

25 October 2017

European Commission
Mr. Jean-Claude Juncker
President
Rue de la Loi/Wetstraat 170
B-1049 BRUSSELS

Our ref: ...

Subject: Issue of enforcement of disciplinary decisions handed down against doctors, dentists and pharmacists in the event of their migration from one European Union Member State to another

Mr. President,

The *Collège médical du Grand Duché de Luxembourg* has the honour to submit for the deliberation of the Commission the legal difficulties encountered in the matter of free movement and the freedom to establish a professional practice enjoyed by doctors, dentists and pharmacists, as governed by Directive 2005/36 on the recognition of professional qualifications (...).

Without prejudice to other provisions, Directive 2005/36 was transposed into Luxembourg's national law by the Act of 29 April 1983 as amended on the practice of the profession of doctor, dentist and veterinary surgeon and by the Act of 28 October 2016 on the recognition of professional qualifications.

Under article 1 of the Act of 8 June 1999 as amended on the *Collège médical*, three professions mentioned in Directive 2005/36 were placed under the supervision and deontological authority of the *Collège médical*, namely doctors, dentists and pharmacists.

Among its duties, the *Collège médical* particularly monitors compliance with professional rules and issues opinions on draft legislation and regulations relating to the aforementioned professions.

In addition, the *Collège médical* initiates disciplinary action by referral to disciplinary jurisdictions should one or more members of one of these professions have committed actions likely to constitute a breach of the rules and duties applicable to the practice of the profession.

At the conclusion of the disciplinary action, determined by final decision, it is the prerogative of the *Collège médical* to enforce the sanctions handed down by the disciplinary jurisdictions.

As the national medical order, the *Collège médical* is also responsible for issuing opinions regarding applications for licence to practise in Luxembourg submitted by one of the professions concerned within the European Union, irrespective of the State of origin.

Opinions on these applications for licence are generally based on standards of good character, verified both by the absence of a criminal record and by a certificate of good conduct, or else of a professional situation free from disciplinary antecedents following final decisions by the competent authority in the Member State of origin.

Over the past three years, the *Collège médical* has found evidence of a surprising phenomenon.*

It has come to our notice that a **certain number of candidates have proved, subsequent to their setting up practice in Luxembourg, to be the subject of final decisions ordering a suspension/temporary ban on their right to practise in their country of origin**, in the wake of matters under investigation/subject to proceedings in this Member State of origin, at the time of submitting their application for licence to practise in Luxembourg.

In this context, article 56 of Directive 2005/36 allows Member States to share information on disciplinary penalties and/or all serious facts likely to affect the practice of an activity by a migrant professional.

The *Collège médical* is aware of current efforts under way to implement the data-sharing measure via the IMI system, based on a proposal for a European professional card containing all the data establishing the professional's situation.

According to data-sharing procedures, privacy and the presumption of innocence must be observed between Member States, which means that, **in principle, only final decisions may be communicated**.

Sharing information that is necessary in many respects does not, however, resolve other situations not explicitly addressed by the Directive, or other instruments applicable to the status of these professionals.

As regards the **processing of information received** in relation to disciplinary sanctions and/or serious facts, this is **left to the discretion of the host Member State**, which is no easy matter, depending on the situation of the professional at the time of receipt.

If the sanctions or facts are communicated at the time the migrating professional is applying for a licence to practise in the country, that licence may be granted or refused, in the light of disciplinary antecedents to be assessed by the Ministry of Health, after consulting the opinion of the *Collège médical*. This approach is therefore clear as regards sanctions for which remedies have been exhausted in the context of the 'licence to practise' procedure.

The special case of disciplinary sanctions withdrawing the right to practise in the Member State of the professional's origin, when said professional is already effectively practising in Luxembourg, does, however, create difficulties of enforcement under Luxembourg's domestic judicial system.

Clearly, under article 46 of the Act of 29 April 1983 as amended on the practice of the professions of doctor, dentist (...), there remains a tenuous possibility of referring the case to the domestic criminal courts in the event of a decision handed down outside Luxembourg on facts leading to the ban on a professional practising their profession. This provision is limited however, by the criterion of subject matter jurisdiction, since only foreign criminal judgements accompanied by a ban on practising will be admissible in the criminal court.

According to articles 4(5) and 11(5) of the Act of 28 April 1983 as amended on the exercise of professions (...) and article 12b(3) of the Act of 31 July 1991 as amended, establishing the conditions for licence to practise the profession of pharmacist, no doctor, dentist or pharmacist banned in Luxembourg when establishing a practice in another Member State is licensed to provide services in Luxembourg.

Directive 2005/36, without prejudice to other specific judicial instruments, does not envisage measures for the enforcement of disciplinary sanctions in the context of freedom of establishment and of movement for professionals.

