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A Silk Road for Professional Qualifications?

EU Models of Integration and their Potential in Sino–EU Relations

Ton van den Brink and Sybe A. de Vries

11.1 Introduction

The New Silk Road for higher education has important implications on trade in goods and services between China and Europe. Although there may be substantial benefits in terms of trade, economic development, and growth, there are also major concerns towards China's assumed shift from defensive mercantilism, to offensive mercantilism. Creating an open market is thus a value that is balanced against competing interests, which equally require protection.

Within the European Union's internal market, considerable experience has been gained by such balancing acts. A key issue, which will impact future China–EU relations as well, relates to the recognition of professional qualifications. Indeed, many people in the EU actually work in a regulated profession—there exists an estimated 600 regulated professions in the EU, and if one includes sub-categories, the total number of professions increases to 5,500.¹ This translates to roughly one-fifth of the EU working population being in a regulated profession. It needs no explanation why persons working as airline pilots, registered accountants, teachers, and lawyers should possess adequate qualifications. The purpose of regulating professions may be informed by the interests of the people for which such services are provided, but may equally relate to the broader public interests (e.g. trust in the profession of lawyers, as cornerstones of legal order based on the rule of law). However, states tend to regulate professions in distinct ways. Even among EU Member States, there are substantial differences in the number of regulated professions and equally in the degree

¹ Impact assessment for a Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions, SWD(2016) 463 final.

such professional standards have been elaborated.² This creates problems in terms of market access for professionals between EU Member States.

This is the exact point where EU law comes in, as the creation of an open, internal market lies at the core of objectives for European integration. Thus, the situation at the EU level essentially revolves around the question how professionals may practice their professions throughout the EU, whilst respecting the interests involved in regulating professions. This provides for a particular focus in EU legislation and practices, and explains why higher education cooperation, or the standardization of academic degrees for instance, have not been a key concern in EU legislative activities.

The aim of this chapter is, firstly, to assess how these competing interests have shaped the EU's legal framework for the recognition of professional qualifications. We will see that a range of regulatory strategies have been applied to design such frameworks. The next element of our analysis is based on the assumption that we may be able to draw lessons from the EU's internal regulatory strategies to deal with national differences in regulating professions. Thus, we will examine to what extent and under which circumstances such regulatory strategies may offer viable perspectives for Sino–EU relations. In other words, in light of the growing need for labor mobility, to tackle shortages of labor and skills in China and the EU, how may labor markets be opened while still respecting the underlying public interest in regulating professions?

With a view to answer this question, we more specifically identify in this chapter five different regulatory strategies, or legal models of integration, the EU has developed to facilitate the free movement of services for professionals: (1) harmonization, (2) mutual recognition, (3) public/private arrangements, (4) a procedural model, and (5) a model based on the EU Directive for lawyers.

11.2 Harmonization

Ever since the inception of the European Economic Community (EEC), the recognition of professional qualifications has been high on the agenda with a view to make it easier for persons to take up and pursue activities as a (self-)employed person across the EU. By contrast, in education—in which EU powers have to date been weak³—recognition of professional qualifications has been viewed as an economic matter, and it has thus not been at issue whether the EU would be competent or not. As from the mid-1970s, the legislative approach by the EU was characterized by

² Generally, southern and eastern EU Member States (including Germany) have regulated professional qualifications much more heavily than northern EU Member States. See Impact assessment for a Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions, SWD(2016) 463 final.

³ The Bologna Process, a series of agreements between European countries (including non-EU countries) to ensure comparability and quality of higher-education qualifications standards, was therefore developed outside the formal institutional framework of the EU (see also Chapter 3 by van der Wende in this volume).

sector-specific legislation based on the free movement of services provision (ex Article 57(1) EEC). For example, the European legislator chose to adopt paired Directives related to medical professions, one prescribing the contents and duration of the relevant study cycle for a particular profession, and the other laying down a system of quasi-automatic recognition of professional titles (Adamo and Binder 2018, 38–39; Hatzopoulos 2012, 239). But this approach was burdensome and accompanied by drawbacks.

Since 2005, the sector-specific approach has been adapted and integrated into a general framework for the recognition of professional qualifications. Directive 2005/36/EC contains both the rules on harmonization as well as the mutual recognition (see next section) and administrative cooperation, and has, therefore, been described as a “horizontally hybrid” (Adamo and Binder 2018, 41; Hatzopoulos 2012, 242). For a specific category of professions, the Directive contains minimum harmonization standards for training, which is followed by an *automatic recognition* system. Contrary to what the term suggests, however, the system is not completely automatic: it rather signifies that host Member States may not impose compensatory measures. Automatic recognition applies to the following professions: architects, dentists, doctors, midwives, pharmacists, and veterinary surgeons.

According to Article 21 of the Directive:

[e]ach Member State shall recognize evidence of formal qualifications as doctor [...], as nurse responsible for general care, as dental practitioner, as specialized dental practitioner, as veterinary surgeon, as pharmacist and as architect, listed in Annex V [...] which satisfy the minimum training conditions referred to in Articles 24, 25, 31, 34, 35, 38, 44, and 46 respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

Such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates listed in Annex V [...].

