FEE PAPER ON "INTERNAL MARKET FOR SERVICES AND THE ACCOUNTANCY PROFESSION: QUALIFICATIONS AND RECOGNITION"

November 2007

PREFACE

Recognition of professional qualifications delivered in another EU Member State is indeed essential to establish an internal market for professional services.

FEE published in March 1999 a discussion paper on Liberalisation of the Accountancy Profession in Europe based on the general system in the Directive 89/48. The EU framework for recognition of professional qualification evolved substantially in the past years, in particular due to the approval of the new Directive of 7 September 2005 on the recognition of professional qualifications and the Directive of 17 May 2006 on statutory audit. Therefore it was important to assess whether previously agreed solutions are still valid.

FEE believes that an EU internal market for accountancy services is necessary because accountants deliver services to companies which operate more and more on the enlarged EU internal market. Professionals and firms need clear regulation allowing them to work without unjustifiable discriminatory barriers.

The paper prepared by the FEE Liberalisation-Qualification Working Party chaired by Vice-President André Kilesse provides an excellent analysis of the application of EU rules in the Accountancy sector. A series of questions, sometimes very important ones, remain open. Nevertheless on many aspects, the paper is a useful reference to be used by professional institutes of accountants and competent authorities in the Member States.

We trust that the paper is a valid contribution to a harmonious implementation of the mechanisms developed in three recently approved Directives which substantially reshaped the professional framework of the accounting profession in Europe.

Jacques Potdevin
President of FEE

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EXECUTIVE SUMMARY

This paper provides an overview of the application to the accountancy profession of new EU legislation adopted since 2000 relating to freedom of movement, and specifically the recognition of qualifications and related matters. It examines the inter-relationship between the relevant EU Directives (Directives on Recognition of Professional Qualifications, Services and Statutory Audit) and the manner in which they modify existing recognition regimes at EU level.

The paper highlights the specific provisions relevant to the profession both in the statutory audit sphere and in the broad range of other activities undertaken by the profession and in doing so emphasises the different arrangements for these two spheres. Overall, the main objective of the paper is to clarify, to extent possible, for FEE Member Bodies and other interested parties FEE's view on how the new legislation should operate in practice.

The paper is written in the knowledge that the process of transposing the new legislation at Member State level is already underway, and with regard to the Directive on Recognition of Professional Qualifications it ought to be nearing completion. As identified in the report, the interpretation and implementation of the legislation can be complex, on account of the wide range of activities undertaken by professional accountants across EU Member States, variations in Member State rules regarding the possible parallel pursuit of different activities by an individual member of the profession or firm and the existence of different regulatory approaches and market access rules at Member State level in relation to the provision of services other than statutory audit.

An important development in EU legislation highlighted in this paper refers to the new rules adopted to facilitate the cross border provision of services.

In addition to overviews of the specific Directives of interest, the paper includes some illustrative guidance on possible examples of recognition and freedom of movement cases across Member States and areas of the profession's activity.

In a number of instances, however, the report also highlights important pending questions where there is a need for further legal clarification on the interaction between or content of the EU Directives or on the scope for Member State implementation. Among the most important pending questions are issues such as the practical interpretation of temporary and occasional service provision, the scope of aptitude tests for statutory auditors and the requirement to have a stable infrastructure in cases of establishment.

INTRODUCTION

The 1957 Treaty of Rome established the principles of freedom of establishment and freedom to provide services which constitute the basis for the European Union's pursuit of a European internal market for services. It took three decades before the European Community sought to implement these principles in legislation. The goal of a European internal market for services became a major political priority following the publication of the European Commission's 2000 report on "The State of the Internal Market for Services" [(1)] which referred to a huge gap between the vision of an integrated European Union economy and the reality as experienced by European citizens and service providers. A concerted political effort followed to review and improve existing EU legislation concerning freedom of establishment relating to individual members of a profession and to extend legislation beyond this in order to create a veritable European internal market for the modern service economy and thereby both individual service providers and companies. A key focus in this drive has been on the freedom to provide services, that is to say the freedom to provide services on a temporary basis across borders into Member States other than the one(s) in which the provider is established.

The pursuit of an internal market in services is complex and policy making within this framework in relation to the professions is especially so. This is because the European Union has necessarily had to chart a course between, on the one hand, the right of Member States to maintain national education systems and to apply regulatory requirements to undertake a given profession – the diversity of which testifies to and preserves national identity – and, on the other hand, the right conferred upon every European citizen to exercise his or her profession throughout the Union [(2)].

This paper deals with the qualification and recognition aspects of new EU legislation adopted since the 2000 European Commission report addressing the manner in which it translates the fundamental freedoms of the Treaty into legislative provisions impacting directly on the accountancy profession. Where directly relevant, the paper discusses other matters related to qualification and recognition aspects. The paper refers to the antecedent EU Directives, related rulings of the European Court of Justice and the central principles underpinning the internal market as they are set out in the Treaty, in order to provide the historical and legal background.

The new EU legislative measures of primary interest in this paper are the Directive on Recognition of Professional Qualifications (RPQ), the Directive on Services in the Internal Market (Services Directive) and the Directive on Statutory Audit. The latter – of major interest to the profession due to its importance and comprehensive scope – was pursued separately from the drive to establish an internal market for services but also includes some of the principal concepts.

References in this paper to the Services Directive are limited to the inter-relationship between this Directive and the above cited Directives, with a view to clarifying questions pertaining to qualification requirements and recognition. It is anticipated that FEE could at a later stage prepare a broader analysis of the impact of the Services Directive on the accountancy profession. This paper also briefly summarises the scope of the E-Commerce Directive of 2000, again solely from the perspective of clarifying qualification and recognition matters.

(1) COM(2002) 441

(2) European Commission "Report to the European Parliament and the Council on the state of application of the general system for the recognition of higher education diplomas" Brussels, 15.02.1996 COM(96) 46 p.2

Overall, the main objective of the paper is to provide clarity to FEE Member Bodies, regulators and other interested parties as to the interpretation and practical implementation of the legal provisions in the qualifications and recognition spheres as they impact on the profession. The paper has been prepared in the knowledge that these legal provisions have been formally adopted at European Union level and are therefore in the process of transposition at national level. The paper deals both with the qualification and recognition rights conferred by EU legislation in relation to freedom of movement and of service provision and also the concomitant obligations and regulations.

The paper is designed to provide both a comprehensive overview of the key underlying legal principles and definitions such as freedom of establishment, freedom to provide services and compensation mechanisms when applied to professional activities, as well as illustrative guidance on complex implementation issues. The clarification of central principles and definitions is pursued through specific legal texts (Treaties, Directives and rulings of the European Court of Justice) while implementation issues are addressed both through descriptive analysis and the use of practical case studies.

It is important to emphasise that all such clarifications in this document represent the views of FEE, developed with a view to providing background guidance to assist the understanding of the impact of European Union legislation on the profession in the specific areas covered by this paper. It is not intended that the information in this paper, and in particular FEE views, will be used as a basis for legal actions by any interested party.

The complexity of the implementation issues in relation to the accountancy profession is perhaps greater than that for comparable professions. This additional complexity arises for three key reasons: firstly, the very wide range of activities undertaken by professional accountants across EU Member States; secondly, variations in Member States' rules regarding the pursuit of different activities by an individual member of the profession or firm; thirdly, the existence of different regulatory approaches and market access rules at Member State level in relation to the provision of non-statutory audit services.

These areas are considered in detail by recent FEE studies which can usefully be read in conjunction with this paper. Specifically, the FEE studies are: *Admission to the Profession of Accountant and Auditor - A Comparative Study* (December 2002) and *Provision of Accountancy, Audit and Related Services in Europe - A Survey on Market Access Rules* (December 2005). In addition, the FEE paper of March 1999 on *Liberalisation of the Accountancy Profession in Europe* sets out the basis of FEE's existing views on freedom of movement as it relates to the profession.

It is recognised that, historically, the number of individual migrant professional accountants who have made use of the legal provisions promoting freedom of establishment has been somewhat limited. However, it is incumbent upon FEE Member Bodies to ensure that professional accountants are fully informed and therefore in a position to make the best use of the new legal provisions creating new opportunities across the EU internal market, particularly where freedom to provide services is concerned, as awareness of the relevant legal provisions is likely to be lower. At the same time, FEE Member Bodies will also be concerned to ensure that there is adequate clarity with regard to the obligations and responsibilities of all service providers, in respect of the public interest. It is with both these contexts in mind that the current paper has been prepared.

STRUCTURE OF THE PAPER

The European Union's regulatory framework has evolved from the founding Treaty [3], rulings of the European Court of Justice and specific EU legislation which can be either sectoral or horizontal in nature. The provisions of the Treaty established fundamental concepts which have subsequently been clarified in many cases through the European Court of Justice rulings and thereafter incorporated into EU legislation.

Section I of this paper deals with the key principles of relevance to the accountancy profession as they have evolved from the founding Treaty and into legislation, with appropriate reference to the European Court of Justice. Throughout Section I, the broad remits and inter-relationships of the individual texts of binding EU legislation are set out, given their impact on the accountancy profession.

Sections II and III of the paper examine from a more practical perspective the implementation of the principles of the legislation in relation to specific activities and cases within the profession. Section II focuses on questions relating to establishment. Section III deals with questions related to the provision of services.

Section IV draws provisional conclusions from the legal and practical analysis of the EU legislation and summarises pending questions where further legal guidance is required.

For the ease of reader, a list of the Official (legal) texts cited during the course of the paper is produced at the outset.

[3] Treaty establishing the European Community (consolidated text) *Official Journal C 325 of 24 December 2002*

OFFICIAL TEXTS MENTIONED IN THE REPORT

- Treaty establishing the European Community, in particular Art. 43 to 50 (consolidated text - *Official Journal C 325 of 24 December 2002)*. Henceforth "the Treaty".

- Council Directive 89/48/EEC/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (*Official Journal L 19 of 24 January 1989)*. Henceforth "Directive 89/48/EEC/EEC".

- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Official Journal L.178 of 17 July 2000)*. Henceforth "Electronic Commerce Directive".

- Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005, on the recognition of professional qualifications (*Official Journal L.255 30 September 2005)*. Henceforth "RPQ Directive".

- Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts, and amending Council Directives 78/660/EEC and 83/349/EEC, and, repealing Council Directive 84/253/EEC (*Official Journal L.157 of 9 June 2006)*. Henceforth "Statutory Audit Directive".

- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (*Official Journal L.376 of 27 December 2006)*. Henceforth "Services Directive".

I. OVERVIEW OF REGULATORY FRAMEWORK

1. Some Essential Concepts and Legal Definitions

1.1. Concept of Services

1. For the purpose of this study, the concept of services is defined in accordance with Community law and in particular with reference to Article 50 of the Treaty establishing the European Community [(4)]: The article also expressly states that *activities of the professions* fall within the definition of services (see § 10-14).

> **Article 50, EU Treaty**
>
> *Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*
>
> *'Services' shall in particular include: (…) (d) activities of the professions.*

2. The European Court of Justice has interpreted this provision of the Treaty in a number of Judgments [(5)] which highlight that a service is a self-employed economic activity normally provided for consideration [(6)]. This has important implications in relation to employees: national employment law is not affected by EU legal provisions dealing with freedom of establishment and freedom to provide services.

3. It is important to clarify that each specific EU legislative initiative (for example Directives) relating to services defines its precise scope of application within the general concept of "services" as laid down in the Treaty. The Treaty does not set out exceptions for certain kinds of economic activities on the basis that they are, for example, services of general interest. Exceptions in the application of Community law can, however, be set out in the scope of the specific legislation, subject to consistency with the principles of the Treaty.

1.2. Freedom of establishment and freedom to provide services within the EU

4. Of direct relevance to the discussion of free movement, the Treaty addresses the concepts of freedom of establishment and freedom to provide services. Specifically, these concepts are based on the elimination of restrictions to, in the first case, the freedom of establishment of nationals of a Member State in another Member State and, in the second case, of restrictions to the freedom to provide services within the EU without establishment in the Member State where the services are delivered.

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(4) Previously Article 60 of the Treaty of Rome

(5) See in particular Joined Cases C-286/82 and 26/83 Luisi & Carbone [1984] ECR 377 §9 and Case C-159/90 Grogan [1991] ECR I-4685 §17. A extensive review of jurisprudence can be found in the "Guide to the case law of the European Court of Justice on Articles 49 et seq. EC Treaty – Freedom to provide services" published by the European Commission in 2001 and available on the website of the EC http://ec.europa.eu/internal_market/services/principles_en.htm

(6) Definition given in the Directive on Services in the Internal Market – Art.4 (1)

5. Article 43 and 49 of the Treaty define these principles [7]:

> **Article 43, EU Treaty**
>
> *Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.*
>
> **Article 49, EU Treaty**
>
> *Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.*
>
> *The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a Third Country who provide services and who are established within the Community.*

6. The concept of establishment normally requires a stable infrastructure from where the business of providing services is actually carried out for an indefinite period, as confirmed in Article 4.5. of Directive 2006/123/EC on Services [8]. The characteristics of the provision of services has been the subject of cumulative clarifications by the European Court of Justice (ECJ) resulting in a definition based around the temporary and occasional nature of the provision of services.

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(7) In this paper the expression "free provision of services" must be understood in the technical meaning used in article 49 of the EU Treaty and interpreted by several judgements of the ECJ. Consequently, it is assumed that a free provision of services is made by a service provider who has no establishment in the Member State where the service is provided.

(8) This Article of the Services Directive is in line with the ECJ judgment of 20 May 1992 - Claus Ramrath v Ministre de la Justice, and l'Institut des réviseurs d'entreprises (C-106/91 ECR [1992] I-03351). The European Court of Justice stated that "Articles 48 and 59 of the Treaty do not preclude a Member State from making practice as an auditor within its territory by a person who is already authorized to practise as an auditor in another Member State subject to conditions which are objectively necessary for ensuring compliance with the rules of professional practice and which relate to a permanent infrastructure for carrying out work, actual presence in that Member State and supervision of compliance with the rules of professional conduct, unless compliance with such rules and conditions is already ensured through an auditor, whether a natural or legal person, who is established and authorized in that State' s territory and in whose service the person who intends to practise as an auditor is employed for the duration of the work."

7. The Gebhard case [9] is a landmark ruling for distinguishing between establishment and provision of services. In this case, the Court ruled that a national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State falls under the provisions relating to the right of establishment and not those relating to provision of services.

In the Gebhard case the Court added: "the temporary nature of the activities in question 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. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself 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".

8. This argument was further developed in a 2001 enforcement case pursued by the European Commission which clarified that the decisive criterion for the purposes of the application of the chapter of the Treaty concerning provision of services to an economic activity is the absence of stable and continuous participation by the person concerned in the economic life of the host Member State [10].

Confirming previous interpretations, in the Schnitzer case of 2005 the Court ruled that: "The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, cannot be sufficient for it to be regarded as established in the second Member State [11]".

9. In addition to distinguishing between establishment and provision of services, the Court has also recognised through the Ramrath (see footnote 8) case that, in view of the special nature of certain activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the Treaty, when justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question. Since the issue in this case related to the specific situation of a statutory auditor, the Court judged, "Requirements relating to the existence of infrastructure within the national territory and the auditor's actual presence appear to be justified in order to safeguard that interest" (§ 35). This ruling underpins the specific references in the Statutory Audit Directive and Services Directive confirming that statutory audit is not subject to provision of services regimes (see § 60 and 62-65).

