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### Professional Qualifications and Skills

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## GROUP OF COORDINATORS FOR THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS

### SUPPLEMENT TO TECHNICAL GUIDANCE ON THE NEW SCREENING FORM: HOW TO FILL IN THE PART ON PROPORTIONALITY IN THE REGULATED PROFESSIONS DATABASE

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## 1. Introduction

The present document was prepared in order to initiate the discussion within the Group of Coordinators on possible ways forward in the exchange of best practices amongst Member States on the information about the proportionality assessments that are to be provided via the Screening Form (Section “Details on regulatory change and proportionality”). It therefore aims to supplement the current technical guidance on the use of the New Screening Form.<sup>1</sup>

*Disclaimer: the explanations and examples provided herein do not constitute approval or disapproval of proportionality assessments or of specific regulatory approaches of professions. This document aims to assist Member States, by way of exchange of practices, in understanding the Screening Form questions and to help in preparing proportionality analyses. If found to be useful, this document could be subject to continuous updates/revisions, depending on the needs expressed by the expert group and the outcomes of any future discussions.*

## 2. General remarks

According to Article 59(3) of the revised Professional Qualifications Directive<sup>2</sup> (PQD), Member States have to examine whether the requirements that restrict access to or the pursuit of a regulated profession comply with the principles of proportionality, and in particular:

- whether requirements are neither directly nor indirectly **discriminatory** on the basis of nationality or residence;
- whether requirements are **justified** by the overriding reasons of general interest; and
- whether they are **suitable** for securing the attainment of the pursued objectives and whether they do not go beyond what is **necessary** in order to attain these objectives.

Pursuant to Article 59(5) Member States have an ongoing obligation to provide information to the Commission on the new requirements they have introduced after 18.1.2016 (or amendments made to pre-existing requirements) together with the reasons why they consider these requirements to be proportionate, within 6 months of the adoption of the measure. Since April 2018, Member States ensure their compliance with this obligation by notification of regulatory changes and information about proportionality assessments via the Screening Form of the RegProf Database.

Owing to the heterogeneity of the professions and the specificities of their relevant markets, no general formula can be applied to these proportionality analyses. In each individual case, it is necessary to assess carefully whether a given restriction of access or conduct would lead

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<sup>1</sup> A link to the technical guidance is available in the Screening tab of the RegProf database.

<sup>2</sup> Directive 2005/36/EC on the recognition of professional qualifications (OJ L 255 30.9.2005, p. 22).

to a restriction of the fundamental freedom of establishment, free service provision and/or free movement of workers. Generally, the greater the degree of restrictiveness, the greater should be the importance of satisfying the public interest(s) pursued and the more thorough and substantiated a proportionality assessment should be.

The proportionality reasoning reported to the Commission via the RegProf Database does not need to consist of a fully-fledged proportionality study. However, the summary of such analysis in the form of replies to pre-agreed questions in the Screening Form should be clear, targeted and comprehensive enough to make it possible to appraise compliance with the principle of proportionality for that specific measure. The scope of the assessment is to be proportionate to the nature, content and impact of the provision (for instance, the creation of a new regulated profession would require a more rigorous assessment compared to a mere change of the registration body).

Regulation of professions may concern one or more of the following requirements (the following list follows the drop-down menu of the Screening Form):

**Market entry requirements**

<b>Regulatory approach</b>	Protected title – professional title is reserved by the state to the holders of specific professional qualifications.
	Reserved activities – some professional activities are reserved by the state to the holders of specific professional qualifications.
	Reserved activities and protected title – both a professional title and some professional activities are reserved by the state to the holders of specific professional qualifications.

The professional activities reserved to the holders of required qualifications can be **exclusive** (monopoly) or **shared** with other regulated professions (and therefore less restrictive).

<b>Competency requirements</b>	Qualification requirements (mandatory minimum education, examinations and training, professional traineeships, professional experience) to get access to the professional <b>activities reserved</b> to the holders of required qualifications or to use a professional title).
	Continuous professional development – when it is mandatory for the pursuit of a regulated profession.
	Language requirements – requirements for the knowledge of language(s) necessary for practising a regulated profession.

*NOTE: Both regulatory approach requirements and qualification requirements will always be present in case of a regulated profession within the meaning of PQD. This follows from the definition itself of a regulated profession in Article 3 of PQD. Please make sure that both these requirements are always indicated for the regulated professions you enter into the database together with any other requirements that apply (**please enter information/updates for ALL the relevant requirements prior to submitting the updated Screening Form to the Commission**)<sup>3</sup>.*

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**Other  
entry  
requirements**

Compulsory registration or membership with a chamber, professional association or a state body.

