

May 2017

**Statement
of the European Tax Adviser Federation
ETAF**

**on the
Proposal for a Directive on a proportionality test before
adoption of new regulation of professions
COM (2016) 822 final**

ETAF www.etaf.tax is a European umbrella organisation for 230,000 tax professionals from France, Germany and Italy. ETAF was launched in January 2016 as an international non-profit organisation (AISBL), governed by Belgian law and located in Brussels. The main role and mission of ETAF is to represent the tax profession at European level in liaising closely with European policy makers to promote good legislation in tax and professional matters.

ETAF is a registered organisation in the EU Transparency Register with the register identification number 760084520382-92.

I. Background

The Proposal for a Directive on a proportionality test before adoption of new regulation of professions [COM (2016) 822 final] is part of the Services Package proposed by the Commission on 10 January 2017.

The proposal aims at obliging the Member States to carry out the proportionality test according to a predefined, detailed scheme before the introduction of new professional regulations or before the amendment of existing professional regulations. The objective of the Commission is to establish a comparable ex-ante evaluation method in every Member State across the EU.

If this proposal were to become a reality, every Member State would be obliged to implement a fixed assessment scheme whose contents and evaluations are prescribed to the most smallest details, disregarding national specificities and without leaving any room for manoeuvre to the Member States.

II. Content

In a first step, certain overriding reasons relating to the public interest like the protection of consumers, the safeguarding of the proper administration of justice, combating fraud and prevention of tax evasion and avoidance shall, as a general principle, be recognised in the proposal as legitimate justifications for professional regulations.

However, in a second step, the Member States shall be obliged to subject their respective professional regulations under a common EU-wide uniform proportionality assessment for which every single detail would be already fixed in the Directive. According to the Commission, these mandatory requirements of the proportionality test shall include, inter alia:

- the link between the scope of **activities reserved to a profession** and the professional qualification required;
- the **scope of reserved activities** as such, namely whether and why the activities reserved to certain professions can or cannot be shared with other professions;
- Within the framework of assessing the possibility to use “less restrictive means”: whether the objective can be attained by the **protection of a professional title alone, without reserving activities**;
- the „cumulative effect” of restrictions to both access to and pursuit of the profession, especially how each of those requirements contributes to public interest objective and whether it’s necessary to achieve the objective. In the framework of this assessment, the Member States would in particular be obliged to examine the following criteria:
 - the existence of **reserved activities and title protection** side by side;
 - a **compulsory chamber membership**;
 - registration or authorisation schemes;
 - legal form requirements;
 - **shareholding or management requirements** of a company;
 - requirements restricting multidisciplinary cooperation and incompatibility rules;
 - requirements concerning insurance cover.

III. Evaluation

1) There is no need for this proposal

First of all, it is to be stated that in the ETAF Member States, a proportionality test is already carried out regularly, both as regards the existing as well as eventually new professional regulations. These proportionality assessments are bound to the respective constitutional rules of the Member State and, as a matter of fact, also take into account the guidelines of the European Court of Justice for a lawful proportionality assessment. Furthermore, the EU

legislators have already incorporated the proportionality criteria developed by the ECJ into the Union's "acquis" [Art. 59 (3) Professional Qualifications Directive and Art. 15 (3) Services Directive].

Today, the European Commission has already sufficient control mechanisms at its disposal in order to ensure the application of the proportionality principle by the Member States, such as the pilot process or the infringement procedure. As the "guardian of the Treaties", the European Commission can make full use of these measures if it considers that certain professional regulations in a Member State do not comply with the principle of proportionality. Mandatory requirements for the proportionality assessment within the competence of the Member States are not relevant for this purpose. The instrument of a new, separate Directive chosen by the Commission is therefore not necessary for an effective control of the Member States' proportionality assessment.

On these grounds, there is strictly no need for additional guidelines by the European Commission.

2) There is no sufficient legal basis for this proposal

ETAF is of the opinion that the Commission does not have a sufficient legal basis for obliging the Member States to carry out such a predefined, detailed proportionality scheme. Art. 53 (1) TFEU, which the Commission explicitly cites as the legal basis for self-employed persons, provides:

"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."

Precondition would be that the intended legal act could "make it easier for persons to take up and pursue activities" in the Member States. Therefore, the target of a detailed proportionality

assessment would have to be the *facilitation of cross-border mobility* and to generate a positive internal market effect.

However, it is to be stated that a proportionality assessment as such, from a purely logical point of view, cannot constitute a barrier for the cross-border supply of services. Only a substantive professional regulation itself can – in case it is disproportionate – constitute such a cross-border barrier.

