



## Reports of Cases

### JUDGMENT OF THE COURT (Ninth Chamber)

2 September 2021 \*

(Reference for a preliminary ruling – Freedom of establishment – Freedom to provide services – Recognition of professional qualifications – Directive 2005/36/EC – Article 5(2) – Automotive expert established in one Member State who moves to the territory of the host Member State in order to pursue, on a temporary and occasional basis, his profession – Refusal of the professional body of the host Member State, in which he was previously established, to enter him in the register of temporary and occasional service providers – Concept of ‘temporary and occasional provision of services’)

In Case C-502/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d’appel de Mons (Court of Appeal, Mons, Belgium), made by decision of 22 September 2020, received at the Court on 5 October 2020, in the proceedings

**TP**

v

**Institut des Experts en Automobiles,**

THE COURT (Ninth Chamber),

composed of N. Piçarra, President, M. Vilaras (Rapporteur), President of the Fourth Chamber, acting as Judge of the Ninth Chamber, and K. Jürimäe, Judge,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- TP, by V. Grévy, avocat,
- the Institut des Experts en Automobiles, by P. Botteman and R. Molders-Pierre, avocats,
- the Belgian Government, by L. Van den Broeck, M. Jacobs and C. Pochet, acting as Agents,

\* Language of the case: French.

- the Czech Government, by M. Smolek, J. Vlácil and T. Machovičová, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and H.S. Gijzen, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by É. Gippini Fournier and L. Armati, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 (OJ 2013 L 354, p. 132) ('Directive 2005/36').
- 2 The request has been made in proceedings between TP and the Institut des Experts en Automobiles (Institute of Automotive Experts; 'the IEA'), concerning TP's pursuit, in Belgium, of the profession of automotive expert.

### **Legal context**

#### ***EU law***

- 3 Recital 11 of Directive 2005/36 states, inter alia, that that directive is not intended to interfere with Member States' legitimate interest in preventing any of their citizens from evading enforcement of the national law relating to professions.
- 4 Article 3(1) of that directive provides:

'For the purposes of this Directive, the following definitions apply:

- (a) "regulated profession": a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession;
- (b) "professional qualifications": qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a)(i) and/or professional experience;

...'

- 5 Title II of that directive, entitled 'Free provision of services', comprises Articles 5 to 9 thereof. Article 5, entitled 'Principle of the free provision of services', provides:

'1. Without prejudice to specific provisions of [EU] law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State:

- (a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (hereinafter referred to as the Member State of establishment), and
- (b) where the service provider moves, if he has pursued that profession in one or several Member States for at least one year during the last 10 years preceding the provision of services when the profession is not regulated in the Member State of establishment. The condition of one year's pursuit shall not apply if the profession or the education and training leading to the profession is regulated.

2. The provisions of this title shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1.

The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.

3. Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.'

- 6 Article 6 of that directive, entitled 'Exemptions', provides, in point (a) of the first paragraph thereof:

'Pursuant to Article 5(1), the host Member State shall exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to:

- (a) authorisation by, registration with or membership of a professional organisation or body. In order to facilitate the application of disciplinary provisions in force on their territory according to Article 5(3), Member States may provide either for automatic temporary registration with or for pro forma membership of such a professional organisation or body, provided that such registration or membership does not delay or complicate in any way the provision of services and does not entail any additional costs for the service provider. ...'

- 7 Under Article 7(1) of Directive 2005/36, Member States may require that, where the service provider first moves from one Member State to another in order to provide services, he or she is to inform in advance the competent authority in the host Member State. Such declaration is to be renewed once a year if the service provider intends to provide temporary or occasional services in that Member State during that year.

### ***Belgian law***

#### *The Law of 15 May 2007*

- 8 In Belgium, the status and rights and obligations of automotive experts are the subject of the loi du 15 mai 2007 relative à la reconnaissance et à la protection de la profession d'expert en automobiles et créant un Institut des experts en automobiles (Law of 15 May 2007 on the recognition and protection of the profession of automotive expert and establishing an Institute of Automotive Experts) (*Moniteur belge* of 2 June 2007, p. 28087), as amended by the Law of 6 October 2011 (*Moniteur belge* of 10 November 2011, p. 67853) ('the Law of 15 May 2007').
- 9 Under Article 5(1)(2)(b) of the Law of 15 May 2007, the status of full member of the IEA is to be granted to any natural person who wishes to become established in Belgium as an automotive expert and so requests, in so far as he or she provides an attestation of competence or evidence of formal qualifications issued by a Member State of the European Union. Article 5(1)(6) of that law adds that the person concerned must be entered on the list of full members of the IEA.
- 10 Article 6 of that law provides:
- 'Where, in the context of the freedom to provide services, nationals of Member States of the European Union ... first move to the territory of Belgium in order to pursue, on a temporary and occasional basis, the profession of automotive expert, they shall inform the competent chamber of the Council of the [IEA] in advance by means of a written declaration, made in accordance with Article 9(1) of the Law of 12 February 2008 establishing a ... general framework for the recognition of [EU] professional qualifications. ...'

