

Draft Position Paper

on the

Proposal for a Directive on a Proportionality Test before Adoption of New Legislation on Regulation of Professions

A. Thesis:

1. Entry regulations in the area of regulated professions do not hinder mobility of workers' and self-employed within the internal market due to common European rules on recognition of professional qualifications.
2. The Commission proposal infringes the principles of conferral, subsidiarity and proportionality, set out in Article 5 of the Treaty.
3. With regards to regulated professions, Art. 53 TFEU limits the competencies of the European Union to issuing directives on recognition of professional qualifications. This view is supported by the case law of the European Court of Justice.

For these reasons, the Commission proposal should be rejected.

B. Reasons for rejection:

1.)

Regulatory approaches differ within the Member States of the European Union. This also applies to the question on whether and how to regulate professional activities. It is helpful here to distinguish between entry and conduct regulations. Research undertaken by the European Commission supports the view, that entry regulations have no adverse effects on economic dynamics (see *Canton/Ciriaci/Solera*, The Economic Impact of Professional Services Liberalisation, Economic Papers 533, September 2014, ISSN (online) 1725-3187). Also research from the UK clearly points out that entry regulations do not negatively affect mobility within the internal market (*Koumenta/Humphris/Kleiner/Pagliero*, Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts, Queen Mary University London, Final Report, July 2014). The authors explain this with the existing rules on recognition of professional qualifications on European level. Indeed, the earliest rules have already been created more than fifty years ago. Today, even without previous minimum harmonization, the principle of automatic recognition is widely applicable (see Art. 5 –

9 of Directive 2005/36/EC for provision of services and Art. 16 – 19 of Directive 2005/36/EC for freedom of establishment).

2.)

These aforementioned findings have far-reaching relevance beyond the field of economic analysis. Legally, Article 5 of the Treaty contains the principles of conferral, subsidiarity and proportionality. The Commission as well as Parliament and Council are bound by these fundamental principles of European law. Following the first of these principles, competences not conferred upon the Union in the Constitution remain with the Member States. According to the proportionality principle, action on Community level is limited in scope to what is necessary in order to achieve the objective of the treaty. Likewise, the proportionality principle ensures decisions to be taken as close to the European citizens as possible by limiting the EU's competence to take action to those cases, where it is more effective than action taken at national, regional or local level.

If entry regulations do neither lead to more economic dynamism nor hinder mobility of workers' and self-employed within the internal market, then any prerogatives from European level limiting national competencies of the Member States would breach the fundamental principles of subsidiarity and proportionality.

3.)

The European Union does not possess unlimited legislative competencies, as Member States have only transferred limited powers to the supranational level. Regulated professions are covered by Art. 53 TFEU and reads as follows:

(1) In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

(2) In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Obviously, the competence of the European Union in the field of regulated professions is limited to issue directives on recognition of professional qualifications. This in no way covers the right to limit the Member States autonomous decision to regulate professional activities. Also the European Court of Justice, in its case law on the free movement provisions of the treaty, never contested the Member States right to regulate professional activities. On the contrary, the ECJ has always respected the

autonomous decisions of the Member States to regulate professional activities and only required for recognition of professional qualifications (see C-340/89 – *Vlassopoulou*; C-234/97 – *Bobadilla*; C-313/01 – *Morgenbesser*). Furthermore, following the case law of the ECJ, Member States might autonomously define the level of consumer protection deemed necessary and how to achieve it (C-159 – 161/12 – *Venturini*). Therefore, Member States possess a wide margin of appreciation.

Conclusions

Considering these facts, the Commission proposal infringes the Member States competencies in the field of regulated professions and conflicts with the principles of subsidiarity and proportionality, by which the European Union is bound. Mobility of workers and self-employed is guaranteed by the Professional Qualifications Directive.

The envisaged legal requirements set out in the draft directive infringe sovereign decisions taken by Member States in the field of regulated professions. It further breaches the principles of conferral, subsidiarity and proportionality, set out in Article 5 of the Treaty on European Union.