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- **Publication of the Green Paper on Modernising the Professional Qualifications Directive (2005/36): comparison with the Consultation Document of the European Commission**

Publication of the Green Paper on Modernising the Professional Qualifications Directive (2005/36): comparison with the consultation document of January 2011

As you know, the European Commission has recently published a Green Paper on Modernising the Professional Qualifications Directive (2005/36).

This Green Paper is the second step of the revision process of the Directive in question, the first one being the Questionnaire of January's Public Consultation. Approximately 200 competent authorities and professional organisations have answered to that Questionnaire by March the 20th of this year. CEPLIS has also participated, as you remember, at this Public Consultation and we are quite satisfied to see that our lobbying in order to promote some of the strong points of our position, for example the one relating to professional platforms, has been fruitful.

The Green Paper raises new questions on which CEPLIS is already working. We'd welcome any comment or suggestion you may have, at your earliest convenience, in order to feedback to the works of our Task Group, responsible for the drafting of our official answer.

The closing date for this new public consultation (since in fact the Green Paper is just another consultation document) is the **20th of September 2011**. Following this consultation, a legislative proposal will be prepared for the end of the year 2011. In this issue of the Telegram, we will discuss the differences between the Consultation Document of January and the Green Paper on Professional Qualifications.

The European Professional Cards:

<u>Public Consultation</u>	<u>Green Paper</u>
<ul style="list-style-type: none"> - In favour of a European Card if it can support information flows in the context of temporary mobility and faster recognition of qualifications. - Set up of an inter-professional Steering Group bringing together professionals and authorities interested in the idea of a European Card - The Commission proposed the following elements for the cards' characteristics: <ul style="list-style-type: none"> • It could be an instrument focusing on interested migrating professionals. • A professional could receive such a card only if he wishes so. • Once issued, the card should be binding on competent authorities • It could be open to all interested professionals, even if they come from a Member State where the profession is not regulated and wish to move to a Member State where it is. 	<ul style="list-style-type: none"> - In its Green Paper, the European Commission is still in favour of a European Card. - The Steering Group on the professional card began its works in early January 2011 and is expected to put forward concrete conclusions by October of this year. The Group is considering the added value and possible legal effects of such a card. As you know, CEPLIS is part of this group. <ul style="list-style-type: none"> • The Commission kept the following elements in the Green Paper as cards' characteristics: <ul style="list-style-type: none"> • Instrument focusing on interested migrating professionals. • The card is not mandatory • The Commission doesn't mention this aspect anymore. • The Commission doesn't mention this aspect and let the possibility for the the competent authority in the Member State of departure to check that applicants hold the correct qualifications and satisfy any other conditions as may be required under a modernised Directive, for

- It could be issued by the competent authority in the home Member State of the professional. This could even be applied in situations where the home Member State does not regulate a profession but the host Member State does.

- It could primarily facilitate the temporary mobility of professionals (freedom to provide services) replacing the current cumbersome declaration regime.

- It could also further simplify the recognition procedure in the context of establishment. It could also speed up the case by case recognition process, notably by facilitating the transmission and translation of documents.

- It could be supported by the electronic exchange of information between Member States.

- It should be a mechanism which already works and in which Member States' competent authorities have already put their trust, such as the Internal Market Information System (IMI) 20. A competent authority could hence only issue such a card if it is registered with IMI and could fully engage in a continuous information exchange with a competent authority in

example that they are legally established or that their diplomas are authentic.

- Mobilising the Member State where the qualification is acquired, under the condition that the professional is entitled to practice. When a profession is not regulated in the Member State of departure it would be up to that Member State to designate a competent public authority to issue the card

- The temporary mobility will be reinforced: all information obligation that the Member State of departure can impose will become useless.

- The card could replace all administrative documents, as it will contain all necessary information for the receiving Member State

- A European professional card could be built around fast communication technologies of the 21st century to create a mechanism which will give it concrete and well-tailored effects under a modernised Professional Qualifications Directive.

- The Internal Market Information system (IMI) could facilitate much faster cooperation between the issuing Member State (the professional's country of departure) and the receiving Member State (the country where the professional seeks establishment). Faster cooperation between the two countries would enable a fast-track recognition process for the

another Member State.

card holder. Cooperation via the IMI should also be subject to deadlines which Member States should be bound to respect in the future.