As a second condition, Art. 53 (1) TFEU only enables the Commission to “issue directives ... for the coordination of the provisions ... in Member States concerning the taking-up and pursuit of activities as self-employed persons. The rules in question here, by prescribing a most detailed proportionality assessment scheme, aim at fixing a value-based, judgmental consideration, under which circumstances a professional regulation shall be regarded as proportionate in the respective Member State. They do not, however, constitute rules about the “taking-up and pursuit of activities”.

3) The proposal violates the principle of subsidiarity

Under the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union, the European Union shall, in areas which do not fall within its exclusive competence, **act only if** and in so far as the objectives of the proposed action **cannot be sufficiently achieved by the Member States**, either at national level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. For this, the Commission must bring evidence on a case-by-case basis that a regulation on EU level is the most appropriate act for achieving the objectives – assuming of course that these objectives are covered by a sufficient legal base, which is not the case here (see above).

However, the Commission has not delivered evidence for this, but merely stated that the objectives it pursues could be better achieved by the Union, without advancing any further arguments or proofs in this regard.

Particularly, if a regulatory area is already adequately covered by the existing EU provisions, there is no need to act on EU level. The principle of proportionality of professional regulations

is already sufficiently enshrined both in national and European Law, since it is not only required by the Court of Justice, but also laid down in Article 59 (3) of the Professional Qualifications Directive and Article 15 (3) of the Services Directive.

One of the main elements of the assessment, if an objective can be better reached at EU level, is to consider the **cumulative effects** of the existing rules and the newly proposed rules.

If complementary measures, which fall under the competence area of the Member States, are adopted nonetheless, irrespective of the existing rules, an infringement of the subsidiarity shall be presumed. On this aspect, the Commission did not produce any arguments at all.

As a general rule, a proportionality assessment is a value-based evaluation which can depend on historical, cultural, organizational circumstances or the security needs of the citizens in the respective Member State. Therefore, the Member States can better decide themselves whether and how they regulate a profession.

4) The proposal disregards the principle of proportionality

According to Article 5 (4) TEU, “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. ETAF considers that by dictating a fixed assessment scheme whose contents and evaluations are prescribed to the very smallest details, disregarding national specificities and without leaving any room for manoeuvre to the Member States, the Commission goes far beyond the objectives covered by the Treaties and the legal basis on which the proposal is supposed to be based on.

In this context, the Court of Justice has stated on several occasions that it is the right of the Member States to determine the rules concerning both access to professions as well as the pursuit of a profession. It has recently stated in its judgement “X-Steuerberatungsgesellschaft” that in the absence of harmonisation at European Union level of the conditions of access to a profession, the Member States are entitled to lay down the knowledge and qualifications required for the profession concerned.

Furthermore, it is settled ECJ case law that from the fact that there might exist less restrictive legislation in other Member States, it may not be concluded that the rules in question are disproportionate.

Secondly, the Commission should have considered, of course, a proposal with recommendatory character instead of a legislative proposal. The Commission, however, has not produced any arguments in this regard, especially not on the question if non-binding guidelines – as requested by the **European Council** in February 2015 – would have been sufficient, as a **less severe means**, to achieve the intended purpose. Furthermore, it has not considered the increasing cumulative effects regarding the interaction with the proposed notification procedure (see separate ETAF Statement), which would result in practically fully removing this area from the legislative powers of the Member States. The Commission has not given any explanations on this point in the impact assessment under “choice of the instrument”. Therefore, it must be held that the Commission did not examine those aspects.

Due to the above considerations, the proposal does not comply with the principle of proportionality.

IV. Core positions of ETAF:

- There is no need for such a mandatory check system, because the principle of proportionality is already enshrined in EU Law by its codification in the Professional Qualifications Directive, the Services Directive and the jurisprudence of the ECJ.
- In line with the ECJ, it must be ensured for the future that the decision about regulations concerning the access to the profession and the practice of the profession will remain – not only in theory, but in common daily practice – within the competency of the Member States.
- As the “guardian of the Treaties”, the European Commission today already disposes of sufficiently effective instruments (e.g. pilot or infringement procedures) to counter a possible breach of EU Law on a case-by-case basis against a Member State.

- According to its new proposals, however, the European Commission would factually take the place of the national legislator by rendering null and void the decision-making prerogatives of the Member State. This is why the proposal constitutes a **breach of the proportionality principle**, because the Commission has not seriously considered a **less restrictive means**, has not taken into account the **cumulative effects** of the proportionality proposal and the notification proposal in their combination, and has thus gone far beyond what is necessary to achieve the objectives.
- The proposal **violates the principle of subsidiarity** because the Commission does not sufficiently set out why it would be better to have a regulation at Union level and has not considered the cumulative effect of new regulations which are additional to already existing regulations.
- ETAF therefore supports the subsidiarity complaints and serious proportionality concerns risen by France, Germany and Austria against the proposal.
- The European Union is based on the principles of subsidiarity and proportionality. These principles must be taken into account by the European Commission.
