MUTUAL RECOGNITION OF PROFESSIONAL QUALIFICATIONS

EBLIDA Annual Council Seminar – Estoril, 14/5/2004

IMPORTANT: this paper does not legally bind the Commission or DG "Internal Market"

GENERAL INTRODUCTION

In a market economy the general rule is that everybody is free to take up any profession. In the general interest of the society this exercise of some professional activities may however be submitted to the possession of given qualifications. It is for each State to determine if the general interest is sufficiently safeguarded by free competition or, on the contrary, if a given profession must be regulated, and how it is regulated (protection of the title or of the professional activities). The qualifications necessary to practice a regulated profession are generally based on the national education system, hence the obstacle to a migrant possessing qualifications acquired in another State.

For example, in most Member States the professions of doctor, lawyer, merchant-navy officer, and primary-or secondary-school teacher (especially in State education) are open only to those who have undergone education and training in accordance with the relevant legal requirements.

The level and content of such education and training are generally determined by reference to the national education system, entailing an element of discrimination if a national qualification is required. Moreover, an appropriate qualification is needed in order to practise a regulated profession. In each Community country, these requirements apply to nationals of that country and to nationals of the other Member States. For obvious reasons, the latter do not normally satisfy the requirements.

The mutual recognition of professional qualifications is an appropriate mechanism for overcoming this obstacle to the free movement of persons and to the freedom to provide services.

DESCRIPTION OF THE LEGISLATION

1. Recognition of professional qualifications

The Community has taken action in this area on the basis of Article 47 (ex-57) of the EC Treaty. Action regarding the activities of employed persons (which are not covered by Article 47) has been taken on the basis of Article 40 (ex-49) of the EC Treaty, either by itself or read in conjunction with Article 308 (ex-235) of the EC Treaty. Generally speaking, since the adoption of Directive 92/51/EEC, all the Directives in this area apply to the activities of employed and self-employed persons.

Between 1964 and 2003, the Community adopted around sixty Directives in this field. They can broadly be divided into three main groups, as summarised below. In the few cases not covered by a Directive, the provisions of the Treaty – as interpreted by the Court of Justice – apply directly.

A. Recognition of professional experience

This system is based on the assumption that, in the course of actually practising a professional activity continuously for a number of years, a certain expertise will have been acquired in the technical skills specific to that activity. Three to six years' experience is generally stipulated, together with requirements as to the migrant's good character, financial standing, and physical and mental health. These Directives, which were the first to be adopted (from 1964 onwards), are generally referred to as "transitional Directives", since the original intention was to replace them with education and training harmonisation machinery – an approach that was abandoned as being too cumbersome and needlessly inflexible.

For the individuals concerned, the arrangements introduced have the advantage of being simple. They make it possible to pursue an activity anywhere in the Community, even if the activity in question is not regulated in some Member States and is subject to differing forms of regulation in others. While not requiring the national systems to be harmonised, the arrangements have the drawback of facilitating mobility only after a number of years' professional activity in the home Member State. Also, more generally, adopting specific directives is a highly cumbersome and complicated way of tackling the problem, since each relates to only one activity or profession. In the light of all these considerations the approach was gradually abandoned, with the last such directive being adopted in 1982.

Most of the measures in question relate to skilled trades, but some that are very broad in scope also cover the provision of professional services (e.g. by patent agents).

These directives have, with few exceptions, been repealed and consolidated in a single piece of legislation, Directive 1999/42/EC (OJ L 201 of 31 July 1999).

B. Automatic recognition of professional qualifications

This second system covers fully-qualified professionals who wish to practise in a Member State other than that in which they obtained their qualification. It comprises two variants, in the first of which automatic recognition is based on minimal co-ordination of education and training.

Member States' provision of education and training for the professions in question is governed by common rules that also require them to recognise such education and training undergone elsewhere in the Community. This variant applied to the health-care professions of doctor, nurse responsible for general care, dentist, midwife, veterinary surgeon and pharmacist.

The second variant applies only to architects. The purpose of the rules is not to harmonise the education and training provided by Member States, but to establish the criteria for recognition. The qualifications in question are likewise recognised automatically, once they have been approved by the Commission and the other Member States.

These arrangements are the result of a highly cumbersome procedure. They also cover only one specific profession or activity. Consequently, this approach has gradually been abandoned since 1985, in favour of a general approach.

C. Recognition of qualifications without co-ordination of education and training

The third set of arrangements is based on Directives 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and education and training of at least three years' duration, and Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and education and training to supplement Directive 89/48/EEC.

In principle, these arrangements apply to all regulated activities not already covered by a specific directive. Recognition under the system might be described as semi-automatic, since the principle is to recognise a migrant's education and training where the regulated professional activities which he wishes to pursue are the same as those which he is entitled to pursue or has pursued in the home Member State, and where the education and training required in the host Member State does not differ substantially from that which he has undergone. If that is not the case, the host Member State may require the migrant to compensate for the difference by completing an adaptation period or taking an aptitude test, the migrant being, in principle free to choose between the two. In the case of the legal professions, however, the host Member State is entitled to require an aptitude test. The compensation measure may relate only to substantial differences in education and training concerned.

