OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 16 July 2009 (1)

Case C-200/08

Commission of the European Communities
v
French Republic

(Freedom to provide services – Freedom of movement for persons – Freedom of establishment – Recognition of professional qualifications – Snowboard instructors – Directive 92/51/EEC – Partial access to a profession)

1. In these proceedings under Article 226 EC, the Commission asks the Court to declare that, in refusing to recognise snowboard instructors' qualifications issued in other Member States, the French Republic has contravened Articles 39, 43 and 49 EC and Article 6 of Council Directive 92/51/EEC. (2)

Legal framework

Treaty provisions

2. Article 39 EC secures freedom of movement for workers within the Community. It prohibits any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment. Furthermore, it entails the right (subject to limitations justified on grounds of public policy, public security or public health) to accept offers of employment actually made, to move freely within the territory of Member States for this purpose and to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.

3. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

4. Article 49 EC prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

Directive 92/51

5. Initially, the approach towards the recognition of qualifications obtained in other Member States was sector-specific, requiring harmonising legislation profession by profession. Subsequently, however, the Community legislature introduced a general system, in the form of Council Directive 89/48/EEC, (3) for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. (4)

6. Directive 92/51 supplements the system of recognition established in Directive 89/48 in respect of regulated professions (5) for which a diploma (as defined in Directive 89/48) is not required. It thus facilitates the pursuit of any professional activity which in a host Member State is dependent upon the completion of a certain level of education and training. (6)

7. Chapter V of Directive 92/51 establishes a system for recognition where a host Member State requires possession of a certificate. As far as relevant, Article 6 reads as follows:

'Where, in the host Member State, the taking up or pursuit of a regulated profession is subject to possession of a certificate, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as those which apply to its own nationals:

(a) if the applicant holds the diploma, as defined in this Directive or in Directive 89/48/EEC, or the certificate required in another Member State for the taking-up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State ...'

8. Article 7 of Directive 92/51 provides that a Member State may require the applicant to complete an adaptation period or take an aptitude test in certain circumstances.

National provisions

9. Law 84-610 of 16 July 1984 governs the organisation and promotion of sports. (7) Article 43 of that law provides for a list of qualifications and diplomas for sports instructors to be compiled. That list was set out in an annex to a ministerial decree of 4 May 1995. (8) No French qualification is listed for sports instructors who wish to qualify in France to give instruction only in snowboarding. Rather, a person who wishes to be a snowboarding instructor must obtain the first-level State certificate for sports instructors in alpine skiing ('the alpine ski instruction certificate').

10. Annex D to the decree lists the foreign diplomas recognised by the French State as being equal to French diplomas. No qualification or diploma for snowboard instruction figures on that list.

11. A ministerial decree of 25 October 2004 (9) fixes the conditions for obtaining the alpine ski instruction certificate. In accordance with Article 1 of that decree, such a certificate attests that the holder is qualified to supervise, accompany, instruct and train participants in alpine skiing and a number of related activities listed in Annex VII to the decree, at all levels and without himself requiring supervision or assistance, both on- and off-piste (with the exception of certain more dangerous zones (10)). Holders of the alpine ski instruction certificate are entitled to call themselves 'national instructors'.

12. Annex VII to the decree lists, inter alia, snowboarding as a 'related activity' which is complementary to alpine skiing. It is common ground that these provisions of national law mean that any snowboard instructor who wishes to pursue this profession in France must also hold an alpine ski instructor's qualification.

The pre-litigation procedure and declaration sought

13. The Commission states that the Direction départementale de la jeunesse et des sports de Grenoble (Grenoble Departmental Youth and Sports Directorate) sent a letter to a German snowboard instructor explaining that French law prevented it from recognising the German qualification. The French authorities likewise informed a number of British snowboard instructors that their qualifications could not be recognised under French law because they had not taken the 'Eurotest' or 'Eurosécurité' tests for alpine skiing. (11) These parties complained to the Commission.

14. Subsequently, the Direction régionale et départementale de la jeunesse et des Sports Rhône-Alpes (Rhône-Alpes Regional and Departmental Youth and Sports Directorate) wrote to the British Association of Snowsports Instructors ('BASI') stating that only a professional qualification in alpine ski instruction would satisfy its requirements for snowboard instructors and that it could not recognise BASI's diploma in snowboard instruction. BASI also lodged a complaint with the Commission.

15. In December 2005, following these complaints, the Commission sent a letter to the French Government. It took the initial view that the French measures were likely to impede non-French snowboard instructors from exercising their profession in France. The French Government replied in February 2006, stating that in its view the measures were justified.

