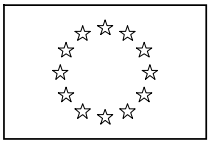

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03.02.2000
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REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

ON THE APPLICATION OF DIRECTIVE 92/51/EEC IN ACCORDANCE WITH ARTICLE 18 OF DIRECTIVE 92/51/EEC

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I. INTRODUCTION

1. Council Directive 92/51/EEC[1] was adopted in order to extend the General System for the recognition of higher education and training of at least three years' duration, laid down in Directive 89/48/EEC, to cover other levels of education and training.

2. The basic principles are the same[2]: a person fully qualified to exercise a profession in one Member State is assumed to possess the necessary qualifications for exercising the profession in another Member State. As with Directive 89/48, if training is not co-ordinated[3], compensatory measures may be required, with procedural guarantees, if there are substantial differences between levels of training. However, the wider variety of training courses covered makes the Directive more complex: there are, for example, three main levels of qualification, with bridges or "passerelles", and atypical training compared with the initial system has had to be included.

3. Article 18 of the Directive provides for a progress report to be made on its application five years after the implementation deadline[4].

4. The present report describes the context in which the Directive was drawn up before turning to its implementation and the statistics on its application. The individual Articles are then examined, as is the experience gained in applying the Directive to the main groups of professions concerned. The work of the Co-ordinators' Group responsible for implementing the Directive is summarised. Next, two important questions on language requirements and the provision of services are dealt with. The conclusions also attempt to identify some policy guidelines for the future.

II. SUMMARY

5. The adoption of Directive 92/51/EEC initiated the opening of a major new phase in the operation of the General System. The Directive extended the application of the General System into a large new area covering a multitude of very different professions. The range of professions covered, the variations in the relevant education and training underlying these professions in the Member States and the system of "passerelle" between this directive and the First General System directive all presented major new challenges to the application of mutual recognition by the Member States in the field of the recognition of professional qualifications.

6. Considerable delays followed in many Member States in the implementation of the Directive. Some of these delays were so extensive and so prolonged as to have deprived the Directive of any real effect across the full range of the professions covered for a whole Member State for several years.

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1 L209 of 24th July 1992 p.25

2 The complementary General System is "based on the same principles" and contains "*mutatis mutandis* the same rules as the initial General System" (recital 5 of the Directive).

3 *"for those professions for the pursuit of which the Community has not laid down the necessary minimum level of qualification, Member States reserve the option of fixing such a level with a view to guaranteeing the quality of services provided in their territory"* (recital 2).

4 18th June 1994.

Others have been more sporadic and specific, often following a more profession-by-profession implementation process, but which when taken collectively have produced significant and widespread delays in application. However, most of these problems are now resolved and the outlook for a more comprehensive and effective application of the Directive looks more positive.

7. Statistics are beginning to become available showing the degree of movement taking place and for which professions it is most concentrated, such as in the field of sea transport and health-related professions. More widely, the teaching and engineering professions are migrating the most under the General System as a whole. A major further step forward will be taken when the Third General System Directive - Directive 99/42/EEC[5] - has been implemented in 2001.

8. Experience of the operation of the Directive has helped to clarify some important points. For example, there remains the legislative vacuum filled by the rules of the Treaty as interpreted by the Court of Justice for those cases which are neither covered by a sectoral directive nor the General System, such as the specialist nurse seeking recognition in a Member State only offering the qualification of general care nurse. There remain some difficulties over recognition under the "passerelles" provisions of the Directive requiring Member States applying Directive 89/48 level qualifications to recognise other Member States' 92/51 level qualifications. Further clarifications are also expected soon from the Court of Justice on language requirements and further work has been done by the Commission on medical certificates.

9. Some controversy still surrounds the application of Article 14 allowing for exemptions from the principle that the migrant has the choice of the type of compensation measure to be applied in cases of the existence of substantial differences between his qualification and that required in the Member State to which he is moving. There have still been few such applications and mostly only temporary exemptions have been granted so far. The most controversial case involves ski instructor recognition and further attention will be devoted to this area over the coming months. In recent months, permanent exemptions have been granted on a request from France concerning high mountain guides and potholing instructors. Temporary exemptions, lasting up to 31 July 2000, have been granted to Austria and France for various ski instruction professions as well as underwater diving and parachuting. The issue of ski instructor recognition is being further examined in a series of ad hoc meetings designed to facilitate the exchange of information, the clarification of views and the development of wide-ranging agreement on the conditions for free movement. In the light of experience so far, more time may be required to ensure the full examination of, and consultation on, future requests for exemptions.

10. In addition, the procedure for the up-dating of the Directive has been criticised as too time-consuming and work-intensive and, despite the evident difficulty of the issue, solutions need to be examined with a view to simplifying the process.

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[5] European Parliament and Council Directive 99/42/EEC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the General Systems for the recognition of qualifications, Official Journal L 201, 31 July 1999.

11. The application of Directive 92/51/EEC has also had some impact on the tourist industry with much discussion and some legal proceedings relating to local qualification and registration requirements for both guides and tour managers. As a result of developments in this and related areas, as well as the new proposal for a directive on electronic commerce, further reflections have been undertaken on the need for greater legal clarity, certainty and rules proportionate to modern market needs concerning the cross-frontier provision of services as opposed to local establishment.

12. The application of the General System directives has also led to the examination of some discrete issues such as the role of Community law in relation to public service recruitment, including for the exercise of specific professions in the public service, general recruitment on the basis of a certain level of qualification and the use of competitions.

13. The work of the Co-ordinators' Group has been extended to embrace Directive 92/51/EEC and the valuable work of this Group has continued and grown in importance, in particular with the adoption of the Code of Conduct approved by the Group of Co-ordinators for the General System of recognition of diplomas on administrative practice in the implementation of the General System. Under the broad ambit of the wider work of the Commission recently on the subject of mutual recognition generally, the Group is currently considering the possible enhancement of the role of Co-ordinators in the exchange of information and views to assist in the taking of decisions on mutual recognition.

III. BACKGROUND

14. The first Directive on the General System (89/48) covered only courses lasting three years or more, at a university or higher education establishment. It thus became clear that the system needed balancing with a Directive covering shorter courses and those at other levels.

15. The Commission's initial proposal, presented on 8 August 1989, thus covered two levels of training :

- secondary or occupational experience (certificate), and
- short, post-secondary training (diploma).

16. This proposal allowed for recognition within each level, between levels 2 and 3 (i.e. Directive 89/48-level qualification of at least three years and short post-secondary training diploma), and between levels 1 and 2 (i.e. the certificate and the “short post-secondary” diploma).

17. Provision for recognition of experience was also made within level 1 (certificate).

18. The amended proposal, presented on 8 August 1990, took over the substance of the amendments adopted by Parliament on 17 May 1990. The main changes were as follows: the diploma was extended to courses whose effective level was comparable to that of corresponding short higher education courses, even though they were not regarded as higher education in the Member State of origin. For the certificate, it was

made clear that courses could alternate between a vocational establishment and an enterprise.

In addition, an upper limit was set on diploma equivalences between levels 2 and 3, when in the host country the course exceeded four years' duration, in order to avoid distortions in the system's application. Another amendment was to include a choice between test and work experience within the certificate level.

19. Two further notions emerged during the Council stage: a certificate of competence, covering very short courses for which the recognition and compensation mechanisms put in place for diplomas and certificates would have been too cumbersome, and regulated training which, by giving exemption from the two years' professional experience which would normally be required in an unregulated profession, created a better balance between Member States where professions are regulated and those where regulation is generally limited to training courses[6].

20. Since the common position of the Council reflected the opinion of Parliament, the latter decided[7] not to submit any amendments on the second reading. The Directive was consequently approved on 18 June 1992.

IV. GENERAL FRAMEWORK

A. Progress with implementation

21. The Directive, due to be implemented by 18th June 1994, has now been transposed in all Member States[8]. In some it was transposed later than the two year deadline laid down in Article 16, which reduces the experience gained in applying it. Spain was approximately one year late, Ireland two years, Portugal and the United Kingdom two and a half years, Belgium three years and Greece four years late. The Commission therefore initiated and pursued infringement procedures.

B. Application

1. Introduction

22. In accordance with Article 18 of Directive 92/51/EEC, Member States are obliged to send the Commission statistics on the numbers of EU diplomas recognised for a 2 year reporting period together with a written report highlighting the main questions and problems arising with implementation of the Directive. The analysis below concerns the operation of Directive 92/51/EEC for the period 1995-98 inclusive and has not been made preceding this date given the little amount of information available at that time. This analysis also includes data from the European Economic Area (EEA) countries[9] given the amendments to the EEA agreement which have incorporated the directives in this field.

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6 According to the Commission's explanations in its Communication of 5 March 1992 to Parliament on the common position of the Council.

7 Doc. PE 200.275

8 This is without prejudice to transposition on a profession-by-profession basis

9 Iceland did not recognise any diplomas falling under Directive 92/51/EEC.

2. Reporting period 1995-96

23. For the most part, the information given in this section of the report has been obtained from the northern Member States (Denmark, Germany, Austria, the Netherlands, Sweden, Finland and the United Kingdom) and from Italy. Of the EEA states, only Liechtenstein provided statistics.

24. For various reasons, the southern Member States did not supply information to the Commission (recent or continuing implementation – Portugal, Spain, Greece; few migrations – France; information not available – Ireland, Luxembourg; no applications – Belgium). An overview of the figures available confirms the nature of the free movement occurring mainly between and amongst northern Member States and Italy.

25.

Main professions for which free movement occurs under the Directive
Physiotherapists (moving to Germany)
Seafaring professionals (moving to Denmark, Sweden, United Kingdom and Germany)
Specialist Nurses (moving to both Austria and Germany)
Childcare workers (moving to Austria)
Masseurs (moving to Italy)
Radiographers (moving to Italy)

26.

Principal States which recognise diplomas	States from which they come
Germany 767	Netherlands, UK
Austria 164	Germany
United Kingdom 106	Netherlands
Denmark 76	Sweden
Italy 25	Germany
Sweden 21	Denmark, Norway, Finland and Iceland
Liechtenstein 8	Germany
Netherlands 7	Belgium
Finland 4	Insufficient data to draw conclusions

27. Germany is by far the highest importer of diplomas (767) and such diplomas are mainly Dutch (288 physiotherapy diplomas and 102 seafaring diplomas) and British (52/64 British diplomas were in the field of seafaring). The Dutch, for their part, were called upon to recognise hardly any diplomas at all (7). Austria, at substantially less than Germany, recognised 164 foreign diplomas, most of them German in the field of childcare and specialist nursing *Kindergärtner/in* and *Pflegehelfer*. The UK was next, recognising mainly Dutch seafaring diplomas.

Denmark, a higher importer than exporter, recognised mainly Swedish diplomas also n the field of seafaring rating (*matros, motormand* and *skibassistent*) whilst the Swedish import market (21) comes from the Nordic countries (Denmark mainly, followed by Norway, Finland and Iceland), also in the seafaring sector.

28. The Dutch and Finns have been called upon to grant many fewer recognition requests than their neighbours partly because they regulate fewer activities.

29.

Principal States which export their diplomas	To :
Netherlands 574	United Kingdom, Germany
Germany 171	Austria
Sweden 78	Denmark
United Kingdom 64	Germany
Austria 55	Germany
Denmark 29	Germany
Finland 29	Germany
Italy 20	Germany
Liechtenstein 1	Germany

30. The highest exporter of diplomas under the second Directive is the Netherlands at 574 and these diplomas are recognised mainly by the United Kingdom and Germany. The latter is both the highest importer and the second highest exporter (171) and German diplomas are mainly recognised in Austria. Swedish diplomas are mainly recognised in the seafaring sector by Denmark. The United Kingdom (64) exports mainly to Germany in the seafaring sector; Austria (55) exports mainly physiotherapists to Germany and Denmark (29) exports mainly to Germany.

31. These absolute figures should, of course, be viewed in the context of the national populations of such professions.

3. Conclusion

32. The seafaring sector benefits from two-way cross-border traffic. Professionals move from the Netherlands, Sweden and the United Kingdom to Denmark, Sweden, the United Kingdom and Germany.

33. Childcare professionals and specialist nurses tend to move in one direction: from Germany to Austria. So do physiotherapists, who move mainly from the Netherlands to Germany. Smaller numbers of masseurs and radiographers have moved to Italy.

4. Reporting period 1997-98

34. It became evident that for the above period, the main sectors where free movement occurs under this directive are health-related professions and maritime transport (seafaring). Norway (EEA country) welcomed by far the highest number of EU migrants mainly from Northern Europe (Sweden and the UK) and most of the qualifications recognised were as Marine Engineering Officers or Deck Officers. Notably, free movement is also very high amongst specialist nurses in Austria, Spain, Germany, France, Luxembourg and UK.

35. Complete data was received from all EU including EEA Member States except Greece .

36.

Main professions for which free movement occurs under the Directive
Seafaring professionals (moving to Norway, Germany, Denmark, Sweden and UK)
Physiotherapists (moving to Germany)
Specialist Nurses (moving to Austria, Spain, Germany, France, Luxembourg and UK)
Opticians (moving to France)
Engineer Technicians (moving to UK)
Dental hygienists (moving to UK) and **Dental Technicians** (moving to Portugal)
Masseurs (moving to Italy)
Aircraft Maintenance Engineers (moving to Ireland)
Childcare workers (moving to Austria and Italy)

37.

Member States which recognise diplomas	Member States from which they come
Norway 1535	Sweden, UK, Greece
Germany 822	Netherlands, UK and Belgium

Luxembourg 283	France, Germany and Austria
Spain 229	Germany, UK and France
UK 173	Ireland, Netherlands and Finland
Austria 91	Germany
Denmark 61	Germany and Sweden
Italy 44	Germany
France 37	Belgium
Ireland 36	UK
Sweden 31	Finland
Netherlands 26	Germany and Belgium
Portugal 20	France and Spain
Finland 20	Sweden
Liechtenstein 10	Austria
Belgium 7	Netherlands

38.

Member States which export their diplomas	To :
Sweden 701	Norway (620), Denmark (30), Finland (15) and UK (13)
UK 580	Norway (460), Germany (54) and Spain (32) and Ireland (21)
Netherlands 574	Germany (504), UK (36) and Spain (12)
Germany 307	Spain (75) , Austria (68), Luxembourg (37), Italy (32), Norway (34) and Denmark (27)
France 277	Luxembourg (206), Spain (38) Germany (10)

Denmark 142	Norway (86), Germany (27) and Spain (18)
Spain 136	Norway (98), Germany (14), UK (11)
Austria 131	Norway (51), Germany (42) and Luxembourg (24)
Belgium 124	Germany (53), France (35), Luxembourg (11) and Spain (10)
Greece 111	Norway (93), Germany (7)
Finland 101	Norway (35), Sweden (22), UK (22)
Ireland 89	UK (77) Norway (18)
Iceland 52	Germany (35) Norway (16)
Italy 47	Spain (22) Germany (13)
Portugal 28	Germany (12) Norway (8)
Luxembourg 14	Germany (13)
Norway 7	Germany
Liechtenstein 4	Germany

39. Excluding Greece, for the above reporting period there were some 3,425 cases of recognition. In total for 1995-98 inclusive, there were 4,603 cases of recognition under this "second" General System directive alone. The reporting period for 1997-98 shows a net increase (almost 3 times) in the numbers of cases of recognition. Many of the qualifications recognised were Diplomas falling under the definition of Annex C, Certificates or Attestations of Competence.

40. The comparatively high number of diplomas recognised by the Nordic countries can be explained by the common interest that all have in seafaring. The profession of Physiotherapist is most probably the profession which moves most under the General System as a whole; this explains the high number of recognition requests granted by Germany under Directive 92/51/EEC which is the only Member State to regulate it under the latter Directive.

The high number of specialist nurses moving between Austria, Spain, Germany, France, Luxembourg and the UK and child-care workers moving to Austria and Italy is explained by the fact that a lot of specialist nurses and child-care workers exist in these countries. The statistics from France produce the new element of the migration of opticians. The Commission is examining in detail the regulation of professions in the IT sector which should lead to an explanation as to why the UK has recognised

so many Engineering Technicians. The quantity of Dental Hygienists moving to the UK also will be the subject of further examination.

5. Conclusion

41. An overview of the various independent or combined reasons for migration appear to be : the existence of professionals in the same category in one or more Member States and an equivalent corresponding level of qualification under the Directive - Diploma, Certificate, Attestation of Competence, etc - (e.g. specialist nurses moving between Austria, Spain, Germany, France, Luxembourg and the UK) : the high quantity of seafaring professionals existing in Sweden, UK, Greece and Norway, a possible explanation for the high number of seafarers moving from these countries mainly to Norway : and both geographical proximity and cultural similarity (e.g. Dutch physiotherapists, licensed boat masters and speech therapists moving to Germany : British Aircraft Maintenance Engineers moving to Ireland : Belgian dispensing opticians moving to France : and French and Spanish Dental Technicians moving to Portugal).

C. Statistics

42. This section includes some additional statistical information concerning recognition decisions granted under the whole of the General System.