The principle of partial access:

Public Consultation

- The Commission believes that the statement of the Court of Justice must be inserted within the Directive. The Court has decided that partial access must be granted if two conditions are met:
 - Differences between the fields of activity of the professions concerned are so large that they cannot be compensated by compensatory measures and that in reality a full training and educational programme is required;
 - There are no valid public interest reasons to prohibit such partial access.
- The Commission proposes that the competent authorities can elaborate “Codes of Conduct”, while Member States should promote the respect of those codes (conditions of organisation, etc).

Green Paper

- The Commission take on the case law statement of the Court of Justice again, and declares that the inscription of the principle within the Directive would extend the safeguards offered to professionals.

- The Commission doesn't speak anymore of “Codes of Conduct”. There can be exceptions from the principle, if justified by overriding reasons of general interest, suitable for securing the attainment of the general interest objective and not going beyond what is necessary in order to attain it.

The Common Platforms:

Public Consultation

- In the Public Consultation, the Commission concluded on the failure

Green Paper

- The European Commission does come back on the failure of Common

of the Common Platforms. There was two reasons:

- A common platform requires, as a starting point, a compilation of a comprehensive, detailed and reliable inventory of the legal situations in all the relevant Member States (the scope of the activities for the profession in question, regulatory details, the level and content of training required). Under Article 15 of the Directive, this inventory would need to have covered at least 2/3 of all Member States – which is very demanding (and which was never reached in any of the requests received by the Commission).

- Considerable differences in professional qualifications requirements (from no regulation at all to the requirement of university diplomas) make harmonisation or approximation between countries nearly impossible. It appears to be difficult to find a common denominator for compensation measures satisfying at the same time Member States that do not see any need for regulation and those with the most demanding requirements.

Platforms but proposes this time to reorganise them by extending the concept of Common Platforms in order to lead to an automatic recognition.

- A new approach to common platforms could operate in much the same way as the system of automatic recognition for doctors, dentists, nurses, midwives, pharmacists, veterinary surgeons and architects, but without the need for participation by all Member States, or even as many Member States as are currently foreseen under Article 15. The threshold could be lowered to one-third of all Member States (i.e. nine out of twenty seven) instead of two-thirds to improve the chances for the creation of common platforms.

- It would also be made clear that any non-participating Member States would be free to join a common platform at a later stage.

- Any new platform would be subject to an internal market test. This would ensure that the agreed conditions are proportionate and that the common platform does not contain excessive detail so as to become an obstacle to the mobility of professionals from non-participating Member States who wish to exercise their right to free movement in the Single Market. The internal market test could be provided by the interested professional associations and may help, in particular, to clarify whether professional experience would enable a

professional coming from a non-participating Member State to enter the profession in one of the participating countries.

- Finally, common platforms would have to be backed not only by professional organisations, but in a second step, also by at least nine Member States. On the basis of a proposal of a professional association and with the necessary support of a sufficient number of Member States, the Commission could finally be in the position to endorse a common platform through a delegated act, the framework for which could be laid down in the modernised Directive. One example of ongoing work on a common platform is a common platform for ski instructors.
- The idea of a “28th Regime” and of European curricula is abandoned by the Commission.
- European curricula for various professions could be developed, for example on the basis of common sets of competences. They could become a “28th regime”, a European training program which exists in addition to national training programs for a given profession.
Under European law, 28th regimes offer a value added in areas like company law or intellectual property law. In the area of professional qualifications, a European curriculum could exist in parallel to national training programmes rather than replace them. It should in principle be

agreed and applied by all, or by a large a number of Member States. If a minimum number of Member States need to be fixed, the quorum mentioned in Article 20 of the Treaty of the European Union (9 Member States) could be a useful benchmark to build on.

Regulated Professions:

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| <p style="text-align: center;"><u>Public Consultation</u></p> <p>- According to the Commission, the regulation of professions could in itself hinder the mobility of professionals across Europe. Under conditions of low mobility and rising demand, the tension between regulation and freedom of movement seems, therefore, to represent a real challenge. Regulation can actually lead to fragmentation of the Single Market instead of promoting its integration. One might even argue that there is a risk of national protectionism. Instead, there should be more focus on offering a wide choice of high quality services to consumers. Not only professionals should be able to participate in the Single Market. The same should be the case for the clients using their services. A consumer or client no longer just stays in her country. As they move, they seek services from professionals</p> | <p style="text-align: center;"><u>Green Paper</u></p> <p>- The Professional Qualifications Directive currently offers a mutual recognition mechanism working overall well for most of them. While Member States are free to define qualifications requirements for access to certain professions as an appropriate tool to achieve public policy objectives in relation to a given economic activity, e.g. the need to ensure its security or its safety, in certain cases the qualifications requirements may be disproportionate or unnecessary for the achievement of public policy objectives and could lead to barriers to the freedom of movement of EU citizens.</p> |
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during their travels, ideally speaking their mother tongues The consumer could be a tourist accompanied by a tourist guide, a sportsman going with his physiotherapist, a landlord who wishes to see a second residence renovated in another country but with the assistance of his architect and/or his real estate agent from home.

