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## **Regulating health professions in a European perspective**

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Text of the video message of **Koen Lenaerts** (President of the Court of Justice of the European Union)

## HOW TO REGULATE ACCESS TO AND THE PURSUIT OF THE HEALTH PROFESSIONS IN CONFORMITY WITH EU LAW?

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First, let me first take this opportunity to thank the European Social Observatory for inviting me to speak at this conference on the subject of the European dimension of health care. I sincerely regret that I am not able to be physically present. Nevertheless, thanks to the wonders of modern technology, I still have this valuable opportunity to share with you, from a distance, some reflections concerning access to and pursuit of the health professions in conformity with EU law.

Since 1957, the European Communities – and now the European Union – have made every effort to ensure that Union citizens can move freely and carry on their economic activities anywhere on the territory of the Union. In order to secure those rights, action at Union level aims to eliminate all obstacles to free movement and, where needed, to harmonise the legislation of the Member States.

The Treaty on the Functioning of the European Union guarantees two fundamental freedoms that are of particular relevance for health professionals: the freedom of establishment and the freedom to provide services. The freedom of establishment, laid down in Article

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49 TFEU, protects the right to take up and to pursue activities as a self-employed person and to set up and manage undertakings in another Member State. The freedom to provide services within the Union, as provided for in Articles 56 and 57 TFEU, guarantees the right to provide or to receive services in an EU Member State other than the one where the company or consumer is established. The freedom of establishment and the freedom to provide services both therefore share a common objective, that of guaranteeing the mobility of businesses and professionals within the EU.

Access to and pursuit of the health professions within the EU is regulated on the basis of the Treaty provisions on free movement and the case-law of the Court of Justice, while specific rules for the recognition of qualifications are further developed on the basis of secondary Union law.

Domestic-law rules govern access to health professions in the various Member States, which leads to different conditions governing such access from one Member State to the other. Medical education is, moreover, governed by the different education systems of the Member States. These differences may hinder free movement within the EU in practice : it is generally more difficult for a person to meet the requirements set by the national legislation of another Member State than those of his or her own. Therefore, the effective exercise of the freedom of establishment and the freedom to provide services requires

that national qualifications should be recognized in the other Member States. The recognition of professional qualifications is necessary to ensure the free movement of health professionals.

As early as 1974, the Court recognised the need to establish a system of recognition for professional qualifications. The *Reyners* case<sup>1</sup> concerned the recognition of professional qualifications for lawyers. In that case, the Court recognized the direct effect of the Treaty provisions on the freedom of establishment and it went on to confirm the direct effect of the Treaty provisions on the freedom to provide services in the *Van Binsbergen* case.<sup>2</sup> The principles laid down in those seminal rulings are essential in protecting the rights of individuals to access and pursue professions in general, as they establish two essential prerequisites for them to do so: first, the prohibition on discrimination and, second, the obligation for Member States to take into account the qualifications that individuals have obtained in another Member State. The *Vlassopoulou* case, which also concerned the recognition of professional qualifications for lawyers, emphasised the point that if national rules fail to recognize the knowledge and qualifications obtained in another Member State, this hinders Union citizens in exercising their free movement rights.<sup>3</sup> The Court further clarified that a Member State that receives a request to admit an individual to a profession to which access is dependent upon

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<sup>1</sup> Case 2/74, *Reyners*, EU:C:1974:68.

<sup>2</sup> Case 33/74, *Van Binsbergen*, EU:C:1974:131.

<sup>3</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 15.

the possession of particular degrees or other qualifications, must compare the individual's specialised knowledge and abilities, certified in another Member State, with the knowledge and qualifications required by its own national legislation.<sup>4</sup> The Member States are, however, entitled to take into account objective differences between different national qualifications.<sup>5</sup>

Most health professionals were previously subject to EU rules that established mutual recognition of qualifications in specific sectors, an approach which began in the 1970s. Sectoral mutual recognition arrangements were adopted for doctors in 1975, for nurses in 1977 and for pharmacists in 1985. Those arrangements harmonised minimum training conditions and established a system of automatic recognition, thereby diminishing, to a considerable extent, the obstacles to health professionals' free movement resulting from divergences among national rules governing access to the relevant professions.

Nevertheless, the complete removal of obstacles to free movement in the area of professional qualifications required a more uniform, simplified and accessible framework. In 2005, the sectoral arrangements to which I have referred were therefore merged and consolidated in Directive 2005/36/EC on the recognition of professional qualifications.<sup>6</sup> That Directive lays down rules on the

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<sup>4</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 16.

<sup>5</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 18.