43. All inclusive, from 1993-98 the total number of recognition requests granted under both General System Directives was 23,224. An analysis of the period 1993-96 showed that of the 12,595[10] requests granted, compensation measures were applied in 1,954 cases, or 15.5%. Of this 15.5%, 63% were adaptation periods and 37% aptitude tests. If we break down the 15.5%, the relative percentages are as follows: aptitude tests were used in 5.6% of all cases of recognition granted under the General System and adaptation periods in 9.8% of such cases. On the other hand, some 1,781 negative decisions were also taken, which amounts to a 12% failure rate, at least on first attempt. Some 7.13% of those refused recognition had undergone compensation measures of which some 95% were aptitude tests. In other words, 6.7% of negative decisions happened after the migrant had undergone an aptitude test and 0.3% after the adaptation period 14.47% of all recognition decisions taken, positive and negative, were the result of the application of compensation measures.

44. It is not necessarily possible or appropriate to try to draw specific conclusions from the statistical information so far available on the application of the *acquis communautaire* in the area of the General System on the recognition of professional qualifications. The information and analysis provided in this report may be found useful for the purposes of further reflection and discussion on the operation of the *acquis.* Nevertheless, it may be possible to conclude in very general terms that the statistics so far available tend to confirm what could be expected from the nature of the different kinds of Community legislation applied in this area.

45. Volumes of migration may not be critical to an evaluation of the General System directives either; partly because they have been in application for a shorter period and so understanding of their availability and application may still be growing. Individuals, in whatever professional walk of life can justifiably expect support from

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[10] This is the most complete figure available.

Community law for the facilitation of migration within the European Union. However, high levels of existing migration can also already be taken to show the very success of the General System directives.

V. COMMENTS ON THE INDIVIDUAL ARTICLES

46. Directive 92/51/EEC refers to the former Articles 49 (now renumbered 40), 57(1) (now 47(1)) and 66 (now 55) of the Treaty, following the Amsterdam amendments. It therefore applies to employees, establishment and the provision of services.

47. The preamble explains the main provisions of the Directive. The main recitals are quoted in this report in conjunction with the provisions to which they refer.

48. The definitions used in the Directive are set out in Article 1. Article 2 explains its scope, particularly where this differs from that of other Directives. Next come the principal mechanisms for recognition on the basis of the level of training required in the host Member State: the Diploma (Articles 3 to 5) or the Certificate (Articles 6 and 7), including the compensatory measures which may be demanded in the event of substantial differences between training levels (Articles 4, 5 and 7). Articles 8 and 9 provide for simplified mechanisms for other types of training. Horizontal provisions cover the recognition of proofs of good character, repute etc. (Article 10), the use of professional qualifications and titles (Article 11) and guaranteed procedures for applying for recognition (Article 12). The co-ordinating group set up by the first Directive on the General System is made responsible for this Directive (Article 13). Article 14 provides for an exemption procedure from the choice between an adaptation period and an aptitude test, and Article 15 for a procedure for amending Annexes C and D. The remaining Articles refer to with the reports to be provided by the Member States (Article 16) and by the Commission (Article 18) and the implementation of the Directive (Article 17).

A. ARTICLE 1

49. Article 1 defines a number of concepts essential to proper understanding of the Directive.

ARTICLE 1(a)

50. This provision defines the Diploma as the result of a post-secondary course lasting at least a year (but less than the three years required for a diploma as defined in Directive 89/48). The course is deemed to be higher education by virtue of requiring the same admission qualifications as a university or higher education course. Article 1(a) also includes in the definition any education or training course listed in Annex C (see comments on Article 15).

51. As in Directive 89/48, the Diploma must have been awarded by a competent authority, and it must show that the holder has the professional qualifications required to take up or pursue a regulated profession in that Member State.

52. Like the corresponding text of Directive 89/48, it covers third-country diplomas under certain conditions, and includes those issued in recognition of courses outside

the Community at teaching establishments which provide education and training in accordance with the law, regulations or administrative provisions of a Member State.

53. Also like Directive 89/48, the Directive recognises alternative education and training, provided that it is recognised by a competent authority in the same Member State as being of equivalent level and confers the same rights to take up or pursue a regulated profession. Such alternative paths may be courses parallel to the main training course or to former courses.

ARTICLE 1(b)

54. The Certificate covers post-secondary professional training and secondary-level training which may be either technical or professional.

55. This post-secondary training may take the form of a formal course, or on-the-job or in-service training, or a probationary period. It is compulsory if the secondary education is general, but optional for the purposes of the certificate if the secondary education is technical or vocational. The training may be in a teaching establishment or in an enterprise, or alternately in both.

56. Like the Diploma, the Certificate must be awarded by a competent authority, and must entitle the holder to take up or pursue an activity which is regulated in the Member State concerned.

57. If a Member State recognises training acquired in a country outside the European Economic Area which was not provided in an establishment teaching in accordance with that Member State's rules, two years' professional experience are required in the Member State before the General System can be invoked to give rights of recognition in other Member States (as against three years for diplomas).

58. Alternative training is recognised in the same way as diplomas.

ARTICLE 1(c)

59. This paragraph defines the attestation of competence as certifying training which gives rise neither to a diploma under either Directive, nor to a certificate. It is thus a very short course. An attestation can also be awarded following an authority's assessment of an applicant's personal qualities, aptitudes or knowledge, without proof of any prior education or training.

60. During the adoption of the Directive, the Commission undertook to pay particular attention, when conducting the review of the functioning of the Directive as foreseen in its Article 18 and in the light of any problems which might have arisen in practice, to the fact that “an attestation of competence” was less substantial than a certificate given the concern expressed regarding the distinction between the two concepts. The Commission is not, however, to this date aware of any particular problems arising.

ARTICLE 1(g)

61. In some Member States there are relatively few regulated professions, but training for professions which are not regulated may be specifically geared to the pursuit of that profession, with the structure and level of training being monitored or approved by the authorities.

62. This regulated training gives guarantees equivalent to those provided in connection with a regulated profession, and the migrant is thus not required to demonstrate professional experience when the activity is not regulated in the Member State of origin (see Articles 3, 5 and 6).

63. Annex D (see below) lists regulated training deemed equivalent in level to the diploma. Other regulated training, e.g. of certificate level, is possible.

ARTICLE 1(d), (e), (f), (h), (i) and (j)

64. The definitions of host Member State, regulated profession, regulated professional activity, professional experience, adaptation period and aptitude test are substantially those of Directive 89/48. No list of regulated professional activities is annexed, however, since many more activities are involved than with Directive 89/48.

65. No particular comments are needed on these definitions compared with those of Directive 89/48[11].

B. ARTICLE 2 (and Annexes A and B)

66. Article 2 begins by stating that the Directive applies to any national of a Member State wishing to pursue a profession in a self-employed capacity or as an employee.

67. According to the second paragraph of Article 2, the Directive does not cover professions which are the subject of a specific Directive establishing arrangements for the mutual recognition of diplomas by Member States, i.e. nurses, doctors, midwives, pharmacists, veterinary surgeons, dentists and architects, and professions in the transport sector (cf. Section VI E "Transport"), nor does it apply to activities covered by a Directive listed in Annex A concerning transitional measures, freedom of establishment and freedom to provide services.

68. Following this second exclusion, the Commission suggested a mechanism for recognising the diplomas for professions in its proposal for a third Directive on the General System, which was approved by the European Parliament (second reading) on 7 May 1999 and by the Council on 11th May 1999. This Directive, signed on 7 June, is to be implemented within two years of its publication in the Official Journal before 31st July 2001. The mechanism is similar to the General System, but differs in two respects. First, it is simpler, particularly because there is only one level of training; the professions covered show fewer differences in terms of training. Secondly, the choice between aptitude test and adaptation period, where there is a

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[11] Document COM(96) 46 final, 15 February 1996. If a profession is not regulated under Directives 89/48/EEC and 92/51/EEC, the host Member State still has Treaty obligations in the field of the recognition of professional qualifications (cf. *Bobadilla* case law n° 234/97of 8.7.1999).

substantial difference between training courses, falls to the host Member State if the migrant wishes, in a self-employed capacity or as a manager of an undertaking, to exercise an activity requiring the knowledge and application of national rules. This second difference stems from the agreement finally reached by Parliament and the Council under the conciliation procedure provided for in Article 189b (now 251) of the EC Treaty.

69. The third paragraph of Annex B extends certain Directives mentioned above to employed persons.

70. This extension fills a gap which did not exist in the other Directives on mutual recognition, since the first Directives dealt only with establishment and provision of services as part of the Council's general programmes for eliminating restrictions on the freedom of establishment and the freedom to provide services. The subsequent Directives included the pursuit as an employed person of the activities in question.

71. As far as the Commission is aware, the application of these Directives to employed persons, even in a capacity other than that of manager of an undertaking, has not given rise to any particular problems.

C. ARTICLE 3

72. This Article lays down the principles of recognition when the host Member State requires the possession of a diploma as defined in either Directive 92/51/EEC or Directive 89/48/EEC.

73. The difference between the diplomas of the two Directives lies in the level of the training. In principle, the newer Directive's definition embraces university training of at least one year (but less than three).

74. There are several approaches, depending on whether the profession is regulated in the Member State of origin and, if not, whether the training is regulated.

75. (a) If the profession is regulated in the Member State of origin and the applicant holds a diploma of either type (89/48/EEC or 92/51/EEC), the diploma should in principle be recognised by the host Member State (with any necessary compensatory measures — see Article 4).

76. (b) If the profession is not regulated in the Member State of origin but the applicant nevertheless holds one or more training qualifications[12] at the 92/51/EEC diploma level, this qualification must as a matter of principle be recognised by the host Member State, provided that the holder has exercised the profession concerned for at least two of the preceding ten years, without prejudice to any compensatory measures (see Article 4).

77. The two years' experience cannot be required, however, if the training is regulated in the Member State of origin. Regulated education and training are defined in Article 1, which requires them to be specifically geared to the pursuit of a given profession

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[12] If the training is parallel to a normal or former training course, it may be recognised on the same basis as normal training if the conditions set out in the penultimate paragraph of this Article are met.

and for their structure and level to be determined by the laws, regulations or administrative provisions of the Member State concerned.

78. The guarantee offered by the legislation of the Member State of origin to the host Member State is replaced, as it were, by a minimum degree of experience of the profession or by the official status of the training obtained.

79. There is no recognition mechanism for Directive 92/51 diplomas when access to the profession in question is contingent on holding a Directive 89/48 diploma, one of the conditions for the award of which is success in a course of post-secondary studies lasting more than four years. The gap between the two types of training would then be more than three years. In this case the migrant may invoke the "Vlassopoulou"[13] case law to obtain recognition of her or his qualifications.

D. ARTICLE 4

80. Article 4 provides for measures which may be imposed on the migrant to compensate for any shortfall in her or his training compared with that required in the host Member State under Article 3. Three measures are provided for according to the type of serious shortfall: (a) if it concerns the duration of training, the compensatory measure is professional experience; (b) if it concerns the content and possibly the scope of the training, the compensatory measure is the adaptation period or the aptitude test.

81. (a) Professional experience may be required if the duration of the migrant's training was a year or more less than that required in the host Member State.

82. The experience which the migrant must prove must not be more than twice the shortfall in training time. In certain cases where the shortfall in training time in fact corresponds to professional practice, the host Member State's requirement must not exceed the equivalent time. In no case may the period exceed four years. Moreover, if the host Member State requires a diploma awarded on the basis of one of the training courses listed in Annex C, it is not entitled to require an applicant with an 89/48 or 92/51 diploma to have experience, since the training courses listed in Annex C have very specific durations which are difficult to compare with those of the diplomas "proper" covered by these two Directives, even though they are equivalent to 92/51 diplomas.

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13 In the judgement handed down in Case C-340/89, the Court of Justice derives from Article 52 (now 43) of the EC Treaty on freedom of establishment the obligation for the host Member State to *"take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules"* (point 16). Only if the diplomas correspond no more than partially is the Member State in question entitled to require the person concerned to show that he/she has acquired the knowledge and qualifications which are lacking (point 19). It must also take into consideration the professional experience acquired in the Member State of origin or in the host Member State (point 21). The examination procedure must be accompanied by guarantees: any decision taken must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed and the person concerned must be able to ascertain the reasons for the decision taken in his/her regard (point 22). This judgement was followed by consistent case-law which has embraced salaried practice (cf. the judgement in Case 234/97, "*Bobadilla*").

83. (b) An adaptation period or aptitude test may be required if:

84. the training received by the migrant was substantially different from the training required in the host Member State or

85. the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the regulated profession in the Member State of origin which are subject to specific training which is not substantially covered by that of the migrant.

86. The Directive limits the adaptation period to not more than three years.

87. The applicant may choose between the adaptation period and the aptitude test. The choice falls to the national authorities in three cases only:

- when practice of the profession concerned requires "a precise knowledge of national law", and the provision of advice and/or assistance concerning national law is an "essential and constant" feature of the professional activity;
- when the host Member State has obtained an exemption under Article 14 on the migrant's right to choose (see below);
- when the host Member State requires a diploma in respect of a three-year course and the migrant has only a diploma in respect of a one-year course or less[14].

88. The adaptation period and the aptitude test are defined in Article 1(i) and (j).

89. Only one of these three compensatory measures may be demanded of the migrant (Article 4(2).

E. ARTICLE 5

90. Article 5 considers the case where the host Member State requires a Directive 92/51 diploma, whereas the applicant has only a certificate.

91. Here, the host Member State must recognise the certificate prescribed in another Member State for entry to a regulated profession. It may, however, require the migrant to undergo an adaptation period of not more than three years or to take an aptitude test. This requirement is not subject to proof of a shortfall between the migrant's training and that required of nationals; such a shortfall is assumed by virtue of the difference in level between the diploma required and the certificate held. The migrant may choose between the two compensatory measures unless an exemption has been granted according to the procedure laid down in Article 14.

92. If the profession is not regulated in the Member State of origin but the applicant holds one or more qualifications of certificate level, his/her training must as a matter of principle be recognised by the host Member State, provided that the applicant has exercised the profession for at least two of the preceding ten years. The host Member

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[14] There is no recognition procedure when the migrant has this qualification and the host Member State requires a level exceeding four years of higher education. The *Vlassopoulou* case law applies in this event.

State is not entitled to require the two years' experience if the training is regulated in the Member State of origin. Regulated training is defined in Article 1(g).

93. All this is without prejudice to any compensatory measures taken under the terms set out above.

F. ARTICLE 6

94. Article 6 lays down the principle of recognition when the host Member State requires a certificate before a profession may be pursued.

95. Access to a regulated profession cannot be refused on the grounds of lack of qualifications if:

96. (a) the applicant holds either the diploma or the certificate prescribed by another Member State for access to this profession;

97. (b) unless the profession is regulated in the Member State of origin, the applicant has had two years of professional experience during the preceding ten years, and holds one or more training qualifications[15] of diploma or certificate level. Such experience cannot be required if the training is regulated;

98. (c) the applicant holds no diploma, certificate or other evidence of education and training but has exercised the profession for three consecutive years of the preceding ten-year period. This mechanism gives a migrant who has been unable to find training suited to his or her situation access to a regulated profession at certificate level on the strength of professional experience. One example might be a pruner who has gained expertise while working in the sector.

G. ARTICLE 7

99. Article 7 sets out the cases in which the host Member State may impose compensatory measures when it requires a certificate for the pursuit of a profession.

100. It distinguishes between two hypothetical cases:

101. (a) the migrant holds a diploma, certificate or other evidence of education and training[16]:

102. - the Member State must show that there is a substantial difference between training courses or differences in the fields of activity characterised by specific education and training relating to matters which are substantially different,

103. - but the migrant is entitled to choose between an adaptation period (not exceeding two years) and an aptitude test (unless the Member State obtains an exemption under Article 14);

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[15] If the training is parallel to normal or former training, it may be recognised as equivalent to normal training if the conditions laid down in the last indent of this Article are met.

[16] Cases covered by Article 6(a) and (b).

104. (b) the migrant does not hold any diploma, certificate or other evidence of education and training[17]:

105. - the Member State need not show that there are differences as outlined above (since the absence of qualifications suggests that there are such differences),

106. - and the Member State is entitled to choose between an adaptation period (not exceeding two years) and an aptitude test (without having to obtain an exemption under Article 14).

H. ARTICLE 8

107. Since the attestation of competence covers very short courses or an appreciation of personal qualities, aptitudes, or knowledge without proof of prior education and training (see definition in Article 1(c)), the Directive's principal recognition mechanism would be too cumbersome. If the host Member State requires an attestation of competence, it must recognise, without proof of qualifications, the attestation of competence required in another Member State for the taking up or pursuit of the same profession. Failing this, it must accept the qualifications of which the applicant provides proof, if they give guarantees, particularly in the matter of health, safety, environmental protection and consumer protection, equivalent to those it requires. These qualifications may also be personal qualities, knowledge or aptitudes obtained outside a training course.

108. In short, the attestation of competence exists for two purposes: as evidence of a very short course not connected with the preceding secondary education or, in the case of certain activities which nevertheless require some specific knowledge, of an examination at a modest level.