16. On 4 July 2006 the Commission sent the French Government a reasoned opinion. That led to a number of meetings and written exchanges.

17. In the course of the written exchanges, the French Government referred to an agreement reached on 28 March 2000 between a number of winter sports associations ('the Brussels agreement') which established a standardised definition of a ski instructor and approved the 'Eurotest' ski proficiency test. France also referred to a further agreement, signed by ski associations from Italy, France and Austria, defining snowboard instruction as a 'related activity' in the sense in which that term is used in the French legislation.

18. The French Government also stated that on 27 March 2006 the Syndicat national des moniteurs de ski français (French Ski Instructors Union, 'the SNMSF') had concluded an agreement with BASI. BASI undertook to ensure that its snowboard instructors would also hold alpine skiing qualifications. The agreement purported to commit France, in return, to regularise the situation of around 40 British snowboard instructors by (exceptionally) recognising their diplomas without further qualifications. BASI accordingly withdrew its complaint to the Commission.

19. The Syndicat National des Entreprises exploitant les activités physiques et récréatives des Loisirs Marchands (the National Union of Businesses based on Physical and Recreational Activities, 'the SENLM') objected to that agreement. It sought a declaration from the Tribunal de Grande Instance in Paris that the agreement could only impose binding obligations on France if it were signed by a government authority with the SENLM's agreement. When the Commission questioned the French Government on this matter, the French Government confined itself to stating that it had

no binding obligation to check the qualifications attested to by a foreign certificate unless there was an allegation of fraud. (12)

20. In the present proceedings, the Commission asks the Court to declare that, by refusing to permit German and British snowboard instructors to teach snowboarding in France and by not referring, in the amended decree of 4 May 1995, to snowboard instructor qualifications acquired in other Member States, the French Republic has failed to fulfil its obligations under Articles 39, 43 and 49 EC and under Article 6 of Directive 92/51.

Assessment

Preliminary remark

21. Both the withdrawal of BASI's complaint and the Brussels agreement are irrelevant to the Court's ruling in the present proceedings. The provisions of national law which form the basis of the Commission's action remain unchanged and, as the Commission correctly notes, an agreement between various skiing associations has no effect on the national legislation at issue.

Partial access to a profession

22. The problems leading to the present proceedings arise because different Member States hold different views about the professions of winter sports instruction. In some Member States, alpine ski instruction and snowboard instruction are treated as two separate professions. In other Member States, the profession of snowboard instruction is viewed as a part of the wider profession of alpine ski instruction. (13) France takes the latter view.

23. The issue in the present case is whether a host Member State is obliged to recognise professional qualifications awarded in another Member State, where the profession in question is viewed as a complete profession in itself in the home Member State, but as part of a wider profession in the host Member State. For convenience, I shall refer hereafter to a person who has obtained his professional qualifications in a more narrowly defined profession in his home Member State and who wishes to exercise free movement rights to engage in the specific activities for which he is already qualified at home and that form part of a more widely defined profession in the host Member State as a 'migrant professional'; and to the possibility of taking up a more widely defined profession in the host Member State partially rather than fully as 'partial taking up' or 'partial access'.

Colegio de Ingenieros

24. Similar issues came before the Court in *Colegio*. (14) In that case, the holder of an Italian hydraulic engineering diploma applied to take up the profession of civil engineer in Spain. The competent national authorities authorised him unconditionally to do so; but the Colegio de Ingenieros (Institution of Civil Engineers) brought an application for annulment of that decision. The Colegio took the view that, although the applicant should be permitted to work as a civil engineer in hydraulics, gaps in his training (15) precluded him from taking up the full profession of civil engineer.

25. The referring court therefore asked (16) (i) whether the competent authorities of the host Member State are precluded by Directive 89/48 (whose regime is complementary to that of Directive 92/51 (17)) from granting restricted recognition (rather than full and unconditional recognition) to a home Member State's diploma where the profession and training in the home Member State do not correspond fully to those in the host Member State; and (ii) whether Articles 39 and 43 EC prevent the host Member State from excluding the possibility of authorising the partial taking-up of a regulated profession.

26. Because the Court's reasoning in that case provides the natural starting point for considering how the present application should be decided, it is worth examining it in some detail.

