

8 June 2009

Mr Peter Mihok,
European Commission
Economie basée sur la connaissance
Professions réglementées
B-1049 Brussels
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and by email to Peter.MIHOK@ec.europa.eu

EU Pilot case: 197/08/MARK
UK DCLG reference: 090515RHPM

Dear Mr Mihok,

Transposition of Directive 2005/36/EC by the United Kingdom – conformity of the Architects Regulations 2008

I refer to your letter to the UK's Department of Communities and Local Government (CLG) dated 8 April 2009 (which dealt comprehensively with the conflicts between section 4(2A) of the Architects Act and the Directive), and to the letter from CLG to yourself that is dated 15 May 2009.

In its letter CLG take issue with your decision that the UK authorities have transposed the Directive in an incorrect manner, doing so by reference merely to Articles 1 and 4(1) of the Directive, and to its Annex VII. The wording relied upon in Articles 1 and 4(1) of the Directive are of similar import, but in passing it may be noted that Article 1 sets out the *purpose* of the Directive while Article 4 sets out the *effects of recognition*. Neither of these Articles defines the procedures by which the purposes and effects of the Directive are to be brought about; these appear later in the Directive. Conspicuously, CLG do not address those parts of the Directive which you have referred to which have led the Commission to conclude that the transposition of the Directive has been carried out incorrectly.

The construct that DLG relies upon appears to have been derived from these introductory and descriptive Articles. It depends upon an assurance that the United Kingdom does not require a "certificate of eligibility" but only

"evidence of formal qualifications, a certificate of conformity from the home Member State Competent Authority indicating that the evidence of formal qualifications is that covered by the Directive, and evidence of good character as described in Annex VII(1d) of the Directive",

a distinction which appears to be more semantic than of substance but which

adequately describes the requirements of the Directive that might properly have been transposed into domestic legislation. Crucially, it does not distinguish between those who wish to register in the UK in Part 1 of the Register and those who wish to register in Part 2 (registration of person lawfully established as an architect in a relevant European State and wishing to provide services in the United Kingdom on a temporary and occasional basis) and, as you have pointed out in your letter of 8 April 2009, such prior declarations (be they certificates or otherwise) apply only to the free provision of services and not to the establishment of migrant professionals in the United Kingdom.

Numbered paragraph 2 of the CLG letter is therefore wide of the mark, for Articles 5-7 refer to the provision of services that is provided for under section 5A of the UK Architects Act. It appears that CLG may have misconstrued the clear explanation given in your letter and have also neglected to confirm, as you requested, your understanding of this section of the Act.

By conflating the requirements for the free provision of services with professional establishment, it appears that CLG has either not attempted to understand the purpose and effect of the Directive, or else is trying to obfuscate it. In this regard the Commission may wish to have regard to the Explanatory Memorandum that was provided to the UK legislature¹ with the draft Regulations. This Memorandum identifies how the relevant provisions of the Directive were transposed, stating at paragraph 4.8:

'...There is still no requirement for a migrant to prove establishment in the United Kingdom in order to be registered in Part 1, but if a migrant becomes established in the United Kingdom (this is assessed on a case by case basis in accordance with European case law), his entitlement to be registered in Part 2 ceases (see paragraph 5(5)(a) of Schedule 1A in the Schedule to the Regulations). The qualifying criteria for Part 1 are more rigorous than for Part 2, and it would be undesirable for migrants to be able to exploit this loophole in order to practise in the United Kingdom on an established basis.'

No explanation is given by the Government as to why it believes the straightforward requirements of the Directive provide a “loophole”. Ostensibly it appears to relate to the possibility of a migrant providing services becoming effectively established in the United Kingdom over the passage of time. But it may also be that the loophole that the Government really intended to close was the possibility of UK nationals registering by what might be called the “EU route” with less qualifications than are required of its own nationals for registration in the United Kingdom². It seems to me that the insertion of the extraneous and supplementary requirements of subsections 4(2A)(a)(i) and 4(2A)(a)(ii) were introduced not only to prevent migrants from taking advantage of this supposed loophole but to protect the *status quo* in the United Kingdom. And if this is accepted, then an alternative of deliberate obfuscation may become the preferred explanation for the reasoning given in the CLG letter of 15 May 2009.

That is certainly the interpretation that I give to it, for having failed to convince the Commission that the Architects Regulations 2008 correctly transpose Directive 2005/36/EC into section 4(2A)(a) of the Architects Act 1997, CLG may now only

1 http://www.opsi.gov.uk/si/si2008/em/uksiem_20081331_en.pdf

2 For an explanation of this distinction, see www.aaruk.info/AARU%20education1.htm#eu

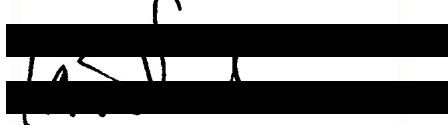
argue to the contrary, as is apparent from its letter, on the basis that the words of the subsections mean something different to what they say. I would urge the Commission to reject this absurdity and consider that the contrary is true.

In its letter of 15 May 2009, CLG do not refer to the General Provisions of Article 21. That is because it is clear that by imposing the extraneous provisions of subsections 4(2A)(a)(i) and 4(2A)(a)(ii) in the Act, the United Kingdom prevents the automatic recognition of the formal qualifications listed in Annex V point 5.7.1 giving access to professional activities as architect in this country that is required under the General Provision of the Directive. Nor does CLG make any close comparison between these new provisions and what is permitted by Annex VII in the way of evidence of good character, etc. That may not be surprising, for the two bear no comparison. For Point 1(d) of Annex VII is not generally permissive: it is specific; and the power of the competent authority to demand documents and certificates is further restricted by the governing Article 50(1). Subsections 4(2A)(a)(i) and 4(2A)(a)(ii) do not match in their requirements what is permitted by Annex VII.

If, lastly, the reasons for the insertion of Subsections 4(2A)(a)(i) and 4(2A)(a)(ii) derives from those given in the Transposition Note on (un-numbered) page 12 of the Explanatory Memorandum already referred to, then a drafting mistake appears to have been made, for this relates to evidence of formal qualifications come under the section 4A(1)(b) where the applicant qualified under the former regime of Czechoslovakia, the Soviet Union or Yugoslavia. This derives from Article 23; and what is provided to facilitate a few cannot be used to provide a general restriction.

By any criteria, the effect of these subsections is therefore to introduce unlawful and non-compliant restrictions on the freedoms of Directive-rights persons. I therefore request that the Commission's decision (that the United Kingdom's transposition of the Directive has been carried out incorrectly) should not now be made final, for there is nothing of substance in the CLG representations to cast any doubt on the Commission's decision. I would be grateful that the United Kingdom be duly required to amend its legislation so that it is properly brought into conformity with the Directive.

Yours sincerely,



Ian Salisbury

cc. Richard Harral, CLG