

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Emilie Marjatta Earl

**LIMITS OF RECOGNITION OF ACADEMIC DIPLOMAS IN  
REGULATED PROFESSIONS UNDER EU LAW**

Bachelor's thesis

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Supervisor: Tatjana Evas-Peeters, PhD

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Emilie Earl .....

(signature, date)

Student code: HAJB 183959

Student e-mail address: emilie@earl.fi

Supervisor: Tatjana Evas-Peeters, PhD:

The paper conforms to requirements in force

.....

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## **LIST OF ABBREVIATIONS**

CJEU Court of Justice of the European Union

EEA European Education Area

EHEA European Higher Education Area

EPC European Professional Card

EQF European Qualification Framework

EU European Union

LLL Lifelong Learning Program

MS Member State

MSs Member States

OMC Open Method of Coordination

TFEU Treaty on the Functioning of the European Union

## **ABSTRACT**

The recognition of academic diplomas is essential for cross-border movement of people to work or to study abroad. Although EU law has harmonized recognition of certain recognised professions, there is still no automatic recognition of all academic diplomas in regulated professions. This thesis analyses European Union (EU) law governing recognition of academic diplomas in regulated professions in the EU, assesses the compatibility of the current system with EU citizenship rights and calls for the revision of EU secondary law. The main research questions that this thesis focuses on are: Can the current system of recognition of professional qualifications be considered as an obstacle to EU citizen's rights conferred under the Treaty on the Functioning of the European Union? And if yes, can this obstacle be justified under EU law? To answer these research questions the thesis analyses two sets of interlinked developments in EU law. First, increasing harmonisation of EU and national law in the area of education. Second, the concept of Union citizenship, that among other things, aims to remove obstacles to free movement. Based on the analysis of the applicable legislation, the thesis also presents proposals for revision of EU law that could simplify the recognition of professional qualification and thus enhance cross-border free movement rights of EU citizens.

Keywords: Education, EU citizenship, Freedom of Movement, Recognition, Diploma

# INTRODUCTION

The recognition of professional qualifications in the EU affects a considerable number of citizens of EU Member States (MS) who work or study abroad. The statistical data suggests that in 2019, 1.7 ml.<sup>1</sup> students were studying in a country other than their home MS and another almost 20 ml of the EU population work abroad.<sup>2</sup> In order to study or work abroad, it is often necessary that educational diplomas already acquired are recognised by the host state. Despite the integration process in the European Union – there is today no automatic recognition for all academic diplomas in the field of regulated professions.

The main research questions that this thesis analyses are: Can the current EU system for the recognition of academic diplomas in regulated professions be considered as an obstacle to the free movement of EU citizens and EU citizenship rights? And if it is an obstacle, can this obstacle be justified under EU law? Furthermore, the thesis presents possible legal solutions in order to enhance the cross-border free movement rights of EU citizens.

EU primary and secondary law in the area of EU citizenship, education and free movement of workers are particularly relevant to analyse the main research questions.

EU law establishes the status of EU citizens and provides for their citizenship rights. Thus, Article 20 of the Treaty on The Functioning of the European Union (TFEU) establishes citizenship of the Union. This article provides that all nationals of EU Member States (MSs) are also the nationals of the European Union.<sup>3</sup> It also states however that EU citizenship does not replace national citizenship. This article together with articles 21 TFEU and 23 TFEU establishes specific rights that each EU citizen has within the EU. Moreover, Article 18 TFEU, within the scope of application of the Treaty, prohibits any discrimination on the ground of nationality. Accordingly, the TFEU does not only establish the rights of the EU citizens, but also sets forth, among other things, the objective to remove other barriers from between MSs in order to “ensure the economic and social progress of the states” as stated in the preamble of the TFEU.

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<sup>1</sup>Eurostat (2019). 112/2019: People on the Move-Statistics on Mobility in Europe. Eurostat News Release (database) [Online]. Retrieved from: <https://ec.europa.eu/eurostat/documents/2995521/9969660/1-09072019-AP-EN.pdf/ed628add-4210-4597-8f2d-696f1b099ff9>, 20 September 2014.

<sup>2</sup>Eurostat (2018). 87/2018: EU citizens in other EU Member States 4% of EU citizens of working age live in another EU Member State Tertiary graduates more mobile than the rest of the population. Eurostat News Release (database) [Online]. Retrieved from: <https://ec.europa.eu/eurostat/documents/2995521/8926076/3-28052018-AP-EN.pdf/48c473e8-c2c1-4942-b2a4-5761edacda37>, 20 September 2014.

<sup>3</sup> Barnard, C. (2009). *The Substantive Law of the EU: The Four Freedoms* (6th ed., p. 365). Oxford University Press.

The EU integration and constitutional process has significantly strengthened the rights of non-economically active citizens.<sup>4</sup> However, the EU is still missing a recognition process, which would allow all regulated professions to have EU-wide recognition for their academic diplomas. Therefore, this thesis considers whether the current system of recognition creates an obstacle on EU citizens to exercise their rights.

The EU law also covers education. However, education falls primarily in the competence of MSs. According to Article 6 TFEU, in the area of education the Union can only “have competence to carry out actions to support, coordinate or supplement the actions of the Member State”. Specifically, Article 165 (2) Paragraph 2 TFEU establishes the aims of the Union regarding education, and states, among other things, that the Union action should be aimed at “encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study and in promoting cooperation between educational establishments”. Therefore, the competences of the Union are limited, and the EU cannot directly take action in the MS’s educational matters, thus the EU cannot on its own set EU-wide educational requirements or a mechanism for automatic recognition. This means that EU citizens seeking to work or study in another MS need to go through a recognition process for their diplomas in the host state, where the diploma will in most cases be compared to the equivalent host state diploma. In the area of education, considering the limits of its competencies, EU actions have mostly focused on the adoption of soft law instruments and programmes in order to facilitate cooperation and mutual recognition of educational diplomas to simplify the free movement rights of the EU citizen.

Furthermore, in addition to primary legislation and the actions in the area of education, the EU has also promoted mutual recognition of certain professions by adopting secondary legislation on the basis of the treaty provisions on the free movement of workers. As an example, the EU has adopted Directive 2005/36/EC, which provides automatic recognition for regulated professions with harmonised training conditions (i.e., midwives, nurses, doctors, pharmacists, dental practitioners, veterinary surgeons, and architects).<sup>5</sup> While this specific secondary legislation covers some of the professions, those which do not fall under the scope of automatic recognition must rely on the general system of recognition, which is also provided for by the Directive. This system does not

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<sup>4</sup>Olsen, T. V. (2011). The Political Constitution of the EU Citizen Rights Regime. *Journal of European Public Policy*, 18(1), 35–52. <https://doi.org/10.1080/13501763.2011.520875>

<sup>5</sup>Directive 2005/36/EC of the European Parliament and of the Council, 07 September 2005 on the recognition of professional qualifications (Text with EEA relevance) (OJ L 255, 30.9.2005).

guarantee automatic recognition as under the general system the minimum level of qualification required is defined by the host state.

These three areas of legislative action including EU citizenship, education and free movement of workers, currently regulate mutual recognition of academic diplomas. This thesis focuses on the interplay and the limitation of this current system. The thesis argues that although the EU integration and constitutional process has significantly strengthened the rights of non-economically active citizens,<sup>6</sup> the EU is still lacking a mutual recognition process, which would allow for the EU-wide automatic and easy recognition for academic diplomas in regulated professions.

In order to develop this argument, the thesis is based on qualitative analysis of EU legislation, both primary and secondary law, case law, EU policies and relevant academic literature. Furthermore, qualitative analysis is complimented by statistical data.

To answer the main research question, the thesis is structured as following. The first section of the thesis analyses the development of primary law and the applicable EU law to establish the division of competences in the area of education. After establishing the competence, the thesis analyses other primary legislation, which bring education further into the scope of EU law. Following an assessment of primary legislation, the thesis analyses secondary legislation on the recognition of academic diplomas. The thesis particularly considers the limits of EU competencies in the area of education, considers the effects of soft law, programs and policy initiatives, in the harmonization and recognition of academic diplomas. Lastly, based on the analysis of the existing framework for mutual recognition of diplomas the thesis proposes legal options that the EU could take in order to better align existing legislation, improve the current system of mutual recognition of professional diplomas and thus facilitate free movement of people and EU citizenship rights as guaranteed by EU law.

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<sup>6</sup>Olsen (2011), *supra nota*.



# CHAPTER 1. RECOGNITION OF PROFESSIONAL QUALIFICATIONS UNDER EU LAW

This chapter reviews EU law applicable to the recognition of academic diplomas. The aim of this analysis is to assess the scope and the limits of EU law in matters relating to education through EU law provisions on EU citizenship and the freedom of movement of workers. The first section of this chapter gives a short overview of the historical development of harmonisation in education, and education becoming part of the scope of EU law. It also provides understanding of how the EU's approach towards education has changed during the 21<sup>st</sup> century. The chapter will then establish the competence the EU has in education through the TFEU. After establishing the competence, the thesis evaluates how this competence is connected to the concept and rights of EU citizenship and the freedom of movement of workers. Following primary legislation, the chapter considers secondary legislation, and the effects secondary legislation has on the recognition of academic diplomas in regulated professions. Lastly the chapter analyses the methods the Court of Justice of the European Union (CJEU) uses in resolving cases where a citizen's diploma has not been recognized by the host state.

