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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Directive of the European Parliament and of the Council  
on a proportionality test before adoption of new regulation of professions**

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## 1. Context

The Commission's priority is "to put policies that create growth and jobs at the centre of the policy agenda".

Unnecessary regulation places unjustified burdens upon European economies. Removing such barriers opens up opportunities and has a positive impact on the productivity and competitiveness of the EU economy. It is for this reason that the following impact assessment proposes the implementation of **systematic proportionality tests in the regulation of professions**, so as to

- ensure the better development of regulation through objective ex-ante analysis and transparency;
- resist the introduction of unnecessary measures;
- identify instances of disproportionate professional regulation;
- guard against inflicting economic constraints on national administrations and the Single Market in Services;
- enable Member States to fully comply with their implementation of EU law and proportionality in the most straight forward and transparent manner.

### 1.1. Policy context

The regulation of professional service providers is a fundamental European issue insofar as it relates firstly the freedom of movement, as it relates to people as well as services, and secondly as a central pillar of the European Single Market. Professionals and their activities<sup>1</sup> are regulated by Member States at national, regional or sometimes local level. Sometimes regulation is devolved to professional authorities outside of central government. In order to facilitate the movement of professionals between Member States Directive 2005/36/EC on the recognition of professional qualifications defines the way through which professional qualifications are recognised between Member States so that services may be provided across borders. Despite this, great disparities lie between the Member States in how they choose to regulate a profession. Those wishing to provide their services may find themselves either unable to or forced to undergo costly and time consuming procedures before gaining access. In 2013 the Directive was amended by Directive 2013/55/EU with the view to simplifying the rules organising the recognition of professional qualifications. It also

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<sup>1</sup> [Professional services](#) often require a high degree of education and training and make specialised knowledge and skills available to clients who may be other business users or private individuals. These services cover, for example: architectural, engineering and technical services, legal, accounting, translation and interpretation, veterinary services etc. **Regulated professions** are defined in the [Professional Qualifications Directive](#) Article 3(1)(a) as professions where one needs a particular professional qualification to be allowed to exercise the profession.

introduced a transparency and **Mutual Evaluation** exercise<sup>2</sup> between the Member States of their regulated professions (Article 59 – Annex 6)<sup>3</sup>.

This exercise culminated in a requirement for Member States to submit '**National Action Plans**' by 18<sup>th</sup> January 2016 outlining and justifying any decisions taken as a result of this analysis to maintain or amend professional regulations<sup>4</sup>.

To help Member States deliver their obligations as described above and during the mutual evaluation, the Commission developed a **questionnaire to guide their assessments**, based on the existing case-law of the Court of Justice. Alongside this, a group of Member States also proposed, in February 2015, a framework for a methodology for considering regulation of professions, supported by case studies of different regulatory approaches taken by participating Member States<sup>5</sup>.

However, having now finalised the initial two year Mutual Evaluation, it is clear that conducting such an assessment presented a challenge to many Member States. Such assessments are a basic tenet of good policy making and that so many assessments lacked proper reasoning suggests an underlying problem concerning how the need for regulation and its effects on the broader business environment is evaluated. Fundamentally, **the Mutual Evaluation process revealed a scarcity of evidence to suggest that regulatory decisions are currently being based on sound and objective analysis or in an open and transparent manner**<sup>6</sup>.

This presents an obstacle to the shared objective of improving the regulatory landscape and by extension for the ramifications it has on Member States' ability to appropriately comply with the Professional Qualifications Directive. **More fundamentally, no action on the issues set out in this Impact Assessment would be a wasted opportunity to address substantial barriers to delivering on the Single Market's full potential.**

From reviewing the information gathered during the Mutual Evaluation it became clear that the regulation of even similar professions varies substantially between Member States and in interrogating many of these instances it was found that such differences could not be objectively explained; thus casting doubt upon their underlying utility.

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<sup>2</sup> See information on the transparency and Mutual Evaluation exercise in Annex 5

<sup>3</sup> Starting in 2014, this process required Member States firstly to introduce all the professions they regulated into the Regulated Professions Database alongside all the regulatory measures they implemented for each profession notified, using this information they were then required to review the impact of such measures and to consider their value in protecting legitimate public interests.

<sup>4</sup> The national action plan is part of the legal obligations Member States have to fulfil in the transposition of the Professional Qualifications Directive. Not delivering any plan exposes Member States to infringement proceedings against them. By May 2016, 18 Member States have submitted their action plans, while most others said they would submit them within the next 2 months. See table 2 with the [latest list of national action plans](#)

<sup>5</sup> See Note from the CZ, DK, DE, EE, LT, LV, MT, NL, NO, SE and UK delegations on the results of Frontrunners Projects to improve the Single Market, 6198/1/15 REV 1, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206198%202015%20REV%201>

<sup>6</sup> See the section on problem definition.

The issue of proportionality and what the Commission may do to encourage comprehensive proportionality assessments is one that the **European Council and Parliament** return to repeatedly<sup>7</sup>. In this context, the Commission's **Single Market Strategy (SMS)** for goods and services of 28th October 2015<sup>8</sup>, announced actions to improve the national regulation of professions, namely the introduction of an analytical framework for proportionality analysis (“proportionality test”) precisely in order to assist Member States in targeting instances of disproportionate and unnecessary regulation:

*The Commission will also set out an analytical framework for Member States to use when reviewing existing professional regulations or proposing new ones. This framework will contain a methodology for comprehensive proportionality assessments of professional regulations. Member States will need to demonstrate that public interest objectives cannot be achieved through means other than limiting access to, or conduct in, the professional activities in question.*

Alongside this, guidance on specific reform needs per country and per profession (“guidance for reforms”) was also proposed [annex 3]. These actions constitute the initiatives to be presented by the Commission on the basis of Article 59(9) (see annex 6) of the Professional Qualifications Directive, the first being the subject of this paper. The two initiatives **were endorsed by the European Parliament<sup>9</sup> and Council<sup>10</sup> in 2016**. In its **conclusions of 29<sup>th</sup> February 2016 the Council again emphasised the need for more consistent proportionality assessments of regulatory requirements regarding professions and welcomed country specific guidance on regulated professions<sup>11</sup>**.

Further, this proposal runs complimentary to that proposed under the Services Directive to notify draft regulatory changes in the context of the scope of that Directive. A more systematic use of proportionality criteria is expected to enrich the shared policy objectives

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<sup>7</sup> In its March 2012 conclusions, **the European Council asked Member States to reduce the number of regulated professions and remove unnecessary or disproportionate barriers to entry to regulated professions**. In its recommendation of June 2012 **the European Parliament called on the Commission to identify areas where Member States are disproportionately blocking access to regulated professions**. In the conclusions from its meeting on 24 and 25 October 2013, **the European Council once again stressed the need for Member States to identify remaining barriers to accessing professions, assess their cumulative effect and take appropriate action**. In July 2015 a number of Member States called for a more uniform application of proportionality assessments [see annex x],

<sup>8</sup> [COM\(2015\) 550 final](#)

<sup>9</sup> [European Parliament resolution of 26 May 2016 on the Single Market Strategy](#)

<sup>10</sup> [Council Conclusions on “The Single Market Strategy for services and goods” of 29 February 2016](#)

<sup>11</sup> [Council Conclusions of 29.2.2016](#) on regulated professions: “REEMPHASISES the need to ensure more consistent proportionality assessment of regulatory requirements and restrictions applicable to services markets. Therefore WELCOMES the analytical framework for comprehensive proportionality assessment of professional regulations, STRESSES the need to develop as soon as possible the framework to ensure consistency and that it should therefore build on existing case law. CALLS ON the Commission to extend the framework to cover all relevant requirements and restrictions impacting access to and pursuit of services activities, regarding both professional qualifications and other regulatory requirements. WELCOMES the periodic country specific guidance on regulated professions, also in light of its potential to ensure that regulation by each Member State is proportionate and STRESSES the need to ensure an effective and consistent follow-up.”

to improve the Single Market in services for both Directives<sup>12</sup>. In terms of scope the Services Directive relates to only legal persons and does not cover the medical professions. The Professional Qualifications Directive refers to the recognition of all individuals who by legislation must be qualified except notaries.

## 1.2. Legal context

Prior to its substantial revision in 2013, Directive 2005/36/EC was the subject of a thorough evaluation<sup>13</sup> on the shortcomings of the existing process for facilitating the free movement of professionals. Based on those findings, Directive 2013/55/EU, amending Directive 2005/36/EC introduced, among other requirements, an **obligation for Member States to assess the proportionality of their professional regulations**. This recalls according to responsibilities under the Treaty (Articles 45, 49 and 56 TFEU) that regulation in the Member States must be necessary, justified and not go beyond what is necessary.

This assessment process, carried out by the Member States included all regulated professions, within the scope of the Professional Qualifications Directive and therefore is not applicable to activities which are explicitly excluded (e.g. notaries)<sup>14</sup>.

Currently, Article 59 of the Professional Qualifications Directive describes the process which Member States must comply with:

- Article 59(3) lays down a general obligation for Member States to examine whether requirements restricting access to a profession or its pursuit<sup>15</sup> are justified and proportionate. In particular, it requires without further detail an examination of whether those requirements are "*suitable for securing the attainment of the objective pursued*" and do not "*go beyond what is necessary to attain that objective*". **It does not explicitly provide an obligation for Member States to eliminate immediately any disproportionate regulation and thus might create legal uncertainty as to whether one is to use Article 59 to preserve its practical effectiveness or the Treaty.**

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<sup>12</sup> [Link to SD notifications](#)

<sup>13</sup> See Impact Assessment SEC (2011) 1558 final.

<sup>14</sup> According to Recital 3 of Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC, notaries who are appointed by an official act of government are excluded from the scope of Directive 2005/36/EC in view of the specific and differing regimes applicable to them in individual Member States for accessing and pursuing the profession. However, the rules of the Treaty as regards the proportionality of the restrictions on free movement apply to this profession, as confirmed by the Court of Justice Case C-47/08.

<sup>15</sup> By "requirement", it is understood all conditions imposed on the access to and exercise of the profession such as activities reserved to the profession (activities no other profession can exercise), academic qualification required, compulsory membership in a professional organisation or incompatibilities of activities (the professional may not exercise certain activities).

- By 18 January 2016 Member States must have examined<sup>16</sup> whether requirements restricting access to a profession or its pursuit are **justified and proportionate** - Article 59(5). This requirement resulted in the so-called Mutual Evaluation process.
- **Within six months of the their adoption**, the Member States have to notify to the Commission the new requirements which have been introduced after 18 January 2016, together **with the reasons for considering that those requirements comply with the principle of proportionality** Article 59(5).
- By 18 January 2016 **and every two years** Member States have to notify to the Commission those requirements **which have been removed or made less stringent** - Article 59(6). These reports take the form of National Action Plans, **based on in-depth, case-by-case analysis** of the restrictions and listing the reforms which have been carried out or are foreseen in the future.
- On the basis of the information received, pursuant to Article 59(9), by January 2017 the Commission is expected to **submit its final findings** on the overview of national regulations of professions and **on proportionality assessments conducted by Member States** to the European Parliament and the Council, accompanied where appropriate by **proposals for further initiatives**.

**Thus, it was foreseen during the revision of the Professional Qualifications Directive in 2013 that new initiatives concerning the proportionality assessments conducted by Member States would have to be submitted by 2017.**

Furthermore, the present initiative will be reinforced by the related Guidance initiative on reform needs [see annex 3]. The two measures can be considered as complimentary in the sense that the present acts pre-emptively through providing a general set of criteria assisting Member States in a thorough ex-ante assessment of justification and need for future regulation of professions in all sectors, while the Guidance aims at prompting Member States to make concrete adaptations to the regulatory framework of specific professions. They both aim at refining Member States' approaches to regulation, not dictating them, but rather by ensuring better regulatory practices guarantee that the requirement for proportionality and necessity of regulation is adhered to and that negative economic consequences avoided.

### **1.3. Economic context**

A better functioning of the Single Market gives European Member States advantages at the national as well as global level. Total services account for 71% of GDP, representing € 8,58 bn and 68% of total employment, the equivalent of 152,6 million persons<sup>17</sup>. However, it is

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<sup>16</sup> Although it is not foreseen in Article 59 of the Professional Qualifications Directive, during the Mutual Evaluation the Commission invited Member States to involve all interested parties while examining the impact of their regulations.

<sup>17</sup> Source: National account statistics



broadly acknowledged that more than 20 years after its creation the full potential of a single market in services remains unfulfilled.

The significant role of professional services in the EU economy cannot be over-estimated and there are numerous studies demonstrating the untapped benefits to furthering the Single Market in services. One such recent study suggested that an annual potential of **€39billion GDP remains to be captured**<sup>18</sup>. At present, based on what Member States notified in the regulated professions database, there are over 5500 regulated professions across the EU<sup>19</sup>. This corresponds to an average of 199 regulated professions per Member State but with such large variances between countries that we see a range from the least, Lithuania reporting only 76, and Hungary with the most at 543<sup>20</sup>. However, these numbers in tell little about the intensity (or proportionality) of the regulation, its economic impact or the characteristics of people affected by it<sup>21</sup> [see annex 2]. Nevertheless as a starting point to the present analysis it does serve to illustrate the scale of divergence in the European Single Market for services.

Measuring the precise impact of regulated professions is difficult owing to the lack of such type of occupations in any EU or international statistical classifications and until recently no figures even existed regarding the **prevalence and effects of occupational regulation on the EU labour market**<sup>22</sup>. Therefore, to support the Mutual Evaluation<sup>23</sup> the Commission contracted the first ever EU-wide representative survey to provide the data necessary to measure the prevalence of regulated professions<sup>24</sup>. Conducted during the first quarter of 2015 this survey contacted over 26,600 European citizens and concluded that **22% of the European labour force**, or over 47 million citizens are directly affected by the most stringent form of '*licensing*' regulation<sup>25</sup>. It also found that its prevalence varies across the Union (from 14% in Denmark to 33% in Germany<sup>26</sup>).

Further to this an independent academic study was subsequently commissioned to analyse the impact on the labour market using this newly available data<sup>27</sup>. This study provides us for

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<sup>18</sup> [http://www.europarl.europa.eu/EPRS/EPRS\\_Mapping\\_the\\_Cost\\_of\\_Non-Europe-June%202014.pdf](http://www.europarl.europa.eu/EPRS/EPRS_Mapping_the_Cost_of_Non-Europe-June%202014.pdf)

<sup>19</sup> See [interactive map](#) in the EU Regulated Professions Database for a visual representation of the occupational regulation across the EU countries. The Database includes information on the regulated professions covered by the Directive 2005/36/EC and shows that some 600 different "[generic professions](#)" are affected by occupational regulation. For each generic profession there are usually many more professions corresponding to the national terminology, because under a generic profession there are several sub-professions, which brings the number of regulated professions in the EU up to c.a. 5500.

<sup>20</sup> EU Regulated Professions Database, June 2016

<sup>22</sup> Attempts made include matching microlevel EU Labour Force Survey results, which do not include questions on whether respondents work in a regulated profession, with International Standard Classification of Occupations (ISCO) codes and the EU Regulated Professions Database run by the European Commission. The estimates provided by Koumenta et al. (2014) show lower and upper bounds of those affected by occupational regulation in the EU: between 10 and 24% of the EU labour force.

<sup>23</sup> "[Communication on evaluating national regulations on access to professions](#)", 2013, COM/2013/0676 final

<sup>24</sup> Reference to TNS work – Annex in M&M study

<sup>25</sup> I.e. reserves of activities ("licensing").

<sup>26</sup> ISCO categories

<sup>27</sup> Koumenta and Pagliero (2016)

the first time ever with estimations based on a single methodology of the impact professional regulation has on labour market for the whole EU. The results are summarised in table 1.

**Table 1 The impact of regulated profession on labour market:**

Impact	Finding	Detail
Wages	An aggregate wage premium of about <b>4%</b> but with considerable variations (up to <b>19.2%</b> in some crafts) <sup>28</sup>	This is reflected in significant differences in wages across professional groups and suggest that licensing may <b>significantly distort relative wages</b> . Also suggests that professional regulation contributes to <b>wage inequality</b> in the European labour market, particularly benefiting those at the top of the income distribution.
Job creation	Suggest that licensing can be associated with a substantial loss in employment (up to <b>705,000 jobs</b> in the EU).	Depending on the occupation, there could be <b>between 3 and 9% more people working</b> in a given profession should access requirements be made less stringent.
Mobility	<b>26% less foreign-born workers in regulated occupations</b> compared to unregulated ones.	Amongst EU citizens in another Member State <b>almost 1/3 fewer work in regulated compared to unregulated professions</b> . The study also found evidence that automatic recognition arrangements under PQD are effective in facilitating mobility.
Skills	“upskilling effect” of occupational regulation – was <b>not confirmed</b>	Certified workers who have no obligation to invest in training do so more than those who do (licensed workers), indicating that licensing is not the only way to promote upskilling.
Consumer information	Commonly used justification is the asymmetry of information between professionals and consumers. Although caveated, the study <b>rejected</b> this explanation for the incidence of licensing in the EU.]	The perceived lack of information on behalf of the consumer is often given as the reason for requiring professional regulation so as to control the quality of service provided.

Source: “Measuring Prevalence and Labour Market impacts of Occupational Regulation in the EU”<sup>29</sup>

Corresponding with this, studies on the impact of regulated professions in specific sectors have been carried out recently in several Member States.

<sup>28</sup> Wage premiums and high profit margins are a common indicator of monopoly rents and which in turn leads to high prices for consumers and an overall lack of competition within the profession.

<sup>29</sup> Maria Koumenta, Queen Mary University of London and Mario Pagliero, Collegio Carlo Alberto Torino

For instance, the French Inspection Générale des Finances conducted its own study in which it analysed 37 regulated professions chosen on the basis of their economic significance and on their subjection to at least two different forms of regulation<sup>30</sup>. The study analysed the regulations in place, the reserves of activities, the qualifications and the tariffs, and on that basis found the following:

- Removing excessive regulations for these professions **could increase French GDP by 0.5%, employment by 120,000 and exports by 0.25% of GDP**
- That these sectors have **profit margins 2.4 times higher** than those seen in the rest of the economy<sup>31</sup>
- In the majority of cases **it isn't possible** to argue that the regulations are aimed at promoting principles of general public interest or the economic efficiency that inspired them
- That the regulated professions under examination are characterized by high levels of profitability which has **no other explanation than the regulations in place.**

In 2016, the Competition and Markets Authority in the UK launched a market study into legal services in England and Wales to see if they were working well for consumers and small businesses. The interim report<sup>32</sup>, published in July 2016 considered in particular the potential for regulation to adversely affect competition in several ways, namely by creating unnecessary and disproportionate costs for consumers and by creating barriers to entry, expansion or innovation. When analysing whether regulation and regulatory framework go beyond what is necessary to protect consumers, the analysis focused on the impact of "reserved activities and on the impact of "regulation by the title", but also on the impact of the overall framework for legal services regulation on competition. The interim report highlighted in particular that the reservation of activities may reduce competition to some extent. Consequently, reducing their scope could have the potential for generating greater competition in the future<sup>33</sup>.

The economic impact of the liberalisation of the profession of real estate agent has been assessed in the Netherlands<sup>34</sup>. In the framework of the Mutual Evaluation, the Netherlands

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<sup>30</sup><http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000569.pdf>

<sup>31</sup> Wage premiums and high profit margins are a common indicator of monopoly rents and which in turn leads to high prices for services recipients and an overall lack of competition within the profession.

<sup>32</sup> <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

<sup>33</sup> See also example cited in Annex 4 that was introduced to the database: "*It should be noted that previous requirements were higher and more stringent. Current ones are the result of the 2013 deregulation process... Introduction of new requirements resulted in a substantial increase in the number of granted authorizations in the field. On average, 212 individuals a year received professional qualifications during 2009-2013. Upon entry into force of the new requirements, in 2014, 420 individuals received a new professional authorizations, while in 2015, 381 individuals. The same time the number of professional liability enquiries before and after the changes in granting authorizations does not indicate that there is the decrease in the quality of services provided. It was concluded that measures put in place have achieved desired result and that current level of qualification requirements is not too high.*"

<sup>34</sup> <http://ec.europa.eu/DocsRoom/documents/15486/attachments/1/translations>

stressed that after liberalising the profession, market entry of new agents became easier. In 2010, the amount of real estate agencies in the Netherlands was 12.339, compared to 7.931 in 2000. Also, after 2005, commission rates went down, which could be seen as a result of increasing competition.

Recognition of the consequences of inappropriate professional regulation may also be found in the context of the **European Semester**: since 2011 an average of 11 countries per year has received recommendations on professional services, including the regulated professions. **The economic value brought about through opening up access to services is further acknowledged as a priority in the economic reforms necessary to support regeneration for some of Europe's most economically challenged Member States**<sup>35</sup> Further, a number of studies recently contracted by the Commission show that making regulation more proportionate and adapted to market reality by e.g. relaxing the most restrictive and unjustified requirements resulted in improved market dynamics specifically leading to more market openings, more start-ups and new innovative services brought to market by new entrants<sup>36</sup>.

