Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 46, Article 53(1) and Article 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The freedom to choose an occupation is a fundamental right. The Charter of Fundamental Rights of the European Union ('the Charter') guarantees the freedom to choose an occupation, as well as the freedom to conduct a business. The free movement of workers, the freedom of establishment and the freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). National rules organising access to regulated professions should therefore not constitute an unjustified or disproportionate obstacle to the exercise of those fundamental rights.

(2) In the absence of specific provisions harmonising the requirements on access to a regulated profession or the pursuit thereof laid down in Union law, it is a Member State competence to decide whether and how to regulate a profession within the limits of the principles of non-discrimination and proportionality.

(3) The principle of proportionality is one of the general principles of Union law. It follows from case-law[(3)] that national measures liable to hinder, or to make less attractive, the exercise of fundamental freedoms guaranteed by the TFEU should fulfil four conditions, namely, they should: be applied in a non-discriminatory manner; be justified by public interest objectives; be suitable for securing the attainment of the objective which they pursue; and not go beyond what is necessary in order to attain that objective.

(4) Directive 2005/36/EC of the European Parliament and of the Council[(4)] includes an obligation for Member States to assess the proportionality of their requirements restricting access to, or the pursuit of, regulated professions, and to communicate

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the results of that assessment to the Commission, launching the 'mutual evaluation process'. That process means that Member States had to carry out a screening of all their legislation on all of the professions that were regulated in their territory.

(5) The results of the mutual evaluation process revealed a lack of clarity as regards the criteria to be used by Member States when assessing the proportionality of requirements restricting access to, or the pursuit of, regulated professions, as well as an uneven scrutiny of such requirements at all levels of regulation. To avoid fragmentation of the internal market and to eliminate barriers to the taking-up and pursuit of certain employed or self-employed activities, there should be a common approach at Union level, preventing disproportionate measures from being adopted.

(6) In its Communication of 28 October 2015 entitled 'Upgrading the Single market: more opportunities for people and businesses', the Commission identified the need to adopt an analytical proportionality framework for Member States to use when reviewing existing regulations of professions or when proposing new ones.

(7) This Directive aims to establish rules for proportionality assessments to be conducted by Member States before the introduction of new, or the amendment of existing, professional regulations, in order to ensure the proper functioning of the internal market, while guaranteeing transparency and a high level of consumer protection.

(8) The activities covered by this Directive should concern the regulated professions falling within the scope of Directive 2005/36/EC. This Directive should apply to requirements restricting access to, or the pursuit of, existing regulated professions or new professions that Member States are considering whether to regulate. This Directive should apply in addition to Directive 2005/36/EC and without prejudice to other provisions laid down in a separate Union act concerning access to, or the pursuit of, a given regulated profession.

(9) This Directive is without prejudice to the competence of Member States to define the organisation and the content of their systems of education and professional training, and in particular as regards the possibility for them to delegate to professional organisations the power to organise or supervise professional education and training. Provisions which do not restrict access to, or the pursuit of, regulated professions, including editorial amendments, technical adaptations to the content of training courses or the modernisation of training regulations, should not fall within the scope of this Directive. Where professional education or training consists of activities which are remunerated, the freedom of establishment and the freedom to provide services should be guaranteed.

(10) Where Member States transpose specific requirements concerning the regulation of a given profession established in a separate Union act which does not leave Member States a choice as to the exact way in which they are to be transposed, the assessment of proportionality, as required by specific provisions of this Directive, should not be applied.

(11) Member States should be able to rely on a common regulatory framework based on clearly defined legal concepts concerning the different ways to regulate a profession across the Union. There are several ways to regulate a profession, for instance by reserving access to, or the pursuit of, a particular activity to holders of a professional

qualification. Member States may also regulate one of the modes of pursuit of a profession by laying down conditions for the use of professional titles or by imposing qualification requirements only on self-employed, on salaried professionals, or on the managers or legal representatives of undertakings, especially where the activity is pursued by a legal person in the form of a professional company.

(12) Before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions, Member States should assess the proportionality of such provisions. The extent of the assessment should be proportionate to the nature, the content and the impact of the provision being introduced.

(13) The burden of proof of justification and proportionality lies with the Member States. The reasons for regulating invoked by a Member State by way of justification should thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that Member State and by specific evidence substantiating its arguments. Although a Member State does not necessarily have to produce a specific study or a specific form of evidence or materials establishing the proportionality of such a measure prior to its adoption, it should carry out an objective analysis, taking into account the specific circumstances of that Member State, that demonstrates that there are genuine risks for the achievement of public interest objectives.

(14) Member States should carry out proportionality assessments in an objective and independent manner, including where a profession is regulated indirectly by giving a particular professional body the power to regulate. Those assessments could include an opinion obtained from an independent body, including existing bodies that are part of the national legislative process, entrusted by the Member States concerned with the task of providing such opinion. This is particularly important in cases where the assessment is made by local authorities, regulatory bodies or professional organisations, whose greater proximity to local conditions and specialised knowledge could in certain cases make them better placed to identify the best way of meeting the public interest objectives, but whose policy choices could provide benefits to established operators at the expense of new market entrants.

