COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.02.1996
COM(96) 46 final

REPORT TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE STATE OF APPLICATION OF THE GENERAL SYSTEM FOR THE RECOGNITION OF HIGHER EDUCATION DIPLOMAS.

MADE IN ACCORDANCE WITH ARTICLE 13 OF DIRECTIVE 89/48/EEC.

(Presented by the Commission)

Article 13 of Council Directive 89/48/EEC[1] 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 provides that the Commission shall report to the European Parliament and Council on the state of application of the general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration by 4 January 1996.

In the report, the Commission shall present its conclusions as to any changes that need to be made in the system as it stands and, where appropriate, submit proposals for improvements in the present system in the interest of further facilitating the freedom of movement, right of establishment and freedom to provide services of the persons covered by the directive.

---

1 OJ of 24.01.1989 n° L 19, p. 16.

INTRODUCTION

Council 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 marked an unprecedented change in the Community's approach to recognition of professional qualifications. The challenge to Community policy in this field has remained unaltered since the signature of the Treaty of Rome: how to resolve the inherent conflict between national education systems, the diversity of which testifies to, and preserves, national identity, and, the right conferred upon every European citizen to exercise his or her profession throughout the Union. This conflict centres upon the need to possess a qualification for the exercise of a regulated profession, which is defined through reference to the national education system of the host Member State. The general system was brought about by the realisation that, in a single market, it is no longer possible to apply such national criteria to determine the quality of education and training.

The general system is founded on a single, simple idea: the presumption that if one is qualified in one Member State to exercise a given profession, one should be entitled to exercise that same profession throughout the Union. This idea requires Member States to display mutual trust in the education and training provided elsewhere: its consequence for the migrant is that his or her diploma should benefit from recognition in any other Member State, save exceptionally, where, after detailed examination, it appears that there are fundamental differences between the education and training to which the diploma attests and the education and training required in the host State, in which case, the migrant may be asked to "compensate" for the differences in accordance with the mechanisms created by Directive 89/48/EEC. In other words, the host Member State is no longer entitled to require a migrant to undertake, in whole or in part, the national course of education nor to sit the examinations laid down for entrants to the national profession.

Seven years after the adoption of the Directive, it appears that the general system is capable of fulfilling the hopes placed in it. The problems of implementation and application to which it has given rise, were to be expected, although that should not disguise the fact that for individual migrants these problems have turned the recognition process into a frustrating and dispiriting experience. Some of these problems have been resolved after discussion with the Member States in the coordinators' group; others are unlikely to be solved without a ruling from the European Court. The main body of the report reviews the difficulties encountered first, by way of a commentary article by article of the directive and, secondly, in an examination of its impact on the main professional sectors.

I LEGISLATIVE HISTORY

i) The roots of Directive 89/48/EEC can be traced back to the European Council of 25 and 26 June 1984 in Fontainebleu which, deeming it indispensable to respond to the expectations of the peoples of Europe, called upon the Council to introduce a "general system for ensuring the equivalence of university diplomas in order to bring about the effective freedom of establishment within the Community".

ii) The Commission's response to this appeal resulted in the proposal for a directive transmitted to the Council on 9 July 1985 which subsequently became Directive 89/48/EEC. In its explanatory memorandum[2] the Commission explained that the traditional approach to the recognition of diplomas (the sectoral approach) provides for the introduction of harmonised conditions, in particular as regards qualifications, for the purpose of access to and exercise of specific activities. Not until those conditions are met does the mutual recognition of diplomas issued in the respective Member States become possible. The new "horizontal" approach was intended to respond rapidly and without preconditions to the individual and immediate requirements of all those holding higher education diplomas wishing to exercise their profession in a State other than that in which they trained. The system was based on the principle of mutual confidence and comparability of training levels, however, where major structural differences between training courses existed, the host Member State would be entitled to require compensation.

iii) Directive 89/48/EEC accords well with the concept of subsidiarity. Member States remain responsible for determining whether or not a professional activity should be regulated i.e. made subject by law, regulation or administrative provision to the possession of a professional qualification and if so, what the level, structure and content of the education should be. As a means of providing for the free movement of persons and the recognition of diplomas, it represented a new departure in Community law. Whereas the earlier sectoral directives required Member States to grant automatic recognition to diplomas issued elsewhere in the Community for a limited number of clearly defined professions, the general system obliges each Member State to put in place, across a broad range of professional activities, structures providing for the case-by-case examination of requests for recognition, accompanied by the appropriate procedural guarantees, and, where appropriate, for the compensation mechanisms laid down in the directive, namely, the adaptation period and the aptitude test.

iv) It was envisaged in the explanatory memorandum to the Commission's proposal that the horizontal approach might be extended to diplomas and vocational qualifications falling outside Directive 89/48/EEC. The review clause in Article 13 was included mainly in order to enable consideration of this issue. However, following the adoption of Directive 89/48/EEC, the Commission decided to draw up proposals for a second directive more or less at once and the horizontal approach was extended to other regulated professional activities by Council Directive

---

2 COM (85)359 final.

92/51/EEC[3], of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.

v) After the adoption of Directive 89/48/EEC, but before the date set for implementation, the Court of Justice gave judgment in Case C-340/89 'Vlassopoulou'[4]. The Court's judgment confirms that, independently of directives adopted by the Council and the European Parliament on the basis of Article 57 of the Treaty, Article 52 of the Treaty must be interpreted as requiring the national authorities of a Member State, to which an application for admission to a regulated profession is made by a Community national who is already admitted to practise the profession in question in his country of origin, to examine to what extent the knowledge and qualifications obtained by the person concerned in his country of origin correspond to those required by the rules of the host State; if those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking. In the course of its examination of the migrant's diploma, the host Member State may take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin, and to its field of activity.

The competent authorities must also assess whether knowledge acquired in the host Member State, either during a course of studies or by way of practical experience is sufficient in order to prove possession of the knowledge missing from the initial education and training.

The examination made to determine whether the knowledge and qualification certified by the foreign diploma and those required by the legislation of the host Member State must comply with the requirements of Community law concerning the effective protection of fundamental rights. Therefore, any decision taken must be reasoned and open to challenge before a national court or tribunal[5].

The Commission considers that the Directive must be read in the light of this judgment: in particular, when examining a migrant's application for recognition. Competent authorities should take into consideration not only the migrant's "diploma" within the meaning of the Directive but also any subsequent professional experience and training.

vi) The application of Directive 89/48/EEC was extended to the European Economic Area[6] with effect from 1 January 1994 and became applicable in the new Member States from 1 January 1995. In this report, unless otherwise specified, statistical information which is gleaned from the bi-annual reports supplied by Member States, refers to EUR 12. However, whenever possible, information on the

---

3 OJ of 24.07.1992, n° L 209, p. 25.

4 [1991] ECR I-2357.

5 On this last point, see the earlier judgement in Case 222/86 UNECTEF v. Heylens [1987] ECR 4097.

6 Annex VII of the EEA Agreement.

implementation and application of the Directive in the three new Member States has been included.

vii) The Commission has recently made a new proposal[7] for a European Parliament and Council Directive to facilitate the free movement and the mutual recognition of diplomas, certificates and other formal evidence of qualification for professional activities not covered by the general system. The main purpose of this directive will be to consolidate the existing "transitional measures" directives but it also includes some 'fine tuning' of the general system directives. It is referred to below as "the proposed directive".

viii) As might have been predicted, the implementation and application of Directive 89/48/EEC have not been without their difficulties. However, the challenge posed to the Member States and the Commission has in large measure been met. At least 11.000 persons obtained recognition of their diplomas in accordance with Directive 89/48/EEC between 4 January 1991 and 31 December 1994[8]. However, it should be pointed out that nearly 6.000 of the total number of diplomas were recognised by one Member State alone - the United Kingdom[9]. Some of these migrations would, undoubtedly, have taken place in the absence of the general system, either in accordance with pre-existing national rules or under bilateral conventions, but, in many cases, the adoption of the directive has, for the first time, simplified or made possible movement between Member States. In addition, the Directive may have improved the situation of migrants already established in another Member State: by obtaining recognition of their diploma, they have been able to improve their employment prospects or obtain a regrading from their employers.

ix) The statistics also show that most applicants are successful in obtaining recognition. Negative decisions run at around 5% of the total number of applications: very few appeals against negative decisions have been made.

x) Anecdotal evidence (gleaned from discussions with migrants and competent authorities) suggests that most moves within the Community are made for personal reasons (for example, in order to marry or where a spouse practising a regulated profession follows his or her partner). The only significant exception to this would appear to be inward teacher migration to the United Kingdom, brought about by the demand for teachers in that country and a surplus in other Member States. This confirms the Commission's experience with the sectoral directives: in the absence of an acute surplus of professionals in one Member State and/or a marked increase in demand elsewhere, significant migration flows have yet to develop. However, the example of teacher migration to the United Kingdom demonstrates that the general system is capable of responding to the socio-economic demands of the internal labour market and therefore of contributing to a reduction in

---

7 COM 96 (22) of 8.2.1996.

8 This is certainly an underestimation of the true figure since the information provided by the Member States is incomplete. In particular it should be noted that 3 Member States have yet to provide statistics for the years 1993/1994.