Hence the formal qualifications are further elaborated in annexes.

The reason for this “harmonization approach” towards these six professions in particular, is at least, in part, that there is a lack of mutual trust between Member States, and that a common European approach to qualification requirements is needed to guarantee market access to other Member States. The main advantage is, of course, that by harmonizing the requirements for a profession throughout the EU, receiving recognition in a host country becomes significantly more accessible. For example, a case study on midwives in a number of Member States seeking professional recognition in another Member State, appears to confirm this view (Adamo and Binder 2018, 47–48). So although a harmonized model offers a solution for professions in more sensitive areas, it is a very burdensome process as profession-specific requirements need to be drawn up. Furthermore, we have to

realize that the harmonized model concerns only a handful of all regulated professions in the EU, for which a mutual recognition approach has been considered more desirable.

11.3 Harmonization as a Basis for EU–China Cooperation

Particularly where mutual trust is lacking, which is, as shown below, a precondition for mutual recognition, and where similar standards on professional qualifications in the EU and China are lacking, harmonizing the content of curricula and the qualifications for certain standards could be an option. However, harmonization comes with a number of drawbacks.

As already demonstrated by the European Union, harmonization has proved to be a difficult and burdensome process, which eventually resulted in only six out of hundreds of regulated professions having automatic recognition and minimum standards (Heremans 2012; Adamo and Binder 2018, 38–39). Where such approaches have proven to be difficult within the EU, it has never been pursued within the context of a trade agreement between the EU and a third country. Attempts have been made, for that matter, to bring higher education under the GATS (General Agreement on Trade in Services) during the Doha Round, but these failed due to disagreement between participating states (Marginson and van der Wende 2007; Vlč et. al. 2008). Furthermore, under the GATS, there is no obligation to recognize foreign qualifications, but member countries must have the opportunity to negotiate such agreements. Otherwise, the trade agreements between the EU and third countries generally includes a non-discrimination clause, whereas harmonization goes beyond a mere prohibition of discrimination as it guarantees market access for the professions, which qualifications have been harmonized through binding EU legislation.

The European Qualification Framework (EQF) could perhaps be a starting point towards some form of harmonization, as it “serves as a translation device between different qualifications systems and their levels.”⁴ Although this only concerns a non-binding recommendation based on Title XII (Education & Vocational Training), it may provide “a basis for third-country qualifications to be more easily compared and recognized with those obtained in the EU [...]” (McCormack-George 2019), and thus a basis for harmonization. Increasing transparency is crucial in creating a system of European and global recognition of professions. The European Credit Transfer System (ECTS) also serves this aim.

⁴ Council recommendation of May 22, 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of April 23, 2008 on the establishment of the European Qualifications Framework for lifelong learning. See also Garben 2011, p. 79.

More specifically regarding China, the joint EU–China Tuning Study was initiated in 2012 to allow for, *inter alia*, strengthened compatibility between the EU and Chinese education systems, and for developing the tools for mutual recognition (Tuning China n.d.). The project applies to three selected disciplines *i.e.*, business, civil engineering, and education, and could perhaps be used to further develop a China–EU Professional Services Pilot, on which basic common, or harmonized standards for specific professions can be defined. Not only engineers, but also, for example, nurses could be professions for which the EU and China could conclude agreements. The growing shortage of qualified nurses in the EU could be an incentive for such an agreement, as is also illustrated by the initiative of the German Federal Minister of Health, Jens Spahn (Stuttgarter Nachrichten 2019).⁵

However, as stated above, a truly harmonized system for professional qualifications between the EU and China may be very slow in coming.

11.4 Mutual Recognition and Mutual Trust

Mutual recognition is a cornerstone of EU law and policy. It has been developed, first, in the context of the Single Market, and later applied equally to the Area of Freedom, Security, and Justice (AFSJ). Its success may be explained from offering a “third way,” between harmonization at the EU level on the one hand, and national autonomy on the other. National autonomy often results in obstacles for the functioning of the Single market. In the context of diploma recognition for instance, differences in national standards attached to professional qualifications may cause obstacles for the proper functioning of the Single Market. Individuals with professional qualifications obtained in one Member State may not be authorized to exercise their profession in another Member State that applies different standards. Such standards may well be justified in the pursuit of legitimate public interests, but thus create a potential source of obstacles to the functioning of the Single Market.⁶ National autonomy thus has serious drawbacks.

On the other end of the spectrum, we find harmonization that has been discussed above. This has the potential to fully eradicate obstacles to the functioning of the Single Market, but is oftentimes an arduous process that requires extensive legislative energy, and the ability to overcome political divides between Member States. Mutual recognition requires less legislative effort, but has the ambition to achieve the same positive results regarding the functioning of the Single Market, the abolition of obstacles to free movement.

⁵ Jens Spahn and Sabine Weiss (CDU) had been travelling to Kosovo and the Philippines to discuss possibilities for highly qualified nurses to work in Germany. The question is, of course, whether similar talks are useful with China, which might not have nurses to send abroad considering its strongly ageing society.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Reform Recommendations for Regulation in Professional Services, COM(2016) 820 final.

