



DRAFT EFAA POSITION STATEMENT: EC REFORM RECOMMENDATIONS FOR REGULATION IN PROFESSIONAL SERVICES

Introduction

The Commission's Single Market Strategy [announced a series of actions](#) ('Service Package') intended to improve the national regulation of the professions. This statement sets out EFAA's position regarding these recommendations. This statement has been compiled in collaboration with EFAA members who were requested to carefully examine the recommendations and provide their input.

EFAA has requested its members mobilize support for the statement through raising awareness amongst their constituents and lobbying relevant stakeholders. EFAA anticipates that some members may develop more granular position statements tailored to their own peculiar set of circumstances. EFAA welcomes the objective of harmonizing regulation across Europe in turn enabling greater mobility and cross border provision of services. Some of the proposals, suitably refined, stand to help achieve this objective. However, we have some concerns. The proposals may ultimately diminish the extent of self-regulation of the accountancy profession¹, regulation that has proven to be largely effective. In some respects the proposals may amount to a violation of the subsidiarity principle with regulatory powers gravitating from Member States to Brussels. And finally, certain recommendations, unless modified, may fail to satisfy cost: benefit criteria, imposing more regulatory burden and bureaucratic procedure without any corresponding and offsetting benefit. Change of itself will be a disruptive and costly and the benefits uncertain. Hence, it is vital the evidence that such change will yield positive net benefits needs to be robust and conclusive. If the evidence fails to meet such criteria – we doubt it does in some instances - then the status quo may be better.

This statement comprises two sections: A. General Remarks that sets out our remarks in relation to [COM\(2016\) 820 final](#) on reform recommendations for regulation in professional services; and B. Specific Remarks that sets out our remarks in relation to the specific recommendations outlined in [COM\(2016\) 821 final](#), [COM\(2016\) 822 final](#), [COM \(2016\) 823 final](#) and [COM\(2016\) 824 final](#). We note that [COM\(2016\) 820](#)

¹ The accountancy profession is taken to include professionals engaged in the provision of audit, assurance, advisory, accounting and tax services.

[final](#) includes guidance on specific reform needs per country and per profession, that of the accountants / tax advisers being 'II.3. Accountants/tax advisers').

A. General Remarks

We have the following remarks in relation to [COM\(2016\) 820 final](#):

Objectives of Service Package

- EFAA and its member organisations strongly support the ability of small- and medium-sized entities (SMEs) and small-and medium-sized accountancy practices (SMPs) to move and operate cross-border. However, we believe the Single Market for Services is presently not fulfilling its full potential.
- EFAA therefore welcomes a deepening of the services market and harmonisation of procedures so as to facilitate and promote the free movement of services within the EU. We encourage measures to reduce the administrative burdens for SMEs and SMPs in line with the Services Directive.
- Ultimately the ability to access the intended benefits and the reduction of administrative burdens will depend on the implementation of the proposals in national law and the content of the delegated acts of the European Commission.
- EFAA questions whether the specific recommendations will have the desired effect and recommends that they be modified or refined. Overall the evidence favors change and supports the proposals. However, given that change of itself will be disruptive and costly we need to be quite certain that they will yield significant positive net benefits. For some recommendations we question whether the evidence is sufficiently robust and conclusive. In such cases the status quo may be better.

Benefits of Professional Regulation

- The underlying objective of harmonizing regulation of the professions across Europe, in turn helping to forge a more effective single market in services, is welcome. We do, however, have serious reservations as to whether the recommendations will help achieve this end and in so doing are not in the public interest.
- The orientation, tone and import of the paper tends to give the impression that the Commission is predisposed to view professional regulation per se as undesirable: we hope that our fears are unfounded. This predisposition may explain why some of the recommendations appear disproportionate, unbalanced and insufficiently informed.
- The Commission only appears to have measured the direct impact of regulation on the professions and has failed to take account of the significant indirect / external effects, to economy and society in general of such regulation such as: the value that businesses place on the quality and reliability of professional / business services; the positive impact that accounting, tax and assurance services have on tax revenue; how accountants can help SMEs gain access to finance; the contribution that professional accountants and tax advisers make to the efficient allocation and management of resources in both the

private and public sectors and to the operation of financial and capital markets; the role of audit in reducing the risk and incidence of fraud; and how accounting imposes a discipline on the operation of business. Regulation seeks to ensure the right quality and, where appropriate, consistency in the quality of accounting and tax services.

