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PROFESSIONAL QUALIFICATION AND DIPLOMA RECOGNITION IN EU LAW

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ABSTRACT

Free movement of qualified professionals within the EU is a prerequisite for free movement of services, workers and freedom of establishment. The harmonization of the national law in this area is accomplished by the Directive 2005/36/EC and Directive 2013/55/EU. Directive 2005/36/EC and its amendments regulated by Directive 2013/55/EU establish system for the recognition of professional qualifications in order to help make labor markets more flexible. Also further liberalization of the provision of services, more automatic recognition of qualifications and simplify administrative procedures were encouraged by these Directives. This paper introduces professional qualifications regulation and gives analysis of the ECJ case law in the area of professional qualifications and diploma recognition. Authors analyze three systems of professional qualifications introduced by the Directive 2005/36/EC and explain them in connection with ECJ judgments. Instead of conclusion authors present the most relevant changes made in this area by the Directive 2013/55/EU.

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1. INTRODUCTION

Taking the professional qualifications issue into consideration¹ it is important to keep in mind the situation in the particular Member State. The national regulations,² by which the professional qualification required for pursuing certain economic activity is regulated, may represent an obstacle for nationals coming from another Member State.³ At the European Union level, the existing directives have been adopted with the purpose to ensure mutual recognition of professional qualifications and primarily to harmonize sectorally regulated professions such as doctor, pharmacist, nurse, midwife, architect, veterinary surgeon and dental practitioner.⁴ It concerns so called vertical access to har-

¹ On recognition of professional qualifications in EU refer to Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Fundamental economic freedoms of the EU* (in Croatian), Inženjerski biro d.o.o., Zagreb, 2011,

² Each Member State is obliged to prepare a list of regulated professions in order to facilitate the access for certain profession to the labor market and to stimulate the cross-border activity. The list of all regulated professions in all Member States is available at the website http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.home as at 21 November 2011. In June 2010, the Government of the Republic of Croatia adopted a list of regulated professions. Database on regulated professions in the Republic of Croatia is available at the website <http://db.azvo.hr/hr/profesije/> as at 21 November 2011 (under preparation).

³ For the purpose of pursuing the regulated professions in the Member States, each State is obliged to establish the contact point, which shall provide the interested with information on recognition of foreign professional qualifications in the national legislation governing the professions and the pursuit of those professions. These information are acquired and submitted by the National ENIC/NARIC Office (contact point) in the Republic of Croatia, which constitution and scope of activity is stipulated by the provision of Article 66 of the Act on Regulated Professions and Recognition of Foreign Professional Qualifications.

⁴ Tiedje, J., Head of Unit, DG Internal Market: *The Directive on Recognition of Professional Qualifications: what is at stake for Service Professionals?*, CEPI meets..., available at <http://www.cepi.eu/uploads/File/CEPImeetsJurgenTiedje.pdf> na dan 8.6.2011 p. 2.

⁴ Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services OJ L 167 , 30.06.1975 p. 0001 - 0013 and Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors OJ L 167, 30.6.1975, p. 14–16 in respect of doctors; Council Directive 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services OJ L 176, 15.7.1977, p. 1–7 in respect of nurses; Council Directive 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses responsible for general care, OJ L 176, 15.7.1977, p.8; Council Directive 80/154/EEC of 21 January 1980 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in mid-

monization,⁵ that is, an automatic recognition system has been established for the aforementioned regulated professions in a way that training in these professions has been harmonized.⁶ Furthermore, a number of directives have been adopted, related to various activities such as manufacturing and processing, small craft industries, food and retail trade, intermediary and construction.⁷

In this field it is pretty hard to reach an agreement, as seen in a fact that 17 years were required to adopt the first Council Directive in respect of architects,⁸ while in respect of engineers for example, no agreement has ever been reached.⁹ Two Directives in respect of lawyers¹⁰ should be mentioned here as

wifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services OJ L 33, 11.2.1980, p. 1–7 in respect of midwives; Council Directive 85/432/EEC of 16 September 1985 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy OJ L 253, 24.9.1985, p. 34–36 in respect of pharmacists; Directive 86/457/EEC on general practitioners OJ L267/26 and Council Directive 87/540/EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway in national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications for this occupation OJ L 322, 12.11.1987 p. 20–24 in respect of carrier of goods by waterway. These directives are amended by Directive 2005/36/EC.

⁵ Refer to Rodin, S.: Like ships in the night: Croatian higher education and the freedoms of the internal market of the EU, *Politička misao*, 2011, stating that full harmonization is valid for these professions, which means that Member States may not adopt any national regulations that would limit their access to the market, but they should be treated as own nationals and as legal entities when concerning legal entities, p. 9.

⁶ Refer to Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Fundamental economic freedoms ...*, op. cit.

⁷ Council Directive 64/224/EEC of 25 February 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries OJ 56, 4.4.1964, p. 869–878 amended by Directive 2005/36/EC.

⁸ Barnard, C.: *The substantive law of the EU, The four freedoms*, Third edition, 2010, p. 408; Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services OJ L 223, 21.8.1985, p. 15–25 amended by Directive 2005/36/EC and Communication 2002/C 214/03 *Diplomas, certificates and other evidence of formal qualifications in architecture which are the object of mutual recognition by the Member States (2002/C 214/03)* (Updating of communication 2001/C 333/02 of 28 November 2001), refer to the judgments in cases C-310/90 *Nationale Raad van de Irde der Architecten v Egle* [1992] ECR I-177 and C-447/93 *Dreessen v Conseil national de l'ordre des architectes* [1994] ECR I-4087.

