

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Recognition of Professional Qualifications of Migrants at Work in the EU: Part I

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Introduction

In two blog posts ([here](#), [here](#)) I have commented on the recognition of professional qualifications between the EU and UK post-Brexit. Yet to be described and reflected upon, however, is the more general scheme of legal regulation of the recognition of professional qualifications which applies to third-country nationals coming to the EU, be they regular, forced or irregular migrants. This blog post, accordingly, seeks to set out the general law governing the recognition of professional qualifications of third-country nationals coming to the EU as found in EU migration and asylum law. The rights of third-country nationals migrating to the EU have largely been constructed under the terms of Part Three, Title V, Chapter 3 TFEU, particularly arts 78-79 thereof. Such migrants may wish to have their qualifications recognised in either and/or both of two scenarios: (a) before departing their country of origin; or (b) on arrival and during their stay in the EU. A table summarising the law follows.

Categories of Migrant

Regular Migrants

Labour Migrants^[1]

Labour migrants enter the EU on the basis of one of the EU's labour migration schemes, namely: the Single Permit Directive;^[2] the Blue Card Directive;^[3] the Seasonal Workers' Directive;^[4] the ICT Directive;^[5] as posted workers under art 56 TFEU;^[6] association and/or trade agreements between the EU, the member states and third-countries;^[7] or researchers, students, trainees, volunteers or au pairs.^[8] In respect of scenario (a), no such procedure generally exists at present. In respect of scenario (b), by contrast, any recognition procedure applied to a member state's own nationals must also be applied to all labour migrants, except for some trainees, volunteers or au pairs who are not working or students without the right to work, by virtue of a guarantee of equal treatment in accordance with the relevant national procedures.^[9]

Voluntary Migrants

Voluntary migrants enter the EU on the basis of one of the EU's family reunification schemes.^[10] The same reasoning which applies to labour migrants in respect of scenarios (a) and (b) roughly applies to voluntary migrants. Strictly speaking, voluntary migrants are not afforded equal treatment with member state nationals in respect of their access to qualification recognition procedures, but it is likely implicit in the guarantee of their equal access to employment and self-employment with their sponsor that they too shall have access to qualification recognition procedures.^[11] In other words, the guarantee of equal treatment is the gateway to qualification recognition.

Long-Term Residents^[12]

For such migrants, only scenario (b) is relevant. Long-term residents are expressly entitled to equal treatment with member state nationals in respect of qualification recognition procedures.^[13]

Forced Migrants^[14]

Persons seeking Temporary Protection^[15]

No question of scenario (a) arises for persons seeking temporary protection, since the terms of the Temporary Protection Directive do not apply until they are in the EU. The only scenario of relevance is scenario (b). According to art 12 of the Temporary Protection Directive, member states must permit beneficiaries of temporary protection to access employment or self-employment, 'subject to rules applicable to the profession' and educational opportunities linked to employment, such as vocational education for the duration of the temporary protection given. Article 12 is, however, ambiguous as to whether beneficiaries of temporary protection are entitled to such public goods on the basis of equal treatment. Member states are permitted to distinguish between member state nationals, certain other third-country nationals and beneficiaries of temporary protection in relation to their unemployment benefit policies 'for reasons of labour market policies'. Article 12 also states that the 'general law in force' concerning remuneration, access to social security systems and other employment conditions will apply. The only reference to non-discrimination in the Temporary Protection Directive is in recital 16, which provides that the member states are bound by obligations under international law which prohibit discrimination, but no reference is made to any specific measures of international law. And, according to art 14(2), member states 'may' allow adults enjoying temporary protection access to their general education system.