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(9) Judgment of 30 November 1995 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, C-55/94, ECR [1995] I-04165

(10) Case C-131/01 Commission v Italy [2001], ECR I-1659)

(11) Case C-215/01, Schnitzer [2003] ECR I-14847

1.3. Regulated profession

10. The definition of a regulated profession is crucial to the application of Community legislation where free movement is concerned. As dealt with in the following section, the RPQ Directive provides the most pertinent and direct legal reference (see §20-52). This definition has evolved from a ruling of the European Court of Justice in 1994 which stated "that a profession cannot be described as regulated when there are in the host Member State no laws, regulations or administrative provisions governing the taking up or pursuit of that profession or of one of its modes of pursuit, even though the only education and training leading to it consists of at least four and a half years of higher-education studies on completion of which a diploma is awarded and, consequently, only persons possessing that higher-education diploma as a rule seek employment in, and pursue, that profession [(12)]".

11. It is important to recognise the distinction between a regulated profession and a regulated activity as well as the fact that the two can combine. If an activity is reserved to professionals who are members of a professional body by virtue of law, regulation or administrative provision, they are members of a regulated profession. If the professional title is reserved by legislation, regulation or administrative provision to the members of a professional body, they are members of a regulated profession. In the latter scenario, a member of the profession may undertake un-regulated as well as regulated activities. In contrast, if a professional body is not organised by law, does not benefit from a legal or administrative protection for its professional title and does not carry out reserved activities, members of such professional body are not members of a regulated profession.

12. Some activities carried out by accountants can be considered business services. When the service provider is a member of a regulated profession, he is subject to professional rules of ethics, professional conduct and due care, which might be different from what is expected from other market participants. Therefore, FEE considers that regulated professions cannot be fully assimilated to business services.

13. However, as is analysed in detail in subsequent parts of this study, the EU legislator has established an approach for dealing with the uneven allocation across different Member States of regulated status to a given profession, which in practical terms can also be referred to specific activities undertaken by professions. With the aim of facilitating the exercise of the freedom of movement, this approach affords some recognition to formal qualifications and practical experience acquired and held outside the framework of a regulated profession but also includes some safeguards to protect the public interest (see § 16-19).

14. It is also appropriate to refer to the legal acknowledgement – in Annex 1 of the RPQ Directive – of the particular status of regulated professions which the EU legislator affords to professional bodies in the United Kingdom and the Republic of Ireland (including the relevant FEE Member Bodies from both countries). This acknowledgement is also made in light of the particular market access rules of the United Kingdom and the Republic of Ireland for the particular professions involved.

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(12) ECJ Judgment of the Court of 1 February 1996, Georgios Aranitis v Land Berlin, Case C-164/94. ECR [1996] I-00135

1.4. Liberal profession

15. During the adoption process of the RPQ Directive (considered in detail in the following section) considerable discussion emerged over the characteristics of a liberal profession. The key definition is to be found in preamble 43 of the RPQ Directive which serves to distinguish between a liberal profession involving "intellectual and conceptual services in the interests of the client and the public," and other professions which could involve, for example, craftsmanship.

However, it is important to underline that the definition is not accompanied by any separate or specific legal treatment.

In this regard, Preamble 43 of the RPQ Directive states: "To the extent that they are regulated, this Directive includes also the liberal professions, which are, according to this Directive, those practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interests of the client and the public".

Article 2 also confirms the application of the RPQ with regard to the liberal professions.

1.5. Education requirements and mutual recognition

16. The Treaty confirms the right of Member States to set their own education requirements, both in relation to the professions and to education more broadly.

The relationship between the exercise of these rights and the rights of freedom of establishment and freedom of provision of services is based on equivalence and mutual recognition. This was clarified in a ECJ ruling in 1977 confirming that Member State might not require an applicant seeking to exercise freedom of movement to have a national diploma prescribed by the legislation of the host Member State [(13)].

17. In effect, the key principle on which the community operates is that of allowing a migrant professional to gain access in a host Member State to the same profession as that for which he is qualified in his home Member State.

18. The Treaty is also interpreted as requiring a Member State, to which an application for admission to a regulated profession is made, to examine the extent to which the knowledge and qualifications obtained by the applicant in his country of origin correspond to those required in the jurisdiction in which the application is made. This was confirmed in an ECJ case in 1991, which clarified that a Member State has the right to examine to what extent the knowledge and qualifications obtained by the person concerned in his country of origin correspond to those required by the rules of the host Member State. If those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking.

(13) ECJ Judgment of 28 April 1977 in the Case 71/76 ECR [1977] p.00765

19. The ECJ provided further clarification regarding the mechanism of assessment in a 1992, stating:

"The authorities of a Member State, in response to a request for permission to practice that profession from a national of another Member State who holds a diploma or qualification relating to the pursuit of that profession in his State of origin, must assess the extent to which the knowledge and skills certified by the diplomas or professional qualifications obtained by the person concerned in his State of origin correspond to those required by the rules of the host State [(14)]".

The application of these rulings through legal provisions is dealt with in the subsequent sections.

2. Overview of Specific EU Legislative Provisions

2.1. The Recognition of Professional Qualifications Directive and replacement of the antecedent General System

a) Introduction

20. Directive (2005/36/EC) on the Recognition of Professional Qualifications (RPQ Directive) was adopted on 7 September 2005. Member States are required to transpose the Directive by 20 October 2007 at the latest.

The RPQ Directive represents the culmination of significant efforts over three decades to translate the freedom of establishment and freedom to provide services principles in the EU Treaty and ECJ rulings into practical legislative provisions for the professions. More specifically, the RPQ represents the completion of a process launched in 2002 in the European Commission to simplify and consolidate into one legal text, as far as possible, the system of existing Directives for the professions and also to introduce some modernised provisions [(15)].

For ease of reference for the accountancy profession, it can be said that the RPQ Directive replaces Directive 89/48/EEC which has hitherto regulated recognition for the profession, while statutory audit is now subject to a separate Directive which refers to the RPQ Directive concerning some procedural aspects (see § 20-24 and 56-59). (Where reference is made to Directive 89/48/EEC/EEC it is understood that this Directive will be repealed by the RPQ Directive once the latter has been transposed as stated in Article 62 of the RPQ Directive.)

(14) ECJ Judgment of 7 May 1992, Colegio Oficial de Agentes de la Propriedad Inmobiliaria v Borrell and others Case C-104/91, ECR [1992] I-03003; see also Judgment of 30 November 1995 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano , C-55/94, ECR [1995] I-04165.

(15) A number of professions lie outside this legislative exercise, notably lawyers.

Article 1 of the RPQ Directive sets out the main purpose of the Directive:

> **Article 1, RPQ Directive**
>
> *The Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of the profession.*

21. To assist interpretation of the impact on the profession, it can be helpful to distinguish between areas where the RPQ Directive consolidates (i.e. does not change) existing legal requirements and where RPQ Directive modernises and therefore changes legal requirements.

22. In relation to the freedom of establishment, there are no fundamental changes to the previous regime: the aim remains that of allowing a migrant professional to gain access in a host Member State to the same profession as that for which he is qualified in his home Member State. For this reason, a summary of the mechanisms established by the earlier legislation which have been incorporated into the new RPQ text have been set out in the paragraphs below dealing with the legal antecedents to the RPQ.

23. In relation to freedom to provide services, the RPQ Directive introduces some important elements (see § 40-42). They are also discussed from a detailed, practical implementation perspective in subsequent sections of this paper.

24. The RPQ Directive deals only with the situation of individuals and does not cover free movement of legal entities. It is also important to clarify that the freedom of movement of statutory auditors is now dealt with through a separate legislative instrument: the Statutory Audit Directive (see § 53-60).

b) RPQ: scope of application and relationship to other EU legislation

25. The RPQ Directive includes in Article 2.3 a provision to clarify legal certainty in relation to other Community legislation.

> **Article 2.3, RPQ Directive**
>
> *Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provisions of this Directive shall not apply.*

26. It should also be noted that the RPQ Directive applies only to EU nationals – and the provisions for recognition in relation to non-EU (Third Country) qualifications relate only to cases where these are held by EU nationals. As per Article 49 of the Treaty, the EU legislator must decide separately whether to extend across the EU rights afforded to EU nationals to Third Country nationals [(16)]. National legislators can decide to extend such rights in this way in their own jurisdictions, but application across the EU can only be decided at Community level.

c) RPQ Directive definition of regulated profession

27. The RPQ Directive maintains Member State responsibility to determine whether or not a professional activity should be regulated - i.e. made subject by law, regulation or administrative provision to the possession of a professional qualification - and if so, to decide what the level, structure and content of the education should be.

The right of Member States to lay down the minimum level of education is dealt with in Recital 11 while the definition of a regulated profession is set out in Article 3 of the Directive which is consistent with the ECJ ruling in 1996 (see § 10-14).

Recital 11, RPQ Directive

The Member State of establishment retains the right to lay down the minimum level of qualification to ensure the quality of the services provided on its territory.

Art.3.1a, RPQ Directive

'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.

28. The reference to 3.1a) above refers to the status of regulated professions afforded to professional bodies in the United Kingdom and the Republic of Ireland (including the relevant FEE Member Bodies) [(17)].

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(16) See applications in Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents and Directive 2004/38/EC of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending regulation (EEC) N°1612/68.

(17) These bodies not only award evidence of formal qualifications to their members, but ensure that their members respect the rules of professional conduct which they prescribe while also enjoying the right to use a title or designatory letters or to benefit from a status corresponding to those formal qualifications (Article 3.3 of the RPQ Directive).

d) Antecedents to the RPQ: freedom of establishment and the General System (including 89/48/EEC)

1° Overall comments

29. In the first phases of Community policy making in the sphere of freedom of movement in relation to the professions, the European Commission worked with individual professions to develop "sectoral" directives specific to each situation, defining the substantive and formal conditions which needed to be met to permit freedom of movement in terms of establishment from one Member State to another. The professions of architects, dental practitioners, pharmacists and midwives were among those which were subject to a sectoral directive [(18)].

However, as the accountancy profession was recognised as being far from being uniform in Member States given the wide range of activities undertaken by its constituent members, it was regarded as inappropriate for a sectoral directive for freedom of movement purposes.

Not least because of the situation of the accountancy profession, it was increasingly recognised at Community level that it was impractical to draft sectoral directives for all professions. A change of policy therefore ensued which resulted in the development of the so-called General System.

2° The General System and levels of qualifications

30. The General System consisted of a framework approach encompassing three separate, tiered directives based on duration of study criteria.

The framework was founded on the assumption that if an individual is qualified in one Member State to exercise a given profession, he should be entitled to exercise that same profession throughout the Community. This approach obliged a Member State to display mutual reliance in the education and training provided in other Member States, underpinned by reference to the duration of study criteria which had to correspond in order for free movement of the migrant professional through establishment to be permitted.

3° General System Directive 89/48/EEC of direct relevance to FEE Member Bodies

31. The most relevant of three General System Directives for FEE Member Bodies was Directive 89/48/EEC for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [(19)].

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(18) The legal profession was also subject to a separate directive to promote freedom of movement but this legislation lies outside the scope of this paper as it was not part of the consolidation leading to the RPQ Directive

(19) JO 24.01.1989 n° L 19, p. 16

This was the highest level of the General System Directives and into which the qualifications of FEE Member Bodies fell, both in relation to statutory audit and other services provided by the profession where they were regulated.

FEE welcomed this Directive as an example of an appropriate combination of liberalisation in terms of freedom of movement and the protection of the public interest [20].

4° Compensation mechanism in Directive 89/48/EEC

32. In relation to the public interest, and in keeping with the General System's principle of mutual reliance in education and training between Member States for the purposes of establishment, Directive 89/48/EEC recognised that significant differences could exist between education and training from one Member State to another for a profession, even within the same band of duration of study criteria. Notably, this could arise from national specificities and requirements (for the accountancy profession, this was pertinent in relation to tax and company law, for example).

33. For this reason, the Directive introduced provisions for the migrant to "compensate" for such differences through the completion of either an aptitude test or an adaptation period. Consequently, Member States were required to put in place structures providing for the case-by-case examination of requests for recognition, accompanied by the appropriate procedural guarantees dealing also with any necessary compensation requirements [21].

34. The 1999 FEE study *Liberalisation of the Accountancy Profession in Europe* argued that the aptitude test is the most efficient mechanism to enable applicant migrant professionals to obtain the host country qualification in the least onerous way possible.

FEE's position was confirmed in the 2002 paper *Admission to the Profession of Accountant and Auditor - A Comparative Study* which noted that the aptitude test is the form of compensation mechanism employed in all Member States, in relation to both statutory audit and other activities in the accountancy profession to ensure adequate knowledge of laws and regulations of the host Member State.

e) RPQ Directive: retention of General System aims and principles for establishment

35. As noted above (see § 22), the RPQ Directive did not fundamentally change the aims or the requirements in relation to establishment, although as mentioned in subsequent sections (see § 79-81), there are some small changes of a practical administrative nature.

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[20] FEE, "Liberalisation of the Accountancy Profession in Europe" March 1999, p.48

[21] See the above-mentioned report on the state of application of the general system, p.3.

36. The aims of the RPQ Directive in relation to establishment are set out in Article 4:

> **Article 4, RPQ Directive**
>
> *Effects of recognition*
>
> *1. The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals*
>
> *2. For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.*

f) RPQ Directive and retention of General System principle of mutual reliance, qualification levels and compensation mechanisms

37. In pursuing the recognition aims, the RPQ Directive has retained the fundamental principle of mutual reliance on education and training between Member States for the purposes of establishment, based as it is on reference levels defined by duration of study criteria.

The RPQ has introduced new definitions of the levels and an additional level of longer duration but, for the purposes of recognition in establishment cases, the Directive has carried forward the main principles and recognition arrangements of the General System Directives. The RPQ Directive specifies in Preamble 14 that there are no changes to the mechanism of recognition established by Directives 89/48/EEC and 92/51/EEC; as noted Directive 89/48/EEC is of reference to FEE Member Bodies.

38. The provisions permitting compensation measures have also been maintained in the RPQ Directive, including the provision of allowing the migrant the choice between an aptitude test and an adaptation period. However, there are a number of references in the RPQ Directive which would allow a Member State to derogate from giving applicants a choice, on the basis of an imperative requirement in the general interest.

More specifically, the RPQ Directive also refers to derogations for professions whose pursuit requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity. In such cases, Member States may stipulate whether an adaptation period or an aptitude test is the form of compensation to be applied.

39. FEE retains the view it expressed in 2002 regarding the benefits of the aptitude test, for all areas of the profession's activities (see § 34).

g) RPQ Directive: new provisions impacting on the profession

40. The process of adoption of the RPQ Directive was rendered more complex by the fact that the proposal for the new Directive did not merely simplify and consolidate the antecedent legislation but also introduced new elements. As detailed below (see § 41-52), these relate both to freedom of establishment and freedom to provide services.

41. In relation to freedom of establishment, the most discussed element is the recognition rights to be afforded to applicants from Member States which do not regulate the profession or activity (see § 44) who are seeking to establish in Member States which do exercise such regulation.

With regard to the freedom to provide services, the RPQ introduces a new regime for cross-border provision of services from one EU Member State to another which affords recognition rights permitting service provision from an unregulated Member State into a regulated Member State, as well as from one regulated Member State into another regulated Member State.