9 The vast majority of which were teachers' diplomas.

unemployment. It also illustrates, incidentally, that such demands may influence the way in which a Member State applies the Directive. It is noteworthy that the application of Directive 89/48/EEC to teachers in the United Kingdom has raised few problems; in other Member States, where there is a surplus of teachers, the application of the Directive has given rise to a considerable number of complaints.

xi) The increased student mobility brought about by the ERASMUS and SOCRATES programmes, may also act as an impetus to greater professional mobility. There is some professional mobility among former ERASMUS students, but the goal of the programme is to provide a European dimension to programmes of study and mobile students are returning to their country of origin after having spent a recognised period of studies abroad.[10]. There are also indications that the changes brought about by the Directive have had an impact on student mobility. Thus, there is evidence that French nationals are making increasing use of their right to study in another Member State (in this case, Belgium) secure in the knowledge that their diploma will give them access to their chosen profession when they return home after their period of study. The existence of a numerus clausus in France and its absence in Belgium is probably the main reason for this trend and the numbers of returning nationals, particularly in the health professions, are a cause of concern for the French authorities. In addition, Luxembourg nationals are choosing to study in Member States whose diplomas were not recognised under pre-directive national rules.

xii) Finally, there are indications that the existence of Directive 89/48/EEC has brought about a certain convergence in education and training programmes. This sometimes results from initiatives taken by individual educational establishments, seeking to meet the needs of their students by adapting their curricula in a manner intended to obviate the need for compensation mechanisms in other Member States. In other cases, it has been brought about by the creation of "common platforms" agreed by European professional organisations[11]. The Commission welcomes such arrangements provided that they do not adversely affect application for recognition from those who do not meet the requirements agreed upon in the common platform.

II IMPLEMENTATION

i) Two contrasting methods of implementation were adopted. Some Member States opted for a "vertical" approach, transposing the directive profession by profession (A, F, GR, L, D, S); in others a general measure was adopted, completed, in some cases, by detailed regulations for specific professions (I, IRL, SF, UK, P, E, DK, NL, B)[12]. Transposition in some Member States was complicated by the fact that powers to regulate professions are shared between the federal government and state or regional governments (D, A, B, E).

---

10 There are also indications that the changes in national law brought about by the Directive have had an impact on student mobility.

11 For an example, cf. p. 24, Engineers.

12 A complete table of implementing measures is attached as Annex 1.

ii) Of the then 12 Member States only Ireland had adopted the necessary measures by 4 January 1991; the three new Member States had all adopted implementing measures by the date of accession. Given the delays in the remaining Member States, a number of infringement proceedings were opened: only two of these reached judgment: Case C-365/93 Commission v/Greece (judgment of 23 March 1995) and Case C-216/94 Commission v/Belgium (judgment of 13 July 1995). In both cases the Court found that the Member State concerned had failed to fulfil its obligations under the Treaty. By the time judgment was given, Greece had implemented for a number of professions, in particular in the field of health and for lawyers, and Belgium had adopted a general law delegating to Ministers the power to take the necessary implementing measures (no such measures had, however, been taken).

iii) In a number of other Member States implementation remains incomplete, chiefly because the detailed rules governing compensation mechanisms for certain professions are not yet in place (for example, those relating to the legal profession in Spain). Where appropriate, infringement proceedings have been or will be commenced.

iv) The Commission takes the view that where implementation is either inexistent, incomplete or inadequate or where the provisions of the directive are incorrectly applied by national authorities, Article 3, which puts in place the basic recognition mechanism, is sufficiently clear, precise and unconditional to give rise to direct effect. In other words, Article 3 creates a right to recognition which individuals may rely upon directly before national authorities, both administrative and judicial. Article 4 of the directive which provides that Member States may in certain circumstances require compensation measures, is permissive (Member States are not required to impose such measures) and thus does not detract from the direct effect of Article 3. The direct effect of Article 3 does not, however, mean that in cases where the directive has been improperly implemented or applied, the migrant has an automatic right to exercise his or her profession in the host Member State. The Commission considers that in these circumstances, the migrant does have a right to obtain from the competent authority or, where necessary, from a national court or tribunal, a decision confirming his/her right to take up and practise the regulated profession in question in the host Member State. It should be pointed out that the fact that certain provisions of the directive give rise to direct effects cannot be relied upon by Member States as a justification for non-implementation[13].

v) In addition, the Commission has undertaken an examination of all the implementing measures notified by Member States. Letters setting out certain objections and seeking clarification on certain points were sent to all (12) Member States during the summer of 1994. In some cases the replies received removed any existing doubts as to the conformity of national implementing measures: in others, the examination is continuing, with a view to opening infringement proceedings.

---

[13] See, for example, the judgment of the Court in Case C-433/93 Commission v. Germany judgment of 11.08.1995 (not yet reported).

vi) Finally, the Commission has received a number of complaints from individuals which reveal flaws in implementation. Where appropriate, infringement proceedings have been commenced or are under consideration[14].

vii) It is difficult to give an assessment of the overall quality of the implementation Member State by Member State, based on the Commission's analysis of implementing legislation and on complaints received. On the one hand, the numbers of applications received by Member States vary enormously. The larger Member States, in particular those whose languages are most widely spoken elsewhere, obviously attract more migrants. On the other hand, those Member States who regulate more widely have more "opportunities" for breaching the directive; this is most marked in Member States who chose to transpose profession by profession. Taking these factors into account, it appears that fewer problems have arisen in the northern Member States (SW, SF, DK, UK, IRL, F, NL) than in the southern Member States (E, G, I, and to a lesser extent P). In Germany, serious problems have been encountered with one profession (teachers) and in Belgium, in the absence of implementation, the directive is being applied to a very limited number of professions (lawyers and health professions) via the adaptation of pre-existing national rules.

III A REVIEW OF THE PROVISIONS OF DIRECTIVE 89/48/EEC

ARTICLE 1(a)

i) This article contains the definition of a "diploma" for the purposes of the Directive. It is intended to define the package of qualifications (for example, university diploma, post-graduate professional training course and period of supervised practice) stipulated by national law for entry to a regulated profession.

ii) Some difficulties have arisen in the interpretation of the second indent of the first subparagraph, namely as to the definition of "university, or establishment of higher education, or another establishment of similar level"[15]. In a document distributed to the coordinators' group, the services of the Commission made it clear that in their view Article 1(a) places all institutes of higher education on the same footing; a Member State is not therefore entitled to refuse recognition of, for example, teachers coming from another Member State simply because they trained at non-university higher level establishments and the host Member States stipulates university education and training for its teachers.

iii) The same document makes it clear that in accordance with the principle of mutual trust and in the light of Article 126 of the Treaty, it is for each Member State to determine which of its educational and training

---

14 Details are given below in the survey of individual professions.

15 Only the English text uses the words "similar level". The other language versions use the phrase "of the same level".

establishments fall within the higher education sector[16]. Consequently, the host Member State is not entitled to assess, applying criteria it has developed for national purposes, whether education and training pursued in another Member State is of higher level or not, and to refuse recognition to holders of those diplomas which, in accordance with such criteria, it judges to be not of higher level.

iv) The first subparagraph of Article 1(a) also provides, subject to certain conditions, for the recognition of diplomas obtained by Community nationals in third countries. This provision marked a new departure for Community law but it has not, to the Commission's knowledge, given rise to any particular problems.

Currently, no Community mechanism is laid down in the sectoral directives for the recognition of third-country diplomas[17]. In its opinion[18] on the Commission proposal for a Directive of the European Parliament and Council amending Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualification[19], the Parliament proposed the insertion of a new recital, calling upon the Commission to examine the problems of Community nationals with third country medical qualifications. Although the Commission considers that the proposed directive, which lays down a comitology procedure for certain amendments to Directive 93/16/EEC, is not an appropriate vehicle for such an exercise, it does recognise that the absence of provisions governing the recognition of third country diplomas in the sectoral directives impedes the exercise by a potentially significant number of European citizens of their rights of free movement under the Treaty. It will again consider whether the mechanism contained in Article 1(a) could not be adapted to take account of the different legal framework applying to the sectoral directives[20].

v) The second subparagraph of Article 1(a) contains the so-called "alternative routes" provision. It assimilates to a "diploma" for the purpose of the directive a professional qualification awarded in a Member State, recognised by a competent authority as being of the same level as a "diploma" within the meaning of the first subparagraph and which confers upon its holder the same rights in respect of the taking up and pursuit of a regulated profession. The provision was included to take account of persons who had not

---

16 Cf. also the judgement of the CFI in Case T-16/90 Panagiotopolou v/Commission [1992] ECR II p. 89.

17 Doctors, dentists, veterinary surgeons, nurses responsible for general care, midwives, pharmacists and architects.

18 PE. 211.189 of 26.4.1995.

19 COM (94)626 final.

20 See the reply to Written Question n° 2866/93 - OJ n° C 300 of 27.10.1994.

undergone three years of higher education and training but who hold qualifications giving them the same professional rights.

vi) Such qualifications exist primarily in the United Kingdom and Ireland (awards made by chartered bodies and others) but are not unknown elsewhere (for example, awards made by the "Jury central" in Belgium) and run concurrently with the standard "diploma" course. However, in the Commission's view, discussed at length in the coordinators' group, the second subparagraph of Article 1(a) can also be applied to an "alternative route" which preceded and has been replaced by a course of education and training leading to a "diploma" within the meaning of the first subparagraph. Typically, when a Member State undertakes a reform of the education and training necessary for entry to a regulated profession, it also takes steps to secure the rights of existing members of the profession and those who have already embarked on the previous course of education and training (so called "acquired rights" provisions). Where a course of education and training falling outside Article 1(a) is replaced by one leading to a diploma within the meaning of the first subparagraph thereof, holders of the "old" qualification are, in the Commission's view, entitled to take the benefit of the second subparagraph provided that the national legislation explicitly recognises that their education and training is of equivalent level to the new "diploma" and confers upon them the same rights to take up and pursue the profession in question (same professional title, same scope of activity, etc.). The grant of these acquired rights may, of course, be made conditional in national law, upon the fulfilment of some additional condition (for example, a specified number of years of professional experience, additional training or a professional review).

vii) It was on the basis of this interpretation of the second subparagraph of Article 1(a), that the Commission provided in Directive 94/38/EEC[21] for the removal of two Italian courses of education and training (namely, those for accountants ("ragionieri") and accountancy experts ("periti commerciali") from Annex C of Directive 92/51/EEC. Changes in Italian education and training had brought the new courses within Article 1(a), first subparagraph of Directive 89/48/EEC and holders of the "old" qualification, previously covered by Directive 92/51/EEC, were by virtue of the second subparagraph of Article 1(a), to be treated in the same way as new entrants to the profession.