109. There is thus no question of compensatory mechanisms. The Directive allows only two outcomes: recognition if the conditions set out in the Directive are met, or non-recognition. There is no other possibility. But the logic of the text in its context requires that Member States should set up a mechanism which is more favourable to the applicant than simple refusal to recognise. If the conditions of the Directive are manifestly not met, it would seem logical and in the spirit of the Directive's aims for the Member State to be able to provide gateways (examination, further training, etc.) to allow the migrant access to the profession in that Member State. This can only be beneficial to freedom of movement. Moreover, the *Vlassopoulou* case law obliges each Member State to take into consideration the diplomas of other Member States held by Community nationals, even when no provision of a Directive is applicable. The national authorities are required to examine how far the knowledge and qualifications attested by the applicant's diploma from his/her country of origin correspond to those required by the regulations of the host Member State.

110. This problem has been raised[18] in the Co-ordinators' Group set up under the Directives. The Commission and most Member States believe that, if a migrant complies with only part of the provisions of the host Member State, his or her

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17 Cases covered by Article 6(c).

18 At the meeting held on 10 and 11 April 1995.

qualifications must nevertheless be taken into consideration under the case law of the Court of Justice.

I. ARTICLE 9

111. When the host Member State requires evidence of general education at primary or secondary school level, it is not entitled to refuse formal qualifications of the corresponding level awarded by a competent authority in another Member State.

J. ARTICLE 10

112. This Article deals with the production of proof that persons are of good character, financially sound, and in good physical and mental health. These provisions are taken from earlier Directives concerning the free movement of persons such as traders or certain health professionals.

113. The application of these provisions has given rise to certain questions, particularly in the case of Directive 89/48. They are, however, applicable *mutatis mutandis* to Directive 92/51.

114. For example, in connection with the award of "qualified teacher status", the Commission has been consulted by the competent British authorities on the possibility of requiring candidates from other Member States to produce an official document attesting that they are of good character and repute and have not been convicted of any offence against children. This goes beyond what is provided for in the Directives.

115. The question is therefore whether more rigorous conditions than those provided for in the Directives may legitimately be laid down, and whether applicants producing the declaration on oath provided for in the Directives, but not an official document attesting that they are of good character and have not been convicted of any offence against children, can be refused access to the teaching profession. The competent national authorities think that, in the case of teachers, a simple declaration on oath as provided for in the second paragraph of Article 6 of Directive 89/48 and the second paragraph of Article 10 of Directive 92/51/EEC, is not a sufficient guarantee that people who might be harmful to children, such as paedophiles, may not obtain "qualified teacher status".

116. The Commission considers it disproportionate to conclude, on the basis of a literal reading of the Directives, that since they do not provide for any exemption from the obligation to accept a declaration on oath, the host Member State must accept a declaration of this kind in the case of persons whose professional activity involves direct daily contact with children. Protecting children against paedophiles can be regarded as a compelling reason of general interest justifying a restriction on the freedoms of movement enshrined in the Treaty. Requiring an official certificate (extract from police records or similar document drawn up by a competent authority) would seem an appropriate way of achieving a legitimate aim without going beyond what is strictly necessary.

117. Another example arises from a complaint against a host Member State on the grounds that, for access to and pursuit of the profession of frogman, a certificate

which can be issued only by medical practitioners approved by the local competent authorities is required.

118. In order to assess the acceptability within the meaning of Directives 89/48 and 92/51 of the system whereby the authorities in the host Member State approve medical practitioners, the system must be examined case by case in the light of criteria established by the case law[19] of the Court of Justice (general interest, non-discrimination, proportionality). The following general principles may be put forward:

119. - when a Member State requests a medical certificate signed and endorsed by an accredited medical practitioner, it must be in the general interest i.e. required for fulfilling certain health requirements in the host Member State for the exercise of given professions, such as those relating to passenger transport;

120. - it would not be acceptable to restrict the opportunity to obtain approval to national medical practitioners alone, since this would certainly render access to a profession on the territory of the host Member State more difficult in practice for nationals of other Member States than for its own nationals;

121. - the proportionality principle implies that the host Member State should seek the least restrictive means of ensuring a high level of health protection. The following conclusions may be drawn from this:

122. (1) If an approval system offering equivalent guarantees also exists in the Member State of origin, the host Member State is not entitled to refuse the certificate issued in the country of origin.

123. (2) If the Member State of origin does not require a document of the same type as that required in the host Member State, i.e. if the certificate required is not issued by an approved medical practitioner or if no certificate is required, the second paragraph of Article 6(2) and Article 10(2) of Directives 89/48 and 92/51 respectively applies. The host Member State may then demand an attestation issued by an authority in the Member State of origin which is more than a simple certificate issued by an unapproved medical practitioner, even if the authority issuing the attestation is not itself approved. Moreover, Directive 89/391 does not explicitly provide for the approval of medical practitioners in order to guarantee the health monitoring referred to in its Article 14.

124. (3) Lastly, only if the authorities of the Member State of origin fail to issue an attestation within the meaning of the above-mentioned provisions is the host Member State entitled to require the migrant to produce a medical certificate issued by a practitioner approved by that Member State.

125. (4) It is worth adding that, to avoid placing excessive restrictions on the free movement of professionals, the entitlement of the host Member State to draw up a list of approved medical practitioners should, in any event, be accompanied by two obligations: first, it must justify the specific health

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[19] Without prejudice to Directive 89/391/EEC which in substance permits Member States to impose more severe requirements in matters of health with the aim of protecting the safety and health of workers at the workplace. The impact of this Directive is under examination.

requirements making such a network of approved practitioners necessary, and it must secondly inform the migrant of the various means by which he/she can meet these requirements (approved medical practitioner in the Member State of origin, attestation from the authorities of the Member State of origin or, failing these, approved medical practitioner in the host Member State).

K. ARTICLE 11

126. Under this Article, the competent authorities of the host Member State must recognise the right of nationals of other Member States who fulfil the conditions for taking up and pursuing a regulated profession to use the corresponding professional title in the host Member State.

127. The same applies to the right to use an attestation of competence, but the host Member State may require this qualification to be accompanied by details of its origin, so as to avoid confusion with qualifications awarded on its territory.

128. If the profession is regulated in the host Member State by an association or organisation, migrants may use its professional title only if they can prove that they are members. If the association or organisation restricts membership to certain qualifications, it must comply with the provisions of the Directive, particularly those laid down in Articles 3, 4 and 5 (recognition of diplomas, certificates or professional titles).

L. ARTICLE 12

129. This Article deals with the proof of qualifications the applicant must provide, and certain procedural points.

130. First, it is up to the applicant to prove what qualifications he/she holds. However, the host Member State must accept as evidence documents issued by competent authorities in the Member States. In other words, the host Member State may not be unreasonable in the evidence it demands. The Commission has therefore, in close co-operation with the Member States, compiled a "Code of Conduct" on administrative formalities which embodies a consensus by the Co-ordinators' Group on the question (see below). The Commission considers that it can be of great practical help to the migrant for the authorities of the Member State of origin to issue a document attesting his qualifications in terms of the Directive (89/48 diploma, 92/51 diploma, certificate or attestation of competence). Nevertheless, the host Member State is not, as a matter of principle, entitled to demand an attestation from the Member State of origin to certify the possession of a diploma as defined by the Directive or the authorisation to pursue the profession in the country of origin (see Code, point 3Cb).

131. The procedure for examining applications must be completed within four months of the presentation of the full set of documents. It must be endorsed by a reasoned decision. This decision, or its absence, must be subject to appeal under national law.

M. ARTICLE 13

132. This Article requires Member States to designate the competent authorities to receive applications and take recognition decisions under the Directive and to communicate this information to each other and to the Commission.

133. It also requires each Member State to appoint a co-ordinator, above all to promote the uniform application of the Directive. These Co-ordinators become members of the Co-ordinators' Group set up under Directive 89/48. The tasks of the Co-ordinators' Group — to foster the implementation of that Directive and assemble all information relevant to its application — are also extended to this Directive.

134. There is an obligation for Member States to provide information on the recognition of qualifications and related issues using existing information networks and professional associations and organisations, where appropriate. The Commission is responsible for initiating any necessary developments in co-ordination and communication measures.

135. The work done by the Co-ordinators' Group is described in Part VII below.

N. ARTICLE 14:

1. General

136. If a Member State proposes not to grant applicants the right to choose between an adaptation period and an aptitude test, it is required immediately to communicate to the Commission the corresponding draft provision. It shall at the same time notify the Commission of the grounds which make the enactment of such a provision necessary.

137. The Commission shall immediately notify the other Member States of any draft which it has received; it may also consult the Co-ordinators' Group.

138. The Member State may adopt the provision only if the Commission has not taken a decision to the contrary within three months. It may also submit its observations on the draft.

139. The definitive text is communicated by the Member State concerned at the request of a Member State or of the Commission.

140. In connection with the application of Directive 92/51/EEC, the Commission has received three applications for exemptions under Article 14. In one case the Article was deemed not to apply, but in the others the Commission's responses were partly favourable. These applications came from France, the United Kingdom and Austria.

2. France: sports instructors

141. On 17 June 1996, France applied for an exemption under Article 14 of Directive 92/51/EEC for the supervision of certain sporting activities. France's application concerned the profession of sports instructor and asked for permission to make an

exception to the principle of the applicant's freedom of choice in the case of certain sporting activities. The French authorities wanted to be able to impose an aptitude test on the applicant if the diplomas awarded in other Member States were substantially different from the qualifications required in France.

142. The French authorities accompanied their application to the Commission with a draft decree which concerns only the establishment of instructors etc. who are qualified in another Member State. This was because, in relation to the temporary provision of services, an infringement procedure opened by the Commission had already been concluded by the grant to France of a permanent exemption, based on a separate piece of French legislation and the relevant Articles of the Treaty rather than on Directive 92/51/EEC, for the same professions. Although intended to transpose the Community law applicable in this field, this draft decree on establishment still maintains special rules for five sporting activities, for which *"the Minister for Sport may stipulate the aptitude test"*. According to the text submitted to the Commission, this aptitude test could be stipulated for ski instructors, mountain guides, diving instructors, parachute instructors and potholing instructors. The French authorities stressed that this application, drawn up pursuant to Article 14, did not call into question the principle of mutual trust but *"tended rather to affirm it in the case of activities where objectives of general interest such as safety were at stake."* It therefore concerned only *"dangerous sports"*. In the view of the French authorities, this application was justified by the dangerous nature of the activities in question.

143. In accordance with Article 14 of Directive 92/51/EEC, the application was submitted to the Member States. It was sent to all the Co-ordinators of the General System for the recognition of diplomas, who stated their views at the meeting of the Co-ordinators' Group held on 8 July 1996.

144. After examining France's application, the Commission thought that the absence of freedom of choice might be justified in this case, provided of course that the Member State shows in each case that the compensatory measure is justified by a substantial difference between the material covered by the migrant's training and the qualification required, taking into consideration the professional experience of the person concerned. The dangerous nature of the activities and the concern for the safety of those involved were arguments against freedom of choice and in favour of an obligation to take an aptitude test in the specific cases mentioned by France in its application and in accordance with Directive 92/51/EEC.

145. In its decision, adopted on 9 January 1997, the Commission granted an exemption for a trial period to end on 30 September 1999. Before making a final pronouncement on this exemption, it wanted to evaluate the practical problems it would entail. It also wanted to enable France to determine whether or not these aptitude tests were in fact the best way of achieving the objective. Finally, it wanted all the parties concerned to make any comments they might have before taking a final decision.

146. The Commission asked France to submit an evaluation report by 30 April 1999 and, if it wished, to submit a new application for an exemption by 30 June 1999. The Commission also decided to ask the other Member States and all the parties concerned to state their views and submit their observations. The Commission itself was also to produce a report.

147. France submitted its evaluation report on 12 May 1999 and requested a permanent exemption for these five professions. After asking for and obtaining additional information, the Commission decided on 14 July 1999 to extend the exemption for one year for ski instructors, but under strict conditions, and for diving instructors and parachute instructors, and for an unlimited period for mountain guides and potholing instructors.

3. Austria: mountain professions

148. In a letter of 15 July 1998, Austria applied for an exemption under Article 14 of Directive 92/51/EEC for the supervision of certain sporting activities. This letter was accompanied by two draft regulations and an account of the motives. The application concerned eight sporting professions (ski instructors, trainee ski instructors, graduate ski instructors, ski guides, cross-country ski instructors, trainee cross-country ski instructors, mountain guides and trainee mountain guides), for which it wanted to be able to depart from the principle of freedom of choice for the applicant. The Austrian authorities wanted to be able to impose an aptitude test if the diplomas awarded in other Member States were substantially different from the qualifications required in Austria.

149. The Austrian authorities stressed that their request pursuant to Article 14, exclusively concerned activities involving risks. In the view of the Austrian authorities, this application was justified on the basis of the dangerous nature of the sporting activities in question.

150. In accordance with Article 14 of Directive 92/51, the application was submitted to the Member States. It was sent on 11 August 1998 to all the Co-ordinators of the General System for the recognition of diplomas, who received supplementary information at the meeting of the Co-ordinators' Group held on 19 November 1998. Additional information and guarantees were then requested and obtained from Austria. On the basis of these, the Commission decided on 14 July 1999 to grant an exemption for one year, in parallel with the decision taken by France on the same day.

4. United Kingdom: seafaring professions

151. On 20 February 1998, the Commission received an application from the United Kingdom authorities for an exemption to Article 10 of Directive 89/48 and Article 14 of Directive 92/51, concerning merchant navy and fishing vessel deck and engineer officers. The British authorities wanted to be able to depart from the principle of free choice by the migrant if a "compensatory measure" (adaptation period or aptitude test) could be stipulated. In the interests of safety, the British authorities wanted to be able to stipulate a test whenever there appeared to be a "substantial shortfall" in knowledge of the language.

152. On careful examination of this application and its professional context, it appeared that the problem raised by the British authorities fell outside the scope of these Directives, since such language requirements did not form part of the education or training which might give rise to compensatory measures. A letter to this effect was sent to the British authorities on 7 May 1998.

5. Conclusions:

153. All of the information presently available to the Commission has indicated that the principal issue of concern to interested parties in connection with the exemptions so far granted is that of ski instructor recognition. While the real underlying issue appears to centre on differing views as to the level of qualification objectively appropriate for ski instructor recognition – and, therefore, also as to the relevance and substantial character of any differences between existing national qualifications - the debate so far has largely focussed on the application of the Article 14 exemptions. This has been the case despite the fact that these exemptions in no way affect the level of qualification required, but rather concern the type of compensation measures which can be applied in cases of substantial differences in qualifications.

154. At the same time, it is clear that the way in which a recognition system is administered can be as important as the underlying law in terms of the conditions applied to market access. In this respect, the degree of clear objectivity involved in all aspects of a recognition process, the manner in which the process of recognition is administered, the reality of the appreciation given to the abilities and experience of each candidate and the degree of explanation given of decisions taken, all constitute elements which contribute to the reasonable character of a recognition procedure and the level of its acceptability to those subject to it. These factors clearly obtain even more importance when the rights normally accorded to migrants are the subject of an exceptional restriction, such as is the case under an Article 14 exemption.

155. Against this background, the Commission has decided to grant temporary exemptions for Austria and France up to 31 July 2000 when it is intended that final decisions, of permanent application, will be taken. It is the intention of the Commission services to use the period of the temporary exemptions to ensure the maximum exchange of information and views between the Member States and interested parties. This process will be directed to the collection and assessment of all relevant information and the discussion of issues in order to prepare for the final decisions to be taken by the Commission and to try to obtain a level of common understanding and agreement which will provide a stable and permanent basis for the future. The process will cover both the exemption issue and all other substantive and procedural issues relevant to ski instructor recognition.

156. At the same time, the procedure and timeframe for the taking of decisions on exemptions under Article 14 has been shown by experience to be very short, particularly in view of the consultations with the Member States which the Commission values greatly. On more than one occasion, the actual three month period between submission of a Member State application and the decision of the Commission has been exceeded because a request for additional information has been required, given that the time period in question is deemed to flow only from the moment when the Commission has all necessary information at its disposal. In the light of experience so far it seems likely that any future applications for exemptions, including in particular any raising important, wide-ranging, complex or very technical questions, could require more than the three month period from the date of submission of the application to that of the adoption of the Commission decision. Consultation and examination of all relevant views and information may justify the Commission taking a preliminary decision, in any particular case, entailing a negative decision of temporary duration being taken, if only to allow more time for a

fuller consideration of the issues, albeit within a set timetable within which a final decision would be taken.

157. It is also evident that the Commission has had recourse to the grant of exemptions on a temporary basis and subject to conditions. While it is clearly preferable that final and permanent decisions be taken on applications, for reasons of legal stability and certainty, it is not possible to rule out continuing recourse to temporary and conditional decisions. One major benefit of such decisions is that they allow for a probation period in which the actual effects of the exemption can be registered and the views of those most directly concerned taken into account before any final decision is taken. In view of the general case law of the Court of Justice on the restrictive interpretation of exemptions from general rules of Community law,[20] it still seems appropriate that these kinds of checks and balances continue to be capable of being applied to requests for exemptions under this Directive.

O. ARTICLE 15 and Annexes C and D

1. Ratio legis

158. Certain types of education and training not covered by the definition of "diploma" within the meaning of Article 1, first paragraph, a), second indent, i) of Directive 92/51/EEC nevertheless lead to a comparable level of professional competency and prepare people for similar responsibilities and activities[21] — for example, training as a physiotherapist in Germany or children's nurse in Luxembourg. Because of their wide diversity, Directive 92/51/EEC provides for the same treatment as diplomas by listing them (cf. Recital 15) in Annex C. Certain types of regulated education and training have also been given diploma status by inclusion in the list in Annex D.