Asylum Seekers^[16]

Like persons seeking temporary protection, the only situation of relevance to asylum seekers is scenario (b). Asylum seekers must be given access to the labour market within nine months of the date of first application if a decision has not been made by the competent authority as to their asylum application. However, member states are free to decide the conditions for effective access to the labour market of asylum seekers 'in accordance with national law'.^[17] Member states are entitled to differentiate between asylum seekers, EU citizens, nationals of EEA states and other legal migrants in their labour market policies.^[18]

Refugees and Persons eligible for Subsidiary Protection Status^[19]

As with persons seeking temporary protection and asylum seekers, only scenario (b) is of relevance for refugees and persons eligible for subsidiary protection. According to the Uniform Status

Directive, refugees and persons eligible for subsidiary protection are expressly entitled, inter alia, to labour market access immediately after their status has been confirmed and equal treatment with member state nationals in relation to procedures for the recognition of their professional qualifications.^[20] Specifically, art 28(2) provides that member states ‘shall endeavour’ to facilitate the former two categories of forced migrant to access assessment schemes for their prior learning and skills, especially for those who cannot provide the documentary evidence of their skills which is generally necessary.

Irregular Migrants

There are three categories of irregular migrant of relevance, namely, those who enter the EU unlawfully, certain victims of trafficking who enter the EU unlawfully^[21] and those whose status as legal migrants becomes irregular whilst in the EU. Only scenario (b) is of relevance for irregular migrants. In respect of the first and third categories of irregular migrant, although the EU does not have the competence to regulate irregular employment, the EU has indirectly regulated irregular employment by prohibiting employers operating in the EU from employing irregular migrants.^[22] Thus, under EU law it is not unlawful per se for an irregular migrant to work and potentially even benefit from the necessary guarantees surrounding work, such as the recognition of their professional qualifications. However, given that it is unlawful for employers to employ irregular migrants and the member states are under a duty to return irregular migrants to their country of origin, the chances of this happening are probably quite slim. This is the case regardless of the length of time spent in the jurisdiction prior to the migrant’s status becoming irregular.

By contrast, victims of trafficking who have been granted a residence permit must be given access to the labour market,^[23] and to professional skills enhancement courses.^[24] However, as with certain categories of forced migrants, there is no general or specific equal treatment guarantee in respect of victims of trafficking, and so member states are entitled to define the conditions in which such irregular migrants may access the labour market and the recognition procedures and standards for their professional qualifications. In general, no equal treatment guarantee is provided for irregular migrants in respect of the recognition of their professional qualifications in scenario (b); they must rely on any available national procedure in those scenarios.

Type of Migrants	Recognition of Qualifications
Labour Migrants	Yes, except trainees, volunteers and au pairs when not working
Voluntary Migrants	Possibly implied
Long-Term Residents	Yes
Persons seeking Temporary Protection	Unclear on the basis of the Directive
Asylum Seekers	Unclear on the basis of the Directive
Refugees and Persons eligible for Subsidiary Protection Status	Yes, even if documentary evidence is unavailable
Irregular Migrants (generally)	No
Victims of Human Trafficking	No

Critical Reflections

Recall that migrants may wish to have their qualifications recognised in either and/or both of two scenarios: (a) before departing their country of origin; or (b) on arrival and during their stay in the EU. In respect of scenario (a) generally, as the Commission quite damningly admitted in its recent *Fitness Check on EU Legislation on legal migration*, ‘[d]epending on the laws of the country of destination, TCNs may (...) face more onerous requirements for recognition of their qualifications than EU citizens holding a similar EU or non-EU qualification’.[25] This means that for all regular migrants—indeed, for all migrants—no single, harmonised pre-departure qualification recognition procedure exists, meaning that it depends purely on the domestic law of each member state. Further, in a lengthy but insightful passage, the Commission observed,

“Recognition of diplomas is a widely posed requirement, especially for work-related permits, but its existence and the related guidance are relatively difficult to find. This, together with the complex process of recognition itself and the multitude of requirements especially concerning regulated professions make recognition one of the more burdensome requirements for TCNs. It has been documented that when there are requirements in terms of qualification level in order to be eligible to a work-related residence permit, some potential highly skilled migrant workers are sometimes excluded because of the excessive requirements or procedures, the impossibility to have access to recognition procedures from outside the country or the lack of knowledge in the destination country (by the administration or by the employer) about the value of the non-EU qualification.”[26]

