

CED POSITION

COMMISSION PROPOSAL FOR A DIRECTIVE ON A PROPORTIONALITY TEST BEFORE ADOPTION OF NEW REGULATION OF PROFESSIONS

May 2017

I - INTRODUCTION

The Council of European Dentists (CED) is a European not-for-profit association which represents over 340,000 dental practitioners across Europe through 32 national dental associations and chambers in 30 European countries. Established in 1961 to advise the European Commission on matters relating to the dental profession, the CED key objectives are to promote high standards of oral healthcare and dentistry and effective patient-safety centred professional practice.

The Council of European Dentists (CED) welcomes the basic direction taken by the services package to intensify the common internal market. However, the CED takes a very critical view of the Directive on a proportionality test before adoption of new regulation of professions (COM(2016) 822), which is part of the services package.

II - PRIORITY OF THE PRINCIPLE OF SUBSIDIARITY – NO UNDERMINING OF NATIONAL COMPETENCES

The planned introduction of an obligatory proportionality test would have considerable effects on all regulated professions within the European Union and would greatly limit the margin of discretion and scope for decision-making available to national law-makers. The instrument of Directive, chosen by the European Commission, interferes extensively in the exclusive competence of EU Member States to regulate professions and has therefore already been criticised as infringing on the principle of subsidiarity that is laid out in Article 5 of the Treaty on European Union. EU case law has repeatedly highlighted that Member States have the right to determine the level of protection that they want to afford to public health and the way in which that level is to be achieved¹.

III - PROFESSIONAL REGULATION DOES NOT HAMPER ECONOMIC GROWTH

Recent economic studies have shown that professional regulation cannot be seen as a general obstacle to economic development but instead that it is helpful in economic terms².

It is alarming that the European Commission places the adoption of new or amending existing professional regulation under general suspicion of slowing down economic growth. However, this economy-only approach, which the Commission has been pursuing for some time, cannot be the defining benchmark for assessing national professional regulation. Professional regulation is based on the need to protect essential public interest.

IV - EXCLUDE HEALTH PROFESSIONS FROM THE SCOPE OF THE DIRECTIVE

Finally, the draft Directive does not do justice to the special nature of the health professions. According to Article 168 paragraph 7 of the Treaty on the Functioning of the European Union, the regulation of health professions must continue to remain a competence of Member States. The CED categorically rejects the attempt by the European Commission to influence national health systems through the Directive on a proportionality test. Rules governing access to and practice of the health professions serve to protect public health and the health of patients. They

¹Judgments of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335; 2 December 2010, *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 58, and of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, paragraph 118

² Study of the Düsseldorf Institute for Competition Economics (DICE) on "Aspects of deregulation in the liberal professions" [*Aspekte der Deregulierung bei den Freien Berufen*], May 2017.

also safeguard the quality of patient care. In fact, the CJEU has, on numerous occasions, stated that protecting health is an appropriate ground to implement restrictions on the freedom to provide services³. The provision of health services thus differs substantially from the provision of other services.

General assumptions about the advantages of free competition do not apply to the provision of health services. Health services rightly occupy a special position among services. At a European level, this is expressed clearly, both in Directive 2011/24/EU on the Application of Patients' Rights in Cross-Border Healthcare and in Directive 2006/123/EC on Services in the Internal Market. Furthermore, the European Court of Just recently made reference to the special relationship of trust that must exist between dentists and their patients⁴.

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Against this background the CED proposes that the health professions are excluded from the scope of the planned Directive on a proportionality test to bring it into line with the approach to health enshrined in the EU Treaties, relevant EU legislation and EU case law.

The CED calls on all those involved to take account of these important aspects during the legislative process.

Unanimously adopted by the CED General Meeting on 26 May 2017

³Judgments of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335; 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 46, and of 12 September 2013, *Konstantinides*, C-475/11, EU:C:2013:542, paragraph 5

⁴Judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335