential for the proper functioning of the internal market to ensure that Member States provide information to representative associations or other relevant stakeholders before introducing new measures restricting access to or pursuit of regulated professions and give them the opportunity to make known their views.

Justification

For an informed debate within the legislative procedure, the group of addressees shall be restricted to those with a relevant expertise and relevant experience.

Article 4 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or ***amending*** existing ones, the relevant competent authorities undertake an assessment of their proportionality in accordance with the rules laid down in this Directive.

Amendment

1. Member States shall ensure that before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or ***tightening*** existing ones, the relevant competent authorities undertake an assessment of their proportionality in accordance with the rules laid down in this Directive.

Justification

It is not within the responsibility of the EU to review existing rules of the profession which are in compliance with EU rules. A review of new rules should be restricted to rules that further limit access to the profession; only these could intensify internal market barriers and would therefore fall under the control competence of the EU.

Article 5 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions they intend to introduce and **amendments** they intend to make to existing provisions are justified by public interest objectives.

Amendment

1. Member States shall ensure that legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions they intend to introduce and **tightenings** they intend to make to existing provisions are justified by public interest objectives.

Justification

It is not within the responsibility of the EU to review existing rules of the profession which are in compliance with EU rules. A review of new rules should be restricted to rules that further limit access to the profession; only these could intensify internal market barriers and would therefore fall under the control competence of the EU.

Article 5 – paragraph 2

Text proposed by the Commission

2. The relevant competent authorities shall consider in particular whether those provisions are objectively justified on the basis of public policy, public security or public health, or by overriding reasons in the public interest, such as preserving the financial equilibrium of the social security system, the protection of consumers, recipients of services and workers, the safeguarding of the proper administration of justice, fairness of trade transactions, combating fraud and prevention of tax evasion and avoidance, road safety, the protection of the environment and the urban environment, the health of animals, intellectual property, the safeguarding and conservation of the national historic and artistic heritage, social policy objectives and cultural policy objectives.

Amendment

2. The relevant competent authorities shall consider in particular whether those provisions are objectively justified on the basis of public policy, public security or public health, or by overriding reasons in the public interest, such as preserving the financial equilibrium of the social security system, the protection of consumers, recipients of services and workers, **the protection of other legal relationships**, the safeguarding of the proper administration of justice, fairness of trade transactions, combating fraud and prevention of tax evasion and avoidance, road safety, the protection of the environment and the urban environment, the health of animals, intellectual property, the safeguarding and conservation of the national historic and artistic heritage, social policy objectives and cultural policy objectives.

Justification

Rules of the professions shall primarily protect legal transactions, because members of regulated professions provide special services, and are by law entrusted with legal transactions. Therefore, the protection of legal transactions should explicitly be mentioned as an objective of public interest in secondary legislation.

Article 6 – paragraph 1

Text proposed by the Commission

1. Before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or **amending** existing ones, Member States shall assess whether those provisions are necessary and suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.

Amendment

1. Before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or **tightening** existing ones, Member States shall assess whether those provisions are necessary and suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.

Justification

It is not within the responsibility of the EU to review existing rules of the profession which are in compliance with EU rules. A review of new rules should be restricted to rules that further limit access to the profession; only these could intensify internal market barriers and would therefore fall under the control competence of the EU.

Article 6 – paragraph 2 – (k)

Text proposed by the Commission

Amendment

(k) the cumulative effect of restrictions to both access to and pursuit of the profession, and in particular how each of those requirements contributes to and whether it is necessary to achieve the same public interest objective. **deleted**

Justification

Recital 20 corresponds to Article 6, Paragraph 2 (k) and Paragraph 4, whose deletion is recommended. For a cumulative consideration existing national and EU-compatible rules are to be taken into account, therefore Article 6, Paragraph 2 (k) exceeds the scope of application of this proposal for a directive. In addition, the member states' legislators should obviously consider any new professional regulations in a broader regulatory context. The evaluation of the overall context including the consideration of existing rules in the course of national legislative procedures falls under the responsibilities of the members states.

Article 6 – paragraph 3

Text proposed by the Commission

3. For the purposes of paragraph 2(j), where the measures are justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties, the relevant competent authorities shall assess in particular whether the objective can be attained by protected professional title without reserving activities.

Amendment

3. For the purposes of paragraph 2(j), where the measures are **solely** justified by consumer protection and where the risks identified are limited to the relationship between the professional and the consumer without negatively affecting third parties **or other legal relationships**, the relevant competent authorities shall assess in particular whether the objective can be attained by protected professional title without reserving activities.

Justification

It should be made clear that consumer protection alone cannot be used as an excuse for a regulation of the profession. In addition, it needs to be clarified that legal transactions, which involve the consumer but which are not limited to consumer protection, are an object of protection in the single market.

Article 6 – paragraph 4

Text proposed by the Commission

4. For the purposes of paragraph 2(k), the relevant competent authorities shall assess in particular the cumulative effect of imposing any of the following requirements:

- (a) reserved activities, existing alongside protected professional title;**
- (a) continuous professional development requirements;**
- (b) rules relating to the organisation of the profession, professional ethics and supervision;**
- (c) compulsory chamber membership, registration or authorisation schemes, in particular where those requirements imply the possession of a particular professional qualification;**
- (d) quantitative restrictions, in particular requirements limiting the number of authorisations to practise, or fixing a minimum or a maximum number of employees, managers or representatives**

Amendment

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holding particular professional qualifications;

- (e) specific legal form requirements or requirements which relate to the shareholding or management of a company, to the extent those requirements are directly linked to the exercise of the regulated profession;**
- (f) territorial restrictions, in particular where the profession is regulated in parts of a Member State's territory in a different manner;**
- (g) requirements restricting the exercise of a regulated profession jointly or in partnership, as well as incompatibility rules;**
- (h) requirements concerning insurance cover or other means of personal or collective with regard to professional liability;**
- (i) language knowledge requirements, to the extent necessary to practise the profession.**

Justification

Consequential deletion relating to the deletion of Article 6, paragraph 2 (k)

Article 7

Text proposed by the Commission

Member States shall, by appropriate means, inform **citizens, service recipients**, representative associations and relevant stakeholders other than the members of the profession before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, **or amending existing ones**, and give them the opportunity to make known their views.

Amendment

Member States shall, by appropriate means, inform representative associations **of service recipients and members of the profession** and relevant stakeholders other than the members of the profession before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, and give them the opportunity to make known their views.

Justification

For an informed debate within the legislative procedure, the group of addressees needs to be restricted to those with the relevant expertise and relevant experience.

Article 8 – paragraph 1

Text proposed by the Commission

1. For the purposes of the efficient application of this Directive, before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or **amending** existing ones, Member States shall encourage the exchange of information with competent authorities of other Member States on matters covered by this Directive, such as the particular way they regulate a profession or the effects of regulation identified in similar sectors of

Amendment

1. For the purposes of the efficient application of this Directive, before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or **tightening** existing ones, Member States shall encourage the exchange of information with competent authorities of other Member States on matters covered by this Directive, such as the particular way they regulate a profession or the effects of regulation identified in similar sectors of activities, on a regular basis, or, where appropriate, on an ad hoc basis.

activities, on a regular basis, or, where appropriate, on an ad hoc basis.

Justification

It is not within the responsibility of the EU to review existing rules of the profession which are in compliance with EU rules. A review of new rules should be restricted to rules that further limit access to the profession; only these could intensify internal market barriers and would therefore fall under the control competence of the EU.