

JUDGMENT OF THE COURT (Fifth Chamber)

23 November 2000 *

In Case C-421/98,

Commission of the European Communities, represented by I. Martínez del Peral and B. Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by M. López-Monís Gallego, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

defendant,

APPLICATION for a declaration that, by providing, in Article 10(2) of Real Decreto 1081/1989 of 28 August 1989 (*Boletín Oficial del Estado* No 214 of 7 September 1989, p. 28449), that holders of qualifications in architecture

* Language of the case: Spanish.

awarded by another Member State and recognised under Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1985 L 223, p. 15) 'may not pursue in Spain activities other than those which they are authorised to pursue in their country of origin on the basis of the qualifications awarded by the latter, unless they collaborate with another member of the profession who is authorised to pursue those activities and who holds a qualification which is likewise recognised under Spanish law', the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 10 of that directive,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, D.A.O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 24 November 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) seeking a declaration that, by providing, in Article 10(2) of Real Decreto (Royal Decree) 1081/1989 of 28 August 1989 (*Boletín Oficial del Estado* No 214 of 7 September 1989, p. 28449) (hereinafter ‘the Royal Decree’), that holders of qualifications in architecture awarded by another Member State and recognised under Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1985 L 223, p. 15) (hereinafter ‘the directive’) ‘may not pursue in Spain activities other than those which they are authorised to pursue in their country of origin on the basis of the qualifications awarded by the latter, unless they collaborate with another member of the profession who is authorised to pursue those activities and who holds a qualification which is likewise recognised under Spanish law’, the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 10 of that directive.

Community law

- 2 Article 1 of the directive provides:

‘1. This directive shall apply to activities in the field of architecture.

2. For the purposes of this directive, activities in the field of architecture shall be those activities usually pursued under the professional title of architect.'

3 Article 2 of the directive states:

'Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications acquired as a result of education and training fulfilling the requirements of Articles 3 and 4 and awarded to nationals of Member States by other Member States, by giving such diplomas, certificates and other evidence of formal qualifications, as regards the right to take up activities referred to in Article 1 and pursue them under the professional title of architect pursuant to Article 23(1), the same effect in its territory as those awarded by the Member State itself.'

4 Under Article 10 of the directive,

'Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications set out in Article 11, awarded by other Member States to nationals of the Member States, where such nationals already possess these qualifications at the time of notification of this directive or their studies leading to such diplomas, certificates and other evidence of formal qualifications commence during the third academic year at the latest following such notification, even if those qualifications do not fulfil the minimum requirements laid down in Chapter II, by giving them as regards the taking up and pursuit of the activities referred to in Article 1 and subject to compliance with Article 23, the same effect within its territory as the diplomas, certificates and other evidence of formal qualifications which it awards in architecture.'

5 Article 16 of the directive provides:

‘1. Without prejudice to Article 23, host Member States shall ensure that the nationals of Member States who fulfil the conditions laid down in Chapter II or Chapter III have the right to use their lawful academic title and, where appropriate, the abbreviation thereof deriving from their Member State of origin or the Member State from which they come, in the language of that State. Host Member States may require this title to be followed by the name and location of the establishment or examining board which awarded it.

2. If the academic title used in the Member State of origin, or in the Member State from which a foreign national comes, can be confused in the host Member State with a title requiring, in that State, additional education or training which the person concerned has not undergone, the host Member State may require such a person to use the title employed in the Member State of origin or the Member State from which he comes in a suitable form to be specified by the host Member State.’

National law

6 The directive was transposed in Spanish law by the Royal Decree, which regulates recognition of certificates, diplomas and other qualifications within the field of architecture in the Member States of the European Economic Community, as well as the effective exercise of the right of establishment and the freedom to provide services.

7 The conditions governing exercise of the profession of architect in Spain and the right of establishment are defined in Articles 9 and 10 of the Royal Decree.

8 Article 10 of the Royal Decree provides:

‘1. By virtue of their membership of the institute of architects, holders of that title to whom the present Royal Decree refers shall have the same rights and obligations as Spanish architects belonging to that institute. With regard, in particular, to disciplinary procedures and the corresponding sanctions, the statutes of the institutes of architects and ethical rules governing professional conduct which are laid down by their respective governing councils shall apply to them.

