The Right of Establishment for Professionals in European Law

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1 Preface and Acknowledgements

The law of the European Union is interesting, challenging and far-reaching. In many cases, we have not fully appreciated the implications for these laws, and certainly, many issues remain unaddressed on the potential impact in health.

This paper is an exploration of the issue of right of establishment, an issue of considerable importance in the regulation of professions. It is a feature of European law, being part of the implementation of the freedom of mobility granted by the Treaty of Rome.

The work for this paper was undertaken as part of post-graduate study in European Law at the University of Leicester Law School. I am grateful for comments received on this work from colleagues at Leicester.

The remarks and opinions expresses are those of the author alone.

2 Introduction

A central feature of the development of the European Community has been the need to focus on freedom of mobility of people. While considerable progress can be made in creating an environment for people who move to take up employment, for instance, as part of working for an employer, self-employed people who are subject to professional requirements present a special case.

In considering how far the European Community has succeeded in developing an appropriate infrastructure, this paper will answer the following core questions:

1. What are the objectives of the EC Treaty?

2. What has been done so far?

3. What remains to be done?

While it is laudable for the forces of economic integration to have embraced the specific concerns of professionals, the cases reviewed lead to the specific conclusion that Member States restrict access to regulated profession not as a function of labour market economics exclusively, but for the reasons of public policy.

3 What are the objectives of the EC Treaty?

A right of establishment is not a citizen right, but is part of the rights enjoyed by workers moving between countries within the Community. The EC Treaty says:

"Every citizen of the Union shall have the right to move and reside freely within the territory of Member States, subject to the limitations and conditions laid down in this Treaty..."[1] In that regard, its earliest formulations focused on this right within the broader objective of economic integration. To claim the right of establishment, then, a person must demonstrate that they belong to a relevant and eligible membership category since in order to enjoy the rights of the Union – i.e. they must be workers first.

The right of establishment has specific features. In its most general form, it "includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings...". [2] To enhance this right, it was necessary to ensure that there was equivalence of qualifications so that self-employed persons could represent themselves without being subject to improper discrimination in their chosen Member State.[3] Fundamentally, too, it was necessary to ensure that improper discrimination did not occur.[4]

This causes an inherent conflict among the right of establishment, regulated professions and regulations on non-discrimination, since the practice of regulating professions is to establish a "discriminating" framework, comprising a system of training, internships, apprenticeships, licensure, protected titles and codes of conduct.

Cremona, citing the Court on *Alpine Investments*, notes that Member States do not have the responsibility to worry about the protection of consumers in other Member States; indeed, Member States may not use "restrictive legislation on the ground of protection of consumers in other Member States**,** *a questionable proposition in the light of the aims of the single market which should surely not regard consumer protection legislation as territorially limited*." (my emphasis)[5] However, the key element is not consumer protection itself, since it appears not to be adequate to justify extra-territorial discrimination. Unsurprisingly, the

[1] Article 8(a) EC Treaty

[2] Article 52, EC Treaty

[3] Article 57, EC Treaty, which notes that the Council shall "issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications."

[4] Article 6, EC Treaty

[5] M. Cremona, Justifying restrictions on cross-border services: home and host state regulation. paper presented to LLM/MA programme, University o f Leicester, 29 June 1996, page 7.

Court found "that the good reputation of the Netherlands financial services *is* a legitimate cause of concern..." (emphasis in original)[6]

Protecting the public interest is clearly the remit of Member States where the objectives of the single market are strictly economic. However, the "public interest" is defined in the Treaty only through the derogation procedures.[7] [8] This raises a tension, which *Alpine Investments* suggests cannot be resolved simply through directives, but goes to the heart of the balance between the objectives of the Treaty and the interests of Member States.

Handoll[9] characterises a right of establishment within the broader framework of Community legislation on workers and freedom of movement. In that respect it includes the following:

1. the right of a national of a Member State to leave that Member State to seek employment in another Member State[10]
2. the right of a national of another Member State to enter a Member State[11]
3. the right of a national to residence in a Member State to pursue their employment[12]

Directive 73/148 deals specifically with implementing the right of establishment:[13]

> The Member States shall ... abolish restrictions on the movement and residence of:
>
> nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue

[6] Cremona, page 8.

[7] Article 57, EC Treaty.