159. This provides a link in the host Member State with diplomas covered by Directive 89/48 (awarded on completion of professional education and training of three or four years' duration) and, if a diploma within the meaning of Directive 92/51/EEC is needed, limits the requirement for compensatory measures to the case of substantial differences between types of education and training.

2. Updating procedures

160. The procedure for amending these annexes is described in Article 15[22]. It involves verifying whether the qualification resulting from education and training courses forming the subject of a reasoned request by a Member State confers on the holder a level of professional education or training comparable to a diploma within the meaning of Directive 92/51/EEC (duration of one year, after the secondary level required for admission to university or higher education) and a similar level of responsibility and activity.

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20 See for example the *Gebhardt* case law C55/94 of 30.11.95.

21 As set out in recitals 15 and 16 of the Directive.

22 This procedure will have to be changed in order to adapt it to the new Council general Decision n°1999/468/EC of 28 June 1999 laying down the procedure for the exercise of powers conferred on the Commission. (OJ L 184 of 17 July 1999, p.23ff.)

3. Amendments through the Treaty of Accession with Austria, Finland and Sweden

161. According to Article 29 of the Treaty of Accession of 24 June 1994 numerous education and training courses were added to Annexes C, effective as of 1 January 1995. This amendment concerned only Austrian professions.

162. Under the heading "health-related and childcare training courses" this related to contact lens opticians, pedicurists, acoustic-aid technicians, druggists, masseurs, kindergarten workers and childcare workers. In the sector "Master craftsmen" the professions of surgical truss maker, corset maker, optician, orthopaedic shoemaker, orthopaedic technician, dental technician, gardener and furthermore 14 master craftsman courses were added. In the "technical sector" the following training courses were included: forester, technical consulting, labour leasing, employment agent, investment adviser, private investigator, security guard, real estate agent, real estate manager, advertising and promotion agency, building project organiser, debt-collecting institute, insurance consultant, master builder or wood builder/planning and technical calculation.

4. Implementing Directives

163. The Commission has received numerous requests for amendments to the lists set out in Annexes C and D. Having examined these requests (together with the committee[23] established in Article 15), three Commission Directives have been adopted so far.

a) Commission Directive 94/38/EC of 26 July 1994

164. Several health-related training courses in Germany were added to Annex C: medical laboratory technician, medical X-ray technician, medical functional diagnostics technician, veterinary technician, dietician, pharmacy technician, psychiatric nurse and speech therapist. Italian training courses for accountants, accountancy experts and *consulente del lavoro* were deleted.

165. Annex D was supplemented by a section on certain German specialist school courses preparatory to the professions of technical assistant, commercial assistant, State-certified respiration and elocution instructor, State-certified technician, business economist, designer, family assistant and several social professions under specified conditions.

b) Commission Directive 95/43/EC of 20 July 1995

96. 166. This Directive is based on requests from the Netherlands and Austria. The new provisions in Annex C are based on requests from the Netherlands referring to courses for veterinary assistants, and several professions in the sea transport sector (first mate, coaster engineer and VTS official). To Annex D training courses in Dutch colleges for intermediate vocational training and in the apprenticeship system were added as well as training courses in Austrian higher vocational schools, higher education establishments for agriculture and forestry, master schools, master classes

[23] The work of this committee has often been prepared by discussions within the Co-ordinators' Group (see Part VII of this report referring to the Group).

and building craftsmen schools. For all these training courses specific conditions were set up.

167. Together with the numerous amendments caused by the accession of the Republic of Austria the contents of the Annexes would have become unclear. With the new Directive, therefore the amended lists of courses were published in a consolidated version.

c) Commission Directive 97/38/EC of 20 June 1997

168. Several professions in the list of the United Kingdom courses accredited as National Vocational Qualifications or Scottish Vocational Qualifications were deleted, because they are now covered by Directive 89/48/EEC (medical laboratory scientific officer) or are no longer regulated (probation officer, prosthetist).

d) Commission Directive 99/ / of 1999

169. A draft Directive has been unanimously approved by the Committee of Representatives of Member States formed pursuant to Article 15 (3). This draft Directive responds to reasoned requests from Austria and the United Kingdom concerning the following issues:

170. Certain certificates of technical competence in waste management in the UK shall be added to Annex C, as well as special training for psychiatric nurses and paediatric nurses in Austria. On the other hand, the professions in the UK "approved social worker – mental health" and "trade mark agent" shall be deleted. Furthermore, the wording of Annex C and D regarding "National/Scottish Vocational Qualifications" in the UK shall be adapted to the terminology presently used in the relevant national law. The Commission early in the year 2000 could possibly adopt the Directive.

171. Owing to new amendments to national legislation, further Directives will probably have to be drawn up in the future.

5. Conclusions

172. Experience[24] has shown that this procedure is cumbersome and complex, and is becoming increasingly difficult to implement as the list grows. The question is therefore whether it would be useful to find an alternative approach — for example, replacing this procedure and these lists with one general definition[25] giving these types of education and training the same status as those leading to a diploma within the meaning of Directive 92/51/EEC.

173. Such a solution is being studied by the Commission services. This general definition, to be included under that of the diploma, would be a reminder that the professional

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[24] See in particular the criticisms in Annex I from Belgium, Denmark and Finland, which wished to see the system changed.

[25] The Netherlands Co-ordinator has suggested a general formulation or a procedure by which the migrant or the competent authority would attest that his education or training met the criteria set out in the Directive.

level of the course should be comparable to that of the course of studies defined as a diploma course; in addition it would set out that the course served as a preparation for a level of responsibilities and tasks to be stated by the authorities of the Member State of origin in a supplementary attestation. A migrant claiming the rights of recognition on this basis could be required to produce a certificate from a competent authority confirming the status of the course in question and providing information enabling the host Member State to know where to obtain any further information required.

174. Annexes C and D would then be deleted, with a clause safeguarding the acquired rights of the holders of the qualifications listed in those Annexes.

P. ARTICLE 16

175. Article 16 is the first Article of Chapter XI of the Directive containing the concluding provisions of general application. It provides for the Member States to report to the Commission every two years on the application of the Directive. These reports are to include any general remarks, statistical summaries of decisions taken and a description of the main problems of application which have arisen.

176. For the latest statistical information resulting from this reporting process see Part IV.B.

Q. ARTICLE 17

177. This Article lays down a maximum period of two years for transposing[26] the Directive.

R. ARTICLE 18

178. As well as providing for this report, this Article adds that: "After conducting all necessary consultations, the Commission shall present its conclusions as to any changes which need to be made to this Directive. At the same time the Commission shall, where appropriate, submit proposals for improving the existing rules in the interest of facilitating freedom of movement, right of establishment and freedom to provide services".

179. This report already includes suggestions for some changes to the Annex C and D qualifications and their up dating and possibilities of the introduction of further flexibility in relation to the cross-frontier provision of services. The question of any proposals for the improvement of the existing rules also, however, gives rise to wider considerations having some relevance also to Directive 89/48/EEC.

S. ARTICLE 19

180. No comments.

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[26] Implementation was dealt with above in Part IV.A.

VI. COMMENTS ON INDIVIDUAL PROFESSIONS

A. Public service

181. The public service is traditionally a very important professional sector in terms of freedom of movement. The Commission is often approached on this matter, either through letters from members of the public or in connection with complaints or requests. For some years now, therefore, there have been a number of infringement procedures on questions of recognition of diplomas, involving several Member States in several professional sectors covered by both Directive 89/48/EEC and Directive 92/51/EEC (teachers, translators, hospital administrators, aircrew and mariners, general government administration, etc.), at both national and local levels. Under these procedures, some Member States have raised basic problems that have led to very careful examination on the part of the Commission, under three main headings:

182. - the basic principle of the application of the General System for the recognition of diplomas (Directives 89/48 and 92/51) to the public service;

183. - the question of the application of the General System to the entire public service or to only those professions or activities requiring specific professional training;

184. - competitions.

185. According to recital 8 of Directive 92/51, "the complementary General System is entirely without prejudice to the application of Article 48(4) and Article 55 of the Treaty". There are no further direct or indirect references to the public service. Moreover, Articles 48(4) (now 39) and 55 (now 45) refer only to nationality.

186. The Commission has always taken the view that the public service is not excluded *a priori* from the scope of the Directives: the mere fact that a profession is exercised in the public service does not place it outside the scope of the Directive. The Court of Justice has pointed out that public bodies are bound to comply with Directives 89/48/EEC and 92/51/EEC[27]. However, this does not mean that the General System applies to the entire public service. This question is closely related to those of the definition of a diploma, regulated profession and professional qualification.

187. According to the definition of the diploma, the holder is required to have successfully completed a course of study or training of a certain duration. The holder must also have all the professional qualifications (diploma or set of diplomas or certificate) required for the taking up or pursuit of a regulated profession in the Member State of origin. This final criterion must be understood as referring only to the qualifications obtained after receiving training geared to the pursuit of a specific profession.

188. Compensatory mechanisms (aptitude test, adaptation period) are not appropriate if there are several very different routes to a profession which itself is general in nature (for example, general competition open to holders of various types of diploma). On the other hand, if such a variety of expertise is accepted for the public service activity in question, the presence or absence of more specific elements of individual

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[27] Point 12 of the judgement handed down on 8 July 1999 in Case 234/97, *Bobadilla*.

professional qualifications would appear less relevant and thereby compensation measures less relevant. Absent a fundamental difference in the nature or level of the professional qualification concerned, the principle of mutual confidence should apply. On the other hand, where compensatory mechanisms would be applied to make up a difference in the overall level of qualification, such measures seem not easily to fit public service recruitment methods. The Commission intends to continue to examine possible solutions.

189. Three questions arise concerning the use of competitions for professional recognition in relation to public service work. How should competitions be considered? Are the professions accessible by competition regulated professions within the meaning of the Directive? How should the concept of a fully-qualified person be defined in connection with a profession to which recruitment is by means of a competition?

190. The Commission's view, which it has frequently expressed in several replies to written and oral parliamentary questions and requests regarding the principle of competitions and within the framework of infringement proceedings, is that each Member State remains free to lay down its own recruitment procedures providing diplomas awarded in other Member States are recognised in accordance with Community law. Competitions, like other recruitment methods, (CV, interview, examinations, etc.) are only one procedure for access to a profession. If, therefore, nothing prevents a Member State from using competitions to recruit its civil servants, it must, if a regulated profession within the meaning of Directive 92/51/EEC is concerned, allow holders of diplomas awarded by other Member States to apply, provided the diploma in question qualifies them to take up that profession in the Member State in which it was awarded. This also means that a person from another Member State who is qualified for the profession must accept the competition procedure, since the right he enjoys under the Directive is to have access to the profession in question on the same terms as nationals.

191. Are the professional activities to which access is by means of a public competition open to the holders of certain diplomas regulated professions within the meaning of Directive 92/51/EEC?

192 Article 1(f) of Directive 92/51/EEC defines a regulated professional activity as *"a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject, directly or indirectly, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence"*. The Directives can therefore be regarded as applying in the case of competitions admission to which is subject to having a specific professional qualification leading to the pursuit of the profession in question.

193. The mechanisms set out in the Directive are, after all, based on the principle of professional activities being the same in the host Member State and the Member State of origin. Migrants must hold the diploma required for carrying out the same profession in the Member State of origin.

194. In relation to a more general public service activity than the more specific professional qualifications required to accede to that public service work, it is still true that a recognition process could take place in the context of the specific professional concerned, with perhaps even more flexible application of the principle of mutual confidence due to the fact that the qualifications required relate more to the

general level of professional activity required than the particular elements of knowledge relevant to each specific profession. Grading within the public service and other means could be used to take account of some of the differences in the relevant professional qualifications in the absence of sufficient justification for a refusal. This kind of analysis would need to be further tested before final conclusions could be drawn.

195. Finally, in order to be able to take advantage of the "General System" Directives, persons must be fully qualified in their Member State of origin, which poses certain problems if a competition is followed by a course of professional training. In this case, persons could not be regarded as fully qualified in their Member State of origin unless they a) held a diploma giving them admission to the competition, b) passed the competition and c) had completed the course of professional training, which might, depending on the professional or national context, be regarded as either forming part of the training and hence of the diploma, or as subsequent to the acquisition of the diploma). This rule puts holders of diplomas awarded by countries where competitions are followed by professional training at a disadvantage, since only if they have passed the competition (and hence followed the subsequent professional training) can they be regarded as "finished products". Failing this, they may be unable to take advantage of the Directives, which often means that a qualification from a French university, for example, may not constitute a diploma within the meaning of the Directives for the purposes of recruitment to the public service (France has a strong tradition of competitions followed by training). On the other hand, fully qualified professionals e.g. teachers from other Member States, seeking recognition in France also suffer the disadvantages of having to undergo the final (competition) stage of the French professional qualification.

196. This places a very large number of applications for recognition with a view to taking a competition outside the scope of the Directive. The Commission is examining this question.

B. Teachers

197. Most countries make access to the pre-school "teaching" profession subject to an 89/48 diploma, the exceptions being Spain, Germany,Austria and Liechtenstein, where a 92/51 diploma is required for the status of *educador infantil*, *Erzieher*, and *Kindergärtner* respectively. The Commission has not detected any specific problems with the application of Directive 92/51/EEC in this sector.

198. Access to the primary-teaching profession is subject to an 89/48 diploma in all Member States, except Italy and Liechtenstein.

199. For secondary education, all the Member States require a 89/48 diploma, except in Luxembourg and Greece, where certain teaching posts require a 92/51 diploma.

200. However, there have been problems in this area with the interpretation of Directive 92/51/EEC. The Commission has received complaints from teachers with 92/51

diplomas[28] — this type of training used to exist in certain countries — who have been refused recognition.

201. Article 3 of Directive 92/51/EEC provides for a system for linking the two Directives: the host Member State must recognise 89/48 diplomas if it requires only 92/51-level training for the profession in question. Conversely, it must in principle recognise 92/51 diplomas, even if it requires a 89/48 diploma for the profession in question.

202. The Directive provides for an exception to this link: the host Member State is not obliged to apply this equivalence principle if access to the profession is subject to the possession of a *"diploma as defined in Directive 89/48, one of the conditions for the issue of which shall be the completion of a post-secondary course of more than four years duration"*.

203. It was on the basis of this exception that 92/51 diplomas held by several teachers have been refused recognition.

204. The Commission thinks that the equivalence principle is applicable in such cases, since the Directive does not provide for exemption when access to the profession is subject to the possession of a diploma awarded on completion of general training of more than four years' duration. For the exception to apply, the diploma required would have to be one as defined in Directive 89/48[29], one of the conditions for the issue of which is the completion of a post-secondary course of more than four years' duration. For the purpose of applying the equivalence principle, therefore, the decisive element is the duration of the course, irrespective of the duration of any profession training required over and above the course.

205. Teachers with 92/51 diplomas are, in general, holders of "old" diplomas, awarded at a time when training in their country of origin lasted two years. Nowadays, teacher training is, in general, covered by Directive 89/48 in all the Member States. The problem with the application of the equivalence principle is a hangover from this former period that affects very few teachers. Concerning as it does holders of "old" diplomas, the migrants in question usually have considerable professional experience.

206. It should be borne in mind that, even if the Directives are not applicable, the Member States are still obliged, under Article 48 of the Treaty, to guarantee the free movement of workers within the Community (cf. Aranitis judgement). It should not be forgotten that these are people who have all the qualifications required in their country of origin and who are holders of a 92/51 diploma rather than a 89/48 diploma simply because that is what was available at the time.

207. It would seem difficult, therefore, to justify refusing recognition in the light of the Community legislation applicable to freedom of movement.

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[28] It should be noted that this refers to teachers with 92/51 diplomas, and not those holding diplomas for a two-year course deemed equivalent to an 89/48 diploma, which eventuality is covered directly by Directive 89/48/EEC. For this, refer to the 1996 report on the implementation of Directive 89/48/EEC, Doc. COM(46) final of 15 February 1996, p. 10

[29] Diplomas as defined in Directive 89/48 are awarded on completion of a course of study of at least three years' duration, possibly followed by a course of profession training required in addition to the course of study (cf. Art. 1a) of Directive 89/48)

C. Social professions

208. According to the information available to the Commission's departments, the profession of social worker is subject – in the countries where it is regulated – to the possession of an 89/48 diploma. In certain countries where the profession is not regulated there are two-year post-secondary courses for social workers.

209. The statistics show that the migratory flows of social workers between the Member States are not very large (except in France, where according to the statistics for 1995/96 the recognition applications submitted for pursuing this profession amounted to 127) and do not pose any particular problems.

210. There are certain situations, however, which are not covered by the provisions of the Directives on the General System of recognition. In Finland and Portugal, access to the profession of social worker is subject to the possession of a diploma awarded on completion of a 5-year course. Consequently, in the case of migrants from countries where training is of the 92/51 level, the authorities of these two countries can legitimately invoke an exception to the equivalence arrangements and the migrants would thus be excluded from the system.