#### *The Law of 12 February 2008*

- 11 Directive 2005/36 was transposed into Belgian law by the loi du 12 février 2008 instaurant un cadre général pour la reconnaissance des qualifications professionnelles UE (Law of 12 February 2008 establishing a general framework for the recognition of EU professional qualifications) (*Moniteur belge* of 2 April 2008, p. 17886; 'the Law of 12 February 2008').
- 12 Title II of that law, entitled 'Free provision of services', comprises Articles 6 to 11 thereof. Article 6 of that law provides:
- 'The provisions of this title shall only apply where the service provider moves to the territory of Belgium to pursue, on a temporary and occasional basis, the profession referred to in Article 7(1).
- The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.'

- 13 Article 9 of that law makes provision for the declaration to be made in advance, in accordance with Article 7 of Directive 2005/36.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 14 TP pursued the profession of automotive expert in Belgium for many years. Since 28 January 2014, he has been resident in the territory of the Grand Duchy of Luxembourg and pursuing the same profession there.
- 15 The referring court states that it is apparent from the information produced by TP that, although, since that date, he has carried out some assignments in Belgium, most of his professional activity currently takes place outside Belgian territory, so that the professional activity which he pursues in Belgium may be classified as ‘on a secondary basis’.
- 16 In September 2015, the IEA invited TP to register on the list of full members of the IEA in order to put in order his situation in Belgium.
- 17 TP refused to make such a request and, since, according to his statements, he provides some expert opinions in Belgium, he requested that he be entered in the list of automotive experts on an occasional and temporary basis, provided for in Article 9 of the Law of 12 February 2008.
- 18 The IEA considers that, by pursuing the profession of an automotive expert in Belgium without being a member of the IEA, TP is pursuing irregular and unfair activity. It therefore brought proceedings against TP before the tribunal de commerce du Hainaut (Commercial Court, Hainaut, Belgium), seeking an injunction preventing him from using the title of automotive expert and pursuing that profession in Belgium.
- 19 TP, for his part, asked the same court, by way of counterclaim, to order that he be entered in the list of automotive experts on a temporary and occasional basis, pursuant to Article 6 of the Law of 15 May 2007.
- 20 By judgment of 29 November 2017, the tribunal de commerce du Hainaut (Commercial Court, Hainaut) upheld the IEA’s action and dismissed TP’s counterclaim. On 15 February 2018, TP lodged an appeal against that judgment with the referring court.
- 21 By judgment of 3 December 2019, the referring court declared TP’s appeal admissible and held, on the basis of the documents produced by him, that he has an establishment in Luxembourg, for the purposes of Articles 16 to 19 of Directive 2005/36.
- 22 The referring court states, however, that it has doubts as to the compatibility with EU law of the interpretation of the words ‘temporary and occasional’ in Article 6 of the Law of 15 May 2007, as argued by the IEA, according to which the previous pursuit, in one Member State, of a continuous and regular activity would preclude recognition of the temporary and occasional nature of the pursuit of the same activity in that Member State, following the establishment of the person concerned in another Member State. The referring court states that TP is pursuing an activity which he carried out in Belgium for more than 25 years.