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Quantitative restrictions:

- Limitations to the number of licenses granted.
  - Fixing a minimum or maximum number of employees, managers or representatives holding particular professional qualifications.
  - Territorial restrictions (requirements that restrict a professional's right to exercise the profession on the entire national territory. This may be the case where the licences are granted with specific geographical boundaries).
  - Age restrictions regarding access to exercise a profession.
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Other authorisation requirements:

- Authorisation procedures or requirements for accessing a profession (“other” in the sense going beyond other notified requirements, e.g., check of criminal records, financial standing, compliance with business premises requirements, etc.).
  - Authorisations for the exercise of specific activities within the scope of the profession (e.g., a requirement for a specific authorisation to work on electrical infrastructures part of the national grid for an engineer).
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<sup>3</sup> To report all relevant requirements via the Screening Form, please use the function “Add New Requirements” for each requirement that you introduce as many times as it is necessary to complete the form. To edit the requirements already in the form, please use the function “Edit”. These steps should be completed **prior** to activating the function “Submit to Commission”.

## Requirements specific to temporary or occasional provision of services (Art.7 PQD)

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### Prior declaration & documents

Mandatory prior declaration might be required when the service provider first moves into the country. It can be subject to annual renewal, require submission of specific information and be subject to a fee.

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Accompanying documents (documents required to be provided with the declaration, including requirements for translations and/or certified copies).

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## Exercise requirements

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### Requirements on specific corporate forms/incompatibilities

Corporate form requirements: specific legal form requirement(s), to the extent they are directly linked to the exercise of the regulated profession (can the professionals organise their practice under any corporate form or are there restrictions on the type of entity?)

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Restrictions related to shareholding and/or voting rights: specific requirement(s) relating to shareholding and/or voting rights in a company, to the extent they are directly linked to the exercise of the regulated profession (e.g., an obligation to have a minimum percentage of shares or votes to be held by professionals with specific qualifications)

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Prohibitions on joint exercise of professions: restriction(s) on the exercise of a regulated profession jointly or in partnership with other types of professions or activities

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Incompatibility rules: this concerns situations where the professional himself may not exercise certain activities (e.g., tourist guide cannot be a travel agent at the same time)

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<b>Professional indemnity insurance requirements</b>	Mandatory insurance cover or other means of personal or collective protection with regard to professional liability.
<b>Tariff requirements</b>	Requirements that define level of the fees or prices charged by the professional to the service recipient.
<b>Restrictions on advertising</b>	Restrictions on advertising by professionals in one or more given media, as regards the content and method of commercial communication.

The following categories of requirements **do not** necessitate a proportionality analysis under the Screening Form (so-called ‘exceptions’):

- 1) **Requirements laid down in specific EU legislation leaving no discretion to Member States on how to implement them** – Member States should specify which EU legislation lays down the requirements and explain why it does not leave any discretion as to how to implement it.
- 2) **Requirements having no restrictive effect (purely editorial and/or technical changes)** – Member States should clearly explain the contents and nature of such requirements.

Additionally, where specific requirements were notified under **the Services Directive 2006/123/EC** and where the assessment of compliance with the principle of proportionality has already been carried out as required under the PQD, Member States may choose to indicate in the Screening Form the relevant IMI reference of the notification under the Services Directive. [In addition, pending technical linkages between the two IMI modules, MSs are also requested to attach a copy of the assessment notified under the Services Directive].

*NOTE: Any use of such exceptional circumstances must be adequately justified in the respective fields of the Screening Form (!)*

### **3. Non-discrimination**

As a first step in the analysis of newly introduced or amended requirements restricting regulated professions, Member States should assess if the notified measure ensures that those requirements are neither directly nor indirectly discriminatory on the basis of nationality or residence. Discrimination (direct or indirect) is found where two groups comparable in relevant ways are treated differently, or where not-comparable groups are treated the same way. Apart from overt discrimination by reason of nationality, there may be situations of covert [indirect] discrimination involving cases where the measure in

question is intrinsically liable to affect migrant professionals more than nationals (e.g., residence requirement would affect essentially migrant professionals, as this condition can be more easily satisfied by nationals than by non-nationals).<sup>4</sup>

Where the requirement is not discriminatory, Member States shall confirm so in the Screening Form.

#### 4. Public interest objectives

For any proportionality analysis, first the public interest objectives will need to be identified.

Member States may consider the following: public policy, public security or public health, preserving the financial equilibrium of the social security system; the protection of consumers, of recipients of services 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. While this list is non-exhaustive, it reflects the current case-law of CJEU in the area of the freedom of establishment, free movement of workers and the freedom to provide services, which may evolve over time.

It should be noted that the terms “public policy”, “public security” and “public health” are concepts of European Union law that stem directly from Article 52 TFUE. These concepts have been consistently interpreted by the ECJ in a narrow sense, meaning that there must be *a genuine and serious threat to a fundamental interest of society* and it is for the Member State invoking these public interest objectives to demonstrate the risks involved.<sup>5</sup>

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#### **Example**

Hairdresser (public health): Vocational training on disinfection and health and hygiene regulations **protect customers** ... Moreover, knowledge about first aid is mandatory because of the use of tools such as knives or scissors.

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In the *example above*, while the measure is said to protect public health, the arguments brought forward are essentially linked to the prevention of damages to the recipients of hairdresser services, so to consumer protection.

It should also be pointed out that according to settled CJEU case-law, purely economic reasons, namely promoting the national economy to the detriment of the fundamental

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<sup>4</sup> Case C-237/94 *O’Flynn v Adjudication Officer* [1996] ECR I-2617.