211. However, according to the information provided by the Member States concerned, this discrepancy between training arrangements is not in practice likely to impede the free movement of the professionals concerned. In Finland the applications received were all granted, including the one that was submitted by the holder of a 92/51 level diploma.

212. In addition, the International Federation of Social Workers (IFSW) has informed the Commission of its plans to set up a register of social workers and to create a "European social workers' qualification" on similar lines to that created by engineers, which should further facilitate free movement of these professionals. The professionals concerned have in fact advised the Commission of the divergences which exist between Member States as regards training of social workers (content, length and level) and have stressed that some convergence in training would be desirable in order to enhance the mobility of social workers within the European Union.

D. Health-related professions

1. General considerations

213. A large portion of the professions in the health-related sector come under Directive 89/48, but others come under Directive 92/51, while in some cases the profession may come under the first Directive or the second, depending on the Member State concerned. One example of this is the profession of physiotherapist, which comes under Directive 89/48 for most Member States but is covered by Annex C to Directive 92/51/EEC for Germany, since the level of training is different.

214. A Conference was held in September 1999 in order to further examine the current position concerning the migration of physiotherapists within the EU. This Conference confirmed a certain progress being achieved through bilateral discussions between Member States and otherwise in this area. A significant result of this Conference was the unanimous agreement between all representatives of the profession on the fact that they all exercise the same profession in the different

Member States of the EU. Further work has also been scheduled by the European Region of the World Confederation for Physical Therapy concerning the compensation measures applied by Member States to migrating physiotherapists to further clarify continuing obstacles to free movement.

215. The figures collected by the Member States, together with the information obtained by the Commission, show that the Directive has made it possible to recognise a large number of diplomas for a number of professions in the health sector, even though there have been found to be problems or limitations in the application of the Directives, as is explained in detail below.

2. Limitations on the recognition of diplomas

a) Activities reserved for certain professions

216. For a number of professions, the recognition of diplomas in a particular Member State is not possible because the activity is reserved for a different category of professionals.

217. The sector of non-traditional medicine is one where these problems arise. An activity such as that of chiropractor is a specific profession in certain Member States, while in others activities related to the "art of healing" are strictly reserved for medical practitioners, in which case the professionals concerned cannot migrate. Migration is possible only to a Member State where non-medical practitioners are authorised to practice the profession. That this situation is in conformity with Community law was confirmed by the Court of Justice in the Bouchoucha case[30]. The same problem can arise for other activities as well.

218. Although the profession of psychotherapist is covered almost exclusively by Directive 89/48, it poses a similar problem in that the regulations differ from one Member State to another and prevent persons trained in certain Member States from practising in certain others, since the professions authorised to pursue the activity are different (activities in the psychotherapy domain are very often restricted to medical practitioners and/or psychologists).

b) Professions which may appear similar in two Member States but have different fields of activity

219. A profession can have the same title in certain Member States but a different content. In this case the Directive can be applied if at least part of the field of activity is the same. Otherwise the Directive will not be applicable, since it bases professional recognition on the identity of the profession.

220. The question of the scope of practice allowed and the level of responsibility required for the exercise of the professions of physiotherapist and radiographer are due to be examined on the basis of questionnaires which have been sent to Member States in order to clarify the present position and provide the information necessary for a full analysis of the current situation to be undertaken. This information, once collected, will be circulated to the Co-ordinators' Group with a view to further discussion, if appropriate.

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30 Judgement of 3 October 1990 in case C-61/89, ECR p.3564.

c) Professions with different levels

221. For certain activities, there may be various levels of competence corresponding to different types of training. For example, alongside the training of physiotherapists there are shorter courses for the profession of assistant physiotherapist or exclusively for masseurs. The difference is even clearer for the professions of pharmacist and pharmaceutical assistant in the Member States. The recognition of professional qualifications is conditional on equivalence between the professions and is not meant to make it possible to pursue an activity completely different from that for which one was trained.

222. In certain cases the second Directive has revealed fundamental differences in the training given in the Member States. For certain professions, sometimes non-regulated ones, training in certain Member States has been found to amount to a few hundred hours, whereas in other Member States it lasts several years.

223. In such cases the mechanism provided for in the General System is generally as follows: when in the host Member State the profession comes under Directive 89/48/EEC, the Directive applies only if the qualification held by the migrant is of "diploma" level within the meaning of Directive 92/51/EEC or is regarded as equivalent by virtue of its inclusion in Annex C to Directive 92/51/EEC. For lesser forms of training in the Member State of origin, such as those at certificate level, it is not the General System which applies if the host Member State requires the 89/48 diploma level, but the case law of the Court of Justice. On the other hand, where training in the host Member State is at diploma level under 92/51 or lower, the Directive will have to apply in most cases, even when courses are at a much lower level (see the comment above on Articles 5 to 7).

d) Limitations relating to the existence of other Directives (case of specialist nurses)

224. The specific Directives for the nursing profession (77/452/EEC and 77/453/EEC) regulate the question of the recognition of diplomas, but this recognition is restricted to the general nursing sector. However, the Directives on the General System exclude from their scope professions for which there is a specific Directive. Consequently, if the Member State recognises only the profession of general nurse, migrants with specialist nursing diplomas can take advantage neither of the Directives on the General System nor of the nursing Directives. They can, however, invoke the provisions of the Treaty as interpreted by the Court in the *Heylens* and *Vlassopoulou* judgements.

225. This question had already been raised in the discussion of Article 2 in point (iii) of the report based on Article 13 of Directive 89/48/EEC. The Commission proposed to solve the problem by making such cases subject to the General System; the provisions inserted to this effect into the proposal for a “third” Directive were transferred by the Council into the proposal for a Directive known as SLIM (Simpler Legislation in the Internal Market).

3. Problems encountered

a) Non-implementation

226. i) A major general problem has concerned Greece, which by August 1998 had not yet implemented Directive 92/51/EEC because the competent authorities

refused to apply it. In the Commission's opinion, the authorities are obliged to apply the Directive even if it has not been formally implemented into national law. This issue affects a number of professions, including physiotherapists with diplomas awarded to Greek nationals in Germany. The information supplied by the Greek authorities states that national commissions began examining the individual cases in January 1999. This follows on from the major delays in implementation of Directive 89/48/EEC in Greece, currently the subject of legal proceedings relating to fines and continuing evidence of non-application of the implementing measures.

227. ii) The delay in the implementation of Directive 92/51/EEC in Belgium has had little effect, since the competent Belgian authorities have applied the principles of the Directive even without implementation.

228. iii) For France, implementation of Directive 92/51/EEC has not been completed for the profession of pharmaceutical assistant. However, France has recently adopted a Decree implementing the Directive for this profession. In order for implementation to be complete, an implementing law still has to be adopted. Cases have been notified to the Commission in connection with migration from Belgium to France. This case is still being examined.

229. iv) Portugal has not fully implemented Directive 92/51/EEC for the profession of pharmaceutical assistant and for other health-related professions. This situation was brought to light by specific cases. The matter is still in hand.

b) Faulty application

230. i) The bridging mechanism ("passerelle") provided for in Directive 92/51/EEC

231. The entry into force of the second Directive made it possible to resolve a number of cases involving the courses listed in Annex C and certain professions for which the level did not correspond to that given in the first Directive.

232. Nonetheless, the second Directive had a rather difficult start, in that the application of the bridging mechanism provided for in the Directive for the courses in Annex C was not readily accepted by some Member States. There are still problems with these mechanisms, and these are pointed out from time to time with regard to individual cases or for a particular profession.

233. A case in point is the profession of optician in a Member State in which the professional association is ignoring the bridging mechanism and refuses to respect the recognition decision adopted by the competent authority on the grounds that migrants hold diplomas within the meaning of Directive 92/51/EEC, whereas access to the profession is subject to the possession of a diploma under Directive 89/48/EEC.

ii) Deadlines

234. On several occasions individual cases have been brought before the Commission services where the deadlines provided for in Article 12(2) of Directive 92/51/EEC for the taking of recognition decisions have not been met. Many of these cases are out of late implementation of the second Directive. In general, this situation has since improved. The most frequent cases relate to situations where migrants have

qualifications dating back to a time since when the qualification in question has changed and on which it is difficult for the competent authority to give a ruling.

iii) Compensatory measures

235. Migrants sometimes consider the compensatory measures required for obtaining recognition of their diplomas to be exaggerated. The existence of substantial differences in the content of courses is often a factual matter which the migrant can contest under national law. The Commission services have not yet heard of any cases in which a ruling has been given by a judicial authority on compensatory measures.

236. Following discussions, an agreement has been concluded between Germany and Austria and they are continuing between the Netherlands and the United Kingdom with a view to facilitating the migration of physiotherapists.

iv) Administrative formalities

237. The Code of Conduct (see Part VII B below) has made it possible to define, through the experience gained by the Commission and the Member States, which practices are preferable, which are acceptable and which are not. Adoption of thisCode makes it possible for Member States to review their own practices and now that the Code has been published, for migrants to claim good practice in the administration of their applications.

238. Questions have been raised about certain measures in a Member State, such as the compulsory consultation of the NARIC centre in the host country, or the fact that a migrant is summoned to a preliminary interview, outside the framework of the compensatory measures, for which he or she has to pay a fee, to which the migrant has to add the cost of a travel ticket and accommodation which can be particularly expensive if he or she is not yet living in this Member State. Ways of guaranteeing the full processing of recognition applications, while guaranteeing the rights and interests of the migrant are in view. The question of administrative formalities could continue to be one of the main issues which the Co-ordinators' Group will continue to be called upon to consider, in order to arrive at a better degree of transparency and to ensure that the system operates efficiently.

v) Professional recognition of diplomas rather than academic recognition

239. One grievance frequently held against certain Member States is that the procedure followed for granting professional recognition under the General System by comparing courses is too academic and is thus contrary to both the letter and the spirit of the Directive. This question arises in a number of individual cases. Such issues can only be dealt with in their context and in the light of a full analysis of the issues at stake. This forms part of the on-going work of the Commission and the Co-ordinators' Group.

4. Conclusions

a) Interdependence between Member States

240. The changes taking place in certain Member States regarding the level of training and/or the regulation of professions have repercussions on the other Member States, particularly noticeable in the health-related professions. Some Member States which

did not regulate certain activities have started to regulate them, and there have been developments in the level of training; examples of this are the professions of dietician and chiropodist.

241. In addition, certain Member States have raised the question of possible "evasion" by their citizens who go to other EU Member States for training and then return to their country of origin. This practice affects the *numerus clausus* and health-care management. It has concerned in the main countries sharing the same language and large migratory flows, such as France and Belgium or Austria and Germany: it also concerns Greece and Germany for Greek nationals holding German diplomas.

242. The answer to this given by the Commission's departments is that the rules of the Treaty permit access to training in another Member State and that a citizen who has obtained a diploma in another Member State must be protected by the rules laid down in the Directives with regard to the recognition of diplomas. The General System reinforces the right of a European national to acquire occupational skills wherever he or she wishes (recital 20 of Directive 92/51/EEC).

243. In addition there are some indications that some Member States which have traditionally or are currently applying a non-regulatory or de-regulatory approach to many professions find this approach challenged by the problems which "their" professionals then face in trying to migrate to Member States with more regulation in contrast with the relative ease of access which others have to their relatively unregulated markets. Such an imbalance could lead to a tendency towards competing regulation in the sense of Member States trying to balance conditions of free movement to and from their jurisdictions by matching levels of others' regulations. This would be an unattractive tendency were it to materialise. The Commission presently has only anecdotal evidence of the possible existence of such perceptions existing within competent authorities of Member States. The national Co-ordinators are in the best position to be aware of the existence and prevalence of such perceptions and their significance and the Commission would always be open to discussion in the Group or bilaterally.

b) The special nature of health-care professionals

244. The migration of health-care professionals, whether for personal (often family) reasons or to seek work in a country where the labour market may be more favourable, is an interesting indicator in terms of demographics, the variety of professions involved and the size of the health sector.

E. Transport professions

245. Some professions in the transport sector are not covered by the General System for the recognition of diplomas because they are already covered by a specific Directive (cf. Article 2 of Directive 92/51/EEC). However, the professional sector for which the largest number of diplomas have been recognised for the period 1995-98 inclusive is that of maritime transport, where there has been significant free movement amongst the Northern European countries.

246. Two examples are Council Directive 91/670/EEC of 16 December 1991 on mutual acceptance of personnel licences for the exercise of functions in civil aviation, and Council Directive 96/26/EC of 29 April 1996 on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of

diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations.

247. These Directives have as their legal basis the Articles on transport policy (i.e. Articles 71 [ex 75] and 80 [ex 84] of the EC Treaty.

248. Council Directive 94/58/EEC of 22 November 1994 on the minimum level of training of seafarers is an exception. While based on Article 80 (ex 84) (2) of the Treaty, it states that "*mutual recognition among Member States of certificates referred to in Article 3 held by seafarers who are not nationals of Member States shall also be subject to the provisions of Directives 89/48 and 92/51"*.

249. A case has also arisen concerning recognition of the qualifications of an inland waterways pilot for which the full qualification includes the element of a period of supervised practice. However, the practice in question has as its essential purpose the acquisition of knowledge of local waterway conditions. This element of qualification in the Member State of qualification has no relevance therefore to anyone wishing immediately to be recognised in another Member State. However, the rules on mutual recognition within the EU are essentially not designed to guarantee what might be termed a "short cut" to immediate recognition in another Member State. In each case, the migrant has to be fully qualified in his home Member State even if specific knowledge is required to pursue the same profession in the host Member State. This specific knowledge has then to be acquired through compensation measures under Directives 89/48/EEC and 92/51/EEC. In these circumstances, therefore, those wishing to qualify so as to be able immediately to take up work in a specific Member State are best advised to verify as early as possible the most direct route to such qualifications which would mainly be through the completion of their qualifications in the Member State where they wish to practise.

F. Professions in the tourism sector

250. A distinction must be made between couriers/tour escorts and tourist guides.

1. Couriers/tour escorts

251. Couriers/tour escorts are not covered by Directive 92/51/EEC, because this excludes from its scope (in the second paragraph of Article 2) the Directive which does cover them, i.e. Directive 75/368/EEC of 16 June 1975[31]. This Directive provides for transitional measures, in the absence of mutual recognition of diplomas[32], consisting of the allowance, "*as sufficient qualification for taking up the activities in question in host Member States which have rules governing the taking up of such activities, the fact that the activity has been pursued in the Member State whence the foreign national comes for a reasonable and sufficiently recent period of time to ensure that the person concerned possesses professional knowledge equivalent to that required of the host Member State's own nationals"*.

252. This Directive explicitly excludes "tourist guides" from its scope.

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31 OJ L 167 of 30.06.75, p.22

32 This recognition is now laid down in Directive 99/42 (see comments on the second paragraph of Article 2).

253. Under the terms of this Directive, the host Member State must allow a Community national who can produce a certificate from a competent authority in his Member State of origin, justifying at least two years of experience in the country of origin, to exercise the occupation of escort on its territory.

254. In theory, the provisions of Directive 75/368 apply both to establishment and to the provision of services. However, case law has it that a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is to guarantee the freedom to provide services[33].

255. Consequently, in the case of the provision of services, the terms of the Directive (particularly the requirement to produce a certificate of experience) must be interpreted with the requisite flexibility, taking account of the temporary nature of the service and without forgetting that the aim of this Directive is precisely to encourage the effective exercise of the freedom to provide services.

256. The authorities of the host country can require couriers/tour escorts to submit a certificate attesting two years' experience in the country of origin, in accordance with Directive 75/368. Nevertheless, this requirement may induce effects contrary to its objective, i.e. that of facilitating the freedom to provide services, and so conflict with Article 49 (ex 59) of the Treaty.

257. It is in fact difficult for couriers/tour escorts to gain professional experience "in the country of origin", which is only where the holiday starts and ends. A travel courier who accompanies tours only within her or his country of origin and is thus able to gain the necessary experience before working in another Member State is a rare being.

258. Consequently, the Commission considers that couriers/tour escorts from another Member State have, under Article 59, the right to provide their services (the actual tasks of a travel courier) freely in another Member State. If the courier does not make the return journey with the tourists (again a rare occurrence), but remains in the host country after the tour, he/she is subject to the rules on establishment.

259. The Commission has drawn the attention of the national authorities to the question. Various contacts have taken place in particular with the Italian authorities, which have agreed not to require the certificate of experience required under Directive 75/368/EEC in the case of the temporary provision of services.

2. Tourist guides

a) Introduction

260. The "General System" Directives apply to tourist guides in the countries where the profession is regulated.

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[33] Cf. in particular the judgement of 25 July 1991 *Säger v Dennemeyer* C-760/90 ECR p. I-4221

261. The profession is not regulated in Denmark, Germany, Ireland, the Netherlands, Finland, Sweden, Norway or the United Kingdom, but it is regulated in Austria, Belgium, Greece, France, Italy, Luxembourg (city), Portugal and Spain.

262. In most Member States where the profession is not regulated, there are training courses for tourist guides which are not compulsory for the pursuit of the profession. In Germany, for example, Chambers of Commerce and Industry issue a tourist guide certificate. In the United Kingdom there are boards which issue a membership card and an identification ("blue badge") following training to the level of Directive 92/51/EEC.

