Is the proportionality test proportionate?
The CPME view

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Political environment

• The European Council reiterated in June 2012, 2014 and 2016 to remove unjustified national barriers in regulation to improve the market of services for the benefit of **growth and competition** („deregulation debate“)

• The regulation under scrutiny also covers professional regulation as experienced with the Member States` National Action Plans.

• The Commission was unhappy with National Action Plans and concluded to discipline Member States with an EU-level and horizontal proportionality test for all professions.
Legal environment

• Health is different from business.

• This is recognised in EU primary and secondary legislation:
  - The organisation of healthcare including health professional regulation is a Member States’ competence.
  - Health services are excluded from the Services Directive.
  - Patients are excluded from the Consumers’ Rights Directive.
Legal environment

- Health is different from business.

- This is recognised by the the European Court of Justice (ECJ):
  - The ECJ continuously highlighted that restrictive regulation is possible, if the regulation at stake serves the public interest.
  - The protection of health is considered one of the key public interest objectives.
  - Member States have discretion as to which level of protection should be determined.
  - Member States may take precautionary measures and do not need to wait for risks to become real.
Why worry?

- EU legislation and the ECJ rulings confirm the special nature of health, health professions and their services.
- Proportionality is a common principle in law and is to be respected in any case.
- The obligation to respect proportionality in regulation is incorporated in the Professional Qualifications Directive („PQD“).
- Why worry about the proportionality test?
CPME Position – Health differs from business

• The economic objectives and assumptions of the Directive are not applicable to Doctors in the same way they are applicable to business professions, see legal environment.

• CPME fears that health is equated with business when put under the regime of a horizontal, EU-level and business driven directive.

• CPME strongly believes that the doctors’ regulation is in the direct interest of patient safety and quality of care.

• CPME therefore opposes initiatives which challenge regulation for economic reasons, with no regard for the special need to protect patient care.
CPME Position – Rationale not fit for doctors

• The proportionality test also aims to improve labour mobility. Doctors are the most mobile profession, not least thanks to the automatic recognition process under the PQD.

• The PQD put in place a great degree of scrutiny on doctors, addressing issues such as CPD, language knowledge and liability. These efforts, which were supported by doctors, are questioned by the proportionality test.

• The rationale of the Directive is therefore not applicable to the health professions.
CPME Position – Dismantling or chilling effects

• Opening the door to the reduction of professional regulation on the basis of supposed economic advantages is a potential risk for the quality of medical practice. In a time of mobile doctors and patients, such risks can affect all Member States.

• CPME doubts that the proposal for a Directive provides for the right incentive. Member States potentially in need of regulation might refrain from any necessary action considering the administrative burden and costs implied by an EU-level proportionality test.
CPME Position – Proportionality test not needed

• CPME highly questions the necessity of an additional legal instrument since the PQD already introduces a proportionality requirement and proportionality is a general principle in EU law.

• The ECJ confirmed that Member States have discretion as to which level of protection should be determined.

• By contrast, a horizontal, EU-level proportionality test conflicts with this discretion by striving for uniformity in the assessment of the regulation of professions and its outcomes.
Conclusions

• The rationale behind the test, i.e. fostering growth, mobility and competition, is not applicable to health professional regulation.

• The test might have detrimental effects by deterring necessary regulation.

• The test is not needed and disproportionate.

• Health professional regulation should be excluded from the test!
Who can help?

• The European Parliament:
  ➢ Has helped in excluding the healthcare sector from the scope of the Services Directive 2006/123/EC.

• National parliaments and governments:
  ➢ Can defend the role and objectives of health professional regulation, in particular if health ministries become involved.

• Professional associations in Europe:
  ➢ Can provide arguments to parliaments and governments as to the necessity of sound professional regulation.

• CPME:
  ➢ Advocates the exemption of health professions from the draft directive in alliance with European dentists and pharmacists.
Thank you for your attention!

The CPME position on the proportionality test is to be found here.

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