27. The Court first observed that the wording of Directive 89/48 neither explicitly recognised nor explicitly prohibited partial recognition of professional qualifications. (18) It recalled that 'differences in the organisation or content of education and training acquired in the Member State of origin by comparison with that provided in the host Member State are not sufficient to justify a refusal to recognise the professional qualification concerned. At most, where those differences are substantial, they may justify the host Member State's requiring that the applicant satisfy [compensatory measures, either a period of adaptation or an aptitude test]'. (19) Indeed, the competent authorities are required to take account of each of the activities covered by the profession in question in both Member States: 'although the Directive treats a regulated profession as a whole, it nevertheless recognises that there are, in reality, separate professional activities and corresponding education and training. It follows that a case-by-case approach, tailored to each of the professional activities covered by a regulated profession, is not contrary to or beyond the scope of the general scheme of the Directive'. (20)

28. The Court therefore concluded that the wording, scheme and objectives of the Directive did not preclude the possibility of partial taking-up of a regulated profession. To the extent that there was a potential risk of consumer confusion, there were sufficient ways of remedying that problem. (21)

29. I pause to observe that in *Colegio* the Court clearly and explicitly recognised the problems that arise where professions differ in their scope in home and host Member States. Equally clearly, the Court favoured a reading of Directive 89/48 that permits appropriate partial recognition and eschews the stark choice between unconditional full recognition and total exclusion. I shall return to this aspect of the case later. (22)

30. The Court then turned to examine whether Articles 39 EC and 42 EC prevented the Member State from excluding the possibility of partial access to a regulated profession (restricted to the pursuit of one or more activities covered by that profession).

31. The Court's starting point was that, where the conditions for taking up a profession have not been harmonised at Community level, Member States retain the power to define those conditions (with which both their own nationals and nationals of another Member State intending to pursue that activity must in principle comply). In exercising those powers, they must nevertheless respect the basic freedoms guaranteed by the Treaty. (23)

32. Those statements apply with equal force to the professions of snowboard instructor and alpine skiing instructor, at issue in the present case.

33. Next, the Court recalled settled case-law to the effect that national measures liable to hinder or make less attractive the exercise of free movement rights can be justified only if they fulfil the

four '*Gebhard*' conditions: (i) they must be applied in a non-discriminatory manner; (ii) they must be justified by overriding reasons in the public interest; (iii) they must be suitable for securing the attainment of the objective which they pursue; and (iv) they must not go beyond what is necessary to attain that objective. (24)

34. Those conditions provide the framework within which the present application falls to be assessed.

35. The Court next stated in terms that legislation of a host Member State which precludes any possibility for the authorities of that State to allow partial taking-up of a profession *is* liable to hinder or make less attractive the exercise of both the freedom of movement for persons and the freedom of establishment, even though that legislation is applicable without distinction to the nationals of the host Member State and those of other Member States. (25)

36. The French legislation here at issue precludes any possibility of partial access. As the French Government acknowledges, it is therefore a barrier to the exercise of free movement rights. (26) The burden of proof to show that it is objectively justified thus falls on the defendant Member State.

37. In *Colegio*, the Court next accepted that protection of the recipients of services, and consumers in general, is capable of being an overriding reason in the public interest such as to justify restrictions on the freedom of establishment and the freedom to provide services (the second *Gebhard* condition).

38. Similar consumer protection arguments are advanced by France (*mutatis mutandis*) in the present case. In principle, they are equally acceptable here.

39. Finally, in *Colegio* the Court went on to examine the third and fourth *Gebhard* conditions together. It put forward two different scenarios, to which it gave two rather different answers.

40. In the first scenario, the degree of similarity between the professions in the home and host Member States is such that they may be regarded as, effectively, 'the same profession'. In such circumstances, the applicant is to be integrated fully into the professional system in the host Member State. Any shortcomings are to be dealt with through the application of compensatory measures. (27)

41. The 'second scenario' identified in *Colegio* concerns 'cases which … are not covered by the Directive, because the differences between the fields of activity are so great that in reality the full programme of education and training is required'. (28) The Court immediately recognised that, '[v]iewed objectively, this is a factor which is liable to discourage the party concerned from pursuing, in another Member State, one or more activities for which he is qualified'. That statement underlines the inherent tension between being qualified to pursue an activity in one's home Member State and being required to undergo 'the full programme of education and training' in order to pursue *the same profession* in the host Member State.

42. In such cases, the Court held that '*one* of the decisive issues is whether the professional activity which the party concerned wishes to pursue in the host Member State may, objectively, be separated from the rest of the activities covered by the corresponding profession in that State … *one* of the decisive criteria in this respect is the issue of whether that activity may be pursued, independently or autonomously, in the Member State where the professional qualification in question was obtained'. (29) The Court continued, '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 [refusing partial access] is too serious to

State, the conclusion is that the dissuasive effect caused by [refusing partial access] 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 … '. (30)

43. Although there are some common elements between the professions of alpine ski instructor and snowboard instructor, (31) the Commission (rightly, in my view) does not seek to argue that the two professions are essentially the same and that France should therefore be required, under Directive 92/51, to treat a qualification in snowboard instruction as fully equivalent to a qualification in alpine ski instruction, subject to the application of limited compensatory measures. Rather, the Commission accepts in its application that the differences between the two activities are sufficiently great that a snowboard instructor would, in reality, need to re-train as an alpine ski instructor in order to teach alpine skiing. The Commission therefore implicitly invites the Court to assess the present application within the terms set out in the second scenario envisaged by the Court in *Colegio*: that is, as being a case where 'the differences between the two fields of activity are so great that in reality the full programme of education and training is required'.