The essence of mutual recognition has been formulated by the Court of Justice of the European Union (CJEU) in its seminal *Cassis de Dijon* ruling.⁷ A product lawfully marketed in one Member State of the EU should have lawful access to the markets of other EU Member States.⁸ Later on, the CJEU extended the same reasoning to services.⁹ Applied in the context of professional qualifications, mutual recognition would mean that the EU would not harmonize national standards on professional qualifications, while national legislative and regulatory regimes that regulate professions would thus remain intact. Differences in national legislation and practices thus continue to exist. However, the principle of mutual recognition requires that EU Member States refrain from invoking these differences to refuse authorization to persons who obtained a professional qualification in another Member State to practice their profession.

Mutual recognition is an attractive mode of governance in light of its ability to balance unity and diversity. Thus, it is generally seen as less intrusive on Member States' autonomy and, in that light, often considered as the ideal "third way" between EU centralization and pure Member State discretion without any arrangements for cross border situations (Van den Brink 2016). In other words, from the Member States' perspective, mutual recognition may be viewed as offering better protection of national sovereignty compared to harmonization, but without losing sight of the interests of the Single Market.

Mutual recognition comes, however, with serious drawbacks. Pelkmans has argued that mutual recognition (in the field of goods, but his analysis could be applied to persons and services as well) involves information, transaction, and compliance costs (Pelkmans 2007). National competent authorities often prioritize the application of domestic standards and businesses may not be aware of their rights under mutual recognition. Moreover, mutual recognition is not an absolute principle. Member States that can demonstrate that the foreign standards fail to offer an adequate level of protection of the public interest may apply their domestic standards to foreign goods, services, and persons (and may thus refuse access to their market). This is known as the Rule of Reason Exception that was already formulated by the CJEU in *Cassis de Dijon* as the other side of the coin of mutual recognition. EU law controls national measures that constitute exceptions to the mutual recognition obligation through the proportionality principle, although it has been argued that the principle still allows substantial room to maneuver for host Member States (Groussot et. al. 2016).

Thus, various scholars have argued that mutual recognition has not lived up to the—indeed high—expectations that the Commission and others have had. Some,

⁷ Case C-120/78 *Société Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:42 (1979).

⁸ The decision *Cassis de Dijon* considered the marketing of a French liquor in Germany and, thus, the free movement of goods. Later on, the application of the principle has been extended to the other freedoms, most notably the free movement of persons and services as well.

⁹ Case C-76/90 *Manfred Säger v. Dennemeyer & Co. Ltd.* ECLI:EU:C:1991:331 (1991).

such as Weiler, have even argued that mutual recognition has been a market failure (2005). Other have gone less far, but still argued that mutual recognition has compromised the objectives of the Single market (Janssens 2013). Pelkmans has, however, made a meaningful distinction between judicial mutual recognition and legislative (or regulatory) mutual recognition and argued that most of the problems are related to the former (Pelkmans 2005). Judicial mutual recognition is mutual recognition in its pure form, and goes unaccompanied by legislative intervention at the EU level. It relies purely on the *Cassis de Dijon* obligation. This has proved to offer too weak a basis to be successful. Later, legislative mutual recognition had been developed which involved a legislative intervention on the part of the EU. Typically, the EU legislature¹⁰ adopted a set of “essential requirements” (e.g., in the field of health, safety, environmental, or consumer protection). Beyond these regulatory objectives, Member States are free to create or maintain a higher level of protection (i.e., apply stricter rules), but they are obliged to respect mutual recognition (and thus free movement) imperatives.¹¹ Pelkmans argued that this form of mutual recognition has been far more successful.

As was explained in a previous section, mutual recognition of professional qualifications is governed by the EU’s General Framework for Recognition of Professional Qualifications based on Directive 2005/36/EC, subsequently amended by Directive 2013/55/EU. For all professions which are not part of the list of harmonized professions, the general mutual recognition regime applies. Formally, this regime may be qualified as legislative mutual recognition, but the drawbacks that Pelkmans identified for judicial mutual recognition apply here as well, as the lack of harmonized standards allow host states to block access to their markets, as we will see later.

This regime is based on the principle that EU Member States may not simply refuse citizens from other Member States on the sole reason that their qualifications have been obtained in their Member State of origin. The Directive imposes an obligation on host Member States to assess foreign qualifications (diplomas and professional experience) to determine whether they are equivalent to domestic standards. The “default option” is that such qualifications are indeed recognized. This is based on an assumption of trust that other EU Member States serve the same objectives in regulating professions. However, the system allows host Member States to refuse recognition, but this is subject to substantive and procedural limitations.

Thus, the general system of recognition involves a complex regulatory system, of which only the main elements can be discussed here. First, the system distinguishes between professionals that wish to work only on a temporary basis in another EU Member State (services), and others that seek to establish themselves permanently in an EU Member State other than the one in which they obtained their qualification (establishment). The regime for services provides more flexibility—and less room for the host Member State authorities—than the applicable regime for establishment.

¹⁰ Used in a broad sense here, it may also include executive rulemaking.

¹¹ Pelkmans (2005), pp. 85–128.

In principle, providing services only on a temporary basis does not require an official recognition of professional qualifications.