[8] This is not a simple issue. Who acts in the public interest is becoming increasingly an issue where concerns over defining the public interest purely in economic terms becomes more common. In the US, the public interest may be defined as the state of affairs that exists when competing claims of legitimacy have been resolved amongst power blocks or lobby interests, whereas in European states, including the UK, there is a view that the public interest exists over and above the particular interests of special interest groups. As this view erodes, there emerges concern that no-one acts purely in the stewardship role previously the main remit of government.

[9] John Handoll, **Free Movement of Persons in the EU**, Wiley, 1995, pages 96-108.

[10] Directive 73/148, in particular Article 2(1).

[11] Directive 73/148, Article 3(1)

[12] Directive 68/360, Article 4(1)

[13] Article 1.1(a), EC Treaty

> activities as a self-employed persons, or who wish to provide services in that state....

The core structure of a right of establishment cannot be de-coupled from the nature and practice of professional activity within the economy of the Community. And this, in turn, cannot be de-coupled from the public interest, otherwise there would be no point to the regulation of professions, and normal labour market mechanisms would prevail and be sufficient; that this has not happened suggests that some thought is needed before professional conduct is deregulated. In order to do this, it is necessary to consider the nature and structure of professional practice within a Member State.

4 What is a professional?

A professional may be defined narrowly or broadly. Generally, its formal and more narrow use restricts the term to people whose work activity and title are regulated by statute, governed by a code of ethics or conduct and requiring licensure by a organisation authorised to do so. A professional is also often described as a person who undertakes work in the context of an "organised body of knowledge"; this is often considered in the more traditional sense of medicine, law, but can also relate to the sciences, but is not generally thought of as applying to, say, plumbers.

Another approach, used more colloquially, suggests that professionals are "self-supervising", in that the ethics and code of conduct are built-in work rules, rather than rules that need to be supervised in by another person. Strictly speaking, there is no definition of a professional in any Community legislation; instead, Community language considers formal qualifications as a basis for carrying out a profession and speaks in particular of a "regulated profession"[14], clearly leaving open the specific professions concerned as long as they are regulated in a relevant manner, namely:

1. it involves a professional title reserved for the holders of a particular diploma or qualification
2. the use of the title is governed by regulations or administrative provisions
3. the activity is subject to regulation and in particular where payment for services is concerned, most notably medicine.[15]

In this respect, the term 'professional' is used in its narrow, formal and historically accepted sense. Hughes, in **Developing European Professions**[16], notes:

[14] Directive 89/48, especially Article 3. However, elsewhere the use of the term 'profession' is more suggestive of how the word 'vocation' is used, i.e. activity, rather necessarily than a body of knowledge, and licensure.

[15] Directive 89/48, Article 1(d)

> Professional once meant an elite male in private practice who belonged to a secretive society which controlled what was legitimate knowledge and who would be permitted to practice it. Members gained the privilege to practice through years of concentrated study, examinations, an oath of allegiance to the profession and its code of ethics, and by passing a screening process.

While it is noted that "[n]ew professionals are real estate agents, computer programmers, astronauts"[17], it seems apparent that the Community legislation has chosen a narrow approach. From the perspective of a right of establishment, this is appropriate, in order to ensure that necessary regulation and licensure at the level of the Member State is restricted to relevant work activities. It is not inconceivable for a Member State to argue that all work activities are potentially regulated in some way, by guilds, unions, etc. In such circumstances, a broad definition would become meaningless in its application when applied to activities where the need was perceived to be more real.[18] It would clearly make the directives' references to regulated professions meaningless if the definition were broadened to encompass any vocational activity which attracted public policy or consumer concern, yet by the same token, it is precisely these considerations which underpin professional regulation.

Typically, then, the following are necessary and sufficient conditions for a person to be considered a professional within a regulated profession:

1. successfully completing a specific training programme, usually endorsed, accredited or supervised by a recognised association, authorised either under statute or by convention.[19] This training may be formalised in university or college courses leading to a degree (e.g. LLB, BArchitecture, MD etc.). Of decreasing relevance is apprenticeship-type training without any formal training component. There are still apprenticeship or internship phases for professionals in such professions as medicine, law, nursing, (and most clinical professions) but has fallen out of favour as the preferred approach to professional training as professions have

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[16] A.K. Hughes, **Developing European Professions**, University of Bristol, 1994, page 9.

[17] Ibid.

