



## Consultation on the regulation of professions: Member States' National Action Plans and proportionality in regulation

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Regulation of professions

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ACE Commentary on the consultation

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Date: 16 August 2016 - Ref: 164/16/PO

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The Architects' Council of Europe (ACE) is the representative organisation for the architectural profession at European level: it aspires to speak with a single voice on its behalf in order to achieve its aims. Its membership currently consists of 43 Member Organisations, which are the regulatory and professional representative bodies in all European Union (EU) Member States, Accession Countries, Switzerland and Norway. Through them, the ACE represents the interests of over 565.000 architects from 31 countries in Europe.

ACE Transparency Register n° 15914681331-83

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### **Background:**

Architecture was one of the professions addressed in the European Commission's 'Mutual Evaluation' exercise arising from Article 59 of the PQD (2005/36/EC). The ACE has previously taken strenuous issue with elements of the process. Architects were one of the professions addressed directly in the mutual evaluation exercise carried out under Article 59(3) of Directive 2005/36/EC in 2014. Member States have been required to respond to the Mutual Evaluation process with the production of National Action Plans (NAPS). The NAPS are intended to address how Member States will improve their regulatory systems. The Commission has opened a consultation on the NAPS which includes a suite of questions on how to assess the proportionality of regulation. Proportionality is defined by the Commission as making sure that that "requirements are justified by overriding reasons of general interest and are suitable for securing the attainment of the objective pursued without going beyond what is necessary to attain that objective".

In the preamble to the questions section, on page 2, the Commission suggests that the burden [of regulation] on the professional poses a risk of negative consequences not only to the economy but also to consumers.

### Reasons for Regulating Professional Services

According to the Commission's website, there are three reasons for regulation professional services:

- 1) asymmetry of information
- 2) externalities
- 3) the concept of public good (interest).



Professional services are typically regulated *ex ante* (where access to the profession is regulated i.e. training) or *ex post* (where the function is regulated). It happens that while registration is not the only way of regulating professional services, it is the most common.

Asymmetry of Information and Public Interest (including Consumer Protection) are the key issues. Architecture is a broad and complex field with a very real and immediate effect on consumers (including financial, health, safety, quality of life, and environment). However the majority of consumers cannot reasonably be expected to have sufficient knowledge and expertise to question the recommendations or proposals of an architect. Thus, many consumers cannot be expected to have the necessary information to select a suitable professional or hold the professional to account. It is a question of trust.

The profession is regulated so that clients/consumers may have the protection of confirmed qualifications, professional experience, knowledge skill and competence, as well as a code of conduct and a complaints process. The quality of the built environment impacts not only physically and visually, but must also be seen in the context of the health and safety of all who use and engage with it.

#### Cornerstones for registration

In relation to consumer protection and public benefit, the registration of architects ensures the protection of public health, safety and welfare, a level playing field, consistency of standards and quality of service. Registration bodies maintain a register of qualified persons, oversee their conduct via Codes of Conduct and sanctions, provide for dispute resolution and monitor requirements for professional indemnity insurance and CPD (continuing professional development). CPD, as is recognised in the original and further so in the modernised Directive 2005/36/EC, is a key element of professional regulation, mostly driven by the professional bodies, which occurs in both statutory and non-statutory contexts according to national regulatory regimes

#### Reserves of function

Some areas of work are reserved to members of the architectural and related professions for the protection of the public interest on the basis that the governing body will ensure that those authorised to practice are qualified and conduct themselves appropriately. The Commission's own research (*"Study to provide an inventory of Reserves of Activity linked to professional qualifications in 13 EU Member States"*, 2012, DG MARKT) showed there is no statistically significant correlation between reserves of activity and the power of professions, their market dominance or competitiveness. Regulation of title does not restrict choice – it helps the client to choose a competent provider.

Regulation not only benefits consumers but actively contributes to the mobility of architects, because employers and consumers have developed a sense of confidence in the regulatory systems in place and are willing to hire architects from other EU Member States because there is an overarching regulatory system (mutual recognition requirements per 2005/36/EC).