Second, the regime for establishment is based on authorization by the host state. The host state assesses whether, and to what extent, the professional qualification of the country of origin is equivalent to that of the host state. If not, the host state authority may require *compensatory measures* which, in any case, must be proportionate and non-discriminatory. The latter requirement demands that measures of the host Member State may not discriminate, also not indirectly, on the basis of nationality. In other words, host state authorities may not illegitimately favor their own standards. The concept of compensatory measures, furthermore, denotes that host state authorities may not simply impose their full regulatory standards on professionals that seek to exercise their professions in the host state. Only in so far as their professional qualifications demonstrate clear gaps in light of host state laws, the host state authorities may require that such gaps will be compensated.

A great responsibility thus lies in the hands of Member States' authorities. This requires that such authorities trust the qualifications issued in other Member States. In practice, this is difficult to achieve. Trust as a basis for mutual recognition in the EU has attracted the most attention in the past couple of years. Especially in the Area of Freedom, Security, and Justice, in which the surrender of suspects and convicted persons (EU criminal law) and asylum seekers (EU migration law) has demonstrated that cooperation between Member States cannot be built exclusively on "blind trust," it needs to be accompanied by additional measures. Thus, in practice, mutual recognition is more and more built on what could be called "qualified trust" (Henning-Roth 2017). The possibility to not grant access to foreign services or persons on public policy grounds (the above-mentioned Rule of Reason) and accompanying harmonization measures are the two ways to qualify trust. The results thereof, even in the field of the Internal Market, have been qualified as unsatisfactory (Henning-Roth 2017).

An even more fundamental dimension to mutual trust has been added by CJEU's Opinion 2/13 on the accession agreement of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹² The Court declared the accession agreement to be contrary to EU law, a conclusion that was in part based on mutual trust as a special characteristic of the relation between the EU member states. The Court observed:

This legal [i.e., EU] structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies *and justifies* [emphasis added] the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

¹² Opinion 2/13 of the Court of Justice ECLI:EU:C:2014:2454 (2014).

Thus, mutual trust is not merely an obligation rooted in EU law to allow cooperation between the Member States to run smoothly. It flows from a deeper source: the sharing of fundamental values and knowing that these values will be applied within the context of the cooperation between Member States. Moreover, the CJEU is there to ultimately enforce it. This is not just a theoretical or hypothetical statement. In recent case-law, the CJEU has developed a line of case law to strengthen and to enforce rule of law obligations in the Member States. In particular, judicial independence has been a principle that the CJEU has recently applied rigorously.¹³ Equally, albeit in other domains of internal EU law—especially the European Arrest Warrant which is the EU’s instrument for the surrender of convicted persons and suspects—the CJEU has ruled that rebuttal of such trust may result in the disapplication of mutual recognition instruments.

11.5 Mutual Recognition as a Basis for EU–China Cooperation?

One major advantage of applying mutual recognition instead of harmonization to facilitate the exchange of labor between the EU and China is that no agreement would be needed on the content of curricula and other substantive criteria that apply to professional qualifications. Differences between the two legal systems could thus continue to exist whilst these differences would not stand in the way of persons exercising their profession in the other jurisdiction.

Two main obstacles would emerge however, which greatly reduce the utility of mutual recognition. The first relates to mutual trust, which has been demonstrated above to constitute a key condition for mutual recognition to function in practice. Even within the EU—a legal and political entity composed of relatively similar national legal orders—the existence of mutual trust cannot be taken for granted. Furthermore, the approach of the CJEU has been that mutual recognition works in the EU as a result of the specific nature of EU law, rooted in an autonomous legal order and enforced by an independent court. Even though mutual recognition is an instrument applied beyond the context of the EU, it is obvious that such characteristics do not apply in international law dominated contexts. Also, additional measures may be necessary to bolster mutual recognition, as we have seen apply in the internal EU context as well. Taking this into account, shaping Sino–EU relations in the field of professional qualifications based on mutual recognition would be most successful in areas in which standards would be similar, and the underlying interests to regulate professions would not diverge either. Professions in the technical and medical fields would be likely options here. Engineering in particular would also apply, since China trains the largest number of professionals in these fields worldwide and

¹³ See the decision in Case C-619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531 (2019).

exports their services abundantly with its infrastructural projects along the New Silk Road (see also Chapter 10 by Zhu et al. in this volume).

The second obstacle to EU/China cooperation would be the limited EU legislation in the field of professional qualifications. The EU system of mutual recognition actually confirms the situation that the regulation of professions is primarily a national matter. Indeed, the competences of the EU in the field of education are weak (see Chapter 3 by van der Wende in this volume). The only true “EU-professions” are professions for which the qualifications have been harmonized. For these professions, it would indeed be an option to set up mutual recognition agreements between China and the EU. For all other professions, however, this would be far less likely. The balance of competences between the EU and its Member States would be tilted. It is not surprising, in this light, that in the existing agreements with China it have been individual EU Member States that have been the contracting parties at the European end, rather than the EU itself.¹⁴

All in all, the existence of shared values as a basis for mutual trust is arguably the main element which defines its success. In this day and age, however, Sino–EU relations demonstrate a decline rather than an increase of mutual trust. This is due to issues of human rights and minority protection, the use of artificial intelligence, espionage, unfair trade rules, and other issues. This significantly reduces the viability of this model.