[18] Having said that, it is worth noting that as people become concerned about the quality of anything from putting up a new roof to selling life insurance, moves are made within States to increase regulation, specify necessary training, a system of vetting people for criminal records, bad character, past business failures, etc. and restrict who can call themselves what through an ever-widening system of credentialing, and work titles. The term 'profession' is really becoming synonymous with 'vocation' and with activity, and all vocational activity taking on the trappings of the traditional professions, i.e. codes of conduct.

[19] So-called "competent authorities" for the purposes of the various directives.

moved increasingly to basic academic training before a period of internship.[20]

2. successfully passing a standardised examination set by a licensing organisation, authorised either under statute or by convention, which confers upon the individual a designation which cannot be used by any one other than those who have completed the examination process. There may also be more formal induction processes involving a code of conduct, ethics, and corresponding public liability and insurance.

3. these two steps are essential and, upon their completion, a person my represent themselves in their community as a duly qualified professional using a protected title. Within a given country, this is equivalent to a right of establishment.

Diagram 1Step 1 training	Step 2 licensure	Step 3 establishment

It is important to note that a graduate of a professional degree programme has no right of establishment as a professional per se until s/he has been accepted as a member of the relevant profession; i.e. Step 3 comes at the end. This is in contrast with European Community notion of a right of establishment which fits within the broader Community objectives of freedom of movement and right to non-discrimination. Step 3 for the Community becomes a tool of economic integration of the labour markets.

5 The structure of professional practice

Table 1 shows the possible combinations which are possible, reflecting Steps 1-2-3 above. Three theoretical Member States, A, B, and C are involved, the entries reflecting the various combinations that are possible.

[20] Increasingly, the system is formalising around a period of formal training leading to a degree, followed by a stipulated internship programme for some months, followed by a licensing examination. In some professions, additional qualifications are achieved in post-graduate study with corresponding additional licensing examinations, for example, consultants in medicine, and lawyers in Germany. Nursing in the UK, for instance, is largely abandoning the apprenticeship route (the Project 2000 initiative).

Table 1: Variants of Professional Practice (reflecting variances in Training, Licensure and Establishment)

Variant	Step 1: Training	Step 2: Licensure	Step 3: Establishment	An Example
1	A	A	A	a doctor studies in France, is licensed in France, and sets up practice in France
2	A	A	B	a nurse studies in Ireland and is licensed in Ireland, but moves to work at a UK hospital
3	A	B	B	a lawyer studies in Greece, but wants to work in Germany and seeks licensure there
4	A	B	C	the true European, studies in one country, seeks licensure in another, and establishes themselves in a third
5	A	B	A	a variant of the doctor from Greece who qualifies as a specialist in the UK then returns home to practice

Variant 1, AAA, represents the typical situation within a Member State, and is generally described by the three Steps being processed in sequence. The remaining variants, from a European Community, perspective are relevant in creating a framework for the practice of regulated professions across the Community. Indeed, in establishing a framework to this end, it has been necessary for the Community to ensure three key elements as constituent to a right of establishment:

1. the mutual recognition of qualifications[21]
2. the freedom of mobility of labour[22]
3. a generalised right of non-discrimination.[23]

The next section, looking at what has been done so far, summarises key references to Treaty, Directives and Cases, to understand what has been done

[21] Article 57, EC Treaty

[22] Article 48, EC Treaty

[23] Article 6, EC Treaty

to ensure professionals a right of establishment.

6 What has been done so far?

The Table 2 summarises the development of legislation with specific reference to the regulation of professions and a right of establishment over the years.

Table 2: Relevant Treaty References on Establishment

EC Treaty References	Description
Art 6	prohibits discrimination on the basis of nationality
Art 52	freedom of establishment includes right to take up and pursue activities as a self-employed person in a manner equivalent to that of nationals of the country of establishment
Art 56	exemptions on the basis of public policy, public security and public health permitted
Art 57	issuance of directives concerning mutual recognition of diplomas, certificates and other evidence of formal qualifications
Art 57(3)	specific reference to medical and allied professions
Art 65	discrimination prohibited on the grounds of residence

Treaty obligations, as observed by Handoll, provide the foundation necessary for the economic mobility of labour throughout the Member States. The outcomes sought are to ensure that in any labour market, regulatory restrictions within Member States do not improperly discriminate against a national of another Member State.

Case law and directives have further defined the effect of the treaty obligations, as Table 3 shows relevant legislation and cases.

