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Opinion Statement of the CFE

on the proposal for a modernised Professional Qualifications Directive

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CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 24 European countries (21 EU Member States) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.
CFE is registered in the EU Transparency Register (no. 3543183647-05).

Background information: Tax advisers as a regulated profession and relevance of cross-border activity

The tax profession is regulated in the sense of the Professional Qualifications Directive 2005/36/EC (in the following: the Directive) in at least 11 EU Member States (Austria, Belgium, Czech Republic, France, Germany, Greece, Luxembourg, Poland, Portugal, Romania, Slovakia) plus Croatia. In at least 5 Member States (Ireland, Latvia, Netherlands, Spain, United Kingdom), professional associations of tax advisers ensure qualification standards for their voluntary members[1]. In a minority of Member States (e.g. Italy and Malta), there is no regulation of the activities of tax advisers but most tax advisers are members of other regulated professions such as lawyers, auditors or accountants.

Cross-border activity does not play a great role in the practice of tax advisers. Reliable figures on cases of cross-border activity are available only for a few countries. In a survey[2] conducted by CFE in 2012 on what the main obstacles to cross-border activity of tax advisers are, the member bodies of CFE identified: (1) the lack of knowledge of the tax law of other countries (relevance 9.1/10); (2) the lack of contacts to clients in other countries (7.7/10) and (3) the lack of knowledge of foreign languages (6.6/10). Lengthy and complicated procedures to be admitted range at 6th place (5.6/10) while legal restrictions to practice in other countries are seen as the least relevant barrier (4.5/10). The solution commonly found is to refer a client to a colleague in another country (relevance 8.2/10).

Comments on the Directive proposal:

We have limited our comments to selected issues, relating to both the Commission´s proposal of 19 December 2012 and the draft report by MEP Bernadette Vergnaud of 16 July 2012.

1. Partial access to a regulated profession

The European Commission has proposed introducing the possibility of partial access to a regulated profession as a last resort, where the compensation measures provided for in Art.14 are insufficient to

[1] In Ireland and in the United Kingdom, the tax profession is treated as regulated in the sense of Art.3 (1) a) 2nd sentence of the Directive.
[2] 11 answers received from EU MSs Belgium, Czech Republic, Germany, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, UK, plus Croatia. The survey will be made available in the 2nd edition of the CFE European Professional Affairs Handbook for Tax Advisers,

allow full recognition and the activity can objectively be separated from the other activities falling under the regulated profession in the host Member State (in the following: MS/MSs).

This should reflect the ECJ case law (case C-330/03, *Colegio de Ingenieros*). To determine whether an activity can *objectively be separated* from the other activities of the regulated profession in the host MS, the ECJ suggests that *one* of the decisive criteria is whether the activity may be pursued independently or autonomously in the *home* MS. The Commission proposes that an activity *is deemed to be* separable if it is exercised as an autonomous activity in the *home* MS.

CFE Comment:

The Commission proposal goes much further than the ECJ case law. According to the ECJ, the question whether the activity can be pursued independently and autonomously in the home MS is only one condition. In the Commission proposal, it would be a sufficient condition.

We doubt that the question whether an activity can be exercised autonomously in the *home* MS can be a sufficient condition. An activity may be separable in the *home* MS but not in the *host* MS where the essence of this activity differs from country to country. This is probably not the case for engineering, as in *Colegio de Ingenieros,* but for activities that consist in the application of national law, like legal or tax advice. For instance, depending on the interrelation between national tax and accounting rules, the question whether certain accounting tasks can be separated from tax tasks differs from country to country. Therefore, the situation in the country of destination should decide; the situation in the provider´s country of origin can merely serve as an indication.

A practical problem is that if the activity is not regulated in the home MS, it is almost impossible to determine whether it can be exercised autonomously in that MS. A professional claiming partial access will certainly assert that this is the case but there will usually be no competent authority to confirm this.

Therefore, the last sentence of Art. 4f (1) should be deleted.

Where partial access has to be granted, this must be transparent to the client. Therefore, it is important to maintain the rule in Art .4 f (5) of the Commission proposal that a partially admitted professional must use the professional title of his/her home MS.

2. Introduction of European Professional Cards

The Commission has proposed the introduction of European Professional Cards for certain professions to facilitate cross-border mobility by speeding up administrative procedures for professionals that opt for a card. The decision to introduce cards for a given profession would be taken by the Commission through implementing acts (Art. 291 TFEU). The Commission has declared that it would only introduce such cards where there is a demand from professionals and that professional organisations would be involved, which is however not stated in the proposal.

The draft Vergnaud report adds that there must be a request from the profession (Art. 4a (6)), without specifying what form such request should take.

CFE Comment:

a) Procedure of the introduction of European Professional Cards

There are vast differences between professions in whether they are ready to have a European Professional Card. This will be the case for a profession where cross-border activity takes place frequently, where the contents of a professional qualification and professional rules are largely comparable and where the profession is regulated in a large number of MSs. Where these conditions are met, there seem to be little objections to tight deadlines for competent authorities dealing with the card.