**Other recent studies further enforce findings that excessive occupational regulation has negative and multi-layered impacts on the economy, leading as it does to:**

- A **distortion of competition** by keeping unnecessarily high entry barriers for newcomers, therefore limiting the number of people and businesses authorised to provide services. A greater number of suppliers may increase levels of innovation via stronger competition.
- Reduced competition can lead to a **suboptimal allocation of resources** and **excessive price mark-ups**, which can be translated into **higher prices of services for consumers**.
- The organisation of entry requirements to access a profession according to transparent and objective criteria may increase significantly the number of professionals, without undermining the quality of the service<sup>37</sup>.
- Disproportionate barriers can act as a **deterrent to innovation** by preventing new service providers with innovative solutions to compete with market incumbents.

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<sup>35</sup> [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2014/pdf/ee5\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/ee5_en.pdf) as well as [http://business.cardiff.ac.uk/sites/default/files/working-papers/e2015\\_16\\_0.pdf](http://business.cardiff.ac.uk/sites/default/files/working-papers/e2015_16_0.pdf)

<sup>36</sup> The effects of reforms of regulatory requirements to access professions: country-based case studies [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8525&lang=en](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8525&lang=en)

<sup>37</sup> See, Rojek M., Masior M., "The effects of reforms liberalising professional requirements in Poland", Warsaw School of Economics, forthcoming. The reforms of 2005 and of 2009 removed the possibility for local bar associations to organise separately access to the profession and gave authority to the Ministry of Justice to organise at national level the entry exams according transparent and objective criteria. Other reforms include: the obligation for lawyers to register in a local bar when changing jurisdiction was replaced by a simple notification to the bar. The most visible effect of the reform shows that the number of lawyers and legal advisers almost doubled between 2005 and 2016. Available data on the quality of legal services gathered by professional bodies show a 50% decrease in the number of complaints per active lawyer for the period 2010-2013 compared to the period 1998-2001 and a decrease in the number of complaints for professional malpractice.

Excessive entry regulation may also unnecessarily **reduce employment opportunities** for professionals<sup>38</sup>.

- Because of their fundamental part in value chains as users of other sectors' inputs and in turn as contributors to the production process of other sectors, their economic role is even greater than its face value. For example, €1 of final demand for architectural and engineering services generates €1.9 of gross production in the whole economy<sup>39</sup>.
- This highlights the pan-economic impact of regulation in professional services and one study found the positive effect of previous structural reforms in German business services *"on the net value added in the downstream manufacturing production as well as in the overall economy"*<sup>40</sup>
- Another paper makes the link with innovation and knowledge spill-overs but also with Foreign Direct Investment (FDI), noting the significant proportion of FDI which goes to the services sector and that *'domestic reforms are crucial in contributing to attract FDI'*<sup>41</sup>:

At **macroeconomic** level this all adds up to a restraint on economic growth and the loss of employment opportunities not only for the Member State directly concerned but also for the internal market as a whole because of the interrelationships between neighbouring economies whose exports depend on the accessibility of their neighbours' markets. Because of their predominance in key sectors (business services, construction, health and social services, etc.), **the regulated professions contribute significantly to the rest of the economy and are needed for economic growth and employment**. It has therefore a substantial impact on Europe's competitiveness as a whole and in this context such issues need to be tackled at a European level.

## 2. Procedural aspects and consultation of interested parties

The evidence base for this impact assessment stems from the on-going Mutual Evaluation exercise undertaken in the last two years, the information provided by national competent authorities in the Regulated Professions Database and the various reports on specific sectors, drafted in agreement with the Member States and published by the Commission. Additionally a public consultation was carried out between 27<sup>th</sup> May and 22<sup>nd</sup> August 2016. A total 420 responses were received.

A fuller extrapolation of results may be found in annex 11.2. Summarised here are the higher level conclusions which may be drawn as they relate firstly to the problem drivers as

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<sup>38</sup> Extensive academic research has been produced on these effects and is summarised in the Communication on evaluating national regulation on access to professions (COM (2013) 676) and in the Staff Working Document accompanying the Communication on Upgrading the Single Market (COM(2015) 550).

<sup>39</sup> [Canton et al. \(2014\)](#) For legal and accounting activities the corresponding figure is 1.8 EUR

<sup>40</sup> [https://www.iwp.uni-koeln.de/fileadmin/contents/dateiliste\\_iwp-website/publikationen/DP/owiwo/OWIWO\\_DP\\_01b\\_2015.pdf](https://www.iwp.uni-koeln.de/fileadmin/contents/dateiliste_iwp-website/publikationen/DP/owiwo/OWIWO_DP_01b_2015.pdf)

<sup>41</sup> [http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127733.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127733.pdf)

set out in this Impact Assessment and secondly a review of responses regarding the introduction of a common proportionality test. In summary:

- Regarding the quality of analysis found in National Action Plans (NAPs) [11.2.3 of annex]:

**When controlled for the organised views of interests around 37% found that NAPs were based upon the most relevant information** on the impact of regulation on the market and/or professionals (e.g empirical studies, reports by professional associations and consumer protection bodies, reports and/or opinions of other national authorities such as competition authorities) and around **35% that 'all impacts of regulation were thoroughly analysed'**. [section 11.5 of annex]

- Regarding current regulatory checks and balances already in place [section 11.6 of annex]:

When asked what proportionality related assessing was already in place in their Member State: around 38 % said there was a systematic methodology, 38% that is was done on a case by case basis and **24% that no methodology exists**.

Regarding existing criteria according to EU law **39% were unaware** of any, of these were 43% of those who responded as a 'public authority'

Transparency issues were addressed in relation to consultation practices: in the region of **61% focussed consultations only on the professions concerned** and the **publication of the results of any analysis is not done in many cases**.

- Regarding the introduction of a proportionality test[section 11.7 of annex]:

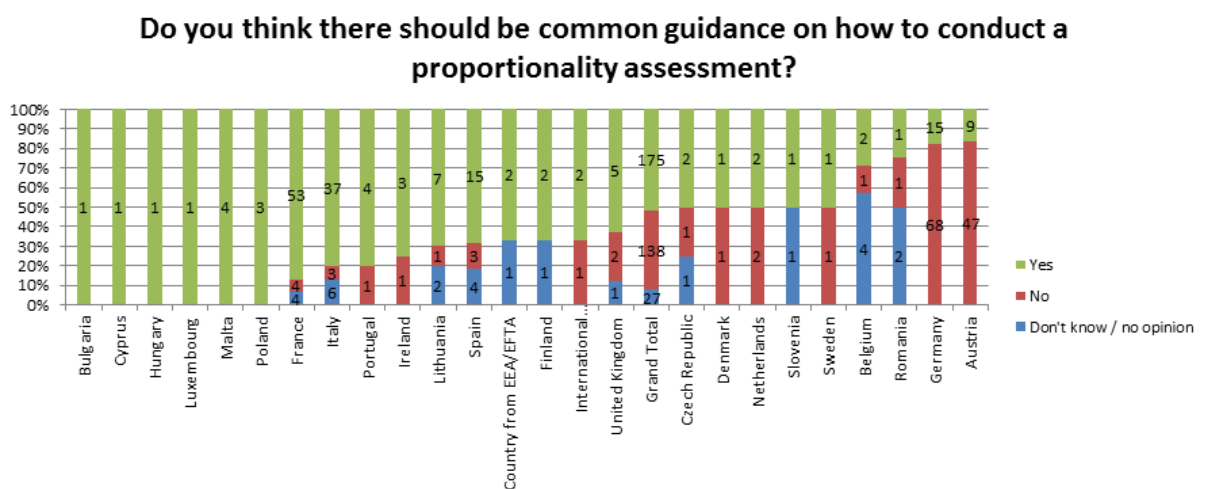
**Around 93% of respondents agreed that authorities should analyse the impact of the professional regulations they introduce.**

**56% that proportionality should 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.

**Of the 61% aware of current proportionality analysing procedures, 45% thought it needed no further clarification but this number drops to 26% when controlled for organised responses.**

- Top concerns with current procedures reflected those in this IA, namely: **quality, compliance, comparability and transparency according to the best principles of proportionality in regulation.**
- **Respondents agree that issues around wider economic impact and cumulative regulatory effects should be part of such a test.** [section 11.6.2 of annex]
- The rate of **regulatory change is high within the professions with around 50% of respondents wishing for more**\_[section 11.2.6 of annex]

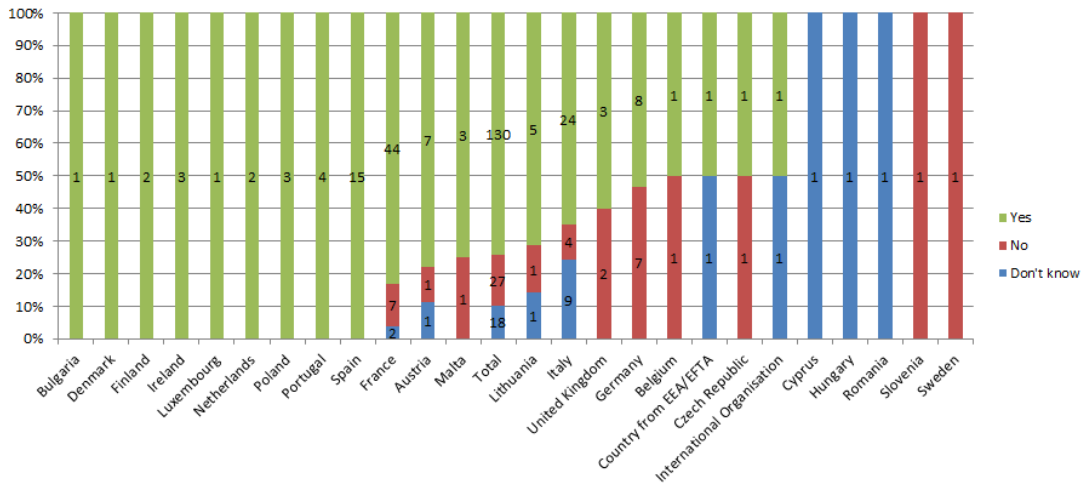
- Aside from a general concurrence, those most reluctant to support any change to the ways through which proportionality is analysed or to acknowledge the benefits it may deliver, come largely from within the professional representative bodies.** Almost exclusively the German and Austrian crafts have particularly strong reservations which are reflected by a coordinated response to the consultation accounting for nearly 100 responses refuting the alteration to current proportionality approaches.<sup>42</sup>
- Across Member States,** attitudes towards an improved used of proportionality are:



Those who replied yes to the above were then asked:

<sup>42</sup> These may be found under the demographic category of 'other' in the consultation, as oppose to user, provider or authority (although a significant additional number also responded as authorities). The category of 'other' is comprised of 173 contributions including 4 from research institutions and 17 from trade unions. The remaining 152 came from professional associations with the majority of the respondents accounted for by Austria (48) and Germany (46), the remaining are Belgium (2), the Czech Republic (2), Denmark (1), Finland (1), France (20), Ireland (2), Italy (12), Lithuania (2), Poland (1), Romania (1), Spain (4), Sweden (1), UK (6), EEA Country (1) and, International Organisation (2). Where organised responses are given it is common procedure to count them as 1 however, for the purposes of transparency we have included these responses though indicating their effect should we not have chosen this route. **It should be noted that the majority of trade unions supported a mandatory route** (see section 11.2.5 of annex)

### Do you think such guidance should be mandatory for public authorities to use?

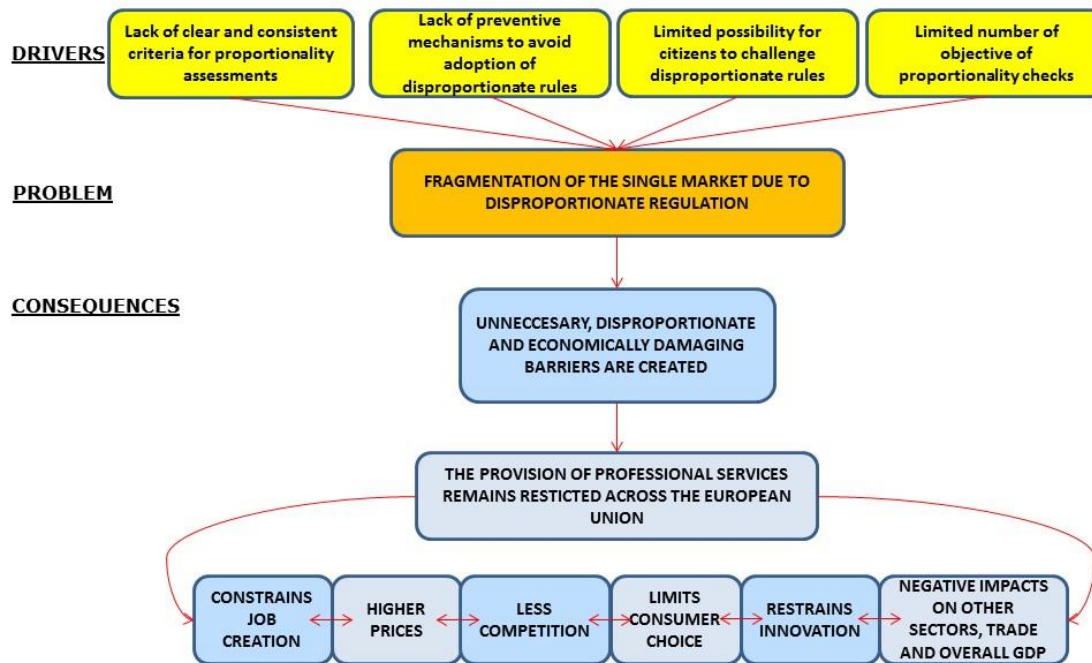


Looking at these responses according to stakeholder demographics we find:

		Should there be common guidance?	Should this guidance be mandatory?
<b>Public Authorities</b>	Yes	<b>30</b>	<b>24</b>
	No	15	6
<b>Users</b>	Yes	<b>85</b>	<b>5</b>
	No	1	-
<b>Providers</b>	Yes	<b>75</b>	<b>64</b>
	No	29	5
<b>Other</b> (bracketed figures denote removal of organised responses)	Yes	<b>64 (53)</b>	<b>46</b>
	No	93 (23)	15



### 3. Problem definition – Fragmentation of the Single Market resulting from disproportionate regulation

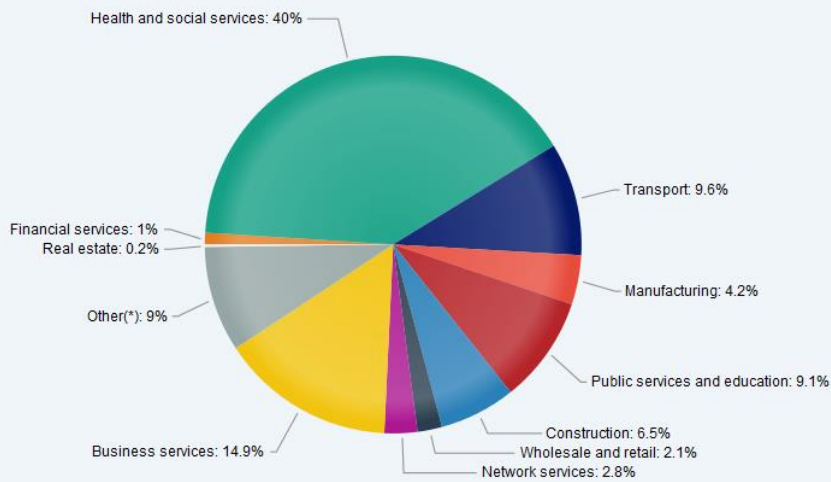


The regulation of professions by definition does and means to create barriers. Such barriers may be necessary to guard against justifiable risks. The reasons for introducing regulation are often to protect the consumer of the service, the public in general or related to environmental concerns. Obvious examples are health professions where the potential for risk is high and the quality of practitioners must be guaranteed as far as is possible. However, proportionality in regulation is not an intangible abstraction but may be objectively interrogated according to the benefits a regulation brings to guard against such risks alongside its impacts upon the broader market. In this way informed judgements may be taken as to the desirability of any trade-offs to the competitive environment. **In view of their important social and economic effects, such assumptions and choices must rest on solid evaluations. Where for whatever reason, failing to ask and properly investigate the fundamental questions underlying such decisions are lacking, the negative consequences of disproportionate and unnecessary regulation are likely to follow.**

Yet the disparity observed in ensuring proportionality in regulation indicates fundamental challenges at a Member State level to properly grasp and respond to issues around proportionality. Ultimately this results in regulatory decisions which may be considered disproportionate or even entirely unnecessary.



Number of regulated professions: 5580



(\*) Including entertainment, tourism, agriculture and mining

Over the European Union more than 5500<sup>43</sup> regulated professions were notified to the Commission, 40% in the health and social services sector and 3% regulated by no more than two Member States. The most striking immediate observation was in the area of civil engineering where the subdivision of categories, largely related to the scope of activities reserved to qualified professionals (i.e. those activities which can only be performed by qualified professionals) uncovered over 90 different classes of civil engineer. For example, it is revealing to consider that there are regulations, adopted decades ago, which are not even applied in practice, but remain in force and thus have the potential to create barriers and may jeopardise legal certainty. Where regulations may have been designed decades previously, **new technological developments** have been taken into account only by a limited number of Member States<sup>44</sup> when regarding the regulations currently in effect.

Additionally, even within a Member State, the approach as regards proportionality assessments may vary significantly and one can find **regional differences** not only regarding which professions to regulate but also which, and how many, measures to apply. For instance in Spain, whereas the profession of real estate agent has been liberalised at national level, the possibility to reintroduce regulation has been foreseen and already implemented at regional level in at least one region. However, according to the information submitted during the Mutual Evaluation, there has been no impact assessment of the

<sup>43</sup> A full list of professions, according to generic title, and which have been notified to the Commission to date may be found here: <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions&quid=2&mode=asc&maxRows=%20-%20top>

<sup>44</sup> See Sector Report on real estate agents and in particular the reform of the regulatory framework of the Netherlands, taking into account the rise of the internet, reducing the asymmetry of information between professionals and consumers.

different regimes in the different regions, nor has been a similar enquiry into the regulation of estate agents as a causal factor in property speculation<sup>45</sup>.

**As an extensive and retrospective exercise, often subject to the will of strong interests as well as a certain endowment bias, the Mutual Evaluation has not been able to deliver the meaningful reform that was expected.**

Whilst the Directive requires Member States to apply proportionality when making assessments it does not address how specifically these proportionality assessments are to be made<sup>46</sup> and, as shown through experience of the Mutual Evaluation, this lack of clarity is likely to hinder the Member States' ability to implement the Directive<sup>47</sup>. Issues of proportionality and in particular the intensity and evidence-base of the assessment are to be found in case-law but in such a fragmented way that it hinders practitioners' ability to act with clarity. Case-law by its nature applies to specific cases and extracting the general principles in the appropriate level of detail may not always be straightforward. As such this may present difficulties for Member States.

Certain professional activities (for instance notaries) have not been subject to an in-depth review due to fact that they were explicitly excluded from the scope of the Professional Qualifications Directive and thus did not benefit from the Mutual Evaluation exercise. However, in line with the Treaty, **it has to be ensured that the proportionality principle is applied in a consistent way** to all sectors of activity, while duly taking into account the specificity of the specific profession under scrutiny and the competency of the Member State to regulate according to these principles.

In view of the striking divergence in the regulation of similar professions across Member States, the variety of approaches and apparent confusion in assessing the value of regulations, the objective of the obligation to assess the proportionality of national regulations under the Professional Qualifications Directive and the Mutual Evaluation has not been reached and it currently does not fulfil its role as negotiations intended. The results of the Mutual Evaluation exercise show that Member States do not provide sufficient arguments, if any, as to the proportionality of their professional regulations and the consultation indicated a disparate and disorganised approach to regulatory assessments. **The existing obligations clearly do not prevent the adoption of disproportionate requirements.**

### 3.1. Experience from the Mutual Evaluation

For the purposes of the Mutual Evaluation the Commission developed a questionnaire according to existing case-law<sup>48</sup> to help Member States review their regulation from the point of view of proportionality. This process informed the proposal set out in this Impact

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<sup>45</sup> See Sector Report on real estate agents and in particular the regulatory framework in Catalonia, Spain.

<sup>47</sup> See the annex on the public consultation: section 11.6.2. : Responses regarding the current state of proportionality assessments in the EU

<sup>48</sup> See footnote n°54.

Assessment; in so much as it legally required Member States to undergo proportionality focussed assessments for each of their regulated professions. As such, an appraisal of its success and any underlying problems encountered is a particularly relevant source of information for this Impact Assessment.

Table 1 illustrates the state of play in June 2016 regarding the proportionality assessments and National Action Plans submitted by Member States. The deadline for submission of this information was 18 January 2016.

**Table 2** – Proportionality assessments carried out by EU Member States, June 2016

	Proportionality assessments submitted [by 9.6.2016]	% of <i>proportionality assessments missing</i>	Total number of professions reported regulated by that Member State	National Action Plan submitted (NAP)
AT	102	52%	213	Yes
BE	88	31%	128	Yes
BG	99	10%	110	Yes
CY	17	85%	114	<b>No</b>
CZ	366	0%	366	Yes
DK	160	1%	162	Yes
EE	84	14%	98	Yes
FI	140	0%	140	Yes
FR	234	10%	260	Yes
DE	112	26%	151	Yes
EL	1	99%	153	<b>No</b>
HR	19	93%	275	Yes
HU	301	53%	634	<b>No</b>
IE	28	81%	149	<b>No</b>
IT	170	5%	179	Yes
LV	267	0%	267	<b>No</b>
LT	76	0%	76	Yes
LU	2	98%	125	Yes
MT	2	99%	140	<b>No</b>
NL	98	27%	135	Yes
PL	345	1%	347	Yes
PT	63	74%	239	Yes
RO	119	40%	200	Yes
SK	252	16%	299	Yes

SI	28	90%	287	No
ES	103	46%	192	No
SE	87	10%	97	Yes
UK	170	24%	224	Yes
<b>EU</b>	<b>3533</b>	<b>39%</b>	<b>5760</b>	<b>20/28</b>

Source: EU Database on regulated professions, extraction on 9.6.2016

As this table shows, overall around 39% of proportionality assessments are yet to be submitted. However, as detailed further below, it should be clearly understood that the presence of submitted information says nothing regarding the intrinsic 'value' of that information to the issues at hand. Indeed, in many instances the information presented was insufficient, analysis often relied upon assumption rather than evidence and too often conclusions were drawn despite an absence of robust examination.