ARTICLE 1(b)

i) Article 1(b) contains the definition of host Member State. It has given rise to few difficulties in practice although it should be emphasised that a national of Member State A who has obtained his/her diploma in Member State B is

---

[21] OJ of 23.08.1994 n° L 217, p. 8, see seventh recital.

entitled to rely upon Directive 89/48/EEC if he/she subsequently seeks recognition in Member State A[22].

ii) One case which has been examined by the Commission and drawn to the attention of the coordinators' group is that of a course of education and training for physiotherapy, the overall duration of which is 4 years, the first 2 years of which take place in Greece and the final two years in the United Kingdom, culminating in the award of a degree by a British university. If that degree were to be accepted by the British competent authority for access to the regulated professional activity of physiotherapy[23], there is in the Commission's view no reason why the qualification should not be treated as a "diploma" within the meaning of Article 1(a). The holder of such a diploma would therefore be entitled to rely upon the directive as against Greece "the host Member State" if he/she wished to return there to exercise the profession.

ARTICLES 1(c) AND (d)

i) These provisions which together define the concepts of "regulated profession" and "regulated professional activity" have given rise to fewer difficulties than might have been foreseen.

ii) One doubt which has arisen is in relation to the first indent of the first subparagraph namely the pursuit of an activity under a professional title[24].

Some Member States have a generic title for engineers (in Belgium and the Netherlands "Ing" or "Ir" according to the category of engineer and in France "ingénieur civil diplômé de" followed by the name of the establishment awarding the academic diploma). These Member States have indicated that they do not consider that the profession of engineer is regulated within the meaning of the directive. This point is one which the Commission is considering in its review of implementing measures.

iii) The other problem which has arisen is that of determining whether the public service is a regulated professional activity for the purpose of the directive. This point is dealt with below in the review of the application of the directive to specific professions.

iv) The second subparagraph of Article 1(d) was adopted chiefly in order to address the situation in the United Kingdom where many professions are regulated by private associations (in the United Kingdom, by chartered bodies). This provision has not given rise to any particular difficulty

---

22 This is settled caselaw. See most recently the judgement of the Court in Case C-19/92 Kraus, [1993] ECR I-1663.

23 Which, according to information available to the Commission, is still under consideration

24 The interpretation of this part of Article 1(d) is raised in a preliminary ruling Case C-164/94 Aranitis, currently pending before the European Court.

although the non-exhaustive list set out in Annex A of the Directive is no longer entirely accurate. The United Kingdom authorities have undertaken to update it when the necessary amendments to national regulations have been made.

ARTICLE 1(f)

i) The functioning of the adaptation period has given rise to few difficulties. According to the statistics supplied by the Member States under Article 11, adaptation periods have been undertaken by migrants in the health sector (physiotherapists, speech therapists, occupational therapists, optometrists, psychologists[25]), teachers[26], engineers[27], lawyers[28], organists[29], and by priests[30].

ii) The detailed rules governing the adaptation period are to be laid down by the competent authority[31]. They vary from country to country. In some cases, the migrant may choose his or her supervisor, subject to the approval of the competent authority; in others, the migrant must undertake the stage at an approved centre. In all cases the adaptation period is structured to the needs of the individual migrant and in some cases (for example, for professions in the health sector in France) very detailed indication of the areas of experience to be acquired is given by the competent authority. Most cases reported by coordinators involve adaptation periods of a much shorter duration than the permitted maximum (3 years cf. Article 4(1)(b)), in many cases limited to several weeks only.

iii) In all cases reported by coordinators, assessment is by way of a written evaluation made by the supervisor either directly to the competent authority or supplied to the migrant for transmission to the competent authority. All coordinators reported a willingness to consider sympathetically the cases of migrants who fail satisfactorily to complete the adaptation period by providing for the possibility of an extension or the opportunity to undertake a second period. Very few failures were reported, however.

---

25 L, F, E, UK, NL.

26 L, D, UK, IRL

27 UK., IT.

28 UK (Northern Ireland), DK

29 DK.

30 S.

31 The Luxembourg authorities have, however, indicated that the organisation of the adaptation period in the health sector has posed certain difficulties for them, for example, in relation to remuneration, professional liability and finding supervisors.

iv) One particular problem was reported in a petition[32] concerning the recognition of a speech therapist's diploma in France. Where a compensation mechanism is applied to migrants seeking recognition in the health sector, the French authorities require that the adaptation period be undertaken in an approved centre. At the time of the petitioner's application only four such centres existed in France, none of which were in the immediate vicinity of the petitioner's home.

The Commission considered an argument that such an arrangement was discriminatory given that a far greater number of establishments exist in France, offering education and training in speech therapy. It concluded, however, that the French arrangement was neither discriminatory (because the situation of those training for the profession in their Member State of origin and those undergoing the adaptation period were objectively different) nor in breach of the directive. The resources devoted by the French authorities were proportionate to the demand for adaptation periods (at the time, only one other request for recognition had been received by the French authorities) and were subject to review in the light of changing circumstances. The individual case was resolved when the French authorities agreed to approve an establishment closer to the petitioner's home for the purpose of the adaptation period.

ARTICLE 1(g)

i) The purpose of both the aptitude test and the adaptation period is, in the Commission's view, to assess the capacity of the migrant to adapt to a new professional environment. As the definition in Article 1(g) indicates, the aptitude test should therefore sample[33] the migrant's knowledge of subjects missing from his or her initial education and training.

ii) Aptitude tests have been taken by migrants seeking recognition in order to practice as lawyers[34], auditors/accountants[35], engineers[36], environmental health officers[37], textile technologists[38], in the health sector[39], priests[40], teachers[41], and foresters[42].

---

32 Petition n° 718/92.

33 The subjects chosen for the aptitude test are to be taken from a list drawn up by the competent authorities, of subjects which are not covered by the applicant's diploma.

34 All Member States with the exception of P, DK, E, B, NL.

35 UK, P, LUX, D.

36 UK.

37 UK.

38 UK.

39 UK, D, F.

iii) Following its examination of the implementation of the directive[43], the Commission expressed its concern to a number of Member States that the tests provided for under national rules for migrant lawyers did not respect the definition in Article 1(g). In some cases this was because no provision was made for dispensations from certain subjects - thereby failing to respect the second subparagraph of Article 1(g) which provides that the aptitude test must be adapted to take account of each individual's education and training. Elsewhere, the length (up to fifteen hours) and nature of the tests bears a strong resemblance to final university and/or professional examinations and may not take account of the fact, as required by the third subparagraph of Article 1(g), that the migrant is a fully-qualified professional, sometimes with many years of experience, in his or her Member State of origin. The application of the aptitude test for lawyers in the Member States was discussed at a special meeting of the coordinators' group on 20 October 1995 in the presence of national experts responsible for organising or conducting the test. Even though the Commission is not entirely satisfied with the regulations and/or application of the test in some cases, the meeting showed as well that the practice of the aptitude test in some Member States appears to be more liberal and seems to take into account the particular situation of migrant lawyers as opposed to national candidates to a higher extent than the relevant regulations suggest. When replies from all of the Member States concerned to the letters sent out by the Commission have been received and analysed, the Commission will decide whether it is appropriate to begin infringement proceedings on this point.

iv) Although the following figures[44] have to be considered with some caution taking into account the particular situation in the different Member States[45], the success rate in the aptitude test for lawyers, may offer some indication of the obstacle it presents to migrants. In France, 25 out of 40 candidates passed the test; 22 of them at their first examination; in Germany, 55 out of 73 migrant lawyers passed; in Greece all 7 Community lawyers who sat the test

---

40 S.

41 UK, D.

42 A.

43 Cf. Paragraph II (iv) above.

44 In most cases the figures are taken from the statistics made available at the meeting on 20 October 1995 and cover the period running from 1991 to October 1995. Otherwise the figures are taken either from statistics supplied by the CCBE in December 1994 or from the Article 11 Reports of Member States. No account is taken of those whose diplomas were recognised without a test. A high number of direct recognitions were granted in the case of migrations between the UK and IRL, some (15) as well in the case of migrations from B or LUX to F. The following figures do not include either those applicants who choose not to proceed with their application by not taking the test.