263. In Member States where the profession is regulated, access to it is restricted to persons who have successfully completed the requisite training and been awarded the necessary qualification.

264. In Greece, this is a three-year course classed as non-university higher education and thus falls within Directive 89/48. In Italy, Spain, Luxembourg city and Austria, the profession of tourist guide is subject to possession of Directive 92/51 qualifications.

265. In France, tourist guide training is structured in three levels: regional interpreter-guide (92/51 Diploma); national interpreter-guide and national lecturer (89/48 Diploma). In Portugal, training is at two levels: regional interpreter-guide (92/51 Certificate) and national interpreter-guide (89/48 Diploma).

b) Tourist-guide case law

266. The Court of Justice has found that four countries — Italy, France, Greece and Spain.[34] — have obstructed the freedom to provide tourist guide services.

267. The Court of Justice considered that these countries failed to fulfil their obligations under Article 59 (now 49) of the Treaty, by making the provision of services by tourist guides accompanying a group of tourists from another Member State, in relation to guided tours of places other than museums and historical monuments where a specialist guide is required, subject to the possession of a licence issued after the acquisition of a specific qualification obtained by success in an examination.

268. The Court also held that Articles 48 (now 39) and 52 (now 43) of the Treaty require the host Member State to establish a procedure for the examination of the qualifications acquired by a Community citizen who holds a diploma as a tourist guide issued in another Member State and the assessment of that diploma with the qualification required in the host Member State.

c) Establishment and services

269. In the “tourist guide” judgements, the Court has observed that a Member State may not make the provision of services in its territory subject to compliance with all of the conditions required for establishment, and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is to guarantee the freedom to provide services. Consequently, a Member State cannot require guides from another

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[34] Cases C-180/89 *Commission v Italy*, C-154/89 *Commission v France*;. and C-198/89 *Commission v Greece* [1991] ECR I-691 *et seq*. and Case C-375/92 *Commission v Spain* [1994] ECR I-923

Member State to undergo national training to obtain a national licence or permit. Similarly, to require that they obtain recognition of their qualifications in accordance with the General System Directives is not normally justified.

270. The judgements of the Court refer to a situation in which the guide travels with the tourists and accompanies them in a closed group; in that group they move temporarily from the Member State of establishment to the Member State to be visited, in as far as the service consists of guiding the tourists in places other than the museums and historical monuments best visited only with a specialist professional guide.

271. In contrast, the tourist guide who is established in the host country to welcome tourists regularly on their arrival and guide them during their tour, but remains in the host country after their return to their Member State of origin, can be subject to the host Member State's requirements as regards professional qualifications. In this case, the host Member State must implement the recognition mechanisms set out in the General System Directives.

272. The statistics show that there were very few applications for recognition in this profession. According to the figures covering the period 1995/96 sent by the Member States, Portugal is the only country to have received requests for recognition (three, including two from Germany and one from Spain). All three were approved after success in the aptitude test.

3. Delimitation of the fields of activity of couriers/tour escorts and tourist

273. The Commission has observed that freedom of movement problems very often originate in confusion between two different but complementary professions: tourist guides and couriers/tour escorts.

274. The Commission has already pointed out, both during the debates on this subject and in the numerous written contacts with the professionals concerned and with the Member States, that it has no powers to define the field of activity of professions or to decide on the tasks corresponding to each profession.

275. It must be stressed that the Communication on the comparability of vocational training qualifications between Member States in the tourism sector[35] makes it very clear in the section on couriers/tour escorts that "this skilled worker must not be confused with a tourist guide".

276. Mention should also be made of the Commission's answer to Written Questions E-2615/96 from Mr Kellet-Bowman[36] and E-0797/98 from Mrs Daskalaki[37].

277. Numerous technical meetings have taken place between Commission representatives and the professional associations concerned: the International Association of Tour Managers, the European Federation of Tour Guides, and the European Tour Operators' Association.

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35 OJ C 320, 7 December 1992

36 OJ C 72, 7 March 1997, p.65

37 OJ C 323, 21 October 1998, p.75

278. In May 1997 the Commission adopted a working paper on the question of tourist guides (SEC (97) 837 final). The professional associations concerned were consulted before and after the adoption of this working paper, and in particular on demarcation of fields of activity between the various professions. Their views appear in full in the annex to the working paper.

279. The question of tourist guides has also been debated in Parliament. For example, Parliament's Committee on Petitions examined and rejected a petition in which a travel courier from a Member State met obstacles to exercising tasks involving the profession of tourist guide in another Member State — in this case this involved providing a commentary to the courier's group of tourists inside the Florence Baptistry.

280. At present, the Commission is not aware of any evidence that there are, generally within the European Union, obstacles to the free provision by couriers/tour escorts of courier services.

281. The desire of certain professional associations, not so much to ensure the freedom of couriers/tour escorts to provide courier services, on which the Commission has taken action (following its intervention the certificate of two years' experience provided for by Directive 75/368 is no longer required of couriers/tour escorts), but rather to gain access to a different profession, is a matter which clearly goes beyond the guarantees provided by current Community law.

282. The Commission is also ensuring that the Member States condemned by the Court of Justice in its tourist guide judgements adapt their national legislation in accordance with the judgement of the Court. Various infringement procedures under Article 171 of the Treaty are in hand.

4. Conclusions

283. The tourist guide who wishes to be established in the host country, to welcome tourists regularly on their arrival and guide them during their tour, and remain in the host country after the tourists' return to their Member State of origin (which is in practice the most usual situation, since it is normally the courier who accompanies the group and makes the return trip with it), can be subject to the host Member State's requirements as regards professional qualifications. In this case, the host Member State must implement the recognition mechanisms set out in the General System Directives.

284. Similarly, the guide can be subject to national qualification requirements when, even within the framework of a restricted tour, he or she wishes to guide tourists in the museums and historical monuments covered by the exception referred to earlier.

285. In these two situations, a guide from another Member State may be required to possess the professional qualifications required in the host country, either through the recognition of qualifications acquired in another Member State, in accordance with the General System Directives, or by having followed national training and obtained the necessary qualification.

286. As regards the scope to be given to this exception, the Commission considers that too broad an interpretation, covering virtually all museums and historical monuments, would in effect render the Court's judgements meaningless. On the other hand, too

restrictive an interpretation would not take adequate account of the general interest inherent in exploitation of the historical heritage, recognised by the Court of Justice as justifying the exception in question. It therefore seems appropriate to interpret this exception from the point of view of proportionality.

287. In addition, the legal arguments cannot mask the economic or commercial issues facing the tour operators of the countries which are seen as "exporters" of tourists. The trends in tourist demand reveal an increasing interest in tourist products with cultural content, built around an interpretation of the cultural heritage of the countries being visited, and this is traditionally the role of the tourist guides in the host countries.

288. Tourist guides cost money (figures ranging from 1% to 3% of the costs of a tour were advanced by various sources), which certain tour operators might be tempted to seek to reduce or even eliminate, for example by having couriers/tour escorts assume tasks otherwise performed by guides.

289. The Commission has initiated several infringement procedures relating to the implementation of the “tourist guide” judgements.

290. In addition, it has always maintained contacts with the Member States and the professional associations concerned in order to find practical solutions to the problems involved in the free movement of tourist trade professionals. However, the issue appears to continue to be seen by some in more ‘black’ and ‘white’ terms.

291. On the one hand, it is important that the countries condemned by the Court of Justice undertake in the long term the necessary legislative work in order to adapt their legislation to Article 49 (ex 59) of the Treaty as interpreted by the Court. Although certain infringement procedures under Article 228 (ex 171) of the Treaty have been dropped following the adoption of the national legislation in the country concerned, in other cases infringement procedures are still in hand pending final adoption of legislation.

292. Moreover, the various professional sectors concerned must be aware of the fact that the freedom of movement guaranteed by the Treaty has as a corollary the obligation on Member States to recognise the qualifications acquired in another Member State. This does not, however, mean that for the host Member State there is an obligation to recognise despite the absence of qualifications.

293. A review of the cases, and the contacts established with the professional associations concerned and the Member States, suggest that the problems about which the Commission was approached are not insurmountable from the technical point of view. Solving them depends rather on the will of the main players to accept solutions aiming to reconcile the principle of the freedom to provide services with the right of Member States the possibility to restrict certain professions to persons having the appropriate professional qualifications.

G. Sports professions

294. The relationships between sport and mechanisms for recognising diplomas are complex, since the approaches to the sports professions differ widely from one country to another. In certain Member States, they are highly regulated and structured professions, and persons who do not hold certain qualifications are not

allowed to practise them. In other countries sport is more of a leisure activity which by its nature is run by amateurs. In these countries the idea of “professionalising” this work is still not at all widespread. There are also intermediate situations, where only the “high-risk" activities which could be classified as dangerous are regulated.

295. The authority to award a diploma also varies considerably from one Member State to another. Certain diplomas are awarded by the State while others are granted by sports federations. Certain diplomas are intended for professionals whereas the purpose of others is to allow the running of sports activities on an amateur basis (even in the latter case diplomas may sometimes be compulsory). This variety of situations naturally complicates the recognition mechanisms, since under the General System the more similar the professions are, the more the levels will be equivalent and the easier the recognition of diplomas will be. In the world of sport, however, we find extreme diversity, and the necessary equivalence between different systems are all the more complicated to set up.

296. However, no specific measure has been adopted in the field of sports professions. A request was made in 1994 by a European mountain guide association. The Commission replied that the General System would have to be proved inadequate and that the measures to be put forward would have to meet with sufficient consensus from professionals in all Member States and between Member States in terms of their principles and primary content. The association had adopted a platform of conditions for access to and exercise of the profession, which had been approved by associations in four Member States. It should also be mentioned that, outside the scope of Community action, certain organisations are working on the wider harmonisation of qualifications in sport. The work of the REISS (Réseau Européen des Instituts chargés des Sciences du Sport) is a good example of this.

1. Free movement of workers and the freedom of establishment

297. As far as workers and the freedom of establishment are concerned, the application of the General System to sport does not present any particular difficulties, at least in principle. It is true that there are problems with the implementation of the Directives or the proper application of Community law, and some time ago proceedings were brought against the sports legislation of a Member State, but the situation is not fundamentally different from that in other professions.

2. Provision of services

298. The free movement of services poses particular problems with regard to sport. First of all it is important to stress that the volume involved seems to be relatively great. It is increasingly common for groups to go abroad for short periods (holidays, sports courses, training) accompanied by group leaders with sports qualifications. Short stays of this type can be for young people in connection with holiday trips (for example "colonies de vacances", holiday camps or activity centres). They can be for adults in the case of trips for skiing, windsurfing, horse-riding etc. They can also be for people undergoing training. Danish ski instructors going for short stays in the Austrian Alps as part of their training are a good example. These groups often have their own leaders, who are qualified in the country of origin. It should be added that a number of sporting activities are by nature seasonal. It is fairly normal practice for the same person to be a ski instructor in winter and supervise other open-air activities

in summer. This raises questions as to the demarcation between establishment and service provision for those operating between Member States.

VII. THE COORDINATORS' GROUP

A. Meetings and reports

299. As with the first General System Directive, Directive 92/51/EEC required each Member State to designate a person responsible for the co-ordination of the authorities which had also to be designated within each Member State to receive applications under the Directive and take decisions on them (Article 13). Article 13.2 provides that these Co-ordinators shall have membership of the Directive 89/48 co-ordinating group and that that the responsibilities of that group were expanded to include the functions of facilitating the implementation of Directive 92/51/EEC and collection of information.

300. As a result and following the adoption and entry into force of the Directive, a number of issues concerning this Directive have been included on the agenda of the meetings of the Group of Co-ordinators. These included some general reporting and discussion on implementation of the Directive.

301. Among the more general discussions was one in mid-1993 concerning the amendments required to Annex C of the Directive in order for its application to be extended to the non Member States which are parties to the European Economic Area. On several other occasions, proposals from Member States for the amendment of Annexes C and D to the Directive, either for the inclusion or for the exclusion of certain existing or new professions, or new forms of training or certificates, or concerning the movement of a profession in a Member State from certificate to diploma level, were discussed. These included cases of professions having moved from Directive 92/51/EEC to Directive 89/48, or having become unregulated or having become regulated. The Italian 'ragionere' and 'consulente del lavoro'; the German 'Masseur und medizinischer Bademeister', 'pharmazeutisch-technischer Assistent', 'podologues', 'logopedes' and certain commercial, industrial and crafts activities which include a teaching element exercised in schools; the Danish 'apotekhassistent' and 'fodterapeuterhovervet'; United Kingdom medical laboratory scientific officer, trademark agent, prosthetist and probation officer are but some examples. In particular a report was produced on the level of education and training leading to the exercise in the Member States of the professions of pharmaceutical assistant in Germany and chiropodist in Germany and Denmark. This was done with a view to an assessment of the compatibility of the activities and responsibilities involved with a view to the possible inclusion of these professions under Annex C of the Directive. This also produced some discussion under the committee procedure[38] under the Directive.

302. Other individual professions were also specifically discussed, as were the various levels of qualification and activity within the profession of social worker. The question of national requirements concerning the recognition of medical certificates from different Member States with respect to the seafaring profession was also discussed in the context of relevant international treaty provisions. Questionnaires

[38] See the results under comments on Article 15.

are currently in the process of being issued on the professions of radiographers and physiotherapists with a view to the subsequent discussion of the information to be provided in the Co-ordinators' Group.

303. A number of discussions dealt with aspects common to the application of the first and second Directives, such as the development of the Code of Conduct for Member States' administrative authorities responsible for recognition decisions. Also, over a period spanning the first few years of operation of the Directive, work continued on compiling a table of regulated professions containing a consolidated list of regulated and non-regulated professions in the Member States, incorporating individual national lists and professions mentioned in statistical reports, including the definition of the professions falling under Directive 92/51. The first report of the Signpost Service on the enquiries and questions received in 1997–98 from individuals through free-phone and web site contacts in the Member States has also been circulated within the Group and is being analysed and commented on.

304. On several occasions, representatives of the Central and Eastern European Countries have taken part in meetings of the Co-ordinators' Group concerning the activities in these countries relating to their prospective accession to the European Union. This participation was put forward in the Commission White Paper on the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union.

305. The Co-ordinators' Group has also been used for the communication of information on activities at national and Community level relevant to the recognition of professional qualifications. Member States have reported on current developments within their territories and, for example, the Commission has recently presented the proposals for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market and two other linked proposals for Directives concerning the ability of independent or employed non Member State nationals to move between Member States in order to be able to provide cross-frontier services within the EU. There have also been regular presentations of the activities of the Commission and Community programmes in the field of education, training and research. Other items, such as the work being done in the field of the recognition of professional qualifications pursuant to the initiative for Simpler Legislation in the Single Market (SLIM) and the UNESCO/Council of Europe Convention on higher education diplomas in the European region, have also been included as information items. The Co-ordinators have also been informed about the work on the three proposals for Directives: establishment of lawyers (1998/5), the "third Directive on the General System" (1999/42), and the "SLIM" Directive (COM(97) 638).

306. The Co-ordinators' Group also continues to play a role in the collection of information on the implementation of the two General System Directives and statistics on the operation of the General System Directives within their territories.

B. Code of Conduct approved by the Group of Co-ordinators for the General System of recognition of diplomas.

307. Pursuant to Directives 89/48/EEC and 92/51/EEC, a basic principle now applies. Any professional who is qualified to pursue a profession in one Member State has a right to the recognition of his or her diploma to gain entry to the same profession in

another Member State. However, implementing this principle requires a number of administrative formalities to be completed by the applicant and the authorities responsible for treating his application. These formalities, while they are essential for the proper operation of the General System, must not constitute disguised ways of impeding the migrant's right to freedom of movement. These administrative formalities are mentioned in Article 8 of Directive 89/48 and Article 12 of Directive 92/51.

308. Article 12 of Directive 92/51/EEC lays down that:

309. *"1. The host Member State shall accept as means of proof that the conditions laid down in Articles 3 to 9 are satisfied the documents issued by the competent authorities in the Member States, which the person concerned shall submit in support of his application to pursue the profession concerned.*

310. *2. The procedure for examining an application to pursue a regulated profession shall be completed as soon as possible and the outcome communicated in a reasoned decision of the competent authority in the host Member State not later than four months after presentation of all the documents relating to the person concerned. A remedy shall be available against this decision or the absence thereof, before a court or tribunal in accordance with the provisions of national law."*

311. However, by their nature the Directives can only make general provision for the implementation of these administrative formalities. In detail, the way these rules are put into practice has been found to vary greatly from one Member State to another, to the extent that there is sometimes a danger of slowing the recognition mechanisms. This is why the Commission services thought it worthwhile to bring this question before the "General System" Co-ordinators in order to arrive at a more precise definition of the applicable rules. This meant initially exchanging views on the various practices, with a view to arriving in a second phase at a consensus in this field.

312. Following these exchanges of views, a document on the national administrative formalities in connection with Directives 89/48 and 92/51 was drawn up by the Commission services. The purpose was to try to ensure the compatibility of these administrative formalities with the right to recognition pursuant to the Directives which the migrant can claim.