Table 3: Relevant Secondary Legislation and Cases, presented from earliest to latest

Secondary Legislation and Cases	Description
Directive 64/221/EEC	co-ordination of special measures to restrict movement and residence of foreign nationals on grounds of public policy, public health and security
Regulation 16112/68	freedom of movement of workers
Directive 73/148/EEC	establishment and provision of services
Case 36/74 *Walrave and Koch*	non-discrimination covers private bodies
Case 2/74 *Reyners*	discriminatory provisions for regulation and establishment cannot invoke nationality
Case 33/74 *van Binsbergen*	entitlement to establishment where no special conditions apply
Directive 75/34/EEC	right to remain after a period of self-employment
Case 71/76 *Thieffry*	legally-recognised professional bodies must respect non-discrimination
Directive 77/249/EEC	freedom to provide services for lawyers
Directive 78/686	medical and paramedical professions: dentistry, medicine, midwives, nurses, pharmacists, veterinarians
Case 107/83 *Klopp*	lawyers can practice in more than one member state
Directive 85/384	recognition of self-employed professionals: architects and lawyers
Case 292/86 *Gullung*	establishment is not a right where a professional is disbarred in a member state
Case 222/86 *Heylens*	assessing equivalency of qualifications had to take into account the content of what could reasonably be known in the context of the qualification (diploma) itself

Secondary Legislation and Cases	Description
Case C-340/89 *Vlassopolou*	entitlement to establish equivalency of professional knowledge and skills
Directive 89/48/EEC	general system for recognition of diplomas
Recommendation 89/49/EEC	recognition of third country diplomas
Directive 92/51/EEC	second general system for recognition of diplomas
Case C-55/94 *Gebhard*	compliance with national conditions can be imposed on non-nationals seeking establishment

The first directives issued on professionals concerned doctors. [24] Subsequent years saw other directives issued covering other professionals[25] culminating in the latest generalised directive on mutual recognition.[26] [27] In respect of a right of establishment, it is necessary to ensure that each Member State considers professional training broadly equivalent in so far as a European right of establishment is concerned since in the normal course of events, a national right of establishment follows licensure, whereas within the European Community, it precedes.

Discriminatory practice within the context of establishment may be understood following a model associated with Article 95(1) and (2)[28], namely that restrictions on a right of establishment may be either discriminatory or protectionist. Given that regulating professions involves both, understanding what this might look like will be helpful in considering the variants. Discriminatory practices may arise from the failure to fully establish

[24] Directive 76/686

[25] Directives 77/249 (lawyers), 77/452 (nurses), 78/686 (dentists), 78/1026 (veterinarians), 80/154 (midwives), 85/384 (architects), 85/432 (pharmacists), 93/16 (doctors, second directive)

[26] Directive 89/48/EEC and Directive 92/51/EEC

[27] In the longer term, profession-specific directives would eventually become unworkable as the number of professions increased. Indeed, it may be that this level of "micro-management" of professional conduct across borders not only undermines the Member State's regulatory prerogatives, but also risks incoherence in legislative drafting between specific directives on individual professions. Needless to say, it certainly does not reflect the dynamic nature of professional practice and the practice boundaries between different professions, most notably doctors and nurses.

[28] Model presented at University of Leicester Law School course held in Brussels, Belgium, 1996.

equivalencies of expertise, or qualifications. Protectionist practices may arise from restrictions on professional substitution, prohibited by licensure and regulatory practices but which cannot be supported in practice.

restrictions on right of establishment **Diagram 2**

Discrimination	**Protectionism**
where expertise, qualifications are equivalent and recognised as such (e.g. doctors, lawyers, nurses)	where there can be professional substitution (e.g. substituting a midwife for an obstetrician, or where a profession does not exist in another Member State)

The variants of the three Steps illustrate the development of Community thinking on establishment and provide a basis for assessing the adequacy of developments to date.