<sup>5</sup> See *Judgment of 14 December 2006 in Case C-257/05, paragraph 25*.

freedoms, as well as purely administrative reasons, such as carrying out controls or gathering statistics, cannot constitute an overriding reason in the public interest.

## 5. Suitability (the “fit” between the measure and its objective)

To meet the requirement of proportionality, a measure should be suitable and appropriate for securing the attainment of the objective pursued.

The following issues would need to be considered:

### ***Whom the measure aims to protect?***

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#### **Examples**

***Service recipients: consumers, patients, etc.? Professionals?***

***Third parties (is there an impact of professional activities beyond those who are paying for such a service?)?***

Clinical Dental technician: In order to secure protection of the **patients** it is necessary to make sure that ...

Crane operator: health and safety of the **worker** and **others** (fellow workers) that are in his proximity.

Dietician: making the exercise of the profession of dietician subject to examination of the required skills gives the **consumer** and the user of a service (**patients**) and the **employer** (e.g., hospitals) the necessary certainty about these skills.

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In the last *example* the regulation of dieticians is aimed at, inter alia, protecting employers in the same way as it protects consumers/recipients of services. However, no consideration is taken of the fact that employers (hospitals) are in a very different situation compared to consumers. Only the latter do not have the high level of technical knowledge needed to assess the quality of the service and the service provider. It is therefore questionable whether the measure in question is at all aimed at protecting the needs of employers. Should there be such a need to protect employers, it should be explained why employers are not in a position to assess the skills of their employees.

### ***What are the risks the measure aims to minimise, or the benefits it aims to maximise, for the pursuit of the public interest objectives? How does the measure operate to achieve those objectives?***

The national measure should effectively contribute to achieving the objective pursued. The Member States should (1) clearly identify the specific risks or benefits the measure aims to minimise or maximise, (2) explain in what manner and to what extent the concrete measure achieves the specific goal(s) pursued. This is one of the most important parts of the

assessment and it requires a thorough analysis based on facts that are able to show that there are indeed relevant risks and that the measure would be able to mitigate these risks. General statements about the measure being beneficial for service quality or consumer protection are not sufficient but need to be corroborated by a meaningful analysis.

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### **Examples**

Tax adviser (consumer protection): The recipients of taxation services are business organizations, central government agencies, civil organizations. The work of tax advisors ensures transparent and correct taxation processes and practices inside the companies. The main risks of the service lie in incorrect or false taxation processes, statements, analysis, etc., which could indicate wrong economic decisions, resulting significant damages to the organizations and to the central state budget. Tax advisors are to fully satisfy the requirements as to professional competence, for instance, bearing adequate professional knowledge or taking part on compulsory education about the new and modified regulations. Well-educated tax advisors with up to date information can minimize the risks and guarantee the correct taxation services.

Architect (protection of clients): The regulation seeks to minimise the risk associated with provision of services by an unqualified person... It also seeks to maximise the quality of the services provided by architects and guarantee a standard of competence whilst ensuring protection of the rights and interests of the clients.

- The academic qualification required for practice of the profession serves to guarantee the knowledge and skills needed for said practice and ensure compliance with the standards in terms of quality and safety that a client can expect.

- Protection of the professional title guarantees to the public that the service provider satisfies the requirements for enrolment in the Association of Architects, thus fostering a relationship of trust between the client and the qualified professional.

- Ethical standards ensure working relationships between professionals and between them and society.

Physiotherapist (protection of public health): The education and training requirements for physiotherapists were introduced with the aim to protect, promote and maintain the health and safety of the public.

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In the example on tax advisers, an effort is made to identify the different types of risks involved, indicating that not only direct business clients but also the state budget could be affected. However, while a long explanation is given, the actual link between the specific measure (i.e., education requirement and reserved activities) and the risks (i.e., incorrect/false taxation processes leading to wrong economic decisions, damage to organisations, state budget) is not genuinely analysed. Indeed, it is assumed that reserving the activity of tax advice to “well-educated” tax advisors will minimise that risk. However, other dimensions of service quality, such as the availability and accessibility of the service (e.g., where the increase in educational requirements results in a fall of the supply/less of practitioners, service quality may also suffer) or price/accessibility (some consumers might prefer “lower” quality rather than very expensive high-tech tax advise). Likewise, it is not

explained how the specific measure, i.e., the specific reserved tasks and educational requirements, is tailored to the specific risk. For instance, whether the tasks performed by tax advisors in these different types of organisations is always of the same complexity and thus justifies reserving the activity of tax advice solely to highly educated professionals. Or whether it has been considered that, for instance, civil organizations typically have less complex tax statements and thus could benefit more from being able to hire less expensive professionals to prepare these (lower benefit from measure).

In the example on architects, there is no explanation about the risks that would result from the provision of services by unqualified persons. Similarly, it is neither explained what is meant by “the quality of the service” nor how the specific competency requirements ensure that quality. For instance, if the regulatory approach is limited to title protection (no exclusive reserved activities), one might argue that the skills requirements combined with the title protection allow to foster trust between the client and professionals, while leaving access to the same activities open to professionals without such protected title that could serve consumers with different preferences (i.e., less risk of reduced supply or unwanted price increase).

