



EPSU Circular LC N°17 (2017)

To the EPSU health and social services standing committee
To the EPSU public services network
To the EPSU Executive Committee (for information)

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EPSU briefing and proposed Amendments on the Directive on a proportionality test for professions

Action required!!

Dear colleagues,

The Services Package¹ was presented by the EC in January 2017 as “an ambitious but balanced set of measures that will make it easier for companies and professionals to provide services to a potential customer base of 500 million people in the EU. It will give a boost to the services sector, which accounts for two-thirds of the total EU labour force that will benefit consumers, jobseekers and businesses, and will generate economic growth across Europe.”

The Package will do this by introducing rules to prevent or block Member States from adopting regulations that are not ‘single market friendly.’ EPSU has many concerns about this underlying objective. As in the Services Directive there is little recognition that regulations and high social standards are necessary and desirable, including to drive quality employment and quality goods and services. Sometimes they may ‘protect’ too much or too little, but they should never be seen as barriers.

EPSU fears however that the Services Package will add to the growing and unsustainable imbalance in Europe between narrow economic interests and wider social and environmental concerns. The proposal for the **e-services card** has received so far the most attention but the proposal for a Directive on a **proportionality test on regulation of professions** and accompanying Communication addressing **recommendations** to Member States on specific professions, and the proposal for a Directive to strengthen the **notification procedure** in the Services Directive also merit criticism.

ETUC Executive Committee that met on 12-13 June 2017 called for a rejection of the Package. EPSU will work with the other ETUC and other groups to lobby for this outcome in the European Parliament and Council. Rather than continue with the Services Package, the European Commission, Member States and the European Parliament should focus on developing the

1 The [Services Package](#) includes initiatives on the European Services e-card ([directive](#) and [regulation](#)), an [improved notification of draft national laws on services](#), a [proportionality assessment of national rules on professional services](#) and [guidance for national reforms in regulation of professions](#).

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European Pillar of Social Rights (EPSR) and on measures to combat tax and social dumping between Member States.

However it was also recognised that securing a rejection will be very difficult, especially on the notification and proportionality Directives that have received less attention and where the Council is advanced in discussion².

For this reason and given EPSU's specific concern about the Directive on a **proportionality test on regulation of professions** and its potential impact on **health and care professions**, we are focusing on obtaining a clear exclusion from the proportionality Directive of these workers.

Reasons why it is important to exclude health and social care professions from the proportionality Directive

The proportionality Directive takes no account of the general interest principles and objectives that underpin healthcare as a public service / Service of General Interest (Protocol 26 of the TFEU). Protecting space for regulation in the general interest was an important reason why healthcare and many social services were excluded from the 2006 Services Directive. Health and social care professions make up around half of all regulated professions across the EU 28 Member States. The European Social Observatory (OSE) has been very critical of the draft Directive's³ impact on healthcare professions.

The Communication on recommendations addressed to Member States for regulation of professional services COM (2016)820 final accompanies the Directive and explains the rationale underpinning the Directive. The text says for example:

- 'No matter which regulatory framework is chosen, regulation creates obstacles for the functioning of the Single Market and holds back the potential for growth and job creation.'
- 'Even when such regulations fully achieve their policy aim, it is undeniable that they have a significant economic impact'
- 'Lower levels of regulatory restrictions coincide with better economic outcomes...'

The role of the social partners and collective bargaining in regulating employment conditions and the labour market is completely absent.

In the Communication the European Commission proposes a new 'restrictiveness indicator' to help Member States assess the restrictiveness of occupational regulation. The proposal echoes similar initiatives on employment protection that have been heavily criticized, not only because they ignore socially desirable outcomes but also because less employment protection does not lead to better economic outcomes.

As with the Communication, the **Directive on a proportionality** test sees the regulation of professions as an impediment to economic rights. Indeed economic rights are qualified in the draft Directive as 'fundamental rights' (recital 1).

While the Directive acknowledges that public interest objectives may justify regulation, the burden of proof of justification and proportionality lies on the Member State, who will be obliged to provide a (quantifiable) cost-benefit analysis, the overall aim of which is to ensure the proper functioning of the internal market. Furthermore, Member States will have to show that the regulation does not go beyond what is necessary and suitable. This has to be done in view of two detailed sets of criteria listed in Article 6. 2 and 6.4 of the draft Directive to be taken into account when assessing the necessity and proportionality of provisions as well as the

² See <http://www.consilium.europa.eu/en/press/press-releases/2017/05/29-services-package-conditions-ease-provision-services-and-mobility-professionals/>

³ See "Was the exclusion of health care from the Services Directive a pyrrhic victory? A proportionality test on regulation of health professions" http://www.ose.be/EN/publications/ose_paper_series.htm

cumulative effect of all the existing measures restricting access to or pursuit of professions (cf. OSE 2017, pp. 15-16). Some criteria go beyond the regulation of professions and would concern parameters of the functioning of health and social services systems, e.g. quantitative restrictions and requirements in view of continuous professional development of health and social care professionals/ workers.