45 e. g. some Member States (e.g. UK and D) allow establishment under the home country professional title, while as this possibility does not exist in other Member States (e.g. F and LUX); in LUX the diploma comprises an approved law degree obtained in another Member State, in most cases B or F, which is completed by a three-month course in Luxembourg law and a stage.

passed; in Ireland, 6 out of 7 candidates were admitted to the Bar at the first attempt, all 3 candidates who took the test for solicitors succeeded; in Italy, all 8 candidates passed; in Luxembourg, 12 out of 14 applicants passed; in England and Wales, 65 out of 143 candidates from Member States other than Ireland were successful in the Qualified Lawyers Transfer Test for solicitors, 7 cases were referred; all 17 applicants obliged to take the test for barristers passed; in Finland, 4 out of 7 candidates failed.

It is difficult to estimate from the statistics alone how many candidates who apply for recognition subsequently choose not to attempt the aptitude test[46] and how many would-be migrants are deterred by the prospect of taking the test.

v) All Member States allow applicants to resit the test, in whole or in part. In some cases, the number of attempts is limited, in accordance with national tradition, to two or three.

vi) Some Member States charge a fee for taking the test and the level of fees has been examined by the Commission. In its view, such fees would constitute a breach of Community law if they were set at a higher level than comparable fees in the national system, if they exceeded the actual cost incurred by the competent authority in arranging the test or if they were set at a level which rendered free movement virtually impossible.

ARTICLE 2

i) Article 2 defines the scope of the directive. Like the sectoral directives it applies only to Community nationals. In the Commission's view, nothing prevents a third country national who subsequently acquires the nationality of one of the Member States from relying upon the directive to obtain recognition of a diploma which he or she acquired prior to the acquisition of Community citizenship.

ii) The second subparagraph of Article 2 excludes from the scope of the Directive professions which are the subject of a separate directive establishing arrangements for mutual recognition of diplomas. These are Directive 77/452/EEC[47] (nurses responsible for general care), Directive 78/686 (dentists)[48], Directive 78/1026/EEC (veterinary surgeons)[49],

---

46 While there are no figures for the other Member States the statistics submitted by the French delegation at the meeting on 20 October 1995 show that only 40 out of 78 applicants admitted to take the test had actually sat it by 1 October 1995.

47 OJ 1977 n° L 176, p. 1.

48 OJ 1978 n° L 233, p. 1.

49 OJ 1978 n° L 362, p.1.

Directive 80/154/EEC[50] (midwives), Directive 85/384/EEC[51] (architects), Directive 85/433/EEC[52] (pharmacists) and Directive 93/16/EEC[53] (doctors).

In the Commission's view, the general system will not apply where the activity which the migrant wishes to exercise in the host Member State is reserved to one of the above professions. Thus, for example, an osteopath qualified in the United Kingdom, where osteopathy is recognised as a profession in its own right, could not rely upon Directive 89/48/EEC to obtain recognition of his or her diploma in a Member State, such as France, which reserves the exercise of this activity to medical practitioners.

However, a British osteopath would, in the Commission's view be entitled to rely upon Article 52 of the Treaty, as interpreted by the Court in the Vlassopoulou judgment. The Court ruled that Member States are required to compare the education and training attested to by the migrant's diplomas with that required under national law. Where the migrant's diplomas are only partially equivalent to those required in the host State, he or she must be given an opportunity to demonstrate that the missing skills or competence have been acquired.

iii) The second subparagraph of Article 2 has caused particular problems in relation to specialised nurses. In some Member States (such as the United Kingdom and the Netherlands) separate training courses exist for general and some specialist nurses (e.g. psychiatric nurses, paediatric nurses); in other Member States, (such as Germany, Luxembourg), those qualified as nurses responsible for general care may take post-diploma specialist courses; the activity of specialist nurse is a regulated activity distinct from that of nurse responsible for general care. Finally, some Member States (such as Denmark) regulate only a single activity, that of nurse responsible for general care. Movement between Member States (e.g. the United Kingdom to Germany) in the first two groups is governed by the general system and has caused few problems.

Difficulties arise when a nurse from the first group of Member States (for example, from the United Kingdom) wishes to move to a Member State in the last group (for example, Denmark). They cannot rely upon the sectoral directive, Directive 77/452/EEC, because the specialist diploma in question is not one which is listed in Article 3 thereof nor can they rely upon Directive 89/48/EEC as a result of the second subparagraph of Article 2. Someone in this position is of course entitled to rely upon Articles 48 and 52 of the Treaty, as interpreted by the Court of Justice in its caselaw and in particular in the Vlassopoulou judgment which requires Member States to

---

50 OJ 1980 n° L33, p.1.

51 OJ 1985 n° L 223, p. 15.

52 OJ 1985 n° L 253, p. 37.

53 OJ 1993 n° L 165, p. 1.

effect a comparison between the specialised knowledge and abilities certified by professional qualifications acquired elsewhere in the Community with those required under national law for access to the profession in question. However, in the Commission's view, the general system offers certain advantages by comparison to the application of Articles 48 and 52, principally as regards legal certainty but also because of the specific compensation mechanisms which Directive 89/48/EEC puts in place. The Commission has therefore suggested an amendment to the second subparagraph of Article 2 in its proposed directive[54].

The amendment would enable a specialist nurse to obtain recognition in accordance with Directive 89/48/EEC or Directive 92/51/EEC, as appropriate, as a nurse responsible for general care in Member States where nursing specialisations are not legally regulated.

ARTICLE 3

i) Article 3 is the crux of the directive and establishes the general rule that a person who is entitled to exercise a profession in the Member State of origin is entitled to recognition of his or her diploma for the purpose of taking up the same profession in the host Member State.

ii) The principle, thus stated, appears clear and easily understandable: it underlines the fact that the foundation of the recognition procedure established by the general system is the identity between the professional activity the migrant is qualified to exercise in the Member State from which she/he comes and that in the host Member State. The Commission has, however, observed a worrying tendency in some cases to transpose to the general system, habits of mind which are familiar in the context of academic recognition. The differences, similarities and synergies between academic and professional recognition are outlined in the Commission "Communication on recognition of qualifications for academic and professional purposes"[55] and a synthesis report will be presented to the European institutions and the Member States in the spring of 1996. This sometimes leads to an over-detailed comparison of the structure, content and length of education and training with the consequence that the focus of the recognition process becomes Article 4 (the compensation mechanisms) rather than Article 3 (recognition per se of the migrant's qualifications). Consequently, the Commission's services have attempted in contacts with national competent authorities and professional organisations and at conferences and seminars to emphasise that the general system represents a new approach to professional recognition and that Article 3 may require new ways of thinking.

---

[54] Forthcoming.

[55] COM (94) 596 final

Where a Member State refuses recognition of a diploma on the grounds that the profession for which the migrant is qualified is not the "same profession" as that which she/he is seeking to exercise, the question is principally one of fact and can only adequately be determined with the assistance of experts[56] by a national court or tribunal.

iii) The identity of the professional activity (Member State of origin/host Member State) is also central to another problem of interpretation of Article 3. In some Member States, two qualifications[57] exist, within the same field of professional activity - this is the case in many Member States for engineers[58] and in some Member States for accountants[59].

Usually, since regulation in these cases is by means of protected professional titles (different titles corresponding to the different diplomas), the question which arises is whether the activities exercised under these titles are the same. If so, the incoming migrant should be able to elect to apply for recognition under one or the other title and the outgoing migrant should be entitled, whichever diploma she or he possesses, to obtain recognition for the purpose of exercising the (unified) profession in question in another Member State[60]. This is an area where the application of the directive has been particularly susceptible to the influence of academic recognition procedures: rather than considering what professional activities the migrant is entitled to exercise in the Member State of origin, competent authorities have tended to assess the level and quality of the education and training, by reference to its duration or to the nature of the establishment (university/non-university higher education) in which the migrant trained.

iv) Article 3(b) defines "evidence of one or more formal qualifications", which is the term used to signify a qualification acquired in a Member State which does not regulate the profession; it therefore corresponds to the concept of diploma in Article 1(a).

v) The definition of "evidence of one or more formal qualifications" is contained within the three indents in Article 3(b); these indents correspond to the three indents in Article 1(a), the definition of diploma.

- the second indent provides that the evidence of formal qualification must show that the holder has completed a post-secondary course of at

---

56 This question is brought into sharpest focus where the professional title is the same in the two Member States (for example, "psychologue clinique"/clinical psychologist) but where the authorities in the host state argue that the activities exercised under these two titles are so different as to constitute two distinct professions.

57 Either two diplomas within the meaning of Article 1(a) or two sets of evidence of formal qualification, i.e. both encompassing a course of at least three years' duration at university of higher level.

58 For example, "ingénieur civil" et "ingénieur industriel" in Belgium.

59 For example, Chartered Accountant and Certified Accountant in the United Kingdom.

60 Subject, of course, to the application of Article 4.

least three years' duration and, where appropriate, that he has successfully completed the professional training *required* in addition to the post-secondary course. In the context of Article 3(b) the word "required" must be taken to mean "required by the rules governing the award of the evidence of formal qualifications". This would be the case where the evidence of formal qualification is awarded on successful completion of a course complemented by professional training or professional practice, the structure and level of which are determined by the laws, regulations or administrative provisions of a Member State or which are monitored or approved by an authority designated for that purpose.