In the last example, the correlation between the imposed educational requirements for physiotherapists and the desired outcome (public health and safety) is not explained at all. In addition, the protection of public health is confused with the protection of the health of service recipients.

***Whether and how you assessed whether the objective is being pursued in a consistent and systematic manner?***

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 (without contradictions or incoherencies), for instance where similar risks related to certain activities are addressed in a comparable way.

For instance, in the DocMorris case<sup>6</sup> the Court of Justice had to examine if a national rule that precludes non-pharmacists from owning and operating a pharmacy constituted a proportionate restriction of the freedom of establishment. The Court pointed to inconsistencies in the way this rule was applied in relation to three types of pharmacies: community pharmacies, inherited pharmacies and hospital pharmacies.

The need to show consistency does not necessarily limit itself to activities within the same economic sector (e.g., where relevant, a comparison could also be made in relation to other pertinent activities or professions, such as “crafts”, “liberal professions”, public function, etc.).

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<sup>6</sup> Joined Cases C-171/07 and C 172/07, §42, DocMorris NV.

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## Examples

Health care services (registration with a state body): [MS] has no professional register other than that for **health care professions**. At present there are plans for adding **social welfare professionals** to the same register that contains the details of health care professionals. The register of professionals is considered to function reliably and systematically. The register makes it easier for [authority] to conduct its monitoring exercises and therefore reduces risks to patient safety and public health. It also boosts the confidence that the public has in the professionals themselves and the service system.

Real estate agent (multiple requirements): The **real estate agent's** role as intermediary can be compared with that of the **insurance intermediary**. An insurance intermediary must also be registered, covered by a liability insurance and have adequate training.

Real estate agent (reduced/removed requirements) Professional qualifications resulted in an unwanted division of the market between **real estate agents** themselves and, for example, **appraisers**. Abolishing the title of real estate agent could guarantee more equal chances on the market.

Personal services: hairdressers, beauticians, pedicurists, massagists, opticians, etc. Technical construction activities: electrician, drainage, pipe fitter...

Physiotherapist: Yes. Comparable professions are met with the same requirements.

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In the first example above, a comparison is made between healthcare and social welfare professions. However, there is no explanation on how these registration systems are comparable in terms of similar risks being addressed with regard to the two groups of professions. The statement that the register is considered to function reliably and systematically is not substantiated.

In the second example on real estate agents, the Member State could explain in more detail why the risks involved in both professions are comparable and thus warrant the same type of regulatory response.

In the examples for physiotherapists, the Member State did not at all assess or explain whether the objective is being pursued in a consistent and systematic manner.

***Have you taken into account any scientific and technological developments, which might effectively reduce the asymmetry of information between professionals and consumers?***

Markets for professional services are often characterized by an asymmetry of information between consumers and professionals as to the quality of the service. Given the complex nature of some professional services that require a high level of technical knowledge on the

side of the professional, consumers might find it difficult to judge the quality of the services provided to them.<sup>7</sup> Hence, consumers will need to be able to trust the professional. To instil such trust, regulators have tried to indirectly influence quality of the professional services by relying upon different types of access and conduct requirements.

As explained by AG Jacobs in *Pavlov and Others*<sup>8</sup> “[s]uch an asymmetry between seller and buyer arises *where the buyer cannot fully assess the quality of the product he receives*. In the professions, the problem is particularly acute because of the nature of their highly technical services. The consumer cannot assess the quality of those services prior to purchase by inspection (as he could for example when buying cheese), but only after consumption. Even worse, he might never fully understand whether or not the professional (e.g. doctor, architect, lawyer) provided a high quality service... The usual methods of overcoming or mitigating the negative effects of asymmetric information, or in other words of preventing a ‘race to the bottom’, can all be found in the professions. Access examinations are intended to guarantee a high initial standard of skills. Liability rules, the consequences of a good or a bad reputation, and certification schemes are incentives to exploit those skills to the full. Advertising is seen by some as a means of overcoming or mitigating asymmetry, whilst others claim that advertising exacerbates the problems.”

In addition to the quality of the actual service provided, consumers may face difficulties in assessing the level of qualification of service providers that might be essential for the delivery of services of a high quality. This asymmetry of information may prevent consumers from making informed service provider choices. To remedy the risk of potential market failures, measures like title protection clarifying the technical knowledge and competences of professionals might provide consumers with the information and reassurances they need.

However, scientific and technological developments might help to reduce this information asymmetry. For instance, the rise of the internet has greatly enhanced the amount and sources of information available to every citizen. Hence, objective quality assessments by experts or by more experienced users have become more easily available. Likewise, the possibility to exchange experiences with a large community of consumers might create more informed consumers.

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<sup>7</sup> See for instance, Case C- 94/04 *Cipolla*, where the Court acknowledged that “in the field of lawyers’ services, there is usually an asymmetry of information between ‘client-consumers’ and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them.”