44. In my view, regarding the present application as a straightforward 'second scenario case' may be an over-simplification.

45. It seems to me that although the two scenarios identified by the Court in *Colegio* undoubtedly correspond to two types of circumstances in which recognition of a professional qualification may be sought in the host Member State, in practice the situation may sometimes be more complex. There will be many instances (of which I take the present case to be one) in which, whilst the two professions are certainly not the same (the first *Colegio* scenario), nor is it right to say that 'in reality the full programme of education and training is required' (the second *Colegio* scenario). (32)

46. Rather, the position in such cases will be as follows. First, there will be certain elements of the narrower profession in the home Member State that are part of a common core of knowledge required generically to exercise most if not all aspects of the wider profession in the host Member State. Second, those aspects of the narrower profession in the home Member State that are specific to it (and that constitute the remainder of the education and training for the narrower profession in the home Member State) will also be found, to a greater or lesser extent, (33) within that part of the wider profession in the host Member State that the migrant professional wishes to access. Third, there will be other elements of the wider profession in the host Member State that are concerned with other specific activities, and that have nothing (or very little) to do with the activities in which the migrant professional wishes to engage. (34)

47. In order to assess the present application, the Court needs to go beyond the analysis it set out in *Colegio* and deal with this 'third scenario'. To that extent, I suggest that the analysis in *Colegio* may need to be supplemented to take account of 'third scenario' cases.

48. I also observe that, in addressing the second scenario put forward in *Colegio*, the Court provided guidance that, although sufficient to deal with the specific query raised by the national court in that reference, does not deal fully with how second scenario cases should be approached. Thus, the Court merely identified *one* of the decisive issues ('can exercise of the narrower profession be dissociated objectively from exercise of the wider profession?') and *one* of the decisive criteria in determining that issue ('can the narrower profession be pursued as such in the home Member State?'). The Court was, it seems to me, careful not to say that exercise of the narrower profession in the home Member State *always* suffices to show that the narrower profession is objectively dissociable from the wider profession in the host Member State and that therefore, in every instance where the applicant can show authority to exercise the narrower profession in the

home Member State, the host Member State must always grant partial access without any further conditions. Such a statement would certainly have promoted free movement rights. It would also have represented a significant further reduction in host State control.

49. The Court was likewise not particularly specific, in *Colegio*, as to what the *other* 'decisive issues' are in dealing with mutual recognition questions in cases where the two professions are *not*, effectively, the same profession (that is, cases that do not fall within the *Colegio* first scenario). It would be imprudent to attempt a comprehensive list of such issues. However, some further degree of analysis is called for in respect of 'second scenario' cases. It will also be needed if I am right in my conjecture that there is sometimes a 'third scenario'.

50. It seems to me that a useful starting point – perhaps, no more than a slightly different way of approaching the question of objective dissociability of one profession from another (in whole or in part) – is to consider how the wider and narrower professions relate to each other. Do they have some common foundation? If so, to what extent? Are there aspects of general professional knowledge that must be acquired by everyone who wishes to exercise either the wider or the narrower profession? Are there elements of professional training for the narrower profession that, although not directly pertinent to every aspect of the wider profession, would nevertheless enable someone trained in that profession to adapt across and to exercise the wider profession without having to undergo 'the full programme of education and training'? Are there specific aspects of the wider profession as exercised in the host Member State that have nothing to do with the activities that the migrant professional wishes to engage in? Are there additional services that professionals trained in the wider profession in the host Member State are expected to render that can, objectively, be dissociated from the activities in which the migrant professional wishes to engage and the services that he proposes to provide? If they cannot be dissociated, can the migrant professional acquire the necessary additional training by following a supplementary course?