There is no prima facie right to establishment when only one Member State is involved

	Training	**Licensure**	**Establishment**	**Example**
1	A	A	A	a doctor studies in France, is licensed in France, and sets up practice in France

In individual Member States, licensure is a necessary predecessor of professional practice, and confers on the holder the right to establish themselves as doctors, lawyers, etc. Citizens of states do not enjoy any generalised right to be anything in particular except in so far as they can establish a claim, which is achieved through licensure. Movement between Member States by professionals involves that person presenting their qualifications to the relevant licensing body in their chosen new State.[29]

It is considered good public policy to regulate the entry of foreign trained professionals either as a function of immigration policy, or labour market management (e.g. regulating the supply of doctors) or where specific content knowledge is required of a country's particular ways (e.g. lawyers moving

[29] A noteworthy exception is the medical credentialing system of the UK's Royal Colleges, which produces broadly equivalent standards among those members of the Commonwealth using it; the holder of UK licensure moving to a country which recognised the jurisdiction of the Royal Colleges, is likely to be granted licensure without examination. Some Commonwealth countries have ceased this practice, as they have moved to modify their own immigration laws, which permits no exemptions on grounds such as these, for example, Canada.

between civil, common law and constitutional systems).

In considering a right of establishment within an intergovernmental situation, the usual approach has been to create an approach to recognise training and basic qualifications within an international labour market, but preserve a state's right to determine whether a professional could establish themselves by using existing licensing systems. This works so long as there are no overriding considerations related to the integration of labour markets, or creating a system of freedom of mobility of workers.

However, the European Community, seen not as an intergovernmental system, but as a transnational entity, purses a policy of integration, of economies and labour markets[30]. To achieve this, it is essential to move beyond the usual intergovernmental approaches, and indeed beyond the approaches used in federal states, such as the U.S., Canada, and Australia where significant disincentives exist between and among jurisdictions. The main concern is that Member States would continue to use traditional methods to regulate their labour markets, in particular the systems to control access to regulated professions, either on the grounds of professional autonomy, of national interest, or uniqueness of professional practice in the specific Member State. Those considerations reflect areas that transnational interests within the Community would not be well-served. Nevertheless, the Treaty does permit derogations[31] on the basis of:

- public policy
- public health
- public security

In the following sections, each of the possible combinations of activity is considered in terms of relevant cases which have helped to clarify what the specific requirements are that need to be satisfied.

Right of establishment means that a professional established in another member state must meet the national requirements.

	Training	Licensure	Establishment	Cases
2	A	A	B	*Vlassopolou, Klopp*

In such a situation, a right of establishment exists but only after a professional

[30] Article 3(c) EC Treaty states, "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;" and as Article 7(a) EC Treaty adds, "…an area without internal frontiers in which the free movement…is ensured…."

[31] Article 56, EC Treaty

has been duly accepted by the professional bodies.

In *Vlassopolou*, a Greek lawyer sought establishment in Germany; however, she was deemed unqualified in Germany. The Court ruled that it was not enough to assess her qualifications against German standards; it was necessary to assess the equivalency of the qualifications and therefore, German standards could not stand in isolation from Greek standards.

Importantly, *Vlassopolou* did not extend protection beyond simple non-discrimination on the basis of nationality. Article 52 has direct effect in so far as individuals can claim a right of establishment per se; however, Handoll notes that it is still uncertain to what extent Article 52 provides protection on other non-discriminatory obstacles.[32]

Klopp involved a lawyer who wanted to establish himself in France, but remain established in Germany. The concept of multiple chambers, common in the case of UK lawyers, was inconceivable from the French perspective. The Court recognised that Member States were free to regulate the legal profession on their own territory, they could not on that basis prohibit establishment where they lacked jurisdiction.[33]

Member States must recognise training and qualifications elsewhere on an equivalency basis to permit professionals, not established elsewhere, to be licensed/recognised and thereby become established

	Training	Licensure	Establishment	Cases
3	A	B	B	*Thieffrey, Kraus*
5	A	B	A	

In *Thieffrey*[34], a Belgian with Belgian qualifications sought to practice law in France, i.e. he sought establishment, and presented his qualifications to the Conseil de l'Ordre des Avocats for licensure. The University of Paris I had independently recognised the Belgian qualification as equivalent to a French one for academic, but not professional, purposes. The Court's ruling, citing a general duty under Article 5, was that it is "impermissible to restrict [freedom of establishment] on the grounds of failure to possess a national diploma where the individual holds a qualification recognised by competent authorities as

[32] Handoll, page 178. He notes that the direct effect pertains to an obligation on Member States to recognise qualifications and experience of nationals of other Member States. In *Bouchoucha*, C61/89 [1990]ECR I-3551, Member States cannot be obligated to recognise qualifications of nationals, not recognised elsewhere in the Community.