## 1.1. Context and historical overview of the main stages in regulation of recognition of professional qualifications in the EU

The EU policy actions on the recognition of academic diplomas began already in the mid-60s, when sectoral Directives, based on the free movement of workers provisions, were adopted for a number of regulated professions.<sup>7</sup> The aim of those early sectoral Directives were to create automatic recognition between regulated professions which already had a level of harmonised training conditions, in order to provide EU citizen's with the possibility to exercise their right to establish themselves in another MS.<sup>8</sup>

However, the convergence of education and EU educational policies began more formally with the Single European Act of 1986, when the Internal Market was established within the EU.<sup>9</sup> This

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<sup>7</sup>West, A., & Barham, E. (2009). Student Mobility, Qualifications and Academic Recognition in the EU. *Assessment in Education: Principles, Policy & Practice*, 16(1), 25–37. <https://doi.org/10.1080/09695940802704062>

<sup>8</sup>d'Artillac Brill, L. (2009). Experience of Diploma Recognition Under EEC General System Directives in the Netherlands. *Assessment in Education: Principles, Policy & Practice*, 16(1), 13–23. <https://doi.org/10.1080/09695940802704047>

<sup>9</sup>Cankaya, S., Kutlu, Ö., & Cebeci, E. (2015). The Educational Policy of European Union. *Procedia - Social and Behavioral Sciences*, 174, 886–893. <https://doi.org/10.1016/j.sbspro.2015.01.706ya>.

provided the EU citizen with the enhanced rights of freedom of movement (beyond narrowly defined economically active citizens), among other rights, which brought attention to the importance of education and the recognition of academic qualifications in order for the internal market to function.

Following the Single European Act, the Maastricht treaty established in 1992 officially made education part of the EU's competence. This gave the EU's educational policy a new legal dimension,<sup>10</sup> which meant that education was now not only in the competence of the MS but also fell to certain but albeit limited degree, within the scope of EU law. As the educational policy began to shift from a wholly internal policy matter of MSs to a policy action covered by EU law, EU actions towards education also began to change. In the beginning of the 21<sup>st</sup> century education was viewed as a key factor in aligning Europe, by providing citizens with the right to education and by establishing the connection between education, employment and economy.<sup>11</sup> However after the first decade or so of the 21<sup>st</sup> century attitudes towards education changed, as it began to be evident that in order to maintain competition in higher education not only in the EU, but also outside of the EU, education needed to become a focus point while setting goals for the EU.<sup>12</sup>

From the idea that higher education was also a competing factor in the EU market, the Bologna process was established between 1998-1999, following the Council of Europe/UNESCO Recognition Convention which provided the legal framework for recognition in the EU.<sup>13</sup> According to this Convention there are five elements which make a qualification: Level, workload, quality, profile and learning outcomes, and all of these should be taken into consideration, when granting recognition.<sup>14</sup> The Bologna process focused on harmonising higher education and to facilitate movement of students by establishing, together with the recognition convention, the European Higher Education Area (EHEA).<sup>15</sup> The Bologna process did not only focus on students

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<sup>10</sup>West. Barham. (2009), *supra nota*.

<sup>11</sup>Antunes, F. (2016). Economising Education: From the Silent Revolution to Rethinking Education. A New Moment of Europeanisation of Education? *European Educational Research Journal*, 15(4), 410–427. <https://doi.org/10.1177/1474904116641696>

<sup>12</sup>*Ibid.*

<sup>13</sup>Bergan, S. (2009). Academic Recognition: Status and Challenges. *Assessment in Education: Principles, Policy & Practice*, 16(1), 39–53. <https://doi.org/10.1080/09695940802704070>

<sup>14</sup>Rauhvargers, A. (2009). Recognition and qualifications frameworks. *Assessment in Education: Principles, Policy & Practice*, 16(1), 111–125. <https://doi.org/10.1080/09695940802704161>

<sup>15</sup>Fredriksson, U. (2003). Changes of Education Policies within the European Union in the Light of Globalisation. *European Educational Research Journal*, 2(4), 522–546. <https://doi.org/10.2304/eerj.2003.2.4.3>

and their mobility, but also connected education to the need for improvements in the field of employability in the EU.<sup>16</sup>

Finally, today's goals set towards education are shaped around the freedom of movement of workers. This is because the Lisbon strategy, which came to be in the year 2000, set the goal for the EU to become "the most knowledge-based economy in the world".<sup>17</sup> This meant that education needed to become a key discussion point in politics as it was considered that in order to maintain economic growth the EU needed to focus on producing high quality workers, which could only be achieved through education and encouraging Lifelong Learning, which also became a policy together with the Lisbon strategy.<sup>18</sup>

In summary, the historical development of education policy in the EU law had three main stages. During the first stage, the main aim of the EU was to create a European identity by facilitating the movement of students, which brought attention to the importance of having harmonisation in educational systems in order for EU citizens to be able to exercise their rights. Therefore, at first the focus was on the citizen. During the second stage, education became a focus point in order to co-ordinate educational policies and harmonise educational systems even further in order to, not only support students, but also to contribute towards the labour market. In the third stage of development, which is currently ongoing, the EU education policy has moved to become seen, in the policy debates, as one of the key opportunities to enhance the economy. This means that the policy of the EU shifted its focus from mainly harmonising education for the benefit of the citizen, to rather focusing on the policy measures to benefit economically active citizens, in order to create more competition in the labour market, by attempting to produce the most qualified workforce and to fill in gaps in the labour market, by facilitating the movement of workers.

Building on this analysis of the overall context and development of the EU law and policy related to the recognition of professional qualifications in the EU the next sections analyse the links between the EU education policy and other rights provided by the TFEU.

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<sup>16</sup>Allan, M. (2002). European Higher Education and the Harmonization of Quality and Standards. *Industry and Higher Education*, 16(5), 283–288. <https://doi.org/10.5367/000000002101296423>

<sup>17</sup>Panitsides, E. A., & Anastasiadou, S. (2015). Lifelong Learning Policy Agenda in the European Union: A Bi-Level Analysis. *Open Review of Educational Research*, 2(1), 128–142. <https://doi.org/10.1080/23265507.2015.1043936>

<sup>18</sup>*Ibid.*

## **1.2. EU primary law applicable to the recognition of professional qualifications**

The TFEU is one of the founding Treaties of the European Union and aims to bring the people of the Union closer and to remove any boundaries that may exist between the MSs. It also establishes the competences the EU has with the internal matters of the MS. Specifically, in relation to the recognition of professional qualification three sets of provisions, analysed in this section, are the most relevant: provisions related to education, EU citizenship and free movement of people.

### **1.2.1. Education**

According to article 6 TFEU the EU has competence towards the education of a MS only in regard to “carrying out actions to support, coordinate or supplement the actions of the Member State” This means that the EU’s competence towards education is limited. States are therefore often left responsible for deciding whether an EU citizen’s academic diploma received in another MS is compatible with the host states requirements.

Although the EU has limited competence towards education in a MS, education is still one of the areas of EU law and therefore MSs must adhere to the aims of the treaty they have ratified in order to comply with the rule of law. Specifically, article 165 (2) outlines competences of the Union on education mainly “encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, promoting cooperation between educational establishments”. Even with restricted competence the EU sets standards and goals for MSs which they must follow.

### **1.2.2. EU citizenship**

In addition to specific articles related to education, EU primary law also includes provisions on EU citizenship. For example, Article 21 TFEU provides that “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States”, therefore as 1.7m<sup>19</sup> students study abroad and 4% of EU citizens work abroad the rights of EU citizens are intertwined with those of education.<sup>20</sup> Furthermore, citizenship of the Union is a fundamental

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<sup>19</sup>Eurostat (2019). 112/2019: People on the Move-Statistics on Mobility in Europe. Eurostat News Release (database) [Online]. Retrieved from: <https://ec.europa.eu/eurostat/documents/2995521/9969660/1-09072019-AP-EN.pdf/ed628add-4210-4597-8f2d-696f1b099ff9>, 20 September 2014.

