Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 8 September 2022 [1]

Case C-270/21

A

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling – Recognition of professional qualifications – Directive 2005/36/EC – Right to exercise the profession of nursery school teacher based on higher education qualifications and pedagogical competence – Regulated profession – Professional qualification obtained in the former Soviet Union – Third country – Concept)

I. Introduction

1. A ('the applicant') applied to Opetushallitus, the Finnish National Agency for Education (EDUFI), for recognition of his qualification as a nursery school teacher, relying on the following documents: a secondary education qualification obtained in 1980 in the Estonian Soviet Socialist Republic ('the ESSR'), that is, in the territory of the former Soviet Union; two higher education qualifications outside the field of education, obtained in 2006 and 2013 in Estonia; and a certificate issued by the Eesti Õpetajate Liit (Estonian Teachers' Association) in 2017, attesting to A's pedagogical competence.

2. A's application was rejected and EDUFI's decision was confirmed by the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), upholding the view taken by EDUFI that, essentially, the applicant did not meet the requirements for recognition of his professional qualification under the national rules transposing Directive 2005/36. [2]

3. The Korkein hallinto-oikeus (Supreme Administrative Court, Finland) harbours doubts in respect of two concepts used by that directive. First, referring to several features of national legislation governing the access to the profession of nursery school teacher in Estonia, it wonders whether that profession, as treated in Estonia, can be considered as a 'regulated profession', within the meaning of Directive 2005/36, given that that concept presupposes, in essence, that the access to a given profession is subject to possession of 'specific professional qualifications'. Second, that court questions whether the professional qualification awarded in the former Soviet Union is to be considered as having been obtained in a third country.

[1] Original language: English.

[2] 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). There have been several amendments to this directive.

II. Legal framework

A. European Union law

4. Under Article 3(1)(a) of Directive 2005/36, 'regulated profession' means '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; …'.

5. Pursuant to Article 13(1) and (2) of Directive 2005/36:

'1. If access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit applicants to access and pursue that profession, under the same conditions as apply to its nationals, if they possess an attestation of competence or evidence of formal qualifications referred to in Article 11, required by another Member State in order to gain access to and pursue that profession on its territory.

Attestations of competence or evidence of formal qualifications shall be issued by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of that Member State.

2. Access to, and pursuit of, a profession as described in paragraph 1 shall also be granted to applicants who have pursued the profession in question on a full-time basis for one year or for an equivalent overall duration on a part-time basis during the previous 10 years in another Member State which does not regulate that profession, and who possess one or more attestations of competence or evidence of formal qualifications issued by another Member State which does not regulate the profession.

Attestations of competence and evidence of formal qualifications shall satisfy the following conditions:

(a) they are issued by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of that Member State;

(b) they attest that the holder has been prepared for the pursuit of the profession in question.

The one year of professional experience referred to in the first subparagraph may not, however, be required if the evidence of formal qualifications which the applicant possesses certifies regulated education and training.'

B. Finnish law

6. Laki ammattipätevyyden tunnustamisesta (1384/2015) (Law on the recognition of professional qualifications, No 1384/2015; 'the Law on professional qualifications') provides, in the first subparagraph of Paragraph 1 thereof, that it governs the recognition of professional qualifications and the freedom to provide services in accordance with Directive 2005/36. Paragraph 6 of that law further details the conditions for such recognition.

C. Estonian law

7. The qualification requirements for nursery school teachers in Estonia is governed by the Koolieelse lasteasutuse pedagoogide kvalifikatsiooninõuded, Riigi teataja (Regulation of the Minister for Education on qualification requirements for nursery school teachers) of 26 August 2002 ('Regulation on qualification requirements for nursery school teachers') adopted by the Minister for Education. According to Paragraph 1(1) of that regulation, the equivalence of the qualification requirements governed in that regulation and the employee's ability to work in the profession in question are to be assessed by the employer.

8. Under Paragraph 18 of that regulation, the qualification requirements for nursery school teachers are a higher education qualification and pedagogical competences. Paragraph 37 provides that the qualification requirements governed by that instrument do not apply to persons who worked as nursery school teachers before 1 September 2013 and who, under the provisions of the same regulation that were in force before that date, are qualified or deemed to be appropriately qualified for a similar role.

III. Facts, national proceedings and the questions referred

9. A applied to EDUFI for recognition of his professional qualification as a nursery school teacher, relying on: (i) a certificate attesting to the attainment of a 'Koolieelsete lasteasutuste kasvataja' (Early Childhood Education) qualification in 1980 ('the 1980 diploma'); (ii) a certificate attesting to the attainment of a 'Rakenduskõrghariduse tasemele vastava hotellimajanduse eriala õppekava' (Specialised Curriculum for Hotel Management corresponding to the higher education level) qualification in 2006 ('the 2006 diploma'); and (iii) a certificate attesting to the attainment of a 'Ärijuhtimise magistri kraad – Turismieetevõtlus ja teeninduse juhtimine' (Master of Business Administration – Tourism and Service Management) qualification in 2013 ('the 2013 diploma'). In addition, A attached to the application a 'Kutsetunnistus Õpetaja, tase 6' (Professional Certificate Teacher, Level 6) certificate, issued in 2017 by the Estonian Teachers' Association ('the 2017 certificate').

10. By decision of 8 March 2018, EDUFI rejected A's application.

11. By decision of 18 April 2019, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) dismissed A's appeal against EDUFI's decision. That court held that A's qualifications and professional experience did not meet the requirements for recognition of a professional qualification under the Law on professional qualifications.

12. According to that court, it did not appear that the 2017 certificate was based on studies completed and professional experience acquired in Estonia. A's professional qualification, therefore, could not be regarded in all respects as having been obtained in Estonia. That court stated that, on account of the manner in which pedagogical competence as a qualification requirement for nursery school teachers has to be demonstrated under Estonian law, that profession should be regarded as unregulated in Estonia. That court also stated that the professional experience gained by A in the ESSR and in Finland [3] cannot be taken into account in the context of the recognition of professional qualifications, not having been acquired in 'another Member State'.

