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DRAFT OPINION

of the Committee on Employment and Social Affairs

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council
on a proportionality test before adoption of new regulation of professions
(COM(2016)0822 – C8-0012/2017 – 2016/0404(COD))

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PA_Legrej

SHORT JUSTIFICATION

The proposal is in breach of the principles of conferral, subsidiarity and proportionality.

Articles 46, 53 and 62 TFEU do not provide a sufficient legal base for the proposal for a directive on a proportionality test before the adoption of new regulation of professions (COM(2016)822 final).

As Directive 2005/36/EC on the recognition of professional qualifications makes clear, Article 46, on free movement of workers cannot be used to shift competences on professional qualification from the Member States to the Commission.

Article 53 TFEU, on the need to ensure mutual recognition of qualifications and coordination of laws governing access to self-employment, does not give to the Commission the power to decide on the validity of new regulations of professions. This is particularly the case for healthcare, on the basis of Article 53(2) TFEU.

Article 62 TFEU, on the freedom to provide services, does not provide a general basis to challenge professional regulations by treating them as access barriers.

Subsidiarity:

The proposal violates the principle of subsidiarity Article 5 (3) TEU because it undermines the competences of Member States in the field of the recognition of regulated professions and professional training. This is so because it requires Member States to justify proportionality to the Commission **before** they can establish new or change existing regulated professions.

These competences are safeguarded under the current directive 2005/36/EC. Member States evaluate the proportionality of regulated professions at national level and notify it to the Commission, leaving their right to regulate unchallenged. In the current set-up, therefore, the burden of proof for the test falls on the Commission, who can still open an infringement procedure or bring the case to the ECJ. However, the current proposal would *de facto* inverse the burden of proof, which would be unlawful.

Proportionality:

The proposal violates the principle of proportionality Article 5 (4) TEU. The terms for the proportionality test are defined too vaguely, with 21 criteria describing relations of goals and measures instead of setting definitions, which moreover do not correspond to existing ECJ case law (cf. on public interest). In the absence of clear, transparent and concrete criteria, it is difficult for Member States to check if they fulfil the criteria or not. This would also be important to ensure legal certainty. An *ex ante* proportionality test, in these conditions, creates an unreasonable burden on their ability to regulate.

The proposal seems to develop a pseudo -ECJ-test for proportionality into a legislative act. But there is no indication that the proposed procedure would be more effective in tackling this issue than current provisions: since it will not change the criteria under which the ECJ is to decide on the proportionality of new regulations.

The Commission treats the regulation of professions as an economic barrier, without consideration of the public interest (such as considerations of health and safety) that inspire this

type of legislation and which contribute to safeguarding quality and security in the provision of services. Moreover, it does not take into account how existing regulated professions are related to educational and vocational training systems that ensure the quality of employment.

By adopting a purely economic perspective, the current proposal draws *an absurdum* situation in which the mobility of workers and the freedom to provide services imply the dismantlement of professional regulations, whereas the latter are integral to ensure employment opportunities for mobile workers and a fair internal market.

Requests:

There is room for the Commission to provide assessment and guidance to Member States, after identifying those areas where professional regulations may be in breach of existing EU legislation. This can be done currently through a transparent dialogue and clear guidelines and recommendations to the Member States, which take full account of existing legislation and ECJ case law. If there is a risk that new regulation breaches EU legislation, existing instruments provide the Commission with enough measures to enforce European law.

In order to support fair mobility, the Commission should consider instead whether further measures are necessary in other areas, such as the mutual recognition of qualifications and skills.

The Committee on Employment and Social Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to propose rejection of the Commission proposal.