⁹ Tiedje, J.: *The Directive on Recognition of Professional Qualifications: what is at stake for Service Professionals?*, op. cit., p. 2.

¹⁰ Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977, p. 17–18 and Directive 98/5/EC

well, along with a comment that in these Directives only freedom to provide services is regulated, not the freedom of establishment.

At the end of '80s, instead of harmonization in education, the horizontal harmonization was introduced, based on the mutual recognition principle¹¹ and based on the European Court of Justice (hereinafter: ECJ) judgments¹² in cases *Cassis de Dijon*¹³ and *Vlassopoulou*.¹⁴ The result of horizontal harmonization was Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.¹⁵ The second general system was introduced by Directive 92/51/EEC¹⁶ in respect of professions for which the required level of education and training is not as high, and the third general system was introduced by Directive 99/42/EC¹⁷ extending the mutual recognition approach to activities such as manufacturing and processing, small craft industries, food and retail trade, intermediary and construction and sectorally regulated professions. In the sense of possibility to recognize not only formal qualifications but training as well,¹⁸ and in order to harmonize the system,

of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained , *OJ L 77, 14.3.1998, p. 36–43*; more details on these directives later in the text.

¹¹ In Rodin, S.: Like ships ... (in Croatian), p. 10 stating that “general system for the recognition of qualifications is based on the mutual recognition principle and applied to all non-regulated professions. The access to pursuing the non-regulated profession must be free based on qualification obtained in the host state.”

¹² Refer to the principles of the European Union law in Josipović, T.: Principles of the European Union law in the judgements of the European Court of Justice, Narodne novine, Zagreb, 2005.

¹³ Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter referred to as: *Cassis de Dijon*).

¹⁴ Case C-340/89 *Vlassopoulou* [1991] ECR I-2357. More details in the chapter regarding the effective exercise by lawyers of freedom to provide services.

¹⁵ Council Directive 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 training of at least three years' duration, *OJ L 019 , 24/01/1989 p. 16-23*.

¹⁶ Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, *OJ L 209, 24.7.1992, p. 25–45*.

¹⁷ Directive 99/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalization and transitional measures and supplementing the general systems for the recognition of qualifications, *OJ L 201, 31.7.1999, p. 77–93*.

¹⁸ Barnard, C.: The substantive law of the EU..., *op. cit.*, p. 408.

the Directive 2005/36/EC on the recognition of professional qualifications has finally been adopted.¹⁹ In last year Directive 2005/36/EC was amended by the Directive 2013/55/EU²⁰ that also established rules on administrative cooperation through the Internal Market Information System (IMI).

2. DIRECTIVE 2005/36/EC ON THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS

Directive 2005/36/EC establishes a system of recognition of professional qualifications for the purpose of establishing more flexible labor market, further liberalization of provisions regarding the services and due to simplified and more transparent regime of recognition of qualifications, as well as administrative procedure. Namely, legal regulation of recognition of professional qualifications may represent an obstacle to the freedom to provide services, freedom of establishment and freedom of labor movement.²¹

Directive 2005/36/EC is an example of positive integration. As stated in the literature: “the Internal Market is established by positive and negative integration measures, by which the market obstacles are been abolished. A term of positive integration designates a system of adopting the European Union legal regulations, by which the national standards are complied, while negative integration designates abolition or exception of national regulations and fact-based barriers by legal actions.”²²

This Directive 2005/36/EC applies to all nationals of Member States Contracting Parties to the Agreement on the European Economic Area (hereinafter referred to as the EEA Member State)²³ wishing to pursue a regulated profession in a EEA Member State, other than that in which they obtained their profes-

¹⁹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22.

²⁰ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (IMI), OJ L 354 of 28 December 2013.

²¹ On fundamental economic freedoms more in Bodiřoga-Vukobrat, N., Horak, H., Marti-nović, A.: Fundamental economic freedoms ..., op.cit. 2011. Refer to Rodin, S.: Like ships ..., op. cit., p. 10.

²² Ibid, p. 8.

²³ Agreement on the European Economic Area, OJ L1, 3.1.1994., OJ L 130, 29.4.2004. Besides the European Union Member States, the European Economic Area comprises the states of Liechtenstein, Norway and Island.

sional qualifications, on either a self-employed or employed basis.²⁴ Pursuant to Article 3 (1)(a) of the Directive 2005/36/EC a term of regulated profession²⁵ presumes a pursuit of professional activity or group of professional activities, access to which and the pursuit of which is subject to the possession of specific professional qualifications.²⁶

Accordingly, pursuant to the provision of Article 3 (1) (b) of the Directive 2005/36/EC a term of professional qualification presumes a qualification attested and being an evidence of specific professional qualification, that is, based on attestation issued by the authorized body in the Member State in accordance with the provisions laid down by laws, regulations and administrative procedures, comprising professional education and training.²⁷

The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.²⁸

In the judgment C-39/07 *Commission v Spain*²⁹ the ECJ defined a term of regulated profession and possibility of recognizing the foreign diplomas based on the earlier enforced Directive 89/48/EEC in respect of activities of pharmacist. Based on the European Commission request, the ECJ made a decision on implementing the Directive 89/48/EEC into the Spanish legislation in respect of activities of pharmacist. The Commission considered that lack of specific directive related to the specific profession meant that such diploma, specifically the master of pharmacy, belonged under the scope of Directive 89/48/EEC,

²⁴ Article 2(1) of Directive 2005/36/EC.