[3] It follows from the order for reference that A exercised the profession of nursery school teacher in the ESSR between 1980 and 1984, and in Finland over the course of 2016 and 2017.

13. In the proceedings before the referring court, A submitted that he obtained the necessary training in his home country, where he had also been awarded a certificate of pedagogical competence. He stated that the profession of nursery school teacher is a regulated profession in Estonia despite the fact that the fulfilment of the relevant requirements is to be assessed by the employer and that pedagogical competence can be acquired and demonstrated in various ways.

14. A further argued that although his first qualification in early childhood education was obtained in the ESSR, that qualification was assimilated to qualifications obtained in Estonia by a law of 2005. He also obtained the 2017 certificate and thus holds, in his view, two qualifications in early childhood education from 'another Member State'.

15. EDUFI stated that the profession at issue cannot be considered as regulated in Estonia, since the Estonian legislation does not link the requirement of pedagogical competence to the evidence of formal qualifications, an attestation of competence or professional experience. Rather, the fulfilment of the requirement of pedagogical competence is to be assessed by the employer.

16. The referring court is unclear as to whether the profession at issue, as treated in Estonia, is to be regarded as a 'regulated profession' within the meaning of Directive 2005/36. On the one hand, the qualification requirements are laid down in the Regulation on qualification requirements for nursery school teachers and consist in a higher education qualification and pedagogical competence, which is defined in a professional standard adopted by a council responsible for the associated profession. That court also notes that the Republic of Estonia has had the profession at issue entered into the database of regulated professions set up by the Commission. On the other hand, the national regulation in question leaves it to the discretion of the employer to assess whether an individual meets the qualification requirements, and there is no legislation or other document regulating how the existence of the required pedagogical competence can be demonstrated.

17. In the event that the profession of nursery school teacher is considered to be a 'regulated profession' in Estonia, the referring court is uncertain as to the nature of the 2017 certificate, having regard to the fact that it was issued, according to the referring court, on the basis of professional experience obtained in the former Soviet Union and in Finland, the host State.

18. Lastly, the referring court considers it necessary to assess whether the applicant's professional qualification acquired in the ESSR is to be regarded as having been obtained in a third country.

19. In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 3(1)(a) of [Directive 2005/36] to be interpreted as meaning that a regulated profession is to be regarded as a profession for which, on the one hand, the qualification requirements are laid down in a regulation adopted by the Minister for Education of a Member State and the content of the pedagogical competence required of a nursery school teacher is regulated in a professional standard and the Member State has had the profession of nursery school teacher entered in the database of regulated professions set up at the Commission, but for which, on the other hand, according to the wording of the regulation concerning the qualification requirements of that profession, the employer is granted discretion in assessing whether the qualification requirements are met, in particular as

regards the requirement of pedagogical competence, and the nature of the evidence regarding the existence of pedagogical competence is not regulated either in the regulation in question or in any other laws, regulations or administrative provisions?

(2) If the first question is answered in the affirmative: Can a certificate relating to a professional qualification and issued by the competent authority of the home Member State, the award of which is subject to work experience in the profession in question, be regarded as an attestation of competence or other evidence of formal qualifications within the meaning of Article 13(1) of [Directive 2005/36] if the professional experience on which the certificate is based originates from the home Member State during the period in which it was a Soviet Socialist Republic and from the host Member State, but not from the home Member State in the period after it had regained its independence?

(3) Is Article 3(3) of [Directive 2005/36] to be interpreted as meaning that a professional qualification which is based on a qualification obtained at an educational establishment situated in the geographical territory of a Member State at a time when that Member State did not exist as an independent State but as a Soviet Socialist Republic and on professional experience gained on the basis of that qualification in the Soviet Socialist Republic in question before the Member State had regained its independence is to be regarded as a professional qualification obtained in a third country, with the result that the assertion of that professional qualification requires, in addition, three years' professional experience in the home Member State in the period after it had regained its independence?'

20. Written observations were submitted by the Estonian, Spanish Netherlands and Finnish Governments as well as by the European Commission. The Estonian Government also responded to the questions for written answer addressed to it by the Court.

IV. Analysis

21. I shall start with preliminary remarks about the applicability of Directive 2005/36 to the case in the main proceedings (A). I will then address the recognition regime established in that directive (B). I will continue the analysis by examining the first question concerned with the concept of 'regulated profession' (C) and turning thereafter to the third question inquiring about whether the professional qualification obtained in the former Soviet Union is to be considered as obtained in a third country (D). The second question seeks to establish the relevance of the 2017 certificate and is raised only in the event that the first one were to be answered in the affirmative. As my suggested reply to the first question is that the profession at issue *cannot* be regarded as 'regulated', the second question becomes moot. However, I will address it as part of the first question, in so far as the relevance of the 2017 certificate is one of the factors that I shall consider in that context. To conclude, I shall recall the applicability by default of EU primary law should the referring court find that Directive 2005/36 does not apply to the main proceedings (E).

A. Applicability of Directive 2005/36 to the main proceedings

22. One of the basic conditions for Directive 2005/36 to apply is that the person seeking his or her professional qualifications to be recognised must be qualified for the exercise of the profession at issue in his or her home State. [4] I note that, in the main proceedings, doubts exist in that respect.