<sup>8</sup> Case C-180/98 - *Pavlov and Others*, Opinion of AG Jacobs, [2000] ECR Page I-06451, para. 86.

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**Examples**

Lawyer (reserved activities): [...] other alternatives for compulsory representation by lawyers in proceedings were also considered. Although it is possible, in principle, for legal experts, who are not lawyers, to perform work that is currently performed by lawyers, for example on the basis of a system of licences and accreditations, the evaluation committee does not believe that the advantages outweigh the disadvantages. Partly because of the information asymmetry between the client and legal service provider, the diversity of different service providers would not make it simpler to choose a good legal service provider. Enhancing and maintaining the quality of legal services would also become very complex. The threshold above which legal representation in civil proceedings is compulsory was recently raised to €25,000. As a result, there is actually a limited procedural monopoly for lawyers. [Sources redacted].

Real estate agent (reduced/removed requirement): Several aspects were taken into account when considering liberalization of the real estate agent profession. A protected title has little to say about actual quality. The check that measured the quality of the agent was only done once, when the agent applied for the title. Certification, by the market, on the other hand, contains a periodic check whereby continued quality can be guaranteed. Also, more requirements can be asked with a certification scheme. Because of the new features of the real estate market, mainly the decline of information asymmetry between agent and customer, the market became more capable to create quality (expertise) norms. The real estate market was already very organized by associations, allowing this market to apply self-regulation.

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In addition, digitalisation as well as scientific developments more generally have the capacity to reduce the complexity of some of the tasks traditionally performed by professionals, thereby potentially reducing the need for certain qualification requirements.

***Have you assessed the impact of the measure (for instance, on the degree of competition in the market, the quality of services, consumer choice, as well the impact on the free movement of persons and services within the Union)?***

The measure should take into account the ultimate impact of the regulation on the users of the services. While the protection of consumers and ensuring quality of professional activities could in theory be used to justify many measures (always provided the analysis is based on facts and has a sufficient depth), other considerations, such as the impact of regulation on prices, competitiveness, consumer choice or the free movement could counterbalance this.

For instance, in case of regulation by way of reserved activities subject to the possession of specific qualification requirements, Member States cannot limit their analysis to a presumption that this will automatically improve consumer protection and/or the quality of services. Also, qualification requirements while leading to the acquisition of specific skills, as

such do not necessarily ensure a high level of quality of the process or service provision or even the output. Other aspects should also be taken into account, such as whether such new regulation might reduce the number of service providers active in the market, and if such a reduction in the number of service providers could negatively affect the quality of services, including via a reduced availability of the service to less well-off consumers.

Finally, one should take account of the impact of regulation on free movement, both from the perspective of outgoing and incoming professionals/services. Member States should assess whether and what impact the measure in question would have on cross-border EU mobility.

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### **Examples**

Pharmacists (tariff requirements): In case C-148/15 *Deutsche Parkinson*, by looking at the aspect of competition, the Court found that setting of fixed prices for prescription-based (Rx) pharmaceuticals had a greater impact on pharmacies established in other Member States (foreign mail order pharmacies) than on German pharmacies. The Court could not see how this measure could be suitable for the attainment of better geographical distribution of traditional pharmacies in Germany.

Assistant nurse (qualification requirements and reserved activities): The newly created nursing profession has access to a clearly defined range of professional activities, which can be objectively separated from those of a general care nurse. Furthermore the professional titles used by these professionals are clearly distinct. For these reasons, national provisions creating an assistant nurse, qualified below the minimum requirements of Directive 2005/36/EC, would not make the market of [MS] less attractive to the incoming professionals meeting the minimum harmonised standards, nor is it likely to inhibit outbound mobility of general care nurses from [MS].

Physiotherapist (multiple requirements): We have not assessed the economic impacts of the measure, but we strongly believe there will be a great benefit for the health system economy.

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In the example for nurse assistants, the Member State has analysed possible impacts of the newly introduced nursing profession on the activities of general care nurses benefiting from the automatic recognition based on harmonised minimum requirements under PQD. However, the impacts of the measure on outbound mobility of the nursing assistants has not been analysed.

In the example for physiotherapists, the Member State did not at all assess wider impacts of the measure.

## 6. Suitability: questions specific to reserved activities

***Please explain whether and how you have assessed the connection between the scope of activities reserved to the profession and the professional qualification required? Have you assessed the connection between the complexity of the tasks and the professional qualification required (with regard to the level, nature and duration of training required)? Have you assessed the relevance of the degree of autonomy in the exercise of the profession as well as the impact of organisational and supervisory arrangements (in particular, where activities are pursued under supervision/responsibility of a duly qualified professional)?<sup>9</sup>***

The broader the scope of reserved activities, the larger the exclusive right to provide these services.

The examination of reserved activities should consider the level of the required qualification as compared to the complexity of the tasks reserved to the profession. The less complex these tasks are the less there is a justification for reserving these activities. The autonomy and level of responsibility in performing those tasks should also be taken into account (the less responsibility the professional has when performing those tasks, the less there is justification for reserving activities).