42. The RPQ also introduces some new requirements to facilitate mobility by migrants, including the establishment of Contact Points (see § 43).

h) RPQ Directive: Contact Points

43. Among a number of provisions to help migrants, the RPQ Directive (Article 57) includes the requirement for Member States to establish Contact Points in each Member State and a network of Contact Points with the responsibility of providing citizens with information and assistance.

The designation of a Contact Point by each Member State within this network does not affect the organisation of competencies at national level. In particular, it does not prevent the designation at national level of several offices, the Contact Point designated within the aforementioned network being in charge of coordinating with the other offices and informing the citizen, where necessary, of the details of the relevant competent office.

i) RPQ Directive: freedom of establishment – provisions for applicants from unregulated professions

44. As noted, the EU legislator recognises the diversity in regulatory approaches and market access rules across the Member States where the professions are concerned.

For this reason, and in order to achieve freedom of establishment (and also freedom to provide services – see § 51), the RPQ Directive includes provisions in Article 13 para. 2 which grant access to and pursuit of a profession to "applicants who have pursued the profession […] on a full-time basis for two years during the previous 10 years in another Member State which does not regulate that profession, providing they possess one or more attestation of competence or documents providing evidence of formal qualifications". As with applicants from a Member State which regulates the profession, a compensation mechanism could be applied.

j) RPQ Directive: Freedom of establishment – common platforms

45. In relation directly to the freedom of establishment (but also of broader potential consequence) Article 15 of the RPQ Directive introduced the concept of "common platforms".

This is defined as a set of criteria of professional qualifications which compensates for the substantial differences between Member States in training requirements for a given profession.

On the basis of such a common platform, the Directive foresees that the requirement for compensation in the case of a migrant professional seeking establishment would be waived.

46. It is important to emphasise, however, that the common platform is not a mandatory requirement and it is incumbent on the individual professions to consider potential feasibility.

47. FEE's view is that a common platform as defined in the Directive is currently not a feasible initiative for the accountancy profession, given the wide variation in scope of activities of professional accountants in Europe, as well as the differences in national company law and tax.

48. As a distinct initiative from the common platforms in the Directive, a number of FEE Member Bodies are working closely together in the Common Content Project, which seeks to unify, to the highest extent possible, the professional entry-level qualifications of the participating Institutes. The Project seeks to maximise the common elements of the professional qualifications while retaining national elements unique to each country.

k) RPQ Directive: freedom to provide services within the EU

49. As noted, the articles in the RPQ Directive dealing with the freedom to provide services attracted considerable attention during the EU adoption process.

The relevant articles in the Directive refer to and are consistent with earlier ECJ rulings with the consequence that Member States should allow such cross-border provision of services into their jurisdiction where the service provider is legally established in another Member State for the purpose of pursuing the same profession there.

50. The Directive stipulates (Article 5.2) that the provision of services must be on a temporary and occasional basis, and this is in line with the concept laid down in the Treaty and clarified by the European Court of Justice.

51. For FEE Member Bodies there are a number of important elements in these new provisions, although their precise impact will differ from Member State to Member State given the different regulatory approaches and market access rules in relation to the profession's activities. In some cases, however, the provisions will require changes to established practices.

The new provisions include the following:

1° The free provision of services will not be dependent upon the completion of an aptitude test, which will however continue to be required in relation to (permanent) establishment (Article 5.2, RPQ Directive).

2° The free provision of services into a Member State which regulates the profession will be permitted in relation both to an individual who is established in a Member State which regulates the profession and to an individual who is established in a Member State which does not regulate the profession, on the condition that the individual has practised that profession for two out of the preceding 10 years (Article 5.1, RPQ Directive).

3° The service provider exercising freedom to provide services will retain the professional title from the country of establishment but will be subject to the same professional rules and disciplinary provisions in the host Member State as are applied to professionals who pursue that profession in that Member State (Article 5.3 RPQ Directive – see § 143-144).

4° Member State authorities have the option to require on the part of the service provider advance notification from a service provider and also temporary registration or pro-forma membership of the host country professional organisation or body (Article 7, RPQ Directive).

52. In subsequent sections of this study, a number of case studies are presented to illustrate the practical issues involved in implementing the above. However, as already noted, these new provisions have particular relevance to Member States which regulate, through the imposition of market access rules and other requirements, specific activities undertaken by professional accountants outside of statutory audit. In these Member States, there are practical implementation issues to be addressed by national authorities and FEE Member Bodies. In jurisdictions where there are no such market access rules, the RPQ Directive provisions in these areas will not be applicable and therefore will result in no change to the present arrangements.

2.2. The Statutory Audit Directive

a) Introduction

53. The EU completed the adoption in 2006 of the Directive on Statutory Audit (2006/43/EC) which is the key legal reference point for statutory audit in the EU and in the EU's regulatory arrangements with third countries in the audit sphere. The Statutory Audit Directive repealed the existing Eighth Company Law Directive (84/253/EEC) of 10 April 1984 which provided rules for the approval of persons responsible for carrying out the statutory audits of financial statements in application of the Fourth and Seventh Company Law Directives on accounts and consolidated accounts.

54. The Statutory Audit Directive sets out detailed rules applicable to statutory auditors extending considerably beyond the qualification and training of statutory auditors to encompass, among other provisions, ethical and technical standards, quality assurance and public oversight.

55. Although the Statutory Audit Directive is, therefore, a specialised, sectoral Directive, it does not stipulate nor does it follow that statutory audit needs to be considered and less still organised at Member State level as a standalone professional activity, separated from other professional activities of accountants.

b) Statutory Audit Directive: approval and registration

Statutory Audit Directive - Approval of statutory auditors from other Member States

Article 3.1
A statutory audit shall be carried out only by statutory auditors or audit firms which are approved by the Member State requiring statutory audit.

Article 14
The competent authorities of the Member States shall establish procedures for the approval of statutory auditors who have been approved in other Member States. Those procedures shall not go beyond a requirement to pass an aptitude test in accordance with Article 4 of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. The aptitude test, which shall be conducted in one of the languages permitted by the language rules applicable in the Member State concerned, shall cover only the statutory auditor's adequate knowledge of the laws and regulations of that Member state insofar as relevant to statutory audits.

56. The Statutory Audit Directive requires approval of statutory auditors by the Member State requiring the statutory audit (Article 3.1) and registration in a national public register (Article 15.1).

The Directive on Statutory Audit contains provisions which, while not covering freedom of establishment as such, address the approval and registration of statutory auditors between EU Member States. The Directive does so in Article 14 dealing with the approval procedures for (migrant) statutory auditors who have been approved in another Member State. In effect, the Directive makes clear that approval in the Member State where the statutory audit is to be performed is required.

57. The Statutory Audit Directive addresses the approval of statutory auditors between Member States and has legal primacy over the RPQ Directive as per Article 2.3 (see § 40-42). Accordingly, Article 14 of the Statutory Audit Directive deals *solely* with approval and not with establishment. Furthermore, establishment is not addressed in any of the other articles. In dealing with approval, the Statutory Audit Directive sets out, as per the highlighted text above,

that an aptitude test – one of the options in the General System and retained in the RPQ for migrant professionals seeking establishment – is to be employed in relation to migrant statutory auditors.

c) Statutory Audit Directive: recognition and freedom of establishment

58. As a consequence, the Statutory Audit Directive contains both some consistency with the previous Eighth Company Law Directive and an element of legal evolution. The previous Eighth Company Law Directive specifically stated in the recitals that "this Directive does not cover either the right of establishment or the freedom to provide services with regard to persons responsible for carrying out the statutory audits of accounting documents". As a consequence, the 89/48/EEC General System applied in relation to statutory auditors seeking to exercise freedom of establishment (and as already noted, Directive 89/48/EEC did not deal with freedom to provide services).

59. In application of the system prevailing before 2006, the European Court of Justice concluded in the Ramrath case that a Member State *can* require infrastructure and actual presence in that Member State (although not the residence of the professional in the country) for carrying out a professional activity if such requirements are objectively necessary for ensuring compliance with the rules of professional practice. However, this is clearly a matter of Member State competence [(22)].

As a consequence Member States can, and in some cases already do, approve auditors without establishment in their jurisdiction where infrastructure is not regarded as necessary to ensure compliance with rules applicable to auditors, as this can be addressed, for example, by monitoring visits and other methods [(23)]. Given the distinctions between approval and establishment, the ruling by the European Court of Justice through the Ramrath case can still be of assistance.

If this ruling is indeed still applicable, FEE is of the view that it is a Member State decision as to whether stable infrastructure in the Member State where the statutory audit is carried out is required. This decision should be made on public interest grounds and according to the principle of proportionality (see § 156-158).

FEE fully recognises that the residence of the professional in the Member State where the statutory audit is carried out is not required. It is important to underline that such arrangements are distinct from the freedom to provide services under the title of the country of origin which, as per § 60, are not permitted in relation to statutory audit.

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(22) "A Member State may carry out that task by requiring compliance with rules of professional practice, justified by the public interest, relating to the integrity and independence of auditors and applying to all persons practising as auditors within the territory of that State. In that respect, requirements relating to the existence of infrastructure within the national territory and the auditor's actual presence appear to be justified in order to safeguard that interest." (Case C-106/91, -ECR [1992] I-03351, para. 33)

(23) Some professional bodies in the UK and the Republic of Ireland are supervisory bodies in both countries and can therefore register auditors for both jurisdictions. There is no requirement for an auditor to have an infrastructure in both countries.

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d) Statutory Audit Directive: non-application of freedom to provide services under the title of the Member State of origin

60. Recital 42 of the Directive on Recognition of Professional Qualifications indicates that "this Directive applies concerning the right of establishment and the provision of services, without prejudice to other specific legal provisions regarding the recognition of professional qualifications, such as those existing in the field of (…) statutory auditors". This is confirmed by Article 3.2. RPQ, which states that "Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provision of this Directive do not apply".

Furthermore, Article 17.13 of the Services Directive explicitly exempts statutory audit from Article 16 relating to the freedom to provide services. This exemption is additional to Article 17.6 exempting more broadly regulated professions falling under the Directive on Recognition of Professional Qualifications. Consequently, it must have another useful purpose (see § 62-65).

In the Electronic-Commerce Directive (see § 67-69) it is explicitly recognised that statutory audit is not a service which can be provided across borders, or through electronic means.

The approval and registration in the Member State requiring the statutory audit implies that the title and the professional rules of this Member State will apply. FEE maintains that the combination of the above mentioned texts does not permit that statutory audit be provided services under the title of the Member State of origin, applying the rules of this Member State.

2.3. The Services Directive

a) Introduction

61. As noted, the European Union has since 2002 afforded priority status in policy making to the drive to create a genuine internal market for services. A major element of this policy has been the Directive on Services in the Internal Market, which was formally adopted on 12 December 2006 and which is aimed primarily at the broader service sector.

The Directive sets out specific legal provisions concerning arrangements for freedom of establishment and freedom to provide services for all economic service sectors unless legal provision exists for either full or partial exemptions for specific sectors and service activities through dedicated directives, as is the case with RPQ Directive, the Statutory Audit Directive and legislation in the financial services sphere.

The specific nature of the relationship between the Services Directive and other EU legislation is, however, highly complex and remains largely outside the scope of this paper. The purpose of including the Services Directive here is solely to clarify the legal impact for the accountancy

profession in relation to qualifications, recognition and related matters in respect of freedom of establishment and freedom to provide services.

It is FEE's intention to deal with the broader implications of the Services Directive for the profession in a separate study.

b) Legal primacy: Services Directive, RPQ and Statutory Audit Directive

62. The basic legal principle of legal clarity is established in Article 3.1 of the Services Directive which states: "the provision of other Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific profession shall prevail and shall apply if the provisions of the Directive on Services conflict with a provision of the other Community act".

Legal clarity specifically in relation to the profession's arrangements where freedom of establishment and provision of services are concerned is provided further in Article 17.6 which clarifies where the Services Directive's provisions relating to freedom to provide services do not apply, specifically in relation to the profession. The relevant references are highlighted in the box below:

Article 17.6, Services Directive

"*Matters covered by title II of Directive 2005/36/EC on the recognition of professional qualifications, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession"*

Article 17.13, Services Directive

"Matters covered by Directive 2006/43/EC […] on statutory audit of annual and consolidated accounts"

63. In light of the above, it is clear that the RPQ Directive and the Statutory Audit Directive are the primary legislative texts directly impacting on the profession in relation to qualification, recognition and related matters, which are considered by this study.

64. However, this does not mean that the Services Directive has no relevance for the accountancy profession, particularly where establishment is concerned. The main impact of the Directive is outside the area of relevance for this study but is potentially wide-ranging (see § 66).

65. With regard to the differentiation in Article 17.6 of the Services Directive in relation to reserved activities and matters covered under Title II of the RPQ Directive, it is important to clarify that reserved activities are overwhelmingly undertaken under the framework of a regulated profession falling under the remit of the RPQ Directive, given that access to or pursuit of the regulated profession is contingent upon possession of specific professional qualifications.

However, in certain countries it might be the case that some activities in the accountancy sphere are reserved outside of the framework of a regulated profession (see case study § 148).

c) Areas of relevance for the profession: future FEE attention

66. The implications for the accountancy profession of the Services Directive merit a separate study. DG Internal Market and Services issued in 2007 a handbook on implementation of the Services Directive that contains useful information which will be considered carefully in future work of FEE on the subject.

It is clear that there are many areas in which the Services Directive has relevance for the profession. Among the most immediately evident are the prohibitions in the Services Directive with regard to the following:

- Discriminatory requirements based directly or indirectly on nationality [(24)];
- Rules against establishing in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;
- Obligations on a provider with regard to location or form of principal establishment;
- Rules regarding commercial communication and rules setting fixed and/or minimum tariffs.

Other relevant provisions include:

- The references to codes of conduct;
- The requirement for Member States to evaluate the compatibility of restrictive measures concerning the legal form and the shareholding of a company;
- The multi-disciplinary nature of service provision;
- The rights of recipients of services and the information to be given by service providers and professional liability insurance and guarantees;
- The voluntary quality-enhancing measures.

As already noted, in all these cases where the profession is concerned, the provisions of the Services Directive must be read in conjunction with the RPQ Directive and the Statutory Audit Directive as the latter will take legal precedence.

2.4. The Electronic Commerce Directive

67. The Electronic Commerce Directive (2000/31/EC) of 8 June 2000 established an internal market framework for electronic commerce to provide legal certainty for business and consumers alike. It sets out harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.

(24) Examples of such prohibited discrimination already exist in the ECJ jurisprudence. For instance in the decision of 13 July 1993 (Thijssen / Controledienst voor de verzekeringen -C-42/92, Rec._p._I-4047) the Court ruled that discriminations base on nationality are not acceptable in the case of a statutory auditor of an insurance company; the argument that the Insurance Supervisors, which is a public body participating in the exercise of official authority and endowed with powers of regulation, supervision and direction on the auditor is not sufficient to justify the derogation from the freedom of establishment provided for in the first paragraph of Article 55 of the Treaty, which excludes from the application of the provisions on freedom of establishment activities which in a Member State are connected, even occasionally, with the exercise of official authority.