11.6 Public–Private Arrangements for Diploma Recognition

Private associations have, of course, always played a crucial role in developing professional skills for the professions they represent. For example, to boost e-skills in Europe’s digital marketplace, a European e-competence framework which involved many stakeholders has been set up to develop “competences, skills, knowledge and proficiency levels that can be understood across Europe” (European Committee for Standardization 2016).

Private professional organizations may more specifically get involved in drawing up mutual recognition agreements, an approach that is followed by CETA, the Comprehensive Economic and Trade Agreement between Canada and the EU that seeks to boost trade in goods and services between the two parties. CETA is rather unique as it does not apply to only goods but to services as well, and includes provisions in Chapters 9, 10, and 11 on cross-border trade in services, temporary entry, stay of natural persons for business purposes, and mutual recognition of professional

¹⁴ According to information from the Chinese Ministry of Education, China had signed mutual recognition agreements with nineteen EU countries by 2016, ahead of the conference on: “Building a China–EU education Silk Road towards the future,” which was held between China and the Ministers of individual EU countries. However, these agreements seems to refer only to academic (not professional) credentials only. See: http://en.moe.gov.cn/News/Top_News/201610/t20161011_284325.html.

qualifications.¹⁵ Chapter 11 is designed to facilitate a “fair, transparent and consistent regime for the mutual recognition of professional qualifications by the parties and sets out the conditions for the negotiation of mutual recognition agreements between the competent authorities of the parties.”

Interestingly Article 11.3 describes the negotiation process for the adoption of a mutual recognition agreement (MRA) as follows:

1. Each Party shall encourage its relevant authorities or professional bodies, as appropriate, to develop and provide to the Joint Committee on Mutual Recognition of Professional Qualifications (MRA Committee) established under Article 26.2.1(b) joint recommendations on proposed MRAs.
2. A recommendation shall provide an assessment of the potential value of an MRA, on the basis of criteria such as the existing level of market openness, industry needs, and business opportunities, for example, the number of professionals likely to benefit from the MRA, the existence of other MRAs in the sector, and expected gains in terms of economic and business development. In addition, it shall provide an assessment as to the compatibility of the licensing or qualification regimes of the Parties and the intended approach for the negotiation of a MRA.

The EU and Canada are thus obliged to “encourage” private and professional organizations who play a key role, and their representative bodies in their jurisdiction, to draw up mutual recognition agreements (McCormack-George 2019, 108).¹⁶

Recognition shall, according to Article 11.4, allow the service provider to provide said service in the host jurisdiction and shall not be subject to discriminatory conditions. Furthermore, recognition is not dependent on a service provider meeting citizenship or residency requirements.

On October 26, 2018 the representatives of the architectural regulatory bodies of Canada and the EU signed a mutual recognition agreement, giving architects the possibility to work across the Atlantic. Qualified architects who satisfy the requirements of the agreement will be able to practice architecture in the host country and eligibility requirements include the following (Architectural Institute of B.C. 2018):

- A qualified architect from the EU and Canada shall be registered or licensed or otherwise recognized and is a member in good standing in their home jurisdiction and have completed a minimum of 12 years of education, training, and practice in the field of architecture, in one or more of the states, provinces or territories of their home jurisdiction, of which a minimum of four years shall be post-registration/licensure experience;

¹⁵ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ 2017, L 11/23, Chapters 9–10.

¹⁶ See also D. McCormack-George, 2018. Recognition of Professional Qualifications Post-Brexit, accessed June 15, 2019, <http://eulawanalysis.blogspot.com/2018/06>.

- proof of “Good Standing” in the home jurisdiction, as verified by the local regulatory authority;
- knowledge of the codes, laws, and other matters applicable to the practice of architecture in the host country;
- mobility across borders in the European Union and across provinces and territories in Canada and;
- European architects seeking licensure in Canada must complete a 10-hour online course on Canadian domain-specific requirements in architecture.

11.7 Public–Private Arrangements as a Basis for EU–China Cooperation?

CETA offers a very interesting example for cooperation between the EU and China, particularly because of its more open-ended character, and at the same time the obligation to facilitate mutual recognition. But it is, for the moment, unlikely that such public–private arrangements based on a CETA-type of agreement may constitute a solid ground for facilitating recognition of professional qualifications. There are a number of reasons for this. Firstly, it took a very long time to negotiate the CETA agreement. The negotiations started in May 2009 and were concluded at the EU–Canada summit on September 26, 2014. The Council adopted a decision in 2016 to adopt the CETA agreement. Meanwhile Belgium had asked the European Court of Justice for an opinion on the compatibility of CETA’s mechanism for the resolution of disputes between investors and States with EU law, which the Court regarded as compatible with primary EU law in its April 30, 2019 judgment.¹⁷ As CETA is a mixed agreement, all national parliaments of the Member States will have to approve the agreement before it can be ratified, a process which has not yet been completed.¹⁸

Secondly, in terms of economic, social, geopolitical, and cultural dimensions, Canada and the EU are more similar than China and the EU, which makes the conclusion of a comprehensive CETA-type of agreement constituting the basis for recognition of professional qualifications, for the moment, most likely “a bridge too far.”