- the third indent diverges most obviously from the text of Article 1(a), which provides that the diploma must show that its holder has the professional qualifications required for taking up or pursuit of a regulated profession. The wording of the provision indicates that there must be some objective link between the matters studied and the professional activity exercised by the migrant in his or her Member State of origin. However, since, in the home Member State the taking up and pursuit of the activity are not regulated, the link between the evidence of formal education and training and the professional activity may be more nebulous than in the case of a diploma giving access to a regulated activity.

vi) Two further points should be made in relation to the definition of evidence of formal qualifications. First, the education and training leading to the award of the evidence of formal qualifications must have been followed entirely within the Community; there is no equivalent, in Article 3(b), to the provision at the end of the first subparagraph of Article 1(a), which extends the definition of diploma to education and training received *mainly* in the Community (but partly in a third country) and to third country diplomas recognised in the Member State of origin and supplemented by three years' professional experience. Holders of third country evidence of formal qualifications or of evidence of formal qualifications awarded in the Community but attesting to education and training received mainly outside the Community fall outside the Directive (c.f. however, the Council Recommendation concerning nationals of Member States who hold a diploma conferred in a third State, published in the Official Journal, immediately after the text of the Directive).

vii) Secondly, although both Article 1(a) and Article 3(b) make provision for "alternative routes", the conditions for recognition are different. A qualification obtained by an "alternative route" is to be treated as a diploma provided that it is recognised by a competent authority in the awarding Member State as being of an equivalent level and that it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State (Article 1(a)). A qualification obtained by an "alternative route" is to be treated as evidence of formal qualifications, provided that it is recognised by the awarding Member State as being the equivalent level and

that the other Member States and the Commission have been notified of the recognition[61].

viii) Article 3(b) refers to a Member State which does not regulate the profession *"within the meaning of Article 1(c) and the first subparagraph of Article 1(d)"*. Article 1(c) contains the definition of regulated profession, Article 1(d) that of regulated professional activity. This wording was intended to deal with a potential difficulty in the United Kingdom: in some cases, a professional activity (e.g. estate agency) is covered by two professional organisations. One of these organisations is a Chartered Body listed in the Annex to Directive 89/48/EEC (Royal Institution of Chartered Surveyors) and in accordance with the second subparagraph of Article 1(d), the activity is considered to be regulated for the purposes of the Directive. However, it was necessary to ensure that members of the other organisation (the Institute of Valuers) would be treated as coming from a Member State which does not regulate the profession and that they could, provided that their qualification falls within the definition of "evidence of formal qualification" take advantage of Article 3(b). The result is that those who are members of a Chartered Body and hold a diploma awarded by it fall within Article 3(a), those who exercise the same professional activity and possess evidence of formal qualification but are members of the non-chartered organisation fall under Article 3(b).

ix) In order to obtain recognition, the migrant who moves from a Member State which does not regulate the profession in question to one which does must, in addition to evidence of formal qualification, "show that he has pursued the profession in question full-time for two years during the previous ten years". The professional experience thus defines, in the absence of a legal definition, the profession exercised by the migrant in his or her Member State of origin.

x) In order to obtain recognition, the migrant must, as under Article 3 (a), establish that he or she has pursued the *same* profession in his Member State of origin as the one which he or she now wishes to pursue in the host Member State. The difficulty of identifying the profession arises in this instance because, *ex hypothesi*, the profession is not regulated, within the meaning of the Directive, in the home Member State[62]. The question is essentially one of fact (what were the activities effectively exercised by the migrant during the two years in question?) and it should be borne in mind that the range of activities which constitute a profession will inevitably vary between Member States (even where the profession is regulated). The Commission has suggested that the following factors may provide assistance in identifying the profession exercised in the Member State of origin:

---

61 The Commission received notifications from the French authorities of Loi n° 92-672 of 20.07.92 and Décret n° 93/538 of 27.03.93 concerning alternative routes to French higher education diplomas.

62 A similar problem may arise under Article 3(a), where in the Member State of origin the profession is regulated only by means of a protected title ; it then becomes necessary to ascertain whether the activities exercised under this title correspond to those which are regulated in the host Member State.

- the taking up or pursuit of the profession in the Member State of origin may be subject to rules other than the possession of a diploma, such as proof of financial standing, good character etc. In this case, the profession would not be "regulated" within the meaning of the Directive, but the relevant national rules might nevertheless contain a definition of the scope of the professional activities (cf., for example: stockbrokers, financial advisers).

- membership of a professional organisation, the statutes of which make reference to the activities exercised by their members.

- the existence of regulated education and training which was conceived to meet the needs of a particular profession.

xi) Some Member States, particularly those who regulate very few professions, argue that the requirement of two years' professional experience works to their disadvantage. Article 3(b) prevents young members of unregulated professions from moving to a Member State which regulates the profession until they have acquired the necessary professional experience. This in turn results in pressure being exerted on national authorities to regulate professions which are currently open to all. Were Member States to cede to this pressure, the Directive would, paradoxically, result in the creation of new obstacles to free movement. A potential solution to this problem would be to transpose to Directive 89/48/EEC, the concept of regulated education and training introduced by Directive 92/51/EEC Article 1 (g). Regulated education and training is defined as "any education and training which - is specifically geared to the pursuit of a given profession and - comprises a course or courses complemented, where appropriate, by professional training or probationary or professional practice, the structure and level of which are determined by the laws, regulations or administrative provisions of that Member State or which are monitored or approved by the authority designated for that purpose". Where a migrant falling under Directive 92/51/EEC comes from a Member State which does not regulate the professional activity but holds a diploma which attests to regulated education and training, he or she is dispensed from the requirements of professional experience.

ARTICLE 4

i) Article 4(1) contains rules for applying the so-called "compensation mechanisms": professional experience, the adaptation period and the aptitude test.

ii) Article 4(1)(a) related to differences in the duration of the education and training. Although Member States have included this possibility in their implementing legislation, the provision appears, with the exception of Luxembourg, to be applied very rarely. This is probably because Article 4(2) forbids Member States to apply paragraphs 1(a) and (b) cumulatively i.e. they may not require both professional experience and an aptitude test or adaptation period.

iii)[63] Apart from the so-called "legal" professions (lawyers, patent agents, accountants) the statistics provided by Member States show that the imposition of a compensation requirement remains, rightly, the exception to the general rule. The statistics also show, that migrants much prefer adaptation periods to aptitude tests where they are offered the choice.

iv) The migrant's right to choose between an aptitude test and an adaptation period is withdrawn where:

- the practice of the profession in question 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.

- professions for which the Member State has obtained a derogation under Article 10 (no such derogations have been granted[64]).

v) The first exception has been interpreted by Member States to include lawyers, judges and other members of the judicial organisation, legally-qualified civil servants, patent agents, tax advisers, auditors and accountants (in virtually all cases, Member States have chosen to apply the aptitude test[65]). In the context of their examination of implementing measures, the Commission's services have raised doubts as to whether some national accountancy professions satisfy the criteria laid down in the final subparagraph of Article 4(1)(b). If the replies from Member States fail to allay these doubts, Article 169 procedures may be decided upon in appropriate cases.

vi) Although Article 4(1) allows Member States to require a compensation mechanism when the matters covered by the migrant's "education and training" differ substantially from those covered by the diploma required in the host Member State, the Commission considers that this provision should be interpreted in the light of the Court's caselaw interpreting Articles 48 and 52 of the Treaty, in particular, the Vlassopoulou judgment. This requires Member States to consider whether knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient in order to prove possession of knowledge which is lacking. In the Commission's view[66], such "post-diploma" study or practical experience, whether acquired in the host Member State, the Member State of origin or a third state may reduce or obviate altogether the need for a compensation mechanism.

---

63 For other comments on the aptitude test and adaptation period see, supra, comments on Article 1(f) and (g).

64 See further below, comments on Article 10.

65 The only exception appear to be Denmark where, for the time being, an adaptation period has been required of migrant lawyers.

66 Cf. Answer to written Question 2790/93, OJ C 268 of 06.09.1994, p. 19.

vii) Article 8 of the Directive required any decision taken concerning the applicant's request for recognition to be reasoned. The Commission is somewhat concerned by the practice of some competent authorities of justifying compensation requirements by reference to unspecified "substantial differences".

ARTICLE 5

This provision is something of a curiosity, it invites Member States to offer to applicants not yet in possession of a "diploma" within the meaning of Article 1(a) the opportunity of undergoing part of their professional education and training - professional practice, acquired with the assistance of a qualified member of the profession - in the host state, yet imposes no legal obligation. Few Member States have transposed Article 5 into national legislation but it is applied in Finland to the teaching profession. However, its merit would seem to be that it draws the attention of Member States to the possibility of going beyond the strict terms of the directive in this particular case.

ARTICLE 6

Article 6 contains standard provisions concerning proof of good character, financial standing and mental and physical health. Its application has given rise to no particular problems. However, in the Commission's "proposed directive", it is proposed to complete Article 6 by adding two new paragraphs. The first would provide that certificates issued by banks in the migrant's country of origin, concerning his or her financial standing should be regarded as equivalent to those delivered on the territory of the host Member State[67]. The second, inspired by a similar provision in the architects' directive[68] provides for acceptance in the host Member State of certificates of insurance issued by an insurance company in the migrant's Member State of origin.