The Directive also clarifies activities which do and do not fall within its scope. Specifically, as noted above, statutory audit falls outside the scope: "Activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts are not information society services" (Recital 18). By contrast, other accountants' activities must be considered as information society services.

68. Given the particular nature of electronic commerce, the concept of establishment assumes particular importance. Recital 19 of the Directive provides clarification in this respect, as set out in the box below:

Recital 19, Electronic Commerce Directive

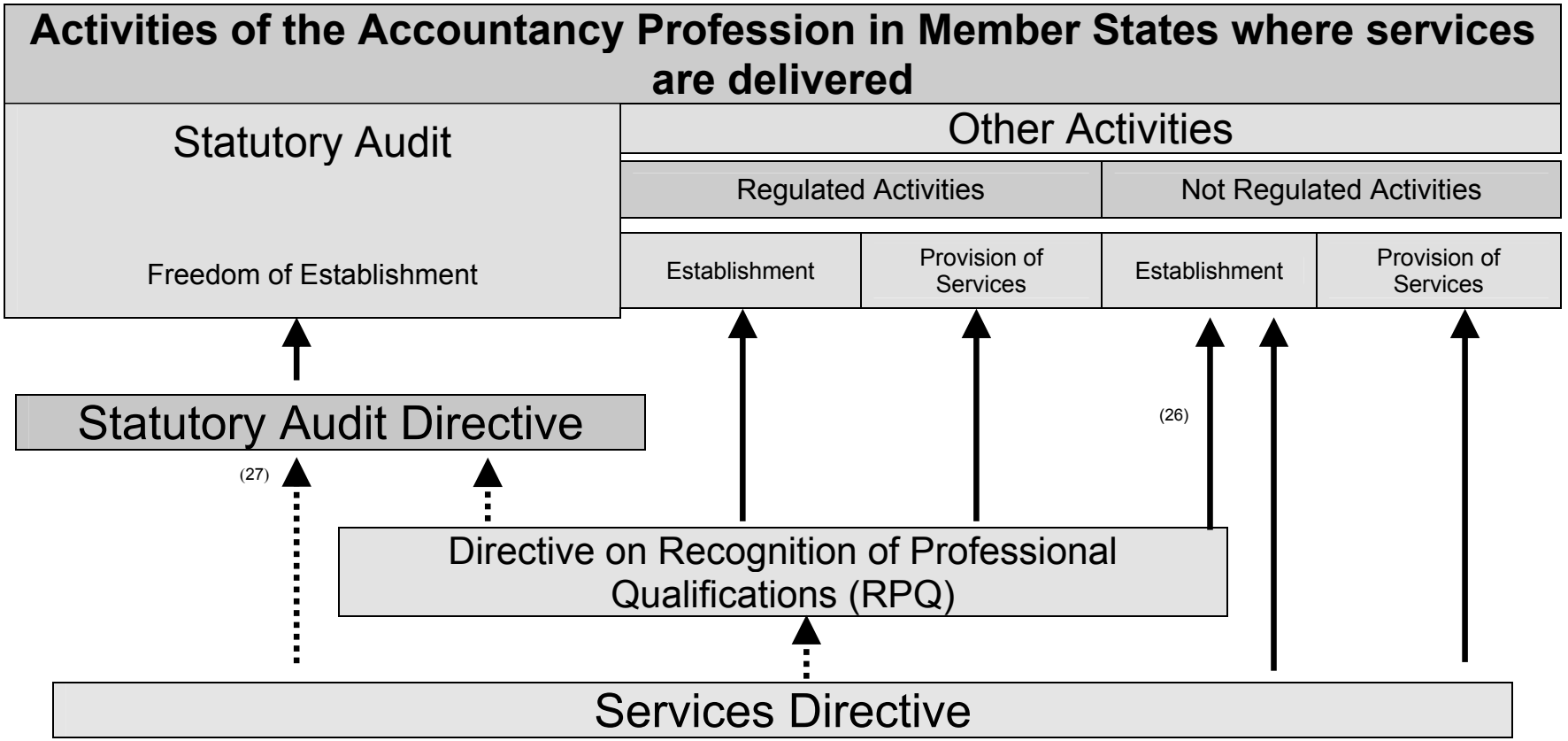
The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

69. In 2002, FEE responded to the invitation to the regulated professions in the Directive to draw up Codes of Conduct regarding types of information that can be provided for the purposes of commercial communications [(25)].

In preparing the Code, FEE worked on the principle that a professional accountant in country A who provides commercial communications (as defined) to an individual in country B will have to comply with the law and regulations of country A.

[(25)] This was in response to Article 8 (1&2) which referred to "the purposes of commercial communications in conformity with the rules regarding, in particular, the independence, dignity and honour of these professions, professional secrecy and fairness towards clients and other members of the profession." Directive 2000/31/EC. *E-Commerce: Model Code of Conduct. Model Code of Conduct Governing On-Line Commercial Communications by Member Bodies of the Fédération des Experts Comptables Européens (FEE) and their members,* May, 2002.

3. Inter-relationship between the Directives in relation to activities of the accountancy profession: FEE Interpretation



(26) Application of RPQ is applicable when the non regulated activity is to be carried out as a member of a regulated profession in the host country - See case study 6, § 150.

(27) Interrupted arrows mean that the provisions of the text are applicable if not inconsistent.

3.1. Statutory audit

70. In relation to statutory audit, the Statutory Audit Directive is the *lex specialis* prevailing on the RPQ Directive and the Services Directive.

The RPQ Directive and the Services Directive specify the areas in which they shall not apply in relation to statutory audit; however, outside of such specific exemptions, the provisions of these Directives could be applicable for statutory audit unless they are incompatible with the Statutory Audit Directive.

In summary, there exist three possible scenarios in relation to statutory audit:

- The Statutory Audit Directive would solely apply in areas where the RPQ Directive and the Services Directive explicitly scope out statutory audit. This is the case of provisions relating to the freedom to provide services (see § 60). It is worth reiterating that the Electronic Commerce Directive explicitly states that statutory audit is not an information society service and therefore does not impact on statutory audit.

- The provisions of the RPQ Directive and Services Directive would apply in relation to statutory audit if they are not incompatible with provisions in the Statutory Audit Directive, given that the latter is the *lex specialis*. This would be the case of provisions relating to advertising or form of establishment, which are not covered by the Statutory Audit Directive and would fall under the Services Directive unless there is incompatibility.

- The provisions of the RPQ and Services Directives would apply in relation to statutory audit when there is inter-dependency between the Directives. This is the case of the aptitude test for statutory auditors in the Statutory Audit Directive in cases of approval for freedom of establishment, which makes direct reference to the procedures laid down in the RPQ Directive.

3.2. All other activities of professional accountants

71. In relation to all other activities of professional accountants outside of statutory audit, where the activity in question is regulated in one Member State, the RPQ Directive is the *lex specialis* prevailing on the Services Directives as far as freedom of establishment and the freedom to provide services are concerned.

Notably, this legal primacy includes all provisions in the RPQ Directive limited to qualification matters and more specifically what is mentioned in Article 5.3.

Only in areas which are not mentioned in the *lex specialis*, do the provisions of the *lex generalis* – i.e. the Services Directive – apply.

This report does not consider these areas, given the focus on qualification, recognition and related matters.

72. It is important to emphasise that the application of the RPQ Directive on qualification, recognition and related matters at Member State level will vary on account of the different national approaches to regulation and market access rules in relation to activities outside of statutory audit.

Where an establishment or service provision case involves a provider from an unregulated Member State who has appropriate qualifications and experience and is temporarily moving to or establishing permanently in a host regulated Member State, the RPQ provisions on recognition and related matters (including discipline by host country) can apply.

Where establishment or service provision involves two Member States which do not regulate the profession or activity in question, the RPQ provisions in these spheres will not apply.

73. As already noted (see § 66), the broader provisions of the Services Directive (as per Chapter 5 of the Directive) dealing with the quality of services and addressing issues such as the information on providers and their services, professional liability insurance and guarantees, commercial communications, multidisciplinary activities, quality of services and settlement of disputes do apply to the unregulated service provider, where providing services both in the Member State of establishment and through provision of services across border.

These matters, however, fall outside the scope of this paper.

II. RECOGNITION AND RELATED RULES APPLICABLE IN CASE OF ESTABLISHMENT IN ANOTHER MEMBER STATE

1. Introduction

74. Member States have the right to regulate an activity and set qualifications for its pursuit (both level and content) within their specific jurisdictions. Consequently, differences exist between the areas of regulated activity (in the first instance market access rules) between EU jurisdictions and the qualifications which are required to pursue such activity.

Where the accountancy profession is concerned, Member States have agreed a common policy on regulation and qualification requirements (set as a minimum) only in relation to statutory audit: outside of this area, differences remain and therefore impact on the implementation of freedom of establishment.

75. This section sets out how the principles set out in the Treaty and the legislative provisions in the relevant Directives are required to function in relation to the achieving freedom of establishment in all the areas of the profession's activities. It provides in the first instance an overview of the recognition rules and procedures which are required to be followed and then provides further detailed comments on the legislative background to the recognition rules and procedures, supplementing the overview information provided in Section II.

76. The starting points for the exercise of the freedom of establishment, awareness of formal qualifications of other Member States (where they exist) and comparison between education requirements in the host country and the qualification of the migrant, are not always straightforward across the professions. These are key elements as competent authorities in the host country need a sufficient understanding of the situation in the country of origin.

In relation to the accountancy profession, there is an added degree of complexity due to the fact that while Member State assessments addresses equivalence for the pursuit of a specific activity, professional titles in the accountancy sphere across Europe can be either educational or functional. The subject of entry to the profession and professional titles is addressed in further detail in the FEE study *Admission to the Profession of Accountant and Auditor – A Comparative Study* (December 2002).

77. In addition to focusing on the recognition rules in the case of establishment, this section outlines the situation relating to the application of host country rules such as disciplinary measures to the extent that they are related to the rights conferred by a positive recognition application (see § 117-119).

78. The section also seeks to illustrate through the use of case studies how particular implementation questions arising from the different structures and activities of the accountancy profession need to be dealt with. The case studies address issues arising out of the different structures of the profession and award procedures for qualifications across Member States and the related access rights to different service activities. The latter is often a subject requiring clarification: for example, a qualified accountant in one Member State might not automatically meet all conditions to be registered as a statutory auditor.

2. *Rules of recognition procedure*

2.1. Procedural framework

79. Table 1 illustrates the procedural framework which is to apply at Member State level on receipt of an application for establishment on the part of a migrant. The specific steps are discussed in § 81.

The procedural framework derives from the relevant Articles in the RPQ Directive.

In relation to statutory auditors, the Statutory Audit Directive requires in Article 14 that competent authorities of Member States shall establish procedures for the approval of statutory auditors who have been approved in other Member States. The Statutory Audit Directive states that those procedures shall not go beyond the requirement to pass an aptitude test in accordance with Article 4 of Directive 89/48/EEC (see § 106-109). (Where reference is made to Directive 89/48/EEC it is understood that this Directive will be repealed by the RPQ Directive once the latter has been transposed (as stated in Article 62 of the RPQ Directive).)

80. It should be re-iterated that the procedures are to be applied by Member States in relation to regulated professions in their jurisdictions and that these differ across EU jurisdictions. In addition, it should also be noted that, outside of the area of statutory audit, certain Member States, namely the UK and the Republic of Ireland, may or may not apply the required procedures according to whether a migrant wishes or does not wish to practice a member of one of the professional organisations listed in Annex 1 of the RPQ Directive.

2.2. Specific procedural steps

81. An individual application must be submitted to the Contact Point in the host Member State, accompanied by certain documents and certificates which are specified in § 85-90 and 98. Following this:

1° The competent authorities have one month to acknowledge receipt of an application and to draw attention to any of the required documents which are missing. These documents are dealt with in § 82-90;

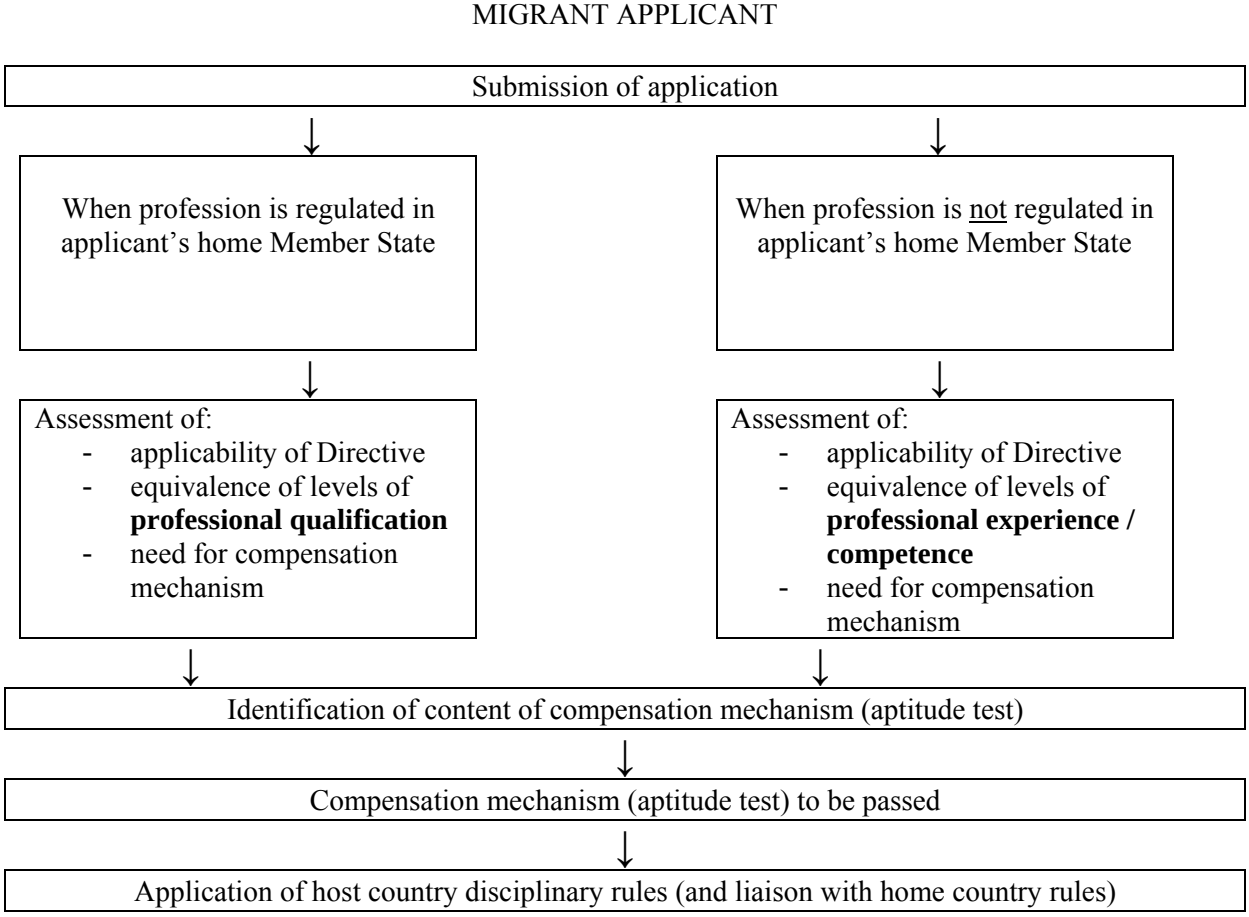
2° A decision is to be taken with regard to the equivalence of the qualification or experience and on the need for a compensation mechanism within three months of the date on which the application was received in full. The manner in which these decisions are made is dealt with in § 91-111;

3° Reasons will have to be given for any rejection of application or decision to grant in exceptional circumstances partial recognition. These issues are dealt with in § 111-113;

4° In the event of a successful application (i.e. including successful completion of aptitude test), the migrant will be subject to the host country rules. These rules are dealt with in §117-119.