2. Where the work consists in drawing up construction projects or optionally assuming control over works, holders of qualifications in architecture awarded by another Member State which have been recognised in Spain pursuant to the provisions of the present Royal Decree may not pursue in Spain activities other than those which they are authorised to pursue in their country of origin on the basis of the qualifications awarded by the latter, unless they collaborate with another member of the profession who is authorised to pursue those activities and who holds a qualification which is likewise recognised under Spanish law.’

Pre-litigation procedure

9 By letter of 19 July 1990, the Commission put the Kingdom of Spain on formal notice to submit its observations as to whether Article 10(2) of the Royal Decree was compatible with Articles 2 and 10 of the directive.

10 By letter of 30 October 1990, the Spanish Government challenged that complaint, relying on Article 56 of the EC Treaty (now, after amendment, Article 46 EC) and on the specific respects in which the directive differs from

other sectoral directives which provide for mutual recognition of qualifications and involve full harmonisation of the minimum training requirements so as to allow for automatic mutual recognition.

- 11 The Commission considered that the argument put forward by the Spanish Government was not such as to alter its position on the matter, and it sent to the Kingdom of Spain, under cover of a letter dated 21 April 1992, a reasoned opinion calling on it to take the measures necessary for compliance within two months of its notification.
- 12 In its reply of 16 December 1992 the Spanish Government stated that it intended to repeal Article 10(2) of the Royal Decree. However, while the Royal Decree was indeed amended by Real Decreto 314/1996 of 23 February 1996 (*Boletín Oficial del Estado* No 64 of 14 March 1996, p. 10140), Article 10(2) continued in force.
- 13 In those circumstances, the Commission took the view that the Kingdom of Spain had not complied with the reasoned opinion and decided for that reason to bring the present action.

Arguments of the parties

- 14 According to the Commission, it follows from the actual wording of Articles 2 and 10 of the directive that the holder of a diploma, certificate or other evidence of formal qualification in architecture awarded by a Member State other than the host Member State must enjoy the same rights and be subject to the same obligations as holders of qualifications awarded by the host Member State itself.

- 15 With regard to qualifications that meet the requirements laid down in Articles 3 and 4 of the directive and those satisfying the criteria under the scheme of established rights in Chapter III, the directive provides for automatic and unconditional recognition. The Community legislature proceeded on the view that the degree of harmonisation achieved in the form of a list of qualitative and quantitative criteria was sufficient for implementation of the principle of mutual recognition.
- 16 Article 10(2) of the Royal Decree is, the Commission submits, incompatible with this principle of mutual recognition. In its view, the effect of that article is that holders of qualifications in architecture awarded by another Member State may not undertake the same range of activities as holders of qualifications in architecture awarded in Spain. Under that national provision, holders of qualifications in architecture awarded by another Member State and recognised in Spain cannot pursue activities in Spain that differ from those which they could pursue in their country of origin on the basis of the qualifications awarded by the latter.
- 17 Although the statutory definition of the field of architecture and the legal arrangements governing the profession of architect are matters for the national legislation of the host Member State, the Commission submits that, contrary to the argument of the Spanish Government, the scope of the activities of architects holding a qualification obtained in Spain is no wider than that of architects from other Member States.
- 18 If that were the case, the Commission acknowledges that, unless the range of activities covered by the profession in question has a definition common to the various Member States, a migrant architect may, in the host Member State, have a wider scope of professional activity than that for which he was originally trained.

- 19 That possibility, however, has been anticipated by the directive. It follows from Article 1(2) that, for the reasons set out in the ninth and tenth recitals in the preamble, the Community legislature accepted that the recognition of qualifications required by Articles 2 and 10 of the directive may have the consequence that members of the profession will be authorised to exercise, under the professional title of architect, certain activities which their qualifications do not entitle them to pursue in their country of origin.
- 20 The Commission points out that, in any event, in order to guarantee adequate protection for the recipient of the services supplied by an architect, the Community legislature has provided, in Article 16(2) of the directive, a specific measure designed to inform consumers of the conditions of training and the origin of the qualification of migrant architects. Any additional measure taken by the host Member State, such as an obligation to work in conjunction with a member of the profession who is authorised, in that State, to perform the activities in respect of which the migrant architect has not received training, is prohibited by the directive.
- 21 So far as application of Article 56 of the Treaty is concerned, the Commission submits that, since it has not been established that there is a substantial difference in regard to training and the scope of the activities of architects from other Member States compared with holders of Spanish qualifications, it is not even necessary to consider whether that article may be applicable to the present case.
- 22 The Commission further submits that it is far from clear that the derogations referred to in Article 56 of the Treaty can be relied on to nullify the effect of a harmonising directive, even if that harmonisation is minimal, where the directive in question itself establishes the mechanisms for avoiding situations which might adversely affect public security. It points out that, within the existing legal framework, Member States have at their disposal a range of safeguard measures designed to ensure that the directive is effective and to remedy situations which do not satisfy the conditions of the directive.

