

29 May 2015

## **HCPC response to the Draft statutory instrument: European Union (Recognition of professional qualifications) regulations 2015 and the Draft guidance for competent authorities implementing Directive 2005/36/EC [mutual recognition of professional qualifications]**

### **1. Introduction**

- 1.1 The Health and Care Professions Council (HCPC) welcomes the opportunity to respond to the Department of Business, Innovation and Skills' (BIS) second consultation on the transposition of the revised recognition of professional qualifications Directive (the Directive).<sup>1</sup>
- 1.2 The HCPC is a statutory UK-wide regulator of health, social work, and psychological professions governed by the Health and Social Work Professions Order 2001. We regulate the members of 16 health and care professions.
- 1.3 We maintain a register of professionals, set standards for entry to our register, approve education and training programmes for registration and deal with concerns where a professional may not be fit to practise.
- 1.4 Our main role is to protect the health and wellbeing of those who use or need to use our registrants' services.

### **2. Our responses**

- 2.1 We have provided responses to both draft consultation documents as the UK competent authority (CA) for each of our regulated professions under the Directive.
- 2.2 Our response has been organised according to themes or topic areas as appropriate.

### **Revocation of 2007 Regulations**

- 2.3 We support the Government's intention to revoke the current 2007 Regulations rather than amend them in order to streamline the transposition of the revised Directive into UK domestic legislation.

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<sup>1</sup> Our response to the first BIS consultation on the transposition of the revised Directive can be found here: [www.hpc-uk.org/aboutus/consultations/external/index.asp?id=178](http://www.hpc-uk.org/aboutus/consultations/external/index.asp?id=178)

## **Timetable for transposition**

- 2.4 The Government's response to the first BIS consultation has confirmed that the draft regulations contain the basic provisions for both the European Professional Card (EPC) and alert mechanism in the Directive.
- 2.5 Due to delays in formalising the implementing act for both provisions, the time allotted to CAs for ensuring that their administrative procedures and governing legislation (including Rules) are compliant with the implementing act is very short. This has resulted in very limited time being available to assess how our internal IT systems will interact with the upgraded Internal Market Information (IMI) system, particularly in the processing of payments and the retention of relevant data and documentation off IMI.
- 2.6 We recognise that the alert mechanism will need to function from the end of the transposition deadline on 18 January 2016. However, for the EPC, we continue to support a six month transitional period after the transposition deadline for the EPC to become fully operational. This would allow us to fully test the upgraded IMI system and set a reasonable and proportionate fee for processing EPC applications. We would continue to process applications for mutual recognition rights from European Economic Area (EEA) nationals or other relevant persons under the existing provisions of the Directive.
- 2.7 We welcome the European Commission's commitment to provide detailed operational guidance for both the EPC and alert mechanism. However, such guidance will not provide solutions to all our internal administrative procedures and the interaction of the upgraded IMI system with our IT systems.

## **European Professional Card (EPC)**

- 2.8 We continue to support in principle the extension of the EPC to the physiotherapist profession.
- 2.9 The draft regulations and guidance need to be strengthened in a number of areas. These include:
- enabling a host CA to challenge a home CA's decision to renew an EPC for the temporary and occasional provision of services where no checks of professional qualifications have taken place under the Directive (Article 4c);
  - clarifying the reference to 'the transposition of the declaration' which may be inappropriate in this context as it presumably refers to the transfer and retention of the declaration by the relevant CAs for as long as it is valid (Regulation 12-1);
  - confirming that where the host CA fails to make a decision to issue an EPC for the temporary and occasional provision of services within the required timelines in the Directive (Article 4(d)-5) or to organise an aptitude test (under Article 7-4), the EPC will be deemed issued and that this EPC for temporary and occasional service provision (with a check of professional qualifications) does give access to the profession;

- ensuring that host CAs can extend the deadlines outlined in the Directive (Article 4d-5) by two weeks on two separate occasions;
- amending table one of the draft guidance to stipulate one month for the home CA to verify the documentation contained within an individual EPC-IMI file; and
- clarifying that there is no possibility of tacit consent for an EPC issued where no checks of professional qualifications have taken place under the Directive (Article 4c) and as evident in table 2 of the draft guidance.