<sup>20</sup>Eurostat (2018). 87/2018: EU citizens in other EU Member States 4% of EU citizens of working age live in another EU Member State Tertiary graduates more mobile than the rest of the population. Eurostat News Release

status granted to every national of a MS, it does not require for the citizen to be active within the EU, since it is an addition to national citizenship, which has been established by the CJEU in the interpretation of article 20 TFEU.<sup>21</sup>

In case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) it was established that EU citizenship is a fundamental status for all MS nationals.<sup>22</sup> The case concerned the auxiliary status of third-party nationals, through their children, as the children concerned were EU nationals by birth.<sup>23</sup> During the court procedures it was established by Advocate General Sharpston that EU citizenship is not something which a citizen earns by practicing what it entails.<sup>24</sup> For example, even though article 20 TFEU states “move and reside freely within a Member State” this does not mean that in order for a person to hold the citizenship he or she must move or reside in another MS, but it is a status given to a person when they are nationals of one of the MSs and they may exercise that right within the state they are born.<sup>25</sup> It was therefore considered by the court that it would significantly affect the citizenship rights of the children if their parent would not be granted citizenship.<sup>26</sup>

This case was one of the examples on how the CJEU has established through the interpretation of article 20 TFEU, that the citizenship of the union should be understood as a fundamental status, which requires no action from the citizen's part and one which should not be disadvantaged. Although this case does not specifically concern education, as it concerns the auxiliary status of citizenship through children,<sup>27</sup> the same principles surrounding this case, by analogy could be applied towards the recognition of academic diplomas in regulated professions. As there is no automatic recognition under the general system of Directive 2005/36/EC, it affects the rights of EU citizens to move and reside freely, if the host state decides to apply compensation measures, as the host state has the power to set the minimum training requirements for the diploma.

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(database) [Online]. Retrieved from: <https://ec.europa.eu/eurostat/documents/2995521/8926076/3-28052018-AP-EN.pdf/48c473e8-c2c1-4942-b2a4-5761edacda37>, 20 September 2014.

<sup>21</sup> Ligeti, K. (2016). EU Citizenship and Justice. *New Journal of European Criminal Law*, 7(2), 138–139. <https://doi.org/10.1177/203228441600700202>

<sup>22</sup> Judgement of the Court, 08.03.2011, Ruiz Zambrano, Case C-34/09, ECLI:EU:C:2011:124, point 41.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Directive 2004/38/EC of the European Parliament and of the Council, 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ L 158, 30.4.2004)

### **1.2.3. Free movement of workers**

One of the three pillars of the internal market is the freedom of movement of people, this means that the freedom of movement of workers, which is established in article 45 TFEU, effects the internal market of the European Union. The possibility of workers being able to work in other MSs enhances competition between MSs for workers and also benefits the citizen.

As article 45 TFEU provides that EU citizens may accept job offers from other EU MSs, the fact that there is no automatic recognition for academic diplomas, which fall under the general system of recognition, sets an obstacle for the objectives conferred within article 45 TFEU. Therefore, the EU is left with only the possibility to try and co-ordinate policies of the MSs, so that they would promote the freedom movement of workers.

In regard to enforcing the freedom of movement of workers and the self-employed the EU has implemented article 53 TFEU, which makes it possible for the European Parliament and Council to issue “Directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications”. This article however does not supersede national legislation, therefore MSs still hold the majority competence in the recognition of academic diplomas.

## **1.3. Secondary legislation**

Based on the primary law analysed in Section 1.2, the EU has also adopted a number of secondary legislation acts, that apply to the recognition of professional qualifications. This section assesses secondary legislation, focused mainly on the recognition of academic diplomas and Directives, which have supported the system of recognition and the goals of the Lisbon strategy regarding regulated professions.

### **1.3.1. Directive 2005/36/EC – system for the recognition of professional qualifications**

Directive 2005/36/EC became a discussion point after the Lisbon strategy, as the new goals set by the EU to become a “knowledge-based society” pushed the EU to take action in the recognition of professional qualifications.<sup>28</sup> The Directive covers de jure recognition, which is the recognition of

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<sup>28</sup>Opinion of the European Economic and Social Committee (2003) on the proposal of Directive 2015/36/EC. (Official Journal C 061, 14/03/2003). Point (1.1) Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002AE1020>

professional qualifications in the area of regulated professions.<sup>29</sup> The general definition of a regulated profession is that they are conducted through a regulated program and usually fall under the following sectors: “health care, teaching, shipping and financial/legal professions”.<sup>30</sup>

Before the Directive, some profession mainly “doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects”<sup>31</sup> were covered by sectoral Directives, which means that each profession was regulated separately, however granting them all with automatic recognition. Therefore, the first task of the Directive was to merge these Directives to make the recognition process simple and more transparent.<sup>32</sup> The Commission then turned its focus towards the general system of recognition. The general system is built on the principal of mutual recognition, this means that if a qualification is granted in another MS, then it should be granted recognition by the host state, unless a substantial difference can be presented.<sup>33</sup> The substantial difference principal was adopted from the method of recognition between educational establishments and does not have a legal definition, however in professional recognition, a substantial difference is considered when a person would not be able to achieve the same objectives with their qualification as a citizen with a qualification granted from the host state, so the qualification would not reach the minimum standards of the host state.<sup>34</sup> Therefore, under the general system it is up to the host state to decide if a qualification granted in another MS corresponds to the one granted by the host state. If the qualification does not reach the minimum standard the citizen would have to result to a compensation measure, which allows the citizen to prove their capability in the profession by other means, by for example an aptitude test. The third method of recognition is based on professional experience, which combines the principles from automatic recognition and the general system.

As the analysis above suggests the adopted Directive did not establish automatic recognition of professional qualification, but provided recognition measures only for some, limited number of regulated professions. The next section analyses why the co-legislators have decided to provide automatic recognition for only a part of the labour market.

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<sup>29</sup>Bergan (2009), *supra nota*.

<sup>30</sup>Brill (2009), *supra nota*.

<sup>31</sup> OJ L 255, 30.9.2005, point 19.

<sup>32</sup> Proposal for Directive 2015/36/EC (2002) of the European Parliament and of the Council, (Official Journal 181 E, 30/07/2002). Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002PC0119>

<sup>33</sup> Bergan (2009), *supra nota*.

<sup>34</sup>Rauhvargers (2009), *supra nota*.

### *1.3.1.1. Commission's proposal*

In its proposal the Commission explained that there was a need for a Directive, which would combine former Directives, mainly the sectoral Directives previously mentioned and the general system Directive, in order to create a more flexible labour market. If the recognition process could be made more simple and more transparent, this would in return facilitate the movement of workers between MSs. the Commission did not however see it as necessary to widen the scope for other regulated professions to have automatic recognition as a public consultation held in 2001 did not comment on the matter strongly enough to make it necessary.<sup>35</sup> Therefore, there remains three methods of recognition for regulated professions, automatic recognition, the general system and recognition based on experience.<sup>36</sup> The Commission also pointed out that as statistics had shown the general system had for most parts functioned without causing the citizen any extra burden as much development had been made in providing the citizens with adequate platforms towards the means and methods on the recognition of academic qualifications.<sup>37</sup>

It should however be considered, that the Commission's proposal for the Directive was drafted in 2002, therefore a new study should be conducted in order to analyse the current system of recognition and its effect on the current Labour market, as from 2009-2019 the amount of highly skilled workers moving between MSs had grown by 6,1%.<sup>38</sup> This indicates that the mobility of the skilled workforce is constantly growing and the need for a more automatic system of recognition could have a positive impact on growing the number of mobile skilled workers.

### *1.3.1.2. Legal basis*

The legal basis upon which the Directive is based is Article 46 TFEU (40 TEC) establishing “the measures required to bring about freedom of movement of workers”, Article 294 (251 TEC) setting the “legislative procedure for the adoption of an act” and Article 53 (47 TEC) concerning the taking up and pursuit of activities as self-employed persons”.<sup>39</sup> Of these Articles the most

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<sup>35</sup>Proposal for Directive 2015/36/EC (2002) of the European Parliament and of the Council, (Official Journal L 181 E, 30/07/2002). Point (17) Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002PC0119>

<sup>36</sup>*Ibid.*

<sup>37</sup>*Ibid.*, point 2.3

<sup>38</sup>Eurostat (2020). EU citizens living in another Member State – Statistical overview. Eurostat Statistics explained (database) [Online] Retrieved from: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU\\_citizens\\_living\\_in\\_another\\_Member\\_State\\_-\\_statistical\\_overview\\_-\\_statistical\\_overview](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview_-_statistical_overview) , 06 December 2020

<sup>39</sup>Proposal for Directive 2015/36/EC (2002) of the European Parliament and of the Council, (Official Journal L 181 E, 30/07/2002). Point (3) Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002PC0119>



important for the legal argumentation for the adoption of the Directive could be considered as Article 46 TFEU (40 TEC) and Article 53 TFEU (47 TEC). Article 46 TFEU (40 TEC) establishes in section (d) that the freedom of movement of workers should correspond to the demand of the labour market in order to “avoid serious threats to the standard of living and level of employment in the various regions and industries”. The Commission explained in its proposal that the Directive is an important tool in order to fill vacancies within the EU, therefore section (d) of Article 46 TFEU (40 TEC) was important for the legal argumentation of the Directive and also may have affected the opinion of the Commission to not apply automatic recognition to other regulated professions, depending on the current status of the labour market. In addition, according to sections (a) (b) of the article, the European Parliament and Council should work in such a way as to remove any obstacles on the free movement of workers where the citizen could be seen as eligible for employment. As the EU has done significant work in harmonising educational policies, it should be considered whether more professions should be granted automatic recognition under the Directive. As the labour market is constantly changing there should also be a re-evaluation of which professions are currently at a shortage level within the EU. Article 53 TFEU (47 TEC) established that the Parliament and Council should adopt Directives on recognition, which create the possibilities for the self-employed in the EU.