51. So as to avoid making assumptions about alpine skiing and snowboarding, let me take a different area of recreational activity by way of illustration. Suppose that in the home Member State the professions of dinghy instructor, yacht instructor, windsurf/sailboard instructor and power boat instructor are separate professions, whereas in the host Member State they are all grouped together under the umbrella qualification of 'recreational boating instructor'. Some elements of the instructors' professional training will be common to all four separate professions in the home Member State and will also form part of the recreational boating instructor qualification in the host Member State. (35) Other elements of training will be very sport-specific. Although sailboards, dinghies and yachts are all propelled by the wind and there are thus significant elements of overlap, they are not sailed the same way as each other. None of them are much like a powerboat (although many yachts do, of course, motor-sail or at least manoeuvre in marinas under power). And then there are the additional elements which may form part of professional training in one or other State for one or other profession. (36)

52. The decision whether a migrant professional holding (for example) a windsurf/sailboard instructor's licence in his home Member State should be given partial access to the profession of recreational boating instructor in the host Member State requires one to evaluate the exercise of free movement rights against the constraint of the need to protect consumers; and then (if a restriction of free movement rights is appropriate) to decide what measures satisfy the *Gebhard* conditions. That can only be done by first deconstructing both the components of the professional training in each Member State and consumers' requirements; and then evaluating the necessity and proportionality of any restrictions that the host Member State seeks to impose.

53. Given the fundamental importance of free movement rights and mutual recognition of

professional qualifications based on mutual trust, it is inherently unlikely that a decision to deny partial access altogether will be justifiable under *Gebhard*. It is far more likely that a proportionate response will be some form of partial access coupled with such conditions as are strictly necessary to ensure consumer protection and are proportionate to that aim.

54. Against that background, I turn to examine the details of the Commission's application and France's defence.

Articles 39, 43 and 49 EC

55. The French legislation precludes any possibility of partial access *as a snowboard instructor* to the exercise of the wider profession of alpine ski instructor which, in France, includes the profession of snowboard instructor.

56. I have already indicated that, in my view, such legislation is intrinsically liable to hinder or make less attractive the exercise of free movement rights. (37) The French Government acknowledges that its national law is likely to have that effect. It argues, however, that the legislation can be justified.

57. I therefore turn to examine the four *Gebhard* criteria for justification.

Non-discriminatory application

58. The Commission initially asserted that none of the *Gebhard* conditions were satisfied. However, it has adduced no evidence to suggest that the French legislation is *applied* in a discriminatory manner to non-French nationals who are citizens of other EU Member States. The Commission's starting point is, rather, that French nationals wishing to be snowboard instructors will tend to have qualified for the wider profession of alpine ski instructor in France. In contrast, other EC nationals wishing to be snowboard instructors may hold only a professional qualification as a snowboard instructor obtained in their home Member State. The Commission's complaint is thus that the *effect* of applying the French legislation is to create de facto discrimination against such persons.

59. The Commission does not suggest that a non-French EU national holding an alpine ski instructor's qualification would be prevented from teaching snowboarding in France. The criterion for exclusion from authorisation to teach snowboarding is the type of qualification held – a criterion that applies to nationals and non-nationals alike.

60. It is precisely in circumstances in which national legislation applied without discrimination produces a de facto discriminatory effect that it becomes necessary for the Member State to justify its measures under the test in *Gebhard*. The first of the four *Gebhard* criteria merely confirms that the legislation is indeed applied without discrimination. It is satisfied in the present case.

Justified by overriding reasons in the public interest

61. The French Government contends that its refusal to recognise snowboard instructors who are

not also qualified as alpine ski instructors is justified by the need to ensure the safety of consumers (that is, those learning both alpine skiing and snowboarding) on the pistes and, more generally, by considerations relating to consumer protection. I accept that these (like the protection of consumer expectations) are overriding reasons in the public interest (38) and that the second *Gebhard* condition is satisfied.

Suitable to attain their objective and not going beyond what is necessary to attain that objective

62. Is the refusal to give partial access – that is, to allow snowboard instructors qualified in other Member States to teach snowboarding, *but not alpine skiing*, in France – a suitable means of achieving that legitimate objective?

63. Applying, as a starting point, the 'second scenario' answer put forward by the Court in *Colegio*, the first question to ask is whether the profession of snowboard instructor is objectively dissociable from the profession of alpine ski instructor. One of the 'decisive criteria' in answering that question is, in turn, whether the profession of snowboard instructor may be pursued, independently or autonomously, in the Member State in which the qualification was obtained.

64. It is abundantly clear that the profession of snowboard instructor is recognised as a separate profession from that of alpine ski instructor in a number of Member States. Indeed, the complaints leading to the initiation of the pre-contentious procedure were lodged by snowboard instructors who had obtained their qualification in Member States which regard the two professions as separate (and which authorise persons holding only a snowboard instructor's qualification to teach snowboarding) (39) who had then sought to be allowed to exercise the profession of snowboard instructor in France.