Thirdly, other agreements between the EU and third countries provide for a more minimalistic approach with a role for professional bodies, but without a detailed template for the negotiation and drafting of Mutual Recognition Agreements. McCormack-George mentions fourteen agreements between the EU and third countries that require national authorities “to encourage professional regulatory authorities to enter into discussion with their counterparts in the other contracting party and consider the possibility of mutual recognition” (McCormack-George 2019, 110). An example is the EU–Singapore Trade Agreement, which states in paragraph 1

¹⁷ Opinion 1/17 of the Court of Justice ECLI:EU:C:2019:341 (2019).

¹⁸ See for the legislative train: <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta> (accessed December 19, 2019).

of Article 8.16 (Section E): “Nothing in this Article shall prevent a Party from requiring that natural persons possess the necessary qualifications and/or professional experience specified in the territory where the service is supplied, for the sector of activity concerned.”¹⁹ The second paragraph continues by holding that “[t]he Parties shall encourage the relevant professional bodies in their respective territories to develop and provide a joint recommendation on mutual recognition to the Committee on Trade in Services, Investment and Government Procurement established pursuant to Article 16.2 (Specialised Committees).” Although generally considered as a weak obligation, it may offer an interesting and more viable model for fostering trade in services between China and the EU.

Lastly, what has been said above about the model of mutual recognition, is equally true here. The lack of trust between the European Union and China may well constitute the biggest obstacle for the recognition of professional qualifications, even in situations where merely a weak obligation, like in the EU–Singapore agreement, exists.

11.8 Model of Procedural Cooperation

In the procedural model, the attention for substantive qualifications and the possible convergence of such qualifications across legal orders is completely absent. Instead, this model is focused on facilitating the *process* of recognition. In the EU legislative framework, this model has not always been recognizable as a separate model to stimulate the recognition of professional qualifications. Instead, it has served as a regulatory tool to support other forms of facilitating recognition. A key example in this regard is the European Professional Card (EPC) which had been introduced by the 2013 amendment of the Professional Qualifications Directive.²⁰ The EPC is an electronic procedure for the recognition of professional qualifications. Another example of the “procedural approach” of the 2013 amendment of the Directive has been the introduction of mutual evaluation of regulated professions and information requirements.

The model of procedural cooperation may increasingly be viewed as a model in its own right. Procedural aspects of recognition, and procedural obstacles to recognition, are increasingly viewed as issues to be addressed separately. The main element of the current EU regulatory framework in this regard is the Proportionality Directive.²¹ This Directive results—at least in part—from the outcomes of the mutual evaluation (mentioned above) that revealed inconsistencies and unclarity

¹⁹ Free Trade Agreement between the European Union and the Republic of Singapore, 2019. Official Journal of the European Union L 294/3, April 18, 2018, updated November 14, 2019.

²⁰ Directive 2013/55/EU of the European Parliament and of the Council of November 20, 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (“the IMI Regulation”).

²¹ Directive (EU) 2018/958 of the European Parliament and of the Council of June 28, 2018 on a proportionality test before adoption of new regulation of professions.

in the way in which national authorities reviewed national requirements in light of proportionality.

The 2018 Proportionality Directive created a legal framework for Member States' authorities to carry out proportionality assessments before adopting—or amending existing—provisions restricting access to, or the pursuit of, regulated professions. It shapes the burden of proof obligation of Member States by requiring them to apply proportionality requirements, such as identifying the risks of non-regulation, the scope of the activities reserved for a profession, and the economic impact of regulation. Also, Member States that seek to regulate professions must inform and consult third parties that would be affected. The directive equally includes provisions on the exchange of information between competent authorities of different Member States. Thus, the Proportionality Directive is intended to create a dampening effect on the regulation of professional qualifications in the European Union. Existing national regulations are not caught by these obligations. Also, the Directive in no way seeks to limit national authority in regulating professions, or even seeks to question the general public policy interests that underlie these regulations. Member States, thus, retain autonomy in this regard as well. Still, the EU legislature considered that much could be gained by this approach.²² In particular, the Directive would help challenge excessive rules, improve the comparability of rules and regulations, and overall improve transparency of the rules adopted by the Member States. Furthermore, the Directive would foster the exchange of information—and thereby cross-border cooperation—between the authorities of the Member States. Furthermore, the position of individuals seeking access to other markets would improve, as the Directive provides that Member States should provide them with remedies.²³

11.9 Potential for Shaping EU–China Relations

This procedural model, and especially the way in which it is embodied within the Proportionality Directive, offers potential for Sino–EU relations. Focusing on administrative cooperation, exchange of information, and exchange of views on the regulation of professional qualifications, both at the level of competent authorities and regulators, may especially help to address initial obstacles to recognition. This type of cooperation leaves national autonomy intact to regulate professions as states see fit and allows them to apply their standards to foreign workers as well. The political feasibility of this model is thereby high. The model could, moreover, be applied as a general one, as differences in the way, or the intensity, in which professions are regulated (or the public interests at stake) matter little for the application of this

²² See the Commission's Impact assessment for a Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions, SWD(2016) 463 final.

