



## EPSU update and request for action 1 March 2018

### Directive on a proportionality test for professions

#### Background

This briefing gives an update concerning the **state of play in the trilogue** (bringing together the European Parliament, European Commission and Council) **on the proposed EC directive on a proportionality test before adoption of new regulation of professions** (COM(2016)0822).

To recall, **EPSU has consistently expressed concerns about the proposal** from the European Commission (EC) that takes cross-border mobility as the sole starting point. These concerns are largely shared by other professional organisations representing health care workers such as doctors (CPME), midwives (EMA), dentists (CDE), pharmacists (PGEU) and special nurses (ESNO) who also **fear that the Directive will weaken general interest approach and principles that should govern health and social care (services and systems)**.

The Council position adopted last May/June 2018 largely followed the EC's proposal but in the European Parliament (EP) there was more opposition. Indeed **the initial draft report from Andreas Schwab (EPP, Germany) in the leading Internal Market and Consumer Protection (IMCO) Committee, proposed to exclude healthcare from the scope of the Directive**. While EPSU would have welcomed a broader carve-out of health *and* social care in order to safeguard the general interest/public service mission that should drive EU policy in these services, this is an essential step.

However in the discussions in IMCO on the draft report **we were not able to maintain this exclusion**, even though **two other relevant EP Committees (ENVI and EMPL) followed our reasoning**. Furthermore, EPSU and HOSPEEM had jointly called on the EP IMCO Committee "to support amendments to exclude all health professions from all or parts of the directive." The **vote in IMCO on 4 December 2017 on the exclusion was narrowly lost (20 to 15)**.

The EP IMCO Committee did agree to **include a number of safeguards for healthcare, but these are only in the recitals**, i.e., helpful for interpreting the Directive (and for influencing its transposition into national law) but non binding (see below).

On a **positive note**,

- the need to consult the social partners, amongst other key stakeholders – Article 7, Paragraph 1. – has been included in the EP position.
- The reference to the precautionary principle (as formulated e.g. in Recital 20b NEW) is welcome.
- the obligation for a purely "economic impact" assessment of professional regulations has been taken out.

## Next steps

=> **More lobbying of Member States (and on the EP rapporteur/shadow rapporteurs)!**

=> **Isn't the exclusion of healthcare from the scope of the Directive the best option?**

The trilogue first met on 20 February and it will meet again **on 20 March 2018**. EPSU Secretariat asks its members to again approach their national governments, including the ministries of health and to press for their support **for an exclusion of health professionals from the scope of the directive**.

While it is true that the Council position does not call for this, we know that certain governments do have concerns and some have shifted their position since last year. The narrow vote on inclusion of healthcare in IMCO also supports the argument that a further discussion in the trilogue is a legitimate demand. It seems too that the Bulgarian Presidency of the Council would be more open to such a discussion.

Failing support for an exclusion, EPSU affiliates could also try to persuade their Government to support language to **strengthen the general interest approach/orientation of the Directive**.

This could be done by **moving language from the recitals into the Articles – and therefore making it a mandatory requirement**. While this is an unusual procedure it has happened in the past and, as said above, the growing concerns – as illustrated by the large amount of amendments on healthcare in the EP report – justify this.

**Relevant text that supports the “special protection” of health care professions (and services) is copied below** (elements underlined are of particular of interest).

- Recital 12a NEW: It is important to ensure that public interest objectives are adequately identified in order to determine, in the absence of harmonisation, the appropriate level of regulation, within the limits of proportionality. For example, where the risks to the public interest objective increase, Member States should have a reasonable margin of appreciation within which they are able to determine the level of protection which they wish to afford, and if necessary, to strengthen the regulation in place. The fact that one Member State imposes less strict rules than another Member State does not mean that the latter Member State's rules are disproportionate and therefore incompatible with Union law. While the regulation of professions is of the utmost importance in protecting public interest objectives and ensuring high quality products and services, it should, inter alia, contribute to the promotion of a high level of employment and a high level of education and training.
- Recital 12b NEW: With regard to protection of public health, according to Article 168(1) of the Treaty on the Functioning of the European Union (TFEU), a high level of human health protection is to be ensured in the definition and implementation of all Union policies and activities. This implies that a high level of human health protection is to be ensured also when the Union adopts acts pursuant to other Treaty provisions and in particular concerning the regulation of healthcare professions, given the particular nature of healthcare services and the fact that patients are different from other service recipients.
- Recital 20a NEW: The introduction of additional requirements might be suitable to attain the public interest objectives. The mere fact that their individual or combined effect should be assessed does not mean that those requirements are prima facie disproportionate. For example, the obligation to undergo continuous professional development might be suitable to ensure that professionals keep abreast of developments in their respective areas ...
- Recital 20b NEW: As confirmed by settled case-law, health and life of humans rank foremost among the interests protected by the Treaty. Consequently, Member States

should duly take account of the objective of ensuring a high level of human health protection when assessing requirements for healthcare professions, such as reserved activities, protected professional title, continuous professional development or rules relating to geographical distribution or the organisation of the profession, professional ethics and supervision, while respecting the minimum training conditions, laid down in Directive 2005/36/EC. Member States should in particular ensure that the regulation of healthcare professions, having public health and patient safety implications, is proportionate and contributes to the guaranteeing of access to healthcare, recognised as fundamental right in the Charter of Fundamental Rights of the European Union, as well as to safe, high quality, and efficient healthcare to citizens on their territory. In establishing policies for healthcare services, account should be taken of population density, geographical characteristics and the distribution of inhabitants, with a view to ensuring accessibility and high quality of service, as well as the adequate and safe supply of medicinal products, in accordance with the public health needs in the territory of the Member State concerned. Account should also be taken of the need to ensure the professional independence of healthcare professionals. Furthermore, as set out in Directive 2005/36/EC, Member States should be able to refuse partial access for healthcare professions, having public health or patient safety implications, if such rejection is justified by the objective of ensuring a high level of human health protection and is suitable for securing the attainment of that objective. Where the precautionary principle applies, Member States may not be required to provide specific evidence to justify the need for regulation.

- Article 5, Paragraph 3a. NEW: Member States shall have a reasonable margin of appreciation to determine the level of protection, which they wish to afford to public interest objectives, within the limits of proportionality.
- Article 6, Paragraph 1a. NEW: In particular, when evaluating the regulation of healthcare professions, which has health and patient safety implications, Member States shall take into consideration the *acquis communautaire*, in particular with regard to the specific nature of the professions providing healthcare services, as recognised by the European legislator and the case-law of the Court of Justice. With regard to the regulation of such professions, Member States shall have a margin of discretion that is sufficient to ensure a high level of human health protection.

EPSU Secretariat and European organisations that we are working with have been in contact with the rapporteur/shadow rapporteurs and the EC to **make the case for a further discussion in the trilogue on the exclusion of healthcare**. Our impression is that that each party would like the other parties to change their opinion before considering a change in their own position. In this context it would be important for EPSU state clearly in which direction they should move.