Even in the absence of harmonisation in respect of scenario (a), simply setting up a common EU website or repository of member state practices would go a long way to overcoming this obvious uncertainty. However, this absence is particularly relevant at present whereby migrants may not be able to travel to the EU to have their qualifications recognised due to COVID-19. Putting in place measures to enable migrants to have their qualifications recognised before coming to the EU is therefore most pressing.

Turning thence to scenario (b), a number of questions arise. First, the guarantee of equal treatment ‘in accordance with the relevant national procedures’ is in relation to member state nationals. However, for the most part, particularly where member state nationals hold qualifications obtained in the relevant member state, no question of recognition arises. Rather, their qualifications are automatically recognised by the relevant authority. This does not mean, however, that third-country nationals are not entitled to equal treatment. Indeed, if they hold qualifications obtained within the member state, then they are equally entitled to such automatic recognition. In general, though, most third-country nationals do not hold qualifications obtained from within the EU. Accordingly, for those third-country nationals who hold qualifications obtained from outside the EU, they will be entitled to the same procedural treatment granted to member state nationals who obtain qualifications from outside the EU.

It is now that the amorphous phrase ‘in accordance with the relevant national procedures’ comes to the fore. This can only mean one thing: permitted discrimination. Allow me to explain. Suppose a member state national obtains a qualification outside the EU and seeks to have it recognised by an

authority within the EU. That authority is obligated to compare it with equivalent qualifications obtained within the EU. If that authority concludes that the qualification obtained outside the EU is equivalent to that obtained within the EU, then it is obliged to recognise it. If, by contrast, the authority concludes that the non-EU qualification is not equivalent to the EU qualification, then it is not required to recognise it. Returning, then, to those third-country nationals who hold non-EU qualifications: like member state nationals holding non-EU qualifications they are simply entitled to have their qualifications compared with relevant member state qualifications. This is a limited guarantee of procedural equality in respect of the recognition test applicable to non-EU qualifications. But, crucially, it does not determine the grounds upon which comparison is to be made. Suppose, for example, that a member state authority is comparing a non-EU qualification with an EU qualification. There is nothing stopping that authority developing criteria which discriminate against non-EU qualifications provided that the recognition procedure is applied to EU and non-EU nationals alike. To put the point another way, while third-country nationals are entitled to procedural equality with member state nationals in respect of qualification recognition, that procedural equality may be substantively unequal.

All of this, of course, is only of relevance to third-country nationals who are clearly granted equal treatment in respect of qualification recognition procedures in accordance with member state procedures. But not all third-country nationals are so entitled. For voluntary migrants, for example, no such express guarantee of equal treatment is provided; and for persons seeking temporary protection and asylum seekers, there is no such guarantee of equal treatment. Even though asylum seekers are entitled to labour market access within nine months of the date of their application for asylum, it cannot be said that, on the basis of the relevant directive, they are entitled to equal treatment with member state nationals in respect of access to qualification recognition procedures. Similarly, victims of human trafficking, who must be given access to the labour market, are not expressly entitled to equal treatment in respect of qualification recognition procedures. These differences in treatment are difficult to rationalise. They range from being entitled to equal treatment in respect of qualification recognition even in the absence of proof of qualifications in the case of refugees and persons seeking subsidiary protection—who might be considered to benefit from the ‘gold standard’ of protection, to no equal treatment whatsoever, as in the case of irregular migrants generally and victims of human trafficking in particular. Even in the recitals to the relevant directives, there is little reasoning provided as to why, if at all, such differences of treatment exist. Indeed, it is possible that the status quo is in breach of the general principle of legal certainty in EU law according to which ‘[i]ndividuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly’.[27]