PROCEDURAL FRAMEWORK FOR ESTABLISHMENT FOR REGULATED PROFESSIONS
where the profession is regulated in the host Member State

Table 1



3. Important reference notes to rules of recognition procedure

3.1. Requirements on migrant applicants to provide evidence of formal professional qualification or professional experience

82. The system of recognition is based on equivalence of qualifications, or appropriate experience.

Consequently, competent authorities may require the applicant to provide copies of the attestations of professional competence or of the evidence of formal qualifications giving access to the profession in question, and an attestation of the professional experience of the person concerned where applicable.

83. If the profession is regulated both in the home and in the host Member State, the evidence of formal qualification is required to have been issued by a competent authority in a Member State, designated in accordance with the legislative, regulatory or administrative provisions of that Member State. Details of the different sources of formal qualifications are provided in § 85.

84. If the regulated profession in the host Member State is not regulated in the country of origin, attestations of competence and evidence of formal qualifications are required to have been issued by a competent authority in a Member State, designated in accordance with the legislative, regulatory or administrative provisions of that Member State; and have to attest that the holder has been prepared for the pursuit of the profession in question.

3.2. Formal professional qualifications

85. In relation to formal professional qualifications, the following should be borne in mind by all national authorities and other competent bodies when identifying qualifications for the purpose of considering equivalence and recognition in the accountancy profession as a whole:

1° Statutory audit: Evidence of formal qualifications permitting the practice of statutory audit means the qualifications approved by a Member State which meet the minimum education and training requirements in Article 6 to 13 of the Statutory Audit Directive. In transposing this Directive, Member States will confirm the approved qualifications;

2° All other activities outside of statutory audit: Evidence of formal qualifications relating to all other activities of the accountancy profession means *diplomas, certificates and other evidence issued by an authority in a Member State* designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community (Article 3.1.c of the RPQ Directive);

3° Formal qualifications provided by non-governmental bodies: Formal qualifications can also be provided by professional associations or organisations which are to be treated as regulated professions, as recognised in Annex 1 of the RPQ Directive. It is the case that Member States can use the qualifications awarded by these associations and organisations as qualifications meeting with the requirements of the Statutory Audit Directive. This is the case with several of the FEE Member Bodies from the UK and Republic of Ireland included in Annex 1 of the RPQ Directive;

4° Third country qualifications for statutory audit: a Member State competent authority may approve a Third Country auditor (i.e. not necessarily an EU citizen but an individual with a Third Country qualification) as an auditor in its own jurisdiction through Article 44 of the Statutory Audit Directive which requires that the approval is reciprocated by the Third Country in question. Article 44 can only applied if the education and training requirements of Articles 6-13 of the Statutory Audit Directive are met. In these cases, as with recognition between EU Member States, a compensation mechanism would also be required as per Article 14 of the Statutory Audit Directive;

5° Formal qualifications for the purposes of the RPQ Directive can also mean evidence of formal qualifications issued by a Third Country recognised by another Member State: this is where the holder has three years' professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications

in accordance with Article 2.2, certified by that Member State (Article 3.3, RPQ Directive) [28].

3.3. Additional documents which may be required to support migrant applications

86. Annex VII of the RPQ Directive allows Member State to require additionally the following documents:

1° Proof of the nationality of the person concerned;

2° Proof that the applicant is of good character or repute or that they have not been declared bankrupt, or suspends or prohibits the pursuit of that profession in the event of serious professional misconduct or a criminal offence [29];

3° A document relating to the physical or mental health of the applicant;

4° An attestation to that effect issued by the banks and insurance undertakings of another Member State proving the applicant's financial standing and/or proving that the applicant is insured against the financial risks arising from their professional liability in accordance with the laws and regulations in force in the host Member State regarding the terms and extent of cover [30];

5° A certificate from the competent authorities of the applicant's home Member State stating that the evidence of formal qualifications is that covered by this Directive.

87. Furthermore, where a host Member State requires its nationals to swear a solemn oath or make a sworn statement in order to gain access to a regulated profession, and where the wording of that oath or statement cannot be used by nationals of the other Member States, the host Member State shall ensure that the persons concerned can use an appropriate equivalent wording (Article 50, RPQ Directive).

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(28) This principle supplements other principles of Community law requiring the host Member State to take account of all diplomas, certificates or other evidence of formal qualification. See § 15.

(29) Where the competent authority of a host Member State requires of persons wishing to take up a regulated profession proof that they are of good character or repute or that they have not been declared bankrupt, or suspends or prohibits the pursuit of that profession in the event of serious professional misconduct or a criminal offence, that Member State shall accept as sufficient evidence, in respect of nationals of Member States wishing to pursue that profession in its territory, the production of documents issued by competent authorities in the home Member State or the Member State from which the foreign national comes, showing that those requirements are met. Those authorities must provide the documents required within a period of two months.
Where the competent authorities of the home Member State or of the Member State from which the foreign national comes do not issue the documents referred to in the first subparagraph, such documents shall be replaced by a declaration on oath - or, in States where there is no provision for declaration on oath, by a solemn declaration - made by the person concerned before a competent judicial or administrative authority or, where appropriate, a notary or qualified professional body of the home Member State or the Member State from which the person comes; such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration. (Annex VII, RPQ Directive)

(30) Documents under 2°, 3° and 4° can only be required where a host Member State requires them from their own nationals.

88. Article 56 of the RPQ Directive provides that the competent authorities of the host Member State and of the home Member State shall work in close collaboration and shall provide mutual assistance in order to facilitate application of this Directive. They shall ensure the confidentiality of the information which they exchange. In the event of justified doubts, the host Member State may require from the competent authorities of a Member State confirmation of the authenticity of the attestations and evidence of formal qualifications awarded in that other Member State (Article 50.2, RPQ Directive).

89. The European Commission has launched a new electronic system – Internal Market Information (IMI) – to facilitate the exchange of this information between Member States.

FEE is pleased to be participating in the pilot scheme of the IMI.

90. Where it is impossible for the applicant to provide information on his training, the competent authorities of the host Member State shall address the Contact Point, the competent authority or any other relevant body in the home Member State.

3.4. Assessment of equivalence based on level

91. As noted, the EU has, through the Statutory Audit Directive, harmonised at a minimum level the education and training requirements for statutory auditors. Consequently, all the qualifications approved by a Member State as having met these requirements are to be considered equivalent for the purposes of recognition by all other Member States. No further assessment of the level of the approved professional qualifications is therefore required for recognition purposes.

92. In relation to relevant qualifications for all other activities outside of statutory audit, Member States are required to undertake an assessment of the level of qualification in their jurisdictions to be used for the purposes of equivalence and recognition. It is the responsibility of national authorities to allocate qualifications to levels in their own jurisdictions, in order to allow other Member States to place reliance on these allocations when considering applications for recognition.

93. The RPQ Directive amended the wording of the existing levels contained in the General System Directives and added a further level to produce a list of five formal levels. However, in doing so, the RPQ Directive carried forward the existing recognition mechanisms established by the General System Directives. Consequently the recognition arrangements of relevance to FEE Member Bodies will remain unchanged (for the purposes of establishment).

The five levels as set out in Article 11 of the RPQ Directive are as follows:

1° Attestation of competence which corresponds to general primary or secondary education, attesting that the holder has acquired general knowledge, or an attestation of competence issued by a competent authority in the home Member State on the basis of a training course not forming part of a certificate or diploma, or of three years professional experience;

2° Certificate which corresponds to training at secondary level, of a technical or professional nature or general in character, supplemented by a professional course.

3° Diploma certifying successful completion of training at post-secondary level of a duration of **at least one year**, or professional training which is comparable in terms of responsibilities and functions;

4° Diploma certifying successful completion of training at higher or university level of a duration of **at least three years and less than four years**;

5° Diploma certifying successful completion of training at higher or university level of a duration of **at least four years**.

94. FEE understands that the allocation by a Member State to one of the above levels will be made either in relation to a single diploma, certificate or other evidence of formal qualifications or set of any such diplomas, certificates or other evidence.

95. The recognition mechanisms remain as under the General System in that the consideration of equivalence of evidence of formal qualifications has an in-built liberalisation perspective. This is to say that the host Member State can only require, when assessing an application for recognition, a qualification level which is immediately below what is required for its nationals. This is set out in Article 13 of the RPQ Directive:

Article 13.1, RPQ Directive

Attestations of competence or evidence of formal qualifications shall attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State.

Paragraph 3 of Article 13 goes even further when stating by way of derogation, that the host Member State shall permit access and pursuit of a regulated profession where access to this profession is contingent in its territory upon possession of a qualification certifying successful completion of higher or university education of four years' duration in cases where the applicant possesses a qualification of level 3, which is at least one year higher education.

96. It is important to underline, however, that an assessment of the need for compensation mechanisms can be pursued by the host Member State in cases both where there is an immediate correlation of levels, and where the recognition application is received from a migrant with a qualification in the level immediately below that set in the host country. The use of compensation mechanisms is dealt with in § 99-102.

97. The RPQ Directive also contains provisions relating to grand-father rights [(31)] in the event that the home Member State raises the level of training required for admission to a profession and for its exercise (Article 12.2, RPQ Directive).

[(31)] Mechanism allowing professionals who have qualified under an older system to keep their practise rights notwithstanding the introduction of a new and more restrictive system.

3.5. Assessment in the absence of a formal professional qualification

98. As noted, the EU recognises that differences exist across Member States with regard to the regulation of activities. Consequently, Community law must also deal with situations where a regulated profession in the host Member State is not organised in the Member State of origin of the migrant. Article 13.2 of the RPQ Directive covers this situation.

Cases of relevance to the accountancy profession can and do arise in relation to all activities outside of statutory audit.

In such cases, a Member State which regulates the professional activity must grant access to and pursuit of the profession to applicants who have pursued the same profession on a full time basis for two years during the previous 10 years in another Member State which does not regulate that profession, provided they possess one or more attestations of competence or documents providing evidence in these respects [(32)].

3.6. Assessment of need for compensation mechanism

99. On receipt of an application, a Member State will undertake a further assessment of the formal professional qualification or, where the activity is not regulated in the country of origin, the attestations of competence or other relevant documents. The assessment will be to determine the existence of potential substantial differences with the required training in the host jurisdiction.

100. In relation to statutory audit, where minimum education and training requirements are set at Community level, the focus of the compensation mechanism is on the different national and legal components between country of origin and host country qualifications (see § 106-109).

101. In relation to all other activities, the determination of substantial differences can involve a broader assessment, encompassing differences in duration and content of the training and in the scope in the regulated profession between EU jurisdictions as per Article 14 of the RPQ Directive below:

Article 14.1c, RPQ Directive

[where] the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant's home Member State.

Article 14.4, RPQ Directive

Substantially different matters means matters of which knowledge is essential for pursuing the profession and with regard to which the training received by the migrant shows important differences in terms of duration or content from the training required by the host Member State.

(32) The two years' professional experience referred to in the first sub-paragraph may not, however, be required if the evidence of formal qualifications which the applicant possesses certifies regulated education and training within the meaning of Article 3(1)(e) at the levels of qualifications described in Article 11, points (b), (c), (d) or (e). – Article 13.2. par.3

In the course of its examination of an applicant's diploma, the host Member State may also take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin, and to its field of activity [33].

102. If the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first ascertain whether the knowledge acquired by the applicant in the course of his professional experience in a Member State or in a Third Country, is of a nature to cover, in full or in part, the substantial difference (Article 14.5, RPQ Directive).

As noted in § 34, while recognising this, FEE strongly supports the use of an aptitude test over that of an adaptation period as the most efficient mechanism to enable applicant migrant professionals to obtain the host country qualification in the least onerous way possible for the migrant, at least as far as knowledge of laws and regulations of the host Member State is concerned.

3.7. Compensation mechanisms: underlying principles and other requirements

103. The compensation mechanism or measures must be implemented by the competent authority of the host Member State and must take account the fact that the applicant is qualified in the Member State of origin. The purpose of this is to ensure proportionality. Both in the RPQ Directive and in the Gebhardt case, reference is made to ensuring that the compensation measures do not inappropriately hinder or make less attractive the exercise of fundamental freedoms. Consequently, as expressed in the Gebhardt case, compensation measures:

1° Must be applied in a non-discriminatory manner;

2° Must be justified by imperative requirements in the general interest;

3° Must be suitable for securing the attainment of the objective that they pursue;

4° Must not go beyond what is necessary in order to attain the objective.

104. The RPQ Directive defines the aptitude test as follows:

> **Article 3.h, RPQ Directive**
>
> *A test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State. In order to permit this test to be carried out, the competent authorities shall draw up a list of subjects which, on the basis of a comparison of the education and training required in the Member State and that received by the applicant, are not covered by the evidence of formal qualifications possessed by the applicant.*
>
> *(…) The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State.*

[33] Vlassopoulou Case ECJ [1991] ECR 1-2357

105. The references in the box above are also based on a 2003 ECJ ruling clarified that the aptitude test shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to exercise the profession in the host Member State. This ruling also clarified that the test may include knowledge of the professional rules applicable to the activities in question in the host Member State [(34)].

The relevance of this ruling and the application of host country rules are dealt with in paragraph 4 below (§117-119).

3.8. Compensation mechanism for statutory audit: form and content of the aptitude test

106. As noted, where statutory audit is concerned, Member States are required under the Statutory Audit Directive (Article 14) to use an aptitude test as per the procedures of the RPQ Directive (Article 14), where a compensation mechanism is justified.

This is to say that the migrant will not be offered a choice between aptitude test and adaptation period.

It is possible that a Member State could conclude in an individual case that no compensation measure is required [(35)]. This would be on the basis that the professional experience acquired by the applicant is sufficient to cover the substantial difference.

There is an example within the EU that two Member States have considered that, given the proximity of their laws and other regulations on accounting and auditing, a compensation measured is not required. This example refers to the United Kingdom and the Republic of Ireland. However, in the EU as a whole, further examples are likely to be exceedingly rare.

Article 14, Statutory Audit Directive

"The aptitude test, which shall be conducted in one of the languages permitted by the language rules applicable in the Member State concerned, shall cover only the statutory auditor's adequate knowledge of the laws and regulations of that Member State in so far as relevant to statutory audits".

107. As specified in Article 14, the content of the aptitude test for statutory audit can only relate to the adequate knowledge of the laws and regulations of the host Member State in so far as relevant to statutory audits as defined in Article 2 of the Directive, namely the "audit of annual accounts or consolidated accounts insofar as required by Community law".

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(34) Judgment of 13 November 2003 in Case C-313/01, Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova, ECR [2003] I-13467. "The aptitude test must take account of the fact that the applicant is a qualified professional in the Member State of origin or the Member State from which he comes. It shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to exercise the profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State. The detailed application of the aptitude test shall be determined by the competent authorities of that State with due regard to the rules of Community law."

(35) This comment is directed at situations other than that between the Republic of Ireland and the UK.

