

Have you ever thought about why sunrises are better than sunsets?

How to test proportionality of regulation before it is too late

Bernhard Zaglmayer, Stockholm, 9.5.2019

Sunrise Vs Sunset approach



Do Member States look into long-term impact of regulation?

- Do benefits of regulation outweigh the costs?
- Is regulation based solely on public interest objectives?



Sunrise review of regulation

- Public interest objectives
- Impact on the market
- Coherent assessment

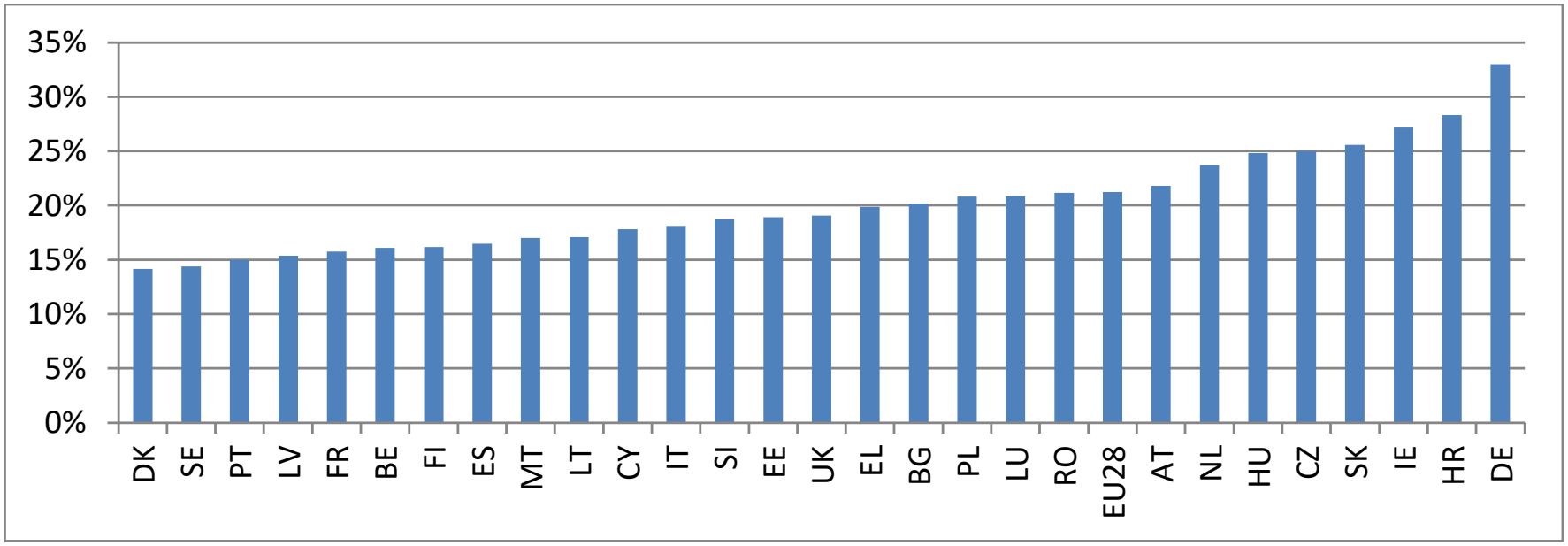


Sunset approach for regulation

- Assessment after introducing the measure
- Deregulation
- Enforcement action

Background

Prevalence of occupational regulation



- 5500 professions in Europe, 22% of the working population, 47 million people
- Considerable economic impact outputs from regulated professions as intermediate inputs for other sectors EU

Mutual Evaluation

The extent of regulated professions (over 5500 profession, 333 professions regulated in less than 5 MS (103 in only 1)

The variety in intensity / approaches taken

The analysis provided as to Proportionality - (1/3 proportionality assessments missing / 7 NAPs missing / **superficial**)

Mutual Evaluation

- 61% of 3500 analysed identified **no sensible risk**
- 84% **did not evaluate effects**. Those that were given were poor
- 69% maintained despite **inadequate analysis**
- This analysis suggests that regulatory decisions are being taken without first ensuring the appropriate questions are being attended to.

To address these fall backs

- Services Package – 10 January 2017
  - **Reform Recommendations on regulation in Professional Services**
  - **Proportionality test directive**

Proportionality Test- Legal Basis

TFEU

- **Fundamental freedoms**
- **Principle of non-discrimination**
- **Principle of proportionality**

