



General Affairs

EU Commission Services Package

ACE response to proposal for a Directive on a Proportionality Test

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The intention of the proposed European Commission Directive is to introduce a harmonised proportionality test by the Member States, based on the case law of the Court of Justice of the European Union.

The proposal deals with the well-known principles of proportionality: non-discrimination, public interest (causal link between the aim and the regulation) and the necessity principle (regarding the choice of regulation, implying always a reduction in the obstacles to cross-border services).

ACE consider that this initiative is inappropriate for the following reasons:

- such a Community harmonisation will impact on the competence of the legislator and national courts in the areas of civil law, criminal law, commercial law, labour law and legal jurisdictions. It also affects the functions of Member States' constitutional courts.
- Regulation of Professional Services remains a prerogative of the Member States. That being the case, the Test must not compromise the competence of the Member States in the field of profession regulations or interfere with national legislative processes.
- the proportionality test is based on the proportionality principle, which is, in turn, a general principle of Law, as a source of the legal order. The legal nature of proportionality prevents its regulation or classification in rules of positive Law.
- Proportionality is a general principle that informs the legislator, the administration and the courts with regard to the resolution of specific cases and conflicts.
- Trying to harmonise a general principle of Law is not technically possible. The application of this principle is made on a case by case basis.
- Harmonising proportionality criteria would lead to the creation of disproportionate obligations in some Member States and further distortion in the market. The obligation to make *ex ante* proportionality reports will introduce another formality while offering no obvious benefit. Evidently, all Member States are already in the habit of carrying out such a prior analysis of proportionality.
- The proposed Directive only addresses *ex ante* regulation (title protection, compulsory registration and, in some cases, duly justified reserved functions) although *ex post* regulation (insurance requirements, Continuing Professional Development (CPD), professional certifications schemes, local regulations or building inspections) can impose significant restrictions on the professional practice. This means that an objective comparison of the regulatory systems is not possible.
- Requirements for regulated professions differ between Member States for cultural, social,



historical and ethical reasons. Attempts to harmonise professional regulation have failed in the past because it has not been possible to find a “one size fits all” model which would cover the diversity of specific needs and requirements of all Member States. The market is diversified and differentiated both horizontally and vertically. Training is also different, though the outcomes are considered equivalent (cf. PQD). However, in the absence of a single, harmonised and transparent market, the need for harmonised criteria for the proportionality assessment of regulation seems disproportionate.

- This has not stopped Member States from assessing the regulation of professional services and introducing reforms of regulatory frameworks which best fit their national context. Member States are already in the habit of respecting general proportionality principles when developing professional requirements (i.e. they must be applied in a non-discriminatory manner; must be justified in the general interest and must be suitable for securing the attainment of the objectives they pursue; and they must not go beyond what is necessary in order to attain it).
- Proportionality criteria as demanding as those listed in the draft Directive may be prohibitive for some Member States. The administrative burden and cost that harmonized criteria will generate – especially the assessment of the economic impact – are not proportionate with regard to the objective. Moreover, there is no “de minimis” rule, so even small change will need to be substantiated by assessments. We only have to look at the National Action Plans the Commission asked the Member States to draft to understand that not all countries have adequate resources to execute tasks required of them.