This raises a difficulty common to all Member State orders, which are finding it difficult to enforce professional discipline according to the principle of a Europe of justice.

The unintentional outcome is the perverse effect of a regime of virtual impunity for those recalcitrant professionals who organise their departure from their State of origin in anticipation of disciplinary proceedings, with the ultimate aim of escaping the enforcement of a potential sanction.

The enforcement of a sanction, of whatever degree, has a key punitive function in bringing the professional to a realisation of their offence, which must be followed by atonement for their failings as the only condition on which to make amends to the profession and to the patient.

The European Commission's priorities include justice, free movement and the internal market, i.e. three essential foundations to which this issue relates.

The *Collège médical* has no doubt, therefore, that the Commission will take a keen interest in better regulation of the justice system and of the internal market.

The *Collège médical* would also like to point out that the professions addressed in Directive 2005/36 form part of the sensitive field of the protection of society in general through the protection of public health.

In most cases where disciplinary sanctions withdrawing the right to practise are imposed, the activity of the professionals concerned constitutes real endangerment of patient health.

It is for these reasons that the activity of professions concerned by Directive 2005/36 requires professional order to be maintained, in the same way as public order is maintained under criminal law.

Rightly or wrongly, the doctrine followed by jurisprudence, or vice versa, is to classify the law and the disciplinary procedure as criminal matters.

The existence at the European level of a mechanism for the enforcement of sanctions on both the domestic scale (adjudication and prosecution within a single State) and the international (adjudication and prosecution in two different States) bears witness to a commitment to an effective system of Community justice between Member States.

The European Convention on the International Validity of Criminal Judgements and the Convention implementing the Schengen Agreement, without prejudice to other Community mechanisms, lay down the conditions governing the recognition and enforcement of criminal convictions between Member States.

These models of recognition, while not excluding any other references or suggestions, already offer a basis for the proposed deliberation on a European mechanism for the enforcement of disciplinary sentences between Member States.

Although disciplinary law may be what is known as “orphan law”, its point of convergence is with criminal law, by virtue of its purpose being the protection of professional order, in which it closely resembles public order governed by criminal law.

Despite the narrower scope of application of disciplinary law, the attributes distinguishing its texts tend to bring it closer to certain principles of criminal law, including the application of the legality of penalties, the principle of the right to remain silent, etc., i.e. the general principles of law, on which more and more disciplinary jurisdictions, caught up by the inescapable conventional law of the ECHR, determine their findings.

It is for this reason that the *Collège médical* advocates on behalf of the professional order, and of European public order, for a legal instrument recognising the enforcement of European disciplinary decisions via the Brussels I regulation, without prejudice to other legal mechanisms and matters.

Thus, a European enforcement law already exists and eagerly awaits the addition of a new field, that of the recognition and enforcement of disciplinary decisions and sanctions.

The many questions of harmonisation raised by this issue are currently being addressed between competent authorities as part of the work of the European Council of Medical Orders (CEOM) and the Federation of European Dental Competent Authorities and Regulators (FEDCAR), without prejudice to other bodies working in the same area.

On the basis of the above considerations, and above and beyond the proposals and hopes expressed herein, the *Collège médical* would also like to see the Commission take a position as regards the current situation, and possibly make recommendations as to the enforcement and recognition of disciplinary sanctions between Member States.

* The following considerations are prompted by two actual cases:

- 1) That of a dentist holding a license to practise dentistry in Luxembourg granted on 29 April 2013 and who, on the grounds of prejudice caused to patients and to the French Social Security system, was sanctioned on 2 October 2014 by the French *Ordre des chirurgiens-dentistes* by suspension of his licence to practise for a period of two years, enforceable as from 1 January 2015. In reality, the sanction was never enforced since the dentist concerned had a licence to practise, and continued to practise, in Luxembourg throughout the period of his suspension in France.
- 2) That of a doctor specialising in orthopaedics, holding a licence to practise in Luxembourg granted on 11 March 2015 and who on 22 November 2016 was sentenced by the French *Conseil National des Ordres des Médecins* (CNOM) for offences committed while practising in France, to a one-year suspension coupled with a requirement to undergo a supervised training course, in a recognised service, with a view to potentially recovering his licence to practise after the year's suspension. This doctor continued to practise in Luxembourg throughout the period of his suspension in France, and therefore did not serve his sentence.

The *Collège médical* thanks you for your consideration of its remarks and remains,

Yours sincerely,

on behalf of the *Collège médical*,

Dr. Roger Heftrich
Secretary

Dr. Pit Buchler
President

Cc to:

- MISA
- *Ordre des chirurgiens-dentistes* France
- CNOM
- CEOM
- FEDCAR