[33] See also Case 143/87 *Stanton* [1988] ECR 3877.

[34] 71/76 [1977]ECR 765.

equivalent to the required national diploma"[35].

It is worth remarking, though, that possession of a diploma is a necessary but not sufficient condition for granting establishment in regulated professions. Indeed, it is the licensure that depends on the qualifications and which bestows establishment.

In *Kraus*[36], a Member State was determined entitled to take measures to prevent the EC Treaty from being used "contrary to the legitimate interests of the state".[37] *Bouchoucha*[38] obtained a qualification in osteopathy not recognised in any Member State, and thus sought to require his own state to permit him to practice. The state was deemed not obligated to recognised qualifications, and hence establishment in professions it did not wish to, simply in virtue of someone claiming to be a practitioner.[39]

Freedom of movement [directive/article] needs flexible right of establishment otherwise Member States can engage in improper discrimination.

	Training	**Licensure**	**Establishment**	**Cases**
4	A	B	C	*van Binsbergen, Reyners*

Variant 4 represents an ideal situation in which the equivalency of the three steps across Member States is accepted. *Van Binsbergen*[40], although an early case, established an important requirement.[41] Indeed, *van Binsbergen* de-coupled the issue of residency for personal purposes and residency for

[35] *Thieffrey*.

[36] C19/92 [1993] ECR I-1663.

[37] Handoll, page 195.

[38] cited earlier

[39] Osteopathy is often practised by doctors and as such is covered by relevant mutual recognition. *Bouchoucha*, not being a doctor, was not covered. However, it remains open whether the existence of professional regulations may operate to restrain activity in a way which would be deemed not in the public interest.

[40] Case 33/74 [1974] ECR 1299.

[41] After *Van Binsbergen*, and *Reyners* (Case 2/74 [1974]ECR 631) the Commission shifted from proposing legislation around abolishing discriminatory practices to a focus on mutual recognition and associated co-ordinating mechanisms (Handoll, page 211. Most recently, the sectoral and general directives are currently under comprehensive review through SLIM, designed to consider the benefits of a more generalised approach to professions.

professional practice purposes. Clearly, the notion of permanent establishment (in order to provide a service) should have little to do with one's choice of home address, since establishment is a labour market notion, not a citizenship and residency rights issue. It is not surprising, though, that impediments are thrown up since the history of these Member States has generally been to favour nationals and insist on residency, too.

The more recent *Alpine Investments* case[42] has reintroduced the issue of host state/home state responsibility. *Van Binsbergen* did not consider whether the Belgian residency, and Dutch nationality, raised issues for the Belgians, and in particular whether *van Binsbergen* was an unlicensed Belgian lawyer practising outside Belgian jurisdiction, and whether Belgium had a duty to intervene to stop *van Binsbergen* representing himself as a lawyer in the Netherlands. This is distinct from *Reyners*[43] in which a Dutch national with Belgian legal qualifications was discriminated against solely on the basis of nationality.

7 What remains to be done?

The main conclusions that can be drawn from the cases to date and the situations raised by the Treaty and the Directives, is that

1. discrimination based on nationality has been affirmed as improper with respect to access to regulated professions and in particular with respect to the right of establishment;
2. the mutual recognition of qualifications is required to respect the meaning of qualifications as awarded and national standards must be understood in a broader framework designed to achieve equivalency;
3. national rules respecting establishment continue to raise problems, not strictly speaking related to nationality, itself, but to rules framed in terms of nationality but designed to regulate professional conduct; nationality may be seen as a more convenient way since it does not discriminate against citizens within a state.

This apparent well-ordered system actually belies considerable confusion, and one might suggest longer term incoherence at least as far as regulated professions are concerned. There is likely to be an increasing development of distinctly European systems of recognition and qualification, quite apart from the systems in Member States. This is likely to be undertaken partly by the professions, such as Engineers, Dentists, and Veterinarians, seeking to establish a transnational basis for professional practice. Of course, this is not really necessary so long as there is effective recognition within Member States of the equivalence of these qualifications, quite apart from their academic

[42] Case C-384/93 [1995] ECR I-1141.

[43] Case 2/74 [1974] ECR 631.

equivalency.

It remains to be seen whether the provisions of the Investment Services Directive[44] will be generalised to the area of establishment since it raises important issues at policy level, viz., the balancing of Community and Member States' interests.