From the legislation used in the adoption of the Directive, it is clear that the Directive is built to support the freedom of movement of workers and services. However, the Directive had not taken into account legislation regarding the competence of MSs in education, nor has it established how education falls into the scope of EU law. If the Commission had considered more aspects from education for example how in educational matters recognition is granted without infringing the competence of the MS, then there would have been better grounds upon which to grant guaranteed automatic recognition for other academic diplomas as well.

#### *1.3.1.3. Opinion of the EESC*

The EESC welcomed the proposal as it considered this to be a part of achieving the goals of the Lisbon strategy to create a “knowledge-based society”.<sup>40</sup> The EESC did not see it as an issue that

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<sup>40</sup>Opinion of the European Economic and Social Committee (2003) on the proposal of Directive 2015/36/EC. (Official Journal C 061, 14/03/2003). Point (1.1) Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002AE1020>

the Directive only covered regulated professions, as the Directive would have a positive affect also on non-regulated professions.<sup>41</sup>

Concerning the labour market, the EESC noted that there has been a significant change in the movement of workers, with skilled employees dominating the internal labour market, therefore the implementation of this Directive would have a huge impact on employment and competitiveness in the EU.<sup>42</sup> The EESC also pointed out that the Directive could be made somewhat more flexible as it is evident that the labour market and educational systems may change with time, therefore the implementation of policy coherence should be considered in education, the labour market and the internal market.<sup>43</sup>

Consumer protection was one of the main concerns of the EESC, as it is important for the EU citizen to be able to rely on services provided in a MS.<sup>44</sup> Therefore, the recognition procedures should remain similar for all regulated professions, so that the consumer does not have to consider if the service reaches a specific standard.<sup>45</sup> The EESC also expressed a strong opinion that the Directive should promote and simplify mobility and not affect the internal matters of the MS.<sup>46</sup>

In addition, the EESC mentioned that the Directive's "levels of qualifications do not correspond with general EU education policies and the trend in the so-called Bologna process for higher education".<sup>47</sup>

Concluding its opinion, the EESC noted that the Directive was only a step forward in "the whole field of recognition" and that in the future it should be considered to employ a European platform for not only regulated professions, but also for non-regulated professions, which would give guidelines for the coordination of the recognition process in order to work as an incentive for movement within the Union.<sup>48</sup>

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<sup>41</sup>*Ibid.*, point 1.3

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.*

<sup>46</sup>*Ibid.*

<sup>47</sup>*Ibid.*, point 4.3.2.2.

<sup>48</sup>*Ibid.*, point 9.1.8.

#### 1.3.1.4. Amendments to Directive 2005/36/EC

The European Parliament approved the Commission's proposal in the first reading and agreed that the Directive was important in making the recognition process simple and more transparent.<sup>49</sup> The Parliament did however present 125 amendments following the report from the European Economic and Social committee. The amendments were in most cases only in support of the Commission's aims, however the Commission accepted only 55 amendments to the Directive.<sup>50</sup>

The amendments presented focused mainly on the recognition of qualifications for service providers and on regulated professions listed, with harmonised training conditions, in order to protect consumers and the health of EU citizens.<sup>51</sup> There were only a few amendments which focused directly on the recognition of educational qualifications and these were accepted by the Commission in spirit rather than in practice.<sup>52</sup> However, while the Parliament attempted to create a wider scope for the Directive the Commission declined this.<sup>53</sup> For example, the Commission declined the Parliament's proposal to encourage efforts to bring national legislation on education and training closer together and to apply automatic recognition to other regulated professions.<sup>54</sup> The Commission explained that these amendments were, first of all, "not related to the text of the Directive" and that the Directive could not be broadened, even though it still remained in the Commission's right of initiative.<sup>55</sup> The Commission also declined the Parliament's encouragement to use already established programs, such as the Bologna process to create a "community framework for the recognition of qualifications" for all professions, regulated and unregulated.<sup>56</sup>

Regardless of the Commission's refusal to accept the broadening of the scope of the Directive, it still maintained a strict line for the recognition of qualifications that fell into the scope of automatic recognition.<sup>57</sup>

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<sup>49</sup>European Commission. (n.d.). *Professional qualifications: European Parliament's Approval of Proposed Directive Brings Simpler System Nearer*. European Commission - European Commission. Retrieved May 3, 2021, from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_04\\_197](https://ec.europa.eu/commission/presscorner/detail/en/IP_04_197)

<sup>50</sup>Amended Proposal for Directive 2015/36/EC (2004) of the European Parliament and of the Council, (COM/2004/0317 final - COD 2002/0061). Point (3.1.) Accessible in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004PC0317>

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*, point 3.2.1

<sup>55</sup>*Ibid.*, point 3.2.1 and 3.2.8

<sup>56</sup>*Ibid.*, point 3.2.7

<sup>57</sup>*Ibid.*

#### 1.3.1.5. Considerations

As discussed above, the Directive was adopted in order to fulfil the demands of the current labour market. Therefore, the legislative ground upon which the Directive was adopted is built to support the freedom of movement of workers.

Furthermore, the Commission's aim was to make the recognition process easier for regulated professions, so it didn't widen the scope of automatic recognition in order to make the process simple and transparent. In addition, the Commission didn't see the need to widen the scope of automatic recognition, as the general system had provided sufficient recognition without providing the citizen with an extra burden.

However, it is not fully explained by the Commission why all regulated professions cannot be provided with guaranteed automatic recognition, while the EESC advocated for a platform for all qualifications. Therefore, the approach of the Commission could be criticised as the EU should be dedicated towards implementing legislation which provides EU citizens with the possibilities to exercise their rights equally.

In regard to qualification frameworks it would have been beneficial for the EU to use for example, the qualifications framework of the European Higher Education Area (EHEA), which establishes that recognition should be based on the learning outcomes of the three cycles (Bachelor's degree, Master's degree, Doctoral degree).<sup>58</sup> It is well established through the EHEA qualifications framework how long these cycles last and how many credit points should be achieved and what should be the learning outcomes, which makes recognition easier between educational establishments.<sup>59</sup> However the Directive on the recognition of professional qualifications does not take advantage of the already existing qualifications framework but creates yet another framework. Currently there exists three overlapping systems of qualification frameworks the first being the European Qualifications Framework by the Council of Europe, the second being the EHEA Qualifications Framework by the Bologna process and the third one being the Qualifications Framework for workers established by the Directive.<sup>60</sup>

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<sup>58</sup>Rauhvargers (2009), *supra nota*.

<sup>59</sup>*Ibid.*

<sup>60</sup>Katsirea, I., & Ruff, A. (2005). Free Movement of Law Students and Lawyers in the EU: a Comparison of English, German and Greek Legislation. *International Journal of the Legal Profession*, 12(3), 367–406. <https://doi.org/10.1080/09695950500480741>

In conclusion, the analysis of the legislative history on the adoption of the Directive 2005/36/EC suggests that there were competing opinions as to the scope of the Directive. The Commission focused on creating a more simple and transparent system for the recognition of professional qualifications based on former legislation while the European Parliament and particularly the Economic and Social Committee asked to broaden the scope to include other professions also and to utilize already existing tools for example the Bologna process to achieve broader recognition. This indicates that the questions on the scope are open, and in the future considering the increasing harmonisation of education in the EU and development of the internal market, this legal question could and perhaps should be revisited by the EU legislators.

### **1.3.2. Directive 2013/55/EU – the IMI Regulation**

Directive 2013/55/EC was established in order to amend Directive 2005/36/EC and EU Regulation No 1024/2012 on administrative cooperation through the Internal Market Information System (IMI regulation) in order to create a more transparent and accessible recognition process for academic qualifications.<sup>61</sup>

The main objective of Directive 2013/55/EU was to “facilitate temporary mobility and recognition under the automatic recognition system, as well as to promote a simplified recognition process under the general system”.<sup>62</sup> This objective would in return contribute towards the facilitation of the movement of workers, to create growth in the single market and to remove obstacles currently affecting EU citizen’s rights.<sup>63</sup> However the Directive does not widen the scope of automatic recognition to apply to all regulated professions, which means that the MSs are still responsible for setting the required minimum level of qualifications for regulated professions under the general system.

In order to fulfil its objective Directive 2013/55/EC implemented the European Professional Card (EPC) into Directive 2005/36/EC, which provides an electronic method of recognition for certain regulated professions and promotes a simplified method of recognition for professions under the general system.<sup>64</sup> The EPC also provided the EU with a more efficient method of recognition.<sup>65</sup> In

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<sup>61</sup>Directive 2013/55/EU of the European Parliament and Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ L 354, 28.12.2013, p.132–170).