<sup>6</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ [2005] L255/22.

basis of which a Member State that decides to make access to, or pursuit of, a regulated profession in its territory conditional upon possession of specific professional qualifications, is obliged to recognize professional qualifications obtained in the other Member States.<sup>7</sup>

Most health professionals fall within the ambit of this Directive, which incorporates elements of the sectoral directives and of the case-law developed by the Court of Justice. The Directive covers the following health professions: doctors, including general practitioners and specialists, nurses responsible for general care, midwives, dentists and pharmacists. The Directive forms part of a system of mutual recognition of qualifications that incorporates three separate forms of recognition: automatic recognition, a general system of recognition and recognition on the basis of professional experience. The health professions covered by the Directive fall under the scope of the system of automatic recognition. For the purposes of access to and pursuit of the professional activities, automatic recognition takes place on the basis of coordination of minimum training conditions, as laid down in the Directive itself.<sup>8</sup> If a health practitioner's qualifications do not meet the criteria for automatic recognition and are not listed in Directive 2005/36/EC, they may still be recognized, either under the general rules governing the recognition of qualifications or on the basis of an acquired rights regime. Nevertheless, if the authorities of a

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<sup>7</sup> Article 3(1)(a) Directive 2005/36/EC ; Case C-298/14, *Brouillard*, EU :C :2015 :652, para. 35-45.

<sup>8</sup> Article 21-45 Directive 2005/36/EC.

Member State believe that the training received is significantly different from that required by its own rules, the health practitioner concerned may be asked to take an aptitude test or to undergo a period of adaptation.<sup>9</sup>

The Court has further clarified the right of access to and pursuit of health professions or paramedical professions other than the professions covered by automatic recognition under Directive 2005/36/EC. In the *Nasiopoulos* case, the Court addressed the authorisation required to access the profession of physiotherapist in Greece in the case of an individual who was in possession of a German professional qualification. The Court determined that, since the conditions for access to the profession of physiotherapist have not been harmonised, the Member States retain the power to determine the conditions for access to that profession. However, the Member States must exercise that power in a manner that is compatible with the fundamental freedoms. This means that national legislation on access to a profession can neither hinder, nor render less attractive, the exercise of free movement, unless it can be justified by overriding reasons of public interest, such as consumer protection or the protection of health, and provided that it does not go beyond what is necessary to attain the objective which it pursues.<sup>10</sup> In the specific case of Mr Nasiopoulos, the Greek legislation excluded partial access to the profession of physiotherapist notwithstanding the fact that Mr

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<sup>9</sup> Articles 10-15 Directive 2005/36/EC.

<sup>10</sup> Case C-575/11, *Nasiopoulos*, EU:C:2013:430, para. 20-21.

Nasiopoulos had obtained, in Germany, a qualification that authorised him to carry out some of the activities that fall within the scope of the profession of physiotherapist. The Court of Justice held that by requiring him to follow a full programme of education and training, the Greek legislation was in conflict with the freedom of establishment.<sup>11</sup>

The same principles also apply to other professions. I refer here to the recent judgment of the Court of Justice in the *Brouillard* case. This case concerned admission to a competition to recruit Legal Secretaries at the Belgian Cour de cassation.<sup>12</sup> The Court recalled that, in the absence of harmonisation of the conditions for access to a particular occupation, the Member States retain the power to determine the necessary knowledge and qualification requirements.<sup>13</sup> However, the Member States must exercise that power in accordance with free movement rights, which means that national rules cannot form an unjustified obstacle to free movement.<sup>14</sup> National rules may restrict the exercise of fundamental freedoms when they fail to take into account the knowledge, skills and qualifications already obtained by an individual in another Member State: national authorities must take account of all of the diplomas, certificates and other evidence of qualifications by comparing the knowledge obtained with the

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<sup>11</sup> Case C-575/11, *Nasiopoulos*, EU:C:2013:430, para. 30-33.

<sup>12</sup> Case C-298/14, *Brouillard*, EU:C:2015:652.

<sup>13</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 9.

<sup>14</sup> Case C-575/11, *Nasiopoulos*, EU:C:2013:430, para. 20.

requirements laid down in the national legislation.<sup>15</sup> In that regard, the Court confirmed that the Member States must take account of all relevant practical experience.<sup>16</sup> The Member States may nevertheless take into consideration any *objective* differences between individuals' professional experience.<sup>17</sup>

Ensuring access to and pursuit of the health professions is therefore ensured through two complementary mechanisms: the elimination of obstacles to free movement and the coordination and harmonisation of national legislation. Both are necessary to secure the fundamental freedoms of health and paramedical practitioners. These processes are taken forward by means of legislative action but also through the case-law of the Court of Justice which aims to ensure the correct functioning of the internal market and to protect individuals' rights that arise from free movement.

I thank you for your attention and I wish you an enriching conference, full of thought-provoking discussions.

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<sup>15</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 15-16.

<sup>16</sup> Case C-298/14, *Brouillard*, EU :C :2015, para. 59.

<sup>17</sup> Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para. 18 ; Case C-298/14, *Brouillard*, EU :C :2015 :652, para. 53-56.