CHAPTER 612

PROPORTIONALITY TEST BEFORE ADOPTION OF NEW REGULATION OF PROFESSIONS ACT

AN ACT to implement the provisions of 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.

30th July, 2020

ACT XXV of 2020.

1. (1) The short title of this Act is the Proportionality Test Before Adoption of New Regulation of Professions Act. Short title.

(2) This Act implements the provisions of 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.

2. (1) In this Act, unless the context otherwise requires: Interpretation.

"protected professional title" means a form of regulating a profession where the use of the title in a professional activity or group of professional activities is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of a specific professional qualification, and where the improper use of that title is subject to sanctions;

"regulated profession" shall have the same meaning assigned to it in article 2 of the Mutual Recognition of Qualifications Act; Cap. 451.

"reserved activities" means a form of regulating a profession where the access to a professional activity or group of professional activities is reserved, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to members of a regulated profession holding a specific professional qualification, including where the activity is shared with other regulated professions.

(2) Where applicable and unless the context otherwise requires, the definitions of the Mutual Recognition of Qualifications Act and the Recognition of Professional Qualifications Regulations shall apply. Cap. 451. S.L. 451. 03.

3. (1) No new legislative, regulatory or administrative provisions restricting access to, or the pursuit of, a regulated profession may be introduced, and no existing legislative, regulatory or administrative provisions restricting access to, or the pursuit of, a regulated profession may be amended, before the Ministry responsible for the said regulated profession shall have undertaken an assessment of proportionality in accordance with the rules laid down in this Act. *Ex ante* assessment of new measures and monitoring.

(2) The extent of the assessment referred to in sub-article (1)

shall be proportionate to the nature, the content and the impact of the provision.

(3) Any provision referred to in sub-article (1) shall be accompanied by an explanation which is sufficiently detailed to make it possible to appraise compliance with the principle of proportionality.

(4) The reasons for considering that a provision referred to in sub-article (1) is justified and proportionate shall be substantiated by qualitative and, wherever possible and relevant, quantitative elements.

(5) The Ministry responsible for the regulated profession referred to in sub-article (1) shall ensure that the assessment referred to in sub-article (1) is carried out in an objective and independent manner.

(6) The Ministry responsible for the regulated profession referred to in sub-article (1) shall monitor the compliance of new or amended legislative, regulatory or administrative provisions restricting access to, or the pursuit of, the said regulated profession, after adoption, with the principle of proportionality, having due regard to any developments that have occurred since the provisions concerned were adopted. For such purposes, the said Ministry shall also prepare a report not later than every three (3) years from the date of entry into force of the said provisions. Where appropriate, the said report shall include relevant proposals for amendment. The said report shall be submitted to Cabinet.

Non-discrimination.

4. When new legislative, regulatory or administrative provisions restricting access to, or the pursuit of, a regulated profession are to be introduced, or existing legislative, regulatory or administrative provisions restricting access to, or the pursuit of, a regulated profession are to be amended, the Ministry responsible for the said regulated profession shall ensure that those provisions are neither directly nor indirectly discriminatory on the basis of nationality or residence.

Justification on grounds of public interest objectives.

5. (1) The Ministry responsible for a regulated profession shall ensure that the legislative, regulatory or administrative provisions restricting access to, or the pursuit of, the said regulated profession, that are intended to be introduced and that the amendments that are intended to be made to existing provisions are justified by public interest objectives.

(2) The Ministry responsible for the regulated profession shall consider in particular whether the provisions referred to in sub-article (1) are objectively justified on the basis of public policy, public security or public health, or by overriding reasons in the public interest, such as 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.

(3) Grounds of a purely economic nature or purely administrative reasons shall not constitute overriding reasons in the public interest, justifying a restriction on access to, or the pursuit of, a regulated profession.

Proportionality.

6. (1) The Ministry responsible for a regulated profession shall ensure that the legislative, regulatory or administrative provisions restricting access to, or the pursuit of, the said regulated profession, that are introduced, and that the amendments that are made to existing provisions, are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.

(2) (a) To that end, before the provisions referred to in sub-article (1) are adopted, the Ministry responsible for the regulated profession shall consider:

(i) 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;

(ii) whether existing rules of a specific or more general nature, such as those contained in product safety law or consumer protection law, are insufficient for the attainment of the objective pursued;

(iii) the suitability of the provision as regards its appropriateness to attain the objective pursued and whether it genuinely reflects that objective in a consistent and systematic manner and thus addresses the risks identified in a similar way as in comparable activities;

(iv) the impact on the free movement of persons and services within the European Union, on consumer choice and on the quality of the service provided;

(v) the possibility of using less restrictive means to achieve the public interest objective; for the

purposes of this point, where the provisions 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, the Ministry responsible for the said regulated profession shall assess in particular whether the objective can be attained by means that are less restrictive than reserving activities;

(vi) the effect of new or amended provisions, when combined with other provisions restricting access to, or the pursuit of, the profession, and in particular how the new or amended provisions, combined with other requirements contribute to and whether they are necessary for the achievement of the same public interest objective.