²⁵ “A fact that certain profession is regulated closes the access to the market in principle. If an activity is proclaimed as regulated profession, it means that when assessing whether access to the market should be absolutely free or whether it should be limited (pursuant to the European rules on permitted limitations) due to protection of profession and service recipient, the advantage should be given to the latter.” Petrović, S.: Real estate ..., op. cit, p. 20.

²⁶ Pursuant to the provision of Article 3 of the Act on Regulated Professions, a regulated profession is a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications, as well as a professional activity or group of professional activities pursuing by the members of professional organizations with professional title. Definition of regulated professions is equivalent to definition in the Services Act under provision of Article 3 (10), as well as in the Directive on services in Article 4 (11).

²⁷ Article 11 (1)(a) of Directive 2005/36/EC

²⁸ Article 4 (1) of Directive 2005/36/EC

²⁹ Judgment in case C-39/07 *Commission v Spain*, hospital pharmacist [2008] ECR I-3435

while the Spain stated that in case of lack of such directive, no Directive 89/48/EEC nor any other measure laid down by the secondary legislation could have been applied to the recognition of such diploma. In the judgment, the European Court of Justice stated that Directive applied to all higher-education diplomas and that regulated professions presumed all professions which activity has been regulated by national regulations in the home Member State. Directive 89/48/EEC establishes no system of automatic recognition, but enables the host Member State to define requirements in respect of beneficiary as the national of other Member State to select one of the additional measures and to carry out the adaptation period or aptitude test, particularly as regarding the obtained education or training issues, which significantly differ from those related to diploma obtained in the host Member State, or in case when regulated profession in the host Member State contains one or more regulated professional activities, which are not contained in the regulated profession in the Member State where the beneficiary comes from and in case when such difference between professional activities arises from different specific education. The judgment defines the regulated profession as professional activity comprised of specific activities, or its pursuit is regulated by regulations creating a system under which that professional activity is expressly reserved to those who fulfil certain conditions and access to it is prohibited to those who do not fulfil them.

In relation to these facts, the ECJ noted in paragraph 32 that the scope of Directive 89/48/EEC was not restricted according to the field or type of the diplomas concerned. It is apparent from Article 1(a) thereof that that directive applies to, *inter alia*, any diploma of higher education awarded on completion of a post-secondary course of at least three years' duration and allowing its holder to take up a regulated profession.

In addition, the ECJ noted in paragraph 33 that a profession is deemed regulated, for the purpose of Directive 89/48/EEC, where access to the professional activity constituting that profession or its exercise is governed by laws, regulations or administrative provisions creating a system under which that professional activity is expressly reserved to those who fulfil certain conditions and access to it is prohibited to those who do not fulfil them.³⁰

Accordingly, it is apparent that right to diplomas recognition is guaranteed as the fundamental right arising from the freedom of establishment guaranteed by the provision of Article 49 TFEU (ex Article 43 TEC). Pursuant to the earlier legal practice and provision thereof, Member States which receive a request to admit a person to a profession to which access, under national law,

³⁰ Refer to judgments in case C164/94 *Aranitis* [1996] ECR I-135, paragraph 18 and 19, and in case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 45.

depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.³¹

In this sense, the evidence of formal qualification is represented by diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community³² defined by the provisions of Directive 2005/36/EC.

A profession practiced by the members of an association or organization listed in Annex I of the Directive shall also be treated as regulated profession.³³ Those associations and organizations are recognized by the Member States as special entities awarding the evidence on formal qualification to their members. These types of associations, i.e. organizations must ensure that their members respect the rules of professional conduct which they prescribe.³⁴

When the evidence of acquired formal qualifications is issued by a third country, it shall be regarded as evidence of formal qualifications if the holder has three years' professional experience in the profession concerned on the territory of the Member State which recognized that evidence of formal qualifications in accordance with Article 2(2) of Directive 2005/36/EC.³⁵

3. GENERAL SYSTEM FOR THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS

The general system for the recognition of professional qualifications applies to all professions which are not regulated by special rules on recognition and in the cases in which the conditions prescribed in the system of automatic recognition of professional qualifications are not satisfied.³⁶ The general system

³¹ Refer to judgments in case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16 and in case C-238/98 *Hocsman* [2000] ECR I-6623, paragraph 23.

³² Article 3 (1)(c) of Directive 2005/36/EC.

³³ Refer to associations and organizations listed in Annex I of the Directive.

³⁴ Article 3(2) of Directive 2005/36/EC.

³⁵ Article 3(3) of Directive 2005/36/EC.

³⁶ Article 10 of Directive 2005/36/EC.

for the recognition of professional qualifications is based on the mutual recognition principle, pursuant to the Directive 89/48/EEC³⁷ and Directive 92/51/EEC.³⁸ When applying the general system for the recognition of professional qualifications, the Member States retain the right to lay down the minimum level of qualification in order to ensure the quality of provided services. In case there are substantial differences in training levels between the state in which the training has been carried out and host Member State, the host Member State is entitled to lay down the compensatory measures in a form of completing the adaptation period or taking the aptitude test.

When we take the general system into consideration, it concerns negative integration in which the judgment on justification of additional requirements is left to the ECJ. In that case, the principle of proportionality is applied as determined in the judgment in case *Gebhard*³⁹.

Within the general system for the recognition of professional qualifications, the following two situations are represented:

1. a situation in which the pursuit of certain profession in a host Member State requires a possession of specific professional qualification regulated in a host Member State and in the state in which the qualification has been obtained
2. and a situation that concerns the professional qualification regulated in a host Member State but not regulated in the state in which the qualification has been obtained.