65. I recall, however, that the question whether the two professions may be practised separately in the home Member State is merely 'one' of the decisive criteria to be used in assessing whether the two professions are objectively dissociable in the host Member State (which is likewise 'one' of the decisive issues to be determined).

66. In assessing the French Government's arguments, I find it helpful to apply the analysis that I have set out for 'third scenario' cases: that is, to bear in mind (so far as the Court has been told) the components of the professional training in each Member State and consumers' requirements; and then to evaluate the necessity and proportionality of the restrictions that the French Government seeks to impose.

67. The French Government's first two arguments relate to ensuring the safety of consumers on the pistes.

68. First, it argues that, as skiers and snowboarders share pistes, instructors need to be qualified in both skiing and snowboard instruction.

69. To succeed with this justification, the French Government would need to show that consumer protection (safety on pistes) requires a snowboard instructor to have a high level of knowledge of alpine ski instruction, that such knowledge is only possessed by those who are licensed to teach alpine skiing, that snowboard instructors coming from other Member States do not have the experience of having to teach snowboarding on pistes that are shared with skiers and/or that there are particular safety rules applying to shared pistes in France with which such snowboard instructors would be unfamiliar.

would be unfamiliar.

70. I have no difficulty in accepting that an instructor leading a snowboarding group may need to be able to anticipate the actions of skiers on the same piste. To that limited extent, I am prepared to accept that, in principle, the French Government's course of action is appropriate. That said, it does not follow that requiring snowboard instructors to hold a ski instruction qualification is the least restrictive way to ensure the safety of consumers on the pistes. (40)

71. Second, the French Government argues that snowboard instructors need to have a perfect knowledge of skiing. In particular, if there were an accident on the piste, it would be easier for an instructor to transport an injured person under his supervision if he were on skis.

72. It may perhaps be thought unlikely that a snowboard instructor teaching a group of novice snowboarders will be on skis rather than on a snowboard; or that, if on a snowboard, he would nevertheless find a spare pair of skis (and compatible boots of the right size) readily available to step into in order to succour the injured snowboarder. Leaving such speculation aside, the French Government's argument conflates requiring an instructor or potential rescuer to have a competent knowledge of skiing as such and requiring him to hold a qualification in ski instruction. I conclude that this argument does not support the French Government's contention that the French measures are either suitable or proportionate to achieve the aim pursued.

73. The French Government's next three arguments relate to ensuring consumer protection.

74. First, the French Government states that snowboarders comprise only some 10% of piste users and not all take snowboarding lessons. Snowboard instructors might therefore be tempted to augment their income by instructing skiing groups, and should therefore be qualified to do so. However, as the Commission rightly notes, this argument fails because it runs contrary to the presumption that citizens exercising their right to move within the Community will not abuse that right. (41)

75. Second, the French Government argues that permitting instructors to give instruction only in snowboarding splits the ski instruction profession. If such splits were allowed to proliferate, the profession would become fragmented, which in turn would confuse customers.

76. I cannot see how this argument adds weight to the French Government's assertion that the measures it has taken are appropriate to the aim of ensuring the protection of consumers on the pistes. Consumers can be deemed to be reasonably well informed, observant and circumspect in informing themselves about the goods or services that they wish to purchase. (42) A novice skier knows he needs a ski instructor. A would-be snowboarder (assuming he decides to take lessons at all) knows he is looking for a snowboard instructor. Both will therefore presumably ask their potential instructor whether he teaches what they want to learn. Furthermore, the measures taken seem to me to go beyond what is necessary to rectify this particular (potential) problem. (43)

77. Third, the French Government argues that the measures are appropriate because snowboard instructors who have a qualification in ski instruction are better snowboard instructors. However, France has adduced no evidence to support this assertion. It is therefore unnecessary to consider it further.

78. Finally, the French Government adds that although other Member States do not insist that snowboard instructors hold a ski instructor's qualification, that does not mean that the French rules are disproportionate or unnecessary.

79. That argument is perfectly correct in logic. However, as a negative argument, it does nothing

to demonstrate that the French rules are either appropriate or proportionate.

80. I therefore conclude that the French Republic is in breach of Articles 39, 43 and 49 EC.

Article 6 of Directive 92/51

81. The Commission has also alleged that the French Republic is in breach of its obligations under Article 6 of Directive 92/51.

82. The French Government states that the Court in *Colegio* did not consider that Directive 89/48 (44) obliges Member States to provide or consider partial access to a profession, only that it does not exclude such partial access. The French Government therefore considers that it is not required to grant partial access to the snowboard instruction profession which, in France, is part of the profession of ski instruction, rather than a stand-alone profession.