(b) The Ministry responsible for the said regulated profession shall also consider the following elements, when relevant to the nature and the content of the provision being introduced or amended:

(i) the connection between the scope of activities covered by a profession or reserved to it and the professional qualification required;

(ii) the connection between the complexity of the tasks concerned and the need for those carrying them out to possess specific professional qualifications, in particular as regards the level, the nature and the duration of the training or experience required;

(iii) the possibility of obtaining the professional qualification by alternative routes;

(iv) whether, and why, the activities reserved to certain professions can or cannot be shared with other professions;

(v) the degree of autonomy in exercising a regulated profession and the impact of organisational and supervision arrangements on the attainment of the objective pursued, in particular where the activities relating to a regulated profession are pursued under the control and responsibility of a duly qualified professional;

(vi) the scientific and technological developments which may effectively reduce or increase the asymmetry of information between professionals and

consumers.

(3) For the purposes of sub-article (2)(a)(vi), the Ministry responsible for the said regulated profession shall assess the effect of the new or amended provision when combined with one or more requirements, bearing in mind the fact that such effects might be positive as well as negative, and in particular the following:

(a) reserved activities, protected professional title or any other form of regulation relating to a regulated profession within the meaning of article 2 of the Mutual Recognition of Qualifications Act; Cap. 451.

(b) obligations to undergo continuous professional development;

(c) rules relating to the organisation of the profession, professional ethics and supervision;

(d) compulsory membership of a professional organisation or body, registration or authorisation schemes, in particular where those requirements imply the possession of a specific professional qualification;

(e) quantitative restrictions, in particular requirements limiting the number of authorisations to practise, or fixing a minimum or a maximum number of employees, managers or representatives holding specific professional qualifications;

(f) specific legal form requirements or requirements which relate to the shareholding or management of a company, to the extent those requirements are directly linked to the exercise of the regulated profession;

(g) requirements restricting the exercise of a regulated profession jointly or in partnership, as well as incompatibility rules;

(h) requirements concerning insurance cover or other means of personal or collective protection with regard to professional liability;

(i) language knowledge requirements, to the extent necessary to practise the profession;

(j) fixed minimum and/or maximum tariff requirements;

(k) requirements on advertising.

(4) Before the introduction of new, or the amendment of existing, provisions, the Ministry responsible for the relative regulated profession shall, in addition, ensure the compliance with the principle of the proportionality of specific requirements related to temporary or occasional provision of services, provided under Part II of the Recognition of Professional Qualifications Regulations, including:

S.L. 451. 03.

(a) automatic temporary registration with or pro forma membership of a professional organisation or body, referred to in paragraph (a) of regulation 8 of the Recognition of Professional Qualifications Regulations;

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(b) a declaration to be made in advance pursuant to regulation 9(1) of the Recognition of Professional Qualifications Regulations, documents required pursuant to regulation 9(2) of the said regulations or any other equivalent requirement;

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(c) the payment of a fee, or any charges, required for the administrative procedures, related to the access to, or the pursuit of, the regulated profession which the service provider incurs:

Provided that this sub-article shall not apply to measures designed to ensure compliance with applicable employment terms and conditions that Malta applies in accordance with European Union law.

(5) Where provisions referred to in this article concern the regulation of healthcare professions and have patient safety implications, the Ministry responsible for the relative regulated profession shall take account of the objective of ensuring a high level of human health protection.

Information and involvement of stakeholders.

7. (1) The Ministry responsible for a regulated profession shall, by appropriate means, make information available to citizens, service recipients and other relevant stakeholders, including those who are not members of the profession concerned, before the introduction of new, or the amendment of existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, the said regulated profession.

(2) The Ministry responsible for a regulated profession shall appropriately involve all parties concerned and shall give them the opportunity to make their views known before the introduction of new, or the amendment of existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, the said regulated profession. Where relevant and appropriate, the said Ministry shall carry out public consultations and shall allow the public a minimum of three (3) weeks from the commencement of the public consultation to make representations.

Remedies.

8. Any person aggrieved by a breach of any provision of this Act may seek redress by instituting proceedings in accordance with and subject to the existing remedies in the Laws of Malta.

Exchange of information between Member States.

9. The Ministry responsible for a regulated profession or its delegate shall take the necessary measures to exchange information with other Member States on matters covered by this Act, on the particular way that Malta regulates a profession, and on the effects of such regulation.

Transparency.

10. The reasons for considering that provisions, assessed in accordance with this Act, are justified and proportionate, together with the provisions, shall be communicated to the European Commission by the Ministry responsible for the relative profession within six (6) months from the adoption of the provisions, and shall be recorded by the Ministry responsible for the relative profession or its delegate in the publicly available database of regulated professions set up and maintained by the European Commission. Member States and other interested parties shall be allowed to submit comments on the said provisions and on the said reasons for considering that they are justified and proportionate.

Power to make regulations.

11. The Minister responsible for education may make regulations to give better effect to the provisions of this Act, and without prejudice to the generality of the foregoing may, by such regulations, provide for any matter consequential, incidental to or connected with the provisions of this Act.