EPSU fears that the Directive, as the notification procedure Directive, will have a chilling effect on Member States and that it will be more difficult to adopt regulations that improve health, social, employment or professional training requirements. This is giving the wrong message and will undermine efforts to develop the social dimension to the European Union.

It will be difficult for Member States to be fully sure that their regulations are acceptable to the European Commission. As stated in the Impact Assessment accompanying the notification Directive (on page 88) 'Given that the proportionality assessment needs to be done on a case by case basis providing general guidance is very difficult.' Especially in cases where evidence is hard to demonstrate Member States may be deterred from taking needed actions. This would be contrary to the 'precautionary principle' that has been upheld by the European Court of Justice as important to protect human health.

Member States will never be sure that their actions will not be challenged. Especially for workers in areas that are under-regulated (for example care workers) this chilling effect may have substantial effects, but for all professions the Directive risks to undermine progress towards and ethical, value-based and social Europe. Unfortunately discussions on these important questions between the European Commission and Member States (in the Expert Group on Services Directive) have not been made public.

Proposal for EPSU amendments to exclude health and social care professions from the proportionality test Directive, to include in the text the 'precautionary principle and to ensure that social partners are consulted

Attached are the amendments (some also in FR and DE) put forward by EPSU to the rapporteurs in the European Parliament. The EP IMCO (Internal Market and Consumer Protection) Committee is the lead Committee and is expected to present a draft report on the Directive in July. When we have the draft report, we shall contact you to ask for your support in lobbying MEPs in the IMCO Committee.

In the meantime, we ask you to raise the EPSU amendments and issues raised in the EPSU briefing and ETUC resolution already with your Government (both health Minister and economic Ministers).

We thank you in advance for your engagement with your government to exclude health and social care professions from the Directive.

Best regards,



Jan Willem Goudriaan
EPSU General Secretary

Attachment**EPSU proposed amendments to the draft Directive on a proportionality test before the adoption of new regulation of professions****Article 2 Proportionality****Add new paragraph 2.2.:**

EN: Without prejudice to the application of Directive 2005/36/EC, this Directive shall not apply to occupations providing health care services and social services, whether or not those services are provided within the framework of healthcare or social service establishments and independently of the manner in which they are organised and financed at national, regional and local level and independently from a provision by the public or the private (not-for-profit or commercial) sector.

FR: *Sans préjudice de l'application de la directive 2005/36/CE, la présente directive ne s'applique pas aux professions fournissant des services de soins de santé et des services sociaux, que ces services soient ou non assurés dans le cadre d'établissements de soins et indépendamment de la manière dont ils sont organisés et financés au niveau national, régional ou local ou de leur nature publique ou privée (non-marchande ou commerciale).*

DE: Unbeschadet der Anwendung der Richtlinie 2005/36/EG, findet diese Richtlinie keine Anwendung auf Berufe, die Gesundheitsdienste sowie soziale Dienste erbringen, unabhängig davon, ob diese Dienste innerhalb oder außerhalb von Institutionen des Gesundheits- und Sozialwesens organisiert sind bzw. erbracht werden wie auch unabhängig von der Art und Weise, wie diese auf nationaler, regionaler oder lokaler Ebene organisiert und finanziert sind bzw. oder diese Gesundheits- und Sozialdienstleistungen öffentlich oder privat (frei-gemeinnützig oder gewinn-orientiert) erbracht werden.

Article 6 Proportionality**Add new paragraph 6.2.:**

The obligations set out in Article 6 are without prejudice to the right of the competent authorities to adopt or maintain provisions to protect human health even where the risks to health may be uncertain or not fully apparent.

Justification: Under no circumstances should the quality of care, the access to care or patient safety be put at risk by decisions by other agendas, in particular economic concerns. In EPSU's view the assessment of the appropriateness of regulations of professions should start from the general interest orientation and the public service missions of health and social services and not from the economic and competition logic of the internal market. This amendment also would integrate into the Directive the concept of the "precautionary principle".

Article 7 Information and involvement of stakeholders

Add after "representative associations, social partners and relevant stakeholders...."