- 23 In addition, that court considers that the temporary nature of the provision of services must be assessed not only in relation to the duration of that provision but also to its regularity, frequency and continuity. It infers from this that a certain degree of recurrence does not, in principle, preclude recognition of the temporary nature of an activity. Moreover, the temporary nature of a provision of services does not preclude the possibility for the person concerned to equip him or herself with some form of infrastructure, such as an office, in the Member State in which he or she provides services.
- 24 The cour d'appel de Mons (Court of Appeal, Mons, Belgium) therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Can the provisions of Article 5[(1)(2)](b) and Article 6 of [the Law of 15 May 2007], read in conjunction with the provisions of [the Law of 12 February 2008], in particular Articles 6, 8 and 9 thereof, be interpreted as meaning that a service provider who changes his or her place of establishment to another Member State cannot, after that change, be entered, in his or her country of origin (in this instance, Belgium), in the IEA's register of temporary and occasional service providers with a view to pursuing temporary and occasional activity in that country? Is such an interpretation compatible with the freedom of establishment granted under EU law?
- (2) Are the provisions of Article 5[(1)(2)](b) and Article 6 of [the Law of 15 May 2007], read in conjunction with the provisions of [the Law of 12 February 2008], in particular Articles 6, 8 and 9 thereof, interpreted as meaning that the concept of temporary and occasional activity precludes the possibility for a service provider established in one Member State to provide services in another Member State if those services are to a degree recurrent, without being regular, or to possess some forms of infrastructure in that other Member State, compatible with the ... provisions of [Directive 2005/36]?'

### **Consideration of the questions referred**

- 25 As a preliminary point, it must be recalled that, although it is true that, on a literal reading of the referring court's questions, the Court is being asked to rule on the compatibility of a provision of national law with EU law, there is nothing to prevent the Court from giving an answer that will be of use to the national court, by providing the latter with guidance as to the interpretation of EU law which will enable that court to rule itself on the interpretation of national law and their compatibility with EU law (see, to that effect, judgment of 30 April 2020, *CTT – Correios de Portugal*, C-661/18, EU:C:2020:335, paragraph 29 and the case-law cited).
- 26 As regards the dispute in the main proceedings, it is apparent from the request for a preliminary ruling that TP is legally established in Luxembourg and is pursuing the profession of automotive expert there. Furthermore, the referring court refers to 'assignments' carried out by TP in several Member States, inter alia in the territory of the Kingdom of Belgium, which implies that he physically moves to that Member State in order to pursue his profession there.
- 27 It follows, first, that such a provision of services is covered by Article 5 of Directive 2005/36, paragraph 1(a) of which sets out the principle that Member States may not restrict, for any reason relating to professional qualifications, the free provision of services if the service provider is legally established in another Member State for the purpose of pursuing the same profession there. In that regard, paragraph 2 of that article states that the provisions of Title II of Directive

2005/36 are to apply only where the service provider moves to the territory of the host Member State, within the meaning of that provision, to pursue his or her profession on a temporary and occasional basis.

- 28 Second, since the circumstances of the case in the main proceedings fall within the scope of Title II of Directive 2005/36, which contains Article 5 thereof, Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) does not apply, contrary to what the Netherlands Government asserted in its written observations submitted to the Court. Under Article 17(6) of that directive, Article 16 thereof is not to apply to matters covered by Title II of Directive 2005/36, or to requirements in the Member State where the service is provided which reserve an activity to a particular profession (judgment of 17 December 2015, *X-Steuerberatungsgesellschaft*, C-342/14, EU:C:2015:827, paragraph 36).
- 29 In the light of those clarifications, it should be understood that, by its questions, which must be examined together, the referring court asks, in essence, whether Article 5(2) of Directive 2005/36 must be interpreted as precluding legislation of the host Member State, within the meaning of that provision, which, as interpreted by the competent authorities of that Member State, does not allow a professional established in another Member State to pursue, on a temporary and occasional basis, his or her profession in the territory of the host Member State, on the grounds that that professional has had, in the past, an establishment in that Member State, the services that he or she provides are to a certain degree recurrent or he or she has equipped him or herself, in that Member State, with infrastructure, such as an office.
- 30 In order to answer those questions, it is necessary to interpret Article 5(2) of Directive 2005/36 and, more specifically, the concept of pursuit ‘on a temporary and occasional basis’ of a profession in the host Member State, which is referred to in that provision, in the light of the Court’s case-law on the freedom to provide services enshrined in Article 56 TFEU.
- 31 In that regard, the Court has previously held that the scope of the freedom to provide services must be distinguished from the scope of the freedom of establishment. To that end, it is necessary to establish whether or not the economic operator is established in the Member State in which it offers the services in question. Where that operator is established in the Member State in which it offers the service, it falls within the scope of the principle of freedom of establishment, as defined in Article 49 TFEU. On the other hand, where the economic operator is not established in the Member State of destination, it is a cross-border service provider covered by the principle of freedom to provide services (judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 34 and the case-law cited).
- 32 The concept of ‘establishment’ within the meaning of the FEU Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that Member State and the pursuit of genuine economic activity there (judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 35 and the case-law cited).