23. More specifically, the order for reference refers to information given by the Estonian Ministry of Education and Research, according to which A is entitled to exercise the profession at issue in Estonia based on the 2006 and 2013 diplomas, as well as the 2017 certificate. That being said, the referring court asked EDUFI to seek clarification from the Estonian authorities as to whether A is qualified for the profession of nursery school teacher in Estonia, more precisely on the basis of the 1980 diploma, taking into account the fact that A had worked as a nursery school teacher in the ESSR from 1980 to 1984. It also asked EDUFI to seek clarification as to whether A falls within the scope of a transitional provision contained in Paragraph 37 of the Regulation on qualification requirements for nursery school teachers. According to that provision, the qualification requirements set out in the regulation do not apply to persons who worked as nursery school teachers before 1 September 2013 and who are qualified or deemed to be appropriately qualified for a similar role under the provisions of the same regulation in force before that date. According to the referring court, the reply received from the Estonian authorities leaves those issues unclear.

24. As the Commission notes, the question whether A is qualified to exercise the profession at issue in Estonia should be investigated further in the main proceedings in order to ascertain whether Directive 2005/36 applies. The following analysis is based on the assumption that this is indeed the case. Should the referring court conclude otherwise, the applicant's situation will remain within the scope of the applicable Treaty provisions, namely Articles 45 and 49 TFEU, and principles deriving from the Court's *Vlassopoulou* line of case-law. [5] That aspect will be dealt with briefly in Section E of this Opinion.

B. The recognition system established under Directive 2005/36

25. Directive 2005/36 aims to facilitate the recognition of professional qualifications obtained in one Member State (referred to as the home Member State) so as to enable applicants to access, in another Member State (referred to as the host Member State), the profession they are qualified for, and pursue it there under the same conditions as the host Member State's nationals, [6] it being understood that the professions at issue in both the home and host Member States may be identical, analogous or 'simply equivalent in terms of activities they cover'. [7]

4 See, to that effect, Article 4(1) of Directive 2005/36, and judgments of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45, paragraph 19), or of 8 July 2021, *Lietuvos Respublikos sveikatos apsaugos ministerija* (C-166/20, EU:C:2021:554, paragraph 26).

5 Judgment of 7 May 1991, *Vlassopoulou* (C-340/89, EU:C:1991:193; '*Vlassopoulou*'; paragraphs 15 to 21). For a more recent application see, for example, judgment of 16 June 2022, *Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists)* (C-577/20, EU:C:2022:467; '*Valvira-Psychotherapists*'; paragraphs 40 to 43).

6 See Article 1 of Directive 2005/36 according to which that instrument 'establishes rules according to which a Member State which makes access to or pursuit of a regulated profession on 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 to pursue the same profession there, for access to and pursuit of that profession. …'.

7 Judgment of 21 September 2017, *Malta Dental Technologists Association and Reynaud* (C-125/16, EU:C:2017:707; '*Malta Dental Technologists Association*'; paragraph 40 and the case-law cited).

26. For Directive 2005/36 to apply, the profession at issue must be 'regulated' in the host Member State [8] (otherwise, the matter is not within the scope of the directive). The concept of 'regulated profession', which is the key element of the whole directive and defined in Article 3(1)(a) thereof, will be analysed in depth in Section C of this Opinion. Nevertheless, it is useful to note, at this stage, that it implies, in essence, that the access to a given profession and its pursuit is contingent upon possession of 'specific professional qualifications'.

27. In order to facilitate the process of the recognition of professional qualifications, Directive 2005/36 lays down three recognition systems.

28. First, the so-called automatic recognition system concerns selected professions for which minimum training requirements are set out in Directive 2005/36. [9] Second, a specific system for recognition of professional experience concerns professions in crafts, trades and industry. [10] Third, the general system for the recognition concerns all other professions. [11]

29. As noted by the Estonian Government and by the Commission, the case at hand falls under the general recognition system.

30. The specific operation of that system fundamentally depends on whether or not the profession at issue is regulated not only in the host Member State (which must always be the case as I already noted) but *also* in the home Member State.

31. First, where the profession is *also regulated* in the home Member State, the host Member State is to allow, pursuant to Article 13(1) of Directive 2005/36, access to, or pursuit of, that profession, under the same conditions as those required for its nationals, to nationals of other Member States who possess an attestation of competence or evidence of formal qualifications required by the home Member State.

32. Second, and by contrast, where the profession at issue is *not regulated* in the home Member State, it follows from Article 13(2) of Directive 2005/36 that the similar recognition obligation, on the part of the host Member State, exists only if the applicant has pursued the profession at issue on a full-time basis for 1 year (or for an equivalent overall duration on a part-time basis) during the previous 10 years in another Member State, and if he or she possesses one or more attestations of competence or evidence of formal qualifications issued by the home Member State. However, pursuant to the third subparagraph of Article 13(2) of Directive 2005/36, the practice-related requirement does not apply when the applicant possesses evidence of formal qualifications attesting to 'regulated education and training', defined in Article 3(1)(e) of Directive 2005/36.

[8] See Article 1 of Directive 2005/36 quoted in footnote 6, or Article 2(1), according to which Directive 2005/36 applies to 'all nationals of a Member State wishing to pursue a *regulated* profession in a Member State, … other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. …'. Italics added.

[9] Doctor, specialised doctor, nurse responsible for general care, dental practitioner, specialised dental practitioner, veterinary surgeon, pharmacist, architect, midwife. See Chapter III of Title III of Directive 2005/36.

[10] The list of which is set out in Annex IV to Directive 2005/36. See Chapter II of Title III of that directive.

[11] Chapter I of Title III of Directive 2005/36 and its Article 10.

33. Thus, while the general system is based on mutual recognition of the diplomas and professional qualifications acquired in the home Member State, it also involves an individual examination of applications and preserves the possibility for the host Member State to require 'measures of compensation', in other words the completion of an adaptation period or the passing of an aptitude test. [12]

34. *In casu*, the referring court observes that in Finland, where A seeks recognition of his professional qualification, the profession of nursery school teacher is a 'regulated profession' because Finnish legislation requires the completion of a specific training. [13] That point is not in dispute. Hence, the referring court needs to ascertain whether the same profession is also regulated in Estonia, in order to determine whether A's application is to be assessed under the conditions of Article 13(1) or rather under those of Article 13(2) of Directive 2005/36.