313. The Commission's document was discussed in the Co-ordinators' Group, amended on a number of points and finally adopted on 18 June 1998. It sets out in detail the desirable, acceptable and unacceptable practices in the following 14 areas: information to be given to the departing migrant by the contact point or a competent authority in the Member State of origin, information to be given to the arriving migrant by the contact point or another competent authority in the host Member State, documents which the migrant may be required to supply to the competent authority in the host Member State, the form of the documents required from the migrant by the competent authority in the host Member State, translations (information to be provided by the competent authority in the Member State of origin), translations required by the host Member State, fees to be paid by the migrant in the host Member State, aptitude tests in the host Member State, adaptation period in the host Member State, compilation of files (time limits), incomplete files,

rules on reasoned decisions and appeals, professional organisations and co-ordination.

314. This document has now become the "Code of conduct approved by the Co-ordinators' Group for the General System for the recognition of diplomas". The consensus which emerged on this Code may make it possible to remove a number of administrative obstacles which hitherto stood in the way of migrants. It can be of use to the national authorities responsible for examining recognition applications and to migrants.

315. The document is of course not exhaustive. New questions will probably arise as time goes on, which will make it necessary to update the document. It is based, moreover, on the Directives, which means that it can by nature only be for information purposes. The reference texts continue, of course to be the Directives and the case law of the Court. Nonetheless, the document could prove to be of considerable use in the future.

316. The Code has now been published with the agreement of the Co-ordinators.

C. Administrative co-operation between Member States

317. The Co-ordinators' Group was initially established under Directive 89/48/EEC, largely in order to facilitate the implementation of the Directive. Its activities have since been extended to Directive 92/51/EEC and will also apply to Directive 99/42/EC (OJ L 201, 31 July 1999, page 77). The role ascribed to the Co-ordinators is similar under all three directives. Article 13.3 of Directive 92/51 states that: "*The Member States shall take measures to provide the necessary information on the recognition of diplomas and certificates and on other conditions governing the taking up of the regulated professions within the framework of this Directive. The Commission shall take the necessary initiatives to ensure the development and co-ordination of the communication of the necessary information*".

318. More generally and more recently, the Commission sent a Communication to the Council and the European Parliament concerning "Mutual recognition in the context of the follow-up to the Action Plan for the Single Market" (COM(1999)299 final). The aim of this Communication is to point out the fundamental importance of the principle of mutual recognition for the Single Market, to examine problems in its application, analyse the causes and make proposals for improving its operation (see extracts in Annex 2).

319. In this context, the Commission has launched a discussion in the Co-ordinators' Group on how to improve communication and co-operation amongst the Co-ordinators in order to facilitate recognition decisions and find quick and pragmatic solutions to problems. Particularly where competent authorities in a Member State have to take decisions on the basis of mutual recognition of professional qualifications gained in another Member State, further contacts via Co-ordinators are likely to foster well-founded decision-making on individual cases. It is, after all, the competent authorities in the 'home' and 'host' Member States which hold all the information relevant to the assessment of the migrant seeking recognition. A number of ideas have been suggested to launch the discussion on the practicalities of communications between Co-ordinators, the value of including available information on professional qualifications in a jointly-accessible database and the introduction of

a procedure for exchanging information and views between 'home' and 'host' Member States on particular cases.

VIII. LANGUAGE REQUIREMENTS

320. A certain knowledge of the language of the host country may be essential for the pursuit of a profession. However, language requirements must not affect the basic freedoms guaranteed by the Treaty, i.e. freedom of movement for workers (Article 39 [ex 48]), freedom of establishment (Article 43 [ex 52]) and freedom to provide services (Article 49 [ex 59]). Requirements of this kind should therefore not be out of proportion with the objective, and the procedures for their application should not involve discrimination against nationals of other Member States.

321. For salaried employees, Article 3 of Council Regulation No 1612/68 on freedom of movement for workers within the Community explicitly admits *"conditions relating to linguistic knowledge required by reason of the nature of the post to be filled"*. Language requirements must be necessary[39], however, and be imposed in a proportionate manner.

322. Where establishment is concerned, a request for a preliminary ruling[40] is currently before the Court of Justice.

323. Knowledge of languages may not, as a matter of principle, be the subject of compensatory measures, since it is not on the restricted list of situations in which such measures may be required (see Article 4(1)(b). Including it would also be unjustified on the grounds that any adaptation period or test would take place in the language of the host country. There is *a fortiori* no justification for an exemption from the migrant's choice between test and adaptation period in the case of language knowledge.

324. An exception may, however, be justified where language knowledge forms an essential part of training, as in the case of language teachers[41].

325. In cases where a language test is justified on legitimate grounds, both the test and above all the conditions under which it is administered must nevertheless be proportionate to the objective sought. The level of a prior test must not exceed the level objectively necessary for the pursuit of the profession in question.

IX. TEMPORARY PROVISION OF SERVICES

326. The legal basis of the General System Directives is Articles 40 (ex 49), 47(1) (ex 57(1)) and 55 (ex 66) of the EC Treaty. They consequently apply to pursuit of professions both as an independent worker and an employee, and in the latter case

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39 e.g. for safety reasons, as in Article 8 of Council Directive 94/58/EC on the minimum level of training for seafarers, which lays down criteria for the language skills of crews of passenger vessels - OJ L 319/1994, p. 28.

40 Case 424/97 ("Haïm II"). The submissions were made by the Advocate-General on 19 May 1999.

41 Cf. the judgement of 28 November 1989 in Case C-379/87, *Groener v Minister for Education and the City of Dublin* , [1989] ECR 3967, on paid employment in teaching. This case was, however, based on the public interest of a national cultural policy: the preservation of the Gaelic language.

they apply to both establishment and the provision of services. In practice, the General System Directives, in contrast to the "sectoral" directives on diploma recognition, contain no special provisions applicable to the provision of services and are different from those applicable to establishment and employment.

327. In theory, therefore, Directive 92/51/EEC applies as much to persons established (or wishing to become established) in the host Member State with a view to pursuing their profession as to those who, whilst they remain established in another Member State, wish to provide services in the host Member State.

328. First, it should be noted that in the case of provision of services, the recognition of diplomas is governed by both the General System Directives. This question does not arise exclusively under Directive 92/51. Throughout this section, therefore, reference is made to "the General System" and "the Directives".

329. Experience has shown that the recognition mechanisms set up under Directives 89/48/EEC and 92/51/EEC are not always ideally suited to the provision of services; some potentially problematic elements include: the requirement for the migrant to produce an application for recognition of the diploma in the correct form; the four-month period for examination of the application; and the possibility for the host Member State to require an aptitude test, an adaptation period or additional professional experience, etc. The question has arisen notably in the tourism sector (see “Tourist professions” above) and in sport (see “Sports professions” above).

330. It is possible, for example, that in certain cases the length of the adaptation period might be disproportionate to the expected duration of the provision of services. In the same way, the aptitude tests are as a rule organised a number of times each year, and the first available test date may be too late, so preventing the services from being provided.

331. A rigid application of the General System would, for example, require a German table-tennis coach accompanying a group of young people on a three-day visit to France to begin the procedure months in advance in order to supervise his group on French territory. Similarly, the children of an Italian riding club wishing to cross the frontier into Austria for a few hours with their instructor would have to prepare their ride months in advance. In such cases, the solutions offered by the General System seem to stand in the way of the free movement of the professionals concerned.

332. The recognition mechanisms laid down by the Directives, and particularly the compensation measures as designed, can in practice be an obstacle to the provision of services. The Commission consequently considers that in the case of the provision of services, the Directives must be interpreted in the light of the nature of the activity in question and its temporary nature.

333. The notion of applying more flexible rules to the provision of services is based on case law of the Court of Justice of the European Communities, which has ruled that Article 49 (ex 59) of the Treaty requires not only the elimination of all discrimination vis-à-vis the provider of services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

334. In the case of *Säger v Dennemeyer*[42] the Court remarked that: *"A Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services".*

335. Consequently, if the migrant is established in the host Member State, he is subject to the recognition procedures of the General System Directives, but in the case of the provision of services, there should be a more flexible recognition mechanism.

336. One important question thus concerns the boundary between provision of services and establishment.

337. Within the meaning of the Treaty (Article 50 [ex 60]), "services" are those normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. The provisions of the Treaty relating to services are therefore subsidiary to those of the chapter on the right of establishment, and are applicable only when the provisions relating to establishment do not apply[43].

338. In the Court's opinion, "establishment" is a broad concept allowing a Community national to participate, on a stable and continuous basis, in the economic life of the host Member State. An activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration, does not fall within the rules on the provision of services[44].

339. As to the activity's temporary or permanent nature (or at least its stability and continuity), the Court has ruled that its temporary nature *"has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity"*[45]. No precise rules have yet been established on this, and each case must be assessed on its merits to decide whether or not, despite its a priori temporary nature, it should be treated as one of establishment.

340. Account also has to be taken of cases where, although the service provider is established in the Member State of origin and not in the host Member State, his situation may still be governed by the rules on the right of establishment. However, the opinion of Advocate-General P. Léger on the same case introduced further reference material. *"Consequently"*, he writes under point 87, *"there is a range of indicia which enables the provision of services to be distinguished from establishment"*. *"The location of the lawyer's main centre of activity,"* he continues in point 88, *"the place where he has his principal residence, the size of his turnover in the various Member States in which he carries out his activity, the amount of time spent in each of those States and the place at which he is entered on the Bar rolls will each afford evidence for the purpose of determining the nature of his activity in each of the Member States considered"*. These considerations are, of course, *mutatis mutandis* applicable to other professions.

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42 Judgement of 27 July 1991 in Case C-76/90 *Säger v Dennemeyer*, [1991] ECR I-4007

43 Judgement of 30 November 1995 in Case C-55/94 *Gebhard v Milan Bar Council;* [1995] ECR I-4165

44 Judgement of 5 October 1988 in Case 196/87 *Steymann v Staatsecretaris van Justitie*; [1988] ECR 6159

45 cf. *Gebhard* and Case C-3/95 *Reisebüro Broede v Sandker,* [1996] ECR I-6511

341. It should also be borne in mind that there are situations in which, even if the interested person is formally established in the Member State of origin and not in the host Member State, he/she is subject to the right of establishment. The Court has recognised that the rules on provision of services cannot be used to avoid complying with the rules on establishment, noting that *"a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services, whose activity is entirely or principally directed towards its territory, of the freedom guaranteed by Article 49 (ex 59) for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services".*

342. Even if the service provider is formally established in another Member State, therefore, he/she may fall within the establishment rules if his/her professional activity is entirely or principally directed towards the territory of the host Member State.

343. At the same time, the Commission's recent proposal for a directive on certain legal aspects of electronic commerce in the internal market (COM(1998) 586 final of 18.11.1998 – OJ C 30 of 5.2.99, amended on 1 September 1999; COM(1999) 427; n° 98/0325) provides in its Article 3 that Member States must ensure that Information Society services provided from its territory comply with its national provisions and may not restrict the freedom to provide such services from other Member States. In the Explanatory Memorandum to the proposal, under the heading 'Necessity of a Legal Framework for the Internal Market' and sub-heading 'Lack of clarity in the existing legal framework', it is stated that:

344. *"Differences in certain legal provisions applicable to Information Society services in different Member States can result in a situation where, as an exception to the principle of free movement and subject to conformity with the case law of the Court of Justice one Member State may make the provision of a service from another Member State conditional on supervisory measures or the application of its own legislation. In practice this means that a service provider wishing to offer a service throughout the internal market must, in addition to the compliance with the rules of the country in which he is established, ensure that the service is compatible with the law of the other 14 Member States.*

345. A significant lack of legal certainty characterises the current legal framework. This legal uncertainty arises over the lawfulness of measures taken by one Member State concerning services provided by providers established in another Member State (are they justified in relation to the principle of the freedom to provide services or of secondary Community law applying that principle?). Legal uncertainty also arises in determining the requirements to be met by Information Society services (to what extent does a particular rule apply to such services?). Cases which have already been decided diverge, indicating that there is a serious lack of legal certainty whose adverse effects are strongly amplified in a cross-border situation."

346. Furthermore, it can be said that although there are some characteristics particular to Information Society services, such as potential lack of certainty of the location of the service provider, much of this reasoning can also apply to the same kind of services, and professional services, provided by such means as fax, telephone, mail or through

cross-border movement of the service provider or service receiver. A large measure of the legal uncertainty identified in the context of the electronic commerce proposal is of wider relevance in evolving market and technological circumstances when the interests of the economy and individual service providers and service receivers are to avoid uncertainty, duplicatory or onerous additional procedures and to benefit from increased competition and opportunity.

347. In all events it must be remembered that, in accordance with consistent case law[46] the freedom to provide services can be restricted only if four conditions are met: the measure must be applied in a non-discriminatory manner; it must be justified by compelling reasons of general interest; it must be capable of guaranteeing that the aim being sought will be achieved, and it must not go beyond what is needed to achieve that aim. In addition, the general interest in question must not already be protected by the rules to which the service provider is subject in the Member State of establishment. This is not the case when, because the profession is not regulated, the service provider is not subject to any rules in the Member State of establishment.

348. This case law remains to be applied, also taking into consideration the case law on the legitimacy of requirements for professional qualifications for certain activities in the interests of service recipients. The *Dennemeyer* judgement states that, *"neither the nature of a service such as that at issue nor the consequences of a default on the part of the person providing the service justifies reserving the provision of that service .. "* (point 20). Here the matter in question was that of monitoring the renewal of patents. For the same reason of simplicity of the activity, the Commission considers the General System to be inapplicable to tax advice[47]. The *Dennemeyer* judgement does, *a contrario,* admit the requirement of qualifications for other activities. The requirement of qualification rules etc. for a provision of services is also admitted in particular by the *Reisebüro Broede* judgement on recovery of debts, an activity restricted to lawyers in the Member State concerned.

349. A further example was the decision of the Commission taken in 1996 to close an infringement procedure opened against France for non-implementation of Directive 92/51 in the field of certain sports/leisure instruction activities including ski instruction. In taking this decision, the Commission relied on the fact that the provisions of the Directive, for example concerning the four-month period in which action has to be taken on a demand for recognition, were too restrictive to apply in relation to the temporary provision of services. Resort was therefore had to the general rules of the Treaty in order to justify the acceptance of legislation being introduced in France by which the French authorities would only apply aptitude tests to foreign ski instructors wishing to provide their services in France on a temporary basis where substantial differences exist between the qualifications of the foreign instructor and those required in France.

350. For the sake of legal certainty for migrant professionals and the competent authorities, it seems appropriate to consider amending the Directives to provide for a mechanism to facilitate service provision by at least making the procedure prescribed by the General System more flexible, while enabling the host Member State to safeguard its legitimate requirements for qualifications.

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46 See in particular the *Reisebüro Broede* judgement in Case C-3/95, point 28.

47 Press release reference : IP/96/598 of 4.7.1996

351. The sectoral Directives on diploma recognition[48] provide for the declaration to be made to the competent authority. The declaration is usually to be made prior to the provision of services, but may in urgent cases be made as soon as possible after the services have been provided.

352. Nevertheless, these Directives organise the co-ordination of training[49], which the General System does not. How then is any substantial shortfall in the training of the service provider from the point of view of the legitimate interests of the host Member State to be made up? The time taken to react to the application — consisting merely of a declaration accompanied by information on the training received — could be reduced to a month, for example, and the aptitude test only could be used as the compensatory measure, the length of the adaptation period being by nature incompatible with the need to provide services. Professional experience must, of course, be taken into consideration in reducing or even eliminating the compensatory measure.

353. Furthermore, there appears to be a clear difference between the situation where the service provider is clearly established in one Member State and provides services from that Member State directly, but at a distance, by some means of communication to service receivers in other Member States or where the service provider travels with those to whom he provides his services to another Member State in order to provide his services temporarily in that other Member State, and the situation where the service provider either temporarily operates out of another Member State or moves to another Member State to provide services to service recipients in that Member State with whom all contacts take place in that other Member State. In the first set of circumstances the service provider and the service recipients, and the relations between them, would appear to have a clear and sometimes closer connection with the legal system from which the service provider is operating. In other cases the service provider may be under the control of a locally established operator or the recipient of the service may be clearly informed and take into account the status and different qualifications of the service provider and be ready to accept the provision of service on that basis. In these circumstances, and subject to specific provisions relating to local insurance cover, etc., it would seem more appropriate for the service provider to be entitled to carry out his activities subject to the law of the Member State of his establishment. Consideration could therefore be given to the possibility and scope of a proposal for a Directive permitting services to be provided on the strength of the provider's home-country professional title, along similar lines to the Directive on electronic commerce.

To conclude :

354. (i) The General System does not apply if the requirement for qualifications is not justified.

355. (ii) If the requirement is justified, more flexible procedures should be put in place, the Treaty taking precedence over the Directives until these are simplified.

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48 e.g in Article 17(3) of Directive 93/16 on the free movement of doctors (OJ L 165 of 7th July 1993).

49 or the acceptance of the conformity of new diplomas with new qualitative and quantitative training criteria for architects

(iii) Modifications to the Directive and/or a specific directive on services are being considered as explained at points 350 and 353.

X. CONCLUSIONS

356. In view of the innovative and complex nature of the Directive, it is too early to draw extensive conclusions about its effects on the basis of the first five years. The following can, however, be said at this point : it has enabled many citizens to pursue their professional activities in other Member States, but it has also revealed the need to simplify certain procedures and enhance administrative co-operation.