The decision whether a professional card is introduced for a given profession has significant repercussions on:

- MSs, as they have to redefine competences of competent authorities, increase their staff and organise training courses. In countries where the profession is unregulated, it creates new responsibilities for the state or other bodies designated as competent authorities, thus more administration and more costs;
- members of the professions who gain procedural and substantive rights; and
- third persons like clients whose protection is affected if tacit authorisation is introduced.

Therefore, it is crucial how the decision to introduce professional cards is taken.

The Commission proposes to decide this through "implementing acts", using the "advisory procedure" set out in Art.4 of Regulation (EU) 182/2011, see Art.4a (6) and 58 of the proposal.

We acknowledge that the quick introduction of professional cards shall be possible and should not require amendment of the Directive itself but see a need for an effective possibility to limit the introduction of professional cards to professions where they are useful.

Deciding on the introduction of professional cards through implementing acts would neither be in the spirit of Art.290, 291 TFEU nor would it do justice to the importance of this decision:

The decision whether to introduce professional cards for a given profession is taken prior to the implementation phase. Therefore, implementing acts do not appear to be the appropriate tool.

According to the current proposal, the decision which professions should have professional cards would be taken by the Commission alone, with no means of control by the European Parliament or the MSs: In implementing acts, when making use of the *advisory procedure*, the Commission is not bound by the opinion of the advisory committee, whatever the majority in the committee.

We therefore propose that the decision for which professions a card is introduced is taken by *delegated* acts. To enable input from practitioners, a mandatory prior consultation of the professions affected should be introduced as well.

In contrast, we agree with the Commission that the mere *technicalities* concerning professional cards and IMI files are better dealt with by implementing acts.

A mere requirement that there should be a "request" from the profession, without any specific criteria on what such a request should look like, would be of little practical value.

Therefore, Art. 4a (6) should be worded *(amendments underlined)**:***

"The Commission shall be empowered to adopt delegated acts in accordance with Article 58a concerning the introduction of European Professional Cards for specific professions, after having consulted the professions affected. It shall adopt implementing acts establishing the format of the European Professional Card, the translations necessary to support any application for issuing a European Professional Card and details for the assessment of applications, taking into account the particularities of each profession concerned. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 58."

Correspondingly, Art. 4a (6) shall be mentioned in the enumerations in Art. 58a (2), (3) and (5).

b) European Professional Cards for tax advisers?

Given the low cross-border mobility of tax advisers due to reasons unrelated to regulation or qualification (see the "Background information" paragraph) and the large differences in qualification, competences and professional regulation, we expect that professional cards for tax advisers will have little effect on cross-border mobility.

We are however concerned that the introduction of professional cards will lead, in countries where the profession is not regulated by law but by professional associations, to the setting-up of state bodies responsible for the handling of professional cards. As in these countries, experience and knowledge of issues concerning the profession rests with the professional associations and not with the state, we believe that these bodies (or their representatives) should be entrusted by the state with the responsibility of handling the professional cards system, as Art.3 (1) d) of the Directive does not require "competent authorities" to be state bodies.
Moreover, in the area of tax advice where the protection of the clients´ fundamental procedural rights requires that the independence of the professional from the tax administration is guaranteed, we strongly believe that tax administrations should not be in a role to decide on the issuing of professional cards to individual tax advisers.

We therefore ask the Commission to promote the idea that MSs, when designating competent authorities for issuing European Professional Cards pursuant to Art. 4a (5) of the Directive proposal, entrust professional associations.

3. Tacit authorisation

In case of permanent mobility, the Commission proposal (Art.4 d) (3) and (5)) would oblige the competent authority of the host MS to decide within two months on compensation measures. Failure to take a decision would be considered a tacit authorisation, allowing the professional to practice in the host MS.

The draft report of MEP Vergnaud would keep the approach of tacit authorisation but states that tacit authorisation would only be temporary. Hence, the competent authority could still take its decision at a later stage.

CFE Comment:

Some of our members have pointed out that they are in favour of tacit authorisation as this would give the professional quicker access to cross-border activity. This however is not shared by the majority of our members who see a severe risk for the financial security of the client, arguing that it is not justified that the client bears the risk of delays caused by the competent authority.

The proposal of rapporteur Bernadette Vergnaud that tacit authorisation should only have temporary effect and can be revoked does not solve the problems related to tacit authorisation as it provides no legal certainty for the client and the professional. The client who might check the validity of the professional card at the beginning of the activity will not be informed of any revocation of tacit authorisation. The professional, on the other hand, risks concluding contracts with the client that s/he might not be allowed to fulfil at a later stage. There is also a risk that competent authorities, knowing that they can revoke any tacit authorisation, carelessly disregard the deadlines, contributing to this uncertainty.