<sup>62</sup>*Ibid.*, point 4

<sup>63</sup>*Ibid.*, point 37

<sup>64</sup>*Ibid.*, point 4.

<sup>65</sup>*Ibid.*, point 4.

addition to the EPC, Directive 2005/36/EC also amended some articles in order to cooperate with the IMI regulation, however these changes should not be considered as significant in light of the general system of recognition. Even though the Directive 2013/55/EC aimed at promoting easier recognition processes for professions under the general system, it still does not provide automatic recognition for them.

### **1.3.3. Directive 2014/54/EU – Working abroad – ensuring EU employees’ rights are respected**

Directive 2014/54/EU on the measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers establishes that MSs should work together in order to remove restrictions and obstacles from workers, in order to further cultivate co-operation between MSs in the labour market.<sup>66</sup> In addition, it is established in the Directive that the issues surrounding the recognition of qualifications is an obstacle on the free movement of workers and that this is an example of an obstacle which should be resolved as EU law guarantees the freedom of movement of workers.<sup>67</sup>

MSs are given minimum requirements through the Directive, which provide the MS with the possibility to choose its approach in order to achieve the uniform application of article 45 TFEU.<sup>68</sup> However the MS is required to select its approach so that it complies with article 21 TFEU and Directive 2004/38/EC, which establishes the rights of the EU citizen to have their family with them when moving to another MS to work. Furthermore, it is encouraged that MS maintain co-operation with organisations which aim to promote the free movement of workers.<sup>69</sup>

The Directive does not however provide automatic recognition for all regulated professions, but sets the Commission with a timeframe for the application of the Directive in which actions and amendments should be made in order to achieve the uniform application of article 45 TFEU.<sup>70</sup>

The analysis of secondary legislation suggests that the existing EU secondary legislation covers and facilitates automatic recognition of professional qualifications only partially. Directive

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<sup>66</sup>Directive 2014/54/EU of the European Parliament and Council, 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (Text with EEA relevance) (OJ L 128, 30.4.2014, point 2).

<sup>67</sup>*Ibid.*, point 5

<sup>68</sup>*Ibid.*, point 13

<sup>69</sup>*Ibid.*, point 19, 20, 22

<sup>70</sup>*Ibid.*, point 28

2005/36/EC covers the recognition of professional qualifications in regulated professions, guaranteeing automatic recognition only for a number of professions. Directive 2013/55/EU and Directive 2014/54/EU on the other hand only supports Directive 2005/36/EC by implementing the EPC and by encouraging the adoption of measures to remove obstacles from the right of freedom of movement of workers. However, neither of the two Directives affect the structure of the current recognition system.

#### **1.4. Case law on the recognition of academic diplomas**

This section analyses how the Court of Justice of the European Union (CJEU) resolves cases where a citizens' diplomas have not been recognised by the host state. The CJEU has a number of cases related to the recognition of citizens diplomas in the host state. The key cases on this topic are case C-575/11 Nasiopoulos<sup>71</sup> and case C-675/17 Preindl.<sup>72</sup>

In evaluating the question whether the host state restricted the rights of a citizen to have their academic diplomas recognised the CJEU usually applies two central tests/principles: the principal of mutual recognition and the proportionality test.

In addition, when interpreting legislation, the CJEU must consider the characteristics of the legislation in question, mainly the letter and the spirit of the law. Furthermore, the court needs to consider how to interpret the legislation in a way which does not go beyond what is necessary in case of restriction of an EU citizen's rights.

When interpreting legislation regarding education, the Court evaluates, among other things, the impact of its decision to the MSs public policy. As education is under the competence of MSs, the CJEU must ensure that EU action respects the competence of the MS in education while at the same time ensuring EU citizens' rights, protected under EU law, are also respected. Therefore, the Court applies principle of mutual recognition and the proportionality test in order to measure the issue with the possible outcome.

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<sup>71</sup> Judgement of the court, 27.06.2013, Nasiopoulos, Case C-575/11, ECLI:EU:C:2013:430

<sup>72</sup> Judgement of the Court, 06.12.2018, Preindl, Case C-675/17, ECLI:EU:C:2018:990.

The proportionality test allows the court to evaluate the correct means of action without endangering the constitutional integrity of a MS.<sup>73</sup> The proportionality test has three dimensions: suitability, necessity, and proportionality.<sup>74</sup>

In case C-575/11 Eleftherios-Themistoklis Nasiopoulos v. Ipourgos Igiias kai Pronoias, for example, the Court applied the proportionality test in evaluating whether a certificate of a masseur-hydrotherapist granted in Germany could grant partial access to the profession of physiotherapist in Greece.<sup>75</sup> The court applied a proportionality test by considering how partial access to a profession of a physiotherapist would affect the public interest and health of Greek citizens.<sup>76</sup> The court considered that the profession of a physiotherapist falls under the scope of the paramedical sector.<sup>77</sup> It is a common practice that a doctor refers a patient to a physiotherapist, which means that the physiotherapist is not working on their own initiative.<sup>78</sup> This means that the public interest and health of Greek citizens are protected and that these factors should be considered when granting recognition.

The principle of mutual recognition is the idea that if something is considered as being within the standards of one MS it should also be so in another MS. While the CJEU considers the principle of mutual recognition, it must establish whether a MS is restricting EU Citizen's rights beyond a justifiable reason within the meaning of EU law. In case C-675/17 Ministero della Salute v Hannes Prendi for example, it was established that it is not in the host states discretion to decide if a qualification granted by another state is adequate, if it meets the minimum standard established in the existing legislation.<sup>79</sup> Therefore, the CJEU underlined, that also in the area of education, a principle of mutual recognition is central and MS cannot without justification refuse to acknowledge a qualification granted by another MS.

The case law of the CJEU suggests that by the use of mutual recognition, courts are able to determine whether or not a citizen's diploma could be considered as meeting the minimum standards of the host State. If the diploma is considered as meeting the minimum standards, then

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<sup>73</sup>Scaccia, di G. (2019). *Proportionality and the Balancing of Rights in the Case-law of European Courts*. <https://www.sipotra.it/wp-content/uploads/2019/03/Proportionality-and-the-Balancing-of-Rights-in-the-Case-law-of-European-Courts.pdf>

<sup>74</sup>*Ibid.*, p. 6

<sup>75</sup>Judgement of the court, 27.06.2013, Nasiopoulos, Case C-575/11, ECLI:EU:C:2013:430

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup>Judgement of the Court, 06.12.2018, Preindl, Case C-675/17, ECLI:EU:C:2018:990.



the proportionality test would indicate that a citizen's right to freedom of movement should not be limited by the host state by not recognising the diploma, as otherwise it would constitute a restriction of the citizen's rights beyond reason.

In conclusion, the CJEU has developed a well-established system of interpretation of application of EU free movement legislation in the national systems, including national provisions and competences related to the education. The case law of the CJEU provides two central principles – principle of proportionality and principle of mutual recognition to ensure that EU citizen can fully exercise their EU rights provided under EU law. However as seen in case C-575/11 when the profession does not fall under automatic recognition the CJEU cannot take direct action as it is for the host state to evaluate if there is a substantial difference between qualifications. The Court's reasoning strongly points towards the position that Mr. Nasiopoulo should be given a partial access to the profession of a physiotherapist, based on the proportionality test, however the final decision falls into the scope of the general system and therefore the decision must be made on national level.

## CHAPTER 2. COORDINATION WITHIN COMPETENCE

### 2.1. Introduction

The analysis of Chapter 1 suggests that through the gradual development of EU primary law, education is now within the scope of EU law. However, this does not mean that the EU can directly affect educational matters, as the main competence still lies within the MS. In addition to this, the previous section also discussed secondary legislation in relation to the automatic recognition of professional qualifications. The key conclusion of Chapter 1 is that the current existing system of recognition for professional qualifications under EU law is built on legislation adopted on the legal basis related to the freedom of movement of workers, and not on provisions of education.

As the EU may only support and encourage co-operation and the development of educational policies within the MS it is important to look at soft policy coordination in order to understand how the EU is able to create harmonisation in order to adopt legislation which provides, for example, automatic recognition, without going beyond its competence.

This section assesses the possibilities and tools the EU has towards harmonising education systems in order to remove obstacles from exercising rights provided by EU citizenship and to enhance the objectives and rights of EU citizens, without infringing the MSs competence in education.

### 2.2. Soft policy coordination

The EU has only limited competences in educational matters. This means that in the area of education, the EU must rely on methods which allow it to act within its competence, this is known as ‘soft law’.<sup>80</sup> One of the instruments of “soft law” methods, that the EU has implemented in the area of education is the Open Method of Coordination (OMC). The OMC allows the EU to create policies in Education, without affecting the MSs competences, by for or example using standards.<sup>81</sup> Standards and the structure of the OMC are not mandatory for EU MSs to follow and

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<sup>80</sup>Hartlapp, M., & Hofmann, A. (2020). The Use of EU Soft Law by National Courts and Bureaucrats: How Relation to Hard Law and Policy Maturity Matter. *West European Politics*, 44(1), 134–154.