### 3.2. Insufficient 'quality' proportionality assessments

The principles which should be followed to ensure that any national requirements imposed on service providers are proportionate have been defined in EU law as follows:

*"requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result"<sup>49</sup>.*

Consequently the European Commission developed a questionnaire requesting that Member States answer a number of questions including:

- the identification of the public interest objectives which the measure(s) in question are meant to fulfil;
- specific risks (or benefits) the measures in question were designed to tackle;
- how the measures in question operate, in aggregate where multiple measures are put in place, to meeting their objectives;
- whether the actual effects of the measures have been assessed and finally;
- whether any amending decisions were being taken as a result of this analysis, notably maintain, improve or remove existing requirements.

This impact assessment covers analysis of the around 3500 proportionality analysis responses received by 9<sup>th</sup> July 2016 of the 5700 professions notified. Crucially, so as to establish an objective starting point, this analysis was **based upon the relevance of the responses given to questions instead of a judgement upon the value (quality) of the assessment** in and of itself. Therefore, rather than taking a position upon the veracity of the proportionality case presented, the analysis sought to establish the relevance of the

<sup>49</sup> See Article 59(3) of Directive 2005/36/EC.

information given for each response in a disinterested way and independent from the particular profession under scrutiny. As such it is important to note that the following should not be construed as judgement by the Commission on the conclusions reached by Member States (maintain, improve or remove the measure), but rather as an evaluation of the pertinence in which issues were considered. **And as a consequence there are many instances where the regulation is place could be entirely justified but insufficiently reasoned or indeed the converse.**

Thus, the analysis is based on a four step analysis of the proportionality assessments submitted by Member States to ascertain their appropriateness as a response to the questions posed<sup>50</sup> [annex 1].

### 3.3. Conclusions from this analysis

The conclusions are based on the instances where a *specific risk or benefit* was indicated as the motivation behind regulation rather than more generalised considerations such quality of services, consumer protection or general consumer safety without indicating any specific risks<sup>51</sup>. The analysis of the question on how specifically a given measure was supposed to tackle these risks reveals that in around 61% (within the ca. 3500 analysed) could the responses be considered as adequate.

#### **Box 1. Some examples of inadequate risk identification by Member States:**

- To increase business reliability (clothes launderer)
- Public policy (real estate agents)<sup>52</sup>
- The protection of creditors (hairdressers)
- The potential for knives to cut (cooks)
- To create a fair and controlled market (information system engineer)
- To promote the attractiveness of activity (boat master)

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<sup>50</sup> Please see Annex 1 for details on the method used to assess the quality of the proportionality assessments submitted by Member States by 9.6.2016. Proportionality assessments are not public but their results should have been summarised in the publicly available [National Action Plans](#) for those Member States which submitted them.

<sup>51</sup> This does not necessarily imply that the risks identified were deemed at the appropriate level of potential harm to consumer or to the professionals themselves. We have focused on the “specificity” of the risks identified, as per the way Q3 is phrased. This allowed us to assess the answers in as objective a way as we could think of. Examples where specific risks/ benefits were identified but the appropriateness of the potential harm can be questionable include: [bakers getting burned when baking, the potential of knives to cut, responsibility of tourist guides to give an accurate account of history to tourists, etc.]

<sup>52</sup> See sector report on real estate agents. It should be noted that the concept of ‘public policy’, particularly as justification for derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly. Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17).

- To cut the risk of fraud or counterfeiting (interior designer)
- To guard against the dissemination of inaccurate information or to ensure security of trade activities and in particular of loyal transactions, (for regulating tourist guides)
- Risk of wrist injury / small explosions (watch maker)

Analysing responses to the question on effects (Q5), reveals that the functioning of **existing measures are being considered only in very few cases and even in these cases, the analysis is rather anecdotal than based on objective studies**. In around 84% of cases, the effects of the measures were not analysed at all.

**Box 2. Some examples of inadequate identification of effects of regulation by Member States:**

- The measures are preventative therefore difficult to measure (Private detective)
- Has been regulated since 1968 and road safety records have improved since that time (driving instructor)
- No penalties have yet been imposed/recorded (multiple instances by the same Member State)
- Is regulated at EU level, therefore proportionality is not applicable (lawyer)
- Not applicable (accountant)\*
- No relevant information on the effects of measures, however the goal is to prevent unauthorised practice (multiple instances by the same Member State)
- Gives the holder a competitive advantage (mechanical engineers)

\* one Member State responded n/a in around 140 instances, another in over half of the few assessments they supplied

The third step, regarding the cumulative effect of multiple measures, found that **in the region of 10% made no analysis where such additional restrictions were in place**. This is even aside from consideration of broader measures in place such as consumer or health and safety law which could be considered additional protections in almost all instances.

Finally, as a conclusion to this analysis regarding the conclusions reached by Member States from their preceding analysis, **in at least 69% of cases where the stated intention to “maintain the current system” were neither the risks that the measures were supposed to minimise identified, nor the effects of the measures analysed**. This illustrates the frequency of regulatory decisions being made upon a paucity of adequately conducted proportionality assessments.

Another sign that proper analysis is not being routinely pursued by administrations refers to the amount of instances where recent reforms were made without the seeming ability to

present the supporting information for these decisions. For instance, in January 2016 Bulgaria introduced regulations concerning the professions of tourist guide<sup>53</sup> and travel agent. Despite the level of restrictiveness of the new rules as regards the scope of the reserved activities or the training requirements, a proportionality analysis of the measures before their adoption does not seem to have been carried out. Similarly, Italy has introduced new requirements<sup>54</sup> for lawyers, which also do not appear to have been analysed according to proportionality principles prior to their adoption and which have not been substantiated by further justification. Furthermore, whereas in 2015 France conducted major reforms<sup>55</sup> in several legal professions, very limited changes were introduced to improve access to ministerial offices, attributed to lawyers acting before the highest courts, as evidenced by the results of the public consultation carried out by the Commission.

**The fundamental and very real concern suggested by this analysis is that Member States are all too often basing far-reaching policy conclusions and implementing new regulations based upon inadequate arguments and without due diligence to the social and economic risks of such decisions.** This lack of assiduousness risks not only unnecessary, detrimental and costly over regulation but also, in not fully appreciating the operation of a regulation on its objectives, to inadequate protections where the public interest ought to rightly be guaranteed.

### 3.4. The drivers of the problem

Multiple drivers may be put forward each operating to lesser or greater degree within a particular Member State but which overall negatively contribute to a collectively divergent approach to the overall regulation of professional services in the Single Market, according to a highly individualised and generally insufficient use of proportionality.

Before outlining these it is also necessary to consider the possibility of other factors that may have influenced our findings above. For example, it may be that some Member States encountered resourcing issues yet even so they still encountered difficulties in relatively fundamental areas, such as identifying those risks necessitating regulatory protection and where data gathering is not required; responses were too often lacking credibility or relevance. Although allocated over two years for the completion of this task some have still failed to deliver and additionally we are aware of instances where Member States encountered opposition from their competent authorities to supply the necessary information. This has not however prevented new regulatory decisions from being taken

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<sup>53</sup> See Ordinance № 1 of 5 January 2016, reserving the activity of accompanying tourists to their accommodation only to qualified tourist guides, available at <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp;jsessionid=A84C95620C98DCBC4173DFAA93C50429?idMat=99918>

<sup>54</sup> See for example the requirement for having dealt with at least 5 cases per year, Decree of 25 February 2016, n. 47 published of the OJ on 07/04/2016 "Regulation laying down rules for the assessment of the effective exercise of the legal profession"

<sup>55</sup> See the Law on Growth and Economic Activity (so-called "Macron Law"), adopted on August 6th 2015.



over this same time period. Additionally, one of the motivations behind the Mutual Evaluation exercise was to ensure that old regulations are screened against contemporary needs. In such cases where a regulation was adopted decades previously it may be that analysis at that time was rudimentary or that much of it has since been lost and as such could not be submitted for this exercise. Similar to the above however, this has not prevented new measures from being introduced or announced during the course of the Mutual Evaluation and without any concomitant reasoning or reflection in the responses submitted.

Understanding this, the present Impact Assessment has identified four primary underlying drivers behind the issue of Member States failing to properly conduct proportionality analysis and thereby guarantee against the negative effects or redundant and undesirable regulations:

**Driver 1: Lack of clarity as regards the criteria required to comply with the principle of proportionality**

The necessary criteria required to comply with the legal requirement to examine proportionality are not clearly established in Article 59 of the Professional Qualifications Directive, making assessment and prevention of disproportionate regulation difficult to moderate. Currently, Article 59 (3) contains only a general obligation for Member States to examine whether national requirements are "suitable for securing the attainment of the objective pursued" and do not "go beyond what is necessary to attain that objective". The criteria to conduct a proportionality test are scattered in the case-law, since each case dealt with by the Court of Justice is specific in its factual and legal assessment of specific requirements. Member States have pre-existing obligations to perform proportionality checks under the Professional Qualifications Directive and the Treaty and going forward will be expected to notify changes to their regulatory environment according to proportionality principle<sup>56</sup>. However, despite criteria already existing in the case-law of the Court of Justice<sup>57</sup>, the fulfilment of existing obligations is often based on national methodologies leading to a great deal of discrepancy and the inability to make workable comparisons. As the case law is dispersed, it is neither clear which criteria are the minimum and sufficient for a proportionality assessment to be deemed satisfactory and compliant nor how to most appropriately frame such responses. Such ambiguity breeds uncertainty, groundless diversity, does not promote capacity building across the Union, risks the adoption of unsound decisions based on unsound evaluations and ultimately risks proper

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<sup>56</sup> See Article 59(3) and (5) of the Professional Qualifications Directive.

<sup>57</sup> See inter alia Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-575/11 *Nasiopoulos*, Case C-539/11 *Ottica New Line di Accardi Vincenzo*, Case C-475/11 *Konstantinides* Joined Cases C 422/09, C 425/09 and C 426/09 *Vandorou*, Joined Cases C 372/09 and C 373/09 *Josep Peñarroja Fa*, C 340/89 *Vlassopoulou*, Case C 76/90 *Säger*, Case C-19/92 *Kraus*, Case C-3/95 *Reisebüro Broede*, Case C-424/97 *Haim*, Case C-197/06 *Van Leuken*, Joined Cases C 94/04 et C 202/04 *Cipolla*, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*, Case C-79/01 *Payroll Data Services*.

implementation according to the objectives underlying the Directive. The prevalence of this issue was borne out by responses in the Public Consultation (see section 11.6 of Annex 2).

### **Driver 2: An absence of preventive structured assessments to avoid adoption of disproportionate measures at all levels of regulation**

Existing obligations are not going far enough to promote best practice and thereby are not preventing the adoption of requirements out of line with the principle of proportionality, as demonstrated by the new regulations introduced in some Member States<sup>58</sup>. Since the case-law on proportionality in professional regulation is not codified and more importantly, neither the case-law nor Article 59 of the Professional Qualifications Directive contain a clear obligation for Member States to carry out a detailed and structured ex-ante proportionality check.

The results of the consultation and Commission observations, as described above in regard to the Mutual Evaluation, demonstrate the lack of such a structured approach. Even Member States which have already made significant efforts to comply with the existing requirements are still seeking to improve their assessment processes<sup>59</sup>. In any event, the way these assessments might be done and in how far they reflect faithfully and coherently the aspects developed in the case law, differ widely, making any comparison impossible.

Thus, there is a risk that regulation is adopted without a prior proportionality assessment and the reasons justifying it are simply routinely drafted and communicated to the Commission during the six-month period after the adoption. Furthermore, although Member States have to comply with the principle of proportionality at all levels of regulation<sup>60</sup> (even on regional or local level), it appears that the proportionality check is not always performed concerning secondary legislation<sup>61</sup>.

### **Driver 3: Limited possibilities to identify and challenge disproportionate regulation**

EU citizens exercising their free movement rights and looking for a job are often requested to fulfil several categories of requirements, which may be seen as excessive, especially when they tend to safeguard inadequately the same public interest objective<sup>62</sup>. There are number

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<sup>58</sup> See above the new rules on tourist guides and travel agents in Bulgaria, or the rules on the continuous and effective exercise of the profession of lawyer in Italy.

<sup>59</sup> See for instance Poland and the Czech Republic, which have been very active throughout the Mutual Evaluation as regards notification and justification of existing legislation, and continue producing impact assessments, supported by economic evidence of their current reforms.

<sup>60</sup> See in that respect Case C-225/15 Politano.

<sup>61</sup> See to that effect examples in Bulgaria: Ordinance № 1 of 5 January 2016, reserving the activity of accompanying tourists to their accommodation only to qualified tourist guides, Poland: The Visiting Regulations for the Old Town of Kostrzyn nad Odrą, adopted by Regulation 32/2011 of the Museum's Director, issued on 29 April, 2011, reserving visits of the whole town and not only of the Museum to locally qualified tourist guides.

<sup>62</sup> One example discussed during the Mutual Evaluation refers to citizens from one Member State crossing its border to study at another where the qualification and training criteria were less stringent before returning

of instances where there is lack of correspondence between the qualifications required (in particular the nature, the level and the duration) and the nature of the tasks performed<sup>63</sup>. National regulatory systems do not always reflect current market realities and thus impede market access for pro-competitive innovations (such as on-line provision of professional services).

In all these situations, EU citizens are faced with various practical difficulties, requested to undergo additional administrative formalities and to spend time and money to fulfil all the requirements, which might well go beyond what is necessary to practice the tasks, relevant for each regulated profession.

Whereas the Commission receives complaints concerning disproportionate regulation, based on Article 59 of the Professional Qualifications Directive, often it does not have the necessary information at its disposal to be able to initiate infringement proceedings and therefore can act only in cases where it identifies clearly disproportionate and excessive requirements.

The difficulty to assess proportionality of a measure lies in the fact that regulation has to be assessed in its national context against the backdrop of the regulatory system in that particular Member State or subdivision of it and the societal environment. Such information is not in the hands of the Commission but rather the national authorities and should be adequately considered by them in assessing proportionality. **The lack of structured and comparable ex-ante assessments will often mean that neither the Commission nor citizens can get the necessary information to assess thoroughly and if appropriate challenge the proportionality of the regulation.**

While in most cases national jurisdictions are better placed to determine the proportionality of the regulation, the continued absence of an EU instrument defining the criteria to be taken into account makes this analysis challenging<sup>64</sup>.

The current system, designed by article 59 of the Professional Qualifications Directive does not foresee the possibility for professionals, consumers or even other Member States to access the notifications on any newly adopted measures, including information on the

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home to claim recognition and start a small business. Despite this Member State facing particular unemployment issues, and these professionals not being found to pose a risk, the Member State indicated it was considering ways to address the 'loop hole' rather than address the underlying issue of overly burdensome national regulation.

<sup>63</sup> See Case C-79/01 *Data Payroll Services*, where the activities of preparing and printing pay slips, which are essentially of administrative nature do not require any specific professional qualities have been exclusively reserved professionally qualified persons who are registered with the association of employment consultants, or with the associations of lawyers, accountants, or business consultants.

<sup>64</sup> In this regard, see for instance national case-law, applying the principle of proportionality to professional regulations, based on competition rules: Belgium, Cour de cassation, 25 September 2003, C.03.0139.N, concerning the profession of lawyer. In France in line with the case-law on the complexity of the tasks (see in particular Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.*, and Case C-79/01 *Payroll Data Services*) a French court decided that an activity, which merely consists in publishing ads on a website for a fee, should not to be part of the activities, reserved to real estate professionals and thus, cannot be subject to criminal sanctions, CA Dijon, Chambre correctionnelle, 19.02.2009: JurisData n° 2009-374844.

proportionality of such measures or to express their views. To conclude, the lack of adequate expectations around issues of proportionality, as well as transparency on what grounds such decisions are taken, renders the possibility for successfully challenging instances of disproportionality at national or European level highly unlikely.

**Driver 4: The limited number of impartial, objective and comprehensive proportionality assessments in all sectors of activities, taking into account the interests of all interested parties, including consumers**

It may be clearly seen from the Mutual Evaluation that Member States often deputized the completion of necessary information to their competent authorities. As intimated by the Mutual Evaluation and then more strongly suggested by the results from the public consultation Member States often fall short in their duty to guarantee the quality, transparency and outcomes of their regulatory choices. Often, the reason given for this lack or their delays in communicating their proportionality analysis has been the reluctance of professional bodies to submit the requested information, whereas the responsibility to comply with the requirements of the Professional Qualifications Directive lies primarily with the Government, who should ensure the effective implementation of its provisions in case of delegation to professional bodies.

**As the ultimate authority accountable for regulation it is the duty of governments to rigorously assess and where necessary provide sufficient challenge to such demands, as such responsibility must remain with them and should be reinforced. Conclusions made by professional bodies appear to be too readily accepted by authorities. The burden of proof must ultimately rest with public authorities and supporting them through a strengthening their oversight and means of enquiry would assist them in properly meeting their duties and best interests.**

Often those who exert the strongest influence on regulatory decisions are those within the profession itself. Whilst it is undeniable that such persons are the best placed to advise on the practicalities and technicalities of the profession, they are not always equipped to properly assess, as one would expect, nor specifically tasked with consideration of the wider social and economic ramifications. It should also be acknowledged, as reflected during the Mutual Evaluation, that commonly the pressure to regulate stems from these same professionals<sup>65</sup>. In this way often the interests of the professionals<sup>66</sup>, the prestige of the profession and their lobbying for regulation was not only reported by Member States but even posited as a suitable justification in the public interest<sup>67</sup>. This was reflected in the

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<sup>65</sup> Though this was not routinely reflected by the same constituency in their consultation responses with many stated they wished for no change to the regulation of their profession.

<sup>66</sup> In this context it could be mentioned that, coming under professional pressure to regulate further, it is not unusual for Member States to contact the Commission seeking EU level legislation to support them in resisting such demands.

<sup>67</sup> See Sector report on real estate agents, and in particular the overriding reasons to regulate the profession put forward by Member States.

consultation which received a significant proportion of responses from bodies representing the professions, often in an organised manner. In addition the consultation indicated that in around 61% of cases these same bodies constituted the main consultative constituency<sup>68</sup> and in a few **no consultation of any sort was even routinely undertaken.**

It is also revealing to observe the difference between outcomes of public consultations on regulated professions, depending on the respondents targeted by those consultations. In the Czech Republic, the need to reform the professional regulators has first been subject to ex-ante public consultations in 2012 (for employees) and the outcome was in favour of liberalisation, whereas the results of the second public consultation carried out in 2014 (targeting employers) were in favour of maintaining the status quo. In view of the results of the public consultation<sup>69</sup>, most national regulatory authorities seem to consult only professionals and no other interested parties, such as users of professional services or potential new entry professionals (young professionals, students), business, unions, competition authorities or consumer groups.

A proper understanding of the broader impacts of regulation, attendance to such issues in considering costs to benefits judgements and an exploration of less restrictive means to achieve the same goals should therefore be more robustly demanded so as to balance the evidence base for regulation. This is reflected in around 84% of respondents who said that wider economic impacts and cumulative effects should be clarified for reviewing regulations

**Furthermore,** the assessment process, carried out by Member States was supposed to cover all regulated professions, within the scope of the Professional Qualifications Directive, including those having particular harmonised minimum training requirements at EU level, with the purpose to avoid gold-plating, i.e. an excess of norms, guidelines and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such EU regulation. The justification submitted by Member States often referred only to the name of the EU legal instrument, without further assessment of the cumulative effect of all restrictions. In addition, due to the fact that some professions are excluded from the scope of the Directive, Member States did not perform systematic proportionality checks, which raised a number of inquiries and parliamentary questions<sup>70</sup>.

Given these factors, improving transparency going forward is therefore a fundamental element. Attendance to more transparent practices should ensure that views from a broader range of stakeholders are engaged; that the process is open to scrutiny and, it is foreseen; that knowledge of this exposure will fortify authorities' engagement in both the

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<sup>69</sup> See results of the public consultation in Annex 2.

<sup>70</sup> In its answer to a parliamentary question, the Commission invited Member States to take the regulations they deem necessary in order to adapt the legal framework governing that profession of notary public to the current economic and business environment. See Parliamentary question E-007438/2014, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-007438&language=SL>

process as well as its outcomes. Ultimately thereby, sharing best practices and approaches to the similar type of decisions faced by other Member States.