The Commission's continued focus on architects is based on the belief that the business services and construction sectors are important to the European (Single Market) economy and an assumption that architecture could generate a large number of new jobs. First, it is worth noting that while the construction industry as a whole may represent c. 10% of EU GDP, architectural services represent less than 10% of the construction sector – so 0.9% of EU GDP.

That said, as far we are aware, architects are relatively mobile and will travel to where the work is. Growth in architectural services is driven by the economy; in particular, cross-border services are driven by economic activity in Cities and Regions where there is construction activity.

Our own Sector Study – and DG REGIO's summary report on 'Overcoming Obstacles in Border Regions' – suggest that professionals cite a great many concerns or potential obstacles to cross-border activity including insufficient language skills, insufficient knowledge of planning / building regulations, practical and location issues, lack of knowledge of the local market or fees / tariffs. Moreover, 98% are excluded from public procurement markets (as SMEs with a turnover of €160,000 or less, they do not qualify for the €200k threshold of the EU Public Procurement Directive).

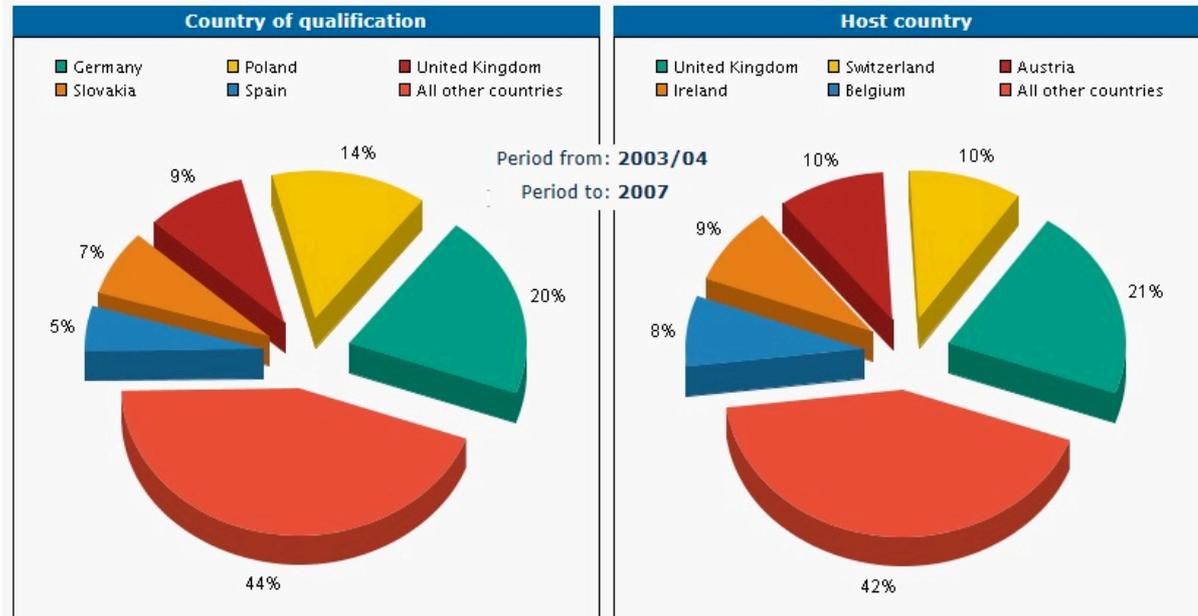
For the period 2007 to 2015, Architects, who represent a relatively small profession compared to the medical and nursing professions in particular, were 14<sup>th</sup> on the EU's ranking of mobile professionals with 4460 architects formally moving from one state to another during that period. The seven sectoral professions which benefit from automatic recognition are all within the top 15 most mobile professions for that period.

In addition, the pattern of mobility (i.e. where architects move from, and their destinations) clearly describes a situation where architects follow the work and make decisions Based on economic considerations combined with cultural, language and historical connections. For example Ireland, a very small country by EU standards was nevertheless the fourth most popular destination for architects in the EU in the period 2003 to 2007 when it was experiencing the so called 'celtic tiger' boom. In the 2008 to 2012 period the most popular destinations were the UK, Norway, Germany and Switzerland.