If any of the following consequences arise within Community law, it is likely that Member States may wish to invoke derogations based on public policy, or public safety:

1. prohibiting persons with revoked licenses (and hence disestablished in their home state) from seeking establishment in another Member State; a right of establishment must not override proper regulatory control. Community mechanisms in this regard are loose and lacking in transnational force.

2. the failure of codes of conduct of home states to govern improper conduct in another Member State; bi-lateral arrangements which have been the normal intergovernmental way to deal with professional conduct will be inadequate if a single market is to evolve. Are bi-lateral arrangements between states, within the Community, adequate to govern the ethical conduct of professionals, when the client is in one state, and the professional is in another.[45] This asks whether, following on from *Alpine Investments*, Member States are more likely to invoke the good name of their national systems (of medicine, nursing, law, etc.) as a principle of public policy and hence extend their reach extra-territorially across the Community, as some now do across the world.

3. the inability of home state professional regulatory bodies to act in the national interest, rather than in the Community interest; regulatory bodies must be able to act (albeit proportionately) with respect to their remits and within their jurisdictions, since their main purpose lies in public safety (protecting consumers from unqualified people).

4. public confusion and doubt as to the legitimacy or safety of regulated professions in granting licensure and establishment to persons trained in another Member State; undermining the regulatory or licensing force of Member States' competent authorities will similarly undermine public confidence. At this time, the Community is unable to put in place a system of single licensure and regulation, without violating some notion

[44] 93/22/EEC OJ 1993 L141/27.

[45] In medicine, the use of telecommunications technology in the U.S. has raised problems of doctors licensed in one state jurisdiction being consulted about a patient from another jurisdiction within which they are not licensed (such as another US state, or indeed Saudi Arabia). Personal communication: Wellcare International, Centre for Telemedicine Law. See also, Robert Waters and Howard Young, Licensure Barriers to the Interstate Use of Telemedicine, Arent Fox Kintner Plotkin and Kahn, Washington, DC, n.d.

of subsidiarity. To what extent does a fear of a "federal" Europe exacerbate the problems with a right of establishment such that Member States will still consider their own systems of licensure, for instance, within the principle of subsidiarity; after all, why should European-level systems prevail when the actual practice is within a Member State. Even federal systems, as noted, restrict cross-boundary practice without the professionals having been duly accepted by the relevant professional bodies in all relevant states.

8 How important is establishment?

The number of people who are professional who seek a right of establishment is not large. Indeed, professional mobility within the Community is quite small and has not shown much evidence of change, before and after various directives on mobility.[46] Does this mean that the issues are best handled on a bi-lateral basis between the professional bodies involved? Indeed, why should professionals have any such right anyway.

Licensure is wrapped up, not in European labour markets, but domestic issues of conduct, and ethics. The regulation of professionals by Member States makes good sense in ensuring public confidence in the services they seek from professionals.

The purpose of regulating professionals has little to do with employment, and more to do with specialist skills being practised by essentially self-regulating people. States move to systems of licensure and control, and thereby to a derivative right of establishment as a function of public policy and public interest. That issues of professional conduct have now been linked in the European Community to a process of economic integration may actually undermine the whole point of autonomous professions. A right of establishment which precedes professional recognition may actually mitigate the effectiveness of systems to ensure the public interest.

Regulated professions have not yet established the principle of the single license within Europe and continue to work within a system of mutual recognition of qualifications even where there are some quite significant divergence of professional practice even within a given profession.[47] *Alpine Investments* suggests the need for a single licensing and regulatory scheme to replace establishment for regulated professionals; however, directives preserve

[46] Personal communications from: UK Department of Health, Royal College of Nursing, DGV.

[47] There is a situation before a nursing regulatory body of a Member State of a nurse granted licensure and establishment on the basis of mutual recognition, but who based on detailed review of training and conduct is unable to fulfil all the duties of a nurse in the host state. The circumstances of this have raised serious issues of vicarious liability of the employing hospital and whether the regulatory body was negligent in granting equivalency when, as alleged, it may not exist.

the primacy of host-state regulation.

The Community may have gone too far in the pursuit of establishment of regulated professions to achieve economic ends. Regulation focuses on public policy objectives and maintaining public confidence in certain professions -- a system of quality control; it becomes confused and potentially incoherent as economic interests intrude into regulatory prerogatives.

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