83. The Commission replies that this assertion fails to take into account *Beuttenmüller*, where the Court held that Directive 89/48 was opposed to national laws restricting the recognition of foreign qualifications to those which had a certain content, (45) an approach confirmed in *Colegio*. (46) The Commission maintains that Directive 92/51 obliges the French Republic to allow snowboard instructors partial access to the combined profession of ski and snowboard instructor.

84. It is true that the actual ruling in *Colegio* is merely permissive, inasmuch as the Court held that the competent authorities of a host Member State are not *precluded* by Directive 89/48 from granting a migrant professional, at his request, partial access to a regulated profession, corresponding to the activities that he is authorised to take up in his home Member State. Does it therefore follow that a refusal to give partial access to a migrant professional is a breach of Article 6(a) (47) of Directive 92/51?

85. The Court's judgment in *Beuttenmüller*, which is based upon a schematic reading of Directive 89/48, suggests that it is. (48) That reading is confirmed by *Colegio*, where the Court expressly recalled that 'differences in the organisation or content of education and training acquired in the Member State of origin by comparison with that provided in the host Member State are not sufficient to justify a refusal to recognise the professional qualification concerned'. (49) A refusal to grant partial access is, in practical terms, the same as refusing to recognise the professional qualification concerned. Both have the result that the migrant professional cannot rely upon the qualifications that he has obtained in his home Member State to work elsewhere in the EU.

86. Finally, I recall that in *Colegio* the Court interpreted the obligations imposed on Member States by Directive 89/48 in the light of the obligations imposed by Articles 39 and 43 EC. It seems to me that if denying access to the snowboard instruction profession to migrant professionals infringes those Treaty articles, such a denial must also constitute a breach of Article 6(a) of Directive 92/51.

Costs

87. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for costs against the French Republic.

Conclusion

88. Accordingly, I propose that the Court should:

– declare that, by refusing to permit snowboard instructors qualified in Germany and the United Kingdom to teach snowboarding in France and by not referring, in the amended decree of 4 May 1995, to snowboard instructor qualifications acquired in other Member States, the French Republic has failed to fulfil its obligations under Articles 39, 43 and 49 EC and under Article 6(a) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.

– order the French Republic to pay the costs.

---

1 – Original language: English.

---

2 – Directive of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25) ('Directive 92/51').

---

3 – Directive 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 (OJ 1989 L 19, p. 16) ('Directive 89/48').

---

4 – See further points 21 and 22 of the Opinion of Advocate General Ruíz-Jarabo Colomer in Case C-102/02 *Beuttenmüller* [2004] ECR I-5405 and points 5 to 7 of the Opinion of Advocate General Léger in Case C-330/03 *Colegio de Ingenieros* [2006] ECR I-801 ('*Colegio*').

---

5 – It is common ground that ski and snowboard instruction fall within the definition of a 'regulated profession' within the meaning of Article 1(e) and (f) of Directive 92/51.

---

6 – Both these directives were repealed, with effect from 20 October 2007, by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), but were in force on 28 August 2006, the date on which the period for compliance with the reasoned opinion expired.

---

7 – JORF of 17 July 1984, p. 2288.

---

8 – JORF No 110 of 11 May 1995, p. 7932. The ministerial decree was modified by ministerial decree of 3 August 1999 (JORF No 197 of 26 August 1999 p 12734). However, these modifications are immaterial to the present case. The ministerial decree was repealed in October 2007, which is after the date on which the period for compliance with the reasoned opinion expired.

---

9 – JORF No 263 of 11 November 2004, p. 19109.

---

10 – Specifically, non-marked out glacial zones and terrains calling for mountaineering techniques.

---

11 – These letters were not submitted to the Court by either party.

---

12 – It is unclear to me how the agreement could operate so as to regularise the position of the British-qualified snowboard instructors without some degree of intervention or acquiescence by a competent State authority in France, but I shall not delve further into this matter.

---

13 – The Commission indicates that the Czech Republic, Germany, Hungary, Poland, Romania, Spain, Finland and Sweden favour separate qualifications for snowboarding and ski instructors, whereas Austria, Belgium, Denmark, France, Ireland, Italy and (now) the United Kingdom require snowboard instructors to hold a ski instructor's qualification.

---

14 – Cited above in footnote 4.

---

15 – Arising from the differences between the Italian education and training necessary for the diploma in hydraulic engineering and the Spanish education and training necessary for the practice of civil engineering.

---

16 – The two questions referred were reworded by the Court at paragraphs 16 and 27 of the judgment. My paraphrase is based on that rewording.

---

17 – See above, point 6.

---

18 – Paragraph 18 of the judgment.

---

19 – Paragraph 19 of the judgment, citing *Beuttenmüller*, cited above in footnote 4, paragraph 52.