Instead of a tacit authorisation, there should be an effective legal remedy for the professional under national law, available upon expiry of the deadline.

We therefore propose to delete Art. 4a (5).

In Art. 4d (7), a second sentence should be introduced: "In the absence of a decision, an appeal under the national law of the Member State concerned shall be admissible upon expiry of the time limits set out in the paragraphs 2 and 3."

4. Professional experience requirement for professionals from unregulated MSs

The current Directive states that professionals from an unregulated MS moving to a regulated MS can only benefit from the Directive after having gathered two years of professional experience in their home MS.

According to the Commission proposal, this 2-year-period should be maintained for *temporary* mobility but it should be possible to gain the required experience in *any* MS, not only in the *home* MS.

CFE comment:

For temporary mobility where a professional with no particular qualification may commence cross-border activity without prior check by the host MS´s competent authority, it seems justified to grant the benefits of the Directive only to persons that have 2 years of professional experience.

In contrast, for *permanent* mobility, the Commission has proposed the deletion of the requirement of 2 years of professional experience. This means that graduates could apply immediately for recognition in another MS. This does not affect the level of professional education they need to prove (Art. 11, 13) or the possibility of that MS to require compensation measures (Art. 14).

CFE comment:

Most regulated MSs require for their own graduates a period of practical training as a precondition for access to the profession of tax advisers, ranging from 2 years in Germany and Poland to 5 years in Romania. The requirement of 2 years of professional experience for applicants from non-regulated MSs is the only way of ensuring that candidates from non-regulated MSs have acquired practical experience before taking the aptitude test. This possibility should be maintained.

However, we do not think that MSs who do not require any practical experience for their own nationals should require this from applicants from other MSs.

We therefore propose that Art. 13 (2) 1st sentence be worded *(amendments underlined)**:***

"Access to and pursuit of the profession referred to in paragraph 1 shall also be granted to applicants possessing an attestation of competence or evidence of formal qualifications referred to in Article 11 issued by another Member State which does not regulate that profession who have pursued the profession on a full-time basis for two years during the previous 10 years in another Member State."

As a consequence, the current last subparagraph of Art. 13 (2) would have to be maintained, subject to editorial changes.

5. Insurance requirement for temporary cross-border activity

Rapporteur Bernadette Vergnaud has proposed to allow MSs to require professional indemnity insurance also from professionals from other MSs that only practice temporarily on their territory. This would be a crucial change as the current legal situation is unclear due to the ambiguous wording of Art.23 Services Directive 2006/123/EC.

CFE comment:

We consider that the possibility to ask for insurance cover for temporary cross-border services would significantly improve the position of the client who would be able to rely on cross-border services as much as on domestically provided services.

We also welcome that this would bring to an end the current legal uncertainty in this respect. For reasons of coherence, we would however recommend to align the wording of Art.7 (2) f bis) of Ms Vergnaud´s draft report with Art.23 of the Services Directive.

Therefore, we support amendment proposal 40, but would add that this should apply only to "services which present a direct and particular risk to the health or safety of the recipient or a third person, or to the financial security of the recipient".

We also see that an insurance requirement may block cross-border tax services as cross-border insurance cover often cannot be obtained in practice, but in the actual situation it seems to be the only way to respect client protection aspects.

We understand that the Commission has taken up efforts to find a solution how cross-border insurance can be obtained more easily. We urge the Commission to continue this work in cooperation with the insurance sector.

In this regard, we would like to point out that in the Czech Republic, an international insurance company and the Czech Chamber of Tax Advisers have reached an agreement according to which professional indemnity insurance cover of Czech tax advisers is automatically valid throughout the EU. In Slovakia, a similar agreement exists, according to which tax advisers can opt for EU-wide cover for a slightly increased premium. We would be pleased to provide you with more information on examples of good practice.

6. Trainees

The Commission proposes to extend the Directive to remunerated traineeships in another MS that have been certified by a competent authority of that State.

CFE comment:

We do not see why the remuneration of the traineeship should be a prerequisite for recognition.

Furthermore, from the perspective of a profession which is regulated only in some MSs, we see a difficulty finding a competent authority ready to certify a traineeship in non-regulated MSs. We therefore propose deletion of these two criteria.

Instead, we are missing a criterion that the traineeship pursued in another MS is actually relevant for the professional activity in the home MS. Where the professional activity consists of the application of national (tax) law, this is not necessarily the case. The competent authority of the home MS must be able to decide on the relevance on a case-by-case basis.

Therefore, Art. 55a should be worded as follows *(amendments underlined/crossed out)**:***

*"With a view to grant access to a regulated profession, the home Member State shall recognise ~~the remunerated~~ **a** traineeship pursued in another Member State **relevant for the exercise of the profession in the home Member State** ~~and certified by a competent authority of that Member State~~."*

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