Temporary Mobility:

Public Consultation

- The Directive relies on the case law of the European Court of Justice to considerably facilitate temporary mobility. The underlying assumption is that a professional who lawfully exercises his profession in a Member State is deemed sufficiently qualified to pursue this profession on a temporary or occasional basis in any other Member State. The Directive only allows Member States to require that, once a year, the professional informs the competent authorities of his intention to provide services.
- However, the application of this regime raises different problems:
 - There is actually a risk that individual

Green Paper

- There is a major issue in dealing with situations where a professional from a non-regulating Member State moves temporarily to a Member State where the profession is regulated. In such cases, the new regime is open only to those who can prove two years of professional experience or provide evidence that they have followed "regulated education and training".
- Some stakeholders are calling for more consumer choice which could be achieved by widening the scope of the lighter regime. Others are afraid of abuse, such as "forum shopping". The modernisation should strike the right balance between these legitimate positions.
- The two-years rule is generally

competent authorities unduly refuse the benefit of this regime, in order to maintain a prior check of qualifications or to check whether their domestic conditions for professionals to establish themselves on a permanent basis are not being "circumvented". Setting (probably) arbitrary time limits would go against the Single Market in which integration of markets should prevail against fragmentation. In addition, the logic of the Treaties dictates that the freedom to provide services applies whenever the rules concerning establishment do not. Accordingly, the way forward is to determine whether a professional fulfils the criteria for establishment, as defined by the European Court of Justice. A professional not meeting these criteria should be considered as providing services on a temporary basis.

- There is another issue. Most Member States make use of the possibility to require an annual declaration for most professions they regulate. This can result in a burdensome procedure, counterintuitive in the context of a single market, where goods circulate freely and services are provided online and offline. Moreover, there is evidence that certain Member States require declarations to be made to different competent authorities, if the professional wishes to provide services in different regions of the same

accepted, because it protects consumers in Member States where the profession is regulated. However, this rule can be disproportionate in the case of consumers travelling from their country of origin to another Member State and where such consumers have not chosen a professional in the Member State they have travelled to but a professional from Member State they are coming from, for example a group of tourists has chosen a tourist guide in the country where they depart from. In this case, the professional concerned does not have any contact with local consumers in the host Member State. Consequently, requiring a prior declaration and two years of prior professional experience may not be justified on the grounds of consumer protection. The respect for consumer choice should prevail over fears about "forum shopping", which do not appear to be relevant in these situations. A prior declaration requirement would thus appear to be unnecessary. Consumer choice would only be limited where public health or consumer safety risks already justify a prior check of qualifications

Member State.

• Finally, a declaration can be required in nearly all cases even if most of the services are provided online, without declaration, and only a minor part of the activity requires physical movement of a professional. Whilst the E-Commerce Directive allows for provision of online services without any declaration, any related physical movement could require a declaration. The result is that a professional who provides online services without moving physically can not be required to make an annual declaration. In contrast, for mere business trips to the country where he is providing services, he may be required to make such annual declaration.

Access to information and e-government:

Public Consultation

- The multiplication of documents slows down the mobility of professionals.
- The “Contact Points” play an important role under the Professional Qualifications Directive in providing information to the citizens and assisting them with the recognition procedures.

Green Paper

- The Commission admits in the Green Paper that there is insufficient clarity and information. It often defeats the objective of getting a quick decision by the host Member State
- More subtly, the Commission proposes that each Member State make available a central on line access point with complete information on competent authorities and document requirements for the recognition of professional

- The entry into force of the Services Directive and the setting up of "Points of Single Contact" foreseen in the Directive should allow service providers to obtain all relevant information and complete all the administrative procedures necessary to provide their services on-line, including those procedures relating to the recognition of professional qualifications.
- A further step, building on the central access points, could consist in offering to professionals the possibility of completing all the procedures related to the recognition of qualifications online.
- The Commission proposes that Member States can rely on the National Contact Points. In the future, the National Contact Points could also organise the central access point to information and coordinate with the competent authorities the e-government facilities enabling the completion of all formalities online. The Commission doesn't include anymore the idea of "Points of Single Contact" within the Green Paper.
- qualifications for all professionals, regardless of their profession or the region in which they intend to exercise it.