(15) It is appropriate to monitor the proportionality of new or amended provisions restricting access to, or the pursuit of, regulated professions after their adoption. A review of the proportionality of a restrictive national measure in the area of regulated professions should be based not only on the objective of that national measure at the time of its adoption, but also on its effects, assessed after its adoption. The assessment of the proportionality of the national measure should be based on developments found to have occurred in the area of the regulated profession since the measure was adopted.

(16) As confirmed by settled case-law, any unjustified restriction resulting from national law restricting the freedom of establishment or the freedom to provide services is prohibited, including any discrimination on grounds of nationality or residence.

(17) Where the taking-up and the pursuit of employed or self-employed activities are conditional on complying with certain requirements relating to specific professional qualifications, laid down directly or indirectly by the Member States, it is necessary

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to ensure that such requirements are justified by public interest objectives, such as those within the meaning of the TFEU, namely public policy, public security and public health, or by overriding reasons in the public interest, recognised as such in the case-law of the Court of Justice. It is also necessary to clarify that the following are among the overriding reasons in the public interest, recognised by the Court of Justice: preserving the financial equilibrium of the social security system; the protection of consumers, of recipients of services, including by guaranteeing the quality of craft work, and of workers; the safeguarding of the proper administration of justice; ensuring the fairness of trade transactions; the combating of fraud and the prevention of tax evasion and avoidance, and the safeguarding of the effectiveness of fiscal supervision; transport safety; the protection of the environment and the urban environment; the health of animals; intellectual property; the safeguarding and conservation of the national historic and artistic heritage; social policy objectives; and cultural policy objectives. According to settled case-law, purely economic reasons, namely promoting the national economy to the detriment of the fundamental freedoms, as well as purely administrative reasons, such as carrying out controls or gathering statistics, cannot constitute an overriding reason in the public interest.

(18) It is for the Member States to determine the level of protection which they wish to afford to the public interest objectives and the appropriate level of regulation, within the limits of proportionality. The fact that one Member State imposes less strict rules than another Member State does not mean that the latter Member State's rules are disproportionate and therefore incompatible with Union law.

(19) With regard to the protection of public health, according to Article 168(1) TFEU, a high level of human health protection is to be ensured in the definition and implementation of all Union policies and activities. This Directive is fully in line with that objective.

(20) In order to ensure that the provisions they introduce, and that amendments they make to existing provisions, are proportionate, Member States should consider the criteria for assessing the proportionality and the additional criteria which are relevant for the regulated profession being analysed. Where a Member State intends to regulate a profession or to amend existing rules, account should be taken of the nature of the risks related to the public interest objectives pursued, in particular the risks to service recipients, including consumers, to professionals or to third parties. It should also be borne in mind that, in the field of professional services, there is usually an asymmetry of information between consumers and professionals, given that professionals display a high level of technical knowledge which consumers may not have.

(21) Requirements linked to professional qualifications should be considered to be necessary only where existing measures, such as product safety law or consumer protection law, cannot be regarded as being suitable or genuinely effective to achieve the aim pursued.

(22) To meet the requirement of proportionality, a measure should be suitable for securing the attainment of the objective pursued. A measure should be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner, for instance where similar risks related to certain activities are addressed in a comparable way

and where any exceptions to the restrictions involved are applied in line with the stated objective. Furthermore, the national measure should effectively contribute to achieving the objective pursued and therefore, where it has no effect on the ground for justification, it should not be considered to be suitable.

(23) The overall impact of the measure on the free movement of persons and services within the Union, on consumer choice and on the quality of the service provided should be duly taken into account by the Member States. On that basis, Member States should ascertain, in particular, whether the extent of the restriction to access to, or the pursuit of, regulated professions is proportionate to the importance of the objectives pursued and the expected gains.

(24) Member States should carry out a comparison between the national measure at issue and alternative, less restrictive means that would result in the same objective being attained but would impose fewer restrictions. Where the measures are justified by consumer protection only and where the risks identified are limited to the relationship between the professional and the consumer and therefore do not negatively affect third parties, Member States should assess whether their objective could be attained by means that are less restrictive than reserving activities to professionals. For instance, where consumers can reasonably make a choice between using the services of qualified professionals or not, less restrictive means, such as protection of the professional title or enrolment on a professional register, should be used. Regulation by way of reserved activities and protected professional title should be considered where the measures aim to prevent a risk of serious harm to public interest objectives, such as public health.

(25) Where relevant in view of the nature and the content of the measure being analysed, Member States should also take the following elements into account: the connection between the scope of professional activities covered by a profession and the professional qualification required; the complexity of the tasks in particular as regards the level, the nature and the duration of the training or experience required; the existence of different routes to obtain the professional qualification; whether the activities reserved to certain professionals can be shared with other professionals; and the degree of autonomy in exercising a regulated profession in particular where the activities relating to a regulated profession are pursued under the control and responsibility of a duly qualified professional.

(26) This Directive takes account of scientific and technological progress, and contributes to the proper functioning of the internal market, including in the digital environment. In view of the speed of technological change and scientific developments, updates in access requirements could be of particular importance for a number of professions, especially for professional services provided by electronic means. Where a Member State regulates a profession, account should be taken of the fact that scientific and technological developments could reduce or increase the asymmetry of information between professionals and consumers. Where the scientific and technological developments carry a high risk to the public interest objectives, it is for the Member States, where necessary, to encourage professionals to keep up with those developments.