

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Recognition of Professional Qualifications Post-Brexit

Dáire McCormack-George (Courts Service of Ireland) · Wednesday, February 6th, 2019



Introduction

In June 2018, I presented a paper on ‘Trade in Services, Migration and Recognition of Professional Qualifications post-Brexit’ (draft available [here](#)) at the third Radboud Economic Law Conference, ‘Upgrading Trade and Services in EU and International Economic Law’. At the time, my interim conclusion (summarised in a blog post [here](#)) was that the ideal model for the recognition of professional qualifications post-Brexit was a CETA or ‘CETA-plus’ approach. However, it now appears that such an approach may not be amenable to the UK. This post provides a recap of the recognition of professional qualifications, analyses those parts of the EU-UK withdrawal agreement concerning professional qualification recognition and provides a renewed consideration of options post-Brexit, with a particular focus on WTO default rules. Finally, I briefly consider the possibility of UK qualifications having a liberalising effect within the Single Market, even after the UK leaves the EU.

Overview

Recall that professional qualifications play a vital role in the international economy. They constitute a market norm which may hinder (hence, non-recognition) or facilitate (hence, recognition) trade in services, labour and migration. Empirical economic research on the role of professional qualification recognition in the Single Market ([here](#) and [here](#)) suggests that the mutual recognition of professional qualifications between states can lead to increases in reciprocal services trade and migration. The same should hold, *mutatis mutandis*, of international trade.

Recognition of Professional Qualifications in the EU-UK Withdrawal Agreement

According to the draft text of Title II, Chapter 3 of the EU-UK Withdrawal Agreement agreed on 14 November 2018 (available [here](#)), the recognition of professional qualifications as provided for under Directive 2005/36/EC (available [here](#)) and related the directives for lawyers ([here](#)), statutory auditors ([here](#)) and intermediaries ([here](#)) shall remain the same during the transition period. That is to say that the recognition of professional qualifications shall take place as normal during the transition period. And any recognition of professional qualifications up to and during the transition period shall maintain its effects thereafter. Furthermore, the UK and remaining EU member states are required to cooperate to facilitate the operation of the qualification recognition during the transition period. The UK shall also maintain access to and use of the Internal Market Information System for a period not exceeding nine months after the transition period in respect of applications for the recognition of professional qualifications taken during the transition period.

Recognition of Professional Qualifications in International Economic Law: Hope in Vein?

Article VII GATS constitutes the primary acknowledgement of the role that qualifications in general—not merely *professional* qualifications—play in international trade in services. According to art VII, WTO members are entitled to recognise the licences or certifications of service providers of other members for the purposes of satisfying their own market standards. Recognition of foreign qualifications may be provided through agreement or independently of any prior agreement. Importantly, WTO members are not obliged to treat each other equally or on the basis of the most favoured nation principle in this area. Rather, WTO members *may* recognise foreign standards but *must* offer all WTO members the opportunity to negotiate an agreement, or accession to an existing agreement, covering the recognition of professional qualifications. Thus, Juan Marchetti and Petros Mavroidis note,

“Article VII GATS is not really an obligation; rather, Article VII GATS is a sort of ‘permission’ granted to WTO Members to decide whether to recognise foreign qualifications or licenses or not...” (‘I now recognise you (and only you) as equal: an anatomy of (mutual) recognition agreements in the GATS’ in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012) 421)

However, members must not grant recognition in a discriminatory manner nor in a way which would constitute a disguised restriction on trade in services. According to art VI.6 GATS, if WTO members have made a commitment to service liberalisation in a given sector, then they must implement a procedure by which to review the professional qualifications of foreign service providers. Article VI.4 provides that all measures affecting service trade are applied in a ‘reasonable, objective and impartial manner’. Specific disciplines have also been developed for the accountancy professions, but these do not expressly endorse the recognition of professional qualifications as such. Rather, they require member states to ‘take account of’ accountancy qualifications.

One interesting question which arises is the similarity of many regulated professions in Ireland and the UK. Given this sort of similarity, Marchetti and Mavroidis raise the following question:

“does the conclusion of a [preferential trade agreement] provide a shield against all claims for extension of recognition? In other words, assume countries A and B have concluded a PTA in accordance with Article V GATS. Their agreement contains provisions on recognition. Country C requests an extension of these provisions for the benefit of its citizens, arguing that its own regulatory arsenal is equivalent to that of the two [preferential trade agreement] partners in the

sector concerned. Can country A (or B) reject this request by claiming that the very existence of their [preferential trade agreement] is a factor justifying the exclusive treatment they grant to each other?" ('I now recognise you...', supra, 426)

As the authors suggest, the answer to this question is likely negative, requiring the elimination of discrimination across partners. The importance of this point, for our purposes, is as follows. Suppose the UK reaches a preferential trade agreement with one of the EU's trading partners (South Korea, for example) which does not provide for qualification recognition. As at least one of the EU's member states has virtually parallelly structured and regulated professions (ie, Ireland), the UK could then claim to seek similar terms of recognition in its agreement with South Korea. This may suggest that, for strategic purposes, Irish professions should shift their regulatory approach to one more similar to those of other EU member states.

A final point which emerges on this issue, noted in passing above, is the possibility of negotiating further sectoral disciplines, such as the accountancy discipline. Although these standards are relatively weak, they are certainly better than the *tabula rasa* which currently seems to face the UK in any post-transition period EU-UK trade agreement.

UK Professional Regulations Liberalising the Internal Market through the Backdoor

If UK qualifications are considered third-country qualifications after the transition period, it is interesting to consider their potential effects within the Internal Market. Suppose, for example, an EU national obtains a professional qualification in the UK after the transition period. That person then returns to an EU member state and attempts to have that qualification recognised. That qualification is recognised in that member state. That person then moves to another member state and attempts to have the qualification recognised.

In *Case C-238/98 Hocsmán* [2000] ECR I-6623 the Court of Justice held that national competent authorities must 'take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national rules'. This may require the national competent authority of the host member state to verify whether prior recognition of a professional qualification by another member state as equivalent 'was given on the basis of criteria comparable to those whose purpose (...) is to ensure that Member States may rely on the quality of the diplomas (...) awarded by the other Member States'. The same reasoning should, *mutatis mutandis*, hold true for EU or third-country nationals who obtained a qualification outside the EU, are lawfully working in the territory of an EU member state in that profession, exercise free movement rights to work in another member state and seek to have that qualification recognised there.

This means that professions in the Single Market may be affected not only by standards of the member states but also global standards from outside the EU. While this is less likely to have such a substantial impact because the number of third-country nationals exercising free movement rights in the EU is much smaller than the number of member state nationals exercising free movement rights, the prominent market in higher education in the UK—which EU nationals have, to date, taken advantage of—may provide an indirect way for UK professional regulation to liberalise the regulation of certain professions in the Single Market. Post-Brexit, the UK's higher education market will not suddenly plummet into disarray: it will surely remain a global leader in higher education and continue to be attractive to EU nationals. If this is the case, then the possibility of the

qualifications obtained in the UK post-Brexit being used to liberalise the EU's Single Market from the outside, as it were, is a distinct possibility which should be guarded against and monitored.

Dáire McCormack-George: LL.B. (Dubl.), B.C.L. (Oxon.), Ph.D. Candidate in Law and Scholar of Trinity College Dublin, the University of Dublin. The usual disclaimer applies.

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