### **3.5. Who is affected, in what ways and to what extent?**

As outlined above, the negative effects of unnecessary regulation have far reaching economic implications. The impact is mostly negative for young professionals and potential new entrants, such as students, but also for consumers of professional services. Regulatory barriers negatively impact both domestic and foreign EU services providers seeking to access the profession and to offer their services in the single market. They act to restrict the supply of professionals thereby constricting employment in those professions and in turn placing upward pressure on wages which the consumer must bear. In this respect it is interesting to recall the high importance consumers placed upon costs as a deciding factor when choosing a professional to provide them with a service<sup>71</sup>. This in turn has ramifications for the competitive environment, again impacting upon consumers, but also leading to less innovation, and related resilience, within business. Given the predominant place of professional services in the European economy, unnecessary costs disperse throughout sectors including manufacturing. Those most directly and apparently affected are those new professionals who wish to enter the sector (see economic section). The lack of clarity is also an obstacle for national administrations to conduct proper proportionality tests.

### **3.6. How would the problem evolve, all things being equal?**

Without further intervention at an EU level, the problems identified during the Mutual Evaluation are likely to persist; indeed there are grounds to expect that the situation will worsen as Member States increasingly diverge from one another without any improvements to current methodologies and a strengthening of expectations in line with conventional good regulatory practices.

Member States are likely to continue to take action in isolation, exacerbating the current divergence of approaches adopted by the Member States, thus increasing fragmentation in the regulation of professional services across the Single Market. Fulfilling their existing obligations would be left to the individualised approach of each Member State, and as such is likely to prevent appropriate implementation.

In this context, despite the guidance provided by the Commission during the Mutual Evaluation, experience shows that decisions are still being inadequately or openly interrogated and levels of scrutiny across the Member States are uneven. No action at the EU level would mean this continuing and as a result the likelihood that ill-conceived regulation be adopted. This risks new regulatory obstacles further fracturing the market and thus intensifying those economic risks already identified in this Impact Assessment. The quality gap between those countries who already prioritise proportionality testing into their legislative process and those who have not is evidenced by the difference between some

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<sup>71</sup> Eurobarometer: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

countries, having incorporated the frontrunners<sup>72</sup> approach and others, making the internal market fragmentation all the more tangible<sup>73</sup>.

More importantly, Article 59 of the Professional Qualifications Directive does not fully play a preventive role as regards the adoption of new disproportionate regulations. As a consequence, those barriers cannot be removed solely by relying on Article 59 of the Professional Qualifications Directive and on the Treaty, since initiating infringement procedures against the Member States on a case-by-case basis would be very challenging for national and EU institutions, considering the huge number<sup>74</sup> of professional regulations across the EU, as well as the overall duration of infringement proceedings from their initiation to termination. Furthermore, in most cases the Commission cannot substitute its own assessment of an individual situation for that of national authorities as it does not possess all the necessary information as regards the particularities of the market and the effects of the regulations in place. The Commission can only do so in cases where regulations are clearly excessive and disproportionate.

#### **4. EU right to act and subsidiarity**

Depending on the option chosen, the legal basis could be either Articles 46, 53(1) and 62 TFEU (Directive of the European Parliament and of the Council) or Article 292 TFEU (Commission Recommendation).

The EU has the right to act in the field of regulation of professions for the achievement of the Internal Market objectives based on the articles in the TFEU on the free movement of persons and services. In particular, Article 46 TFEU provides for specific provisions to be adopted in the area of free movement of workers, Article 53(1) TFEU provides for issuing Directives concerning the taking-up and pursuit of activities as self-employed persons and Article 62 of the TFEU is the basis for legal acts on the exercise of the freedom to provide services.

According to the subsidiarity principle, the EU should only act where the objectives of the proposed action cannot be achieved sufficiently by Member States and where the objectives can be better achieved by the EU. The current uneven scrutiny of the regulation of professions across the EU has a substantial impact on the wider economy as shown above, the provision of services and the mobility of professionals. Action by individual Member States alone will not ensure a coherent EU legal framework for assessing the proportionality

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<sup>72</sup> The Frontrunners refers to a group of Member States who commonly come together to push for Single Market developments. For example; together the UK, NL, DK, LT, PT, SE and NO developed a methodology for considering regulation of professions, supported by case studies of different regulatory approaches taken by participating Member States to support the Mutual Evaluation process.

<sup>73</sup> UK 'Growth Duty' consultation <https://www.gov.uk/government/consultations/business-impact-target-growth-duty-and-small-business-appeals-champion>

<sup>74</sup> Currently there are more than 5700 regulations of professions across the EU, often implemented through multiple layers of regulation.

of the national regulation and address the existing problems faced by national authorities. As evidenced by the information obtained in the Mutual Evaluation, the criteria used and the intensity of the assessments vary significantly between Member States.

The objectives of the action, namely the reliability and comparability of proportionality assessments could be achieved more successfully at the Union level through the introduction of a common EU-wide assessment mechanism, enacted by all Member States in a similar way by virtue of its scale and effects. National law would hence reflect the criteria set out in the proposed action and which would have to be considered by the national authorities when assessing the proportionality of national regulations of professions.

Thus, by providing a common set of criteria as to the method that Member States need to use to carry out proportionality assessments, the proportionality test would ensure that the rules are applied in an equal manner by all national authorities. At the same time, the initiative will reinforce the quality of the assessment of envisaged national legislation from which national governments should be in a position to examine alternative mechanisms, draw conclusions and propose appropriate actions to modernise their national legislation.

An EU approach would enable national authorities to perform comprehensive and comparable proportionality checks by creating a transparent and predictable legal framework to assess barriers to regulated professions.

## **5. Consistency with other EU policies and with the Charter for fundamental rights**

The objectives are consistent with the Commission's priorities as set out in its Single Market Strategy and with the EU objectives broadly of creating growth and jobs, ensuring free movement of professionals, improving the environment for businesses and offering choice to consumers.

Apart from the proportionality test, another action, announced in the SMS is the periodic guidance on specific needs. This initiative aims at identifying problems per country and per profession where the reform of the regulatory framework would be economically beneficial, and based on which the Commission will recommend Member States level action. These recommendations will be developed using qualitative and quantitative information gathered during the Mutual Evaluation exercise as well as follow-up reporting by Member States.

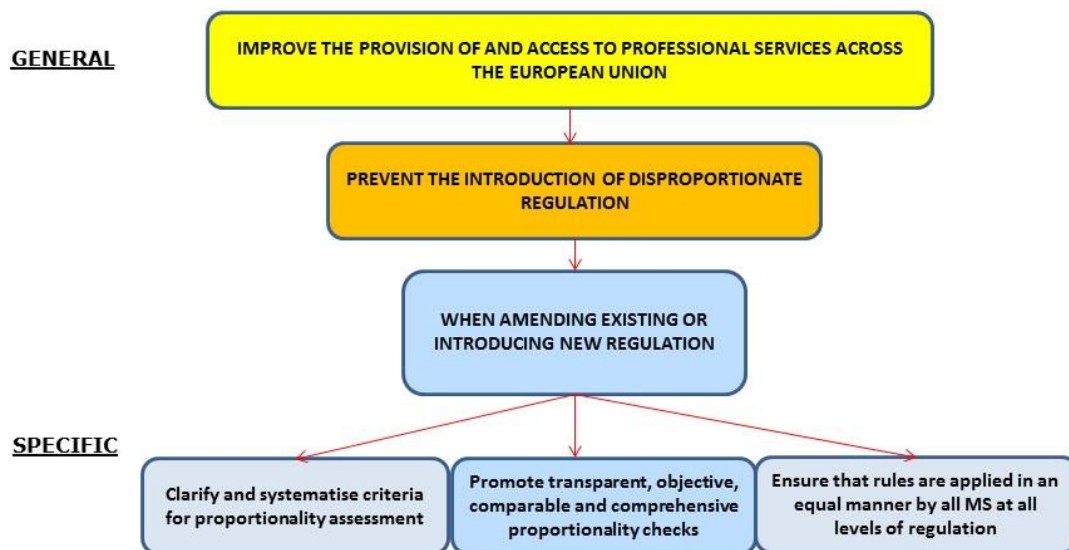
These two actions are complementary, in the sense that the proportionality test would provide general framework for the criteria to be used when assessing the proportionality of envisaged regulation, while the periodic guidance on reform needs will focus on specific issues, identified in existing regulations in certain professions or sectors.



The present initiative is not inconsistent with the initiative to improve notifications under the Services Directive, since it does not provide for additional notification procedure and implies that proportionality tests, carried out in the context of regulated professions will continue to be communicated to the Commission on the basis of existing procedure, set out in Article 59 (5) and (6) of the Professional Qualifications Directive. Notifications under the Services Directive are different in scope in terms of which professions and situations they apply to as well as which measures. There will be certain overlaps as far as requirements are concerned which are covered by the services directive, such as legal form and shareholding requirements, and which are also part of regulation of professions. Implementation will pay due consideration to such instances so as not to be onerous for MS and to ensure that COM services are linked up<sup>75</sup>.

Action at EU level would be compatible with the EU Charter of Fundamental rights as it ensures free movement of professionals, services, and the freedom of establishment.

## 6. Objectives



### 6.1. General policy objectives

Following experience from the Mutual Evaluation therefore, our intention is to future-proof regulation from further the unsubstantiated and inadequately understood effects of future

<sup>75</sup> Proportionality test under our proposal is expected to inform notifications under the Services Directive and consistency between the two initiatives will be ensured. We are currently working on technical ways by developing IMI modules to avoid double notifications.

regulatory decisions. The general objective of this initiative is to improve the functioning of the Single Market for professional service providers and citizens by improving the quality of regulation in the professions through the proportionality assessments and thereby, ultimately, regulatory outcomes. In doing so, this initiative aims at ensuring that only proportionate regulation is put in place to achieve a modernised, simplified and improved access to professions across the EU. The objective implies focussing mainly on prevention, instead of ex-post control of disproportionate regulations.

To be clear, this proposal **would apply only to future regulatory reforms**. In this way the action is intended to stem the introduction of new burdensome requirements and to better inform decision makers at the moment when they are already considering reforms. Following our experience we know the rate of change in the regulation of professions to be high and as such have judged that the pre-emptive step of a robust evaluation would be more efficient than retrospective corrective actions following injurious or unnecessary choices. As an indication, if from the 5700 professions we were to conservatively estimate a reform once a decade for each; it would represent 570 changes annually. Reflecting this; our public consultation showed 28 professions who alone accounted for 147 regulatory changes in the past decade. Given this preventative intention therefore, as well as the sheer scale of change witnessed, it would be neither desirable nor conceivable for COM to monitor changes and issue subsequent guidance along the lines of that currently being undertaken by our second SMS initiative for Reform Guidance. Additionally and according to this high rate of regulatory change, we would expect the benefits of a better regulatory environment for service providers to accumulate over the longer term.

## 6.2. Specific policy objectives

In order to achieve the general objective set, the following specific objectives have been defined as follows:

- Clarify and systematise the minimum criteria to be used for proportionality analysis;
- Make proportionality assessments more transparent, reliable, comparable, objective and comprehensive across the Member States to ensure that the regulation they approve is best fit for their objectives and that all relevant interest are served;
- Ensure that rules are applied in an equal manner by all MS at all levels of regulation to avoid fragmentation of the Single Market.

## 7. Policy options

The policy options below can be considered for the content of the initiative, bearing in mind that with the exception of the baseline scenario, on substance the different elements in most options are not mutually exclusive and could therefore be combined.

### **7.1. Baseline scenario: no new action**

Under this option the Commission would continue to rely on the existing framework, without undertaking further action to address the weaknesses in the assessment of proportionality in regulation or the lack of clarity as to the criteria to be used for conducting proportionality tests and complying with legal obligations.

### **7.2. Policy option 1: Guidance approach**

Under Option 1 the Commission would support Member States' actions in clarifying the existing obligations on how to properly analyse the proportionality of national regulations. The following aspects could be included under this option:

- Drawing up a Code of Conduct in agreement with the Member States, laying down a range of "best practices", "acceptable practices" and "unacceptable practices" to guide Member States when carrying out proportionality assessments, based on national experiences gathered during the Mutual Evaluation exercise;
- Establishing a list of the relevant case-law on specific professions providing concrete examples;
- Facilitating a reinforced information exchange between regulatory authorities, including by building on IMI (a system already available at EU-level and familiar to national administrations).

### **7.3. Policy option 2: EU proportionality test for regulated professions – common set of criteria**

Option 2 is a comprehensive European level solution setting up an EU-wide approach for assessing the necessity and proportionality of national regulations in the professions. The instruments under this option would represent a tool for the better regulation of professional services.

#### **7.3.1. Option 2a Legally binding instrument (Directive)**

The objective of this option would be to give clarity on all the aspects to be addressed in assessing the proportionality of proposed legislation or modifications to the existing whilst setting out concrete obligations to be transposed in national legislation. Member States would therefore apply the proportionality test during the adoption process of new legislation, i.e. prior to adoption or when reviewing or modifying existing legislation.

Under this option the existing case-law will be consolidated into one comprehensive instrument, laying down a proportionality test. For instance, whereas the concept of overriding reasons relating to the general interest, developed by the Court of Justice identifies specific legitimate interests to protect in each case, the new instrument could list the objectives already recognised as such, e.g. consumer protection, protection of workers etc. in a comprehensive way in order to facilitate the assessments conducted by Member States. The instrument could also limit where necessary the possible justifications for

regulating a profession<sup>76</sup>. The criteria set out in the instrument, suggested in option 2a would have to be considered by the national authorities in a structured way.

In particular, the proportionality test would cover the following aspects:

- Identification of the overriding reasons relating to the general interest which justify the measure;
- Identification and assessment of the nature of the risks to consumers, to professionals or third parties, including where the risks can be reduced by new technological developments. Member States would have to demonstrate, on the basis of evidence, whether and why rules pursuing the same objective (such as consumer protection law) are considered inadequate to protect the relevant public interest objectives;
- Assessment of the necessity of requiring possession of specialised skills and training focussing specifically on the level, the nature and the duration of the training required for specific tasks, as well as on the existence of different routes to obtain the qualification;
- Analysis of the scope of practice and the reserves of activities;
- Estimating the effects of the regulation and the economic impact of the proposed measures including a consideration of market impacts and free movement of professionals;
- Analysis of the alternatives to regulation or less restrictive regulation (such as protected title). Obviously, it would be open to Member States to consider the impact of potential market restrictions, resulting from non-regulatory barriers, such as voluntary certification schemes, replacing regulation.
- The reasons for concluding that an objective cannot be better achieved by less restrictive means would have to be substantiated by qualitative and, wherever possible, quantitative indicators (cost-benefit analysis).
- Assessment of the cumulative effect of restrictions imposed on the same profession. As already mentioned in the Communication of 2 October 2013<sup>77</sup>, multiple layers of regulation will have to be carefully designed, in order to avoid the risk of duplication<sup>78</sup>. Regulation of professions should be maintained only where existing safeguards are not sufficient.

In addition to consolidating existing case-law and best practices, the instrument would ensure better transparency and effectiveness of the existing legal framework as regards the possibility for other Member States or even professionals and consumers to access the information concerning new regulations and their proportionality assessment, which have been communicated pursuant to Article 59. This would give them the opportunity to

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<sup>76</sup>See by analogy Case C-593/13 - Rina Services e.a.

<sup>77</sup> See Communication on Evaluating national regulations on access to professions COM(2013)676 final, [http://ec.europa.eu/internal\\_market/qualifications/docs/policy\\_developments/131002\\_communication\\_en.pdf](http://ec.europa.eu/internal_market/qualifications/docs/policy_developments/131002_communication_en.pdf)

<sup>78</sup> Ibid. The cumulative effect of multiple layers of regulation covering for instance reserved activities, compulsory membership to professional associations, additional safeguards offered by education systems or employers, legal form and shareholding requirements, continuing professional development, language requirements will have to be assessed and only those requirements necessary to practise the profession would have to be maintained.

express their views on the quality of the assessment provided and merit of its conclusions. Furthermore, this option would better enable the Commission to maintain a quality check on proportionality tests and thereby, over time, more intrinsically influence the assessments and ultimate outcomes in proportionate regulatory improvements. Additionally, it would serve as a transparent alert mechanism for those Member States who continuously misapply the proper principles and thereby offer the opportunity to improve support for them or in excessive cases to take more stringent enforcement action.

The scope of this option as regards the professions covered would correspond to the scope of the Professional Qualifications Directive and it would cover all regulated professions, except for those which are explicitly excluded (such as notaries).

### **7.3.2. Option 2b Non-binding instrument (Recommendation)**

Under this option, the proportionality test could be in the form of a non-binding act, i.e. Commission Recommendation. On substance, this option is similar to option 2a since the instrument will include all the elements listed under that option, but given its non-binding nature, would serve only as 'optional' regarding how to analyse properly the proportionality of the envisioned regulation. However, transparency could not be achieved since there would be no obligation for the Commission to give other Member States access to the information received or to make it publicly available to citizens and stakeholders.

## **7.4. Policy option 3: Comprehensive modifications of the existing system**

### **7.4.1. Option 3a Legally binding instrument (Directive)**

In addition to the elements indicated under Option 2a, this option includes some procedural aspects. In particular, Option 3a covers the following elements:

- An obligation to perform periodic reviews of existing national legislation (to ensure it is keeping pace with social and technological needs);
- An obligation to ensure consultation of all interested parties, e.g. individual professionals, professional organisations, academic, research, competition authorities and consumers at national level prior to the introduction of new measures (to support a wider view of the costs/benefits/ impacts of changes);
- Requirements for national authorities conducting proportionality checks (to ensure objectiveness and impartiality).

Procedural elements, such as the organisation of public consultations are necessary to evaluate objectively the potential impact of regulation. Extending to all Member States the obligation to perform periodic reviews which has already been introduced in several Member States, in particular Austria, Denmark and the UK<sup>79</sup>, and which is generally

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<sup>79</sup> See sector report on the Overview of the regulatory framework in the tourism sector by using the professions of tourist guides and of travel agents as example, published in 2016 <http://ec.europa.eu/DocsRoom/documents/15486/attachments/1/translations>

accepted as best practice. Under this option, Member States will have to take the necessary measures to guarantee that the proportionality test is carried out in an objective and independent manner in order to ensure its effectiveness and appropriateness and that its scope of enquiry goes beyond that of the already practising professionals.

As regards the scope of this option, this approach requires covering all regulated professions in all sectors of activities currently covered by the Professional Qualifications Directive.

#### 7.4.2. Option 3b Non-binding instrument (Recommendation)

Under option 3b, the proportionality test would take the form of a non-binding instrument, while on substance it will cover all the elements, listed in option 3a. Similarly to Option 2b however, the transparency aspect will not be addressed.

## 8. Analysis of impacts

The depth of expected impacts will differ between the voluntary or mandatory nature of the options, particularly with regard to their level of implementation. This is the fundamental difference between the options, where for example the intensity of expectations regarding the rigorousness of the option ascends, the distinguishing feature between options 2b and 3b on one side and 2a and 3a on the other relates to whether the 'process' aspect is of a compulsory or optional nature. The foreseeable effect on regulatory changes, which should either be better designed or evaded as a result of an upfront, shared and defined assessment of proportionality will accordingly, improve or avoid the negative economic consequences defined above in this paper [see section 1.3]. In all cases, and following experience during the Mutual Evaluation, the exact formulation of any proportionality test will be developed according to the parameters already set out under the treaties and elaborated upon by the settled case law of the European Court of Justice as well as those accepted according to basic better regulatory principles<sup>80</sup>. It is expected that the Commission would work closely with regulators across the Member States to design and adopt an approach that is least burdensome and most supportive to achieving a positive outcome through wherever possible by building upon practices already in operation.

The analysis below will not assess the environmental impacts because none of the specific policy objectives or the assessed policy options have environmental dimensions.

### 8.1. Baseline scenario

This option would meet none of the **objectives**. Furthermore, this option does not entail any positive impact from an **economic** or **social** perspective and is even likely to have a negative impact, since it will not help to reduce the unnecessary and unjustified barriers. As regards the impact on the Single Market, no policy change at EU level would mean that the current uneven performance of proportionality checks and the differences of quality and intensity

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<sup>80</sup> such as an analysis of evidence, evaluation of market impacts and options, broad stakeholder consultation, transparency of process and objective scrutiny.

of proportionality assessment conducted by Member States would remain, ultimately leading to distortions of the Single Market.

From the consultation it was clear that many stakeholders, even those serving a regulatory role, were unclear about obligations to proportionate regulation. In the continued absence of clear rules on the way to conduct proportionality tests, the existing general obligation to comply with the proportionality principle would continue to rely on ex-post enforcement action, with the understanding that this could significantly increase litigation costs, linked to infringements for all parties concerned. In practice, it would remain difficult to identify disproportionate rules and it would not be efficient to challenge more than 5000 superficial assessments.

Under the present circumstances launching infringements is problematic. This stems in large part from the lack of information available to the Commission on which to inform and pursue cases. The judgement as to the proportionality of a measure rests upon a holistic appreciation of the regulatory environment in which that measure functions. Such information is not only most amenable to the Member States rather than the Commission but also dependent upon the existence of a rounded enquiry into that environment such as through proportionality analysis.

## 8.2. Policy option 1: Guidance approach

### Impact on policy objectives

As regards the impact on the specific **policy objectives**, to date the guidance approach has not been very effective in solving the problems. The main achievement of such approach which can reasonably be expected would be to play an explanatory role in supporting those national authorities which have difficulties in performing proportionality checks but which are willing to improve.