If access to a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals. In order to pursue a professional activity, a person must possess a qualification obtained in another Member State, attesting a level of professional education (and/or training) at least equivalent to the level immediately prior to that which is required in the host Member State.⁴⁰

If access to a regulated profession requires no possession of specific professional qualification in a home Member State, the access to such profession in

³⁷ Council Directive 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 training of at least three years' duration, OJ L 19, 24.1.1989, p. 16–23.

³⁸ Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ L 209, 24.7.1992, p. 25–45.

³⁹ C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165

⁴⁰ Article 13 (1)(b) of Directive 2005/36/EC.

a host Member State in which the profession is regulated requires an evidence of at least two year professional experience on a fulltime basis during the previous ten years as additional qualification.

There are five levels⁴¹ of professional qualifications which are graded from the lowest to the highest level of qualifications:

- first, the lowest level presumes a possession of an attestation of competence issued by a competent authority in the home Member State attesting that the holder has acquired general knowledge equivalent to the first or second level of education or that the holder has carried out a training not forming part of a certificate or diploma or that the holder has passed a specific examination without prior training or that the holder has a three year professional experience;⁴²
- second level presumes a possession of a certificate attesting to a successful completion of a secondary course of technical, professional or general character supplemented by professional training;
- third level presumes a possession of a diploma certifying successful completion of a secondary course of a duration of at least one year or professional training comparable in relation to the conditions, responsibility and acting;
- fourth level presumes a possession of a diploma⁴³ certifying successful completion of training at post-secondary level of at least three and not more than four years' duration, and

⁴¹ Refer to Rodin, S.: Like ships..., op. cit., p. 13 stating that "Directive 2005/36/EC pursuing the previous directives dealing with the same legal issues applies terminology older than the Bologna Declaration, thus in Article 11, inter alia, distinguishes post-secondary level of training of at least three and not more than four years' duration, and post-secondary course of at least four years' duration. Levels of qualifications and their scope are hereby elaborated as the minimum condition for transboundary mobility... The aforementioned system indirectly affects the national education policy by opening the labor market to the nationals of other Member States under conditions less strict than those required within the framework of national system. For example, person from certain Member State who obtained a three year higher education will have the same possibility of accessing the market as person from host Member State who obtained a four year education."

⁴² This requirement indicates to a diversity of education, i.e. training system in various Member States, since in certain Member States three, i.e. four or five years of training are required.

⁴³ Refer to judgment in case C-286/06 *Commission v Spain* [2008] ECR I-8025, paragraph 55. A diploma may be composed of a set of documents evidencing formal qualifications. In that sense, it is sufficient that the education and training were received 'mainly in the Community', presuming that that expression covers both education and training received entirely in the Member State which awarded the formal qualification in question and that received partly or wholly in another Member State. Refer to judgment in case C-274/08 *Commission v Greece* [2008] ECR I-7969, paragraph 28, as well as in Rodin, S.: Like ships ..., op. cit., p. 11.

- fifth level presumes a possession of a diploma certifying that the holder has successfully completed a post-secondary course of at least four years' duration.⁴⁴

In case C-274/05 *Commission v Greece*⁴⁵ the European Court of Justice defined a term of “diploma” as the evidence of formal education and education obtained mainly in the Community, which is of particular significance taking into consideration a different time of duration of education and training in different Member States, as well as a possibility of mobility during pursuing the education.

The ECJ made a decision on implementation of Directive 89/46/EEC into the Greek legislation. The provisions of Article 4(a) and Article 3(1) of Directive 89/48/EEC entitle any applicant who holds a “diploma”, enabling him to pursue a regulated profession in one Member State to pursue the same profession in any other Member State. It follows expressly from the provision of Article 1 (a) of Directive 89/48/EEC that it is sufficient that the education and training were received ‘mainly in the Community’, presuming that that expression covers both education and training received entirely in the Member State which awarded the formal qualification in question and that received partly or wholly in another Member State.⁴⁶

According to the system put in place by Directive 89/48/EEC, a diploma is recognized not on the basis of the intrinsic value of the education and training to which it attests, but because it gives the right to take up a regulated profession in the Member State where it was awarded or recognized. Differences in the duration or content of education and training acquired in another Member State by comparison with that provided in the host Member State are not therefore sufficient to justify a refusal to recognize the professional qualification concerned. At most, where those differences are substantial, they may, in accordance with Article 4 of Directive 89/48/EEC, justify the host Member State requiring that the applicant satisfy one or other of the compensatory measures set out in that provision.⁴⁷

The judgment defines a meaning of diploma and education and/or training acquired mainly in the Community and institutions in which education has been

⁴⁴ Article 11 of Directive 2005/36/EC.

⁴⁵ Judgment in case C-274/05 *Commission v Greece*.

⁴⁶ Judgment in case C-274/05 *Commission v Greece*, paragraph 28, refer to case C102/02 *Beuttenmüller* [2004] ECR I5405, paragraph 41.

⁴⁷ Judgment in case C-274/05 *Commission v Greece*, paragraph 29, refer to case C102/02 *Beuttenmüller*, paragraph 52 and case C330/03 *Colegio* [2006] ECR I801, paragraph 19.

acquired, whereat it is expressed that education may be acquired at university, i.e. higher-education institution or any other institution of equivalent level. The host Member State is obliged to recognize a diploma awarded by a competent authority of another Member State even if that diploma is awarded on completion of education and training received, in whole or in part, in the host Member State and even if, according to the legislation of that State, that education and training is not recognized as higher education.

