

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## Reconsidering the Recognition of Professional Qualifications post-Brexit

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In two previous blog posts (one [here](#) on this blog and an earlier one on [EU Law Analysis](#)) I pre-emptively commented on the possible legal construction of professional qualification recognition post-Brexit. Now that the [EU-UK Trade and Cooperation Agreement](#) has been published, it is appropriate to describe and critically reflect upon the actual legal construction of professional qualification recognition between the EU and UK post-Brexit.

### The Text of the Agreement

Article SERVIN.5.13 opens with a strong defence of the domestic qualification recognition regimes of the UK and the EU's member states by providing, per art SERVIN 5.13.1, that '[n]othing' shall prevent the Parties from requiring that natural persons possess certain professional qualifications necessary to access and participate in a given profession in the territory of one of the parties. However, this wide-ranging defence is reined in by a significant caveat, namely, that nothing in the Article shall be construed as to exclude the possibility of some future agreement between the Parties on the recognition of professional qualifications. This leaves open the possibility for agreements to be reached by professional regulators in the respective Parties to the Agreement at some point in the future.

This very possibility is dealt with expressly in art SERVIN 5.13.2, which states that such regulators 'may' develop and provide joint recommendations on the recognition of professional qualifications to the Partnership Council established by the Agreement. Such recommendations must ('shall') be supported by an evidence-based assessment of: (i) the economic value of qualification recognition, presumably, to both Parties; and (ii) the compatibility of the respective qualification recognition regimes. This provision is a strange one. We know that, empirically-speaking (see [here](#) and [here](#)), facilitating qualification recognition improves trade in services and migration, so increasing cooperation in respect of qualification recognition is likely to be economically valuable as required by the first sub-clause of art SERVIN 5.13.2. But such heightened cooperation will only be effective in practice where there is already a relatively high degree of comparability between professional qualifications (for a case study exploring this point, see my paper [here](#)); and obviously, the very fact of Brexit suggests a significant future reduction in cooperation in this respect.

To understand this better, it is helpful to recall the typology I previously outlined [elsewhere](#)

concerning the range of possible qualification recognition regimes which the EU and UK could agree on post-Brexit. This typology reflects different degrees of economic integration, ranging from full mutual recognition which applies between EU member states and between the EEA countries and the EU's member states; to CETA, which requires the parties to a trade agreement to 'encourage' the development of mutual recognition agreements amongst professional bodies; to CETA 'minus', which requires the encouragement of professional bodies but does not set out any template for qualification recognition; and finally equal treatment clauses, which may require mutual recognition of qualifications but do not address same expressly.

Unfortunately, the UK does not fall clearly into any of these categories. The mutual recognition of professional qualifications is not guaranteed at all in the EU-UK Trade and Cooperation Agreement; and professional bodies in the respective Parties to the Agreement are not even 'encouraged' to develop mutual recognition agreements. Rather, such bodies are merely permitted to make recommendations to the Partnership Council established by the Agreement. Once they do so, the Partnership Council must ('shall') then review its consistency with the Agreement within a reasonable period of time. After such review, the Council 'may' then, by way of annex to the Agreement, set out the conditions for the mutual recognition of qualifications in a given sector.

## **Guidance on Developing Mutual Recognition Arrangements**

However, there is one aspect of the Trade and Cooperation Agreement which bears some similarity to CETA: that is the provision of an annex to the Agreement (Annex SERVIN-6) which provides, like the equivalent annex in CETA (Annex 11-A), guidelines on the development of arrangements concerning the mutual recognition of professional qualifications. The guidelines contained in this Annex must be taken into account by the Partnership Council when developing arrangements governing mutual qualification recognition, but they are, nonetheless, non-binding. The guidelines are accordingly characterised by a high degree of flexibility. While they set out the 'typical' contents of a mutual recognition arrangement, it is noted that any such arrangement need not slavishly follow the structure envisaged in the guidelines. Any arrangement may also be limited in nature, merely addressing administrative issues, for example.