In that context, it should be emphasised that the Communication of the Commission from 2<sup>nd</sup> October 2013, for the Mutual Evaluation, already provided guidance for Member States on the aspects to take into account when conducting proportionality assessments of their regulated professions. However, as discussed above, this proved insufficient to promote the conducting of adequate proportionality assessments, including the assessment of the cumulative effects. Based on that experience, therefore, it could be concluded that the guidance approach would not deliver the desired outcomes. Although for the 12 professions under focused discussion during the Mutual Evaluation, the quality of **the publically available** proportionality assessments could be said to have gradually improved to a certain extent, this positive effect did not extend to the remaining professions across Member States and where the information which was not made public. Furthermore this positive effect could be said to be due to the fact that there was a peer pressure to improve

proportionality arguments put forward by national authorities as preparation for intensive group discussions in Brussels<sup>81</sup>.

Due to its dependency on the goodwill of individual authorities therefore, this option does not appear to be an effective approach and the current legal framework alongside those of different national initiatives has shown to be ineffective in addressing the issues.

### **Economic impact**

The **economic** impact on operators is expected to be slightly positive in those areas where an in-depth exchange of information between Member States and intensified scrutiny is facilitated by the Commission.

### **Impacts on SMEs and microenterprises**

No costs are foreseen for SMEs and microenterprises.

### **Impact on Member States Public Authorities and administrative costs**

Whereas in principle this option does not entail significant costs for national administrations, as proportionality assessing obligations were already envisioned by the modernised Directive, due to the shortcomings of this option to achieve the policy objectives, it may lead to costs for those authorities who have yet to comply with these pre-existing obligations. This cost was already calculated and presented in the impact assessment SEC (2011) 1558 final, showing that the organisation of in-depth exchange of information would represent an additional cost of 400 - 7.000 euros per Member State.

### **Impact on the Commission**

Depending on how this option is implemented, it could bring additional costs to the Commission. It has to be born in mind that so far the guidance approach tested during the Mutual Evaluation implied important costs as a result of the organisation of in-depth exchange of information, meetings and reports on professions. As an indication, the total cost for the organisation of in-depth discussion meetings on 12 professions has been estimated at 81932,22 euros. The costs of infringement proceedings would increase in view of the number of missing proportionality assessments, due to the difficulties to comply with the pre-existing obligation. Problems in pursuing ex-post infringements to motivate correction owing to the asymmetry, or complete lack of information would persist.

### **Social impact**

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<sup>81</sup> Equally, whilst in NAPs, some small progressive improvement in not only the assessment of these twelve professions, but also in the few incidences where regulatory improvements were suggested, no such remedial effect could be demonstrated for the remaining professions not subject to such focused and open attention. In most cases this learning experience has been isolated only to those participating in the meetings and has not therefore been beneficial to all authorities, dealing with regulation of professions.



From a **social** perspective, it could be expected to have some positive impact on consumers and citizens in general, but again limited to the areas and sectors where authorities applied proportionality principles, subject to exchange of information.

### **Stakeholders views**

The results of the public consultation show all categories of respondent supporting the issuing of 'common guidance' in a mandatory form. The only category that did not support steps to clarify the current situation in either a voluntary or mandatory form came from within the German and Austrian crafts sector. [Annex 2].

## **8.3. Policy option 2: EU proportionality test for regulated professions**

### **8.3.1. Policy option 2a EU proportionality test for regulated professions (legislative)**

#### **Impact on Policy objectives**

Due to its binding form, the value-added of this option would be to more effectively drive the changes necessary to deliver meaningful improvements. As the instrument will have to be transposed into national law, it would oblige Member States to consider necessity and proportionality when introducing (or amending) legislation in a systematic and structured way. Through compelling more in-depth reviews, and accustoming authorities to such analytical conventions, this option is expected to have the cumulative impact of improving the regulatory landscape overall. The EU-wide legally binding proportionality test would guarantee that proportionality checks are carried out at an appropriate stage of the process, before legislation is adopted or even proposed and is endorsed by the authority that takes the political responsibility for tabling a proposal (i.e. responsible ministry or government or local/regional authorities in case the profession is regulated at regional level).

Furthermore, the initiative will effectively:

- clarify and systematise the minimum criteria to be used for proportionality analysis thus creating a transparent and predictable legal framework to assess barriers to regulated professions and utilising aspects drawn not only from case law but also general better regulation practices.
- make proportionality assessments more transparent, reliable and comparable across Member States;
- facilitate compliance with the existing requirements: notification of regulation and reasons for which it is considered proportionate, as stipulated under the existing EU rules (Professional Qualifications Directive and the Treaty);
- ensure that the rules are applied in an equal manner by all national authorities
- require solid evidence to help shaping the involvement of stakeholders in policy making;
- allow for the analysis to be publically available.

Failure to transpose this framework into national law could be challenged by way of infringement proceedings. So as to ensure legal certainty, any failure by a Member State to conduct a proportionality assessment would not affect automatically the validity of the national rules. On the other hand, depending on the national legal regime, the absence of a properly conducted proportionality test, resulting in the adoption of disproportionate measures could be challenged more effectively before national courts by citizens affected by those measures and lead to their invalidation or annulment<sup>82</sup>.

Given that such an instrument would impact on Member States' decision-making processes, an appropriate level of margin for implementation by the Member States must be ensured and must fully respect their responsibilities to organise national decision-making and legislative procedures, in line with the principle of subsidiarity. Therefore, concrete modalities, institutional responsibilities and timelines for carrying out such an assessment in the course of the legislative process would be for Member States to decide.

The most significant benefits of this approach is to not only oblige authorities to fully conduct a proper analysis but also to make openly available for scrutiny their analysis. This would deliver greater transparency to the regulatory process and enable a quality check on proportionality tests and thereby motivate an improvement in assessments and in turn the final regulatory outcomes. Additionally, it would serve as a transparent alert mechanism for those Member States who continuously misapply the proper principles and thereby offer the opportunity to improve support for them<sup>83</sup>.

### **Economic Impacts**

The impact felt by business will largely be positive in so far as the proportionality test may lead to better regulation or prevent inadequate legislation from being proposed or adopted. This option will prevent adoption of regulation which is not appropriately designed and implemented and thus can effectively create market restrictions, limit innovation and consumer choice. Impediments to competition lead to a reduced market performance, mirrored in ineffective resource allocation and excessive rents. Given the specific objectives of this initiative, notably to improve the quality of regulation of professions, the economic impacts of this initiative is expected to materialise in a mid to longer term perspective.

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<sup>82</sup> In this regard, see also the national case-law, applying the principle of proportionality to professional regulations: Belgium, Cour de cassation, 25 September 2003, C.03.0139.N, concerning the profession of lawyer; See also Constitutional Court of Austria (Verfassungsgerichtshof), decision of 27 November 2013 G 49/2013-7 where the Court decided that the regulation of the profession of "Berufsfotograf" ("professional photographer") is unlawful due to non-compliance with the principle of proportionality. According to the judgement the impact of regulation on the freedom to choose an occupation is not justified by the dangers emanating from the activities of this profession towards goods of public interest (possible dangers for public health, public security and consumer protection).

<sup>83</sup> In this regard it should be noted that whilst Article 59 (5) already compels Member States to report amendments to the Commission, it is silent upon how this should be enacted. Introducing a binding framework will support the all parties in ensuring workable and meaningful measures are in place.

Ultimately, the fact that new regulation should be better designed will keep access to jobs open inasmuch as protection of public interests is ensured, hence without compromising on the quality of services provided. The analysis presented by some Member States points to an increase in GDP to be gained from reforming the regulation of professions – confirming that the modernisation of the regulated professions can significantly contribute to growth and job creation.

### **Impacts on SMEs and microenterprises**

The impacts of this proposal on SMEs and micro-enterprises will be largely positive as it will mitigate the possibilities of low quality, burdensome regulation from being enacted. This should in the long term improve market access and mobility across the EU countries. As the empirical studies mentioned above show, the liberalisation of certain requirements increases market dynamics in so far as it brings new players into the market. In fact, increasing the access to a wider pool of professionals will make it easier to hire people having the necessary skills, and will contribute to lowering cost to access professional services that in case of SMEs are often outsourced, thus improving their competitiveness.

### **Impact on Member States Public Authorities and administrative costs**

Member States already have an obligation to perform proportionality checks under the Professional Qualifications Directive and the Treaty. Whereas the proportionality test is expected to facilitate the fulfilment of the existing obligations and to set up a comprehensive methodology for the assessment of the proportionality of national regulations, it does not imply new additional financial or administrative burden for the national administrations.

Administrative burden for national authorities of proper application of proportionality test was already imposed and assessed in the Professional Qualifications revision of 2013<sup>84</sup> and thus constitutes a part of current scenario. Therefore, all Member States who already prepare good quality proportionality test will face no additional burden as result of Option 2. However, all those Member States who are not yet in full compliance with the Directive will have to face administrative burden equal to around 2 working days or around €700 per regulated profession (total cost between 3,700 and 115,000 euros, depending on the Member State and number of proportionality tests to carry). This cost is thus not a result of Option 2 but of the existing regime. These costs will also apply to all future professional regulations that Member State may want to introduce – and again this cost has already been introduced in 2013.

However, since the proportionality test is supposed to facilitate the work of national administrations, Option 2 is expected to reduce the overall cost on the long run. A positive effect in terms of administrative costs could also stem from the fact that Member States are

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<sup>84</sup>See Impact Assessment SEC (2011) 1558 final

likely to be faced not only with less EU-Pilot procedures or infringements as a result of an improved system but could also result in a more simplified implementation of better designed and targeted regulatory decisions going forward. Additionally, we are aware of some form of proportionality assessment already existing in some Member States<sup>85</sup> this should mean a lesser implementation burden for those states and also gives the Commission some structures upon which to build our framework.

### **Impact on the Commission**

The impact on the Commission would be related to the general costs, implied by monitoring the transposition and the correct implementation of the new legislation, resulting from Option 2, which is expected to be largely compensated by the lower number of infringements.

### **Social impacts**

Social impacts are intertwined with the economic impacts and include, on the one hand, the impacts this proposal will have on employment in the professions affected by a change in regulation, on the similar professions and on the employment in general (in terms of numbers, age structure, quality of contracts, etc.), which includes the mobility of professionals across the board and between professions. On the other hand social impacts cover social inclusion considerations and consumer related impacts. For example, there are indications of a changing age structure, reflecting easier access for younger people to some professions further to a regulatory change. Some positive effects can be seen on employment and the number of start-ups in certain professions, access to which have recently been facilitated. It has also been shown that the opening-up of regulated professions can increase professional mobility and help professionals to quickly respond to labour market opportunities. In terms of social inclusion, services become more available and more affordable.

Conversely, proper analysis will support the development of the data necessary to properly understand the nature of risk and to ensure that responses are effective in mitigating them. In this way it is not inconceivable that protections on currently poorly understood hazards could increase or at least be better designed to the task. In this way consumer protections could be strengthened or at least cost to benefit trade-offs better understood.

### **Stakeholders views**

Analysis of the replies to the public consultation indicates sound support for a legally binding instrument [See Annex 2]

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<sup>85</sup> UK, NL, DE, AT

### 8.3.2. Policy option 2b EU proportionality test for regulated professions (Recommendation)

#### **Impact on policy objectives**

A recommendation may encourage Member States to carry out proper proportionality assessments, based on the criteria, identified in the new initiative. Thus, it would provide the necessary clarity as regards the criteria to be used when conducting proportionality tests and it would significantly facilitate compliance with the existing requirements to comply with the principle of proportionality. However, it is likely that in practice, the application of such a recommendation would diverge from Member State to Member State and rules may not always be applied in an equal manner by all national authorities or in all specific instances. Achieving the **policy option objectives** of promoting objective, transparent and comprehensive proportionality assessments, applicable at all levels of regulation in an equal manner through a Recommendation would mean reliance on Member States' willingness to comply with already existing obligations.

Nevertheless, even though Member States would be free on whether to adopt detailed national rules on conducting proportionality tests and not just to implement the general obligation to comply with this principle as set out in article 59(3) of the Professional Qualifications Directive, in line with the Recommendation, they could be under some political pressure to do so. Compliance by some Member States may compel others to take into account the suggested approach. A recommendation would be more easily accepted by Member States and could represent an immediate solution to the problem, compared to the heavy legislative procedure. However, the impact would very much depend on any follow-up to the recommendation.

#### **Economic impact**

In order for all the economic benefits of this option to be fully realised, similarly to option 2a, the recommendation would have to be followed by all Member States.

#### **Impact on Member States' authorities and administrative cost**

No significant costs on Member State's administrations can be expected, since the method of implementation of the Recommendation will be left for Member States. However, those Member States who are not yet in full compliance with their existing obligations and choose to implement the Recommendation will have to face administrative burden equal to around 2 working days or around €700 per regulated profession as previously mentioned.

#### **Impact on the Commission**

As regards the impact on the Commission, a very insignificant additional administrative cost can be expected as a result of the Recommendation follow-up, linked to the control of the implementation of the Recommendation. However, it can reasonably be assumed that this

cost would be significantly less important than the cost of litigation procedures in the absence of a recommendation, setting out the main aspects of a proportionality test. Similar to the guidance option, problems in pursuing ex-post infringements to motivate correction owing to the asymmetry, or complete lack of information would persist and place burdens on the Commission.

### **Social impacts**

Similarly to option 2a, under this option the proposed measure would lead to a more efficient functioning of the market and thus positively affect the level of employment. Depending on whether Member States follow the recommendation, the new initiative may increase confidence, as well as foster investment, innovation and technological developments.

### **Stakeholders views**

The results of the public consultation show all categories of respondent supporting the issuing of 'common guidance' in a mandatory form. The only category that did not support steps to clarify the current situation in either a voluntary or mandatory form came from within the German and Austrian crafts sector. [see Annex 2].

## **8.4. Policy option 3: Comprehensive modification of the existing system**

### **8.4.1. Policy option 3a Comprehensive modification of the existing system (legislative)**

This option covers all the elements, listed in option 2a. However, it includes additional procedural aspects, as well as additional professions, not covered by the Professional Qualifications Directive.

### **Impact on policy objectives**

This option is building upon option 2a, and would therefore address all specific policy objectives mentioned above. In addition, procedural elements, such as the organisation of a wider public consultations would promote **objective** proportionality tests in allowing national authorities to obtain views and evidence from all interested parties (e.g. professional organisations, individual professionals, consumers), on the potential impact of regulation. This element of transparency at the level of citizens and other Member States as well as the Commission is expected to Option 3a would further facilitate the performance of proportionality checks by introducing regular reviews to track the impacts over time. Periodic reviews of regulation in professions would enable national competent authorities to reflect any changes in the business environment, such as for example new technological developments, in order to continually modernise existing regulatory frameworks over the long term. The impartiality of the bodies charged with conducting proportionality assessments is also essential to the proper functioning of the process.

Extending the scope of the instrument to all regulated professions, including to those which are explicitly excluded from the Professional Qualifications Directive would ensure that the proportionality principle is applied in a **comprehensive** way to all sectors of activity, while duly taking into account the specificity of the professions under scrutiny.

### **Economic impact**

The economic impact of this option would be largely positive, similarly to the economic advantages, mentioned under option 2a. It will impact positively the Single Market for professional services and it will help reducing disproportionate regulatory barriers in all sectors of activities in a consistent way.

### **Impact on SMEs and microenterprises**

Opening access to the professions will be beneficial to SMEs and microenterprises, since in general they represent the majority of the professional service providers. It neither entails any new obligation for businesses nor additional costs for them.

### **Impact on Member States Public Authorities and administrative costs**

As previously mentioned, the national requirements and the proportionality assessments would continue to be notified according to Article 59 of the Professional Qualifications Directive, whereas the proportionality assessment of those requirements would be carried out according to the proportionality test. The possible costs to assess and notify all regulated professions was estimated<sup>86</sup> at around 2 working days per regulated profession with total ranging between 3,700 and 115,000 euros, depending on the Member State and number of assessments to carry out.

However, conducting a proportionality test would be higher than that previously estimated due to the additional consultation obligation. Using cost of Eurobarometer representative surveys outsourced by Commission to external polling organisation as a proxy for cost public administration would incur, the additional cost can be estimated at around €600 per investigated regulated profession (under assumption of a 10-question-long questionnaire and 100 responses). This would be the only genuine additional cost not already imposed.

Since the scope of this option is wider than the Professional Qualifications Directive and covers professions which are currently excluded from the Mutual Evaluation exercise, the proportionality assessment might entail some additional administrative costs for Member States (as estimated above, on average around 700 euros per profession). However, the regulation of those professions is in any event subject to proportionality assessment under the Treaty, which implies that there will be no new administrative burden. On the long run, the proportionality test is supposed to facilitate the work of national administrations and reduce the overall cost.

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<sup>86</sup> See SEC (2011) 1558 final

As with option 2a, we are aware of some form of proportionality assessment already existing in some Member States<sup>87</sup> this should mean a lesser implementation burden for those states and also gives the Commission some structures upon which to build our framework.

### **Impact on the Commission**

The impact on the Commission would be related to the general costs, implied by monitoring the transposition of the new legislation, which is expected to be largely compensated by the lower number of infringements.

### **Social impact**

The social impact of this option is expected to be more significant than Option 2a, not only for consumers who will be associated to the design of regulatory measures for professional services, but also as regards the levels of employment. It is expected to promote social and economic integration especially for young skilled workers. Furthermore, the effect of lawyer costs in some areas, such as legal services may have positive effects on improving access to justice and thus reduce the cost for legal aid. Again as with option 2a, we could envision a more robust evaluation of the operation of a regulation(s) against its risks leading to better designed protections for consumers.

### **Stakeholders views**

Analysis of the replies to the public consultation indicates robust support for a legally binding instrument [See Annex 2]

## **8.4.2. Policy option 3b Comprehensive modification of the existing system (Recommendation)**

### **Impact on policy objectives**

While on substance, this option is similar to option 3a, it would take the form of a non-binding instrument (a Commission Recommendation) and is therefore expected to be less effective in achieving the specific policy objectives. However, this approach would be more acceptable for Member States. It could provide an additional incentive for Member States to address these concerns and to implement the initiative on a voluntary basis. Although it would leave a lot of flexibility to Member States, it could contribute to more harmonised approach as regards conducting proportionality checks. If implemented at national level, the recommendation would clarify and systematise the minimum criteria to be used for proportionality analysis and would effectively facilitate compliance with the existing requirements to conduct proportionality tests. Depending on the nature of the national instrument (law, decree or just an administrative act), implementing the Recommendation,

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<sup>87</sup> UK, NL, DE, AT



it may even ensure that the rules are transparent and applied in an equal manner by all national authorities (local, regional, governmental).

### **Economic impact**

In order for all the economic benefits of this option to be fully realised, similarly to option 2a, the recommendation would have to be followed by all Member States. In that scenario, the instrument will effectively support growth and job creation, allowing to ensure the competitiveness of professional services in the global economy.

### **Impacts on SMEs and microenterprises**

Under this option there will be no financial cost for businesses.

### **Impact on Member States' authorities and administrative cost**

This option does not imply significant costs Member State's administrations, since the method of implementation of the Recommendation will be left for Member States. However, costs can be expected, depending on whether Member States follow or not the recommendation and in case of full compliance be similar to the costs in option 3a.

### **Impact on the Commission**

An additional, but rather insignificant administrative cost can be expected as a result of the Recommendation follow-up. However, in the absence of a recommendation, the costs for the Commission will increase due to increased number of infringement procedures. Once again, pursuing infringements would suffer from the lack of the substantive information necessary upon which to develop a case.

### **Social impacts**

Similarly to option 2a, under this option the proposed measure would lead to a more efficient functioning of the market and thus positively affect the level of employment. Depending on whether Member States follow the recommendation, the new initiative may increase confidence, as well as foster investment, innovation and technological developments.

### **Stakeholders views**

The results of the public consultation show all categories of respondent supporting the issuing of 'common guidance' in a mandatory form. The only category that did not support steps to clarify the current situation in either a voluntary or mandatory form came from within the German and Austrian crafts sector. (See Annex 2)

## **9. Comparison of options**

### **Stakeholders views**

The consultation showed that respondents agree the situation should be improved and showed a high level of confusion as to what obligations were to proportionate regulation; the existence of any criteria to respond to this and a variety of approaches adopted even within the same Member State. All categories of respondents indicated support for action to address this, with the majority preferring the mandatory (legislative) route. The only category that did not support any steps to clarify the current situation, in either a voluntary or mandatory form, came from within the German and Austrian crafts sector. (See Annex 2)

### **9.1. Comparison in terms of effectiveness, efficiency and coherence**

Table X: Summary table of options and their impact (--, -, 0, +, ++)

	Effectiveness			Costs
<b>Options/ Objectives</b>	Clarify and systematise the minimum criteria to be used for proportionality analysis	Make proportionality assessments more transparent, objective, comprehensive and comparable across the MS	Ensure that the rules are applied in an equal manner by all national authorities to avoid distortions of the Single Market	
<b>Baseline (0)</b>	0	0	0	0
<b>Guidance (1)</b>	(+) provide comprehensive and detailed guidance	(0) subject only to the willingness of participants to engage, comparability unsure	(0) essentially voluntary nature means divergences highly likely to endure	0
<b>EU proportionality test for regulated professions – Directive (2a)</b>	(++) binding form provides clear parameters and helps challenging excessive rules, but limits descriptiveness of the test	(++) comparability ensured due to uniform application and improved transparency	(++) prevents disproportionate rules and ensures Member States implement in an equivalent manner	(-) for those MS not already in compliance: around €700 per regulated profession
<b>EU proportionality test for regulated professions – Recommendation (2b)</b>	(+++) no-binding test can be more detailed and descriptive	(+) as above but limited due to voluntary nature	(+) voluntary nature means divergences may remain	(0/-)as above but could be lower due to potential unwillingness of administration to comply with non-binding measure
<b>Comprehensive modifications – Directive (3a)</b>	(++) binding form provides clear criteria, but may limit detailed description of analysis	(+++) comparability ensured due to uniform application and improved objectiveness and up to date rules due to public consultations and periodic reviews	(+++) prevents disproportionate rules and ensures Member States implement in an equivalent manner and in a comprehensive way	(--) as for option 2 but with obligation to perform steps for additional professions and €600 per regulated profession for consultation obligation
<b>Comprehensive modifications – Recommendation (3b)</b>	(+++) non-binding proportionality test can be more detailed and descriptive	(++) as above but limited due to voluntary nature	(++) as above voluntary nature means divergences may remain	(0/--)as above but could be lower due to potential unwillingness of administration to comply with non-binding measure

All the options are coherent with pre-existing legislation.