The two Directives have the advantage of covering all regulated activities and professions that do not fall under a specific directive, while introducing machinery for the semi-automatic recognition of education and training.

The Commission's adoption of a general approach with regard to the recognition of qualifications does not altogether rule out the possibility of future directives specific to certain professions. But it has stipulated three preconditions for the adoption of such directives: the agreement of the profession concerned, a broad consensus among the Member States and advantages compared with the "general system" Directives.

This was illustrated by the adoption in 1998 of Directive 98/5/EC on the establishment of lawyers under home title. A similar Directive, covering only cross border provision of services had already been adopted in 1977 (Directive 77/249/EEC).

2. Recognition of proof of good repute, sound health, etc.

The various directives all contain, in differing forms, provisions requiring the host Member State to accept certificates issued by the authorities in the home Member State as proof that the person concerned is of good character or repute, enjoys sound physical and mental health, has not been declared bankrupt, and has not committed an act of serious professional misconduct or a criminal offence.

A number of the directives - and particularly those on architects - stipulate that, where proof of sound financial standing is required, attestations issued by banks in other Member State must be accepted; the same applies with regard to certificates issued by insurance companies in other Member States as proof of cover against the financial consequences of professional liability.

3. Membership of professional organisations and compliance with codes of conduct

In the case of establishment, migrants are normally required to register as necessary with the relevant professional organisations and to comply with their rules. The host country must ensure that registration with the organisations, and also appointments to their managing boards, is open to nationals of other Member States. The "general system" and "architects" Directives (for example) stipulate that, if necessary, migrants may provide proof in the form of a declaration on oath or a solemn declaration.

As regards provision of services, the specific directives on the recognition of (for example, architects') diplomas provide for exemption from registration with the professional organisations, or at least a simplified registration procedure or a straightforward declaration.

Lawyers providing services must observe the host Member State's rules of professional conduct without prejudice to their obligations in their home Member State, and when representing clients in legal proceedings, may be required to work in conjunction with a lawyer who practises before the judicial authority in question. Architects providing services are subject, in particular, to the host Member State's professional and administrative rules of conduct.

A complex set of legislation has thus been introduced in order to permit the cross-border practice of regulated professions in the European Union.

> In case of a gap in the EU legislation the basic substantive and procedural principles that Member States must observe have been established under Article 43 (ex-52) of the EC Treaty, as interpreted by the Court of Justice in its judgement of 7 May 1991 in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357. In this case the Court held that, when an application to take up a regulated profession is submitted to a host Member State by a migrant who is authorized to practise that profession in his home State, the migrant's diplomas, certificates and other qualifications and the professional experience he has acquired must be taken into account by that Member State.

If those qualifications are equivalent to those required under the host Member State's legislation to work in the field of architecture, the migrant must be authorized to do so. If that is not the case, he must be afforded the opportunity to remedy any shortcomings in his training. Lastly, the reasons on which any administrative decision is based must be given and it must be possible to make it the subject of judicial proceedings in which its legality under Community law can be reviewed.

Third countries and conclusion

These rules only apply to EU citizens with EU qualifications. The regime may be extended to third countries through appropriate agreements (such as the EEA Agreement). Furthermore the Union's schedule of commitments in the framework of the GATS clearly excludes third country qualifications from the Union's system of mutual recognition.

The recognition provided for under the sectoral Directives applies only to diplomas acquired by Community nationals in a Member State of the Union (with the exception of the EEA Agreement). Where diplomas were acquired in a third country, recognition is optional and determined by each Member State. The fact that a diploma awarded by a third country has been recognized by one Member State does not oblige the others to do so (cf. Court judgments of 9 February 1994 in Cases C-319/92 *Haim* and C-154/93 *Tawil-Albertini*).

However the "second" Member State must take into account that "first" recognition as well as education and training or/and professional experience that might have been gained in another Member State. The procedural principles of the "Vlassopoulou" case-law stating that the reasons on which any administrative decision is based must be given and that it must be possible to make it the subject of judicial proceedings in which its legality under Community law can be reviewed also apply (see above).
This case-law was formally put on the "statute book" by Directive 2001/19/EC of 14 May 2001 (OJ L 206, 31/7/2001, p.1).

Recognition by a Member State of a third country qualification held by an EU national in the framework of the general system, supplemented by 3 years of certified professional experience in the case of a diploma and 2 in the case of a certificate in that Member State enables that qualification to be recognised in the other Member States.

According to the Conclusions of the informal EU Summit held in Stockholm in March 2001 the Commission presented, before the informal EU summit of Barcelona of March 2002, a comprehensive proposal for a Directive (COM (2002) 119 final of 7.3.2002) setting out the future regime of professional recognition within an enlarged EU, which is still in first reading at the Council (next paper).