²³ Article 9 Proportionality Directive.

model. An indirect effect of the model could, furthermore, be that recognition procedures would be simplified. More generally, establishing administrative cooperation between competent authorities would create benefits in its own right. A greater interaction and cooperation between the relevant administrative and regulatory authorities could also prove helpful in addressing common obstacles, such as knowing how recognition works in the other jurisdiction (and why it functions as it does), creating a fruitful ground to do so.

However, there are substantial drawbacks attached to this model as well. First, the strongest advantage of the model—that it does not require the participating states to agree on common standards on professional qualifications—is also its weakness. Indeed, the lack of such common standards means that substantive differences between the regulation of professions continue to exist. Such differences thereby continue to pose significant obstacles to professionals that seek to work in the other jurisdiction. Thus, the overall objective—an increase in volume of the exchange of labor between the EU and China—may turn out to be more modest than what would perhaps be desired. Another issue is that if cooperation between the EU and China would remain limited to procedural cooperation, processes to stimulate mutual understanding and convergence on the *substance* of professional qualifications, and its underlying values, are not necessarily implied. This model could therefore perhaps serve as a stepping stone for more intensified forms of cooperation between the EU and China in the future.

11.10 Model Based on the EU Lawyers' Directive

The model based on the EU Lawyers' Directive takes a slightly different starting point, which is the free movement of lawyers across the EU using the *home country's title* as lawyer (Adamo and Binder 2018, 44–45). Directive 98/5/EC was adopted with a view to facilitate the practice of a lawyer in another Member State on a permanent basis by stating in Article 2 of the Directive that “any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title.” This means that the competent authorities in the host state, where the lawyer wishes to establish himself, cannot require him to undergo a like treatment with non-lawyer applicants.

Directive 95/8 therefore includes a *maximum* of four requirements that Member States may impose upon registration of a lawyer from another Member State:

- Article 1.2 (a): Evidence that the applicant is a national of a Member State;
- Article 3(2): Evidence that the applicant is registered a lawyer in his home state;
- Article 6(3): Coverage by professional indemnity insurance;
- Article 11(4): Information whether the lawyer is a member of a grouping and if the case be, any relevant information on that grouping.

Bar associations, law societies and legislators in Member States may not introduce additional requirements.²⁴

It appears that this system seems to work fairly well in a sense that the Directive is applied uniformly across the EU Member States, and “that it is possible to exercise the profession on a permanent basis using the home country’s professional title” (Adamo and Binder 2018, 44). But there are various remaining barriers to the free movement of lawyers within the EU as a result of requirements that Member States impose upon lawyers, ranging from registration with the national bar association, or undergoing a three-year internship, in addition to examinations, in national legal disciplines.²⁵

11.11 Conclusion

The recognition of professional qualifications between jurisdictions is a thorny issue by its very nature. Imbalances between demand and supply in different sectors create a strong argument for the opening up of markets. However, there are both compelling and diverse reasons to regulate certain professions. Such reasons may relate to the protection of public health and safety (e.g., professions in the medical and technical domains) or to the protection of consumers/end users (e.g. architects), or be culturally inspired (e.g. teachers). Other public interests involved may be of a more general nature and for instance relate to the stability of the financial sector (e.g. accountants) or the judicial system (e.g. lawyers). For such professions, such regulations are not only for the protection of clients, but also to maintain the trust of the general public in the reliability of these professions which informs the regulation thereof.

This tension between public interests to regulate professions and economic rationales to open up markets has long been an issue within the EU. This has resulted in a variety of regulatory models to accommodate the interests and values at stake. Such models differ in terms of their impact on national autonomy and also in their effectiveness in actually achieving access to markets in other EU Member States.

Crucially, however, none of these models actually award EU institutions the competence to decide on access to specific professions. Despite what may be suggested by EU regulatory instruments, such as the EU Professional Card, markets for professionals are still defined by national borders. This is even true for the harmonization model, the most integrated one available. Even in case of full harmonization of professional qualifications, national authorities still decide on

²⁴ See also CCBE position Evaluation of the Lawyers’ Directives: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/FREE_MOVEMENT_OF_LAWYERS/FML_Position_papers/EN_FML_20140912_CCBE_position_on_Evaluation_of_the_Lawyers__Directives.pdf (accessed June 17, 2019).

²⁵ See also the S. J. F. J. Claessens, M. C. C. van Haeften, N. J. Philipsen, B. J. Buiskool, H. E. G. S. Schneider, S. L. T. Schoenmaekers, D. H. Grijpstra, and H. J. Hellwig, 2012. *Evaluation of the Legal Framework for the Free Movement of Lawyers*. Zoetermeer: Panteia.

access to their respective national markets. The exercise of fully harmonized professions may still be subject to national rules and conditions—e.g., compulsory membership in professional organizations.