<https://doi.org/10.1080/01402382.2020.1738095>

<sup>81</sup>Elken, M. (2017). Standardization of (Higher) Education in Europe-Policy Coordination 2.0? *Policy and Society*, 36(1), 127–142. Taylor & Francis Online.

<https://www.tandfonline.com/doi/full/10.1080/14494035.2017.1278873?scroll=top&needAccess=true>

are therefore voluntary in their nature. By setting standards in education the Commission is able to encourage harmonisation of educational systems by increasing public responsibility, which forces the MS to take action in order to align with the given standards.<sup>82</sup> By knowing what the standards are in the EU, MSs are able to identify gaps in their educational systems, additionally the EU publishes different kinds of surveys to measure for example the level of education in a MS and whether this complies with the given standards. The results of these surveys may then become a topical discussion point in, for example, political debates and put pressure on a MS to better align its educational system with EU standards.<sup>83</sup>

The OMC also provided the EU with the possibility to implement qualification frameworks in order to create an understanding between MSs on what grounds each MS grants a qualification.<sup>84</sup> The aim of the frameworks was to create transparency and also provide better communication between MSs in regard to qualifications.<sup>85</sup> In 2008 the EU formally adopted the European Qualification Framework (EQF), which was aimed towards supporting the Lifelong Learning program (LLL).<sup>86</sup> This framework was directed to all levels of qualifications.<sup>87</sup> Before the formal adoption of the EQF there already existed a qualifications framework, which was implemented through the Bologna process, but this was directed towards only higher education, meaning Bachelor's, Master's and Doctoral degrees.<sup>88</sup> Furthermore through the adoption of Directive 2005/36/EC a new framework was adopted, which was built on the principals of freedom of movement. Therefore, today there remains three types of Qualification Frameworks. However, all three of the frameworks are categorised as recommendations which means that they are not binding between MSs and therefore the EU may only support coordination between MSs in this area.<sup>89</sup>

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<sup>82</sup>European Commission. (2019). *The annual Union Work Programme for European Standardisation for 2020*. Retrieved August 12, 2020, from Europa.eu website: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0486>

<sup>83</sup>Volante, L., & Ritzen, J. (2016). The European Union, Education Governance and International Education Surveys. *Policy Futures in Education*, 14(7), 988–1004. <https://doi.org/10.1177/1478210316652009>.

<sup>84</sup>Elken, M. (2015). Developing Policy Instruments for Education in the EU: the European Qualifications Framework for Lifelong Learning. *International Journal of Lifelong Education*, 34(6), 710–726. <https://doi.org/10.1080/02601370.2015.1103795>

<sup>85</sup>Isopahkala-Bouret, U., Rantanen, T., Raij, K., & Järveläinen, E. (2011). European Qualifications Framework and the Comparison of Academically-Oriented and Professionally-Oriented Master's Degrees. *European Journal of Higher Education*, 1(1), 22–38. <https://doi.org/10.1080/21568235.2011.577180>

<sup>86</sup>Lester, S. (2015). The European Qualifications Framework: a technical critique. *Research in Post-Compulsory Education*, 20(2), 159–172. <https://doi.org/10.1080/13596748.2015.1030251>

<sup>87</sup>Rauhvargers (2009), *supra nota*.

<sup>88</sup>*Ibid.*

<sup>89</sup>Elken (2015), *supra nota*.

Using soft policy-co-ordination and qualification frameworks are together an effective tool of the Commission, however it could be argued that even though MSs attempt to comply with given standards and recommendations they are not bound by them, therefore the EU is relying on the voluntary commitment of each MS. If a MS decides at any point that they will no longer apply these standards or recommendations towards their educational system this may trigger a reaction from other MSs, therefore it could be considered that relying primarily on soft law and the voluntary nature of each MS, is not sufficient to maintain a harmonised educational system.

### **2.3. EU programs and policies regarding education**

Educational programs of the EU aim to create a European identity by focusing on mobility and the quality of education throughout the Union. Such programs are for example the Lifelong Learning Program (LLL), The Bologna Process and the Erasmus Program. The following section discusses the main details and effects of these programs and policies in order to understand their area of action and impact in the EU.

#### **2.3.1. The Lifelong Learning Program**

The LLL was established together with the Lisbon strategy, which emphasised the concept of a “knowledge society”,<sup>90</sup> the aim being for the EU “To become the most dynamic and competitive knowledge-based economy in the world”.<sup>91</sup> This statement created a brand-new understanding in the EU regarding education and the EU economy and how through education the EU could build its economy to compete better in the world market. By focusing on education, the EU would produce career motivated people to induce the EU labour market.

To support EU education policies the LLL was established to facilitate the goal that learning can and should be conducted throughout life. The program also established that the MSs should be more open in sharing information on their educational systems<sup>92</sup> in order to be able to open up and encourage students to be more involved in educational matters.<sup>93</sup> By opening up their education

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<sup>90</sup>European Parliament. (2010). *The Lisbon Strategy 2000-2010: An analysis and evaluation of the methods used and results achieved*. Retrieved from: <https://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24270/20110718ATT24270EN.pdf>, 01.12.2020, p.11.

<sup>91</sup>*Ibid.*

<sup>92</sup>Volante. Ritzen (2016), *supra nota*.

<sup>93</sup>Fredriksson (2003), *supra nota*

systems issues could be identified and fixed, and also enforce co-operation between universities within, but also outside of the EU could be encouraged.<sup>94</sup> By opening up opportunities for citizens of the Union within other MSs competition would grow as, for example companies would begin to look for “the best” employees across the EU, which would in return motivate citizens to strive in education and become more career motivated.

Furthermore, The LLL is seen as one of the cornerstones, in regard to the European Education Area (EEA), which gives the citizens of the EU accessibility towards education across borders. The LLL has, in addition, had a huge impact on MSs, making them see the effect education has on economy. In order to achieve its’ goals, the LLL does not only focus on education, but also on workplace learning to establish the current needs on the labour market, which can then be implemented in educational systems, in order to fill in the current gaps.<sup>95</sup>

### **2.3.2. The Bologna Process**

Following the goals set by the Lisbon strategy in order to create a “knowledge society”,<sup>96</sup> the Bologna process was established, focusing strictly on higher education and the movement of persons in the EU. The Bologna process, as other EU programs, is based on the Open Method of Conduct (OMC),<sup>97</sup> this means that even though the EU does not hold full competence in the area covered by the Bologna process, it is still able to govern and manage it.<sup>98</sup> This provides the MSs with flexibility when implementing the process, which makes them more likely to cooperate. The Bologna process is also dedicated towards creating a level of mutual trust between MSs, which has been achieved by adopting the process on already existing conventions.<sup>99</sup>

Cooperation is an important aspect of the Bologna process since the aim is to better education in all MSs and to bring citizenship of the EU into a wider role. The Bologna process has through time widened its role by initially working on removing barriers and moving on to the importance of the

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<sup>94</sup>*Ibid.*

<sup>95</sup>Leader, G. (2003). Life Long Learning Policy and Practice in Further Education. *Education + Training*, 45(7), 361–370. <https://www.emerald.com/insight/content/doi/10.1108/00400910310499938/full/pdf?title=lifelong-learning-policy-and-practice-in-further-education>

<sup>96</sup>European Parliament. (2010). *The Lisbon Strategy 2000-2010: An analysis and evaluation of the methods used and results achieved*. Retrieved from: <https://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24270/20110718ATT24270EN.pdf>, 01.12.2020, p.11.

<sup>97</sup>Zahavi, H., & Friedman, Y. (2019). The Bologna Process: an International Higher Education Regime. *European Journal of Higher Education*, 9(1), 23–39. <https://doi.org/10.1080/21568235.2018.1561314>

<sup>98</sup>*Ibid.*

<sup>99</sup>*Ibid.*

knowledge-based economy in order to keep the EU as a global competitor,<sup>100</sup> It is important for the EU to be able to produce citizens able to fill in gaps in the current labour market and to keep the EU as competitive as possible, so that economic growth is not stalled.

### 2.3.3. The Erasmus Program

The Erasmus program has had a huge impact in encouraging the mobility of students and in facilitating co-operation between different schools and universities, providing students with the opportunity to exercise exchange opportunities in not only EU countries, but also outside the EU.<sup>101</sup>

In addition to providing students with the possibility of exchange and in facilitating movement between MSs, the Erasmus program also plays a role in the structural reforms in order to establish harmonisation between higher education establishments.<sup>102</sup> Each University choosing to join the program must sign a European charter which guarantees that the University will fulfil certain conditions regarding the exchange.<sup>103</sup> For example, if a student goes on exchange from one university to another, then on returning to the original university the study credits achieved in the host university must be accepted by the original university.<sup>104</sup> This not only encourages mobility but could also be seen as encouraging automatic recognition.