Qualifications levels (only within the Green Paper):

In the Green Paper, the Commission examines the five levels of qualification of professionals (defined at the Article 11 of the Directive). When a professional applies

for the recognition of his or her qualifications for a profession under the general system, the competent authority must use these levels in order to determine if the applicant can benefit from the Directive. If there is a difference of two or more levels between the qualification of the professional and the qualification required in the host Member State, the Directive does not currently apply.

The Commission fears an overlap with the eight levels of the European Qualifications Framework (EQF) which is based on "learning outcomes", once the latter is implemented in 2012.

A possible way forward could be to avoid any classification of qualifications that excludes certain professionals from the scope of the Directive. A possible solution could be to delete the levels of qualifications in Article 11 (as well as Annex II which is linked to Article 11). This would mean that competent authorities would no longer determine the eligibility of an applicant according to pre-defined levels of qualifications but would focus on the identification of substantial differences in training to decide whether compensation measures are necessary. As a consequence, competent authorities could no longer refuse applications for recognition on the grounds of a difference in the level of qualifications, such as between a university diploma and secondary education. Neither could they exclude professionals from recognition of qualifications on the basis of professional experience attested by a Member State (as currently provided for in Article 11 (a) of the Directive). Deletion of such classifications would also give more discretion to Member States.

Compensation measures:

- | <u>Public Consultation</u> | <u>Green Paper</u> |
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| - In most cases professionals cannot benefit from automatic recognition of their professional qualifications. Under the so-called "general system", access to a profession should be granted to a professional who is fully qualified for the same profession in another Member State. Member States can impose compensation measures (a | - The European Commission proposes to recalibrate the system of compensation measures in four steps: |

choice for the applicant between an aptitude test and a period of supervised practice), if the duration or the content of the migrant's training differs substantially from that which are required in that Member State.

- The European Commission wanted to have the opinions of the stakeholders on:

The compensation measures, in particular whether they risk acting as a deterrent to the movement of workers.

How could the task of devising and organising such tests and adaptation periods be facilitated for the Member States? As to this question, forging closer networking and cooperation between competent authorities might be a way forward.

How could we deal with cases where a Member State considers that major deficiencies in the training of a migrating professional cannot be compensated and that intensive additional training remains strictly necessary? On the second question, the European Court of Justice paved the way with the so-called doctrine of "partial access" to a profession (see above).

- 1) Reflexion on the definition of the conditions according to which the host Member State can impose compensation measures.
- 2) Delete the Article 13 (2) of the Directive requiring professionals to have at least two years of professional experience if their profession is not regulated in their home Member State.
- 3) The addition in the Directive of a new safeguard protecting EU citizens against arbitrary compensation measures. When imposing a compensation measure on an applicant, the competent authority in the host Member State could explicitly justify its decision with regards to:
 - A) The substantial differences between the training of the applicant and the training required in the host Member State.
 - B) These substantial differences prevent the professional to

exercise his profession in the host Member State.

- 4) In order to facilitate the implementation of compensation measures, essential provisions of the Code of Conduct for national administrative practices falling under the Directive²³ (such as the requirement for competent authorities to offer aptitude tests at least twice a year) could be made mandatory. However, for the remaining parts, the Code of Conduct should not become mandatory.

Automatic recognition:

Public Consultation

- The Commission take the opinion of the national authorities supporting the maintaining of the automatic recognition for seven professions (doctors, general care, nurses, dentists, midwives, veterinary surgeons, pharmacists and architects). They also support an update of the training requirements, the lack of transparency regarding the contents of the training programmes and the means of dealing with new diplomas.
- On the basis of the experience reports by competent authorities, the Commission proposed to:
 - Stronger focus on output based training

Green Paper

- The Commission proposes a modernisation of the Directive on the automatic recognition through three phases:
 - In the first phase, the Directive itself could be amended to clarify and adapt the foundations of the training requirements, such as clarifying minimum