Full text with the EPSU amendment: Member States shall, by appropriate means, inform citizens, service recipients, representative associations, **social partners** and relevant stakeholders other than the members of the profession before introducing new legislative, regulatory or administrative provisions restricting access to or pursuit of regulated professions, or amending existing ones, and give them the opportunity to make known their views.

Justification: Social partners should be mentioned as they have a specific role in determining labour market and employment conditions.

Recital (7)

Add new recital 7.2

EN: It is important to ensure full respect for the responsibilities of the Member States as defined in Article 168 of the Treaty on the Functioning of the European Union with regard to the definition of their health policy and the organisation of their health care systems, including the provision of health and medical services by the regulated professions designated for this purpose. To this end, the said regulated professions and also all social service professions should be excluded from the scope of this Directive.

FR: Il convient d'assurer le strict respect des responsabilités des États membres, telles que définies à l'article 168 du traité sur le fonctionnement de l'Union européenne, en ce qui concerne la définition de leur politique de santé, ainsi que l'organisation et la fourniture de services de santé et de soins médicaux par les professions réglementées désignées à cet effet. Dans ce but, il y a lieu d'exclure lesdites professions réglementées ainsi que les professions réglementées tombant dans le secteur des services sociaux du champ d'application de la présente directive.

DE: Die strikte Einhaltung der Zuständigkeiten der Mitgliedstaaten gemäß Artikel 168 des Vertrages über die Arbeitsweise der Europäischen Union im Bezug auf das Recht, ihre Gesundheitspolitik zu definieren und im Blick auf die Organisation ihrer Gesundheitssysteme, einschließlich der Bereitstellung von Gesundheitsdiensten und der medizinische Versorgung durch zu diesem Zweck reglementierte Berufen ist zu gewährleisten. Deshalb sind die reglementierten Berufe aus dem Anwendungsbereich dieser Richtlinie herauszunehmen.

Full text with the EPSU amendment: The activities covered by this Directive should concern the regulated professions falling within the scope of Directive 2005/36/EC. This Directive should apply in addition to Directive 2005/36/EC and without prejudice to other provisions laid down in a separate Union act concerning access to, and the exercise of a given regulated profession. ***It is important to ensure full respect for the responsibilities of the Member States as defined in Article 168 of the Treaty on the Functioning of the European Union with regard to the definition of their health policy and the organisation of their health care systems, including the provision of health and medical services by the regulated professions designated for this purpose. To this end, the said regulated professions and also all social service professions should be excluded from the scope of this Directive.***

Justification: Under no circumstances should the quality of care, the access to care or patient safety be put at risk by decisions by other agendas, in particular economic concerns. In EPSU's view the assessment of the appropriateness of regulations of professions should start from the general interest orientation and the public service missions of health and social services and not from the economic and competition logic of the internal market.

Recital (9)

Add at end: Where a measure concerns the protection of human health, Member States shall enjoy wide level of discretion to determine its appropriateness and proportionality.

Full text with the EPSU amendment: The burden of proof of justification and proportionality lies on the Member States. The reasons for regulation invoked by a Member State by way of justification should thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its

arguments. **Where a measure concerns the protection of human health, Member States shall enjoy wide level of discretion to determine its appropriateness and proportionality.**

Justification: EPSU supports the fundamental freedom of EU citizens' mobility in the single market, but surely not against the fundamental rights of patients for quality health care and provision offered by professional nurses and midwives who have constant access to continuous professional development (CPD). The qualification level of the providers of the health care (e.g. nurses, midwives, doctors, dentists, pharmacists, but also all other professions not falling under the automatic recognition regime of Directive 2005/36/EC amended by Directive 2013/55/EU) should be highly considered and safeguarded, and should not be jeopardised for any economic or financial reasons.

Recital (15)

Add at end: ... effective to achieve the aim pursued except where these requirements are to protect human health.

Full text with the EPSU amendment: (15) Requirements linked to professional qualifications should be considered as necessary only where existing measures, such as consumer protection law, cannot be regarded as being suitable or genuinely effective to achieve the aim pursued **except where these requirements are to protect human health.**

Justification

These amendments integrate into the Directive the concept of the 'precautionary principle' that has been upheld by the CJEU e.g. in Case C-531/06 Commission v Italy, Joined Cases C-570/07 and C-571/07 José Manuel Blanco Pérez and María del Pilar Chao Gómez, Case C-73/08 Bressol and Chaverot. This says that Member States actions to protect human health should not be constrained by difficulties in assessing or quantifying the risks.