C. Is the profession of nursery school teacher, as regulated in Estonia, a 'regulated profession' within the meaning of Directive 2005/36?

35. By its first question, the referring court wishes to ascertain whether the concept of 'regulated profession' applies where: (i) the requirements applicable to the profession at issue are defined in a regulation adopted by a Ministry of Education and Research; (ii) the content of the pedagogical competence is defined by a professional standard established by a council competent for the given profession; (iii) the Member State has entered the profession at issue in the Commission's databases of the regulated professions; but (iv) the national provisions leave it to the discretion of the employer to assess whether a given person fulfils the qualification requirements; and (v) the nature of the evidence demonstrating pedagogical competence has not been specified.

36. In order to address that question, I will examine the concept of 'regulated profession' within the meaning of Directive 2005/36 (1) before turning to the elements indicated by the referring court (2).

1. The concept of 'regulated profession' under Directive 2005/36

37. The concept of *regulated* profession constitutes the central element of Directive 2005/36. As already mentioned, first, the directive applies only when recognition is sought in a Member State where the profession at issue is 'regulated' [14] and, second, whether or not the profession is also regulated in the home Member State determines which of the specific conditions for recognition, set out in the two paragraphs of Article 13 of Directive 2005/36, respectively, are applicable.

38. Pursuant to Article 3(1)(a) of that directive, the term 'regulated profession' refers to '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

[12] Under the conditions laid down in Article 14 of Directive 2005/36. See recital 11 of that directive and, for example, judgment of 26 June 2019, *Commission* v *Greece* (C-729/17, EU:C:2019:534; '*Commission* v *Greece*'; paragraph 91).

[13] The referring court observes that the qualification requirement consists of at least a degree in educational sciences, which includes training as a nursery school teacher, or a vocational qualification in the field of health and social care, which includes a specialisation in early childhood education and social pedagogy.

[14] See, for example, Article 1 and Article 2(1) of Directive 2005/36, quoted in footnotes 6 and 8 above.

qualifications; …'.[15] Moreover, 'professional qualifications' are defined in Article 3(1)(b) of the directive as 'qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a) (i) and/or professional experience'. It follows, for what is relevant in the present case, that for a profession to be 'regulated', the access to it must be subject, by virtue of law, to the possession of 'specific professional qualifications'. At the same time, as the Commission notes, national law must also require, for such a 'regulated profession', 'evidence of formal qualifications', 'an attestation of competence', 'and/or professional experience'.

39. More specifically, the Court has inferred from the definition contained in Article 3(1)(a) of Directive 2005/36 (which was, in a slightly different wording, present already in Directives 89/48[16] and 92/51,[17] which were replaced by Directive 2005/36) that in order for a profession to be 'regulated', access to it must be expressly reserved to persons who fulfil certain conditions and is prohibited to those who do not fulfil them.[18] Furthermore, the Court has also held that requisite professional qualifications for a given profession to be considered as 'regulated' do not cover 'all qualifications attested by evidence of formal qualifications, but only these relating to training which is specifically designed to prepare candidates to exercise a given profession'.[19] For that reason, as the Commission essentially points out, the terms 'specific professional qualifications' used in the definition of 'regulated profession' in Article 3(1)(a) of Directive 2005/36 must differ from the broader concept of an academic qualification.[20]

40. By way of several examples, the Court has excluded from the concept of specific professional qualification evidence of formal qualifications (such as a degree in law) that give access to a wide range of careers rather than preparing its holders for a specific position.[21] The Court has also regarded the profession of geologist as not 'regulated' since access to that profession was not subject, in Germany, to any legal rule even if, as a matter of fact, only persons holding the certificate of higher education 'Diplom-Geologe' pursued such employment. That was because, as the Court explained, the issue of whether a profession is regulated depends on the legal situation in the host Member State and not on the conditions prevailing on the employment market.[22]

41. By contrast, the Court considered as 'regulated' the profession of hospital manager in the French public service. That decision was based on the fact that access to that profession was reserved by law for those having completed a course with the Ecole nationale de la santé publique (National School of Public Health, France) and having passed the final examination certifying the necessary practical and theoretical skills to work in hospital management (although that training

[15] That definition also adds that '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.' The last sentence of the same provision refers to professions that are practiced by the members of associations or organizations listed in Annex I to Directive 2005/36 and specifies that those professions 'shall be treated as regulated profession'. Those elements of the definition are not relevant to the present case.

[16] Article 1(c) and (d) 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 (OJ 1989 L 19, p. 16).

[17] Article 1(e) and (f) and Article 2 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 (OJ 1992 L 209, p. 25).

[18] See, for instance, judgments of 1 February 1996, *Aranitis* (C-164/94, EU:C:1996:23; '*Aranitis*'; paragraph 19), or of 8 May 2008, *Commission* v *Spain* (C-39/07, EU:C:2008:265, paragraph 33 and the case-law cited).

[19] Judgment of 6 October 2015, *Brouillard* (C-298/14, EU:C:2015:652; '*Brouillard*'; paragraph 38).

[20] See also Opinion of Advocate General Sharpston in *Brouillard* (C-298/14, EU:C:2015:408; 'Opinion in *Brouillard*'; points 54 and 55).

[21] The case was concerned with the profession of legal secretary at the Cour de cassation (Court of Cassation, Belgium); *Brouillard*, paragraph 39.