ARTICLE 7

This provision governs the use of professional and academic titles by the migrant. The migrant is entitled to make use of the professional title of the host Member State (Article 7(1)) and to continue to use his academic title there (Article 7(2)). It is important to note that Article 7(2) only applies where a migrant has obtained recognition in accordance with the directive and does not grant an independent right to make use of an academic title[69]. Article 7(3) contains a specific application of these rules to Chartered Bodies and similar associations in the United Kingdom and Ireland.

---

67 This provision replicates that in a number of liberalisation directives, for example, Directive 77/92/EEC (insurance brokers and agents). OJ L n° 26 of 21.01.1977.

68 Directive 85/384/EEC, OJ N° L 223 of 21.08.1985, p. 15.

69 As to which, see the judgement of the Court Kraus.

ARTICLE 8

i) Article 8(1) provides that the host Member State must accept as proof that the conditions laid down in Articles 3 and 4 are satisfied, documents and certificates issued in the Member State of origin. In practice, host Member States require, as they are entitled to do, in addition to the migrant's diploma and the documents referred to in Article 6, proof of the migrant's nationality.

In addition, migrants are often asked to supply information concerning their education and training: whilst such a demand may be legitimate in order to enable the competent authority to assess whether or not a compensation mechanism is justified, it should not result in a detailed comparison of course syllabi, as is sometimes the case in academic recognition procedures. In addition, older migrants sometimes have difficulty in providing details of courses studied ten, twenty or even thirty years ago. The Commission is currently investigating with Member States the extent of documentation they require in support of a request for recognition and is exploring with them the solutions which might be applied where the migrant is unable to supply the detail required.

ii) The Italian implementation legislation provides for the issue of an attestation to outgoing migrants by the Italian authorities certifying that the professional qualifications are a "diploma" or "evidence of one or more formal qualifications" within the Directive. Although the Commission would not deny the usefulness of such a document, it has made clear in the coordinator's group that Member States are neither obliged to supply nor entitled to demand such an attestation. Doubts as to whether evidence presented by a migrant is or is not a diploma are, in the Commission's view, best settled by bilateral contacts either directly between competent authorities or via national coordinators.

iii) The Commission is also continuing its examination of the formalities surrounding the presentation of documents in support of a recognition request. In many cases, translations of diplomas are required and some Member States require the translation to be undertaken by a certified or approved translator. The Commission will continue to keep such requirement under review, since it considers that a systematic requirement, in cases where competent authorities have become familiar with documents issued elsewhere in the Community may not be justified.

iv) The Commission considers that a Member State is not entitled to require that a migrant submit the original of his or her diploma but may require that any copy be certified in accordance with national practice. Following a complaint, the Commission's services examined the requirement made by Spain that diplomas and other documents be authenticated in accordance with the Hague Convention of 5 October 1961 by the addition of an "apostille". The Commission's services took the view that such a requirement was not justified in the context of the single market and, more especially, Directive 89/48/EEC since it was disproportionate to the objective it aimed to achieve namely guaranteeing the authenticity of the document. Where doubts arise as to the authenticity of a diploma, bilateral contacts should

allow the competent authorities to obtain the necessary verification. The Spanish authorities accepted this point of view and agreed to withdraw the requirement.

v) Article 8(2) requires Member States to reply to requests for recognition by way of a decision within four months of presentation of all the documents necessary. The decision, or its absence, must be open to challenge before a national court or tribunal. The role of the national court is extremely important in recognition cases: only a national judge can rule on issues of fact, (such or whether there are substantial differences justifying a compensation requirement), take a decision in the individual case and, where appropriate, award damages. The Commission's services have taken the view that the four month limit is to be applied to the initial decision: where that decision imposes a compensation requirement in accordance with Article 4(1)(b), the recognition procedure may take considerably longer.

vi) Although the absence of any decision at the end of the four month period opens the way to national legal proceedings, the Commission's services are concerned that in a number of cases consideration of the migrant's request regularly takes longer (periods of up to 18 months have been cited by complainants). Where there is evidence that delays are a regular occurrence, the Commission will consider bringing proceedings under Article 169 of the Treaty.

ARTICLE 9

i) Article 9(1) is a standard clause requiring Member States to designate the authorities empowered to take decisions on recognition. In many cases these authorities are named in national implementing legislation.

ii) Article 9(2) deals with the appointment of national coordinators and the tasks of the coordinators' group. The role played by national coordinators is an important one: their formal task is to ensure the uniform application of the directive to all the professions concerned but in practice they also act as a conduit of information between the Commission and national competent authorities. In many instances, contacts between a national coordinator and the Commission or between two national coordinators have helped to resolve problems which have arisen with the operation of the directive. This network of administrative cooperation is bolstered by regular meetings of the coordinators' group. The personal contacts made in these meetings, are in the Commission's view, an essential element in bringing about the atmosphere of mutual trust necessary to the proper functioning of the system.

iii) The coordinators' group began its meetings in March 1989 and has now met on 29 occasions. From 1993 onwards, coordinators responsible for the application of the second general systems directive, 92/51/EEC have participated in the group[70]. The group discusses problems arising from the

---

[70] In some Member States (B, DK, D, IRL, I, SF, F) a single coordinator is responsible for both directives, in some cases assisted by a deputy. In the other Member States separate coordinators have

application of the directive, sometimes on the basis of "position papers" prepared by the Commission's services, exchanges information on the individual professions covered by the directive (whether regulated or not, form of regulation, nature and duration of the education and training). Items are included on the agenda either on the initiative of the Commission or at the request of a national coordinator. The group has also heard presentations from other services of the Commission working in related fields (for example the EURES project). National coordinators also took part in the ad hoc advisory committee which assisted the Commission in the preparation of its "Communication on Recognition of Qualifications for Academic and Professional Purposes".[71]

iv) In order to enhance the role of the coordinators' group, the Commission intends to consider ways in which its deliberations might be put on a more formal footing. One possibility would be for the coordinators' group to issue advisory opinions on the interpretation of the Directive or to approve "Codes of Practice" for its application.

v) All Member States have appointed a contact point responsible for providing information on the application of the directive to migrants. In some cases (B, D, GR, F, IRL, L, SF, S) Member States have nominated their representative in the NARIC *(National Adademic Recognition Information Centres)* network referred to in Article 9(3); in other Member States, the coordinator or a third person has been appointed as a contact point. Several joint meetings between the coordinators and the NARIC network have been held to discuss provision of information on the directive and a member of the service within the Commission responsible for the general system attends other NARIC meetings to report on the application of the Directive.

vi) Many Member States have produced explanatory leaflets on the application of the general system. The Commission has commissioned consultants to produce a vade-mecum, destined for national competent authorities and other experts involved in the application of the two general system directives. The French version has already been distributed in draft to coordinators and it is currently being translated into English and German. Once these translations are complete, the Commission will take appropriate steps to ensure that the vade-mecum is made available to all interested parties.

vii) In addition to the vade-mecum, the consultants produced a 12-page users' guide which explains by means of questions and answers how the general system works. A provisional version of this guide is already being supplied to anyone who contacts the Commission's services for information on the general system. A printed version will be available shortly and will be

---

been appointed for the two directives. In accordance with the EEA Joint Committee Decision n° 5/94, the coordinators of the EEA contracting States (currently Norway, Iceland and Lichtenstein) also attend meetings of the coordinators' group. Representatives of the EFTA Secretariat and the EFTA Surveillance Authority are also invited.

71 COM (94) 596 final.

distributed to Commission Information Offices in the Member States, to contact points, professional bodies and other organisations who are called upon to answer enquiries on the directive.

ARTICLE 10

i) Article 10 lays down the procedure by which Member States may obtain a derogation, allowing them the right to withdraw from the migrant the right to choose between the aptitude test and the adaptation period (cf. Article 4(1)(b), last subparagraph).

ii) The Commission has not yet been required to take a decision under Article 10(2). The only request in due form received from a Member State, the Netherlands, was withdrawn after initial discussions in the coordinators' group[72]. However, the EFTA Surveillance Authority did take a negative decision on a request made by the Austrian authorities to restrict compensation measures for civil engineers to the aptitude test[73]. This decision was taken after consultation of the Commission and the coordinators' group and is one which the Commission endorses.

ARTICLE 11

i) As the deadline set for transposition was 4 January 1991, the Commission has asked Member States to supply Article 11 reports for two calendar years at a time. So far reports have been requested in the years 91/92 and 93/94. Ten Member States[74] supplied a report for the first period. Complete reports from France, Ireland, Luxembourg, Italy, Greece, and Belgium have not yet been received for the period 93/94.[75]

IV A REVIEW OF THE MAIN PROFESSIONS COVERED BY DIRECTIVE 89/48/EEC

HEALTH PROFESSIONS

i) The directive has worked very satisfactorily in this sector - although problems have arisen in a certain number of cases, they have usually been the result of individual circumstances and have not raised more general

---

72 It concerned (i) the judiciary and other professions connected to the administration of justice, (ii) maritime professions, (iii) health and safety experts, (iv) paramedical professions. For the first three groups, the proposed regulations imposed an 'aptitude test', where a compensation requirement was justified, for the fourth, an adaptation period. It was agreed that the first group came within the "legal professions" exception in Article 4(1)(b) ; for the other professions, the migrant will retain his or her right to choose the method of compensation.