- Increase the minimum duration of training
 - Clarify the calculation of the minimum duration
 - Clarify and update training subjects
 - More transparency about the training contents
 - Reinforcing automatic recognition for new diplomas at European level
- training periods and strengthening the measures which underpin the quality of the services offered by professionals.
- In the second phase, the framework of newly introduced implementing or delegated acts would be used to update the existing training subjects for all professions concerned but also to develop sets of competences.
 - Finally, in the third phase, the harmonisation of minimum training requirements could be further optimised, if necessary, for example by moving from a system of training hours to the use of the European Credit Transfer and Accumulation System (ECTS)²⁸ across Member States in order to facilitate automatic recognition in the future. A mechanism could be envisaged to clarify the minimum number of years specified in a modernised Directive in terms of equivalent number of ECTS points.
- The Commission proposes also to:
- Increase confidence in automatic recognition with more harmonisation of the minimum training periods. Another way forward would be to consider which body or authority at national level could take more responsibility in ensuring that the contents of the training leading to a given professional title fulfil the requirements of the Directive at all times.
 - Clarify the status of professionals under minimum conditions basis, and if the diploma holders lose their right to

exercise the profession for which they were qualified in their home Member State

Internal Market Information system (IMI):

Public Consultation

- Administrative cooperation is the key to building the confidence between national administrations which underpins a smooth application of the internal market rules. The Professional Qualifications Directive requires competent authorities of the home and host Member States to work in close collaboration and to provide mutual assistance. The Internal Market Information system (IMI) has been developed for this purpose. It allows national administrations to identify the relevant competent authorities in other Member States and to communicate with them in their own language by using a set of pre-defined questions.
- The Services Directive has also introduced the use of an alert mechanism allowing competent authorities to inform each other of cases of professional malpractice. It can be used, under certain conditions, in cases including those of a professional who could cause serious damage to the health or safety of persons or to the environment. As a consequence, activities of a craftsman fall under this alert mechanism whilst

Green Paper

- Cooperation between Member States via IMI is already daily practice. However, it is not mandatory for the competent authorities for professionals whose activities are excluded from the Services Directive. Feedback received from the competent authorities in the experience reports in 2010 and the public consultation showed broad support for a mandatory use of the system, beyond the professions covered by the Services Directive. A possible way forward in the context of the modernisation of the Directive could be to ensure all competent authorities respond via IMI to queries from their counterparts in other Member States.
- Regarding the alert system, the Commission asks what would be the best solution for the healthcare professionals?
 - The first option would be to apply the same alert mechanism which applies to professions covered by the Services Directive to health professionals: an alert would thus be limited to circumstances where there is clear evidence that a health professional is migrating to another Member State though he has been

this is not the case for a health professional outside the scope of the Services Directive.

- A particular question is under what circumstances should such an alert be triggered by a Member State without waiting for a question from another Member State, in relation to health professionals. The following examples are conceivable and there may be others:

- A professional presents a fake diploma to a competent authority or gives false declarations/evidence;
- He is subject to sanctions and is no longer allowed to practice in his country of origin; or
- He is subject to investigations possibly leading to a withdrawal of his licence.

subject to sanctions barring him from exercising his profession in the Member State of origin. The alert would be limited to the specific Member States where there is sufficient likelihood of risks or damage occurring, which means considering any factors that might indicate that the professional is likely to be active in other Member States.

- Another option which would protect patients in a much more effective way would be to introduce an obligation to launch an alert to all Member States once a migrating health professional loses his right to practice due to sanctions in a Member State. Any measure taken in this respect should be in line with the Charter of Fundamental Rights in particular with the protection of personal data and the right to an effective remedy

Language requirements:

Public Consultation

- Professionals must have the language knowledge necessary for exercising a particular activity in a Member State.
- Language requirements should be justified and proportionate, in view of the activity that the professional wishes to carry out. Thus, they may vary according to the activities to be exercised, in line with the

Green Paper

- The Commission agrees on that professionals must have the language knowledge necessary to perform their activities in the host Member State. In this context, Member States must take due account of the principle of proportionality which excludes systematic language tests.

proportionality principle.

- The Directive should not be construed as imposing a blanket ban on language testing. It does allow for language testing in exceptional and justified cases.

The Commission believes that testing the language knowledge of EU citizens interested in professional mobility on a case-by-case basis may be a legitimate way of safeguarding the interests of consumers and patients. However, systematic language testing can become a means of unfairly preventing foreign professionals from accessing the right to perform a professional activity, if applied disproportionately. The main responsibility to ensure that all necessary professional language skills are acquired lies with the employers.

- A public debate on language requirements for health professionals is on-going: should they be subject to language tests? If so, at which point? The Commission proposes two solutions and invites stakeholders to give their opinion on it:

- The clarification of the Code of Conduct, which would be more conducive to future adaptations.
- The introduction into the Directive a rule specifically applicable to health professionals with direct contact with patients. This provision would allow a one-off control of the necessary

For further information on this article, please contact CEPLIS' Secretariat