[22] *Aranitis*, paragraphs 22 and 23.

was not evidenced by any diploma or other document).[23] Similarly, the Court regarded the profession of mediator as 'regulated', since access to it was subject, under national law, to the completion of training geared towards the acquisition of a professional qualification and a status specifically allowing its holder to pursue that profession.[24] The Court reached the same conclusion in respect of the profession of dental technologist in Malta, since access to that profession was subject to evidence of university training required in order to be able to gain access to complementary medicine professions. Such training was specifically aimed at preparing candidates to exercise such professions, with the profession of dental technologist being expressly listed amongst them.[25]

42. With those clarifications in mind, I shall now turn to the specific features of the profession at issue as treated under Estonian law.

2. The specific factors to be taken into consideration

43. The referring court cites several factors for the purposes of assessing whether the profession at issue is 'regulated' in Estonia. I will turn first to the significance of the entry of the profession at issue in the Commission's databases of regulated professions (a) and look thereafter at the further elements stated by the referring court (b).

(a) Entry in the Commission's database of regulated professions

44. Article 59 of Directive 2005/36, headed 'Transparency', requires Member States to notify to the Commission a list of, inter alia, existing regulated professions. The current wording (and heading) of that provision, inserted by Directive 2013/55/EU,[26] specifies that the Commission is to set up and maintain a publicly available database of regulated professions, and details requirements relating to cooperation between the Commission and the Member States in this context.

45. That being said, the definition of 'regulated profession' in Article 3(1)(a) of Directive 2005/36 does not in fact refer to the content of the Commission's databases, or to the domestic law of the Member States. I also note that the Court has repeatedly held that the definition of 'regulated profession' is 'a matter of EU law'.[27] Accordingly, the Commission list must be considered as indicative.[28]

46. Accordingly, and as argued by both the Netherlands Government and the Commission, the fact that a Member State, such as the Republic of Estonia in the present case, considers a profession as 'regulated' for the purpose of entering it into the Commission's database is not, per se, determinative of whether that profession is 'regulated' within the meaning of Directive 2005/36. The features of the national regulation must be tested against the standard laid down in that respect by that directive.

[23] Judgment of 9 September 2003, *Burbaud* (C-285/01, EU:C:2003:432, paragraphs 44 to 53).

[24] *Commission* v *Greece*, paragraph 88.

[25] *Malta Dental Technologists Association*, paragraph 36.

[26] Directive of the European Parliament and of the Council of 20 November 2013 (OJ 2013 L 354, p. 132) ('Directive 2013/55').

[27] For a recent statement, see *Malta Dental Technologists Association*, paragraph 34.

[28] As was already observed in Opinion in *Brouillard*, point 50.

(b) The specific features of the national regulation at issue

47. Turning to the features of the applicable national regulation specifically mentioned by the referring court in the context of its inquiry whether the profession at issue is 'regulated', I recall that under Paragraph 18 of the Regulation on qualification requirements for nursery school teachers, the applicable qualification requirements are (i) a higher education qualification and (ii) pedagogical competences.

48. It follows from the order for reference that, in Estonia, the requirement of a higher education qualification does not refer to any particular field, such as education, but it can rather be in *any* field.

49. Having regard to the general nature of the higher education qualification requirement, I agree with the Netherlands and Finnish Governments and with the Commission that that element cannot be relied upon to consider the profession at issue to be 'regulated', as it does not appear to concern a qualification geared towards the pursuit of a specific profession within the meaning of *Brouillard*.

50. It remains, however, to be considered whether the profession at issue can still be classified as 'regulated' by virtue of the requirement of 'pedagogical competences', which is the second requirement under Paragraph 18 of the Regulation on qualification requirements for nursery school teachers.

51. I do not believe so.

52. It follows from the order for reference and the answer provided by the Estonian Government to the question put to it by the Court that the required pedagogical competences are defined in a professional standard,[29] namely professional standard Õpetaja, tase 6 ('Teacher, Level 6'), which was approved by decision No 10 of the Hariduse Kutsenõukogu (Occupational Qualification Councils: Education, Estonia) on 25 April 2017.[30]

53. I understand that access to the profession of nursery school teacher in Estonia is, thus, reserved to those who, inter alia, possess the pedagogical competences within the meaning of the professional standard in question. However, it appears from the information in the case file that compliance with that standard is not subject to any binding control mechanism and does not have to be manifested in any particular way. Rather it follows from Paragraph 1(1) of the Regulation on qualification requirements for nursery school teachers that compliance is assessed, in each case, by the employer. In view of those circumstances, the requirement of the pedagogical competences does not appear to be linked to any of the forms in which 'professional qualifications' have to be shown and which are listed in Article 3(1)(b) of Directive 2005/36, as I already observed in point 38 of the present Opinion, namely 'evidence of formal qualifications', 'an attestation of competence', 'and/or professional experience'.

54. It is true that, in the main proceedings, A relies also on the 2017 certificate that was issued by the Estonian Teachers' Association.

[29] Within the meaning of Article 5 of the Kutseseadus (Law on Professions), RT I, 13.03.2019, 10, according to which, as the Estonian Government explained, a professional standard is a document that describes the profession and specifies the competences required.

[30] The Estonian Government provided the following source of the professional standard at issue: https://www.kutseregister.ee/ctrl/et/Standardid/vaata/10640560.

55. The Estonian Government explained that when the Estonian Teachers' Association issues professional certificates of nursery school teachers ('Kutsetunnistus, Õpetaja tase 6'), such as the 2017 certificate, it acts as the professional certifying body under Article 10(1) of the Law on Professions. It was also explained that the 2017 certificate was issued on the basis of the professional standard Õpetaja, tase 6 ('Teacher, Level 6'), referred to in point 52 of this Opinion.

56. Nevertheless, the case file contains diverse views as to the exact nature of that certificate and its relevance for the access to the profession of nursery school teacher in Estonia.