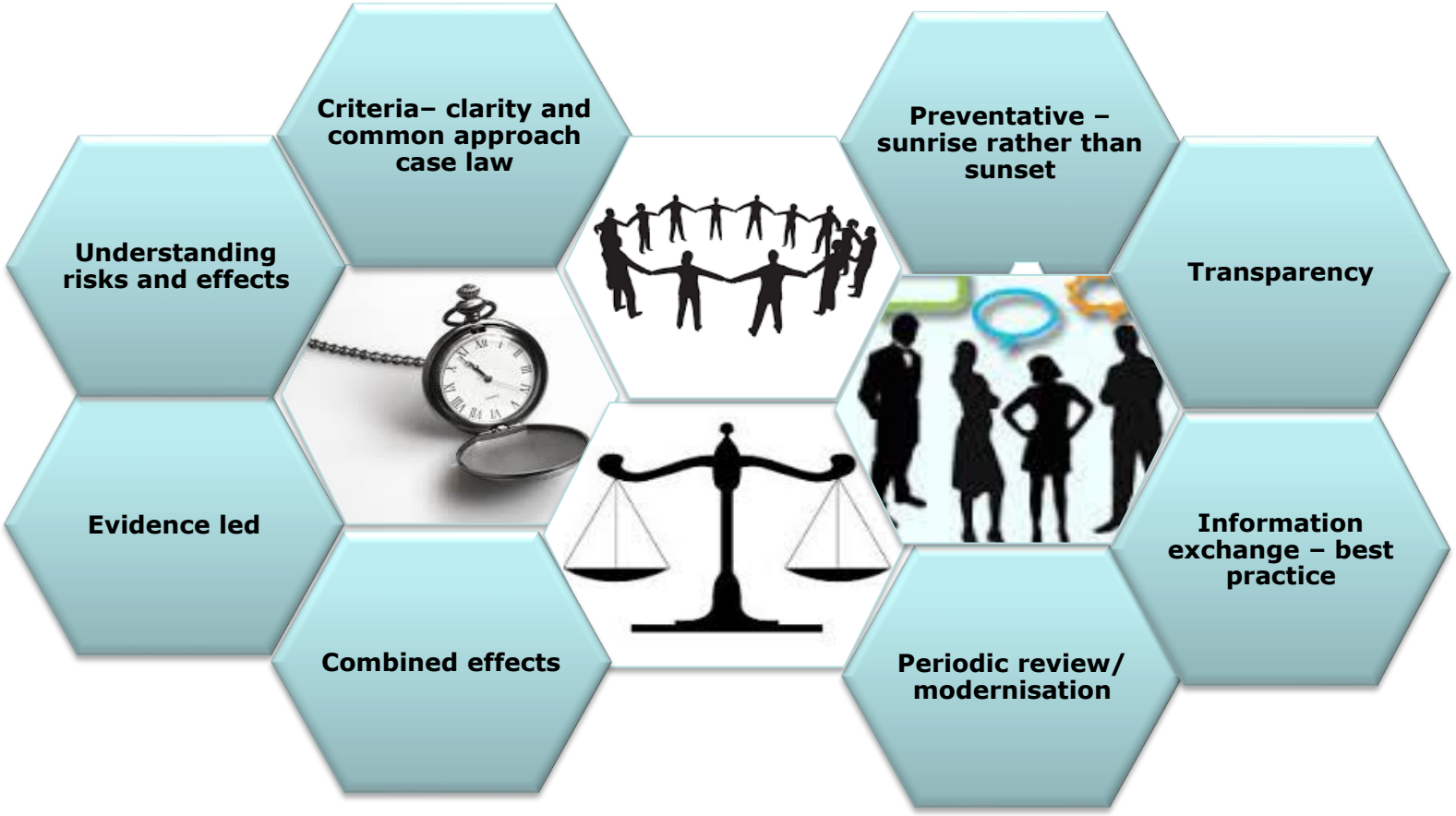
Case Law, including:

- **C-55/94 Gebhard (restriction) …**

Existing Union law, namely:

- **Professional Qualifications Directive**

Proportionality test – What's in it?



Public interest objectives

Public security or public health	Protection of consumers	IP	Artistic heritage
Transport safety	Administration of justice	Fiscal Supervision	Health of Animals
Fair trade transactions	Protection of environment	Combating fraud/ tax evasion	Social/cultural policy objectives

Ex-ante assessment

Criteria always applicable:	
Risks related to public interest objectives;	√ / X
Existing rules insufficient for the attainment of the objective pursued;	√ / X
Suitability of the provisions to obtain the objective pursued;	√ / X
Impact on free movement of persons and services;	√ / X
Possibility of using less restrictive means to achieve public interest objective;	√ / X
The effect of the provision when combined with existing provisions.	√ / X

Ex-ante assessment

Criteria applicable depending on the content and nature of the provision being introduced or amended:	
Connection between scope of activities / reserves of activity and the professional qualification required;	√ / X
Connection between the complexity of the tasks concerned and the need for specific professional qualifications;	√ / X
Possibility of obtaining the professional qualification by alternative routes;	√ / X
Whether/why reserves of activities can/cannot be shared with other professions;	√ / X
Degree of autonomy in exercising a regulated profession	√ / X
Scientific and technological developments	√ / X

Combined effect of new provision with existing requirements

Reserves of activities/Protected professional title

Restriction on joint exercise of profession

Minimum/maximum tariffs

Organisation of profession

CPD

Membership of Professional organisation

Language

Quantitative restrictions

Legal form requirements

Advertising requirements

Territorial restrictions

Insurance

Temporary or occasional provision of services

Automatic temporary registration with or pro-forma membership of a professional organisation or body

Declaration to be made in advance (pursuant to Article 7(1) of Directive 2005/36/EC)

The payment of a fee, or any charges, required for the administrative procedures

Transparency before and after new measures are adopted

- Involvement of **stakeholders**
  - Not just those that are members of the profession concerned
- Member States encouraged to **exchange information** with other Member States
- Reasons why new provisions are **justified and proportionate** to be made publicly available

Margin of Discretion

- **One margin of discretion**
  - Gebhard (C-55/94)
  - Vanderborght (C-339/15)

- **No differential treatment between professions**
  - Principle of proportionality always applies (inlc health professionals)

- **Evidence based – lesser restrictive means**
  - no special form but plausible, not necessary to prove that no other means possible

Chronology

- Part of Services Package of 10 January 2017
- Unanimous General Approach on 29 May 2017
- EP position on 12 December 2017
- Agreement under Bulgarian Presidency on 20 March 2018
- EP vote in June, Council approval thereafter
- Publication on 9 July 2018, OJ L 173/25
  - 2 years deadline for implementation

Method of implementation

- *Appropriate arrangements and procedures for proportionality assessments*

- *Nature of the transposition measure:*

  - **choice as to exact way and means**

  - **legislative and/or non-legislative**

    Not necessarily need for "formal and verbatim incorporation" into express and specific legislation (e.g. C-363/85 *Commission v Italy*)