In respect of the meaning of the general system for the recognition of higher education diplomas laid down in Directive 89/48/EEC, the judgment expresses that it concerns the system based on the mutual trust that Member States have in the professional qualifications that they award. That system essentially establishes a presumption that the qualifications of an applicant entitled to pursue a regulated profession in one Member State are sufficient for the pursuit of that profession in the other Member States.⁴⁸

It is apparent from the abovementioned considerations that Articles 1(a) and 3 of Directive 89/48/EEC must be interpreted as meaning that a host Member State is obliged to recognize a diploma awarded by a competent authority of another Member State even if that diploma is awarded on completion of education and training received, in whole or in part, in the host Member State and even if, according to the legislation of that State, that education and training is not recognized as higher education.

This judgment is in favor of recognizing the previous education and training received in the European Union Member States even if it concerns no higher education in another Member State, as well as in situations in which there were certain changes during education or training, as the applicant changed the institution in which he was educated, since total period of education and training carried out mainly in the Community is relevant.

In case a pursuit of certain profession requires professional qualifications in a host Member State, but not required in a home Member State, the host Member State shall grant the pursuit of the profession to applicants who have pursued the profession on a fulltime basis for two years during the previous 10 years in a home Member State.⁴⁹

In both cases, recognition of professional qualifications may be made conditional by a host Member State upon the aptitude test or completing an adap-

⁴⁸ Case C-274/05 *Commission v Greece*, paragraph 30.

⁴⁹ Article 13(2) of Directive 2005/36/EC.

tation period⁵⁰ of up to three years. These compensatory measures⁵¹ may be stipulated in three cases:

- if the duration of the training is at least one year shorter than that required by the host Member State
- if the training covers substantially different matters than those covered by the evidence of formal qualifications required in the host Member State and
- if the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant's home Member State, and that difference consists in specific training which is required in the host Member State and which covers substantially different matters from those covered by the applicant's attestation of competence or evidence of formal qualifications.⁵²

When stipulating compensatory measures in a form of aptitude test or adaptation period, it is required that one of three the aforementioned requirements are satisfied. In judgment in case C-149/05 *Harald Price*⁵³ the ECJ states that a host Member State is entitled to stipulate compensatory measures, whereat it must, in principle, give the applicant the choice between the adaptation period and the aptitude test. However, as regards professions whose practice requires precise knowledge of national law, the Member State may stipulate either an adaptation period or an aptitude test.

The reference was made in the course of proceedings brought by Mr. Price, the holder of certain qualifications relating to auctioneering acquired in the United Kingdom, against the decision of the Authority for voluntary sales of chattels by public auction, by which the latter made Mr. Price's admission to the profession subject to the successful completion of an aptitude test covering three areas: legal matters, conduct of sales by public auction and professional regulations.

⁵⁰ The Directive guarantees the right to the applicant to choose between an adaptation period and an aptitude test. That right to choose does not apply in respect of professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity in a host Member State, when the Member State may stipulate either an adaptation period or an aptitude test (Article 14 of Directive). Refer to case C-274/05 *Commission v Greece*, paragraph 44.

⁵¹ Refer to cases C-149/05 *Harald Price v Conseil des ventes volontaires de meubles aux enchères publiques* [2006] ECR I-7691 and C-197/06 *Confederatie van Immobilen-Beroepen van België VZW v Van Leuken* [2008] ECR I2627, paragraph 35-8.

⁵² Article 14 of Directive 2005/36/EC.

⁵³ Case C-149/05 *Harald Price v Conseil des ventes volontaires de meubles aux enchères publiques*

The judgment indicates to a definition of regulated profession according to the provisions of Article 1 (c) of Directive 89/48/EEC and Article 1 (e) of Directive 92/51/EC, based on which a regulated profession is the regulated professional activity or range of activities which constitute that profession in a Member State.

A special emphasis is given to stipulation of compensatory measures. Paragraph 16 of the judgment states that the host Member State which applies the compensatory measures must, in principle, give the applicant the choice between the adaptation period and the aptitude test. Nevertheless, as regards professions ‘whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity’, the Member State may, by derogation from that principle, stipulate either an adaptation period or an aptitude test. Mr. Price claimed that the contested decision, by depriving him of the opportunity to choose between an adaptation period and an aptitude test, infringes the provisions of Directive 92/51/EC, which supplements Directive 89/48/EEC.

The profession which Mr. Price applied for is not a regulated profession in the Member State where the training took place, but it is a regulated profession in France as the host Member State.

In order to derogate from the principle that the applicant is entitled to choose between an adaptation period or an aptitude test the third subparagraph of Article 4(1) of Directive 89/48/EEC imposes two cumulative conditions for Member States to be able to choose the compensatory measure: first, the profession concerned must be a profession the practice of which requires precise knowledge of national law. Second, the provision of advice and/or assistance concerning national law must be an essential and constant aspect of the professional activity.

As regarding the requirement of taking an exam related to the knowledge of national law, the ECJ states in paragraph 58 that contrary to the arguments, the application of that requirement is not related only to ‘traditional’ legal professions, such as that of judge, notary or lawyer. Legal professions are hereby extended to other legal professions outside so called “traditional legal professions”, to all the professionals applying the national law in his/her profession.