In some cases, narrowing the scope of reserved activities by sharing some activities with other professions might still suffice to achieve the desired public interest objective. If, for instance, professionals from abroad request partial access to some but not all of the reserved activities, this might be an indication of the need to examine whether the existing regulation is still proportionate.

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<sup>9</sup> See also, case C-76/90 Säger, §18, and case C-79/01, Payroll Data, §34:

*"In that respect, it is appropriate to point out that it is for the national court to establish the nature of the activities of the DPCs [data processing centers]. If it concludes that the services of preparing and printing pay slips offered by Payroll involve essentially the execution of instructions and do not require any special professional qualities, the disputed provision would not seem apt to protect workers' rights".*

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<p><b>Examples</b></p> <p><i>establish the link between the specific qualification required</i></p> <p><b>AND</b></p> <p><i>the reserved activities, their complexity, and autonomy / level of responsibility</i></p>	<p><u>Clinical dental technicians</u> are the members of the dental health care team specifically trained and educated in the skills and knowledge necessary to provide [dental health] services to the general public. It implies that the dental technician directly works in the oral cavity of the patient. A qualified clinical dental technician is specifically educated and trained for this purpose; he is equipped with a solid technical training as a technician, supplemented with a (usually post-technician) specific training in sciences, clinical skills and interpersonal skills. A dental technician does not give injections, does not use X-rays and does not cut [...], [but] works with appliances or constructed devices only. Furthermore, dental technicians are entitled to work independently (under full responsibility) with the patients, in particular for [activities] that justify a need for minimum qualifications. These activities are clearly distinct from those of a university-trained [dental practitioner], who performs the full range of services related to [dental] health care.</p> <p>In view of clearly defined activities limited to [...] and the right to carry out [...] activities autonomously, vocational education of [n] years duration is considered appropriate to ensure the adequate knowledge and skills.</p> <p><u>Health profession:</u> In [the] health sector, the professions that are regulated require the demonstration/mobilization of a high level [of] skills, under penalty if [the] professionals apply wrong techniques in patients with damage/injury to the patient's health.</p>
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In the last *example*, the Member State did not at all assess the connection between activities reserved and qualifications required.

***Please also explain whether and how you have assessed the possibility of sharing the reserved activities with other professions.***

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<p><b>Examples</b></p>	<p>Case C-451/03 Servizi Ausiliari Dottori Commercialisti, §§39-43:</p> <p>Some of the <u>services reserved</u> to CAF [<u>tax advice centers</u>], such as delivery of a copy of the tax declaration and of the tax payment schedule, filing the tax declarations with the tax authorities and informing employers responsible for the collection of tax of the effect of the tax declaration, are essentially simple and do not require any specific professional qualifications.</p> <p>The Court found that it is obvious that the nature of those services could not justify their provision being limited solely to holders of a particular professional qualification. Such activities should therefore be open to other professionals.</p> <p><u>Real estate agent:</u> all activities exclusively reserved.</p>
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In the last *example*, the Member State did not at all assess the possibility of sharing activities with other professions.

## 7. Necessity

***Please explain whether and how you assessed whether existing rules of specific or general nature (e.g., product safety legislation, consumer protection laws, penalties/criminal sanctions in case of illegal exercise of professional activities) are insufficient to protect the public interest objective pursued.***

Requirements should be considered 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. Member States are invited to look at the existing safeguards offered through other types of ex-ante or ex-post regulation applicable to the services provided by each profession e.g. approval procedures, compliance with technical and safety standards, or inspection mechanisms.

For instance, the following example shows that service standards can be as effective as professional regulation: “Currently, the activities of hair and beauty salons are governed by the Hygiene Standard “Health and Safety Regulations for Beauty Services”, which was approved by the Minister. The mentioned Hygiene Standard gives the definition of the services (of decorative cosmetics, hair care, etc.) and sets out the requirements for the premises, tools, equipment and other inventory as well as for the provision of services. The said Hygiene Standard, however, is silent on the qualifications of the service providers as well as the limits to their competencies. [...] In 2013, the associations of beauty professionals were holding meetings with the educational institutions, who provide training for the staff in the beauty services sector, as well as the state authorities [...]. It has been concluded that new Standards for Beauty Professionals and amendments of the current Hygiene Standard are necessary in order to clearly define the limits to the competencies of the said professionals. The said national standards are in the process of development thanks to the funding from the EU Structural Funds.”

***Have you considered the possibility of using less restrictive means to achieve these objectives?***

Member States should carry out a comparison between the measure at issue and alternative, less restrictive means that would result in the same objective being attained but would impose fewer restrictions.

Examples of alternative means to regulation:

- ***Voluntary codes of conduct***, i.e. creation by professional organisations (chambers, orders, etc.) of voluntary rules and standards without legally binding nature. This is of particular relevance when assessing whether there is a need to newly create a

professions. While the specialised knowledge of professional organisations can in certain cases make them better placed to identify the best way of meeting the public interest objectives, a model of compulsory membership of professional organisations with delegated state powers to define and enforce professional rules may also carry the risk of resulting in biased regulation or might be conducive to anti-competitive and rent seeking practices.