73 Doc 163/94/COL

74 Not Portugal and Luxembourg.

75 The then EEA contracting states (A, S, SF, N, IS) supplied a report for 1994.

problems of interpretation or application. Although differences in education and training have led to compensation requirements in many cases (in practice, the adaptation period), there is evidence that their use is declining either because of voluntary adaptation of training courses or because competent authorities, increasingly familiar with qualifications awarded elsewhere in the Community, see less need for them.

ii) The numbers making use of the directive in this field may be compared with those obtaining recognition under the sectoral directives for other health professions. Between 4 January 1991 and 31 December 1994, at least 1450 physiotherapists obtained recognition[76], an average of about 310 per year[77] or about 1.5 per thousand active physiotherapists[78]. This figure may to be compared with the 1991 statistics for the sectoral directives where the numbers obtaining recognition in the health professions were as follows: 205 pharmacists, 1969 doctors (about 1.7 per thousand doctors), 230 veterinary surgeons, 2588 nurses, 253 dentists (about 1.2 per thousand dentists) and 87 midwives.

ENGINEERS

i) Since most engineers are salaried and since the profession is either not regulated[79] or regulated by way of reservation of title in most Member States[80], recognition of an engineering diploma is not a pre-requisite to free movement and the numbers of migrants making use of the directive gives only a partial indication of mobility within this profession. To the end of 1994 at least 1050 engineers had obtained recognition of their diplomas under Directive 89/48/EEC.

ii) Difficulties were encountered mainly by engineers moving towards the southern Member States. In Greece, these were caused by the absence of implementing legislation and mainly affected Greek nationals who had studied elsewhere in the Community. In Spain and Italy, delays were also encountered as a result of the failure to put in place the necessary compensation mechanisms. Finally some problems arose as a result of the situation described under the commentary to Article 3 above where an engineer was seeking to move from a Member State which awards two

---

[76] This figure includes recognition of physiotherapists in Germany and of German physiotherapists elsewhere in the Community who are governed by Directive 92/51/EEC, which came into force on 19 June 1994. It also includes recognition of physiotherapists in Sweden, Austria and Finland in 1994 and of their nationals in the Community under the EEA agreement.

[77] Given the late implementation of the directive in many Member States, the yearly average will increase in future.

[78] Calculated on the basis of figures for active physiotherapists supplied by the Standing Liaison Committee of Physiotherapists within the EC.

[79] DK, NL, B, F (but cf. comments made in relation to Article 1a), S, SF.

[80] UK, IRL, D.

categories of engineering qualifications (for example, Belgium, Germany) to one in which only one qualification exists (for example, Greece or Italy).

iii) In a written question[81] the Commission was asked whether it felt that the register of engineering qualifications and the title of "Eur Ing" created by the Federation of National Engineering Association (FEANI) might facilitate the recognition of national engineering diplomas amongst Member States. The minimum requirements for admission to the register are (i) full secondary education, (ii) education and training extending over seven years, including at least three years of theoretical education at higher level and two years of assessed professional experience). The Commission replied as follows:

"Although the Eur Ing title cannot itself be considered as a "diploma" within the meaning of Article 1(a) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas[82], it may nevertheless be of assistance to the competent national authorities when they examine a request for recognition under Article 3 of the Directive. Registration on the FEANI register indicates that, whatever the duration or content of his or her initial training, the engineer has reached a certain level of professional competence, certified by his or her peers both at national and European level. Bearing in mind that Member States are required by the caselaw of the Court to take into consideration, when reaching their decision on recognition, post-diploma professional experience, the Commission considers that an engineer who has obtained the title of "Eur Ing" should not normally be required to undertake an adaptation period or sit an aptitude test, as provided for in Article 4 of Directive 89/48/EEC."

TEACHERS

i) The application of the directive to the teaching profession has been rather unusual. On the one hand, in absolute terms, teachers represent the largest single professional group to have benefited from the directive. More than 5000 teachers[83] have obtained access to their profession in another Member State, but of these 3800[84] were recognised in the United Kingdom alone[85]. Elsewhere the application of the directive to the teaching profession has been fraught with difficulty.

ii) Some Member States separate the process of qualifying as a teacher from the process of recruiting teachers into the state school systems. In these states the

---

81 n° 3429/93 - OJ N° C 268 of 26.09.1994, p. 38.

82 OJ n° L 19 of 24.01.1989, p. 16.

83 Based on figures supplied by Member States to the end of 1994 includes all categories of teaching (including those in higher education).

84 No compensation measures have been applied for this profession in the United Kingdom.

85 Given recruitment procedures in the United Kingdom, it is not possibly to say how many of those who obtained recognition of their diplomas subsequently found employment in the public sector.

would-be teacher first acquires a "diploma" and then seeks employment. In some Member States (for example, the United Kingdom and Ireland) recruitment procedures are similar to those in the private sector; vacant posts are advertised, and selection is made, usually after an interview from the candidates who apply. In other Member States, for example, Spain, recruitment is by way of an open competitive examination, open to those who hold a teaching qualification; successful candidates are then placed on a list and take up posts as and when they fall vacant. In the Commission's opinion, Member States are free to use either form of recruitment: recognition of a teaching diploma from elsewhere in the Community entitles the migrant teacher to enter the recruitment procedure in the host Member State. In other words, where recruitment in public sector teaching is by way of competition, recognition entitles the migrants to take part in the competition but does not guarantee that he or she will be successful.

iii) In other Member States (for example, France and Luxembourg) teacher training and recruitment are inextricably linked. After obtaining a primary academic qualification, candidates for teacher training sit an open competition. The number of successful candidates is determined by the demand for teachers in the Member State concerned. Success in the competition gives access to teacher training and, if this is successfully completed[86], to a guaranteed post in a state school. Recruitment thus takes place prior to the award of the "diploma" within the meaning of the Directive. This has caused difficulties in the application of the general system to teachers moving to such Member States. In the Commission's view, the migrant teacher must go through the normal recruitment process i.e. he or she must participate in the competition; however, since the migrant is already a fully qualified teacher, the host Member State should grant them a dispensation from that part of the education and training which follows the competition[87]. In line with this view, infringement proceedings have been opened against France.

iv) The Commission has also received a number of complaints from teachers seeking recognition in Germany. In part, problems have arisen from the apparent refusal of some German Länder to recognise teaching qualifications awarded by non-university higher education establishments (in the United Kingdom, the Netherlands, Denmark and Austria). The Commission has made clear its view that such an approach contravenes the directive and as a consequence, infringement proceedings are under consideration.

v) A further difficulty encountered by migrant teachers in Germany is the requirement that all teachers should be capable of teaching two subjects[88]. Teachers qualified elsewhere in the Community as single-subject teachers have been refused recognition on this basis. The two-subject requirement is

---

86 As is almost always the case.

87 Subject to the application of a compensation mechanism under Article 4.

88 A similar requirement exists in Austria.

not, as such, contrary to the Treaty or the directive but, in the view of the Commission's services, it cannot be argued that single-subject teaching and two-subject teaching are different activities, justifying a refusal to apply the Directive to single-subject teachers moving to Germany. It is clear, however, that a compensation mechanism under Article 4(1)(b) will be appropriate. The Commission is continuing its examination of this problem.

vi) A final problem concerns language requirements for teachers. Article 3(1) of Council Regulation n° 1612/68[89] permits the laws, regulations or administrative provisions or administrative practices of a Member State "to lay down conditions relating to linguistic knowledge required by reason of the nature of the post to be filled". Such requirements, like all other requirements laid down by national law are subject to the general principle of non-discrimination contained in Article 6 of the EC Treaty.

vii) Furthermore, in the view of the Commission, Member States are not entitled to make proof of linguistic ability a precondition to the examination of a request for recognition under the Directive. Thus a Member State is not entitled to include proof of the migrant's knowledge of the host State's language amongst the documents which must be submitted in support of the request for recognition or to treat the migrant's file as incomplete in the absence of such proof.

viii) The Commission accepts that requirements relating to linguistic knowledge which are non-discriminatory and which are proportionate to the actual need to speak the host State language[90] may be in conformity with Community law. Where the migrant's diploma, within the meaning of Article 1(a), does not attest to that knowledge, the host Member State is required, in accordance with the Vlassopoulou judgment, to examine whether the migrant has acquired the necessary linguistic capacity by prior or subsequent education and training, or by professional experience. If no such proof is submitted, the absence of the necessary linguistic ability may be viewed as a "substantial difference" justifying an aptitude test or an adaptation period.

LAWYERS

Some 620 lawyers obtained recognition under the directive until autumn 1995[91], more than 400 of them in the UK, at least 76 in Ireland, 55 in Germany, and 40 in France. Nearly 400 lawyers were granted immediate recognition without having to take an aptitude test, the vast majority of them representing migrants moving

---

89 Council regulation n° 1612/68 of 15 October 1968 on freedom of movement for workers within the Community as amended by Regulation n° 2434/92 of 27 July 1992. OJ n° L 245 of 26 August 1992.

90 Cf. Case 379/87 Groener [1989] ECR 3967. It should be noted that in those Member States which recruit public sector teachers by way of open competition, the migrant is required de facto to demonstrate his or her linguistic ability. In addition, aptitude test or adaptation period will take place in the national language.