- 33 It should also be noted that a person may be established, within the meaning of the provisions of the FEU Treaty on freedom of establishment, in more than one Member State, in particular by establishing a second professional base (judgment of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 24 and the case-law cited).
- 34 In contrast, where the provider of services moves to a Member State other than the Member State in which it is established, the provisions of the Treaty chapter on services, in particular the third paragraph of Article 57 TFEU, envisage that he or she is to pursue his or her activity there on a temporary basis (judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 36 and the case-law cited).
- 35 According to the case-law of the Court, ‘services’ within the meaning of the FEU Treaty may cover services varying widely in nature, including services which an economic operator established in one Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States. No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the FEU Treaty (see, to that effect, judgments of 11 December 2003, *Schnitzer*, C-215/01, EU:C:2003:662, paragraphs 30 and 31, and of 10 May 2012, *Duomo Gpa and Others*, C-357/10 to C-359/10, EU:C:2012:283, paragraph 32).
- 36 Furthermore, the Court has held that the fact that the provision of services is temporary does not mean that the provider of services may not equip him or herself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question (judgment of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 27).
- 37 It is in the light of those considerations that it is appropriate to answer the questions referred.
- 38 In the first place, in a situation in which a professional established in one Member State moves to the territory of the host Member State, in which he or she has had, in the past, an establishment, in order to pursue his or her profession there only on a temporary and occasional basis, the competent authorities of that Member State are entitled, as is confirmed by recital 11 of Directive 2005/36, to verify the veracity of the statements of that professional in order to ensure that he or she is not attempting to evade enforcement of the national law relating to professions.
- 39 Furthermore, in such a situation, it does not follow either from Articles 56 and 57 TFEU or from Article 5(2) of Directive 2005/36, or from the case-law of the Court cited in paragraphs 31 to 36 of the present judgment, that the mere fact that a professional has had, in the past, an establishment in the host Member State may prevent him or her, in the exercise of the freedom to provide services, from pursuing his or her profession in that host Member State by moving there from the Member State in which he or she is currently established.
- 40 In the second place, it is apparent from the case-law cited in paragraph 35 of the present judgment that the fact that the services provided in the host Member State by a professional established in another Member State are to a certain degree recurrent does not preclude them from being classified as services provided ‘on a temporary and occasional basis’, within the meaning of Article 5(2) of Directive 2005/36, in the host Member State.



- 41 In the third place, it is apparent from the case-law cited in paragraph 36 of the present judgment that the fact that, in that situation, a professional has equipped him or herself, in the host Member State, with some form of infrastructure, such as an office, does not, as such, preclude such a classification of the services which he or she provides in the host Member State.
- 42 Lastly, it must be recalled that, under point (a) of the first paragraph of Article 6 of Directive 2005/36, service providers established in another Member State, referred to in Article 5 of that directive, are to be exempt from the requirements placed on professionals established in the territory of the host Member State, relating, *inter alia*, to the authorisation by, registration with or membership of a professional organisation or body; that Member State may provide only for automatic temporary registration with or *pro forma* membership of a professional organisation or body, in order to facilitate the application of disciplinary provisions, in accordance with Article 5(3) of that directive, and provided that, *inter alia*, they do not delay or complicate in any way the provision of services.
- 43 In the light of all the foregoing considerations, the answer to the questions referred is that Article 5(2) of Directive 2005/36 must be interpreted as precluding legislation of the host Member State, within the meaning of that provision, which, as interpreted by the competent authorities of that Member State, does not allow a professional established in another Member State to pursue, on a temporary and occasional basis, his or her profession in the territory of the host Member State, on the grounds that that professional has had, in the past, an establishment in that Member State, that the services that he or she provides are to a certain degree recurrent or that he or she has equipped him or herself, in that Member State, with infrastructure, such as an office.

### Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

**Article 5(2) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013, must be interpreted as precluding legislation of the host Member State, within the meaning of that provision, which, as interpreted by the competent authorities of that Member State, does not allow a professional established in another Member State to pursue, on a temporary and occasional basis, his or her profession in the territory of the host Member State, on the grounds that that professional has had, in the past, an establishment in that Member State, that the services that he or she provides are to a certain degree recurrent or that he or she has equipped him or herself, in that Member State, with infrastructure, such as an office.**

[Signatures]