- ***Voluntary certification schemes:*** voluntary certification systems are often used by professions that are not regulated by law. Their main objectives are to demonstrate professional competence, guarantee quality of services and inform consumers, in the absence of regulation. Article 26 of the Services Directive promotes the development of certification systems and quality labels to enable assessment of the competence of service providers and to ensure high quality of service. Some certification schemes are developed by regulatory bodies appointed by state authorities. These practices aim to improve the transparency of professional activities for the consumers and help them choose between different service providers. However, they may create practical obstacles to the access of professional activities. They could, for example, favour the development of dominant professional associations, leading to the isolation of new entrants from other countries: although access to the professional activities would be unrestricted by law, certification would become a necessity on the market; at the same time, in the absence of state regulation, the system of recognition provided for in Directive 2005/36/EC would not apply.
- ***Regulated education and training:*** training programmes, including apprenticeship periods, can be developed, under the control of the State, to prepare individuals to carry out specific professions' activities, which are non-regulated. The qualifications delivered act as quality assurance for employers and consumers when the access to the profession as such is not regulated and when there is no reserve of activities.
- ***Protection of the professional title (without reserved activities):*** In this case, a specific qualification is required to use a professional title, but the activity associated with the profession is not reserved to the holders of this title: anybody can exercise the activities, as long as they do not use the title. A protected professional title is a signal for consumers and employers that the holder meets the particular qualifications requirements, whilst leaving them free to hire professionals who do not hold the title.
- ***Regulation for special modes of pursuit*** of the profession (e.g., only for managers, for supervisors/responsible persons, shareholders, salaried staff, self-employed, for activities subject to reimbursement from social/public funds, for public/private sector, other). For instance, regulating a profession which is mainly exercised by self-employed professionals could perhaps be considered as proportionate. The situation is different if the profession is mainly exercised by professionals employed in private companies or public entities where employers have a role to play in checking the

competence of newly recruited staff and are responsible in the case of accidents or complaints.<sup>10</sup>

- **System of ex post controls** (e.g., processes, standards, safety controls, etc.).
- **Liability rules** which ensure that a provider is liable for faulty services and damages caused. Such rules depending on how they are designed are likely to produce a potentially strong incentive to display a high degree of diligence.

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 could be considered only where the measures aim to prevent a risk of serious harm to public interest objectives, such as public health.

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<sup>10</sup> E.g., the engineering profession is not regulated in France where 95% of engineers are employed in a company or in public administration and recruitment is heavily based on the reputation of engineering schools (COM/2013/0676 final).

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## Examples

Urban planner (protected title): The current system is designed to **protect the title** of urban planner. It is functional. On several occasions a system of profession protection with **reserved activities** was considered. This option was rejected, because there are enough instruments that guarantee safety standards. Another option was to make architecture a **protected profession**, but the general conclusion was that this would amount to over-regulation and would therefore be inappropriate for the disciplines concerned. A system of **voluntary certification** was also considered by, amongst others, the evaluative report on the [Act]. The report concluded that replacing legal title protection with private certification – as in the case of estate agents – was not appropriate for the four architectural disciplines, for the following reasons: • the individual character of the four disciplines differed significantly from that of estate agent; • the low level of organisation in the architecture sector (30% at that time) compared with estate agents (90 %); • instead of one arrangement and one register for all four disciplines at least four certification systems and organisations would be needed, which is not transparent; • if the [Act] were scrapped, everyone would be free to call themselves an urban planner. The certification system would then become far more extensive and cost much more than the current registration system. The number of architects from the four disciplines who would participate in the certification system would be far lower than the number that now applies for registration.

Cook: No alternative mechanism was considered suitable to secure the food chain.

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In the last *example*, the Member State did not at all assess the possibility of alternative mechanisms.

***For requirements concerning qualifications, have you considered alternative possibilities to obtain the required professional qualification (e.g., other training options, or a combination of training and professional experience, etc.)?***

When the measure concerns qualification requirements, this question requires Member States to assess how flexible the system is to obtain the required credentials. The more possibilities (pathways) there are, the less restrictive the system could be considered. For example if for a given profession, it is possible to obtain the qualification by either going through a vocational secondary programme, a combination of professional experience and periods of training or the passing of a test, it would be less restrictive compared to a situation where the vocational secondary programme is the only route to obtain the qualification.

While the mere fact that there are no alternative pathways to obtain a qualification would not make the measure automatically disproportionate, the assessment should take due account of this criterion depending on the regulatory context of a given profession.

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**Examples**

Accountant: Yes, four pathways were introduced to access the profession: 1. pass entry exam+traineeship+final exam; 2. Master degree+traineeship+final exam; 3. PhD, or university professor or Member of Academy, specialisation field in economic studies, plus interview; 4. licensed accountant + final exam on certain disciplines.

Tax advisor: No, there is one pathway only (general post-secondary education of minimum 3 years and the State exam, followed by 6 months of professional practice).

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In the second *example*, the Member State did not explore any alternative training possibilities to allow access to the profession of tax advisor nor did it explain the reasons for having one pathway only.

Please note that each pathway to obtain a qualification shall be entered individually in the Screening Form (for this purpose, tick “yes” to a question “Are there other pathways to obtain qualifications?”)

