

CCBE comments on the proposal for a Directive COM (2016) 822 on a proportionality test before adoption of new regulation of professions

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The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers.

The CCBE wishes to provide its views regarding the proposal for a Directive COM (2016) 822 on a proportionality test before adoption of new regulation of professions as part of the so-called “Services Package”.

1. The CCBE is aware that the proportionality test for regulated professions is meant to follow-up on Article 59 para 3 of the Directive on the recognition of professional qualifications (2013/55/EC) and Article 15 para 3, 5 and 6 of Service Directive of December 12, 2006 (2006/123/EC).

The CCBE notes that the proposal, in toto, is subject to objections with respect to a lack of EU competency, subsidiarity, choice of legal form (Recommendation or Directive) and legal basis. The proposal is based on Articles 46, 53 para 1 and 62 TFEU. Articles 53 para 1 and 62 TFEU provide competence only for the coordination of legal, regulatory and administrative action of the Member States whereas the proposal tends to "harmonise" certain procedural aspects, under some very specific criteria, of the means of adopting laws or regulations at national level which involves interference in the national legislative process, as explained further below. The CCBE notes that the applicability of the Services Directive to purely internal situations is in issue in Case C-31/16 *Visser Vastgoed Beleggingen* pending before the Court of Justice of the European Union (CJEU). However, the CCBE underlines that when examining the compliance of the proposal on a proportionality test with these principles, a clear distinction needs to be drawn between issues of substance on the one hand, for which the EU has competency, and procedural aspects, on the other hand, for which there is the considerable risk of lack of EU competency.

This having been said, the CCBE is of the firm opinion that the proposal on a proportionality test needs to be modified in certain respects.

2. The CCBE takes exception to Recital (9) and Article 4 para 3 of the proposal.

Recital (9) of the proposal states that *“the burden of proof of justification and proportionality lies on the Member State. The reasons for regulation invoked by a Member State by way of justification should thus be accompanied by analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments”*.

Similarly, Article 4.3 of the proposal states that “*the reasons for considering that a provision is justified, necessary and proportionate shall be substantiated by a qualitative and, wherever possible, quantitative evidence*”.

The abovementioned language needs refinement in several respects. The Member State has the burden to argue justification and proportionality and the burden to prove the facts that underlie such arguments. The CCBE wishes to underline that, according to CJEU case law, a claim by a Member State that a measure is proportionate may not be dismissed solely on the grounds that the Member State is not able to produce studies serving as the basis of the adoption of the legislation at issue (see case C-316/07 *Stoß v Wetteraukreis*, para 72). Moreover, the CJEU has made it clear that the burden of proof placed upon the Member State “cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions” (Case C-518/06, *Commission of the European Communities v Italian Republic*, para 84).

Most importantly, and entirely missing in the present language of the proposal, is the CJEU case law, according to which the Member State has a reasonable margin of appreciation. The CJEU has held that “Member States must be allowed discretion” [or margin of appreciation] not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question, “since [that] level may vary from one Member State to another” (see joint Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes v Saarland and Ministerium für Justiz, Gesundheit und Soziales*, para 19). That reasonable margin of appreciation comes to bear, when historic data to support the underlying facts is not available. It also comes to bear with respect to the judgement to be made which conclusions to draw from the underlying facts (proven or based on reasonable appreciation), taking into account the importance of the relevant public interest and as well as the effects that are forecast to follow in the future from the intended measure.

The CCBE therefore stresses that the reasonable margin of appreciation acknowledged by the CJEU must be reflected in the language of the proposal on a proportionality test. In this context, the CCBE wishes to mention a recent judgment by the UK Supreme Court of 24 June 2015 ([2015] UKSC 41; <https://www.supremecourt.uk/cases/docs/uksc-2014-0272-judgment.pdf>) which provides a comprehensive summary of the CJEU case law on proportionality. Particular reference is made to para 56-66 of the judgment analysing the degree of freedom granted to Member States in justifying restrictions on public interest grounds.