Two lessons are to be drawn from this for potential Sino–EU cooperation in the field of professional qualifications. The first is that any such cooperation will always involve individual Member States’ authorities. This may be a complicating factor, especially when it concerns access to the European market. Even if a recognition scheme between China and the EU would be based on trade and services, this would still not entail recognition of professional qualifications at the EU level, but at the level of the EU Member States. The Member States have not attributed the EU with this responsibility for internal recognition procedures. Recognition procedures with other states would thus follow that set-up. The second lesson is that the EU has built extensive experience in dealing with the tensions outlined above. This experience may be relied upon here. In the earlier stages of the EU’s professional qualification policies great efforts were put into harmonizing professional qualifications. For professions for which the EU succeeded to harmonize qualifications, empirical evidence demonstrates that access to other markets is indeed greatly enhanced. Harmonization is an arduous process, however, even when it succeeds, other obstacles may continue to exist. Harmonization efforts have been especially successful for medical professions, in which typical national concerns play a smaller role. The EU’s internal dealing with professional qualifications equally demonstrates that a holistic approach is necessary in view of genuinely opening up markets. A focus on substantive aspects needs to be complemented with attention for the procedural aspects of recognition. Interestingly, the EU legislature has only more recently picked up this latter aspect.

The procedural model may perhaps offer the highest potential for future Sino–EU cooperation. The ambitions associated with this model may be modest, but it may, for now, be the most feasible and open more intensified forms of cooperation in the future. It may foster cooperation and interaction between recognition authorities. As the internal EU experiences have demonstrated, a sufficient level of mutual trust is key for all of the models to work. The procedural model may foster this from the ground up.

References

- Adamo, S. and T. Binder. 2018. “Union citizens and the recognition of professional qualifications: where do we go from here?,” In *EU Citizens’ Economic Rights in Action: Re-Thinking Legal and Factual Barriers in the Internal Market*, edited by de S.Vries, E. Ioriatti, P. Guarda, and E. Pulice. Cheltenham: Edward Elgar Publishers, pp. 38–48.
- Architectural Institute of B.C. 2018. Canada and the European Union Sign Mutual Recognition Agreement, October 31, accessed June 15, 2019. <https://aibc.ca/2018/10/canada-and-the-european-union-sign-mutual-recognition-agreement>.

- European Committee for Standardization. 2016. A common European framework for ICT Professionals in all industry sectors, European e-Competence Framework, accessed June 15, 2019. <https://www.ecompetences.eu/>.
- Garben, S. 2011. *EU Higher Education Law: The Bologna Process and Harmonisation by Stealth*. Alphen aan den Rijn: Kluwer, p. 79.
- Groussot, X., G. T. Petursson, and H. Wenander. 2016. Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?, *European Papers* 1(3), pp. 865–892.
- Henning-Roth, W. 2017. “Chapter 19: Mutual recognition,” In *Research Handbook on the Law of the EU’s Internal Market*, edited by P. Koutrakos and J. Snell, Cheltenham: Edward Elgar Publishing, pp. 427–459.
- Heremans, T. 2012. *Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation*, Oxford: Hart Publishing.
- Hatzopoulos, V. 2012. *Regulating Services in the European Union*, Oxford: Oxford University Press, pp. 239–242.
- Janssens, C. 2013. *The Principle of Mutual Recognition in EU Law*. Oxford: Oxford University Press, pp. 106–120.
- Marginson, S. and M. C. van der Wende. 2007. Globalisation and Higher Education, *OECD Education Working Papers* 8, p. 11. doi: 10.1787/17383173824.
- McCormack-George, D. 2019. “Chapter 6: Trade in Services, Migration and Recognition of Professional Qualifications post-Brexit,” In *Upgrading Trade and Services in EU and International Economic Law*, edited by S. Tans, and M. Veenbrink, Nijmegen: Wolf Legal Publishers, p. 121.
- Pelkmans, J. 2005. “Mutual Recognition in Goods and Services: An Economic Perspective,” In *The Principle of Mutual Recognition in the European Integration Process*, edited by F. Kostoris and P. Schioppa. London: Palgrave Macmillan, pp. 85–128.
- Pelkmans, J. 2007. Mutual recognition in Goods: On promises and disillusion, *Journal of European Public Policy* 14(5), pp. 699–716.
- Stuttgarter Nachrichten. 2019. Zuwanderung für ausländische Pflegekräfte soll erleichtert werden, August 12, accessed December 18, 2019. <https://www.stuttgarter-nachrichten.de/inhalt.gesundheitsminister-jens-spahn-zuwanderung-fuer-auslaendische-pflegekraefte-soll-erleichtert-werden.5cf2bc52-b006-4589-a563-49e6f99cb27a.html>.
- Tuning China. n.d. EU–China Tuning study, *Tuning China*, accessed December 18, 2019. <http://tuningchina.org>.
- Van den Brink, A. 2016. Horizontal Federalism, Mutual Recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy, *European Papers* 1(3), pp. 921–41.
- Vlk, A., M. C. van der Wende, and D. Westerheijden. 2008. GATS and the steering capacity of a nation state in higher education: case studies of the Czech Republic and the Netherlands, *Globalisation, Societies and Education* 6(1), pp. 33–54.
- Weiler, J. H. H. 2005. “Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO,” In *The Principle of Mutual Recognition in the European Integration Process*, edited by F. Kostoris and P. Schioppa, Basingstoke, London and New York: Palgrave Macmillan, pp. 25–84.