357. The Directive appears to be too cumbersome in terms of the application of its procedures for recognising qualifications and training in connection with the provision of services and its procedure for reassessing certain types of training[50] (by amending Annexes C and D). On this last point, it is suggested that the existing procedure be replaced by a definition making such training equivalent to the diploma under certain conditions. To facilitate the provision of services, it would be desirable for the sake of legal certainty to provide for an appropriate mechanism; this is not easy to formulate, however, since speed must be combined with certainty that there is no substantial shortfall in the training. To launch the debate and without claiming to be exhaustive, the Commission suggests that the deadline for responding to applications and the range of compensatory measures be reduced. More generally, consideration could be given to extending, for certain professional activities, the range of services which may be rendered under one's home-country professional title, taking as an example the proposal for a Directive on electronic commerce.

358. Administrative co-operation has enabled a code of conduct on formalities to be drawn up. We hope that this will be extended by enhanced co-operation between Member States, along the lines of the communication adopted by the Commission on 16 June 1999 on facilitating and improving the application of the mutual recognition principle in the single market. Moreover, the proposal for a "SLIM" Directive, currently before the Council, comprises measures intended to strengthen the role of the Co-ordinators' Group.

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50 It should in any event be amended in order to adapt it to the new Council general Decision of 28 June 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission.

ANNEX I

I. OBSERVATIONS BY MEMBER STATES

359. The following contributions were compiled from written communications to the Commission. They agree closely on two aspects:

360. - the need to simplify the Directive;

361. - the need for changes to the system of annexes C and D.

362. The following national contributions were received.

A. Belgium

363. Belgium is particularly concerned at how often the procedure laid down in Article 15 of Directive 92/51/EEC for amending Annexes C and D is used. Amendments to these annexes, some of them relatively minor, are made by means of Directives, which inevitably means that the Member States are obliged to incorporate them into national law (even though the new Directive may already itself be partly out of date). Belgium therefore thinks that other channels should be explored and other legal solutions found for taking account of amendments reported by the Member States in the field of professions. The Annexes C and D system needs to be simplified.

364. Belgium has also pointed out that it has not yet taken advantage of the possibilities offered by the system involving Annexes C and D to Directive 92/51/EEC. No Member States have therefore had to incorporate a list of training or education provided in Belgium into their national legislation.

B. Denmark

365. Denmark wished to make a major contribution to the Report on Directive 92/51. The essential points made by the Danish authorities were as follows.

1) Complicated regulations

366. All the Danish authorities which have played a role in implementing the second Directive, either as competent authority or as co-ordinator, consider the text too complicated. Its complexity means that they often have difficulty getting a general overview of the procedures to be followed, and indeed in providing clear and concise information to members of the public wishing to benefit from the General System. This applies equally to Community or EEA citizens wishing to pursue a regulated profession in Denmark, and to Danish citizens wishing to pursue their profession elsewhere in the Community or the EEA.

367. The complexity of the text has been felt particularly in two areas.

368. The first of these is the many levels of training, their hierarchy, the relationships between levels and the rights associated with each. This category of problems also includes the structure and significance of Annexes C and D — the "gateways". A specific problem also arises with the training referred to in Article 8 of the Directive, which appears not to have been taken into account in the review of regulated

professions in the Member States recently completed by the Commission. In the case of Denmark, a number of professions are concerned, notably in the seafaring sector.

369. Secondly, the system for amending Annexes C and D is too complex. For example, Denmark requested the inclusion of chiropodists (fodterapeuter) and pharmacy assistants (apoteksassistenter) in Appendix C. The processing of the request, in particular an enquiry by experts, was so lengthy that by the time the Commission decision had been reached, in 1997 — negative, in the event —the legal basis for the training of chiropodists had been changed, and inclusion in Annex C was no longer necessary. In any case, the Commission decision took no account of the changed law.

370. Denmark's view is therefore that the rules could usefully be simplified by setting out clearly and simply the hierarchical relationships between the levels of training and, if it then remains necessary, the gateways. The Danish authorities would also recommend consolidating the two Directives to create a single hierarchy and eliminate duplicated provisions.

2) The General System

371. This is another problem Denmark believes should be discussed. Denmark's view is that as a whole, these rules govern freedom of movement of labour, the right of establishment and the freedom to provide services, and that the stress should be placed on the right to pursue the profession. In practice, this involves, on the one hand, national rules, and whether the requirements they lay down are reasonable (they should, naturally, comply with the general Community principles of non-discrimination and proportionality), and on the other, the applicant's professional competence, meaning both training and experience. The problem in fact arises increasingly at the practical level.

372. Within the Co-ordinators' Group the problem can be seen in particular in the issues raised for discussion or which are the subject of requests for information, e.g. ongoing information on Socrates and other training programmes (in the strict sense), and in the presentation of miscellaneous training programmes and establishments such as the European certificate in psychotherapy. Such issues, which are also highly specific to the professions concerned, could in Denmark's view usefully be examined within the NARIC (National Academic Recognition Information Centre) Group. If NARIC was used in accordance with the Directives, it would be able to play precisely this role of training expert, with the Co-ordinator as the general expert in training, and the competent authorities the experts in specific professional domains.

373. As to specific cases, Denmark would like to stress the problems encountered by Danish ski instructors in the Alpine regions. In this case, too much importance seems to have been given to the question of training, and not enough to professionalism.

3) Specific comments

a) France : sports instructor

374. The Commission accepted France's application under Article 14 for an exemption in respect of sports instructors in a number of sports disciplines. France was thus authorised to require an aptitude test for applicants wishing to have their instructor's diploma recognised before establishment in France, if the training differed significantly from the training required there.

375. The Commission's decision relates only to establishment, but the provision of services by sports instructors falls within the rules of Decree 96/1011 of 25 November 1996. The Decree also prescribes an aptitude test; the principle is thus being ignored that the choice between aptitude test and adaptation period lies with the applicant. For this reason Denmark wishes to draw attention to the fact that France is imposing an aptitude test for both establishment and the provision of services. It should also be noted that an aptitude test can only be demanded when there are fundamental differences between the candidate's level of competence and that required in the host Member State.

376. The fundamental issue is the applicant's qualifications as a whole, and not the content of his training. As a consequence, what must be taken into account in evaluating whether the applicant should undergo an aptitude test is his competence at the moment of the application. It should not therefore be possible to demand an aptitude test of all applicants from one or more countries without having first established the skills of each one individually.

377. In Denmark's view, the French rules have been a source of serious difficulties for foreign ski instructors wishing to pursue their profession in France as providers of services. Every Danish ski instructor who has applied to France has been required to take an aptitude test, regardless of the level of skill he had attained on completion of training as a ski instructor.

378. As to the content of the aptitude test, the Commission Decision of 9 January 1997 states that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must be applied in a non-discriminatory manner; must be justified by imperative requirements in the general interest; must be suitable for securing the attainment of the objective which they pursue; and must not go beyond what is necessary to attain it.

379. Denmark recognises fully that the profession of ski instructor entails risks which justify verifying that the applicant does indeed possess the safety skills needed to ensure that suitable instruction is provided. In the same logic, Denmark also agrees that, if an applicant is to be evaluated, account must be taken of his skills e.g. in avalanche risk, searching for missing persons, language skills, etc.

380. Denmark believes that experience has shown that there is a considerable risk that exemptions, when implemented, will go beyond what is necessary to attain the objective being sought.

381. Denmark therefore wishes to observe that systems of exemption should be avoided whenever possible, in order to ensure that the general principles of mutual recognition should also apply in the sports sector. This means that the host Member State should a priori recognise a candidate's purely technical training qualifications from another Member State and therefore abstain from testing those technical qualifications.

b) Austria : ski instructors and mountain guides

382. In a note dated 15 July 1998, Austria also requested an exemption under Article 14 in respect of ski instructors and mountain guides, authorising an aptitude test for applicants wishing to have their instructor's diploma recognised before establishment in Austria, if the training differed significantly from the training required there.

383. Denmark responded rapidly that it could not support Austria's request, considering that the increasing number of requests from Alpine countries might well be a sign of a regrettable tendency which could in the end deprive instructors from non-Alpine countries of the possibility of pursuing their profession in the Alps.

384. Denmark's view was thus that the Commission should refrain from recognising any new request under Article 14 until such time as the French exemption had been evaluated.

c) Professions in the sports sector

385. The Commission has noted very significant disparities between Member States relating to the framework in which sports professions are practised. In some Member States these professions must be recognised by the State, whilst in others the state relies on various organisations to train and approve sports instructors.

386. Denmark feels that this situation should not be allowed to stand in the way of applying the general principles of mutual recognition in these professions, and also that those principles should be applied without the prior requirement of a detailed scrutiny of each course.

387. In practice, by accepting such detailed comparisons, the Community will deviate from the rules on mutual recognition of skills and the logical conclusion of such a process would be for the Commission to propose full harmonisation of training, to which Denmark is totally opposed. Denmark sees no reason to abandon the principle of mutual recognition simply because there are problems with the professional competence of sports instructors, such as ski instructors.

C Netherlands

388. The Netherlands' state that in their view, one of the main aims of the General System Directives has been frequently observed in the Netherlands, that is, the mutual recognition of diplomas. In the Netherlands, diplomas for seafarers (certificates of competence) from other EU Member States are treated in the same way as Dutch diplomas meaning that they are automatically recognised. This means that hardly any applications have been made under the Directives and no records kept on those EU citizens working on Dutch ships.

The Dutch Co-ordinator would like to know whether any trends can be discerned in the other Member States, either in terms of a more hands-off approach or in the day-to-day application of the General System, which can, in turn, lead to deregulation for some regulated professions. They reiterate that if indeed such a trend is taking place in the other Member States, it would be worthwhile finding out whether these changes have brought about the desired relaxation of the rules, and/or whether they have led or could lead to the abolition of regulations for certain professions.

D Austria

389. In Austria, many professions are covered by Directive 92/51/EEC but the application of this Directive does not present any particular problems.

390. However, Austria regrets the difficulties encountered by certain of its nationals in obtaining recognition for their diplomas. The authorities in the host countries have

apparently sometimes made questionable claims regarding substantial differences. Bilateral discussions with the authorities of the countries concerned are still under way with a view to solving these problems.

391. In the interests of the smooth running of the General System, Austria calls for improvement of the equivalence mechanism for diplomas within the meaning of the two "General System" Directives, and in particular for an amendment to Article 3(b) of Directive 92/51/EEC.

E Portugal

392. Portugal has implemented Directive 92/51/EEC by means of Decree-Law No 242/96 of 18 December 1996. It lists around forty regulated professions, for which five competent authorities under four Ministries are responsible. Most of these professions require a certificate or attestation of competence within the meaning of Directive 92/51/EEC, the health sector being an exception, requiring diploma-level training within the meaning of the Directive.

393. The vast majority of applicants encounter no problems with recognition and are therefore not subject to any compensatory measures. When problems do arise, it must be stressed that the competent authorities are still finding their feet with the application of the Directive and this may mean some difficulties in organising recognition procedures and compensatory measures. The regulated professions sector is also in a constant state of flux and the list of regulated professions in Portugal needs regular updating, particularly as new professional profiles are being certified or regulated with the introduction of the "SNCP" (National System of Professional Certification).

F United Kingdom

394. The United Kingdom has drawn attention to a number of points.

395. This is a complex and diverse Directive which has encountered lengthy implementation periods and as a result Member States are only now getting to grips with it.

396. Professions may differ widely from one Member State to another as regards the level, the conditions of access, the fields of activity, the definition, etc. The idea of professions being the same everywhere is central to the "General System", which means that the expectations of migrants as regards the recognition of a diploma for access to a profession that is not identical, is not regulated or does not exist in another Member State may not always be realised.

397. As a consequence, a lack of identity between professions may result in the need for compensation measures. In the majority of cases migrants recognise this need and are more than willing to make up any substantial differences.

398. The concept of substantial difference has given rise to difficulties. Defining what is substantial or what is not is by no means a straightforward matter (the health-care professions and ski instructors are cases in point). The equivalence mechanisms for diplomas awarded on completion of three years of post-secondary education and those awarded on completion of two years of post-secondary education are sometimes difficult to apply (e.g. in the health-care professions). The point at issue is

that the extra year of study makes it possible to go into subjects in greater depth and that UK health-care professions are structured in such a way as to require this greater depth of knowledge as a prerequisite for safe practice.

G Finland

399. In Finland the regulated professions covered by Directive 92/51/EEC tend to be found in the health sector, in shipping and in rescue services. In the public service, situations covered by the Directive can be found in municipal administrations.

400. The competent authorities in Finland have generally found the Directive very difficult to apply. This is particularly because of the diversity of national education, training and professional structures. For the man in the street, the Directive is difficult both to read and to use.

401. Finland believes that the system could be generally improved by a change to the system of annexes, and by simplifying the procedure for recognising diplomas.

402. In the view of the Finnish authorities, the priority would be to abandon the system of annexes. The fact is that the frequent changes in domestic regulations in Member States generate an equal number of amendments to the annexes. This means a substantial volume of work for both the Commission and the Member States. For this reason Finland believes that the system of annexes should be replaced by an arrangement which does not need constant amendment.

H Liechtenstein

403. Liechtenstein does not have any particular problems with the application of Directive 92/51. Awareness of the status of the EFTA Member States and diplomas issued in the EFTA countries could, however, be improved in the Member States (and particularly among local authorities).

I Germany

404. In Germany, several professions fall under Directive 92/51/EEC. As far as the application of the directive is concerned, no major difficulties have arisen, except for teachers. These difficulties could be solved, by and large, over the course of time.

405. The explanations by the Commission concerning the recognition of teachers' diplomas in cases where the migrant holds a diploma in the sense of directive 92/51/EEC, and the host Member State requires a diploma in the sense of Directive 89/48/EEC, are not very transparent : on the one hand, the bridging mechanism from directive 92/51 to directive 89/48 and its limitations are explained concerning the limitations with reference to the text of the directive (paragraphs 201 and 202); on the other hand, reference is made for specific cases, in paragraph 203 to a position that may not be followed.

As far as the training of teachers in Germany is concerned, it should be stated that the length of post-secondary training is more than four years, which excludes the bridging mechanism of Article 3, final paragraph, of Directive 92/51/EEC.

ANNEX II

Communication to the Council and the European Parliament concerning "Mutual recognition in the context of the follow-up to the Action Plan for the Single Market" (COM(1999)299 final - OJ .. .. ..). To quote from this Communication :

406.

> "The application of mutual recognition is fully consistent with the Single Market philosophy according to which the rules of the Member State of origin normally prevail. The application of this principle is also consonant with the idea of a dynamic approach to the application of subsidiarity; by avoiding the systematic creation of detailed rules at Community level, mutual recognition ensures greater observance of local, regional and national traditions and makes it possible to maintain the diversity of products and services which come onto the markets. It is thus a pragmatic and powerful tool for economic integration. [page 4]

407. In the regulated professions the difficulties experienced with the application of the principle of mutual recognition of diplomas affect individuals more than businesses. Although the indicators show that mutual recognition has had a positive effect in this area, there are still very many individual complaints, as the report by the Citizens Signpost Service carried out for the Commission In February 1999 shows. The main sticking point is that the equivalent of training acquired has to be assessed in each individual case. [page 6]

408. According to the analysis carried out by the Commission, there is a need to improve and reinforce the knowledge of economic operators and the competent authorities of the Member States regarding the principle of mutual recognition. [page 7]

PROPOSED APPROACHES

Credible monitoring of the application of mutual recognition

409. In order to assess the progress made in the application of mutual recognition and to have statistics which are both reliable and more complete than at present, the Commission will prepare, every two years, an evaluation report which will be forwarded to the Council and the European Parliament ….

Measures aimed at citizens and economic operators

Action by the Commission

410. The Commission has committed itself to facilitating dialogue with citizens and businesses. Numerous initiatives have been taken in this area: work under the Action Plan for the Single Market of June 1997 has led to the setting up of "contact points" in each Member State, the Dialogue with Citizens and Businesses was launched in June 1998 and an Internet site for businesses was opened at the beginning of 1999 …

Improve information and economic analysis

411. The Commission stresses that mutual recognition requires a major effort on the ground: one of the areas in which the investment of such an effort is essential is the area of information. …. [page 8]

Render mechanisms for dealing with problems more effective

412. The Commission's biennial report on the application of mutual recognition will allow a more accurate assessment to be made of the need for a new harmonisation initiative or further harmonisation in specific areas in compliance with the subsidiarity principle. Harmonisation must be applied when it is considered necessary, for example, when every effort to apply mutual recognition has failed and whenever Community intervention provides added value ….[page 10]

Action by Member States

413. It is the Member States who have primary responsibility for the application of this principle and the Commission is in favour of a genuine partnership becoming established between itself and the Member States to improve the functioning of mutual recognition.

414. More systematic use of the "contact points" set up for all areas of the Single Market as part of the implementation of the 1997 Action Plan and of Decision 3052/95 should henceforth be encouraged by all Member States. In the regulated professions, national co-ordinators were instituted under the General System directives. They play a similar role to that of Single Market contact points and this role must be strengthened. …" [page 12].

Done at Brussels,

For the Council
The President