- 23 Furthermore, Article 10(2) of the Royal Decree fails to comply with the principle of proportionality. The rules on ethical conduct applicable in Spain may, in any event, be capable of resolving differences in the training of architects.
- 24 The Spanish Government, for its part, submits that it is for the national legislation of the host Member State to define the scope of the activities of the profession of architect and to determine the applicable legal regime. Articles 2 and 10 of the directive, it argues, do no more than require each Member State, in its capacity as the host Member State, to recognise the diplomas, certificates and other formal qualifications awarded to Community nationals by the other Member States by giving them the same effect within its territory as the diplomas, certificates and other formal qualifications which it itself awards.
- 25 The Spanish Government further contends that it follows from Article 1 of the directive that the latter covers only the activities usually pursued under the professional title of architect. While it is not disputed that Spanish legislation recognises the diplomas, certificates and other formal qualifications that open the way to activities within the architecture sector that are usually pursued under the professional title of architect, the Spanish Government takes the view that the activities covered by Article 10(2) of the Royal Decree do not form part of those usual activities. Activities consisting in drawing up construction projects or optionally assuming technical control over works are matters which come, in various Member States, within the competence of civil engineers.
- 26 The Spanish Government argues that Article 10(2) of the Royal Decree is designed precisely to remedy the fact that certain qualifications mentioned in the directive do not confer on those holding them full competence within the technical field relating to the stability of buildings. That provision therefore requires only that, in the case where the formal qualification awarded in the Member State of origin does not confer full competence on the migrant architect, the latter must work in conjunction with another member of the profession who

is appropriately authorised and whose qualification is recognised by Spanish legislation. This other member of the profession need not necessarily be a Spanish national or have obtained his qualification in Spain.

- 27 The Spanish Government submits that there are significant differences in regard to the scope of the activities covered by the qualification giving access to the profession of architect, and in regard to the training, tasks and liability of architects.
- 28 In the absence of harmonisation of the rules on training and areas of competence of architects in the different Member States, the Spanish Government takes the view that Article 56 of the Treaty allows the Member States to put in place mechanisms to ensure that those benefiting from the directive may assume responsibility for the security of architectural projects. That is the situation, in particular, where a case involves members of the profession who, in their Member State of origin, are required to work in conjunction with another member of the profession in order to be able to guarantee that the project will meet the requirements of public security specific to that State.
- 29 The Spanish Government submits that Article 10(2) of the Royal Decree complies with the principle of proportionality and that it is designed to protect public security, which is guaranteed by the requirement of collaboration with a member of the profession who is authorised to make structural calculations. This solution, it argues, is the one which least obstructs the freedom to supply services.
- 30 The same result, it continues, could not be obtained by reliance on the rules of ethical conduct which persons benefiting under the directive are required to observe or by prohibiting any member of the profession from performing activities in respect of which that person has not received adequate training.

- 31 As the Commission has acknowledged, the definition of the profession of architect differs from Member State to Member State, and therefore the host Member State enjoys wide powers to regulate the conditions under which the title of architect may be used. In those circumstances, Article 10(2) of the Royal Decree may be considered to correctly transpose Article 16(2) of the directive.

Findings of the Court

- 32 First of all, it is common ground that, under Article 10(2) of the Royal Decree, where the work consists in drawing up construction projects or optionally assuming control of works, persons holding a qualification in architecture awarded by a Member State other than the Kingdom of Spain and recognised by the latter Member State cannot pursue, within Spanish territory, activities differing from those which they could pursue in their Member State of origin or in the Member State from which they have come on the basis of the qualification awarded to them.
- 33 It follows from that provision that the range of activities open to persons holding qualifications in architecture awarded by a Member State other than the Kingdom of Spain is not the same as is open to persons holding qualifications obtained in Spain.
- 34 According to the second recital in the preamble, the directive is designed to ensure mutual recognition of diplomas, certificates and other formal qualifications in respect of activities in the field of architecture in order to facilitate the effective exercise of the right of establishment and freedom to provide services within that field.