- As an example of the significant indirect effects of professional regulation EFAA highlights a new study, [The Accountancy Profession—Playing a Positive Role in Tackling Corruption](#), from the International Federation of Accountants (IFAC) that shows professional accountants are playing a major, positive role in reducing corruption, along with other key actors in the global economy that support strong governance structures.
- The market for professional / business services is highly susceptible to information asymmetry where one party has more or better information than the other thereby creating an imbalance of power in transactions that can sometimes culminate in market failure in the worst-case scenario. In the provision of accounting and tax services often the buyer / client is at a disadvantage to the provider of the service as they are unable to evaluate effort or quality. Regulation can address the knowledge imbalance between the provider and purchaser of professional / business services by providing a level of comfort to the purchaser that the provider has the necessary qualifications and is obliged to meet the appropriate professional standards in their work. In this way the purchaser can take comfort that they are receiving services of the right quality and / or are not being exploited.

Need for Good / Smart Regulation

- EFAA is keen to see a better functioning Single Market, especially for services, and believe smarter more harmonized regulation is key to achieving this objective. However, the Commission proposal seems to be driven by an underlying belief that regulation essentially amounts to a barrier to competition and, therefore, we need to deregulate. This notion has often proved misplaced, perhaps most demonstrably when banks exploited lax regulation and in so doing laid the foundation for the Global Financial Crisis. Markets function more effectively when subject to high quality, not less, regulation. Quality and quantity do not necessarily go hand in hand: less quantity does not necessarily equate to better quality.
- The ultimate objective should be one of seeking high quality (alternatively referred to as good or smart) regulation. Such regulation can be dubbed good or smart. EFAA supports the *Principles of Good Regulation* advocated by IFAC in its publication [From Crisis to Confidence Good Regulation Governance and Culture](#) (see page 13) which are as follows: clear objectives in the public interest; proportionate and balanced approach; evidence-based assessment; appropriate resourcing for regulators; collaborative action; consistent and coherent; active oversight; transparent and open consultation; systematic review; and deliberate enforcement. We don't believe the Commission's proposals satisfy most, let alone all, of these principles.

- There appears to be a positive relationship between good regulation and economic growth and stability. That is, countries with a reputation for good regulation often appear to be in better economic health than those seen as having a reputation for being thinly regulated. While it's impractical to prove causality, namely that good regulation leads to economic growth and stability, there is significant circumstantial evidence to support this. For example, a glance at the World Bank's [Doing Business Rankings](#), Fraser Institute's [Economic Freedom Rankings](#), and the [Global Innovation Index](#) from INSEAD and the World Intellectual Property Organization, which purport to measure business friendliness, innovation and market dynamism, indicate that those European countries performing best in these rankings have a track record of sound economic growth and stability allied with a reputation for strong regulation. Sweeping across-the-board 'deregulation' is, therefore, unlikely to promote sustainable economic growth and stable societies. Instead the EU must establish the conditions and opportunities that foster the development of good regulation.
- The Commission should carefully consider the persuasive arguments of the Wording Document of the [Committee on the Internal Market and Consumer Protection](#) which highlighted concerns about the Commission proposal for a proportionality test for regulated professions and outlined key issues. These arguments are still relevant to the present Commission proposal. This document concluded that "the proportionality principle is still not taken sufficiently into account in many instances in the regulation of professions, even though it is now a general principle of law in the EU."

Professional Self-Regulation

- Critics of professional self-regulation charge that it inhibits competition, is unable to regulate transnational work effectively, it facilitates professional misconduct and above all results in self-regulating professions placing their own interests ahead of the public interest. Such criticisms have prompted legislative change to limit, and at times eliminate, professional self-regulation. We suspect the Commission shares such reservations about the ability of the professions to self-regulate. We contend that such reservations, at least in so far as accounting and tax, are largely unfounded.
- [IFAC policy papers](#) on issues of global regulation and standard setting speak of the developing nature of a shared (public–private) system of standard setting and regulation in the public interest where responsibility and cost is shared. We believe the current model used in the EU, where professional accountancy / tax organizations (PAOs) play a vital role in regulating the profession, strikes the optimal balance between 'self-regulation with public oversight' on the one hand and 'external regulation' on the other.
- If PAOs, including chambers and associations, are responsible for supervising the profession and of ensuring legal compliance, then mandatory membership seems to be the only practical way to secure effective supervision. If such functions are not the responsibility of PAOs then they must be performed by a public authority with the inevitable consequence of the public bearing the cost.

- The Commission shows an inadequate knowledge of the different professions within the EU. Accounting services are mostly connected to other professions and linked to other professional / business services such as legal and tax advice. For example, in at least one of the jurisdictions in which we have a member, accounting services can be provided by anyone but professional regulation only extends to those using the professional title. Those without the title are unregulated.
- The Commission fails to recognize the interconnectedness and sophistication of certain professional activities. For example, it states that tax declarations and payroll services are “simple activities”. While we accept these activities in isolation may be relatively menial professionals in some Member States are fully responsible for the veracity of the numbers and so must verify the circumstances (bookkeeping, separation of private / business area, transfer pricing etc.) as well as have a comprehensive and up to date understanding of the entire tax code. Professionals also have a duty to inform clients about other relevant legal obligations. For example, when providing payroll services this implies knowledge of legislation relating to minimum salary / wage, labour time, social security etc.
- The accountancy profession’s commitment to holding itself and its members to account is perhaps best exemplified by the introduction by the International Ethics Standards Board for Accountants (IESBA) of [Responding to Non-Compliance with Laws and Regulations](#), a standard that sets out a framework to guide auditors and other professional accountants in what actions to take in the public interest when they become aware of a potential illegal act, known as non-compliance with laws and regulations, or NOCLAR, committed by a client or employer. The standard applies to all categories of professional accountants including those in public practice and those in organizations. It addresses breaches of laws and regulations that deal with matters such as fraud, corruption and bribery, money laundering, tax payments, financial products and services, environmental protection, and public health and safety. Among other matters, the new standard provides a clear pathway for professional accountants to disclose potential non-compliance situations to appropriate public authorities in certain situations without being constrained by the ethical duty of confidentiality. In sum, it places the public interest first.

Evidence Supporting Recommendations

- EFAA has significant reservations about the evidence contained in the Commission staff working document used to support the Commission’s recommendations.
- It is unclear from this document as to how the new indicator for regulatory intensity has been calculated. We welcome some transparency as to the calculations so that we and others may be able to judge the validity of the new indicator.
- The document uses a business churn rate and a restrictiveness indicator to test the hypothesis that more regulation leads to less dynamic markets, an indicator for lower productivity. We attempted to replicate the calculations but these do not tally with the projected mean values for the business churn

rate nor the restrictiveness indicator. The data for many countries do not support the hypothesis rendering the sample size of countries too small to prove it.

- We believe the estimated 5% increase in productivity arising from a reduction of service barriers are a gross overestimate. The World Bank's [EU Regular Economic Report 3 - Growth, Jobs and Integration: Services to the Rescue](#) estimates the productivity gain to be 3.4% at the most.

Specific Remarks

We have the following remarks in relation to the specific proposals:

Services Passport / Card ([COM \(2016\) 823 final](#) and [COM\(2016\) 824 final](#))

- EFAA understands that the services e-card aims to facilitate selected administrative procedures required from various professions to provide services in European Union (EU) countries other than the home country. The proposed services e-card shall consist of the following elements: the identity of the applicant, proof of establishment in the home country and specific requirements on the relevant service, for example information about good reputation and professional indemnity insurance.
- As noted under the 'General Remarks' above the creation of a European Services e-card has to be satisfy the objective of simplification and the reduction of administrative burdens and align with the Services Directive. However, EFAA believes the proposal does not meet this criteria.
- The European Commission package comprises two proposals - a Regulation and a corresponding proposal for a Directive introducing a European Services e-card. This adds a degree of complexity, not least since the interplay between the regulation and the directive is not clear. In addition, several important technical aspects will be regulated in delegated acts by the European Commission. This could create a context of legal uncertainty for companies. Moreover, the implementation might differ significantly from one Member State to another. This could lead to regulatory gaps that have negative impacts on SMEs.
- EFAA welcomes the goal of the Commission to reduce the administrative burden for service providers in the EU. We accept that the acquisition of information about certain requirements in other Member States and the lack of knowledge about administrative procedures can constitute barriers for an intended provision of services in other Member States. However, the proposal, especially the tight verification deadlines that render it impractical to conduct a meaningful examination, risks undermining or circumnavigating justifiable professional regulation and introducing the country of origin principle² "through the backdoor".
- The Services Directive ensures that the regulation of standards for service provision remains the domain of the country of destination which prevents the undercutting of service quality in the EU. The

² The principle states that, where an action or service is performed in one country but received in another, the applicable law is the law of the country where the action or service is performed.

Services Directive clearly states that the country of destination must be responsible for supervising the service providers operating within their jurisdiction. This is indeed the only effective way to ensure that these businesses will comply with the applicable rules. The host Member States have, in theory, the possibility of opposing the issuance of the electronic card. In practice, given the delays granted, this option will be difficult to implement. In addition, they do not have access to the original documents; an assessment of the equivalence of the legislation requires a thorough knowledge of the rules applicable in the country of origin.