108. The general principles on aptitude tests as a compensation measure for substantial differences in professional qualifications apply. This includes the principle of proportionality. Member States must take into consideration all elements of an acquired professional qualification and relevant professional experience that could have a bearing on the scope of the aptitude test.

In this respect, consideration would also need to be given to the completion by the applicant of an aptitude test for authorisation to carry out another regulated activity in the host Member State [(36)].

109. In ascertaining the content of the aptitude test, it is possible for Member States to consider the rights that the applicant would acquire in the host Member State in relation to the exercise of other audit activities pertaining to national regulations, for instance statutory audit of charities or government entities. This could also result for instance from an enlarged definition of public interest entities as allowed by Article 2.13 of the Statutory Audit Directive. The decision is a matter of national competence, which is to be exercised according to the principle of proportionality.

3.9. Compensation mechanism(s) for all other activities: form and content

110. As regards all other activities, the RPQ Directive applies.

In principle, the RPQ Directive presumes that the profession which the applicant wishes to pursue in the host Member State is the same one as the one for which he is qualified in his home Member State if the activities covered are comparable (Article 4.2, RPQ Directive).

However, the situation regarding recognition can, on occasions, be more complex. In some cases the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant's home Member State and that difference consists in specific training which is required in the host Member State and which covers substantially different matters from those covered by the applicant's attestation of competence or evidence of formal qualifications (Article 14.1c, RPQ Directive).

The FEE study *Provision of Accountancy, Audit and Related Services in Europe* published in December 2005 reviews the different activities that are usually carried out by professional accountants. It shows a variety of situations across Member States. This could provoke difficulties when a professional accountant wants to establish in another Member State where the scope of regulated activities is broader than in his Member State of origin.

The usual approach to this problem is to examine whether this situation involves a substantial difference in education, which could open the way to requiring the completion of compensation measures by the applicant.

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(36) Compare with ECJ judgment of 22/01/2002 in the case Dreessen II C-31/00 [2002] I-663 : "the authorities of a Member State (…), are required to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national legislation (see, *inter alia*, *Vlassopoulou*, paragraphs 16, 19 and 20, Case C-319/92 *Haim* [1994] ECR I-425, paragraphs 27 and 28, and Case C-238/98 *Hocsman* [2000] ECR I-6623, paragraph 23)."

3.10. Partial recognition

111. Another situation might occur in very exceptional circumstances, where compensation measures are so extensive that the application of a compensatory measure would in effect amount to requiring the migrant concerned to complete a fresh and entire programme of education and training. In such a case the host Member State might consider restricting the scope of practice of the applicant in the host Member State to activities for which the applicant has the required host Member State qualification.

112. Legal guidance on partial recognition in relation to the use of the home country title – as opposed to the host country title – can be found through the European Court of Justice 2006 ruling in the Case of Collegio de Ingenieros [(37)] which remains applicable under the regime of the RPQ Directive.

Answering a question of the Spanish Supreme Court, the ECJ ruled that "When the holder of a diploma awarded in one Member State applies for permission to take up a regulated profession in another Member State, the competent authorities of that Member State are not precluded by Council Directive 89/48/EEC/ […] from partly allowing that application, if the holder of the diploma so requests, to limit the scope of the permission to those activities which that diploma allows to be taken up in the Member State in which it was obtained".

The Court pursued this course in recognising that in some cases the differences between the home and host Member State education and training are so great that the application of a compensatory measure would in effect amount to requiring the applicant "to complete a fresh, complete programme of education and training" (§ 36) .

The Court also stated, "When the activity in question may objectively be separated from the rest of the activities covered by the profession in question in the host Member State, the conclusion is that the dissuasive effect caused by the preclusion of any possibility of partial recognition of the professional qualification in question is too serious to be offset by the fear of potential harm to recipients of services. In such a case, the legitimate objective of protection of consumers and other recipients of services may be achieved through less restrictive means, particularly the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in its original form, and in the official language of the host Member State" (§ 38).

113. According to FEE's interpretation of the above ECJ ruling, partial recognition resulting in use of the home country title could be relevant to all other activities, with the exception of statutory audit (see § 162). However the condition remains that partial recognition may be rejected when shortcomings may effectively make up through compensation measures provided in the RPQ Directive.

[(37)] Judgement of 19 January 2006 (C-330/03) in case Collegio de Ingenieros v Administration del Estado ECR [2006]

3.11. Rules applicable to trainees

114. The above paragraphs address recognition where the education, training and experience has been completed by the applicant.

The question can also be raised in relation to applicants who have not completed the requirements in these areas to be registered as a qualified professional.

115. The ECJ addressed this question in a case concerning a trainee lawyer who moved to a host Member State prior to completing all the required education and training in the home Member State [(38)]. The Court argued that "that examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess having regard to that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates" (§ 68). The Court concluded "that Community law precludes the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it is not a legal diploma issued, confirmed or recognised as equivalent by a university of the first State" (§ 72).

116. This ruling could be applicable to the accountancy profession. It is to be noted that the Statutory Audit Directive has specific provisions on education and training and therefore the ruling is of more direct relevance for all other activities undertaken by the profession.

4. Application of related host country rules (and liaison with home country rules)

117. The recognition of professional qualifications enables beneficiaries to practice under the same conditions as nationals of another Member State in cases where these professions are regulated.

The guarantee conferred by the RPQ Directive to pursue a profession in another Member State with the same rights as nationals is without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the host Member State, provided that these are objectively justified and proportionate (Recital 3, RPQ Directive). Rules of this kind relate, for example, to the organisation of the profession, professional standards, including those concerning ethics, and supervision and liability (Recital 11, RPQ Directive).

118. FEE understands that the application of host country rules where they relate to disciplinary matters will involve liaison between the host and the home country competent authorities. This

(38) Judgment of 13 November 2003 in Case C-313/01, Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova, ECR [2003] I-13467. Ms Morgenbesser, a French national living in Italy, applied to the Bar Council of Genoa for enrolment in the register of praticanti. In support of her application, she produced a diploma of maîtrise en droit obtained in France in 1996. In April 1998, after doing legal work for eight months in a Paris law office, she joined a firm of avvocati registered with the Genoa Bar, where she was continuing to practise at the time of the hearing before the Court.

is also essential in relation to the free provision of services, as dealt with in Section III, 4.4 (see § 143-144).

119. If the profession or activity is not regulated in the host Member State, a migrant professional can establish and begin practicing in that Member State subject to the same conditions as the nationals, which means without any certification of recognition of qualifications or related regulation.

5. Establishment in more than one Member State

120. As noted earlier, a member of a profession might be established in more than one Member State if all conditions related to professional qualifications are fulfilled (this is dealt with in paragraph 4 above). The right of establishment includes the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community. The ECJ stated that the rule must be regarded as a specific statement of a general principle, applicable equally to the liberal professions [(39)]. Similarly, the prohibition on the enrolment in a register of a professional body on the ground that the professional is still enrolled or registered in another Member State is too general in nature to be justified by a public interest argument [(40)].

121. A question could be posed on whether the rights of establishment would be maintained when the professional in question leaves the country and wishes to continue servicing his clients from abroad in a manner distinct from the freedom to provide services dealt with in the next section. The response can only be positive in the case of professional accountants including statutory auditors, given that, except for specific and exceptional cases, residence cannot be made a requirement to establish in another Member State.

As defined by ECJ in the case Ramrath, the Member State can require a minimum infrastructure for carrying out the work, actual presence in that Member State and supervision of compliance with the rules of professional conduct but this does not ordinarily include the residence of the professional in the country.

As noted in § 56-59 dealing with the Statutory Audit Directive, the requirement of a minimum infrastructure must be objectively necessary for ensuring compliance with the rules of professional practice.

122. As also noted (§ 59), some Member States do not require an establishment and will approve statutory auditors who are not established in their jurisdiction. They do not regard establishment as necessary to ensure compliance with rules applicable to auditors as this is tested by monitoring visits and other methods.

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(39) CJ Case 107/83 of 12 July 1984 Ordre des avocats au Barreau de Paris v Onno Klopp, ECR [1984], 02971

(40) CJ Case 96/8530 April 1986. - Commission of the European Communities v French Republic, ECR [1986] 01475;

6. Case studies

Case Study 1

Consequences of compensation measures in the host Member State

A German Wirtschaftsprüfer intends to establish in France. He is asked to pass an aptitude test, which he does successfully. Consequently, he is registered on the list of the Compagnie Régionale des Commissaires aux Comptes of Paris and is authorised to carry out statutory audits in France.

In Germany, the Wirtschaftsprüfer is also entitled to provide a wide range of tax services. However, French commissaires aux comptes do not have the right to carry out other accounting or tax services; in order to do so, they need to be approved as an expert-comptable (professional accountant). In France, tax advice is reserved to lawyers but experts-comptables can provide tax services as an ancillary activity when they are providing accounting services.

Will it be necessary for the Wirtschaftsprüfer to seek an additional registration with the Ordre des Experts Comptables if he wants to provide tax services in France?

Discussion

1. Member States remain free to organise professions and to regulate professional activities on their territory.
2. Migrants must be required to comply only with non-discriminatory conditions of pursuit of the profession in the host Member State provided that these are objectively justified and proportionate (Recital 3 DRPQ).
3. If the Wirtschaftsprüfer applies to be approved as expert-comptable, the French competent authorities will have to assess the equivalence of diplomas, certificates and evidence of formal qualification. They need to take all elements into consideration before deciding whether compensation measures are needed, including the fact that the applicant has already passed the aptitude test to be registered as commissaire aux comptes (see below § 4).
4. If the Wirtschaftsprüfer obtains the title of expert-comptable, he will be allowed to carry out tax activities subject to French applicable law.

Case Study 2

Scope of compensation measures – Concept of partial recognition

Austrian laws and regulations require accountants to be registered with a professional body. The activities of accountants in Austria include accounting and also tax services.

A professional accountant from the Czech Republic wants to establish in Austria but does not claim to be competent in Austrian tax and does not want to practice as a tax adviser.

Does that influence the assessment of the equivalence of qualifications by the Austrian competent authorities and the nature of the compensatory measures?

Discussion

1. EU Directives do not prevent Member States to regulate professional activities on their territory. Migrants must comply with non-discriminatory conditions of pursuit of the profession in the host Member State provided that they are objectively justified and proportionate (Recital 3, RPQ Directive).

2. In relation to the professional title in Austria, it would be misleading for consumers if a holder of the professional title were to be subject to restrictions of the scope of activities.

3. The jurisprudence in ECJ case Collegio de Ingenieros (see §112) allowing partial recognition would only apply when differences in education are so great that the application of compensatory measures would not be possible in practice.

4. Consequently, the applicant professional accountant from the Czech Republic will be required to cover all the substantial differences to exercise under establishment the profession as it is organised in Austria.

Case Study 3

Formal professional qualification v evidence of practical experience

Provision of tax services is a regulated activity in Germany, whereas it is not regulated in the Netherlands. This means that in the Netherlands, a practitioner need not be a member of a professional Institute to be allowed to carry out tax services.

Can Germany reject the application based on the ground that the applicant has no recognised qualification in his Member State of origin (i.e. the Netherlands)?

Discussion

1. Since the professional activity is regulated on its territory, the host Member State, Germany, has the right to submit the migrant to the conditions imposed to its nationals or to assess whether the qualification acquired abroad is equivalent.
2. The activity is not regulated in the Netherlands, the Member State of origin. Consequently, Germany cannot expect the migrant to have a *formal professional qualification.* This is a possibility but it cannot be imposed.
3. The RPQ Directive establishes an alternative system, which is based on practical experience. The Dutch applicant must demonstrate that he has pursued the regulated activity on a fulltime basis for two years during the previous 10 years. If this is demonstrated, then the Dutch applicant can, subject to completion of a compensation mechanism, establish in Germany as a tax adviser.

III. RULES APPLICABLE IN CASE OF TEMPORARY PROVISION OF SERVICES IN ANOTHER MEMBER STATE

1. Introduction

123. As noted in the preceding sections, one of the key elements in the RPQ Directive (and the Services Directive) relates to the provision of services: this is to say the cross-border provision of services from the Member State of establishment of the provider into another.

The Statutory Audit Directive and Services Directives make clear that cross-border service provision is not foreseen in the case of statutory audit, as defined in the Statutory Audit Directive.

As is also noted, the definition of provision of services is based on the temporary and occasional nature of service delivery.

This section sets out how the principles set out in the Treaty and the legislative provisions in the relevant Directives are required to function in relation to the freedom to provide services in all the areas of the profession's activities outside of statutory audit. It provides in the first instance an overview of the applicable rules and procedures and then provides further detailed comments on the legislative background to the recognition rules and procedures, supplementing the overview information provided in Section I.

It should be emphasised, as noted elsewhere in this report, that the application of the rules and procedures will vary according to the specific activity and the regulatory and market access approach pursued by the Member States involved, either in their capacity as home or host Member States. An example of the latter concerns the decisions by Member States on whether to require submission of a pro-forma declaration by applicant professionals (see § 136-142). At the time of writing, many Member States are yet to decide on this requirement and it is important to highlight that such decisions could impact on the comments expressed in this paper.

The section also seeks to illustrate through the use of case studies how particular implementation questions arising from the different structures and activities of the accountancy profession need to be dealt with.

2. Legal basis for applicable rules

124. The applicable rules stem from Article 5 of the RPQ Directive setting out the principle of free provision of services which is directly inferred from the Treaty. This article states that, without prejudice to specific provisions of Community Law, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there.

Article 5, RPQ Directive

The host Member State may not prevent the service provider who is legally authorised to pursue a profession in his country of origin from carrying cross-border services belonging to this profession, under his home country title.

125. The RPQ Directive is also clear that the cross-border service shall be provided under the professional title of the Member State of establishment, in so far as such title exists in that Member State for the professional activity in question.

That title shall be indicated in the official language or one of the official languages of the Member State of establishment in such a way as to avoid any confusion with the professional title of the host Member State (Article 7 .3 of the RPQ Directive).

The approach in Article 5 and related articles mirrors that pursued for freedom of establishment: that is to say, the provisions on same rules apply in relation to experience where formal professional qualifications are not issued within a Member State and the activity/profession is not regulated.

126. It should be noted that Article 6.a of the RPQ Directive requires the host Member State to exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to authorisation by, registration with or membership of a professional organisation or body. This follows a ruling of the European Court of Justice in 2002 which concluded that such registration would constitute an obstacle to temporary service provision [(41)].

The RPQ Directive, through Article 7, permits but does not oblige Member States to render authorisation to provide cross border services subject to certain conditions such as a pro-forma declaration to local competent authorities.

127. This is in line with the FEE position in its 1999 paper on *Liberalisation of the Accountancy Profession in Europe*, where it was observed that the registration of the cross-border professional service provider with the relevant Institute in the host country might be useful. One of the arguments was linked to exercising disciplinary control (p. 54-55).

This reasoning is also evident in Article 6 of the RPQ Directive. The pro-forma is an optional requirement and must not delay or complicate in any way the provision of services or not entail any additional costs for the service provider. Article 6 of the RPQ suggests a system whereby a copy of the declaration shall be sent by the competent authority to the relevant professional organisation or body, and this shall constitute automatic temporary registration or pro-forma membership for this purpose.