Compensatory measures must be restricted to those cases where they are proportionate to the objective pursued. In other words, although those measures are expressly authorized, they may, in certain cases, be a highly dissuasive factor for a national of a Member State exercising his rights under the Directive. An adaptation period and an aptitude test both call for considerable time and

effort on the part of the party concerned. The Court made a decision that when the holder of a diploma awarded in one Member State applies for permission to take up a regulated profession in another Member State, the authorities of that Member State are not precluded by the Directive from partly allowing that application, if the holder of the diploma so requests, by limiting the scope of the permission to those activities which that diploma allows to be taken up in the Member State in which it was obtained.⁵⁴ Articles 45 TFEU and 49 TFEU do not preclude a Member State from not allowing partial taking-up of a profession, where shortcomings in the education or training of the party concerned in relation to that required in the host Member State may be effectively made up for through the application of the compensatory measures provided for in Article 4(1) of the Directive. However, Articles 45 TFEU and 49 TFEU do preclude a Member State from not allowing that partial taking-up when the party concerned so requests and the differences between the fields of activity are so great that in reality a full program of education and training is required, unless the refusal for that partial taking-up is justified by overriding reasons based on the general interest, suitable for securing the attainment of the objective which they pursue and not going beyond what is necessary in order to attain that objective.⁵⁵

In case C-286/06 *Commission v Spain*⁵⁶ the European Court of Justice defined a meaning of diploma pursuant to Directive 89/48/EEC in respect of pursuing the profession of engineer. It concerned recognition of diploma of engineer acquired in Italy by Spain. The judgment confirms that it is guaranteed to each applicant who obtained a diploma, within the meaning of Directive 89/48/EEC, enabling him to pursue a regulated profession in one Member State to pursue the same profession in any other Member State. It is sufficient that the education and training were received ‘mainly in the Community’. It has already been held that that expression covers both education and training received entirely in the Member State which awarded the formal qualification in question and that received partly or wholly in another Member State.

Spanish legislation on university diplomas draws a distinction between two types of diplomas, namely “official diplomas”, the validity of which is recognized in the whole of Spain and which give access to the regulated professions, and “own diplomas” which the various universities have the option of awarding but which, in particular, do not give access to the regulated professions. The procedure for recognizing professional qualifications must be

⁵⁴ Case C-330/03 *Colegio de Ingenieros de Caminos* paragraph 26.

⁵⁵ Case C-330/03 *Colegio de Ingenieros de Caminos* paragraph 39.

⁵⁶ Judgement in case C286/06 *Commission v Spain* of 23 October 2008 [2008] ECR I-8025

distinguished from the procedure known as the homologation procedure of university diplomas. The first of those procedures is designed to carry out a review for the purpose of determining whether the person concerned does or does not possess the qualification required to pursue a given regulated profession. On the other hand, the homologation procedure is designed to monitor the academic content, in terms of knowledge, of the studies pursued for the purpose of obtaining a diploma.

The European Court of Justice compares legislation by which the regulated profession of engineer is regulated in Italy and Spain. The Italian and Spanish education and training systems are similar so far as concerns qualifications in the field of engineering. In both those Member States such qualifications can be obtained at the end of a post-secondary course of three or five years' duration. In Spain, a distinction is drawn between technical engineer ('ingeniero técnico') university diplomas, awarded after three years of studies, and those of engineer ('ingeniero'; 'fully-qualified engineer'), awarded after five years of education and training. Holders of a technical engineer diploma may obtain the diploma of fully-qualified engineer by successfully completing the two last years of the education and training leading to that diploma. In Italy, a distinction is drawn between university diplomas obtained after three years of studies ('laurea triennale'), which are awarded on completion of junior engineer ('ingegnere junior') education and training, and those which are awarded following two additional years of studies for the purpose of training engineers ('ingegnere'; fully-qualified engineers'). Since reform of 2004, the latter diplomas which were previously entitled 'specialist diplomas' ('laurea specialistica') have been entitled 'laurea magistrale'.

In Spain, the taking up of the professions of technical engineer and fully-qualified engineer is in principle conditional on possession of the official university diploma, corresponding to the profession concerned. In Italy, the taking up of the professions of junior engineer and fully-qualified engineer is conditional on possession of the requisite university diploma and success in the State examination ('esame di Stato') corresponding to the profession concerned. That State examination is to include at least two written tests, an oral test and a practical test. Candidates who have been successful in the State examination are granted the entitlement to pursue the profession of engineer ('abilitazione all'esercizio della professione di ingegnere'). In both Spain and Italy, the pursuit of the profession of engineer also requires registration in a professional register. In Spain, according to the specialization and the regions, different associations of engineers (colegios de ingenieros) are competent. In Italy, a register of engineers is kept in each province by the Council of Engineers ('Consiglio dell'Ordine degli Ingegneri'). That register is divided into two sec-

tions, namely Section A for fully-qualified engineers, and Section B for junior engineers. In both those Member States, registration in a register of engineers constitutes a simple administrative step which does not of itself attest to the professional qualifications of the persons concerned, but is designed to ensure that the pursuit of the profession observes certain standards as regards rules and obligations.