57. The referring court infers, from the facts available to it, that the issuance of such a certificate is optional and subject to a fee. That court concludes that such an issuance is predicated on the possession of a higher education diploma and the assessment as to whether competences acquired previously comply with the professional standard. According to that court, the issuance of the certificate at issue presupposes, de facto, professional experience as a nursery school teacher.

58. For its part, the Estonian Government indicated in its written submissions that that certificate attests to the fact that: (i) the holder has been admitted to the profession of teacher and (ii) his or her competence has already been assessed in the process of granting access to that profession. In its reply to the question put to it by the Court, that government observed, in essence, that the certificate at issue attests, pursuant to Article 21(1) of the Law on Professions, to the fact that the holder's competences correspond to the requirements set out in the professional standard.

59. In this respect, I note, first, that the case file does not contain any further information on a process of granting access to the profession at issue beyond the obligation for the candidate to hold a higher education qualification and the pedagogical competences, the latter being assessed by the employer, as is apparent from Paragraph 1(1) and Paragraph 18 of the Regulation on qualification requirements for nursery school teachers. Second, and independently of the exact classification of the 2017 certificate for the purposes of the directive, I consider it decisive that possession of that certificate is *not* a precondition for accessing the profession of nursery school teacher, as was explained by the Estonian Government by reference to Article 15(2) of the Law on Professions.

60. Nevertheless, the Estonian Government observed that, when presented with a certificate issued by the Estonian Teachers' Association, the employer does not have any reason to doubt the candidate's pedagogical competences. At the same time, however, that government confirmed that the Estonian legislation does not contain any rule to that effect. I understand therefore that, even when presented with such a certificate, it is still for the employer to assess whether the given candidate meets the requirements relating to pedagogical competences, as it is stated in Paragraph 1(1) of the Regulation on qualification requirements for nursery school teachers.

61. I wish to stress that, contrary to the view apparently taken by the Netherlands Government, it is not obvious that the assessment made by the employer concerns the suitability of the candidate, for example, in the light of the specific needs of the employer or of the competences possessed by competing candidates. Such an assessment is indeed bound to take place in the context of any hiring process, whether or not the profession at issue is regulated. In contrast to that, I understand that the assessment, within the meaning of Paragraph 1(1) of the Regulation on qualification requirements for nursery school teachers, concerns the very qualification criteria

allowing the candidate access to the profession as such. I understand that the possession of an attestation, such as the 2017 certificate, may facilitate the assessment but does not affect the discretion that the employer appears to enjoy in that context.

62. That also means that the pedagogical competences can be demonstrated in various ways, none of which is mandatory. Thus, the conclusion as to whether specific candidates meet the requisite 'entry' standard to access to the profession of nursery school teacher appears to lack a uniform binding basis, as observed, in essence, by the Spanish Government.

63. In those circumstances, I conclude, in agreement with the Spanish and Finnish Governments, as well as the Commission, that the profession of nursery school teacher, as regulated in Estonia, cannot be considered as 'regulated' within the meaning of Directive 2005/36, where access to that profession and its exercise is subject, on the one hand, to a higher education diploma, not specifically geared toward the pursuance of that profession and, on the other hand, to pedagogical competences which are defined in a professional standard but the existence of which is assessed in each case by the employer.

D. The significance of the professional qualification obtained in the former Soviet Union

64. By its third question, the referring court is asking whether the professional qualification based on a diploma obtained in the former Soviet Union (that is to say, the 1980 diploma that A submitted together with the 2017 certificate and other documents to the Finnish authorities) is to be considered as having been obtained in a third country within the meaning of Article 3(3) of Directive 2005/36, with the result being that, for such a qualification to be recognised in Finland, A would have to have exercised the profession at issue for three years in Estonia (1).

65. I understand that that question is put to the Court because, as it is apparent from the order for reference, the referring court also envisages the possibility that the 1980 diploma might constitute evidence of 'regulated education and training' within the meaning of Article 3(1)(e) of Directive 2005/36, since that would lead to the recognition of A's professional qualification based on the third subparagraph of Article 13(2) of that directive (2).[31]

1. Is the professional qualification obtained in the former Soviet Union a qualification obtained in a 'third country'?

66. The recognition system established by Directive 2005/36 presupposes, in essence, that for the initial professional qualification to be recognised it has to have been obtained in one of the Member States. That follows from Article 2(1) of Directive 2005/36.[32] By way of derogation to this rule, Article 2(2) of that directive states that 'each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of Article 3(1)(a) on its territory in accordance with its rules'.

67. When that happens, a formal qualification issued in a third country will be relevant for the purpose of the common recognition system only after three years of practice in the Member State which recognised it. This follows from Article 3(3) of Directive 2005/36, which states that

[31] See above point 32 of the present Opinion.

[32] See above footnote 8.

'evidence of formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if 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'.

68. The referring court asks therefore about the significance of the term 'third country' used in that provision in order to ascertain, as it has already been noted, whether the condition of three years' practice applies to A or not.

69. It follows from the order for reference that the 1980 diploma is a secondary education diploma in early childhood education, which A obtained in the former Soviet Union and which was assimilated, by a law of 2005, to a secondary education diploma obtained in Estonia.

70. That, in my view, answers the third question to the effect that the 1980 diploma cannot be regarded as having been issued by a third country.

71. Contrary to the view put forward by the Finnish Government, I do not consider that the opposite can be inferred from the wording of Article 3(3) of Directive 2005/36, referred to in point 67 of this Opinion. That wording is open-ended and does not give any indication as to how situations such as the one in the main proceedings should be characterised.

72. In fact, Directive 2005/36 does not contain any provision on that issue when it comes to the *general* recognition system. Admittedly, that absence contrasts with an express mention to that effect under the *automatic* recognition system. [33]

73. Indeed, as regards specifically Estonia, Article 23(4) of Directive 2005/36 on 'acquired rights' addresses the question of evidence of qualifications for professions coming under the automatic system such as doctors, nurses or architects and obtained before 20 August 1991, that is to say, in the former Soviet Union. It follows from that provision that evidence of formal qualifications relating to the professions coming under the automatic recognition system is to be recognised by the other Member States, where the Estonian authorities attest that such evidence has the same legal validity within its territory as the evidence which they issue. [34]

74. Other parts of Article 23 of Directive 2005/36 make similar provision in respect of professional qualifications obtained in the territory of other former States, namely the German Democratic Republic (Article 23(2)), Czechoslovakia (Article 23(3)) and Yugoslavia (Article 23(5)).

75. It follows that the responsibility for deciding the continued legal validity of formal qualifications issued by those former States concerning the professions subject to the *automatic* recognition system is explicitly acknowledged to fall to the authorities of the Member State concerned.

76. Does a different conclusion follow from the absence of similar rules when it comes to the *general* recognition system with which the case in the main proceedings is concerned? I do not think so.

[33] As explained above, the automatic recognition system is one of the three systems provided under Directive 2005/36 and concerns certain selected professions such as doctors, nurses or architects. See above point 28 of this Opinion.

[34] And that the activity in question has been practiced by the respective persons in their territory for at least three consecutive years during the five years prior to the date of issue of the certificate. See the penultimate subparagraph of Article 23(4) of Directive 2005/36.

77. The fact that the EU legislature expressly acknowledged the Member States' competence to decide upon the continued validity of qualifications obtained in the former States concerned, as regards the situations falling within the scope of the *automatic* recognition system, can be explained, as the Commission essentially suggests, by the fact that that system goes hand in hand with detailed rules on the minimum professional requirements. In that context, the temporal aspect had to be addressed together with other aspects.

78. By contrast, the *general* recognition system does not contain any such minimum harmonisation of professional requirements, which, thus, remain under the control of the Member States, subject to compliance with EU law.[35] It is therefore for the Member States to determine what ought to be recognised as evidence of formal qualifications within their territory.

79. In the same vein, Article 12(2) of Directive 2005/36 acknowledges the possibility for the (home) Member States to preserve the acquired rights when it comes to professional qualifications acquired under rules that are no longer in force, including when the requirements have, in the meantime, become more stringent. In such situations, the host Member State must regard, for the purposes of the general recognition system under Article 13 of the directive,[36] the training formerly obtained (in the home Member State) as corresponding to the level of the new one.[37]

80. I think that the same must be concluded, *mutatis mutandis*, when it comes to the decision of a Member State, such as the Republic of Estonia, to determine whether professional qualifications obtained on its territory when that territory formed part of another State, meet the minimum level of qualification required by the rules currently in place.

81. That conclusion is, in my view, confirmed by the objective pursued by Article 3(3) of Directive 2005/36. The requirement of three years of professional practice set out therein aims, in my view, and similarly to the requirement of one year under Article 13(2) of Directive 2005/36,[38] to ensure that the professional qualifications 'entering' into the common recognition system have been tested against the reality of the relevant professional market. It can be also viewed as a guarantee against circumvention of the professional qualification requirements in force in the respective Member States.

82. There is, however, no similar need when it comes to professional qualifications obtained in the territory of a Member State at a time where that territory formed part of another State. What arises, historically, in that respect is, first of all, an issue of continued legal validity[39] within the newly constituted (or reconstituted) State (together with the validity of other elements of the legal system). Once a decision on the continued validity of a professional qualification has been made, it becomes part of that Member State's legal system and should then benefit from the mutual recognition system under the conditions set out in Directive 2005/36.

[35] See recital 11 of Directive 2005/36. See also *Vlassopoulou*, paragraph 9, or *Malta Dental Technologists Association*, paragraphs 47 and 53 and the case-law cited.

[36] Presented above in points 31 and 32 of this Opinion.

[37] See also, in the context of Directive 89/48, judgment of 29 April 2004, *Beuttenmüller* (C-102/02, EU:C:2004:264, paragraph 45).

[38] The Court held, in the context of Directive 89/48, that 'the essence of the requirement of professional experience of that duration is therefore that there is a real possibility that the applicant for recognition can pursue the profession concerned in the Member State of origin'. Judgment of 5 April 2011, *Toki* (C-424/09, EU:C:2011:210, paragraph 31).

[39] I note that the aforementioned provisions of Article 23 of Directive 2005/36 use the term of legal validity of the professional qualifications concerned.

83. Hence, in the light of the foregoing, I conclude, in agreement with the Estonian Government and the Commission, that a professional qualification obtained in the former Soviet Union and assimilated by the Republic of Estonia, by way of its legislation, to a qualification obtained in that Member State, must be regarded as having been obtained in that Member State and not in a third country.

2. Does the 1980 diploma attests to 'regulated education and training'?

84. As I already observed, it follows from the order for reference that the referring court is uncertain as to whether the 1980 diploma can be regarded as evidence of 'regulated education and training' within the meaning of Article 3(1)(e) of Directive 2005/36. If so, it would follow from the third subparagraph of Article 13(2) of that directive that the applicant cannot be required to have acquired, during the previous 10 years, 1 year's professional experience as a nursery school teacher in another Member State in order to have his professional qualification recognised in Finland.

85. Article 3(1)(e) of Directive 2005/36 defines 'regulated education and training' as 'any training which is specifically geared to the pursuit of a given profession and which comprises a course or courses complemented, where appropriate, by professional training, or probationary or professional practice'. The second sentence adds that 'the structure and level of the professional training, probationary or professional practice shall be determined by the laws, regulations or administrative provisions of the Member State concerned or monitored or approved by the authority designated for that purpose'.