91 Cf. Footnote 44

between the UK and Ireland[92]. Due to this phenomenon and to the fact that many Member States were late in adopting the implementing rules on the aptitude test, only about 340 lawyers took the aptitude test in the period concerned, at least 180 in the UK alone. 214 lawyers managed to pass the aptitude test. There are, however, considerable differences as to the pass rate in the Member States, as is pointed out on page 11.

The relatively low number of lawyers having obtained recognition can probably be explained, to some extent, by the right granted to lawyers by the national law of some Member States to practise under the title of the Member State of origin[93] and, in part, by the fact that many Member States were late in implementing or, as it is the case especially for Spain, have not yet implemented the directive for lawyers, but it is likely that the mere requirement that migrant lawyers sit an aptitude test[94] has also acted as a disincentive.

The need to further facilitate the free movement of lawyers within the single market led the Commission to make a proposal for a new directive[95] which is based on the idea of mutual recognition of authorisations to exercise/licences to practise. A lawyer from one Member State would be entitled to exercise in another Member State under his or her home title for a period of 5 years. According to the proposal, lawyers practising under their home title would be entitled to be granted a full or a partial exemption from the aptitude test on the basis of the professional experience gained in the host Member State.

AUDITORS/ACCOUNTANTS

The numbers of auditors and accountants having made use of the directive is minimal (50 on the basis of current statistics). Whilst the prospect of taking an aptitude test is no doubt a factor, it has also been suggested that multinational accountancy firms increasingly recruit their personnel locally and that posting, within the undertaking, is usually for short periods only. This would not, however, explain the failure of sole practitioners and those in small and medium-sized firms to make use of the directive. The F.E.E. (the European Federation of Accountants) is currently exploring with its members the form which a specific directive for accountants might take.

---

92 At least 311 in the UK and 67 in IRE, 15 applicants from B and LUX were accepted directly in F.

93 Albeit, in some cases, with a limited field of activity (advice on home state law, international law and Community law).

94 Cf. comments made above under Article 1(g).

95 COM 94(572) OJ n° C 128 of 24.05.1995. Final Proposal for a European Parliament and Council Directive 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.

i) The twelfth recital of Directive 89/48/EEC provides that "the general system for the recognition of diplomas is entirely without prejudice to the application of Article 48(4) and Article 55 of the Treaty". The application of the general system to posts in the public service falling outside these articles and therefore open to non-nationals has given rise to a certain number of problems.

ii) In attempting to resolve those problems with the coordinators' group, the Commission's services have identified three possible situations.

The first, and simplest, is where national regulations apply indistinctly to the public and private sectors i.e. the same professional qualification is required regardless of whether the professional activity is exercised within the public service or in the private sector. Typically this is the case of professions in the health sector. The regulations governing access to the profession are distinct from those governing access to a post in the public sector. One set of rules regulates access to the profession and the individual then has to decide whether to seek a post in the public or private sector.

In such cases, the application of the general system is relatively straightforward (recognition places the migrant in the same situation as the national who has completed professional training but has yet to find employment).

iii) In the second situation different rules apply respectively to the public and private sector. Either both the public sector and the private sector are regulated but different rules apply, the requirements in the private sector being in general less strict, or the profession is regulated in the public sector but not in the private sector.

Examples of this form of regulation include teaching (both variants) and certain health sector professions where for example there is a reservation of activity in the public sector to those holding certain qualifications (often enforced via the social security scheme) and either a simple protection of title or no regulation whatsoever in the private sector.

This situation applies to recognisable "professions" i.e. a range of activities which, even if unregulated, exists as a distinct discipline in the private sector.

iv) Again, in principle, this form of regulation presents few difficulties for the application of the General System. A migrant is in accordance with Article 3, only entitled to recognition for the purpose of taking up and pursuing the profession which she/he is entitled to exercise in his or her Member State of origin. A migrant who satisfies the requirements in his or her Member State of origin for exercise in the private sector but not those for exercise in the public sector is not therefore entitled to rely on the General System directives for the purpose of obtaining access to the public sector in the host Member State. (Nothing, of course, prevents the authorities of the host

Member State from taking a more generous approach and it is arguable that they are even required to do so under the Vlassopoulou caselaw).

If a migrant has in fact worked in the private sector in his or her Member State of origin but has all the qualifications necessary for practice in the public sector, she/he is entitled to rely on Article 3 to obtain recognition for the purpose of access to the public sector.

v) The third and final situation concerns activities exercised exclusively in the public sector. Essentially, this category consists of posts in the general administration (administrators, executive officers, assistants, secretaries, clerks, messengers, etc.) where no equivalent "profession" exists in the private sector.

vi) For such posts, some Member States have recruitment procedures which are very similar to those applying in the private sector: announcement in the press with an indication of the likely education profile of successful candidates. In such circumstances, no requirement is made with respect to candidates' qualifications. Such procedures should be sufficiently flexible to allow applicants from other Member States to be taken into account. A breach of Article 48 would only occur if it were established that, in practice, candidates with non-national diplomas were systematically rejected for posts in the public service.

vii) On the other hand, some Member States (particularly, but not exclusively, those which use the competitive examination as a means of recruitment) lay down more formal requirements whether by law, regulation or (more commonly) administrative provision. In some instances, the qualification requirement takes the form of a list of specified diplomas, in others a certain level of education is required (e.g. a degree, a baccalaureate). In the view of the Commission the activity in question is a "regulated professional activity" within the meaning of Directive 89/48/EEC and the recognition mechanisms laid down in the directive apply.

viii) It is true that Article 3 may be difficult to apply to this type of regulated professional activity in the public service. Article 3 entitles a migrant to recognition for the purpose of taking up and pursuing the same activity on that which they are qualified to pursue in their Member State of origin. The problem is therefore to identify the "same" activity in the Member State of origin since the categories of employment in the public service do not correspond exactly between Member States. There is no complete solution to this problem but this is not a difficulty which is peculiar to the public service: many other instances exist where it is difficult to identify the "profession in question" for the purpose of Article 3. It is for the migrants to establish, if necessary with the assistance of the authorities of the Member State of origin, that their diploma would give them access to the corresponding activity in the public service in that State.

It is also true, that, in this situation, compensation mechanisms which are based on substantial difference in the duration and/or content of the education and training are difficult to apply, particularly in the context of an open competitive examination, where time may be of the essence. The view of the Commission is that where a general requirement is made, relating to

the level of qualification, it will be difficult to establish the existence of a substantial difference and/or that any missing matters are essential to the exercise of the activity in question. In any event, where an open competitive examination exists, it effectively takes the place of any other compensation mechanism.

V CONCLUSIONS

Directive 89/48/EEC embodies the subsidiarity principle but it demonstrates that, whilst respecting this principle, Community measures can bring about far-reaching changes in national legislation, administrative structures and administrative practice. The implementation of the directive has seen the incorporation into the laws of the Member States of rules which reflects a new and fundamentally different approach to professional recognition. It has obliged Member States to create new administrative structures to deal with applications for recognition and to provide for the necessary coordination between the different competent authorities within Member States.

The directive was also intended to bring about new administrative practices, and new ways of addressing the issue of recognition for professional purposes. Unfortunately, as has been observed above, habits of mind, developed in the sphere of academic recognition, continue to prevail in some Member States.

The directive has also brought about a changed situation for would-be migrants: it grants to them new rights and new remedies. From the correspondence received by the Commission, it appears that many migrants are aware of the existence of the right to recognition but are all-informed as to the mechanics of the general system. The ratio of complaints received by the Commission to the number of appeals reported by Member States suggests that migrants are either unaware of their rights of appeal or reluctant to exercise those rights.

Finally, the directive has given added impetus to the cooperation between national professional organisations at European level and there have been many initiatives aiming at bringing about voluntary convergence of education and training.

Changes of this degree and nature take time and it is not yet possible to reach any final conclusions as to the functioning of the general system.

For this reason, the Commission does not intend at present to propose any fundamental changes to Directive 89/48/EEC. The review of Directive 92/51/EEC, the second general system directive, which is scheduled to take place in 1999 will offer an opportunity for a review of the system as a whole. However, it does intend to examine the possibility of proposing certain limited amendments to the directive before this date. In addition to the proposals contained in the forthcoming consolidation directive, the Commission will examine:

- the possibility of incorporating into Directive 89/48/EEC the obligation to take into consideration, when examining the migrant's application for recognition, post-diploma experience;

- the possibility of introducing into Directive 89/48/EEC the concept of "regulated education and training", thereby obviating the need for a migrant coming from a Member State which does not regulate the profession in question to demonstrate two years' professional experience;

- ways in which the role of the coordinators' group could be developed in order to secure a more uniform interpretation and application of the directive.

In addition, the Commission will continue its efforts, first, to ensure that the basic principle of the directive, enshrined in Article 3 (namely, recognition per se of the migrant's qualification) is respected and that the right to impose the compensation mechanisms contained in Article 4 is not misused and, secondly, to make migrants fully aware of their rights under the directive.

The Commission remains convinced that the strong, simple idea at the heart of the directive remains as valid in 1995 as it was in 1988 and that the play of the single market and the increasing use of the general system will lead to an improvement before the 1999 report to the European Parliament and the Council.