The Commission has received numerous complaints prompted by the refusal of the competent Spanish authorities to allow the applications for recognition of the professional qualifications of engineer obtained in Italy in order to pursue the profession of road, canal and port engineer in Spain. Pursuant to a framework cooperation agreement between the University of Alicante and the Polytechnic University of the Marches (Italy), the studies of 'civil engineering' to which the University of Alicante gives access are coordinated and supervised by the Polytechnic University of the Marches. Pursuant to that framework agreement, the Polytechnic University of the Marches recognized for the benefit of the complainants the equivalence between the two abovementioned Spanish university diplomas and the Italian university diploma of civil engineer ('laurea in ingegneria civile') and consequently awarded them a diploma of civil engineer. Once in possession of that diploma, the complainants passed the Italian State exam conferring on them the entitlement to pursue the profession of engineer which authorizes them to pursue the profession of civil engineer in that Member State. The complainants subsequently applied to the Spain ministry for recognition of the professional qualifications obtained in Italy in order to be able to pursue the profession of road, canal and port engineer in Spain. That ministry rejected those applications, relying on the fact that all the university education and training received by the complainants had been provided in Spain and that therefore neither the Spain legislation nor Directive 89/48/EEC was applicable.

The basic question regarding the regulation of recognition of professional diplomas pursuant to Directive 89/48/EEC, which the ECJ gives an answer to, is whether the applicant is authorized or not to pursue regulated profession in the Member State. According to the system established by the Directive, a diploma is not recognized on the basis of the intrinsic value of the education and training to which it attests, but because it gives the right to take up a regulated profession in the Member State where it was awarded or recognized.⁵⁷

⁵⁷ Judgement in case C-102/02 *Beuttenmüller* [2004] ECR I-5405, paragraph 52, and case C330/03 *Colegio de Ingenieros de Caminos* of 19 January 2006 [2006] ECR I-801, paragraph 19

4. PRINCIPLE OF AUTOMATIC RECOGNITION OF QUALIFICATIONS IN THE RESPECT OF CERTAIN INDUSTRIAL, CRAFT AND COMMERCIAL ACTIVITIES

Industrial, commercial and craft activities referred to in chapter III of Directive 2005/36/EC are subject to an automatic recognition of qualifications based on professional experience.

The recognition of professional experience, takes into consideration a duration and type of experience (taking into consideration whether it concerns employed or self-employed persons),⁵⁸ as well as possession of general, commercial or professional knowledge and aptitudes.⁵⁹

The provision of Article 49 of TFEU guarantees that „... *restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.*”

As regarding a difference between employed and self-employed persons, it should be emphasized that provisions of TFEU guarantee a right to take up and pursue activities not only to employed persons but to persons providing the

⁵⁸ Within the European Union framework, a term of employee defines persons pursuing certain economic activity (Article 53 TFEU). Furthermore, a definition of employee ensures that all provisions of TFEU related to employees are also related to self-employed persons. In principle, when we discuss the employed and self-employed persons, a difference is that employed person is subordinated and dependent on employer. An employed person is dependent on employer in respect of salary obtained. A self-employed person is not, in economic sense, any less dependent on a salary, but such compensation in principle comes from clients, i.e. customers. There is a number of categories of self-employed persons, which mutually differ. Self-employed persons are persons pursuing the craft activities, independent professions and agriculture and forestry activities.

The activities of independent professions are considered to be:

1. independent activity of health personnel, veterinary surgeon, lawyer, notary public, auditor, engineer, architect, tax adviser, insolvency practitioner, interpreter, translator, tourist personnel and other similar activities,
2. independent activity of scientist, writer, inventor and other similar activities,
3. independent lecturer activity, educational activity and other similar activities,
4. independent activity of journalist, artist and sportsman.

Pursuant to provision of Article 2 of the Labour Act (OG 149/09; 61/11) a term of employee (throughout the Act the term employee shall be used to include gender-specific terms for employees or workers) is defined as a natural person who, as part of his or her employment, carries out certain tasks for the employer.

Pursuant to Article 3 of the Act on Regulated Professions and Recognition of Foreign Professional Qualifications (OG/09), a person carrying out an independent activity is a person taking a risk of business success or failure, working outside a relationship of subordination for which he/she is paid directly and in full.

⁵⁹ Article 16 of Directive 2005/36/EC.

services as self-employed persons or require the exercise of right to the freedom of establishment in another Member State.⁶⁰ The provisions of TFEU do not define a term of “self-employed” person, but the term is interpreted, *inter alia*, in the judgments of the ECJ. Thus the judgment in case *Jany*⁶¹ interprets that self-employed persons, unlike employed persons, are outside a relationship of subordination, thus taking a risk of success or failure for which they are paid directly and in full. In case *Jany* the ECJ made a decision on a right of female prostitutes from Czech Republic and Poland working in the Netherlands and paying a rent to the holder of permission for pursuing the activity of prostitution, thus obtaining a monthly income and reporting it to tax authorities. The Court considered these persons as self-employed.⁶² It arises from the judgment in case of *Jany* that provision of Article 49 of TFEU guarantees individuals to pursue a number of economic activities in other Member States, whereat they are still considered as self-employed persons.

The activity pursued may not necessarily be the activity pursued by employee or by person providing the service or requiring a right of establishment, but according to TFEU provisions and European Court practice this freedom is extended to all three categories of pursuit of economic activities.⁶³

Thus the provision of Article 53 of TFEU guarantees that the Council shall:

„ 1. ..., acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

*2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.“*⁶⁴

⁶⁰ Article 49-53 of TFEU.

⁶¹ Judgment in case C-268/99 *Jany and others v Staatssecretaris van Justitie* [2001] ECRI-8615, paragraph 34 and 70.

⁶² So far as concerns the question of the immorality of prostitution, it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practiced legally.

⁶³ As established in the judgment of case C-257/99 *R.v Secretary of State for the Home department, ex p. Barkoci and Malik* [2001] ECR I-6557, paragraph 50, these categories involve a pursuit of activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member States.