- 35 The essential point of this mutual recognition is expressed in Article 2 of the directive, which requires Member States to recognise the diplomas, certificates and other evidence of formal qualifications acquired as a result of education and training fulfilling the requirements of Articles 3 and 4 of that directive and awarded to nationals of Member States by other Member States and to give them, as regards access to the activities usually pursued under the professional title of architect, the same effect in their territory as those diplomas, certificates and other evidence of formal qualifications which they themselves award.
- 36 Article 10 of the directive extends mutual recognition to certain other qualifications which do not meet the requirements set out in Chapter II of the directive, including those specified in Articles 3 and 4.
- 37 It follows from Articles 2 and 10 of the directive that, when an activity is usually pursued by architects holding a qualification awarded by the host Member State, a migrant architect holding a diploma, certificate or other evidence of formal qualifications coming within the scope of the directive must also be able to pursue such an activity, even if his diploma, certificate or other evidence of formal qualifications is not necessarily substantively equivalent in terms of the training received.
- 38 While it is true, as the Spanish Government submits, that it is for the national legislation of the host Member State to define the field of activities covered by the profession of architect, once an activity is considered by a Member State as coming within that field, the requirement of mutual recognition means that migrant architects must also be able to pursue that activity.
- 39 As regards the Spanish Government's argument that the directive, in accordance with Article 1(2) thereof, covers only activities usually pursued under the professional title of architect, and that the activities covered by Article 10(2) of the Royal Decree do not form part of those usual activities, it is not disputed that

those activities are usually pursued by architects holding a qualification awarded by the Kingdom of Spain. Such activities therefore do come within the scope of the directive.

- 40 In any event, it follows from the seventh recital in the preamble to the directive that Article 1(2) thereof is not intended to provide a legal definition of activities falling within the architecture sector.
- 41 So far as application of Article 56 of the Treaty to the present situation is concerned, it should be borne in mind that that provision is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of free movement to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article (see to this effect, with reference to Article 36 of the EC Treaty (now, after amendment, Article 30 EC), Case 5/77 *Tedeschi v Denkavit* [1977] ECR 1555, paragraph 34).
- 42 Where Community directives provide for harmonisation of the measures necessary to ensure the protection of a specific objective, recourse to Article 56 of the Treaty is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonising directive (see to this effect, with reference to Article 36 of the EC Treaty, Case 251/78 *Denkavit Futtermittel v Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* [1979] ECR 3369, paragraph 14, Case 190/87 *Oberkreisdirektor des Kreises Borken and Another v Moormann* [1988] ECR 4689, paragraph 10, and Case C-112/97 *Commission v Italy* [1999] ECR I-1821, paragraph 54).
- 43 In this case, the directive provides for measures to be taken where there is no substantive equivalence between, on the one hand, the training received in the Member State of origin or from which the person concerned comes and, on the other, that provided in the host Member State.

- 44 According to Article 16(2) of the directive, if the academic title used in the Member State of origin, or in the Member State from which a foreign national comes, can be confused in the host Member State with a title requiring, in that State, additional education or training which the person concerned has not undergone, the host Member State may require such a person to use the title employed in the Member State of origin or the Member State from which he comes in a suitable form to be specified by the host Member State.
- 45 Consequently, it must be held that, by providing, in Article 10(2) of the Royal Decree, that persons holding qualifications in architecture awarded by another Member State and recognised under the directive may not pursue in Spain activities other than those which they are authorised to pursue in their country of origin on the basis of the qualifications awarded by the latter, unless they collaborate with another member of the profession who is authorised to pursue those activities and who holds a qualification which is likewise recognised under Spanish law, the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 10 of that directive.

Costs

- 46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by providing, in Article 10(2) of Real Decreto 1081/1989 of 28 August 1989, that persons holding qualifications in architecture awarded by another Member State and recognised under Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, may not pursue in Spain activities other than those which they are authorised to pursue in their country of origin on the basis of the qualifications awarded by the latter, unless they collaborate with another member of the profession who is authorised to pursue those activities and who holds a qualification which is likewise recognised under Spanish law, the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 10 of that directive;
2. Orders the Kingdom of Spain to pay the costs.

La Pergola

Edward

Jann

Delivered in open court in Luxembourg on 23 November 2000.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber