10 THESES CONCERNING THE PROPORTIONALITY TEST

AND THE PROPOSAL FOR A

"DIRECTIVE ON A PROPORTIONALITY TEST

BEFORE ADOPTING OF NEW REGULATION OF PROFESSIONS"

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I. 10 Theses on the proportionality test concerning the regulated (health) professions in the past and in future

1. When regulating the "regulated professions", all member states are obliged, based on art. 15 of the Charter of Fundamental Rights, the fundamental freedoms in the Treaty on the Functioning of the European Union (TEUF) and the already existing secondary law, to check the existing and new regulations regarding their proportionality.

2. Another protection can be found in art. 59 Directive 2005/36/EC (Directive on the Recognition of Professional Qualification). It obliges the Member States to report to the commission every two years what requirements for the access and pursuit of the regulated professions have been lifted or loosened. This exchange, if it is further professionalised by an appropriate survey tool, will offer good but so far not used opportunities, for a better regulation that Member States and regulators share together with the European Commission.

3. The so far inconsistent and with the words of the commission „weak" proportionality tests within the so-called transparency process are no surprise considering the questionnaire that is used for that purpose. The questionnaire has provoked these results. Since the 1950s in social science methods it has been established that the quality of answers is only as good as the questionnaire. For example the commission questionnaire used double-barreled questions (present in almost all questions of the questionnaire) and did not avoid abstract and ambiguous terms (e.g. in question 8 "cumulative effect"). The survey tools for the proportionality test used so far should be improved with scientific support in order to be able to create a valid and reliable basis for the regulation situation and for the estimation of regulation effects. Only then will we be able to foresee the need of a new regulation (e.g. a new Directive).

4. The list of criteria for the proportionality test of the proposal for the Directive (version: 29 May 2017) is based on the case law of the European Court of Justice (ECJ). However, the question is: Why is the case law not sufficient for controlling the Member States? The case law has the advantage that it can be understood in the particular context of the decided case. In contrast, many terms of the criteria list in the Directive are often abstract and ambiguous.

5. If the formerly conducted proportionality tests (in 2014 – 2016) do not meet the expectations of the commission, despite the existing case law by the ECJ which the Member States are also familiar with, the question arises why a fixation in a legal act should produce better results than the tests in the past. It cannot be ruled out that during the assessments the same problems occur as in previous proportionality tests in 2014 – 2016.

6. The Directive imposes a wide range of obligations requiring explanation, evidence, monitoring and action by the Member States. For example they have to ensure that the

assessment of proportionality test is carried out in “an objective and independent manner taking into consideration of objective observations” (art. 4 par. 5). What does “objective and independent manner” mean? This should be made more concrete.

7. This also holds true for art. 4 par. 3 (= the obligation that “qualitative and, as far as possible and relevant, quantitative means for the reasons, that a provision is justified and proportional, have to be presented”). It should be made clear to what extent (scientific) evidence has to be provided, on what level of quality and by whom. Problems occur in different areas (e.g. when measuring the quality and the impact of regulations). If the evidence is scientifically not possible, evidence that was not provided must not be evaluated to the disadvantage of the Member State resulting in an automatic violation of the contract.

8. Health is a specific legal good that distinguishes itself from other legal goods – *e.g. roadmaking, fiscal advice or another activity in the area of real estate*. Damage due to false or bad consulting can be compensated by money. Depending on the damage done to health, no payment, regardless of the amount, can indemnify the damage. Not even an insurance policy can help in this case.

9. In every European State, the regulation of the health professions and the securing of health care are closely linked to the particular system of social security. Damages to health, due to an improper regulation, can trigger consequential costs for the social systems if an entitlement to treatment exists. This connection does not exist with any other professional group, only with the health professions.

10. Due to the peculiarities of the legal good health, the results of scientific studies on the reduction of regulations and its consequences for “other” regulated professions cannot be transferred to the health professions.