Table X: Summary table of options and their impact on key stakeholders (--.- 0, +, ++)

Options	Stakeholders				
	National authorities already doing proper analysis according to PQD	National authorities not complying with PQD analysis requirements	Incumbent professionals covered by excessive protection	New entry Professionals (young professionals, EU qualified)	Users of professional services (consumer and business)
<b>Baseline (0)</b>	0	0	0	0	0
<b>Guidance (1)</b>	(0)	(0/-) cost may occur if MS decide to follow	(0/-) depending on MS uptake profession may be open to new entrants	(0/+) depending on MS uptake profession may be open to new entrants	(0/+) depending on MS uptake wide choice and lower prices
<b>EU proportionality test for regulated professions – legislative (2)</b>	(0) no additional cost	(2A: - ; 2B: 0/-) expected cost in short run of setting up system according to PQD; long run: better regulations, adapted to business environment	(2A: - ; 2B: 0/-) medium to long run: more competition from new entrants, potentially lower profits	(2A: ++ ; 2B: 0/++) Potential easier access to professions	(2A: ++ ; 2B: 0/++) medium or long run: wider choice of services and lower prices
<b>Comprehensive modifications – legislative (3)</b>	(3A:-- ; 3B: 0/--) additional cost due to public consultations and extended scope	(3A:-- ; 3B: 0/--) As above plus additional cost for consultations and extended scope	(3A:-- ; 3B: 0/--) Long run: more competition from new entrants also in new professions, potentially lower profits	(3A:++ ; 3B: 0/+++ ) Potential easier access to the professions concerned	(3A:++ ; 3B:0/+++ ) long or medium run: wider choice of services and lower process

## 9.2. Preferred option / Justification for no preferred option

Although the options are not mutually exclusive, based on the analysis above, Option 3a is expected to address most adequately the problems and generate the most suitable benefits.

## 9.3. Subsidiarity and proportionality of the preferred option

The proposal complies with the principle of subsidiarity, since the objectives of the proposed action cannot be achieved sufficiently by Member States acting in isolation and therefore can be better achieved by the EU. The current uneven scrutiny of the regulation of professions across the EU has a substantial impact on the provision of services and the mobility of professionals. The objectives of the action, namely the reliability and comparability of proportionality assessments could be achieved more successfully at the

Union level through the introduction of a common EU-wide assessment mechanism, enacted by all Member States in a similar way by virtue of its scale and effects.

The proposal is in line with the principle of proportionality, as set out in Article 5(4) TEU, being adequate to reach the objectives and not going beyond what is necessary in doing so. The selected policy options seek to strike the right balance between securing public interest objectives and quality of services on the one hand and improving access to and exercise of regulated professions for professionals, as well as ensuring wider choice for consumers on the other.

## **10. Monitoring and evaluation**

The Commission would regularly report to the Council and the European Parliament on the implementation of the proportionality test at national level. The Commission will continue to monitor the professional regulations in the EU as reported in the database of Regulated Professions; the percentage of economy covered by regulated professions (in terms of persons employed and value added) and the cross border mobility of professions. As well as this the Commission will monitor the robustness of proportionality tests for existing and new professional regulations submitted by Member States.

## **11. Annexes**

### **11.1. Annex 1: Procedural information**

#### **Lead DG**

The lead DG is the Directorate General for the Internal Market, Industry, Entrepreneurships and SNEs (DG GROW)

#### **Agenda Planning and Work programme**

The Agenda Planning Reference is 2016/GROW/048

The proportionality test initiative forms part of the Single Market Strategy adopted in October 2014 as part of one of the 10 priorities for the Juncker Commission, part of the Commission's 2015 and 2016 Work Programmes.

#### **Organization and Timing of the Impact Assessment and Inter-service Steering Group**

The Directorates General participating in the Inter-service Steering Group chaired by the Secretariat General included:

- The Secretariat General
- The Legal Service
- DG Economic and Financial Affairs
- DG Trade

Meetings of the Inter-service Steering Group were held on:

- 3<sup>rd</sup> February 2016. The background to the initiative and the roadmap was discussed.
- 25<sup>th</sup> February 2016. The draft consultation and roadmap were discussed.
- 27<sup>th</sup> May 2016. The draft impact assessment was discussed.
- 12<sup>th</sup> July 2016. The draft impact assessment was discussed.
- 7<sup>th</sup> September 2015. The draft impact assessment was discussed.
- 26<sup>th</sup> October 2015. The draft Directive was discussed.

**Consultation of the Regulatory Scrutiny Board (RSB).**

The RSB of the European Commission assessed a draft version of this Impact Assessment on 12th October 2016 and issued a positive opinion on 4<sup>th</sup> October. The changes made in response to their recommendation are set out below.

<b><i>RSB recommendation</i></b>	<b><i>Changes</i></b>
Place the proposal in a broader context and clarify how it relates to other initiatives (e.g. the notification procedure under the Services Directive).	This has been elaborated further under section 5 and footnote 74.
Elaborate on the scale of the problem, and clarify why the scope of the initiative targets only forthcoming restrictions on professions. Explain why existing legislation, planned reviews, case law and recourse to infringement proceedings cannot address the problem.	This has been addressed under sections 1 and 6.1
Explain how the proportionality test was designed and to what extent provisions are likely to make a difference (e.g. improve transparency). Describe how the options would work in practice and what the main differences between them are.	This has been supplemented to section 8.
Expand the analysis of likely impacts, including on consumers and SMEs and national authorities. There is room to make better use of the views of different categories of stakeholders.	This has been further developed under section 8.

## **11.2. Annex 2: Stakeholder consultation**

As the consultation served the dual purpose of responding to National Actions Plans (NAPs), as per Article 59.7, as well as publically consulting on the proposals set forth in this Impact assessment, the following will focus only on those aspects relevant to the matter now in hand, namely: those aspects of the NAPs consultation related to quality and proportionality in professional regulation; the section of the consultation related specifically to the use of proportionality and open to all respondents; the section of the consultation related to the use of proportionality given only to those identifying as a 'Public Authority'.

### **11.2.1. Methodology**

The public consultation is based on voluntary answers sent by respondents to the Commission via an on-line questionnaire. Thus the results should be seen as the views of those who replied and by no means can be considered as representative to the EU (unless otherwise stated). The consultation which ran from 27<sup>th</sup> May to 22<sup>nd</sup> August 2016 received 420 responses and 21 separate submissions. As only one submission per email address / organisation address is admissible (except in cases where the respondent was replying to different Member States' NAPs) 80 multiple submission were removed. Of the remaining 340, at least 100 were identical and clearly represented a coordinated response from respondents. In such circumstances it is permissible for the Commission to count such responses as only 1. However, in the interests of transparency we have allowed these submissions to remain and where helpful will clearly present the results both of the full 340 and the corrected 241 responses<sup>88</sup>. As this introduces a potential bias we will be sure to present it with full transparency.

### **11.2.2. Demographics**

Table 1 Responses according to Member State

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<sup>88</sup> The responses came from the German and Austrian crafts sector.

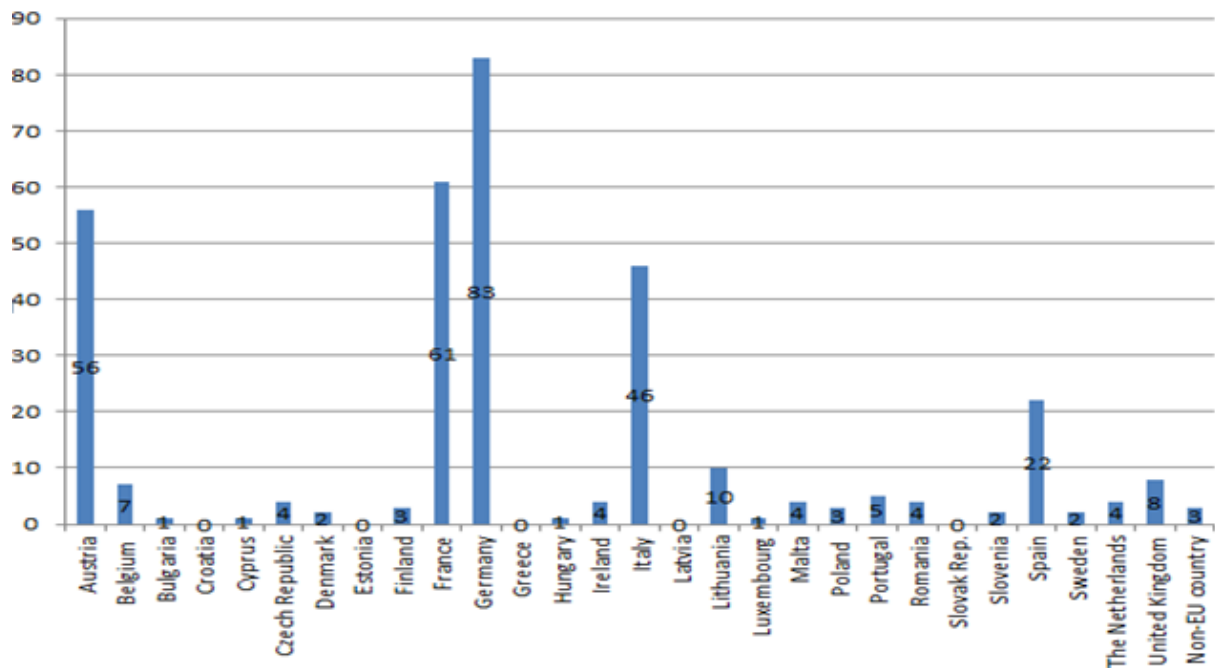


Table 2 Responses according to sector

Business Service	37
Construction	28
Manufacturing	4
Real Estate	9
Transport	1
Wholesale & Retail	1
Education	12
Entertainment	1
Health & Social Services	78
Network Services other than Transport	0
Public Administration	20
Tourism	17
Other Services / activities	129
Responding as a consumer with no one particular profession of interest	3

Table 3 category of respondent

In which capacity were respondents answering:	
Provider of professional services	112
User of professional services	6
Public authority	49
Other	173



The **category of 'other'** includes at least 81 of the organised responses noted above. From the total 173 contributions made under this category were also 4 research institutions and 17 trade unions. The remaining 152 came from professional associations with the majority of the respondents accounted for by Austria (48) and Germany (46), the remaining are Belgium (2), the Czech Republic (2), Denmark (1), Finland (1), France (20), Ireland (2), Italy (12), Lithuania (2), Poland (1), Romania (1), Spain (4), Sweden (1), UK (6), EEA Country (1) and, International Organisation (2)

From the **provider of services** category we have 19 of the organised responses mentioned previously. Additionally, 19 identified as a private company (of which 4 were 'large', 4 'SME', 9 as 'micro' and 1 as a business organisation), 55 as self-employed and 39 as professional chambers.

Of those responding as **public authorities**, at least 4 were part of the organised response and around 28 could be considered as professional bodies.

### 11.2.3. Quality and Proportionality in National Action Plans (NAPs)

As respondents were given the opportunity to respond to multiple NAPs a total of 471 were commented upon. Most respondents, 288, chose to respond to only one NAP but 36 chose to respond to 4. 31 of those responding to 4 NAPs issued from Germany and related to the NAPs from Germany, Austria, Luxembourg and France. In almost all these instances the responses were identical, finding the quality of the NAPs high and seeing no need for neither regulatory change nor the introduction of further proportionality controls. As these accounted for 144 NAP responses in total, 31%, of all responses, they have an important impact on collated responses. In reviewing the below it is helpful to refer also to the finding presented under the Commission's proportionality assessment in this paper under sections 3.2 and 3.3.

Regarding general satisfaction with the approach taken by Member States to analysing regulation in their NAPs two questions below are particularly pertinent:

**Question 1:** Do you think this NAP is based upon the most relevant information on the impact of regulation on the market and/or professionals (*e.g empirical studies, reports by professional associations and consumer protection bodies, reports and/or opinions of other national authorities such as competition authorities*)?

Response	% - total responses	% - organised responses removed
Yes	62%	37%
To some extent	16%	26%
Not really	12%	20%
No	9%	15%
Don't know	1%	2%

Looking at the overall response therefore we find 37% of respondents saw room for improvement to a greater or lesser extent in the relevance of information used to assess regulatory impacts whereas once we account for organised interests we find **overall 61% finding some room for improvement in the information gathered to inform regulatory decisions.**

**Question 2:** From reading this NAP do you think it thoroughly analysed all impacts of regulation?

Response	%	% with organised responses removed
Yes	53%	35%
To some extent	12%	17%
Not really	15%	21%
No	14%	19%
Don't know	6%	8%

Following from the previous question this also indicates that **41% thought the impacts of regulatory decisions were not fully analysed, 57% when controlled.**

### Responses to the use of proportionality – public questions

All respondents were given the opportunity to respond to this section regarding the more general use of proportionality in professional regulation. First we shall look at general awareness to issues of proportionality including, where relevant, areas where it is considered proportionality analysis may be improved; then to attitudes in general to the use of proportionality when designing or reviewing regulations and finally at responses to what impacts could be expected by the introduction of a more methodological approach to the assessment of proportionality:

#### 11.2.4. General Awareness of Proportionality

Regarding proportionality requirements already in place, from those who were aware of such requirements 38 % said there was a systematic methodology, 38% that it was done on a case by case basis and from 24% that no methodology exists. Regarding existing criteria according to EU law 39% were unaware of any and of these – 21 of these were public authorities and 5 of those same authorities did not see the need for any further clarification in guidance.

However, looking more deeply at these responses and alongside the later question of '*In your view are the existing criteria for assessing proportionality clear enough?*' and response of '*Yes, and there is no or little need to clarify the criteria*', we find that:

- 39% had responded that analysis was done on a case by case basis;
- 5% that they did not know if any methodology existed;

- 8% came from those who said that no methodology was in place and;
- Overall, 65% came from organised responses.

Although the above does not tell us what the reality in any Member State regarding obligations when designing regulations, the responses do suggest an overall confusion; that in many instances there seems to be no set criteria (case by case basis) or; at least a lack of awareness of any. It should also be noted how many responses coming from professional representative bodies, who had in some cases indicated a lack of existing criteria, who either seem to not wish, or perhaps not accept the benefits of introducing a more transparent and coherent approach to regulation.

### 11.2.5. Responses regarding the current state of proportionality assessments in the EU

61% of respondents were aware of current proportionality based requirements, these respondents were asked:

#### **Q. In your view what, if any, are the shortcomings of the current situation regarding the assessment of proportionality?**

	Overall
It is not clear which criteria should be used to comply with the requirement to assess proportionality	7%
There is no common methodology to carry out proportionality assessments	12%
Proportionality assessments are not comparable across Member States	27.5%
The quality of proportionality assessments that I am aware of is inadequate	27%
Member States do not respect their obligations to assess proportionality and there is no mechanism to correct this behaviour	21%
There is no proper consultation.	4.5%

Given the motivation behind this initiative we see that 'quality', 'comparability' and the accountability of Member States to the principles of proportionality feature as the most predominant concerns.

Respondents were then asked which criteria they would wish to see improved:

#### **Q. What elements of the proportionality assessment should be clarified?**

	Agree	Disagree	No opinion
1. Reasons: Identification of the overriding reasons relating to the general	90%		10%

interest which justify the measure (public policy, security and/or health, consumer protection, fairness of trade transactions, combating fraud, protection of the environment)			
2. 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	84%	4.5%	11%
3. Assessment of the necessity of requiring possession of specialised skills and training and assess specifically the level, the nature and the duration of the training required	90%		10%
4. Assessment of the existence of different routes to obtain the qualification	77%	11%	11%
5. Analysis of the scope of practice and the reserves of activities	86%	2%	11%
6. Estimating the economic impact of the proposed regulation including a consideration of market impacts on such variables as employment, competition, prices, etc.	79.5%	10%	11%
7. Analysis of the alternatives to regulation or less restrictive regulation	73%	13.5%	13.5%
8. Assessment of the	79.5%	2%	18%

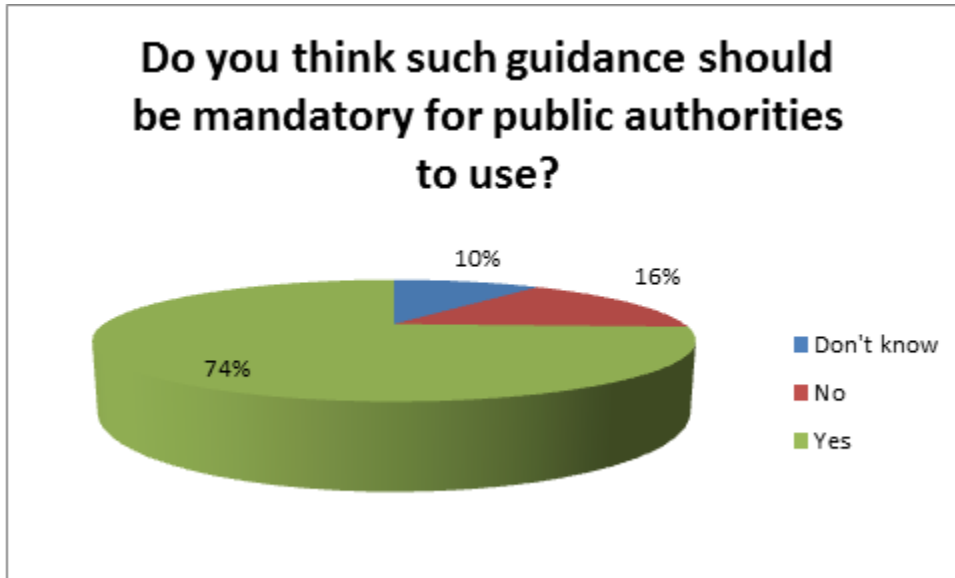
cumulative effect of restrictions to both access to and exercise of the professional activities			
9. Assessment of non-discrimination of professionals from other EU countries	88%	2%	10%
10. Improve procedures: Steps necessary to carry out proportionality assessment	88%	4.5%	7%
11. Improve procedures: Obligatory consultation with all stakeholders before decision	91%	2%	7%
12. Improve procedures: Publication of assessments online	86%	4.5%	10%

The responses in particular to questions 2, 6, 7, 8, 11, 12 are interesting as they relate to the motivations behind the bringing forward of this impact assessment: namely to improve the way in which regulation is analysed so as to ensure both its wider **economic and cumulative effects** are taken into consideration; to ensure this is done in a **transparent** fashion and to **prevent unnecessary burdens being placed upon the economy and consumers**.

*a. Attitudes to the use of proportionality*

To note that in the following that:

- Q2 was given only to those who was given only to those who previously indicated an awareness of pre-existing proportionality criteria in their Member States and;
- Q4 was given only as a follow up to those who had answered 'YES' to Q3 (38% of total responses) Therefore, as an example in table 5 below, the figure of 74.2% requesting a mandatory proportionality test equates to 38% of those surveyed overall.



**Table 4 - Overall responses across the whole consultation:**

1. Should authorities analyse the impact of regulations?	%	2. In your view is the existing criteria for assessing proportionality clear enough?	%	3. Should there be common guidance?	%	4. Should this guidance be mandatory?	%
Yes	93%	Yes	74%	Yes	51%	Yes	74.2%
No	3%	No	21% <sup>89</sup>	No	41%	No	15.4%
Don't know	4%	Don't know	5%	Don't Know	8%	Don't know	10.2%

However, it is useful to look at these responses in more depth and breaking them down according to the status of respondent so as to understand how different stakeholder constituencies reacted:

**Table 5 - Providers of services**

1. Should authorities analyse the impact of regulations?	%	2. In your view is the existing criteria for assessing proportionality clear enough?	%	3. Should there be common guidance?	%	4. Should this guidance be mandatory?	%
Yes	94%	Yes	56%	Yes	67%	Yes	85%
No	4%	No – should be clarified	5%	No	26%	No	6%
Don't know	2%	No- should be clarified and	39%	Don't Know	7%	Don't know	9%

<sup>89</sup> Three quarters of these people thought it not only should be clarified further but that it should be made comparable between Member States.

		made comparable across Member States					
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**Table 6 Users of services**

1. Should authorities analyse the impact of regulations?	%	2. In your view is the existing criteria for assessing proportionality clear enough?	%	3. Should there be common guidance?	%	4. Should this guidance be mandatory?	%
Yes	50%	Yes	25%	Yes	83%	Yes	100%
No	17%	No – should be clarified	25%	No	17%	No	
Don't know	33%	No- should be clarified and made comparable across Member States	25%	Don't Know		Don't know	
		Don't know	25%				

**Table 7 Public Authorities**

1. Should authorities analyse the impact of regulations?	%	2. In your view is the existing criteria for assessing proportionality clear enough?	%	3. Should there be common guidance?	%	4. Should this guidance be mandatory?	%
Yes	96%	Yes	64%	Yes	61%	Yes	80%
No		No – should be clarified	4%	No	31%	No	10%
Don't know	4%	No- should be clarified and made comparable across Member States	25%	Don't Know	8%	Don't know	10%
		Don't know	7%				

To note that 21 public authorities responding to the previous question on criteria were not aware of any existing in their Member States. It is further worth noting the later responses from this group who generally strongly saw the benefits of introducing proportionality testing and 9 of whom later endorsed a common mandatory framework. 5 did not support the idea of common guidance and saw no benefits from analysing different criteria (tables 9 and 10) and 2 from this group answered 'don't know' to what methodology was in place in

their Member State, in fact only 60% indicated that there was no methodology in their Member State.