## **Alert mechanism**

- 2.10 We support the development of a proactive alert mechanism for professions which have patient safety implications as a very positive development in the Directive.
- 2.11 However, the draft guidance needs to be strengthened in a number of areas. These include:
- The reference to sending an alert if a ‘court in the United Kingdom’ has found evidence of the use of false documentation in the recognition process (Regulation 59-5). This point needs clarification as the French version of the Directive has given a wider interpretation to this provision to include a CA as opposed to just a court.
  - The interaction between having to send an alert within three calendar days of a final fitness to practise (FTP) decision and the necessity of qualifying an alert at a later date due to the statutory appeal period which lasts 28 days (Regulation 59-8 and 59-9).
- 2.12 The right of a professional who was the subject of a false alert to access remedies for damages (Regulation 59-8) has a number of implications for public bodies which could include handling possible compensation claims in instances of false alerts. This needs to be explored further.
- 2.13 We understand that there has been some debate in relation to whether Article 56a of the Directive refers to non-FTP related matters. For example, administratively removing a professional from our Register due to a registrant accidentally letting their registration lapse at renewal. We contend that administratively removing a professional in such instances would not constitute a prohibition on practice of the kind envisaged by the Directive. Such an interpretation would require us to send many hundreds of alerts at each renewal period which would subsequently be revoked within a short time period. This would be disproportionate for CAs.

## **Partial access**

- 2.14 We understand that the Government has considered that the partial access provisions will apply to each of our regulated professions. These can be assessed on a case-by-case basis and can be rejected ‘due to overriding reasons of general interest’ under the Directive (Article 4f-2). In practical terms we do not foresee that this provision will need to be exercised very frequently, given that the HCPC statutory regulates each of its professions on

the basis of protection of title without reserved activities or functions (with the exception of hearing aid dispensers).

- 2.15 The revised Directive and draft regulations require us to process applications for partial access both for establishment (via the general system) and for temporary and occasional service provision (via the free provision of services). We would welcome clarification in the draft guidance on an appropriate workflow for partial access applications via both of these routes.

### **Free provision of services**

- 2.16 We consider that all of our professions have 'patient safety implications' whereby we will require discretion for requesting a completed language declaration from a visiting health or care professional (visitor) in some instances.
- 2.17 The completion of a professional indemnity declaration from visitors is outside the scope of UK domestic legislation and our own Order. We would welcome clarity from the Government as to whether we can or cannot require a declaration from visitors based on the template provided under Annex 3 of the draft guidance.
- 2.18 The draft guidance could also be strengthened in a number of areas. These include:
- clarifying our ability to refuse to process a declaration due to the absence of required accompanying documentation; and
  - clarifying the interaction between requesting a character attestation under the Directive (Article 7-2(e)) from a visitor or home CA and the prohibition in the draft guidance on a host CA requesting CRB checks or for information on good conduct and character from visitors.
- 2.19 The compensation measure referred to in the draft guidance under the free provision of services when a check of professional qualifications is carried out in the Directive (under Article 7-4) should be limited to the completion of an aptitude test and not a POA. The draft guidance should also provide clarity over the deadline for the organisation of such an aptitude test.

### **Freedom of establishment (general system)**

- 2.20 We welcome the opportunity to assist EEA nationals or other relevant persons exercising their mutual recognition rights under the Directive. However, the draft guidance has arguably placed too great an expectation on the obligations of a CA in the organisation of a POA.
- 2.21 We already provide information to applicants on how best to organise a POA but the responsibility for organising this must remain with the applicant as acknowledged in the latter section of the draft guidance. We will continue to signpost applicants to relevant professional bodies and other stakeholders to assist them in obtaining a suitable POA.

- 2.22 The draft guidance could be strengthened in clarifying when a CA operating under the general system would be able to exercise the one month extension to informing the applicant on the outcome of an assessment in writing for establishment purposes as evident in the draft guidance.

### **Exchange of and Access to Information**

- 2.23 We do not currently allow online or electronic applications either for establishment or under the free provision of services schemes in the Directive. The various forms for both are available on our website, which can be downloaded and submitted to us by post. We also accept payment for applications for establishment via a telephone payment system.
- 2.24 The draft guidance does not stipulate minimum requirements for ensuring that all procedures and formalities (other than the completion of compensation measures) under the Directive can be completed remotely and via electronic means. We would welcome an indication from BIS on minimum requirements in this area for CAs.
- 2.25 The draft guidance does advise CAs to move to establishing online application forms through their website. We hope to implement this recommendation over the next few years but will not have this in place by the end of the transposition deadline.