## 8. Combined effect

***Please explain whether and how you assessed the effects of the notified measure when combined with other existing requirements? Please explain how the notified measure when combined with other requirements would contribute to and whether it is necessary to achieve the same objective(s).***

According to the Court of Justice’s case-law, the national legislation should be considered as a whole taking into account the various relevant rules aimed at ensuring the attainment of the objective relied upon.

Member States should carry out a comprehensive assessment of the circumstances in which the measure is adopted and implemented and examine in particular the effect of the new or amended provisions when combined with other requirements restricting access to, or the pursuit of, the profession. The taking-up and pursuit of certain activities may be conditional on complying with several requirements. Therefore, when assessing the effect of the new or amended provisions, Member States should take into account the existing requirements, including continuous professional development, compulsory membership of a professional organisation or body, registration or authorisation schemes, quantitative restrictions, specific legal form requirements and shareholding requirements, territorial restrictions, multidisciplinary restrictions and incompatibility rules, requirements concerning insurance cover, language knowledge requirements, to the extent necessary to practise the profession, fixed minimum and/or maximum tariff requirements, and requirements on advertising.

The mere fact that their individual or combined effect should be assessed does not mean that those requirements are *prima facie* disproportionate. For example, the obligation to

undergo continuous professional development might be suitable to ensure that certain professionals keep abreast of developments in their respective areas, as long as it does not lay down discriminatory and disproportionate conditions to the detriment of new entrants. However, where the introduction of additional requirements duplicates requirements which have already been introduced by a Member State in the context of other rules or procedures, such requirements cannot be regarded as proportionate to achieve the objective pursued.

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**Examples**

Cook (qualifications and reserved activities): Due to the fact that the current regulatory framework lays down only one measure on this profession no cumulative effect can be mentioned.

Health profession (qualifications, reserved activities, registration): The requirement for the professional to sign up to the register increases transparency towards both the government as well as consumers. While the obligation to possess certain qualifications before entering the profession already ensures the required standard of skills, a register further helps to increase trust among consumers and makes it possible for government to actively control/supervise those inside the profession. Hence, the requirements in place are designed with different objectives and do not duplicate each other.

Engineer: There is no cumulative effect. Our measures are very clear and well established and are not redundant in their effect.

... we haven't reviewed the cumulative effects of the measures. The current system is working as intended. It is not considered, that it would be beneficial to change the system

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In the last *example*, the Member State did not at all assess the combined effects.

## 9. Supporting information or data

***Please provide any relevant information you have gathered (such as qualitative and/or quantitative evidence) regarding the concrete effects of the measure.***

The reasons for regulating invoked by a Member State should be accompanied 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.

Member States are not expected to submit such information in full via the Screening Form. However, where such supporting information or data exists, it should be clearly referred to in the screening form, and where available, with relevant links to publicly available sources.

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## Examples

Architect: As the number of architecture students and, accordingly, the number of professionals, has grown, we have witnessed corresponding growth in the turnover in the sector and improved quality of design and construction, which have been reflected in the dissemination of the architect as an added value that guarantees the quality of the final product, enhancement of the public space and protection of the historic and cultural heritage of the built environment (Sources: [redacted]).

Child supervisor: Fukkink, R. G., & Lont, A. (2007) Does training matter? Meta-analysis and review of caregiver training studies. *Early Childhood Research Quarterly*, 22 (3), 294-311. The European Quality Framework ([http://ec.europa.eu/dgs/education\\_culture/repository/education/policy/strategic-framework/archive/documents/ecec-quality-framework\\_en.pdf](http://ec.europa.eu/dgs/education_culture/repository/education/policy/strategic-framework/archive/documents/ecec-quality-framework_en.pdf)): "There is a broad consensus among researchers, practitioners and policymakers that the quality of ECEC and ultimately the outcomes for children and families depends on well educated, experienced and competent staff. The quality and relevance of staff training has a direct effect on practitioners and an indirect effect on children." p.31 This "staff" is not only the child care worker, but also the responsible or manager that runs the child care setting. The risk of a bad managed child care location is limited.

Example: There is no relevant information on the concrete effects of the measures.

Crane operator: [Due to regulation] [t]he number of accidents in [the MS] relating to the operation of cranes is, in comparison to similar countries, very low.

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In the last *example*, the Member State did not indicate any sources underlying its assessment or the relevant figures and did not analyse these alleged statistical findings as to whether they were indeed linked to the degree or type of regulation.

## 10. Conclusions

The Commission looks forward to the exchange of views of participants in the GoC meeting on 26.11.2018 concerning the present guidance document, which aims to initiate the discussion on the way forward on how to exchange best practices amongst Member States on their proportionality assessments. If need be, any of the topics of this paper can be discussed in the upcoming GoC meetings.

The participants are also invited to reflect about any additional/more specific support action that is needed in cooperation with other Member States, such as dedicated/sector/profession-specific discussions, discussion on specific requirements or assessment criteria, possible sources of evidence (e.g., how one could measure the link between regulation and quality) that need to be further explored, etc.

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