**Table 8 Other<sup>90</sup>**

1. Should authorities analyse the impact of regulations?	%	2. In your view is the existing criteria for assessing proportionality clear enough? <sup>91</sup>	%	3. Should there be common guidance?	%	4. Should this guidance be mandatory?	%
Yes	94%	Yes	87%	Yes	37% (66%)	Yes	72%
No	2%	No – should be clarified	4%	No	54% (19%)	No	23%
Don't know	4%	No- should be clarified and made comparable across Member States	3%	Don't Know	9% (15%)	Don't know	5%
		Don't know	5%				

The final segment of responses is that of 'other' and as with other sections of the consultation results could be considered the outlier. As this group is composed of multiple organised responses the results given in brackets represent the percentage as they would be had we counted these responses as only 1. Of the Trade Unions responding under this category 65% responded yes to Q3, 6% No and 29% don't know. Of those saying yes, 73% wished for the binding option under Q4.

Therefore support for the use of common guidance (question 3) across categories is as follows: services providers (67%), users (83%) and public authorities (61%), dropping to 37% within the category of 'other' but rising again to 66% when controlled for bias. Following on from this, *and remembering that Q4 was given only as a follow up to those who had answered 'YES' to Q3 (38% of total responses)*, those who thought it should be mandatory for public authorities to use those who answered yes to this represent 39% of all those surveyed before controlling.

<sup>90</sup>173 contributions come under the self-nominated category of 'other' : 4 are research institutions, 17 trade unions and the remaining 152 are predominantly from professional associations with the majority of the respondents accounted for by Austria (48) and Germany (46). The remaining are Belgium (2), the Czech republic (2), Denmark(1), Finland (1), France (20), Ireland (2), Italy (12), Lithuania (2), Poland (1), Romania (1), Spain (4), Sweden (1), UK (6), EEA Country (1), International Organisation (2)



Of all demographics those under the category of 'other' run contrary to this trend in that they not only do not support the idea of a mandatory test but they also do not support the sharing of common guidance on any level (54%).

*b. Expectations of impacts from the introduction of proportionality*

Finally, all respondents were asked what they thought the impacts of introducing a common methodology would be. Taking firstly those aspects where there was overall acceptance of the possible benefits of introducing a common proportionality test, highest rated responses are in blue:

**Table 9**

		Overall %	Providers %	Users %	Public Authorities %	'Other' %
a. Would help to <b>clarify</b> the minimum criteria necessary to comply with the requirement to assess proportionality	Agree	54%	75%	100%	57%	36%
	Disagree	36%	12%	-	35%	54%
	Don't Know	10%	12%	-	8%	10%
b. Would support Member States with a <b>common template</b> and guidance on the method needed to carry out such assessments	Agree	71%	81%	100%	61%	66%
	Disagree	12%	10%	-	27%	9%
	Don't Know	18%	9%	-	12%	25%
c. Would improve the overall <b>quality</b> of proportionality assessments	Agree	45%	64%	50%	45%	33%
	Disagree	41%	21%	33%	37%	55%
	Don't Know	14%	14%	17%	18%	12%
d. Would make proportionality assessments more <b>transparent</b> and <b>comparable</b> across Member States	Agree	52%	71%	83%	59%	36%
	Disagree	37%	17%	17%	30%	53%
	Don't Know	11%	11%	-	10%	11%
e. Would support <b>compliance</b> with existing legal requirements on the notification of new regulation and the reasons for which it is considered proportionate* * As stipulated under existing EU rules in the Professional Qualifications Directive 2005/36/EC as well as the Treaty	Agree	47%	76%	67%	41%	30%
	Disagree	36%	14%	-	35%	52%
	Don't Know	17%	10%	33%	24%	18%
f. Would make it easier to <b>compare</b> regulatory	Agree	51%	75%	67%	55%	34%
	Disagree	39%	17%	33%	35%	55%

requirements across the EU	Don't Know	10%	8%	-	10%	10%
g. Would improve <b>legal certainty on compliance</b> with existing requirements under EU law	Agree	44%	65%	67%	45%	29%
	Disagree	40%	23%	17%	35%	54%
	Don't Know	53/ 16	12%	17%	20%	17%
h. Would make Member States seriously <b>consider, in a structured way, necessity and proportionality factors</b> when adopting new or revising existing regulations	Agree	49%	79%	83%	43%	31%
	Disagree	37%	10%	17%	41%	54%
	Don't know	14%	11%	-	16%	14%
i. Would <b>ease the mobility</b> of professionals between Member States	Agree	43%	61%	67%	49%	28%
	Disagree	34%	30%	17%	43%	35%
	Don't Know	23%	9%	17%	8%	37%

In reviewing the above we see a broad consensus of opinion between providers, users and public authorities but which, in all instances, is not shared by the 'other' category. In fact, between the above and below table this category is the consensus outlier from the other three categories in 8 of the 9 categories. The above align closely with the fundamental reasoning for action as set out in this IA namely: **quality, compliance, comparability and transparency according to the best principles of proportionality in regulation.**

Next we consider responses to the impacts of the introduction of a common proportionality test where the suggested benefits were not accepted:

**Table 10**

		Overall %	Providers %	Users %	Public Authorities %	'Other' %
a. Would <b>improve the quality</b> of regulation	Agree	45%	59%	83%	49%	33%
	Disagree	47%	29%	17%	41%	61%
	Don't Know	8%	12%	-	10%	6%
b. Would <b>simplify</b> professional regulation	Agree	42%	62%	50%	49%	27%
	Disagree	46%	25%	50%	37%	62%
	Don't Know	12%	13%	-	14%	12%
c. Would <b>lead to the modernisation</b> of national regulation regarding access and conduct requirements	Agree	37%	57%	83%	45%	20%
	Disagree	45%	29%	17%	39%	59%
	Don't Know	18%	14%	-	16%	21%

d. Would help <b><u>investigating alternatives to regulation</u></b> and propose appropriate actions to improve legislation	Agree	34%	47%	17%	43%	24%
	Disagree	45%	29%	50%	37%	57%
	Don't Know	21%	23%	33%	20%	19%
e. Would <b><u>improve the involvement of various affected groups</u></b> , such as businesses and consumers, in the development of legislation	Agree	31%	45%	83%	35%	20%
	Disagree	46%	32%	17%	41%	57%
	Don't Know	23%	23%	-	24%	23%
f. Would <b><u>reduce administrative burdens</u></b> for professionals	Agree	18%	31%	17%	20%	10%
	Disagree	43%	37%	33%	57%	43%
	Don't Know	39%	32%	50%	22%	47%
g. Would <b><u>ease access</u></b> to the professions	Agree	31%	48%	33%	35%	18%
	Disagree	56%	39%	50%	47%	69%
	Don't Know	13%	12%	17%	18%	12%
h. Would <b><u>increase competition</u></b> in the market	Agree	25%	44%	17%	30%	11%
	Disagree	51%	39%	50%	39%	66%
	Don't Know	24%	21%	33%	30%	23%
i. Would <b><u>raise the level of consumer protection</u></b>	Agree	29%	52%	50%	33%	13%
	Disagree	55%	38%	33%	41%	71%
	Don't Know	16%	10%	17%	27%	16%
j. Would <b><u>improve the functioning of labour market</u></b>	Agree	26%	43%	33%	27%	15%
	Disagree	53%	39%	33%	39%	65%
	Don't Know	21%	18%	33%	35%	20%
k. Would <b><u>deliver a better price-to-quality ratio</u></b> of services	Agree	19%	29%	33%	22%	10%
	Disagree	59%	50%	33%	41%	71%
	Don't Know	22%	21%	33%	37%	19%
l. Would <b><u>raise the quality</u></b> of professional services	Agree	30%	49%	50%	30%	16%
	Disagree	38%	38%	33%	41%	39%
	Don't Know	32%	13%	17%	29%	45%

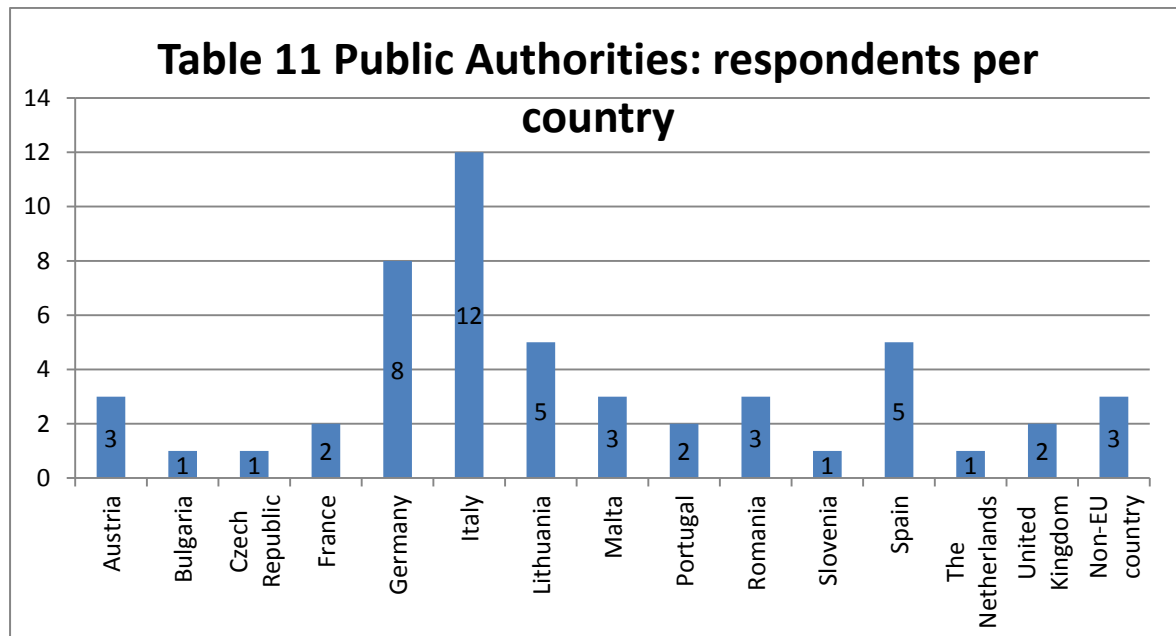
Consensus is generally more divided and narrow in these categories than the previous. Regarding (a), quality, the overall figure between agreement and disagreement is quite narrow with public authorities, users and providers all thinking a common test would have positive benefits, the same may be said of (c), modernisation, though the overall margin is not so narrow. There is general doubt that (f), reducing administration burdens will be helped, access eased (g), or competition improved (h). However it is worth noting that service providers do foresee this benefit. Both public authorities and 'other' categories do not foresee a positive impact on consumer protection, though this is not shared by users or providers. Negative opinion on its effects on the functioning of the labour market (j) is strong overall but when broken down to groups the margins are narrower, with only 'other' in strong disagreement. Most users did not think effects on price- to quality ratio (k) would be improved though it is not clear how this contrast with those who think quality will not be

improved (l) – perhaps they suggest no impact on prices but this must be interpreted against effects on competition (h). Finally, regarding (l) it is interesting to note the 45% response rate from the 'other' category given that many of those respondents come from the crafts sector where service quality is often a primary motivation in their justification for regulating.

**It should be noted that both of the above tables 9 and 10 have not controlled for organised responses which were predominantly negative towards all aspects.**

### 11.2.6. Public Authorities

The proportionality section of the consultation designed exclusively for public authorities is helpful not only to understand what their views are on the proposals set forth in this IA but to also appreciate what regulatory and proportionality based processes are currently in operation.



49 responses came from public authorities, 21 of which regulate a profession[s], 10 which review or supervise the implementation of professional regulation. From previous questions under general proportionality [see section 2.2] we know that 30 of these agree there should be a common set of criteria, 17 disagree, 2 have no strong opinion. In addition the consultation section on general proportionality for all respondents, showed that:

- 21 public authorities were **unaware of national and/ or EU level proportionality criteria;**
- 11 implement a systematic methodology when reviewing/implementing regulation; 16 review according to a case by case basis; **8 operate without any methodology and; 14 do not know if one is in place.**

- Despite this, 18 think that there is no need to further clarify criteria; 8 think criteria should be further clarified and 7 of these that it should be comparable across Member States [see sections 2.2 and 2.3]

Overall 30 think there should be some form of common guidance introduced, of which 20 think it should be mandatory and 5 that it should not. 15 disagree with the idea of a common methodology and 4 have no fixed view.

Of those 15 who disagree with the use of a mandatory test, 6 indicated there was a national level methodology in place; 2 previously indicated that a systematic system was in place, 4 that there was no methodology and 3 that analysis was on a case by case bases; 8 said they were not aware of any European proportionality requirements.

Further to this, of these same 15 8 had previously responded 'YES' to the public question 'Should this guidance be mandatory', **only 3 refuted the mandatory route for each of the two times the question was posed.**

The situation and respondents' views on it may be somewhat unclear therefore. However what does come through is a concerning **lack of clarity and/or awareness of criteria when analysing regulatory choices.**

#### *a. Current state of analysis*

Below we will look first at how Public Authorities currently deal with regulatory change, then we shall look at issues around stakeholder engagement and transparency and finally, how subject to change professional regulation has been in the previous 10 years and is projected to be in the coming 3.

	1. Do the regulations you deal with have a review clause	2. When reviewing or amending regulation are you aware of proportionality based criteria to support your decisions?	3. Do you think proportionality check-ups help/would help to ensure regulation is best designed to serve public interest objectives?	4. As far as you are aware, in the past 10 years has there been changes to the regulation of this / these professions?
Yes	8	22	39	28
No	28	15	10	14
Don't	13	12	-	7

know				
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Although column D is more relevant to section 3.3 it is helpful to consider it also alongside the above.

**Column 1:** Of those who indicated a review clause we found annual review periods stipulated as 1; 5; 2; 15; 3; 4; 1; 15 years respectively. One of the respondents to a yearly review indicated previously that they were not aware of any existing national proportionality requirements but saw no need to further clarify criteria. Their view was that guidance should be voluntary and professional reputation should be included as justification for regulation. One respondent with a 15 year review clause indicated a systematic methodology was in place, that no further clarification was necessary but replied 'don't know' to column 2 regarding the use of proportionality based criteria. Conversely however, this same respondent indicated a wish for further EU-level guidance to be mandatory on public authorities. So the picture is confused.

**Column 2:** Within those 15 who responded 'no' to this question, 5 were not aware of any proportionality requirements at a national level; 11 unaware at the EU level; 5 indicated no methodology was in place (one of which had a 3 year review clause); 3 that assessments were done on a case by case basis; 2 that a systematic methodology existed (but one of these was not aware of any EU level criteria). However since both of these last two indicate earlier that no proportionality based criteria was in place we can assume that the methodology they refer to makes no reference to proportionality.

**Column 3:** Of the 10 responding 'no' to this question; 4 later indicated that further EU-level guidance (such as an analytical framework) would be useful; 4 were unaware of proportionality based criteria used when reviewing/amending regulation; 7 indicated no systematic methodology was in place at a national level; 4 of these 7 were unaware of any EU level proportionality expectations and yet 5 felt the current system was satisfactory and in no need of further clarification whereas 4 supported the idea of further EU-level proportionality guidance, 2 of whom thought this should not be voluntary in nature.

### *b. Engagement and Transparency*

#### **3.2.1 Regarding stakeholder consultation, the following responses were given:**

	Do you consult a broad range of stakeholders?
We primarily consult the profession concerned	30
We consult a broad range of stakeholders including consumer and competition stakeholders	9
We do not routinely consult	3
Not applicable	7

**61% of consultations therefore focus primarily on the professionals themselves** and in a minority of cases no consultation of any sort takes place. However, two of these three are supportive of further EU proportionality guidance (though one thinks it should be voluntary and the other holds no strong view<sup>92</sup>). **One of those responding that they did not consult also replied that their regulation had been altered to introduce new requirements 3 times in the past 10 years.**

*c. Regarding transparency of the analysis conducted before taking regulatory decisions:*

	How do you disseminate the results of your proportionality analysis? <sup>93</sup>
It is published with the professional regulations	15
It is published separately online	1
It is not published	7
Not applicable	17
Other	2

**Of the 17 who claimed it was 'not applicable', 3 were regulators and 6 were responsible for reviewing or supervising the regulation of a profession/professions; 14 indicated that they primarily consult the professionals and 2 that they do not routinely consult.** This final two may explain why they chose the response 'not applicable' but it does not explain the remaining 15. If we were to take this as an indication that results are not published we could say that overall 49% of assessments are not made public. However, from this group, 12 indicate further EU level guidance (such as a proportionality test), would be welcome, 3 have no clear preference and 2 do not support the proposal. Additionally, from those supporting the proposal 5 think it should be voluntary in nature, 2 that it should be mandatory and 5 show no clear preference. Those 15 who publish results alongside the regulation were not clear on whether this was the draft regulation or final, as such it is not clear if the the for concerns to be raised prior to adoption are open.

*d. Changes to the regulatory landscape:*

As far as you are aware, in the past 10 years have there been changes to the regulation of this/these profession(s)?	
Yes	28
No	14
Don't Know	7

Those responding 'yes' to the above were then asked to indicate the number of changes over this period, in total this came to **147 known regulatory changes in the past decade**

<sup>92</sup> The respondent who said the guidance should be voluntary, when asked why they responded: "It could promote more confidence between EU members, helping to overcome for instance the exigency of compensatory measures" so there may be a conflict in their response.

<sup>93</sup> This question was not given to those who answered 'not applicable' to the question "Do you consult a broad range of stakeholders?"

across 28 authorities representing 13 Member States . These same respondents were then asked:

Overall, did these changes:	
Introduce more requirements	10
Remove requirements	7
Replace requirements with alternative / lighter touch measures	5
Relate primarily to administrative improvements	2
Other	4

Of those who 'introduced more requirements', **5 had checked the 'not applicable' response to the publication of their proportionality analysis, 8 primarily consulted the professionals, and 1 did not routinely consult.** From this same group all agreed that proportionality help design 'good' regulation and 8 wished for further EU level guidance: two thought the guidance should be voluntary, two that it should be mandatory and 6 had no set opinion. Regarding the use of alternatives, when further prompted 2 indicated that they included 'less restrictive' measures and 3 had 'no opinion'.

**Going forward we then asked if any regulatory changes were foreseen in the next 3 years:**

Are you aware of any intention to change the regulation of this/ these profession(s) in the next three years?	
Yes	18
No	12
Won't know until conclusions are drawn from an upcoming review	8
Don't know	11

From the 18 respondents who answered yes to the above; 17 agreed proportionality analysis helped in designing regulation, 4 did not want further EU level-guidance (**1 of whom had introduced 8 new requirements in the past 10 years and all 4 foresaw regulatory change in the coming 3 years**), 11 indicated support for further EU level guidance and of these 4 thought the guidance should be mandatory, 4 that it should be voluntary and 3 had no firm opinion). This 18 were then asked:

Overall, are these changes likely to:	
Introduce new requirements	5
Remove some requirements	4
Replace existing requirements with alternative measures	3
Relate primarily to administrative improvements	5
other	1



Setting aside 'administrative improvements' we see that the majority of changes foreseen relate to the underlying professional regulations in themselves. It is useful also in this context to keep in mind the NAP section of consultation where respondents were given the opportunity to refer to a particular profession of interest to them and, and from those who mentioned one, there was pretty even 50:50 split between those wishing for future regulatory change and those who did not. Professional associations in particular did not want to see any future regulatory changes.

### 11.3. Annex 3

#### **Guidance Initiative**

The “**Guidance for reforms**” action on is designed to address issues in existing professional regulation and for specifically targeted professions<sup>94</sup>. For this existing national regulatory frameworks are being compared across countries and analysed on the basis of information provided in the Member States' proportionality assessments as well as information notified to the EU Regulated Professions Database. On this basis profession-specific guidance with regards to proportionality within the wider European regulatory landscape and according to Member State shall be developed and shall focus upon those areas which appear to be disproportionality restrictive. Acting upon such findings Member States will then be expected, to develop the desired regulatory improvements.