⁶⁴ When considering Article 53 of TFEU, it should be kept in mind the Directives based on provisions of Article 53 and 62 of TFEU. It concerns Directive 96/71/EC on posting of workers and Directive 2006/123/EC on services. The provisions of Directive 2006/123/EC represent

As regarding the automatic recognition of professional experience, previous training shall be taken into consideration, thus affecting a reduction of requirements regarding the professional experience. In any case, when recognizing a professional experience, it is required to submit evidence on previous pursuit of professional activity. Certificates issued by a competent authority in a Member State or certificates judged by a competent professional body to be fully valid are considered to be the proofs of acquired professional experience.

Pursuit of all professional activities referred to in chapter II of Directive 2005/36/EC is subject to conditions referred to in:

- List I of Annex IV of Directive 2005/36/EC related to various sectors such as textile sector, chemical and petroleum industry, printing, manufacture, construction, etc.⁶⁵
- List II of Annex IV of Directive 2005/36/EC related to sectors such as manufacture of transport equipment, activities related to transport, postal services, telecommunications, photographic studios, etc.⁶⁶
- List III of Annex IV of Directive 2005/36/EC related to sectors including restaurants and hotels, personal, recreation and community services, etc.⁶⁷

5. FULL HARMONIZATION SYSTEM IN SEVEN SECTORALLY REGULATED PROFESSIONS: DOCTOR, PHARMACIST, NURSE, MIDWIFE, ARCHITECT, VETERINARY SURGEON AND DENTAL PRACTITIONER

Principle of automatic recognition of qualifications is based on the coordination of minimum training conditions in respect of seven sectorally regulated professions: doctor (doctor with basic training and specialized doctor), nurse responsible for general care, dentist (dental practitioner and specialized dental practitioner), veterinary surgeon, midwife, pharmacist and architect.⁶⁸

a basic turning point in the field of establishment and services in the sense that services provisions are regulated horizontally, but still being subject to a numerous significant exceptions to the latter. The provisions of Directive are also directed towards the abolition of restrictions regarding the establishment in a host Member State for service providers and for temporary cross-border service provision. Refer to Craig, P, De Burca, G.: *The evolution...*, op. cit. p. 312, Barnard, C: *Unraveling the services directive*, 45 CML Rev, p. 323; FIDE, *The new services directive of the European Union*, Nomos 2008.

⁶⁵ Examples from List I of Annex IV of Directive, p. 70.

⁶⁶ Examples from List II of Annex IV of Directive, p. 74

⁶⁷ Examples from List III of Annex I of Directive, p. 76.

⁶⁸ Chapter III of Directive

For the purpose of recognition, Directive 2005/36/EC lays down the minimum training conditions for each of the aforementioned professions, including the minimum studies duration. Formal qualifications appointed by Member States pursuant to Directive are listed in Annex V of the Directive.⁶⁹ These qualifications enable their holders to pursue their professions in any Member State.

Directive enables Member States to recognize a part-time training for all the aforementioned professions in case when overall duration, level and quality of such training is not lower than that of continuous full-time training.⁷⁰

Regardless the specific acquired rights in respect to professionals, which an automatic recognition of qualifications is related to, and particularly in respect to architects,⁷¹ in case when formal qualifications for these professional activities do not satisfy all the training requirements, each Member State shall accept them as sufficient proof. However, these qualifications shall attest until successful satisfying of training requirements that began prior to the dates indicated in Annex V, and proofs that the holder has been effectively engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate.

6. NEW DEVELOPMENTS IN PROFESSIONAL QUALIFICATION REGULATION – DIRECTIVE 2013/55/EU AMENDING DIRECTIVE 2005/36/EC

Directive 2005/36/EC⁷² was amended by Directive 2013/55/EU. Directive 2013/55/EU presents the agreed amendments on the Directive 2005/36/EC and has two-year period for implementation in EEA countries. It introduces common training frameworks (CTFs) that will allow groups of Member states to agree curricula based on common sets of knowledge, skills and competences and other Member States may then opt in.⁷³ Directive promotes ECTS (European Credit Transfer and Accumulation System) and introduces the possibility to express the duration of a program defined by the Directive 2005/36/EC also

⁶⁹ Provisions related to doctors, nurses, dentists, veterinary surgeons, midwives, pharmacists and architects are listed in Annex V of Directive, p. 79 to 137.

⁷⁰ Article 22 of Directive.

⁷¹ Annex VI of Directive, p. 138.

⁷² Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (IMI), OJ L 354 of 28 December 2013.

⁷³ Recital 25 and Article 49a of the Directive 2013/55/EU

in ECTS.⁷⁴ The most important amendments are related to introduction of so called European Professional Card,⁷⁵ issued by holders of a professional qualification upon their request and on condition that the Commission has adopted the relevant implementing acts. Furthermore, holders of the European Professional Cards are enabled to create the IMI file automatically, providing and simplifying services provision, i.e. freedom of establishment in a state other than that of their home Member State.

This Directive introduces a system of administrative cooperation and responsibility towards citizens for implementation, and alert mechanism. One of the basic amendments is introduction of central online access to information and completion of procedures by electronic means, thus ensuring availability of online information via unique contact points, as well as the establishment of assistance centers.

All these changes of the Directive 2005/36/EC have as aim improvement of existing diploma recognition system and movement of professionals across the borders. Directive aims to introduce and reinforce safeguards for citizens and patients through the alert mechanism and knowledge of languages and facilitation and simplification of qualification recognition and it will be of great importance for future professionals' movement and qualifications recognition across the European member states borders.

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