There has, however, been some issues regarding the Erasmus program, where students have not been able to have their credits recognised, which significantly affects the will of students to exercise exchange opportunities.<sup>105</sup> This means that the idea behind recognition actually works better in theory, than in practice,<sup>106</sup> which may be caused by the fact that harmonisation has not fully been established between educational establishments.

Regardless of its challenges, the Erasmus program has provided students with the opportunity to exercise their rights as EU citizens, providing them with the possibilities to study in other MSs. In addition, the co-ordination which has happened between education establishments has had a

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<sup>100</sup>*Ibid.*

<sup>101</sup>Souto-Otero, M., Huisman, J., Beerkens, M., de Wit, H., & Vujić, S. (2013). Barriers to International Student Mobility. *Educational Researcher*, 42(2), 70–77. <https://doi.org/10.3102/0013189x12466696>

<sup>102</sup>*Ibid.*

<sup>103</sup>*Ibid.*, p.70

<sup>104</sup>*Ibid.*, p.70

<sup>105</sup>*Ibid.*, p.71

<sup>106</sup>*Ibid.*

positive effect on recognition between MSs and contributed towards the possibility of automatic recognition of academic diplomas.

The analysis of Chapter 2 suggests that the EU has mostly adopted policies in education through soft law. The EU has used instruments such as various programs and encouraged the implementation of qualification frameworks. These instruments have helped the EU in achieving harmonization in education in order to achieve the objectives set by the EU and in removing obstacles from exercising EU citizenship rights. However soft law has its limits, which means that MSs are still in primary control in making decisions about educational matters. This is problematic as the EU cannot set concrete goals for education as competence lies within the MS and the EU can only encourage the MSs to participate in its attempt to harmonise education and adopt legislation in the area of recognition of academic diplomas. In addition, MS are constantly developing and changing their educational systems, which means that they may choose to separate themselves from the EU's educational policies. If this situation was to occur the EU would have issues in enforcing non-compliance as education is in the primary competence of the MS. Based on the above, the EU education policy still heavily relies on the voluntary participation and harmonisation actions by MS.

## CHAPTER 3. REVISION OF LEGISLATION

### 3.1. Introduction

In Chapters 1 and 2, the thesis has analysed the convergence and harmonisation of education and established the influence education has over the current goals set by the EU, in order to become “the most knowledge-based economy in the world”.<sup>107</sup> In addition to this, attention has been brought towards the fact that the recognition of academic diplomas has largely been built on the freedom of movement of workers, rather than on the recognition principals of education.

The current EU law does not guarantee automatic recognition for regulated professions under the general system of Directive 2005/36/EC. As it was analysed in detail in Chapter 2, during the negotiation process of adoption of the Directive the Commission has argued, that there was no need to implement guaranteed automatic recognition for qualifications under the general systems, as citizens did not usually need to use any compensation methods in order to have their qualifications recognised. However, at the same time, other EU bodies, mainly the EESC, argued that the labour market is constantly changing, and that wider automatic recognition should be applied to other regulated professions, currently under the general system. Thus, clearly, the situation is not settled and even within EU institutions and bodies there are divergent opinions on the necessity to extend the general automatic recognition of qualification beyond the limited number of regulated professions.

If it is considered that the current system of recognition of diplomas does not create an obstacle, it should be argued that it may cause indirect discrimination for the EU citizen who falls under the general system, as EU nationals should be treated equally in every EU MS. Indirect discrimination appears when for example a requirement applies to all MS citizens equally, however putting some citizens at a disadvantage, which was the case in case Case C-20/12 Giersch and Others. The case concerned students, who were children of frontier workers of Luxembourg applying for financial aid for their studies based on their parents residence, but who were denied the aid as their own residence was not in Luxembourg.<sup>108</sup> The rejection of not granting the aid was based on the students not having a strong enough social link towards Luxembourg, even though one of their

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<sup>107</sup>Panitsides (2015), *supra nota*

<sup>108</sup>Judgement of the court, 20.06.2013, Giersch and Others, C-20/12, ECLI:EU:C:2013:411



parents worked there.<sup>109</sup> It was argued that the aim of granting financial aid was to promote students to attain a higher degree in order to boost the economy of Luxembourg, therefore the requirement of residence was implemented, as it was believed that residents were more likely to return to Luxembourg to work.<sup>110</sup> The court found that the objective was not of discriminatory nature, however the fact that it excluded frontier workers and their children based on the social link, constituted indirect discrimination. The court explained that frontier workers have a strong enough social link and should therefore be treated equally to MS nationals, therefore the students should have been granted the aid based on their migrant parents.<sup>111</sup> From this case it can be concluded that residents of Luxembourg were put at an advantage, by implementing the requirement of residence for children of frontier workers, therefore constituting indirect discrimination.<sup>112</sup>

The definition of an obstacle was established in joint case C-407/19 and C-471/19 *Katoen Natie Bulk Terminals and General Services Antwerp*, where new requirements were set for dock workers by Belgium.<sup>113</sup> The court considered in this case, that national legislation should not “impede or render less attractive the exercise by nationals of the European Union of the freedom of establishment and the freedom to provide services guaranteed by those provisions of the Treaty” as otherwise the national legislation would become an obstacle on the fundamental rights provided for under the TFEU.<sup>114</sup>

The fact that some regulated professions have guaranteed automatic recognition and some need to rely on the principle of mutual recognition in order to have their diplomas recognized by the host state creates a division between not only professions, but also citizens and causes indirect discrimination when a citizen needs to result to compensation measures.

As regulated professions are those, that can have a strong negative effect on society if they are not practised properly, it is in the best interest of the MS itself to produce qualified professionals.<sup>115</sup> This means that the MS has a strong motive to implement EU standards in education and to adopt

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, point 46.

<sup>113</sup> Judgement of the court, 11.02.2021, *Katoen Natie Bulk Terminals and General Services Antwerp*, Cases C-407/19, ECLI:EU:C:2021:107

<sup>114</sup> *Ibid.*, point 58.

<sup>115</sup> Bergan (2009), *supra nota*

means and measures to harmonise education in order to facilitate the movement of workers. Because of the harmonisation and the increase in movement of qualified workers in the EU, a re-evaluation should be made of whether the existing measures for the recognition of academic diplomas are sufficient enough to encourage and maintain the movement of workers and whether measures should be taken in order to avoid indirect discrimination of citizens.

Based on the above, this Chapter considers what possibilities the EU could have in order to maintain equality between professions. The Chapter discusses possible options the EU may have in order to improve the system of recognition to better suit the current labour market and EU citizens. The first two of the suggestions are in relation to legislative changes and the last section will consider what the outcome would be if the EU was to do nothing and the effect this would have on the EU citizen and the EU in general.

## **4.2. The Policy Options**

In order for the EU to achieve its objectives beyond purely economic integration and further enhance EU citizenship rights, that would cover education policy, one policy option could be to grant the EU more competences. The revision of EU competences, to cover a recognition of academic diplomas, would require however a reform of the existing provisions of the TFEU or addition of a new provision within the Treaty. A second option could be to revise secondary legislation, which would maintain the MSs competence, however giving the EU the possibility to achieve its objectives. The third and final option would be for the EU to do nothing regarding the matter, which would significantly affect the opportunity for EU citizens to exercise their rights within the EU. This section is focused on the analysis of these three options and to their possible outcomes.

### **4.2.1. Revision of Primary Legislation**

The competence towards education is established in Articles 6 TFEU and 165 TFEU. Both of these Treaty articles provide that the EU may only support and encourage the MSs in the recognition of academic diplomas. Therefore, education only falls within the scope of EU law to a limited degree. However, in addition to the competence in education, the TFEU also establishes EU citizenship through Article 20. The EU citizenship is a fundamental status, that provides among other things, that citizens should not be discriminated in the exercise of their EU rights provided under the

Treaty. This means, that through the EU citizenship provisions, certain aspects of educational policy are brought further into the scope of EU law. For example, the freedom of movement of workers is provided for in Article 45 TFEU, therefore in order for a person to be able to exercise their right to work in another MS the EU needs to provide a method of recognition for diplomas, which it has done through Directive 2005/36/EC. Therefore, through other articles of the TFEU the EU is able to adopt secondary legislation in order to guarantee the rights of EU citizens.

As the TFEU brings education into the scope of EU law, while maintaining primary competence within the MS, this creates a contradicting state within EU primary legislation. On the one hand the EU may not act directly towards matters relating to education, while on the other hand it must provide the rights established under EU citizenship.