- While the proposal is intended to speed up procedures, we fear that the introduction of this card will lead to delays compared to the current situation under the Services Directive. Presently, it is possible for service providers to cross borders and to provide a service or to establish a business. There are some critical unanswered questions not least: has the service provider with the introduction of the European Services e-card to wait until there is the approval by the host country or is the service provider allowed to start immediately as it is now?
- The proposal includes a requirement that a separate card has to be requested per service and per country. An enterprise, like an accounting firm, that offers different services will consequently be obliged to apply for different cards for the different services it provides. It is possible that for these different services different national rules and regulations apply. This will in practice certainly lead to very complex application procedures for the service provider.
- The European Services e-card shall be valid for an unlimited time unless suspended or withdrawn. The procedure is based on mutual trust and self-declaration. This means there's a high-risk of outdated cards, fraudulent use and circumventions.
- We have some specific concerns with the Directive. The one-week deadline for the assessment in the host country is too short (Article 11). If the host Member State decides to object to the issuance of the e-card, this must be done within 2 weeks (Article 12): this is too short for a sufficient analysis.

Revised Notification Procedure under Services Directive [\(COM\(2016\) 821 final\)](#)

- EFAA understands that Member States would be obliged to notify every relevant provision to the Commission at an early drafting stage. This will apply for any new or amended professional regulation or requirement that falls under the scope of the Services Directive including any kind of admission scheme, legal form rules, shareholding requirements, reserved activities and minimum fees. The information to be notified to the Commission by the Member State would have to contain the grounds of justification for the legal measure and an explanation as to why it is proportionate. Then, the Commission proposes the various steps for further procedures.
- EFAA believes the proposed notification procedure would allow the Commission to prohibit Member States from implementing an intended regulation. In effect, national legislators would no longer be able to draft laws on professional matters, that role being assumed by the Commission. Furthermore, there

is a threat to the self-governance of the profession because the Commission could at any time block any amendments to the professional code or the accountant / tax adviser's fee regulation. To justify this proposal, the Commission refers to a similar notification procedure to that contained in the Transparency Directive. However, this Directive almost exclusively deals with certain goods (industrial, agricultural and fishery products) as well as technical regulations and rules on Information Society services which bear little if any relation to the independent and personal provision of high quality services by accounting and tax professionals. Finally, the public legitimacy of the proposal is questionable: during consultation barely 50% of public authorities expressed support for binding notification in the early stages of an intended law.

Introduction of Analytical Framework for Proportionality Analysis ('Proportionality Test') (COM(2016) 822 final)

- EFAA understands that Member States would be obliged to carry out the proportionality test according to a predefined, detailed scheme before the introduction of new or amended professional regulations. The objective of the Commission is to establish a comparable ex-ante evaluation method in every Member State across the EU.
- EFAA accepts that there is merit in improving transparency and further assessing the proportionality of certain national rules for regulated professions which might prove to be an obstacle to free movement of services. However, on balance we believe the new proposal as currently drafted will not help reduce restrictions in the Single Market.
- EFAA believes this proposal would impose a standard assessment scheme whose form, content and conduct is prescribed down to the smallest details, disregarding national specificities and leaving no room for being tailored by the Member States. Our objections to the proposal are four-fold.
 - First there is no need for this proposal. In EFAA Member States, a proportionality test is already carried out regularly, both as regards the existing as well as proposed new professional regulations. Furthermore, the Commission, as 'guardian of the Treaties', already has sufficient control mechanisms, such as the pilot process or the infringement procedure, at its disposal to ensure the application of the proportionality principle by the Member States.
 - Second, the Commission does not have a sufficient legal basis for obliging the Member States to carry out such a predefined, detailed proportionality scheme.
 - Third, the proposal fails to satisfy the principle of subsidiarity whereby the EU shall, in areas which do not fall within its exclusive competence, act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level. For this, the Commission must bring evidence on a case-by-case basis that a regulation on EU level is the most appropriate act for achieving the objectives. No such evidence is forthcoming. A proportionality assessment is typically a value-based

evaluation which can depend on historical, cultural, organizational circumstances or the security needs of the citizens in the respective Member State. Therefore, the Member States are best placed to decide for themselves whether and how they regulate a profession.

- Finally, by dictating a standard assessment scheme whose form, content and conduct are prescribed down to the smallest details, disregarding national specificities and without leaving any room for tailoring by the Member States, the Commission goes beyond the objectives set out in the Treaties and the legal basis on which the proposal is meant to be based.

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