In terms of the structure of the guidelines contained in the Annex, the scope of any mutual recognition arrangement, conditions for recognition, procedural arrangements, the effect of recognition and administration of any arrangement are all identified as issues which could form the content of a mutual recognition arrangement. Thus, mutual recognition arrangements between the Parties could, amongst other things, specify the professional qualifications necessary for recognition, the degree of discretion allowed to professional recognition authorities in determining whether to recognise a given qualification as well as the potential use of compensatory measures to permit partial recognition.

The Annex goes on to address, in further detail, the two conditions set out in Article SERVIN.5.13.2 above, namely, the economic value of any mutual recognition arrangement and the compatibility of the Parties' respective qualification regimes. In respect of the economic value of mutual recognition arrangements, the Annex envisages joint recommendations submitted to the Partnership Council analysing relevant aspects of the Parties' economies such as the existing level of market openness, industry needs, and business opportunities. Any such economic analysis need not, however, be comprehensive: a mere identification of business and consumer need will suffice.

In respect of the compatibility of the Parties' qualification regimes, the Annex outlines, in relative detail, a three-step process: first, an assessment of the scope of practice and qualifications needed to practise a profession should be conducted; second, an evaluation of the divergence, if any, between these two aspects of the Parties' respective qualification regimes will be necessary; and third, an analysis of the recognition mechanisms of the respective Parties should be carried out. If, on analysis, it turns out that there is a substantial divergence between the scope of practice and qualifications needed to practise a profession in the respective Parties, then compensatory measures, such as a period of supervised access to the profession in question, a test, a temporary limitation of the scope of practice or any combination of these measures, may be provided for in a mutual recognition arrangement.

Annex SERVIN-6 is accordingly rich in the guidance it provides to professional authorities in preparing joint recommendations for submission to the Partnership Council. While strictly non-binding, it does expand upon the relatively sparse text of art SERVIIN 5.13 in a number of areas.

## Critical Reflections

It must be remembered that the UK is now a third-country for the purposes of the recognition of qualifications. While UK nationals do not necessarily need a visa to come to the EU, depending on the duration and purpose of their visit, there is no longer any automatic recognition of professional qualifications obtained in the UK as existed under the terms of [Directive 2005/36/EC on the recognition of professional qualifications](#) (outlined by me in a previous blog post [here](#) and in full detail in the *European Business Law Review* [here](#)). Moreover, all of the problems identified by me ([here](#) and [here](#)) in respect of the recognition of professional qualifications of migrants coming to work in the EU now apply to UK nationals too. Along with the launch of [New Pact on Immigration and Asylum](#) in September 2020, the exit of the UK from the EU in December 2020 should be seen as a reminder of the significant re-thinking of the recognition of professional qualifications of migrants at work in the EU necessary in the near future.

Refocussing on the specifics of the EU-UK Trade and Cooperation Agreement, one must say, at least in respect of those provisions concerning qualification recognition, that it is generally a well-constructed document and provides sufficient guidance at an appropriate level of abstraction to professional regulators who wish to lobby for the establishment of mutual recognition arrangements. It is, however, unfortunate that the Parties to the Agreement are not expressly required by law to encourage such cooperation. This alone makes it stand out from the standard typology of trade agreements noted earlier. But Annex SERVIN-6 does go very far in expanding upon the limited text of art SERVIN 5.13, even more so than the equivalent annex of CETA. What effect the Agreement will have on mutual recognition is difficult to determine at this point in time. [Some reports](#) suggest that the service sector in the UK was seeking greater cooperation in this respect and will, accordingly, be disappointed with the outcome. Will the EU extend cooperation and integration in respect of professional qualifications to education and training? Given the development of, inter alia, the [Recommendation on Key Competences for Lifelong Learning](#), [Recommendation on Common Values](#) and the progress towards a [European Education Area](#), it certainly seems to be on track to do so. If such further integration deepens, then it is possible that the differences between the EU and UK in these respects will too.

Such differentiation is not without positives, however. EU nationals going to study or work in the UK post-Brexit should be keenly aware of the opportunity they are availing of: to learn about how

the EU's most important trade partner works. The knowledge and work experience such EU nationals gain in the UK may be of great assistance on their return (if at all) to the Union. The same applies, *mutatis mutandis*, to changes made in qualification recognition arrangements.

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