This is complimentary to the proposed action on guidance, in the context of the European Semester the Commission adopts annual country specific recommendations addressed to each Member State, these target major structural issues in all sectors of the economy and in line with the policy priorities defined in the Annual Growth Survey and are endorsed by the Council. Amongst the three priorities identified for 2016 is the call to pursue structural reforms that modernise national economies. **In particular Member States are asked to improve the functioning of their services markets by making them more competitive and open through, inter alia, the removal of disproportionate requirements.**

### 11.4. Annex 4: Analytical models used in preparing the IA

#### **Methodology of the quality check of proportionality assessments (PAs) in the Database**

In the context of the Mutual Evaluation exercise carried out between 2014 and 2016, Member States were asked to address, for each profession they regulate in their territory, the following 10 questions<sup>95</sup> prepared by the Commission on the basis of the existing jurisprudence<sup>96</sup>, which were designed to help assess whether the national requirements are proportionate. Supporting guidance was provided and the Commission assisted respondents

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<sup>94</sup> [Link to the roadmap when published](#)

<sup>95</sup> See Annex X

<sup>96</sup> Reference to the relevant case law

as further questions arose. In addition, during the six Mutual Evaluation meetings which gathered representatives from Member States and the Commission, proportionality analysis was discussed in detail for 12 professions and reports summarising the findings were subsequently published.<sup>97</sup> During these meetings the way in which proportionality was expected to be carried out for it to be considered of a satisfactory quality was clarified a number of times. The 12 reports, endorsed by Member States before their publication, are in line with the outcomes of the analysis the Commission subsequently run on all professions. The responses were used by the Commission to assess the appropriateness of the relevant analysis by the Member States. The assessment process is described below.

The Commission has now reviewed all submitted replies and assessed the level of analysis conducted in each. The process through which this assessment was conducted is described below.

There are c.a. 600 generic professions across the EU, which translates into c.a. 5700 different regulated professions at national level<sup>98</sup>. In order to verify all proportionality assessments submitted for each profession in every Member State (or 3533 questionnaires of 10 questions each), the Commission followed the following method. Five of the ten questions of the questionnaire were selected so as to find out whether the conclusion reached was based on analysis of the critical points related to the identification of risks, assessments of the effect regulation on the ground and the cumulative effects of the existing multiple restrictions imposed on each profession. This consisted in verifying whether satisfactory responses were provided by Member States to a set of questions (Q3, 4, 5, 8) and linking the answers to the answer to Q10 for each profession to see whether the conclusion given in Q10 is founded on analysis or not. In assessing what constituted "satisfactory" in this exercise, it is important to note that no value judgements as to the merit of the information were made at this stage – only the (completeness) relevance of the reply was assessed.

Given the answers were provided by Member States as free text, a rating was applied for questions 3 (in conjunction with Q4, given that more telling answers are sometimes provided under Q4), 5 and 8 to be able to score the quality of the answers in the most objective possible way. For example, for the question on whether Member States have identified specific risks or benefits that the regulation in question was supposed to tackle (Q3-4), the following scores were attributed:

- 0 if no/ unrelated or inadequate response;
- 1 if a general reference to consumer protection/ safety or ensuring quality of services was made; and

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<sup>97</sup> See "[Organisation of the Mutual Evaluation](#)" and "[Sector reports](#)"

<sup>98</sup> The Database shows that some 600 different "[generic professions](#)" are affected by occupational regulation. For each generic profession there are usually many more professions corresponding to the national terminology, which brings the number of regulated professions in the EU up to c.a. 5700.

- 2 if specific risks or benefits were indeed identified.

For the other questions (Q5 effects of regulation / Q8 cumulative effect analysed or not) a binary rating was applied:

- 0 if no/ unrelated or inadequate response;
- 1 if a fairly satisfactory response was provided.

It is to be noted that the scores were given in a rather generous way (i.e. even a relatively limited effort to analyse the effects of regulation was attributed 1 which is the maximum score for this question, any risk more specific than reference to consumer protection or quality of services in general was scored 2 which is the maximum amount of points attributable to this question) which makes the estimates overoptimistic. **This was done to allow for the development of data but in as an objective rather than value-driven manner as possible.** Anonymised examples of the real replies and the scores assigned are given below to better illustrate the way in which replies were scored.

Then, the answers to questions on effects were linked profession by profession with the question on the conclusion reached by a Member State (maintain, improve or remove the measure) so as to see whether the conclusions were founded on analysis or not. The same approach was taken for the question on cumulative effect, linking it to the existence of multiple regulatory restrictions on top of qualification requirements. For each Member State, GROW thereby obtained a quantitative estimate of Member States' response rate to the more detailed questions. **The objective of this analysis was to show that [some] regulatory decisions are being taken by relevant authorities without first ensuring that the appropriate questions are even being asked or answered. The quality (merit) of the ensuing decisions will obviously be affected by this fact.**

In doing so, the *quality* of the responses provided by Member States was assessed to be able to reach conclusions with regard to the **quality of the proportionality assessment**, without however judging at this stage whether the response is convincing to justify regulation (and therefore to justify whether the regulation is proportionate) [given this is by no means the purpose of the exercise]. In this way the scoring could be considered liberal.

Questions analysed	Scoring
<b>Q3-4 Risks/ benefits</b> What specific risks or benefits have you identified that your measure(s) is designed to, respectively, minimise or maximise? How specifically does the measure operate to ensure it?	Answers to Q3 were read in conjunction with Q4 and an appropriate score was given accordingly: - 0 if no, unrelated or inadequate response - 1 if general reference to ensuring quality of services, safety, consumer protection - 2 if specific risks/ benefits identified
<b>Q5 Effects of the measures</b> Please provide information that you have gathered regarding the concrete	Read answers to Q5 and give the appropriate, in your opinion, score:

effects of the measure(s).	<ul style="list-style-type: none"> <li>- 0 if effects not analysed</li> <li>- 1 if effects analysed (the response was even fairly satisfactory)</li> </ul> <p><i>[End result: Answer to Q5 will be linked with the answer to Q10 <u>for each profession</u> to see whether the conclusion given in Q10 is founded on analysis (Q5=1) or not.]</i></p>
<p><b>Q8 Cumulative effect</b></p> <p>Where you have indicated several measures in place in the screening tab, have you reviewed the cumulative effect of all these measures on professional activities?</p>	<p>Read answers to Q8 and give the appropriate, in your opinion, score:</p> <ul style="list-style-type: none"> <li>- 0 if cumulative effect not analysed</li> <li>- 1 if cumulative effect analysed</li> </ul>

The scores relative to the answers to these questions were, profession by profession, linked with the answer to Q10 (maintain the current system/ improve/ remove) to see whether the conclusion was founded on analysis or not (Q5), whether risk/ benefits have been identified (Q3-4) and cumulative effects analysed (Q8). These values were then summarised and divided by the total number of assessments done for a given country to have the % of assessments which were, accordingly, based or not based on analysis.

**Step 1:** In making this assessment it is important to note that to be as objective as possible DG GROW made no value judgements as to the *merit* (quality) of the information given; it only assessed the completeness of the reply or it's appropriateness to the question under consideration. This scoring can be seen through the following examples to the questions:

**Q3: What specific risks or benefits have you identified that your measure(s) is designed to, respectively, minimise or maximise?**

And

**Q4: How specifically do your measures operate to minimise the risk(s) or maximise the benefits) identified in Q3?**

response	score	explanation
<p>Q3 None Q4 Via long-standing and stated criteria.</p>	0	
<p>Q3 It is significant to have skilled [professionals], because it helps owners to manage more effectively. Q4</p>	0	Q3 does not identify a relevant risk nor benefit. Q4 provides only a circuitous logic.

<p>The measures ensure the competence of persons working in [the] field. Only trained and certified persons can provide services in mentioned field.</p>		
<p>Q3 The main risk is to appoint inappropriate persons. Q4 Appointment only of eligible and trusty persons.</p>	0	No identification of risks and self-evidently shallow understanding of the relationship between risks and impact.
<p>Q3 Risks: limited access to the profession. Benefits: trainee is well educated. Q4 To minimise the risk – the legal system provides the mandatory course and mandatory state exam. In addition, can have no physical and psychical contraindications. To maximise the benefit – there is a wide accessibility to attend the course.</p>	1	Limiting access to a profession is not in and of itself a legitimate concern but only where limiting access is to mitigate against risks which are not identified in this response. The risk here is mistaken as being one of poor training as oppose to risky outcomes as the result of poor training
<p>Q3 The measures help to minimize all the above risks because they help guaranty that specialized acts be practiced by qualified people and identifies the responsible for each service and work. Only legally qualified people can be responsible because the title is legally protected. Q4 The measures filter academic qualification and experience and creates a fair market and a controlled, but just access to those that work to obtain them. In case of an accident or fraud the legal service of OE can act with disciplinary proceedings.</p>	1	Undefined acknowledgement of risks
<p>Q3 Since 1998 the requirements were introduced with the aim to protect, promote and maintain the health and safety of the public. Q4 The profession has to meet the standards that were set in 1998.</p>	1	This refers to an ancillary health related profession which is only regulated by a few member States. General health concerns need to be better defined.
<p>Q3 Based on the monitoring of the compliance requirements on the use of plant protection products, undertaken to set up a responsible state authority, was found progress in reducing risks to human health and the environment. Persons meeting the required qualifications respectively. professional practice</p>	2	A forestry profession

<p>have much greater awareness not only about the extent of the risks to human health, consumers, and the environment, but especially on the methods of plant protection, which can significantly reduce these risks to be eliminated. Reduce risks for consumers (consumers of food of plant origin) resulted in an overall decline in samples taken from these foods, where the content of the residues of active substances of plant protection products exceeded the maximum limit set for the substance in the EU.</p> <p>Q4  ... Part of the qualification is access to knowledge about the biology of organisms harmful to plants, methods to be used to protect against them, including toxicology, biological efficacy and risks of plant protection products. Another part of the training in order to achieve professional qualifications of information on methods or elimination, reduction of risks in the use of products such as. correct use of mechanization for plant protection and integrated pest management.</p>		
<p>Q3  Obligation of professional qualification The risks covered are damage to human health when the activities of retail, storage and transport of products of animal origin (or food containing) impose unknown health rules people do not speak the necessary for the performance of their business techniques. The obligation of professional qualification ensures that the services or works are carried out by qualified professionals, knowing the safety rules and standards apply. Registration requirement in the trades: The risks covered are preparing or selling breads, specialty breads, pastries, cakes by unskilled persons the ensuring control of pre-qualification for registration, and endangering the client and the creditor would have no way of knowing the identity and characteristics of the company.</p> <p>Q4  Obligation of professional qualification The risk is that the manufacture and sale of bread, specialty breads, pastries, cakes do not meet health standards. The most effective way to minimize risk and ensure that those preparing or selling these products personally or have a qualification justifying their knowledge of standards and rules to follow, whether they work under the effective control of a qualified person. Registration requirement in the trades: The registry is a less stringent standard measure that allows systematic monitoring of compliance of professional qualification. Only one registration also allows the provision of a third legal directory listing all companies in the sector.</p>	2	Pastry maker

<p>Q3 Our regulatory measures are designed to protect consumers and recipients interest in services sector, to provide special, high-quality, reasonably accurate and correct information about attended museums, art galleries, natural, cultural, academic, exhibition, or other sites or locales.</p> <p>Q4 Professional qualification of a guide is awarded to persons who have completed higher education having attended a special guide training course totalling no less than 250 academic hours and covering methods of preparing and conducting a tour, rhetoric, professional ethics, communication, psychology, culture, history, and geography disciplines and having passed a practical tour guidance exam. Having assessed their professional qualification, guides are awarded second, first, or highest category considering their professional experience, ability to work in different languages, and the number of tour routes they are able to guide. All guide training programs are approved by the State Department for Tourism under the Ministry of Economy. Minimum scope of a guide training program is 250 academic hours.</p>	2	Tourist Guide
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In this way, and regardless of professional context, responses were judged to be either inadequate (0), general (1) or specifically related to the risks / benefits identified (2) as the motivation behind the regulation.

**Step 2:** To assess the use of parameters to measure the impacts and success of a regulatory framework DG GROW then analysed responses to the question (0= no evidence presented / 1= evidence given)<sup>99</sup>:

**Q5: In so far as you are able, please provide information that you have gathered regarding the concrete effects of the measure(s).**

Response	score	explanation
Professional regulation prevents that entrepreneurs start an enterprise without sufficient professional qualifications and swiftly end up in bankruptcy, with all the disadvantages as well on personal as on social level. Professional regulation contributes also to the promotion of the craft, and presents a large offer of education.	0	Dental technician
No information can be provided regarding	0	The interesting thing with this response

the concrete effects of the measures as there was not recently a review of any of the relative measures, neither a change in the philosophy of the measures allowing access in the profession.		was that it was given in so many cases by the same member State. Yet responding to the following question regarding recent reviews on the cumulative effect the responded "Yes we have reviewed the cumulative effect and they are not restrictive or disproportionate" It should be noted that in step 3, this response was awarded 1 as we took each response solely as presented by the Member States and without our own judgement.
The activities have long traditions. Legislation in its current form has been in place since 1971, and before this time, official regulations were followed.	0	
We aren't able to provide more information because there isn't an Order but only trade associations and they aren't able to provide uniform information.	0	Again this Member State used this reply for multiple professions.
Professional regulation and reserve of activity based model of organization and related public policies were recently reviewed. The existence of measures was generally maintained.	0	This is concerning that a review recently occurred but no information on effects is available,
Demand for the protected title is market led, in that many employers value and support the qualification process and holding the title can give a competitive advantage in the job market.	0	
A variety of methods is used to supervise activities and to monitor their impact. These include various repeat inspections, statistical reviews and Mystery shopper type methods. In addition, four separate studies have been commissioned [...and] this data clearly indicates that the qualification and continuing training requirements ...have links with public safety, protection of consumers and service recipients, prevention of fraud, environmental protection, ensuring reliable administration of justice and road safety.	1	
During 2009-2010 we were supervising our provisions relating to mandatory professional qualifications. As a result of this	1	Sales manager



<p>screening, a significant simplification has been adopted, as we reduced the number of products where certain qualification had been required. In our opinion diminishing any mandatory qualification that remained after the supervision would cause larger risk to the safety of buyers, public security, public health, food safety or product safety than the administrative burden may be in relation with obtaining the required qualification. We believe that the current provisions pertain to such products of which selling without a qualified seller could harm the above-mentioned public interests. Besides, these provisions do not cause disproportionate burden or costs, the required qualifications can be obtained within a relatively short time, and the obtained qualification effects benefits in the labour market as it qualifies for selling many types of products.</p>		
<p>According to our data in the period up to 2014 year only 2 suspensions of qualification and 2 warnings were applied. Low number of these cases proves that attestation ensures required qualification of professionals.</p>	1	
<p>It should be noted that previous requirements were higher and more stringent. Current ones are the result of the 2013 deregulation process... Introduction of new requirements resulted in a substantial increase in the number of granted authorizations in the field. On average, 212 individuals a year received professional qualifications during 2009-2013. Upon entry into force of the new requirements, in 2014, 420 individuals received a new professional authorizations, while in 2015, 381 individuals. The same time the number of professional liability enquiries before and after the changes in granting authorizations does not indicate that there is the decrease in the quality of services provided. It was concluded that measures put in place have achieved desired result and that current level of qualification requirements is not too</p>	1	

high.		
We are continuing to see an increase in the total number of fitness to practise allegations which we receive for our professions as a whole. In 2010-11, we received 759 allegations. This amounted to 0.35% of all registrants at that time. 315 cases were concluded at a final hearing and panels imposed a striking-off order in 62 cases. In 2011-12, we received 925 allegations. This amounted to 0.42% of all registrants at that time. 287 cases were concluded at final hearing and panels imposed a striking-off order in 46 cases. In 2012-13, we received 1,653 fitness to practise allegations. This amounted to 0.53% of all registrants at that time. 228 cases were concluded at a final hearing and panels imposed a striking-off order in 44 cases. The increase in the total number of fitness to practise allegations across all of our professions over this period illustrates the continued importance of our role in safeguarding the public. Fitness to practise action acts to prevent continuing harm to service users and carers. We also conduct and commission research with the aim of improving our standards and regulatory processes.	1	

**Step 3:** A further analysis was then made in relation to the assessment of regulation in a cumulative light, linking the existence of multiple regulatory restrictions on top of qualification requirements. In this case a binary rating was applied by DG GROW :unrelated, inadequate or missing response (0) / direct response *despite robustness of argument provided* (1) Examples:

Response	score	explanation
No, because we think that the measures indicated in the screening tab are necessary to guarantee the quality of the professional activities.	0	Multiple measures indicated in this instance including 51% shareholding requirements.
No	0	
Yes	1	
Yes (with any form further explanatory)	1	

**Step four:** Finally, these answers were linked to the profession under consideration with the conclusion reached by a Member State as a result of their analysis (maintain, improve or remove the measure) so as to see how founded these conclusions were on analysis or not. **This analysis suggests that regulatory decisions are being taken without first ensuring the appropriate questions are being attended to. The merit of the ensuing decisions will obviously be affected by this fact.**

Overall, in conducting this four step analysis, without judging the *quality* of the responses provided, DG GROW was able to reach conclusions with regard to the **usefulness of the proportionality assessment and from this the likelihood of capturing unintended, negative, unjustified consequences upon the market.**

## 11.5. Annex 5

### Intensity in regulation

Regarding the intensity of particular measures and considering only the basic qualification/education/training related form of regulation aside from additional requirements [such as...], table X below outlines the various forms utilised and describes their level of restrictiveness, with '*licensing*' understood to be the most intensive form. Whilst licensing may only award the professional title to a professional, in another form it may also permit the execution of activities reserved only to those titled professionals. The diversity of these reserves between the Member States is especially problematic for those wishing to provide their services cross border and the Mutual Evaluation therefore requested that Member States interrogate the necessity of each reserve they implement.

Table X EU typology of occupational regulation [check the examples]

		Requirement to demonstrate a minimum degree of competence?	
		No	Yes
Any legal regulation by the government (directly or through an appointed agency)?	No	<p><b>Unregulated</b></p> <p>The occupation may be subject to conventions, whereby employers will typically cite minimum entry criteria, but these are not co-ordinated, nor do they have any legal basis.</p> <p><i>Example: retail assistant, bank clerks, priests (in some member states)</i></p>	<p><b>Non-governmental accreditation schemes</b></p> <p>Practitioners may apply to be accredited as competent by an accrediting body, which is usually a professional body or industry association. May permit the accredited person to use a specific title or acronym but confers no legal protection of title, nor any legal protection of function.</p> <p><i>Example: Accountants, hairdressers (in some member states)</i></p>
	Yes, but confers no rights to practice	<p><b>Empty cell</b></p>	<p><b>Certification schemes</b></p> <p>There is no legal restriction as to who may carry out the tasks covered by the occupation, but practitioners may apply to be certified as competent by the state (or an appointed agent). This certification may sometimes (but not always) confer legal protection of title.</p> <p><i>Example: taxi drivers (in some member states)</i></p>

			<i>states), fitness instructors (in some member states), electrical engineers (in some member states)</i>
	<i>Yes, and confers rights to practice</i>	<p><b>Registration schemes</b></p> <p>Requires registration of personal details. May also make stipulations in areas other than competence (e.g. finance)</p> <p><i>UK example: registration of estate agents</i></p>	<p><b>Licensing</b></p> <p>Only those who can demonstrate the specified level of competence may obtain a licence permitting them to undertake the tasks covered by the regulation, also called “reserves of activities” or “reserved activities”.</p> <p><i>Example: veterinary surgeons, pharmacists, dentists</i></p>

Source: Koumenta, Pagliero 2016

## 11.6. Annex 6

### Article 59

#### *Article 59*

#### **Transparency**

1. Member States shall notify to the Commission a list of existing regulated professions, specifying the activities covered by each profession, and a list of regulated education and training, and training with a special structure, referred to in point (c)(ii) of Article 11, in their territory by 18 January 2016. Any change to those lists shall also be notified to the Commission without undue delay. The Commission shall set up and maintain a publicly available database of regulated professions, including a general description of activities covered by each profession.

2. By 18 January 2016, Member States shall notify to the Commission the list of professions for which a prior check of qualifications is necessary under Article 7(4). Member States shall provide the Commission with a specific justification for the inclusion of each of those professions on that list.

3. Member States shall examine whether requirements under their legal system restricting the access to a profession or its pursuit to the holders of a specific professional qualification, including the use of professional titles and the professional activities allowed under such title, referred to in this Article as 'requirements' are compatible with the following principles:

(a) requirements must be neither directly nor indirectly discriminatory on the basis of nationality or residence;

(b) requirements must be justified by overriding reasons of general interest;

(c) requirements must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective.

4. Paragraph 1 shall also apply to professions regulated in a Member State by an association or organisation within the meaning of Article 3(2) and any requirements for membership of those associations or organisations.

5. By 18 January 2016, Member States shall provide the Commission with information on the requirements they intend to maintain and the reasons for considering that those requirements comply with paragraph 3. Member States shall provide information on the requirements they subsequently introduced, and the reasons for considering that those requirements comply with paragraph 3, within six months of the adoption of the measure.

6. By 18 January 2016, and every two years thereafter, Member States shall also submit a report to the Commission about the requirements which have been removed or made less stringent.

7. The Commission shall forward the reports referred to in paragraph 6 to the other Member States which shall submit their observations within six months. Within the same period of six months, the Commission shall consult interested parties, including the professions concerned.

8. The Commission shall provide a summary report based on the information provided by Member States to the Group of Coordinators established under Commission Decision 2007/172/EC of 19 March 2007 setting up the group of coordinators for the recognition of professional qualifications [\(23\)](#), which may make observations.

9. In light of the observations provided for in paragraphs 7 and 8, the Commission shall, by 18 January 2017, submit its final findings to the European Parliament and the Council, accompanied where appropriate by proposals for further initiatives.

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