

## **Notes on EU Directives 2005/36 and 2013/55**

### **Mutual recognition of professional qualifications**

The relevant EU Directives have at their heart the principle of mutual recognition of professional qualifications. There is a protocol for establishing equivalencies of different levels of qualification across EU member states, but once this level of equivalence has been established the principle is that each member state must recognise and accept the qualifications of other member states unless there is an overwhelming public interest not to (based only on public safety grounds).

### **Full Right of Establishment**

Much of the debate for many years has been concerned with employment rights of instructors qualified with the highest level of BASI award who wish to gain the full right of establishment to operate without restriction across different EU member states. With regard to instructors in France this issue has been settled for several years, and instructors who have gained BASI's ISTD qualification (as this is deemed equivalent to the French qualification necessary for full working rights) are able to present their papers to the relevant French government department and be issued with a licence to practise which gives them the full right of establishment. More recently a procedure has been put in place for BASI qualified snowboard instructors who wish to work in France. There is a similar procedure in Italy (at least in some of the regions). The legal basis for this process is clearly described in 2005/36 and continues in 2013/55.

### **Legal basis for temporary workers rights**

Temporary Worker Rights (or Free provision of Services) stem from Articles 5 to 9 of the EU Directive 2005/36/EC (dated 7/9/2005). This was transcribed in to French law in 2007. The Directive 2005/36 repealed Directive 1992/51 including its derogations regarding safety tests. In summary, Article 5 of 2005/36 states that:

- a professional can provide their services in another EU nation on a "temporary and occasional basis" if the profession in their home nation is regulated or if they have been practising their profession in their home nation for at least two of the previous 10 years.

As you know, ski instruction are not regulated in the UK so the clause regarding two years of service in the previous 10 becomes pertinent for any UK national (regardless of them being BASI qualified or another system). The Directive does not define "temporary" other than to state that 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."

The Directive does not specify a level of professional qualification which must be held, only that the temporary worker must be qualified in their home nation to deliver the service they wish to provide on a temporary basis in the host nation. The Directive requires (Article 7, 2) that a declaration is made in advance by the professional wishing to provide their services on a temporary basis. The declaration

(in the first instance and where there is a material change in circumstances) must include the following documents:

- proof of nationality
- a certificate that the holder is legally established in their home nation, and that he is not prohibited from practising
- evidence of professional qualifications
- proof of professional practice for 2 of the last 10 years

The Directive places certain obligations on the host nation that the professional wishes to practice in on a temporary basis (Article 7, 4):

- where there are public health and safety implications the host nation may check the professional qualifications which are being declared with the relevant organisation in the home nation. Such a check can only be carried out if there are serious health or safety implications arising from the lack of professional qualifications.
- the host nation has a maximum of one month of receipt of the declaration to inform the professional either that they will check for relevant qualifications or the outcome of any such check. If they do check for relevant qualifications the host nation has up to two months to finalise the checks.
- where there is a substantial difference between the professional qualifications of the professional wishing to provide a temporary service and the training required in the host nation an opportunity must be given by the host nation for the professional to demonstrate he has acquired the knowledge or competence lacking by means of an aptitude test. This can only relate to public health or safety issues and no other aspect of professional services.
- if the host nation does not respond within this timescale the temporary service may be provided.
- the Directive requires the competent authorities in both the home and host nations to ensure the exchange of all necessary information, including the legality of the service provider's establishment and his good conduct.

## **UPDATE TO THE 2005/36 DIRECTIVE**

As of 28 December 2013 Directive 2005/36 was amended and replaced by Directive 2013/55. From our reading of the new directive the key changes that are relevant to BASI members are:

### **Introduction of a European Professional Card**

This is described in amendments to Article 4, and seems an enabling mechanism for the operation of a European Professional Card. Obviously you are well aware of this through discussions on the MoU, and this Directive now provides the legal force for this to happen. The European Professional Card refers only to those professionals seeking full right of establishment, and the previous requirements for mutual recognition of professional qualifications seem unchanged.

### **Improving temporary provision of services**

This is a key theme of the amendments, with the main change being a reduction from two year's professional experience to one year for any professional whose home nation does not regulate their profession. The amendments also clarify

document requirements and the procedural steps required when declaring temporary provision of services, but does not change any of the previously described requirements for temporary working as far as I can tell.

### **Amendments to the comparison of qualifications and use of compensation measures**

The amended Article 11 removes the ability for host nations to refuse an application for right of establishment on the basis of the classified level of the qualification being offered except for certain situations. Currently professional qualifications are assigned to one of five levels:

- Level A is a basic certificate of competence;
- Level B is equivalent to secondary school qualifications such as GCSE or NVQ L2;
- Level C is equivalent to upper secondary school qualifications such as A level of NVQ L3 which lead to entry to higher education;
- Level D is broadly equivalent to a university diploma/degree or NVQ L4;
- Level E is a postgraduate level professional qualification or NVQ L5.

The work being done for BASI by Pete Allison at Edinburgh University is central to this.

The Amendment to Article 11 states that the host nation can refuse an application for right of establishment if an applicant holds a Level A qualification but the host nation requires a Level E qualification for their own nationals. Further, the host nation can specify an aptitude test and a period of adaption if an applicant holds a Level A qualification and the host nation requires a Level D qualification. In other cases where there is a difference between the level of the qualification held by the applicant and the level required by the host nation the host nation can impose a compensation measure/aptitude test. However, the amended Article places a responsibility on the host nation to better justify their decisions to impose qualification measures. New Article 14,5,a and 14,5,b require the host nation to provide the applicant with reasons why any difference in training/qualification level cannot be acquired in the course of professional experience validated by the relevant authority in the home nation.

As we understand it, the current compensation measure/aptitude test is the Eurotest and the justification for this is on safety grounds. Obviously the Directive does not go in to this level of detail for the ski instruction profession, so the implementation of these revised Articles would need to be tested in court for absolute clarity on what is allowed by host nations. The new Directive is unchanged from 2005/36 with regard to qualifications deemed at an equivalent level. Applicants offering qualifications at an equivalent level must be granted full right of establishment in the host nation.

### **Amendments to the conditions for recognition of qualifications**

There has been a key change in the new Directive with regard to the conditions required for accessing a profession with regard to the level of qualifications which must be recognised. In the existing Directive 2005/36 Article 13/2/b states that qualifications one level down from the level required by the host nation satisfy the requirements for competence and access to the profession. In the new Directive 2013/55 this sub clause has been removed.

**Has the Directive been implemented by EU nations?**

With regard to temporary provision of services there is an EU document (“Scoreboard on the Professional Qualifications Directive (Directive 2005/36/EC)” dated 15 April 2010) in which Austria, France, Germany, Italy and Spain all self-declare that they have fully implemented the temporary provision of services aspects of 2005/36. It is expected that the updated Directive 2013/55 will similarly implemented in national legislation in due course.

**Swiss implementation of the Directive**

There is an agreement by the official EU-Swiss Joint Committee in October 2011 that Switzerland shall apply without restrictions the acquired rights of EU nationals provided for by 2005/36.

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