---

20 – Paragraph 20 of the judgment.

---

21 – Paragraph 25 of the judgment.

---

22 – See point 40 et seq, below.

---

23 – See *Colegio*, paragraphs 28 and 29 and the case-law cited therein.

---

24 – *Colegio*, paragraph 30, citing (inter alia) Case C-55/94 *Gebhard* [1995] ECR I-4165.

25 – Paragraph 31. See below, point 56.

26 – The Court in *Colegio* only referred to Articles 39 and 43 EC. I see no difficulty in applying this reasoning, mutatis mutandis, to Article 49 EC.

27 – Paragraph 34. The Court made it clear that such cases are therefore to be dealt with under Directive 89/48/EEC. The same reasoning may be applied, mutatis mutandis, to regulated professions to which Directive 92/51 applies.

28 – Paragraph 35.

29 – Paragraph 37 of the judgment (emphasis added), citing with approval the illustrations put forward by Advocate General Léger at points 86 and 87 of his Opinion.

30 – Paragraph 38.

31 – For example, both need to be able to explain the mountain environment in winter to their students; both need to make their students aware of safety precautions to be taken on- and off-piste; and both need to explain how the different means of transportation (skis, snowboards) behave on an inclined surface when flat or on their edge and how these characteristics can be used to steer, turn and stop.

32 – Thus, whilst such a comprehensive programme might certainly be needed to enable the migrant professional to teach alpine skiing, it is less easy to see how or why it would necessarily be required to enable him to teach snowboarding.

33 – Precisely because the way in which the boundaries of particular professions are defined varies from Member State to Member State, it is entirely possible that the 'profession-specific' aspects of the narrower profession in the home Member State may go beyond what is expected of those exercising the part of the wider profession in the host Member State that corresponds to that professional activity.

34 – Such an analysis accords with the Court's express recognition, in *Colegio*, that it may be necessary to look at each of the professional activities covered by a regulated profession: see point 28 above.

35 – For example, matters such as knowing about the marine environment (winds, tides, currents), understanding how boats behave on water, and why (heading, leeway, drift), some basic notions of navigation (at least for yachts and powerboats – dinghy sailors and sailboarders tend to stay within a smaller area) and safety rules for the prevention of collisions or other accidents.

36 – For example, some water safety information, rescue and first aid, or the mechanics of inboard and outboard engines, and almost certainly knowledge of any country-specific regulations governing

recreational water sports.

37 – See point 36 above.

38 – See, most recently, Case C-88/07 *Commission* v *Spain* [2009] ECR I-0000, paragraph 88 and the case-law cited therein.

39 – Since it is possible to teach snowboarding both in the United Kingdom (principally, in the Cairngorms) and in the numerous Austrian, German and Italian ski resorts, the present case is distinguishable from Case C-311/06 *Consiglio Nazionale degli Ingegneri* [2009] ECR I-0000, where the certificate in question did not provide access to the regulated profession in the home Member State.

40 – The French ski authorities could, for example, instigate a short additional training programme to familiarise potential instructors who are migrant professionals with the specific safety rules of the French pistes and with appropriate procedures to avoid accidents arising from encounters between skiers and snowboarders (the classic compensatory measure to deal with disparities in professional training). If and to the extent that a snowboard instructor could show that his training already equipped him with appropriate knowledge, he should be dispensed from following such a course.

41 – See point 38 et seq of the Opinion of Advocate General Poiares Maduro in *Consiglio Nazionale degli Ingegneri*, cited above in footnote 39, which gives a very helpful overview of the (extensive) case-law surrounding abuse of free movement rights.

42 – See, regarding the labelling of goods, point 61 of my Opinion in Case C-446/07 *Severi* (judgment pending) and the case-law referred to therein.

43 – Ensuring that all consumers are provided with clear information as to what each instructor is qualified to teach, and/or requiring a distinct job title for snowboard instructors not qualified to teach skiing (a technique identified in *Colegio* at paragraph 38) are possible measures that would be less restrictive of free movement rights than denying partial access.

44 – Directive 89/48 and Directive 92/51 form part of the same system of mutual recognition of diplomas: see above, point 5.

45 – *Beuttenmüller*, cited above in footnote 4, at paragraphs 50 and 53.

46 – Paragraphs 20 and 25 of the judgment.

47 – Although the Commission requests that the Court declare the French Republic to be in breach of Article 6 of Directive 92/51, the present case only appears to concern an infringement of Article 6(a).

48 – See, in particular, paragraphs 50 to 53 of the judgment.

49 – Paragraph 19 of the judgment, citing *Beuttenmüller*, cited above in footnote 4, paragraph 52.