There is a particular moral ideal which can enlighten and respond to the uncertainty created for third-country nationals seeking to have their qualifications recognised, one which has attracted the attention of labour and migration scholars in recent years.[28] It is the ideal of freedom as non-domination. It transcends the conceptual point that people’s well-being or welfare is partly determined through their free choice of options available and holds that freedom of choice in the absence of arbitrary, uncontrolled or discretionary power is a vital constituent element of people’s well-being. In the context of migration specifically, the ideal of freedom as non-domination can identify the intensity and extent of domination in the lives of migrants. As Iseult Honohan puts it,

“The intensity of domination (...) will depend on the degree of arbitrariness; the ease of exclusion; and the severity of the measures excluding foreigners. (...) The arbitrariness of migration controls appears in the way in which the exact

requirements for migration are liable to change according to the will of the admitting state (...) The intensity is increased by the arbitrariness that arises from the greater prevalence of discretionary powers in the area of migration than in most areas of domestic policy: here agencies and officials are given wide powers, often laid down without legislative provision or oversight; their decisions are often not subject to review, judicial or otherwise; the framework within which they make decisions is often neither clearly laid out nor well known to citizens as well as non-citizens.

The extent of domination will depend, first, on the range of areas of their lives affected, and the degree to which their options are limited for those who are excluded. On this basis, evidence suggests that the extent of domination by migration controls is significant. The whole lives of potential migrants who lack the basics of a reasonable level of subsistence may be determined by the difficulty of migration, which leaves them unable to access the preconditions for a flourishing life—even if they are not continuously subject to interference in each aspect of their lives.”[29]

I am here concerned with only one aspect of third-country nationals’ vulnerability to domination: namely, their entitlement to have their qualifications recognised. It is now clear that third-country nationals have very different rights in respect thereof depending on their migration status. Yet, little to no reasoning is provided by the EU in its laws as to why this is the case. To drill down into the criteria identified by Honohan, then, let us dwell on the intensity and extent of domination caused by this uncertainty. As to the intensity of domination, this is clearly evident in the case of voluntary migrants, persons seeking temporary protection, asylum seekers and victims of human trafficking. Their right to have their qualifications recognised is not clearly guaranteed and, in the case of victims of human trafficking, is likely not guaranteed at all. This is a major source of anxiety for such migrants and leaves them particularly vulnerable to the exercise of arbitrary, uncontrolled or discretionary power by relevant member state actors. If their rights are not clearly identified, then they may not be fulfilled; and if they are not guaranteed at all, then their well-being will be negatively affected. As to the extent of domination, this is also significant given that what we are concerned with here is the ability to access the labour market. Failing to consider qualifications because of the uncertainty surrounding third-country nationals’ actual entitlement thereto constitutes a significant obstacle to labour market access—something which we know, empirically-speaking, is the case. This is due to a lack of clear rules and procedures and, consequently, a form of arbitrary, uncontrolled or discretionary power—in other words, domination.

How, then, can such domination be reduced? The simple answer is to reduce arbitrariness, an absence of controls and a reduction of discretionary power. One way in which this can be achieved is simply by clearly stating the rights and entitlements of third-country nationals coming to the EU. Notice that the ideal of freedom as non-domination does not demand that all migrants be afforded the same rights: indeed, it is likely consistent with a tiered system of rights afforded depending on the degree of integration and participation of the migrant in their host society.[30] However, it does require, at a minimum, clarity and fairness in the rights and entitlements afforded to migrants. By clearly stating the reasons for differential treatment as well as the actual differences in treatment, the domination migrants habitually experience would be significantly reduced.