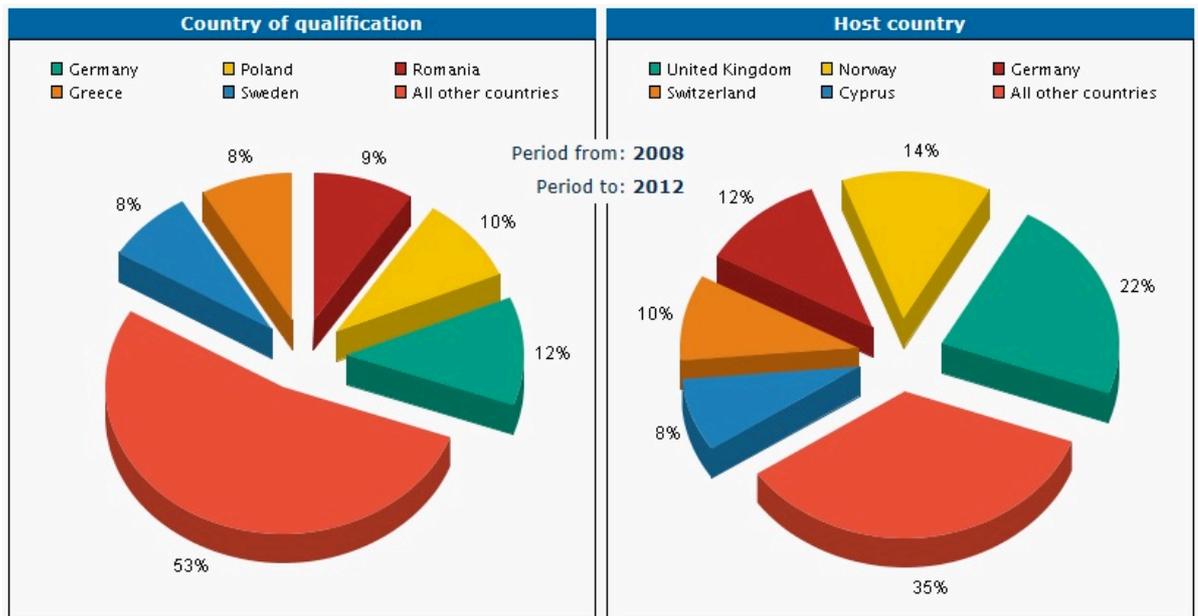
Architects go where there is work. The regulatory regime is clearly not a barrier. Although the Member States have quite diverse approaches to regulation ranging from ex ante to ex post mechanisms, according to the Commission's own database of the regulated professions 94% of cross-border recognition / registration requests are satisfied for architects. According to the Labour Force Survey, national accounts and structural business statistics by Eurostat, the biggest obstacles to growth for the years 2011-2013 for enterprises involved in the provision of services were: the general economic climate, demand in domestic markets, price competition and high labour costs. Financing, succession planning, demand in foreign markets, the legal framework and tax incentives were rarely perceived as a potential barrier to growth.



**Mobility of Architects according to the EU Regulated professions database from 2003 to 2007 showing 'Home' country and 'Host' country.**



**Mobility of Architects according to the EU Regulated professions database from 2008 to 2012 showing 'Home' country and 'Host' country.**



**Proportionality questions:**

With regard to most of the questions in the consultation, there is no opportunity to provide comment but only to answer Agree, Disagree or Don't know. In many cases this is entirely insufficient and the questions may be best left blank and comment provided where possible if the answer is not immediately clear.



<i>Should authorities analyse the impact of the professional regulations they introduce?</i>	
<i>Should proportionality be analysed with a set of common minimum criteria to assess the impact of regulation so that the most relevant factors are considered by all regulators?</i>	It is important to note that while levels of regulation are quite similar in the field of architecture they take different forms (ex ante vs ex post) depending on the historic approach to regulation in different Member States.
<i>Are you aware of requirements for a proportionality assessment of regulation in your country?</i>	
<i>Can you please provide a reference to or summary of this methodology?</i>	
<i>Are you aware of existing criteria at the national or EU level to analyse proportionality in professional regulation?</i>	
<i>In your view is the existing criteria for assessing proportionality clear enough?</i>	
<i>In your view what, if any, are the shortcomings of the current situation regarding the assessment of proportionality</i>	
<i>Are there any other problems related to assessing proportionality not included in the above which you would like to include?</i>	