Article 7 permits Member States, in cases where it is the first provision of services by the provider, to request that the pro-forma declaration is accompanied by additional documents certifying the identity, professional qualifications / or professional experience and other matters.

(41) "The requirement of registration with or membership of professional organisations or bodies should be abolished, since it is related to the fixed and permanent nature of the activity pursued in the host country, for such a requirement would undoubtedly constitute an obstacle to the person wishing to provide the service by reason of the temporary nature of his activity" ECJ Judgement of 16/05/2002 in case 232/99, Commission/Spain (Rec. 2002, p. I-4235)

128. Article 5.3 of the Directive stipulates that the cross-border service provider will be subject to the disciplinary rules of the host Member State having a direct and specific link with the professional qualifications, such as the definition of the profession, the scope of activities covered by a profession or reserved to it, the use of titles and the like. Unlike the pro-forma declaration, the provisions in the Directive are binding in these respects.

129. It should be noted that, in the cases of the Republic of Ireland and the UK, Article 5 and the related Articles in the RPQ Directive are not applicable in relation to accountancy and tax services, given that there are no market access rules in these areas. It is also to be noted that the UK will apply Article 5 and related provisions in relation to insolvency, a reserved activity in the UK.

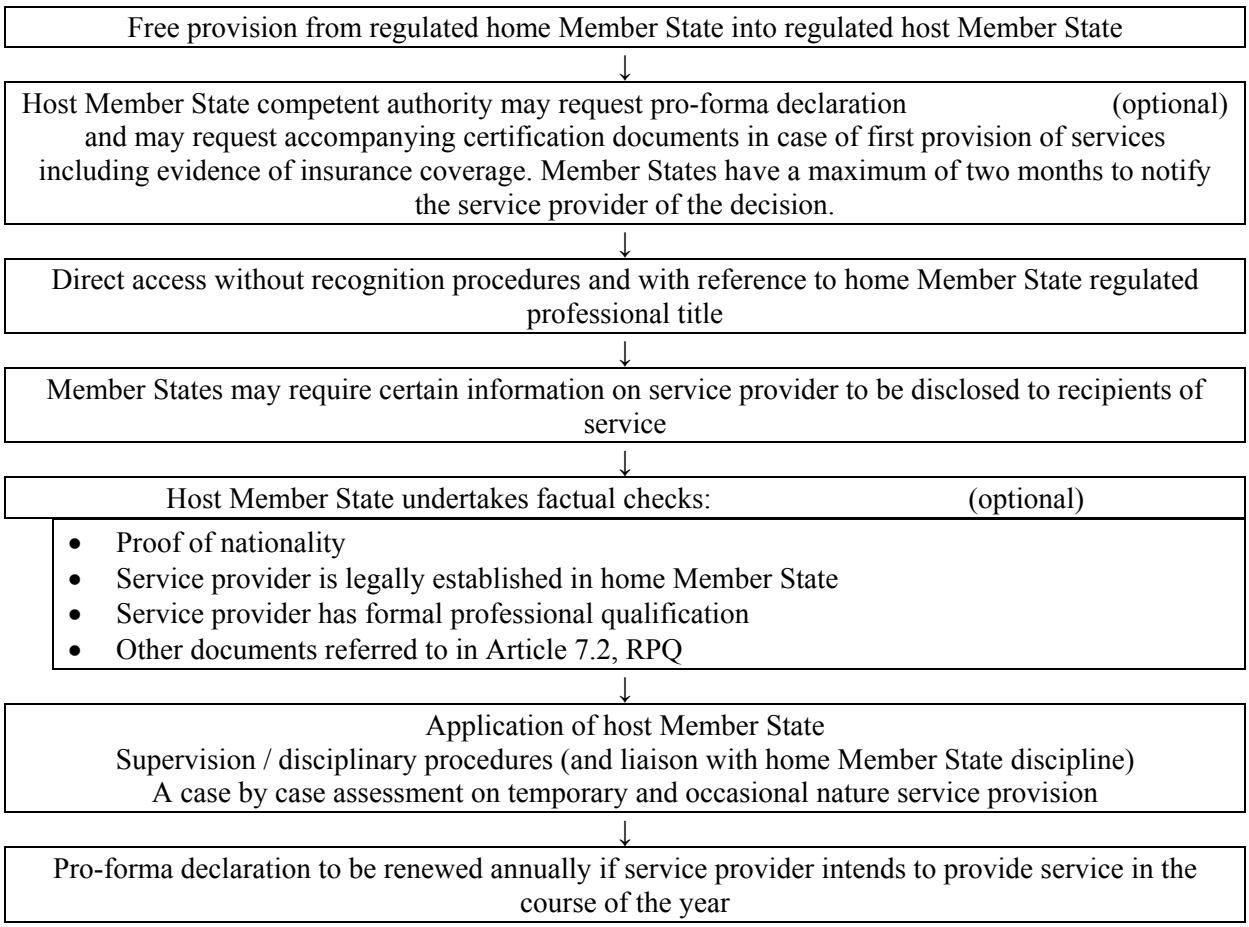
3. Procedural framework

130. The following pages illustrate the different procedural frameworks which will apply at Member State level according to the four different possible scenarios which can be envisaged, according to Member State rules on the regulation or not of the specific activity/profession in question. The four different scenarios are:

- Graphic 1: free provision from regulated home Member State to regulated host Member State;
- Graphic 2: free provision from regulated home Member State into unregulated host Member State;
- Graphic 3: free provision from unregulated home Member State into regulated host Member State;
- Graphic 4: free provision from unregulated home Member State into unregulated host Member State.

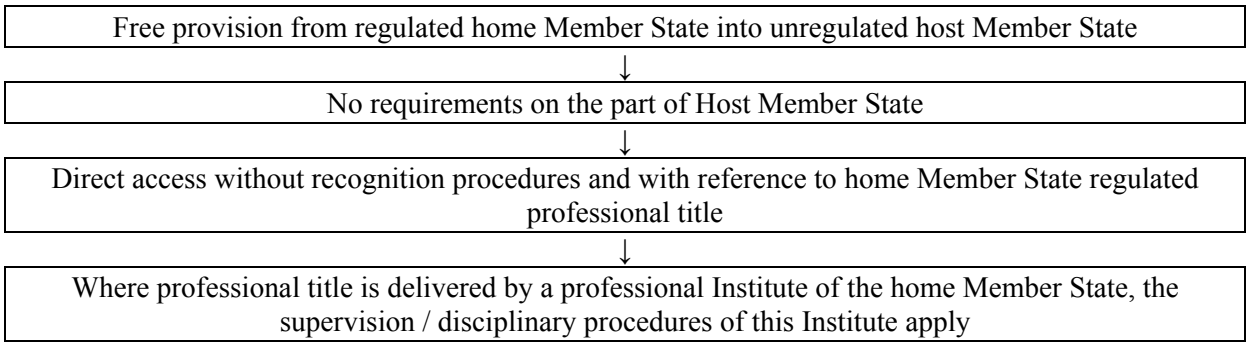
131. Following each Graphic, a short description of each procedural framework follows. The details of specific requirements are provided in 4.1-4.5 (§ 136-147).

132. Graphic 1:



This scenario is relatively straight forward, whereby the main potential uncertainties for migrants lie in whether the Member State into which the cross-border services will be delivered will require a pro forma declaration and whether accompanying documents and renewal will be required.

133. Graphic 2:



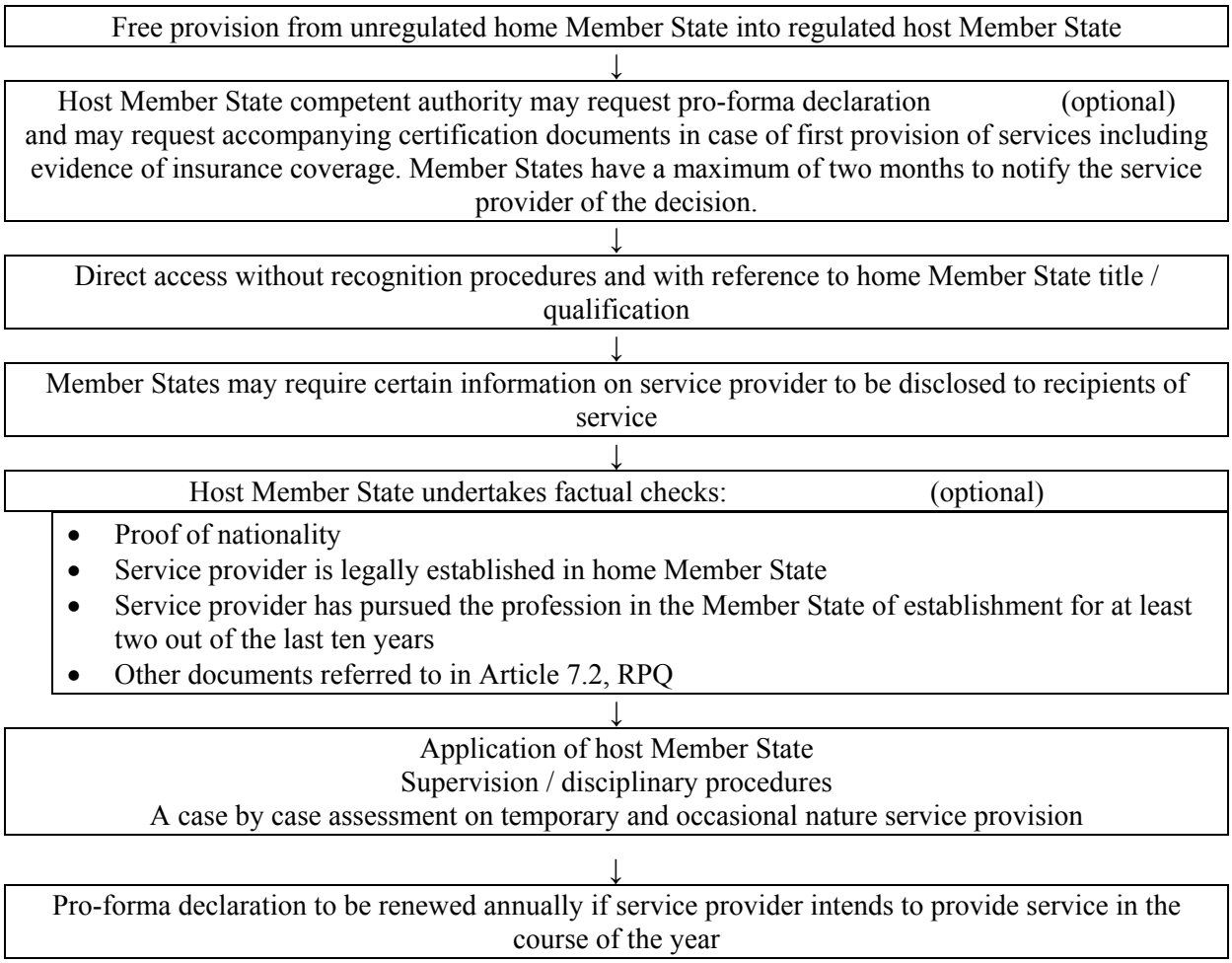
No regulated title or activity exists in the host Member State. Therefore, the RPQ Directive does not apply in this context.

Since these activities can be carried out without any restriction in the host Member State (whether through freedom of establishment or freedom to provide services [(42)]), the service provider may practice them using his home country title, under the same conditions as local professionals, which means without any restriction.

Where the provider is a member of a professional Institute, the observance of the Institute's rules (ethical and otherwise) is regardless of the recipient's location of the service provision, subject to the consistency with broader national requirements.

[(42)] In the Case Gebhardt, the European Court of Justice judged "Where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself in the first State and pursue that activity there." The same applies to cross border provision of services from the Member State of establishment.

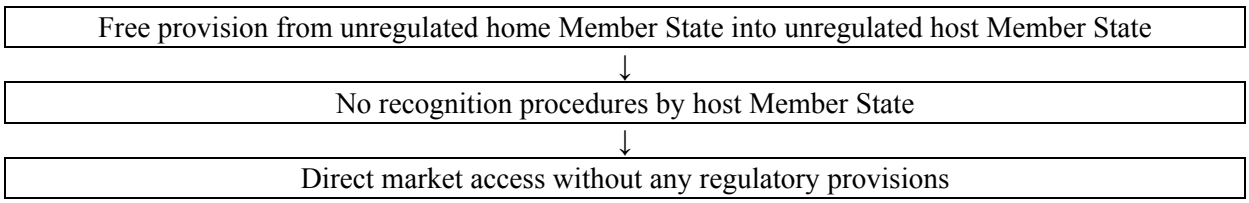
134. Graphic 3:



Where the service provider is established in a Member State where the profession is not regulated and moves to a Member State where the profession is regulated, without prejudice to specific provisions of Community Law, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services if the service provider has pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when in that Member State (Article 5 of the RPQ Directive).

In accordance with Article 7.3 of the RPQ Directive, "The service shall be provided under the professional title of the Member State of establishment, in so far as such a title exists in that Member State for the professional activity in question. That title shall be indicated in the official language or one of the official languages of the Member State of establishment in such a way as to avoid any confusion with the professional title of the host Member State. Where no such professional title exists in the Member State of establishment, the service provider shall indicate his formal qualification in the official language or one of the official languages of that Member State".

135. Graphic 4:



The RPQ Directive does not apply in this context.

In this scenario, as no professional rules are in place in either the home or host Member States, no recognition or related requirements exist.

4. Important reference notes to rules of recognition procedure

4.1. Pro forma declaration: competent authority and form

136. As noted (§ 126-127), Member States *may* require that, where the service provider provides cross-border services in another Member State, he shall inform the competent authority in the host Member State in a written declaration to be made in advance.

As also noted (§ 127), the justification for such a pro forma declaration could be to facilitate the application of disciplinary provisions in force on the territory of the host Member State.

137. It is also the responsibility of the Member State to organise the procedure.

The declaration must be made to the competent authorities as defined in Article 3.d of the Directive: "any authority or body empowered by a Member State specifically to issue or receive training diplomas and other documents or information and to receive the applications, and take the decisions, referred to in this Directive".

It is the responsibility of the Member State to clearly define who is the competent authority to whom a declaration must be made.

138. The service provider shall be allowed to supply the declaration by any means, which includes in writing or electronically.

In FEE's views an oral declaration would not be appropriate at a minimum because it should be necessary to have a proof of the declaration.

4.2. Pro forma declaration: content and accompanying documents

139. Where a Member State requires a pro forma declaration, it has to define the content of such declaration which cannot extend beyond the requirements of the Directive.

140. Article 7 of the RPQ Directive makes it clear that the Member State may require that the declaration includes the details of any insurance cover or other means of personal or collective protection with regard to professional liability.

141. Member States may also require the declaration made on the first move to be accompanied by the following documents:

a) Proof of the nationality of the service provider;
b) An attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation;
c) Evidence of professional qualifications;
d) When the profession is not regulated in the Member State of origin, any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years;
e) For professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.

4.3. Renewal of the pro forma declaration

142. Where a Member State requires a pro forma declaration, this declaration will remain valid for one year (Article 7 of the RPQ Directive). The Member State may require the pro forma declaration to be renewed once a year if the service provider intends to provide temporary or occasional services in that Member State during that year.

If there is a material change in the situation substantiated by the documents submitted in the first pro forma declaration, the Member State may require the service provider to submit updated information.