From the point of view of legal certainty, the most direct policy option to resolve this contradiction would be to enhance EU competences in the area of education. This would require however, the amendment of the existing Treaties, which is a long and a very complex legal and political process, requiring among other things consent of all EU MSs. The development of secondary law, particularly the Directive 2005/36/EC, suggests that, even with the current limited competences in education, relying on the free movement of people provisions, the EU has a legal basis to adopt measures to ensure and facilitate recognition of professional qualifications. Therefore, considering the procedure for primary law amendments provided under the EU law, the revision of Treaties is probably not the most efficient way to change the current system of the recognition of professional qualification. Moreover, arguably it is not even necessary. The most viable solution is then to focus on the revision of the secondary legislation

#### **4.2.2. Revision of Secondary Legislation**

Primary legislation has provided the possibility for the EU to adopt secondary legislation, which has helped EU citizens to exercise their rights under EU citizenship, by providing for example methods of recognition for academic diplomas. However secondary legislation has not been able to provide guaranteed automatic recognition for all regulated professions, which causes indirect discrimination if the citizen needs to result to compensation methods during the recognition process as MSs are responsible for determining their minimum training requirements.

One policy option in order to achieve automatic recognition for academic diplomas would be to revise Directive 2005/36/EC so that automatic recognition would also apply to professions under

the general system. This could be achieved by implementing the methods of the Bologna process, which has established a qualifications framework for higher education. This framework does not only focus on duration of studies but also the outcome of studies, which is different from Directive 2005/36/EC, as the directive gives a lot of weight on duration. Therefore, it could be considered whether the qualifications framework for higher education and the one for workers could be merged in order to remove the possibility of indirect discrimination and follow the idea established in the directive, that “persons having acquired their professional qualifications in a Member State to have access to the same profession and pursue it in another Member State with the same rights as nationals”.<sup>116</sup>

In addition to implementing the qualifications framework of higher education the EU could look to the principals from the EU Blue Card, which is a method for third country nationals who wish to work in the EU.<sup>117</sup> The main point behind the EU Blue Card is that it requires from the applicant a higher education qualification and a work contract for the minimum period of one year. The EU Blue Card allows the third party national to apply for any jobs on the European job mobility portal and if the third party national fulfils all the requirements they will be granted the EU Blue Card.<sup>118</sup> The EU Blue Card therefore grants recognition for higher education qualifications without compensation measures.

The EU should therefore consider that if an EU citizen moves to another MS to work or study then their diplomas should be automatically recognized if they provide proof of employment or proof of studying in a host state’s educational establishment. As an EU citizen is allowed to reside in another MS in any case only for three months without any particular reason and without registering their residence in the host State, the requirement to provide proof of employment or study could not be held as an obstacle or an extra burden as it is in any case required if a citizen wishes to remain in a host state for over three months.

As a result, the qualifications framework of Directive 2005/36/EC, should be changed so that it would implement the framework from higher education, this would make it easier for the directive to grant automatic recognition as the directive could not consider duration on its own as a

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<sup>116</sup> OJ L 255, 30.9.2005, point 3.

<sup>117</sup> European Commission. (n.d.). *EU Blue Card: Permit for Highly-Qualified Workers*. EU Immigration Portal, - European Commission. Retrieved January 10, 2021, from [https://ec.europa.eu/immigration/blue-card/essential-information\\_en](https://ec.europa.eu/immigration/blue-card/essential-information_en)

<sup>118</sup> *Ibid.*

substantial difference. The EU blue card is a good example of how the EU is able to grant recognition for qualifications equally without indirect discrimination for third party nationals. As it is possible to achieve this for third party nationals it should be imperative to achieve this for EU citizens as well.

#### **4.2.3. No Action**

So far it has been established that the revision or adoption of new secondary legislation could possibly provide an answer to the questions of automatic recognition for academic diplomas under regulated professions. The third and final option would then be for the EU to do nothing. This section is therefore dedicated towards the outcome of the third option.

As the citizenship of the EU is a fundamental status, this means that every citizen of an EU country should have the same possibilities to exercise their rights under article 20 TFEU. However, as this thesis has established, the current system of recognition for academic diplomas restricts the exercising of EU citizenship rights for those who wish to study or work abroad, because MS are responsible for granting recognition under the general system. In addition, the current system of recognition not only affects the rights conferred under article 20 TFEU, but also rights established under article 21 TFEU on the freedom of movement and article 45 TFEU on the freedom of movement of workers. Therefore, If the EU would act passively against the issue, it would affect the rest of the rights provided for in the TFEU.

The result of the EU not taking action would not only affect citizens seeking recognition under the general system, but also weaken the effectiveness EU citizenship. The fact that the EU cannot guarantee the right to freedom of movement to all citizens equally is an issue which can only have a negative effect as the benefits to EU citizenship are built around the idea that every citizen should without discrimination be able to access their rights. Citizens may therefore begin to question the effectiveness of EU citizenship if they cannot move freely within the EU, as MSs have the competence not to recognize their academic diplomas. This idea however would only apply to people who wish to work or study in another MS.

In addition to the negative effect on EU citizens, not taking action would also affect the internal market of the EU, as the free movement of people is one of the main pillars of the internal market, which promotes the possibility to work and study abroad. Through the internal market the EU is able to stabilise its economy and also keep individual MSs in harmonised development. For

example, by implementing the free movement of people and workers, EU countries with high levels of unemployment may benefit by their national leaving to another MS to work, therefore removing the burden of social benefits from the State. In addition, the difference in wages between MSs means that people may leave a MS which provides less pay to a MS which provides more pay for the same work, therefore working as an incentive for the MS with lower wages to raise the standards of wages. In return the EU secures a more stable economy, through MSs benefitting and competing with each other.

## CONCLUSION

The aim of the thesis has been to analyse whether the current EU practice on the recognition of academic diplomas can be considered as an obstacle to the free movement of EU citizens and if it is an obstacle, whether this obstacle can be justified under the EU law.

Based on the qualitative analysis of the current system of recognition of professional qualifications the thesis concludes that the current system should not be considered as an obstacle, but rather as creating indirect discrimination, as citizens who fall under the general system may need to rely on compensation measures if the host state considers that their academic diploma constitutes a substantial difference. This means that even though the Directive applies to everyone equally it puts some citizens in a worse off position. The system should not be considered as an obstacle, as it does not constitute to direct discrimination.

Regarding the recognition in education, the EU has worked hard to achieve harmonisation for students with different kinds of programs and by encouraging students to participate in exchange possibilities. Furthermore, the qualification frameworks in higher education are harmonised to an extent that MSs cannot easily restrict students from moving from one MS to another.

When it comes to the working citizen the system is more complex, as Directive 2005/36/EC provides automatic recognition for only regulated professions with harmonized training conditions. This means that other professions under the general system have to rely on the principal of mutual recognition. In addition to this the MS have differences in regulated professions, some may have more regulated professions, some may have less, therefore the host state has a lot of power to decide if a diploma under the general system will be granted automatic recognition or not. If the diploma is regarded as not reaching the host states minimum standards, then the citizen needs to result to compensation methods, which creates indirect discrimination as the general system should follow the principal of mutual recognition. The issue lies within the qualification framework used in the Directive, which differs considerably from the educational qualification framework in higher education. When comparing these two frameworks it may be concluded that both of them have a different understanding of a substantial difference which would prevent automatic recognition. The educational qualifications framework in higher education has a more open approach, meaning that it does not consider minor differences as substantial, looking more at the learning outcomes and quality, while the framework for workers is more closed, as it does

not look at the learning outcomes, but requires to be almost complete identity with the host states requirements and focuses on duration and substance of studies.

The current systems of recognition lack cooperation, which means that there is a division between employment and education, which could be criticised as there is a clear link between education and employment. This thesis argues that the Commission could have utilised the tools the EU already had, for example the Bologna process, and the existing secondary legislation to establish a wider system of automatic recognition for academic diplomas in the EU. In addition the EU relying on the existing competences can introduce changes in order to actually guarantee automatic recognition for all regulated professions. For example, the EU can change the existing rules to ensure that a 'substantial difference' should be viewed as an exception to the main rule of the mutual recognition, and not as it is now, where power is with the host state to decide what the substantial difference is in order to decline recognition.

The CJEU has repeatedly, in the case law, underlined that EU citizenship is a fundamental status. Among other things, EU citizenship prohibits discrimination of EU citizens who exercise their rights provided under EU law. Free movement of persons, is one of the areas clearly covered by the EU law, and as this thesis argued, the current system of recognition of academic diplomas affects rights provided under EU citizenship, mainly freedom of movement and freedom of movement of workers. In addition the general system causes indirect discrimination for citizens who are not granted automatic recognition, but must result to compensation methods. Therefore, this thesis argues for a revision of the EU secondary legislation in order to guarantee the rights of freedom of movement of people and the EU citizenship rights as provided in the Treaties.

There is no need to revise primary legislation as primary legislation already provides leverage for the EU to adopt secondary legislation in the area of recognition. Accordingly, it would be sufficient to revise Directive 2005/36/EC so that it would implement principles from the education qualification framework in order to create cooperation between education and employment, which would contribute towards the possibility for achieving an even wider scope of automatic recognition. In addition, the EU could implement principles from the European Blue Card system into Directive 2005/36/EC in order to create a sufficient system of recognition. Through this system a citizen would need to submit proof of employment or study to the host state, in order to be granted recognition. This system would not be a burden on the citizen as in any case an EU citizen needs to do this procedure if they wish to remain in a host state for over three months.



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