**What elements of the proportionality assessment should be clarified?**

<i>Reasons: Identification of the overriding reasons relating to the general interest which justify the measure (public policy, security and/or health, consumer protection, fairness of trade transactions, combating fraud, protection of the environment)</i>	Asymmetry of information, Public Interest (including consumer protection), Public health and safety and Protection of the environment
<i>Risk analysis: Identification and assessment of the nature of the risks to consumers, to professionals or third parties, including in particular whether and why existing rules (such as consumer protection law, liability law, health and safety regulations, ex post regulation/standards) are inadequate to protect the public interest</i>	Asymmetry of information Breadth and depth of expertise required Legal accountability
<i>Assessment of the necessity of requiring possession of specialised skills and training and assess specifically the level,</i>	Again many of these will depend on the nature, extent and general approach of national regulation systems which may



<i>the nature and the duration of the training required</i>	<p>take different forms but have the same purpose and often arrive at similar levels of regulation.</p> <p>Some are clearer from the outset – ex ante systems, and others provide for more local level decision making</p>
<i>Assessment of the existence of different routes to obtain the qualification</i>	
<i>Analysis of the scope of practice and the reserves of activities</i>	
<i>Estimating the economic impact of the proposed regulation including a consideration of market impacts on such variables as employment, competition, prices, etc.</i>	
<i>Analysis of the alternatives to regulation or less restrictive regulation</i>	
<i>Assessment of the cumulative effect of restrictions to both access to and exercise of the professional activities</i>	
<i>Assessment of non-discrimination of professionals from other EU countries</i>	
<i>Improve procedures: Steps necessary to carry out proportionality assessment</i>	
<i>Improve procedures: Obligatory consultation with all stakeholders before decision</i>	
<i>Improve procedures: Publication of assessments online</i>	
<i>No clarifications are necessary</i>	

**Are there any other elements not included in the table above which you think could benefit from further improvement?**

This provides an opportunity for more general comment

<i>Do you think there should be common guidance on how to conduct a proportionality assessment?</i>	<p>It is hard to see how this might work without standardising all national level systems which does not seem practicable or wise.</p>
<i>Do you think such guidance should be mandatory for public authorities to use?</i>	

**What do you think the impact would be of introducing a common methodology to clarify the minimum criteria necessary for the proper assessment of proportionality when introducing new or revising old regulations?**

<i>Would improve the quality of regulation</i>	<p>We observe that all of the statements represent a positive effect, there is no space to suggest potential problems or better alternatives</p>
<i>Would simplify professional regulation</i>	
<i>Would lead to the modernisation of national regulation regarding access and conduct requirements</i>	
<i>Would help to clarify the minimum criteria necessary to comply with the requirement to assess proportionality</i>	
<i>Would support Member States with a</i>	



<i>common template and guidance on the method needed to carry out such assessments</i>	
<i>Would improve the overall quality of proportionality assessments</i>	
<i>Would help investigating alternatives to regulation and propose appropriate actions to improve legislation</i>	
<i>Would make proportionality assessments more transparent and comparable across Member States</i>	
<i>Would support compliance with existing legal requirements on the notification of new regulation and the reasons for which it is considered proportionate*</i>	
<i>As stipulated under existing EU rules in the Professional Qualifications Directive 2005/36/EC as well as the Treaty</i>	
<i>Would improve the involvement of various affected groups, such as businesses and consumers, in the development of legislation</i>	
<i>Would make it easier to compare regulatory requirements across the EU</i>	
<i>Would improve legal certainty on compliance with existing requirements under EU law</i>	
<i>Would make Member States seriously consider, in a structured way, necessity and proportionality factors when adopting new or revising existing regulations</i>	
<i>Would reduce administrative burdens for professionals</i>	
<i>Would ease access to the professions</i>	
<i>Would ease the mobility of professionals between Member States</i>	
<i>Would increase competition in the market</i>	
<i>Would raise the level of consumer protection</i>	
<i>Would improve the functioning of labour market</i>	
<i>Would deliver a better price-to-quality ratio of services</i>	
<i>Would raise the quality of professional services</i>	

**Margaret Hynds O'Flanagan, Chair, ACE WGPQD, 11/7/16**