Summary

To recap: in scenario (a), there is no harmonised procedure for the recognition of qualifications of migrants coming to the EU. Even in the absence of harmonisation, establishing a website or database of member state practices would go a long way to reducing the uncertainty in the lives of migrants. In scenario (b), things are more problematic. Migrants are afforded a patchwork of rights ranging from recognition even in the absence of documentary proof thereof to no rights at all. The reasons for these differences are not clear. The uncertainty in respect of what rights migrants have may violate the general principle of legal certainty in EU law and be a significant source of domination in their lives. This could quite easily be resolved through clearly identifying the reasons for differential treatment and the actual differences in treatment, something which has not been achieved to date.

[1] With the exception of the right to have one's qualifications recognised, the rights of labour migrants have been comprehensively described elsewhere: see, inter alia, Herwig Verschuren, 'Employment and Social Security Rights of Third-Country Nationals under EU Law: An Incomplete Patchwork of Legal Protection' (2016) 18 EJML373; and Elaine Dewhurst, 'Labour Rights of Third-Country National Workers in the European Union' in Edoardo Ales, Mark Bell, Olaf Deinert and Sophie Robin-Olivier (eds), *International and European Labour Law: A Commentary* (Hart 2018).

[2] Parliament and Council Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1 (Single Permit Directive).

[3] Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 (Blue Card Directive).

[4] Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375 (Seasonal Workers' Directive).

[5] Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1 (ICT Directive).

[6] Case C-43/93 *Van der Elst* [1994] ECR I-3803; Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761.

[7] TFEU, arts 207 & 217.

[8] Parliament and Council Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L132/21 (Researchers', Students', Volunteers' and Au Pairs' Directive).

[9] Single Permit Directive, art 12(1)(d); Blue Card Directive, art 14(1)(d); Seasonal Workers' Directive, art 23(1)(h); ICT Directive, art 18(1)(b); and Researchers', Students', Volunteers' and

Au Pairs' Directive, art 22.

^[10] The primary scheme is embodied in Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12 (Family Reunification Directive). However, Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 is an essential companion to the Family Reunification Directive. In addition, some association agreements, such as the EEA Agreement, may provide for family reunification schemes.

^[11] Family Reunification Directive, art 14(1)(b).

^[12] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (LTR Directive).

^[13] LTR Directive, art 11(1)(c).

^[14] See generally Franziska Weber, 'Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum System' (2016) 18 EJML 34.

^[15] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive); and see Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff 2018). This measure has never been activated in practice.

^[16] Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Directive).

^[17] Reception Directive, art 15(1). The reference to 'national law' must include provisions of EU law which are directly effective too, but given that the terms of the Reception Directive provides member states with a power to distinguish between asylum seekers and other nationals, any more general EU equality guarantee must be displaced by this measure.

^[18] Reception Directive, art 15(2).

^[19] Parliament and Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Uniform Status Directive).

^[20] Uniform Status Directive, art 28.

^[21] Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19 (Victims of Trafficking Resident Permit Directive).

^[22] Parliament and Council Directive 2009/52/EC providing for minimum standards on sanctions

and measures against employers of illegally staying third-country nationals [2009] OJ L168/24.

[23] Victims of Trafficking Resident Permit Directive, art 11.

[24] Victims of Trafficking Resident Permit Directive, art 12.

[25] Commission, ‘Fitness Check on EU Legislation on legal migration’ (Staff Working Document) SWD(2019) 1055 final, 128.

[26] *ibid*, citing European Commission, *Obstacles to Recognition of Qualifications* (2017); and OECD and EU, *Recruiting Immigrant Workers: Europe 2016* (2016).

[27] Case C-158/06 *ROM-projecten* [2007] ECR I-5103 [25].

[28] See, eg, Iseult Honohan and Marit Hovdal-Moan (eds), *Domination, Migration and Non-Citizens* (Routledge 2015).

[29] Iseult Honohan, ‘Domination and migration: an alternative approach to the legitimacy of migration controls’ in *Domination, Migration and Non-Citizens* (n 38) 40.

[30] Marit Hovdal-Moan, ‘Unequal residence statuses and the ideal of non-domination’ in *Domination, Migration and Non-Citizens* (n 38).

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