86. I admit that that definition is not easy to grasp in as much as, first, 'professional training, or probationary or professional practice' appears to form part of 'regulated education and training' only 'when appropriate' and, second, the requirement relating to 'the structure and level' set by the national rules appears to concern only such (practical) part of the training as opposed to theoretical part. [40]

87. However, I concur with the Commission that the requisite level and structure of the training as set by national provisions must apply to both the theoretical and practical parts of such education, otherwise I am not sure how the 'regulated education and training', addressed by that definition, could indeed be regarded in its entirety as *regulated*.

88. It is therefore for the referring court to ascertain whether: (i) the 1980 diploma constitutes evidence of the completion of education and training that was geared toward the exercise of the specific profession at issue; (ii) the structure and level of such training was determined by way of national laws, regulations or administrative provisions or monitored or approved by the authority designated for that purpose, as stated in Article 3(1)(e) of Directive 2005/36; and (iii) such evidence was issued by a competent authority, designated in accordance with the laws, regulations or administrative provisions, and attests that the holder has been prepared for the pursuit of the profession in question, in accordance with the second subparagraph of Article 13(2) of Directive 2005/36.

[40] I note that examples of 'regulated education and training' were given in Annex III to the initial version of Directive 2005/36 but that annex was deleted by Article 1(52) of Directive 2013/55, presumably as a result of the intention to broaden the scope of that concept. See Commission Staff Working Paper, Impact Assessment, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System; SEC(2011) 1558 final, paragraph 6.4.2; p. 33. The Commission proposal of the directive defined 'regulated training' as being, inter alia, 'specifically directed to the practice of a particular profession'. Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications, COM/2002/0119 final (OJ 2002 C 181 E, p. 183), draft Article 11(4)(b), (5) and (6) and Article 13(2), third subparagraph.

89. If that is the case, and bearing in mind the fact that that diploma was assimilated by the Republic of Estonia to diplomas issued by that Member State, I am of the view that that professional qualification must be recognised, without prejudice to the possibility for the authorities of the host Member State to require compensation measures within the meaning (and within the limits) of Article 14 of Directive 2005/36.

E. Final remarks on the (default) applicability of primary law

90. As the Court has repeatedly recalled, when a case does not fall within the scope of Directive 2005/36, the competent authorities cannot cease their assessment but must continue that assessment in the light of the basic freedoms guaranteed by the TFEU.[41] Indeed, 'it is not the purpose of the directives on mutual recognition of diplomas, inter alia Directive 2005/36, to make recognition of diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect'.[42]

91. Thus, when presented with an application for recognition of professional qualifications that does not fall within the scope of Directive 2005/36, Articles 45 and 49 TFEU come into play. Thus, the competent authorities must take into consideration the professional qualifications of the person concerned by comparing the qualifications certified by his or her diplomas, certificates and other formal qualifications and by his or her relevant professional experience against the professional qualifications required under the relevant national rules for the exercise of the profession in question, as set out in *Vlassoupoulou* and the subsequent line of case-law.[43]

92. It follows from those principles that the Member State concerned must verify, on an objective basis, whether the foreign diploma certifies that its holder has knowledge and qualifications which are at least equivalent to those attested by the national diploma and, if so, recognise that diploma as fulfilling the requirements laid down by its national provisions. In case of substantial differences, they may set compensatory measures that have to comply in particular with the principle of proportionality, after verifying nevertheless whether the knowledge already acquired by the applicant, including in the host Member State, can be taken into account for the purpose of proving possession of the knowledge required by the host Member State.[44]

93. Thus, and as the Commission argues in principle, when conducting the examination in the light of Articles 45 or 49 TFEU, the applicant's qualifications are to be assessed in depth having regard to all of his diplomas, professional experience acquired in the former Soviet Union and in Finland,[45] as well as the 2017 certificate, so as to establish whether there is an equivalence between his qualifications and the professional qualifications required, under the legislation of the host Member State, for the exercise of the profession of nursery school teacher and to ascertain whether skills that may be missing have in fact been acquired.

41 See, for a recent statement, *Valvira-Psychotherapists*, paragraphs 35 to 44.

42 Judgment of 3 March 2022, *Sosiaali- ja terveysalan lupa- ja valvontavirasto (Basic medical training)* (C-634/20, EU:C:2022:149; '*Valvira – Basic medical training*'; paragraph 37 and the case-law cited).

43 *Vlassopoulou* was decided on facts to which none of the instruments of secondary law concerning the recognition of professional qualifications yet applied and the Court thus based its findings on the relevant provision of the Treaty (*in casu* Article 52 EEC Treaty, now Article 49 TFEU). Although that case was concerned with freedom of establishment, its rationale applies also to freedom of movement of workers. See, for a recent application, *Valvira-Psychotherapists*, paragraphs 40 to 41, and *Valvira-Basic Medical Training*, paragraph 38 and the case-law cited.

44 See for instance *Valvira-Basic medical training*, paragraphs 42 to 46 and the case-law cited.

45 See judgment 8 July 2021, *BB* v *Lietuvos Respublikos sveikatos apsaugos ministerija* (C-166/20, EU:C:2021:554, paragraph 40 and the case-law cited) as regards the relevance of experience acquired in the host Member State.

V. Conclusion

94. In the light of the above, I suggest that the Court respond to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) as follows:

Article 3(1)(a) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, is to be interpreted as meaning that:

the profession of nursery school teacher cannot be considered as 'regulated' within the meaning of that provision where access to that profession and its exercise is subject, first, to a higher education diploma not specifically geared toward the pursuance of that profession and, second, to pedagogical competences which are defined in a professional standard but the existence of which is assessed in each case by the employer.

Article 3(3) of Directive 2005/36 is to be interpreted as meaning that:

a professional qualification obtained in the former Soviet Union, assimilated by the Republic of Estonia, by way of its legislation, to a qualification obtained in that Member State, must be regarded as having been obtained in that Member State and not in a third country.