4.4. Application of host country rules

143. As already noted (§51), where a service provider provides cross-border services in another Member State, the professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, shall be applied (Article 5.3 RPQ Directive).

144. Article 5.3 of the RPQ Directive states this as a mandatory requirement but does not list all of the relevant rules, citing specifically only the following by way of example:

- Definition of the profession, which should normally include the scope of services authorised or prohibited to professionals who pursue the same profession in that Member State;
- Use of titles;
- Serious professional malpractice which is directly and specifically linked to consumer protection and safety in the host Member State;
- Disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.

4.5. Administrative cooperation between Member States and role of professional Institutes

145. The overall functioning of the RPQ Directive requires close cooperation between Member States. This is mandated in Article 56.

> **Article 56, RPQ Directive**
>
> *The competent authorities of the host Member State and of the home Member State shall work in close collaboration and shall provide mutual assistance in order to facilitate application of this Directive. They shall ensure confidentiality of the information which they exchange.*

146. As noted, FEE is pleased to be participating in the pilot project of the Internal Market Information (IMI) system which the European Commission is promoting to ensure effective collaboration.

147. The role of FEE, and more specifically of FEE Member Bodies is extremely important. In many cases, FEE Member Bodies will be the relevant competent authorities, which will liaise with the Contact Points to be established under the Directive in order to process applications.

Furthermore, FEE Member Bodies will also have a critical role in the necessary liaisons between host and home Member States in cases where disciplinary procedures are applied, and more generally in ensuring the respect of professional rules.

5. Case studies on temporary provision of services in another Member State

148. Case study on reserved activities (see § 65)

Case Study 4

Reserved activities

In Belgium, regulated activities reserved to reviseurs d'entreprises/bedrifsrevisoren include statutory audit and expert activities as defined in the Second, Third and Sixth Company Law directives. Belgian Law provides that to carry out such engagements registration with the local professional Institute is required.

A Spanish professional who is not an accountant but who would be entitled in his country to issue the report on the contributions in kind as required by the Second Company Law Directive is requested by one of his clients to prepare such a report for a subsidiary that this company intends to incorporate in Belgium.

Discussion

1. The question relates to a temporary and occasional provision of services. Even if in some Member States expert activities required by Company Law Directives are usually (sometimes necessarily) carried out by statutory auditors, these services are not covered by the provisions of the Directive on Statutory Audit.

2. Directives 77/91/EEC, 78/855/EEC and 82/891/EEC require the expert to be "approved by an administrative or judicial authority" without specifying in the host Member State.

3. Article 17.6 of the Services Directive foresees an explicit exemption when the Member State where the service is provided reserves an activity to a particular profession. Recital 88 confirms that the provision on the freedom to provide services should not apply in cases where, in conformity with Community Law, an activity is reserved to a particular profession.

4. To be registered in Belgium to carry out above-mentioned services, it is required to be registered in accordance with the provision of the Statutory Audit Directive. Compensation measures must be considered against that background.

149. Case study on distinction between establishment and cross border provision of services

Case Study 5

Establishment or provision of service?

The client of a French professional accountant opens a subsidiary in Spain and asks his accountant to help him with the organisation of the accounting systems in the subsidiary. The French accountant who has no office in Spain accepts to send an assistant to Spain for a couple of weeks to do the job. The assistant knows very well the Spanish legislation because he is of Spanish origin.

The project having been conducted to the satisfaction of the client, he asks whether the French accountant would accept to send the assistant three days every month to help the company with preparing monthly reports. A contract is signed for two years.

Discussion

1. The activity "organisation of accounting system" is not reserved to professional accountants in Spain. It would then be possible for a French qualified accountant to undertake the work.

2. The French accountant has no office in Spain which means that he intends to work cross border on the basis of the Treaty's Article on provision of services.

3. The host Member State may not prevent the service provider who is legally authorised to pursue a profession in his country of origin from carrying cross-border services belonging to this profession, under his home country title.

4. Article 5.2 of the Directive on RPQ states 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 (see also the Gebhardt Case in § 7). Applying these principles allow concluding that this is not a provision of services but an establishment. The question might be raised however whether establishment is linked to the existence of a minimum of infrastructure in the country.

5. Article 4.5 of the Services Directive provides the following definition of "establishment": the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out. Applying these principles allow concluding that this is not an establishment but a provision of services, which is contradictory with what is said in the previous paragraph.

150. Case study on market access rules: Tax and Accountancy Services

Case Study 6

Tax and accountancy services

A member of the Italian accountancy profession (Dottore Commercialista/Esperto contabile) wishes to provide accounting and tax advice in the United Kingdom. What possibilities are there in terms of market access rules and recognition rights and procedures?

Discussion

1. The Italian Dottore Commercialista/Esperto contabile can provide services on a permanent or temporary and occasional basis without any need to pursue recognition procedures in the UK. This is because accountancy and tax are not regulated activities in the UK and therefore there are no market access rules. The services would be offered under the professional title of the home country – i.e. Dottore Commercialista/Esperto contabile (and not a liberal translation of this: see 3 below). It should be noted that the Italian professional is not permitted to offer services under one of the professional titles in the UK, unless the recognition procedure is pursued (as 2 below).

2. The Italian Dottore Commercialista/Esperto contabile MAY seek recognition through membership of an equivalent UK professional body in order to offer tax and accounting services with one (or more) of the professional titles in the UK. In order to do so, the recognition procedures in the RPQ dealing with freedom of establishment would apply. The provision of services procedures in the RPQ are not applicable as there are no market access rules in the areas of tax and accountancy concerning temporary (or indeed permanent service provision – as per 1 above).

3. It should be noted that the RPQ has very clear provisions on the use of professional titles for the purposes of avoiding confusion. In Article 7, dealing with freedom to provide services where the service is provided under the professional title of the Member State of establishment, "that title shall be indicated in the official language […] of the Member State of establishment in such a way as to avoid confusion with the professional title of the host Member State." In Article 52, it is further clarified that nationals of Member States shall not be authorised to use the professional title of the UK (and Republic of Ireland) bodies in Annex I of the RPQ unless they furnish proof that they are members of those bodies.

Case Study 7

Freedom to provide services: insolvency practice in the UK

A dottore commercialista/esperto contabile is authorised to practice insolvency in Italy wishes to practice insolvency work on a temporary and occasional basis. Insolvency is a regulated activity in the UK reserved to members of a number of professional bodies and subject to specific authorisation requirements.

What procedures need to be completed in order for the provision of services to take place?

Discussion

1. UK authorities acknowledge that if the professional is authorised to practice insolvency in his home country, he will be authorised to practice in the UK, subject to Articles 5 to 9 of the RPQ Directive.

2. Articles 5 to 9 of the RPQ deal with the freedom to provide services given that the activity is regulated in the host Member State. As noted, these articles include a number of "may" provisions in relation to the pro-forma declaration and information to be given to recipients.

2. The UK Insolvency Service requires that the Italian authorised insolvency professional should make a declaration in advance of the intention to provide temporary and occasional services and that the declaration should be accompanied by the relevant documents referred to in Article 8. Furthermore, the service provider should be required to furnish the recipient of the service (e.g. creditors, debtors and directors) with relevant information as allowed by Article 9. The Service also considers that it is in the public interest for a central and accessible record of service providers to be maintained.

IV. PROVISIONAL CONCLUSIONS AND PENDING QUESTIONS

151. Free movement is an essential characteristic of the Internal Market and derives from the 1957 Treaty of Rome. The European institutions, including the European Court of Justice, have since developed a regulatory framework intended to permit freedom of establishment and the free provision of services across the Internal Market.

While the principles are simple, their application and implementation are complicated. As far as professional accountants are concerned, the additional complexity arises for three key reasons:

- The very wide range of activities undertaken by professional accountants across EU Member State;
- Variations in Member States' rules regarding the possible parallel pursuit of different activities by an individual member of the profession or firm;
- The existence of different regulatory approaches and market access rules at Member State level in relation to the provision of non-statutory audit services.

152. The existence of three Directives and the interrelationship between them could give rise to a number of divergent interpretations. This study shows that there is a complex interaction between the three recent EU Directives, and while there is a clear hierarchy of legal primacy, there are still a number of questions requiring further clarification. This concluding chapter sets out areas where there is a considerable degree of clarity and areas where further questions should be addressed.

At this stage, FEE decided to draw the attention to pending questions rather than to fully develop comments that require further and detailed study in view of the transposition of the Directives by the Member States.

153. Three recent EU Directives prompted FEE to reconsider the principles of free provision of services and freedom of establishment and to examine whether the previous framework remains valid. As noted throughout this paper, these Directives introduce a new regime in relation to the free provision of services, which will be applicable to services other than statutory audit which are provided on temporary and occasional basis.

Given that the transposition process is still underway, it remains to be seen how individual Member States will address the options available to them as stipulated in the Directives. By way of example, an important question would be whether Member States will use the option to require a pro-forma declaration in case of temporary and occasional provision of services in another Member State.

154. This study shows that rules applicable to the establishment of professional accountants in another Member State remain broadly unchanged, where the professional is engaged in all activities other than statutory audit (the specific treatment of statutory auditors is dealt with below).

In regard to the establishment of accountants the same provisions which were present in the existing recognition regime will continue (including aptitude test).

In relation to this area of professional activities, the Directives introduce new elements including the possibility of recognition in a new Member State to an individual who originates from a Member State which does not regulate the activity. In this case, the recognition would be afforded on the basis of professional experience within a given timeframe. It would also be subject to a compensation measure as is the case for regulated migrant professionals.

155. The following pending questions concerning the accountancy profession are briefly commented on in the subsequent paragraphs:

- Requirements relating to statutory auditors' infrastructure (§156-158);
- Interpretation of Article 14 of the Statutory Audit Directive (§ 159);
- Scope of host country rules applicable in case of provision of services (§ 160);
- Scope of the exception in Article 17.6 of the Services Directive (§ 161);
- Relevancy of the system of partial recognition (§ 162).

156. The difference between establishment and provision of services raises a difficult problem of interpretation which is not specific to the accountancy profession. Provision of services must remain temporary and occasional; these criteria will be assessed case by case, in particular in relation to the duration, frequency, regularity and continuity of the services (Article 5.2 RPQ).

The definitions of establishment in the Services Directive refer to a stable infrastructure from where the business of providing services is actually carried out. The nature of this infrastructure as analysed by the European Court of Justice in the Ramrath case did not become clearer after the approval of the three recent directives.

157. The Statutory Audit Directive requires approval and registration by the Member State requiring the Statutory Audit. It does not address specifically the different possibilities concerning the modes of exercise. The question could then be raised whether a statutory auditor must be established in order to be approved and registered in the Member State requiring the statutory audit. Establishment must be understood here as stable infrastructure. It is an important pending question whether under the new legislative framework Member States would be allowed to require actual presence and infrastructure in order to approve and register migrant professionals.

158. In the past an important element to consider was the ECJ jurisprudence (see § 9 - Ramrath case) that a Member State can require a minimum infrastructure and actual presence in that Member State (although not the residence of the professional in the country) for carrying out a professional activity if such requirements are objectively necessary for ensuring compliance with the rules of professional practice. It is to be clarified whether this ruling is still relevant following the Statutory Audit Directive, which includes a comprehensive regulatory framework for statutory audit including a requirement of cooperation between competent authorities of the Member States to ensure compliance with the rules of professional practice.

159. A further pending question relates to the compensation measure for the approval of statutory auditors when migrating to another Member State. Article 14 of the Statutory Audit Directive determines the conditions for approval of statutory auditors from another Member State. It refers to the RPQ Directive which introduced the aptitude test as a compensation measure when qualification in the Member State of origin and destination are substantially different from qualifications obtained in the Member State of origin. The implementation can become difficult when Member States seek to reconcile the requirement to set an aptitude test relating only to the audit of annual and consolidated accounts as required by Community Law with national

structures of the profession. This can occur where national structures encompass the regulation of activities set by national as opposed to Community Law.

In other words, is it necessary to organise a aptitude test for statutory audit activities separate from other accountants' activities? In many cases, this could contradict the principle of proportionality. Also, it would interfere with the organisation of the professions in the Member States and suggest a wide application of partial recognition (see § 162).

160. In its comments on the proposed Directives on RPQ and Services, FEE expressed a preference for the application of the professional rules of the Member State where the service is provided to insure an equivalent quality of service to customers but also to avoid distortions in the competition.

The RPQ Directive states that the service provider shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications (Article 5.3). Examples are given by the Directive: definition of the profession, use of titles, serious malpractice directly and specifically linked to consumer protection, disciplinary provisions.

Interpretation of "malpractice linked to consumer protection" is not easy – it is unclear whether this example can be related to the requirement that the rule be linked to professional qualification. It is also unclear how this restrictive approach to the application of the host country Member State will combine with Article 16 of the Services Directive.

In particular, FEE considers that regulated professions cannot be fully assimilated to business services. The implications for the accountancy profession of the Services Directive require further analysis and could be the subject of a separate study.

161. Article 17.6 of the Services Directive exempt from the specific rule of Article 16 (free provision of services), the matters covered by the title II of the RPQ Directive (see § 61-66). This is a good decision avoiding conflict of laws since both provisions relate to the temporary and occasional provision of services without establishment.

However, article 17.6 has apparently a broader scope. It provides a similar exemption for requirements in the Member States where the service is provided which reserves an activity to a specific profession (see § 65).

The question is to know whether some activities might be reserved to a particular profession that would not be regulated (see § 11).

162. The European Court of Justice defined conditions for a partial recognition of qualifications (see § 111-113). This means that the migrant would only be allowed to practice some activities of a regulated profession in the host Member State. The Court ruled that the RPQ Directive does not preclude competent authorities to allow partial recognition if the holders of the diploma so request.

The Court also discussed whether Member States are required to allow partial recognition. Two situations were distinguished:

- Partial recognition may be rejected when shortcomings may effectively make up for through compensation measures provided for in the RPQ Directive;
- If differences are so great that in reality a full programme of education and training is required, the competent authorities must justify the refusal for partial recognition by "overriding reasons based on the general interest, suitable for securing the attainment of the objective which they pursue and not going beyond what is necessary in order to attain the objective".

If compensation measures can be limited to an aptitude test covering the sufficient knowledge of local law and regulation, it seems difficult to conclude that Member State would be required to allow partial recognition. However, it remains unclear whether some application of this jurisprudence could be found in the accountancy profession but this cannot be excluded when considering the wide variety of activities carried out by accountants in the Member States. FEE believes that the application of such rules on partial recognition would in practice arise in very exceptional cases.

APPENDIX 1: EUROPEAN COURT OF JUSTICE – CASES MENTIONED IN THE STUDY

- Case 71/76, Thieffry *v* Conseil de l'ordre des avocats de la Cour de Paris (ECR [1977] p.00765)
- Joined Cases 286/82 and 26/83, Luisi & Carbone *v* Ministero dello Tesoro (ECR [1984] 377)
- Case 107/83, Ordre des avocats au Barreau de Paris *v* Onno Klopp (ECR [1984], 02971)
- Case C-96/85, Commission of the European Communities *v* French Republic (ECR [1986] 01475)
- Case C- 340/89, Vlassopoulou *v* Ministerium für Justiz, Bundes- u. Europaangelegenheiten Baden-Württemberg (ECR [1991] I-2357)
- Case C- 159/90, Society for the Protection of Unborn Children Ireland *v* Grogan (ECR [1991] I-4685).
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