3. The CCBE also underlines that according to the CJEU, comparison with other Member States’ practices, even if more advanced or more efficient in achieving the same public policy objective, is not a conclusive argument in the proportionality test. The CCBE recommends that this point which is extremely important for acceptance and practical application of the proportionality test, should be reflected much strongly in the proposal, preferably in Article 6 (“Proportionality”).
4. The CCBE also questions the legality of a part of Article 4 para 5 of the proposal. According to this provision, “Member States shall take the necessary measures to ensure that the ex-ante assessment of proportionality is carried out in an objective and independent manner *including through involvement of independent scrutiny bodies*”. The CCBE emphasises that, when carrying out a proportionality test for regulated professions, aspects of substance (or content) of such a test and its procedural aspects need to be differentiated. The procedural aspects on how the test is to be carried out fall into the exclusive competency of the Member States. It is solely up to the Member States to decide whether to involve independent scrutiny bodies or not. The Union has no competency in that regard. Therefore, the CCBE strongly recommends that the insertion “*including through involvement of independent scrutiny bodies*” should be deleted.

The same logic applies for Article 7 and Article 8 of the proposal. Regulation of information and involvement of a broad range of stakeholders, which is a well-established procedural practice in many Member States, lies outside the competence of the EU.

5. The CCBE also finds little consistency in the terminology of the proposal on a proportionality test and recommends that this should be remedied.

The term “proportionality” as used in the title of the proposal and in Article 4 para 1 of the proposal, in particular if read together with Article 4 para 3 of the proposal, appears to be used in a broader sense which includes the justification aspect. However, the headings of Article 5 (“Justification on grounds of public interest objectives”) and Article 6 (“Proportionality”) of the proposal clearly separate the aspects of justification and of proportionality from one another: Whereas Article 5 of the proposal deals with the justification test, Article 6 of the proposal deals with proportionality test itself. In this context, the term “proportionality” is evidently meant in a narrow sense that excludes the justification aspect.

The terminology is further clouded by Article 6 para 1 and 2 of the proposal (“Proportionality”). Likewise, Article 9 of the proposal (“Transparency”) deals with justification, necessity and proportionality as different and separate aspects.

Article 6 para 1 of the proposal provides that Member States shall assess whether new legislative, regulatory or administrative provisions “*are necessary and suitable*” for securing the attainment of the objective pursued which according to Article 6 para 2 “address necessity and suitability”. According to Article 6 para 1 of the proposal, Member States shall assess in addition whether the provisions “*do not go beyond what is necessary to attain that objective*”. This language seems to merely repeat in different words the necessity test that is the subject matter of the preceding sentence.

Article 6 para 2 of the proposal reads as follows: “*When assessing the necessity and the proportionality of the provisions, the relevant competent authorities shall consider in particular [...]*”. This language treats “necessity” as an aspect separate from proportionality and entirely omits the aspect of suitability as mentioned in Article 6 para 1 of the proposal. The CCBE wonders why Article 6 para 2 of the proposal has not been given the following, more simple, wording:

“When carrying out the assessment referred to in paragraph 1, the relevant competent authorities shall consider in particular...”

6. The heading of Article 4 of the proposal reads “Ex ante assessment of new measures” and para 1, 2, 3 and 5 in fact deal with the assessment before introducing new provisions and therefore are consistent with that heading. However, Article 4 para 4 of the proposal says that Member States shall monitor existing provisions on a regular basis and with an appropriate frequency. Such monitoring of existing provisions clearly falls outside the scope of the heading of Article 4 of the proposal (“Ex ante assessment of new measures”). The CCBE therefore recommends to include ex post monitoring in the heading of Article 4 of the proposal.
7. Article 6 para 1 of the proposal speaks of “provisions restricting access to or pursuit of regulated professions”. In this context, the CCBE wishes to draw attention to a case presently before the CJEU (C-31/16) with regard to the question of an implied cross-border requirement. That case concerns Directive 2006/123/EC, but it may be relevant here.