### **Functions of CAs**

- 2.26 The draft guidance requires CAs to provide information or evidence to a registrant as listed under Annex VII of the Directive in order to facilitate the exercise of mutual recognition rights in another relevant European state. We may not necessarily possess all the information and documentation contained in Annex VII for our registrants, for example, proof of identity.
- 2.27 We would welcome confirmation that we would only be required to issue the evidence or information under Annex VII which we have a record of (Regulation 5-3). An applicant will need to provide the other information or evidence directly to us or the host CA in question.

### **Documentation**

- 2.28 Our role is to protect the public and to ensure that a professional has met our standards and is appropriately qualified to practise their profession safely and effectively.
- 2.29 Therefore we do not agree with the view in the draft guidance that requiring original or authenticated documents together with translations is disproportionate. In the interests of patient safety we will continue to require discretion in this area.

## **Language controls**

2.30 We would welcome clarification that any language controls for establishment purposes can only be imposed after the applicant's qualification has been recognised. This would mean that a language control could not be imposed prior to the completion of a compensation measure including a POA.

## **Safeguarding vulnerable groups act (SVG Act)**

2.31 We would welcome further clarification in the draft guidance on the obligations of a CA under the SVG Act and particularly on the duty to supply relevant information about registrants to the Independent Safeguarding Authority (ISA).

## **Draft guidance workflows**

2.32 The draft guidance contains a number of useful workflows. However, we recommend some minor amendments to these for clarity. These include:

- clarifying the workflow 'Does the general system apply' to take account of instances of the use of third country qualifications in the recognition process under the general system in the Directive (Article 10 cases);<sup>2</sup>
- amending the workflow 'The process for recognition under the general system – establishment' to remove reference to imposing a compensation measure solely on the basis of duration of the applicant's education and training except in very limited circumstances;
- amending the above workflow to include the derogation where a CA can impose both compensation measures under certain conditions in the Directive (Article 14-3); and
- amending the above workflow to refer to regulation 48 as opposed to regulation 49 where it states 'of the UK in cases set out...'

## **Role of a CA as a contact point**

2.33 The draft guidance and regulations have provided a number of definitions for the terminology used in the Directive. A CA will now act as 'contact point' for each of their regulated professions. The limited information that we provide on each of our regulated professions should supplement and not replace that offered by other stakeholders including professional bodies and UK NARIC (which acts as the point of single contact and assistance centre) particularly in relation to information on relevant social legislation (Regulations 5-4 and 5-5).

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<sup>2</sup> Annex 1 in the draft guidance needs to further specify a CAs obligations under point (g) for migrants meeting the requirements set out in Article 3(3) of the Directive whereby a professional holding a third country qualification which has been recognised in an EEA state must have three years professional experience in that EEA state which recognised the qualifications for the first time. In cases in which the condition of professional experience is not fulfilled Treaty provisions would apply. It would be helpful if draft guidance could outline the Treaty provisions in question.

## Minor mistakes / typos

2.34 The draft regulations contain a number of minor mistakes and / or typos. These include:

- The misuse of brackets in regulations 22-2(d) and 33(b).
- We would suggest listing all of our 16 regulated professions in the same section of schedule 1 – part 1 of the regulations.
- The correct title for one of our regulated professions is the ‘Hearing Aid Dispenser’ profession referred to in the above schedule.
- Our correct title since 2012 is the ‘Health and Care Professions Council’ as opposed to the ‘Health Professions Council’ which is evident in some entries to the schedule.
- We would suggest referring to the ‘Dietitian’ profession as opposed to ‘Dietician’. However, both terms are acceptable.
- We also contend that practitioner psychologist is the appropriate legal term for describing this regulated profession in the schedule.
- We would recommend that schedule 2 is updated to take account of our observations with regard to the use of ‘Dietitian’ and ‘Practitioner psychologists’ as above.
- We would also recommend the inclusion of all the relevant protected titles for the practitioner psychologist profession in particular in this schedule in order to avoid any potential confusion.<sup>3</sup>
- We would recommend that schedule 2 should substitute ‘or’ for ‘and’ when referring to ‘chiropractors or podiatrists’.
- Schedule 5 appeal bodies should refer to regulation 60 instead of 61. The reference to social workers in England and the appeal body of the first-tier tribunal should be removed as this is covered by regulation 60(4) (b).
- We would recommend amending the phrase ‘of having falsified evidence’ to ‘to have falsified evidence’ of professional qualifications under regulation 59-5.

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<sup>3</sup> A full list of our regulated professions and protected titles can be found here: [www.hcpc-uk.org/aboutregistration/protectedtitles/](http://www.hcpc-uk.org/aboutregistration/protectedtitles/)