

### The Recognition of Professional Qualifications in the European Union: The Practice of Administration and European Courts - The Ski Instructor Example

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## **The Recognition of Professional Qualifications in the European Union**

### **The Practice of Administration and European Courts – The Ski Instructor Example**

#### **Abstract**

The case of the English ski instructor Simon Butler working in France is the best example of the malfunctioning of the professional-qualifications-recognition system in Europe. The practice of European and national administration as well as the jurisprudence of the CJEU and French courts shows how important and complex the subject of qualification recognition is. A review of administrative practices and an analysis of case law show the positive and negative sides of the EU's qualification recognition system. The European Commission is carrying out numerous activities aimed at improving said system. The latest solutions make the idea of qualification without borders a reality.

The most important task is to examine the changes and legislative proposals of the European Union, analyse the case of Simon Butler and present proposals for changes against the background of activities undertaken throughout the Union. They should be realised through legal research methods and non-reactive social methods.

**Keywords:** Professional Qualifications, Ski Instructor, European Union, Internal Market, Law, Jurisprudence, Court of Justice

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## Introduction

It is an ordinary winter morning in December 2013, in the French Rhône-Alpes region. Young people practise skiing under the supervision of a few ski instructors. They know those teachers because they have worked in these mountains since 1982; they like working with them because they are real blue-chippers, (highly valued sportspeople), and are people who lead their own registered companies. However, some of them are slightly different from the other instructors – they are British citizens. They have experience and certificates of competence gained in the United Kingdom; they are also members of a British professional instructors' association. Though they are registered in France as residents, they pay taxes; they have local, regional, and national authorisation to conduct business.

However, this typical day changed very quickly. A few hours after the beginning of the day's skiing lessons, the slope was suddenly swarming with many police officers on snowmobiles and skis. They immediately arrested most of the ski instructors, as they had discovered that they were working without national French ski instructor certificates. Eventually, the police arrested six British instructors and charged them with working in France without a French ski instructor's licence. Moreover, one man was accused of operating a ski instruction company without specific French authorisation.<sup>1</sup>

He was called Simon Butler, and his story became quite famous in Europe. Now his case serves to represent the situation of European internal market policy regarding the field of the recognition of professional qualifications, the freedom of workers' movement, and the right to establish companies. This man and his situation is only one example of such misunderstandings, the primacy of (non-) EU law, poor regulations, and the unfair practice of national administrations and courts. Similar cases could also occur with lawyers, tour leaders, trade agents or photographers, and all 5,500 professions where countries regulate the provision of services.<sup>2</sup>

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<sup>1</sup> Simon Butler's story was reconstructed on the basis of: P. Allen, *Ski instructor locked up for giving lessons in Alps wins court battle*, "Mail Online", 4.12.2016; H. Druce, *Ski instructor guilty: Simon Butler is not outside the law*, "The Telegraph", 5.02.2016; *Is Simon Butler a national hero – or just a skier who ignores*, "The Independent", 20.06.2014; H. Morris, *British ski instructor sentenced to prison or a €30,000 fine*, "The Telegraph", 16.06.2014; <http://www.planetski.eu/news/8476> (access 26.10.2019); <http://www.planetski.eu/news/8493> (access 26.10.2019); <https://www.j2ski.com/ski-chat-forum/posts/list/0/16320/simon-butler-basi.page> (access 26.10.2019).

<sup>2</sup> Commission staff working document impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Coun-

Butler's case serves as an example of breaking the EU's internal market rules. Thus, it is an important task to examine European Union national Member States' laws regarding the provision of services, the case law of the *Court of Justice of the European Union* (CJEU) and some national courts in this area. A comparison of these legal situations regarding the practice of local administration and states should be the most important element. In addition, it is necessary to investigate the European Union's current work on the system of recognising professional qualifications, and the freedom to provide services, as well as other methods of qualification recognition. Proposals of specific solutions to this chaos should arise from these considerations. The situation in France, the UK, Italy, Poland, Austria, and the Czech Republic should serve as an example for the entire EU.

The current study was conducted using several research methods combined as a part of the case study method.<sup>3</sup> In short, the case study focuses on the situation of Simon Butler and the people, situations, and relationships associated with him. As part of the general case study method, non-reactive research methods were used. In particular, the method of content analysis and an analysis of statistical data, press releases, and literature analysis were used.<sup>4</sup> These research methods were supplemented by methods belonging to the legal sciences: the functional<sup>5</sup> method of legal acts and applying the law as well as the comparative method. Legal methods have been used mainly to analyse acts of European Union law and national law, the jurisprudence of the CJEU and the jurisprudence of national courts, as well as the analysis of *opinio iuris*.

## Simon Butler's Story

Simon Butler is an ordinary citizen of the United Kingdom. Skiing is his great hobby; he has competed in FIS ski tournaments, was a highly competitive sportsperson in his childhood and decided to teach skiing in

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cil introducing a European services e-card and related administrative facilities (SWD/2016/0439 final-2016/0403 (COD)), Brussels 10.01.2019; 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), Brussels 10.01.2019.

<sup>3</sup> A.B. Starman, *The case study as a type of qualitative research*, "Journal of Contemporary Educational Studies", no. 1/2013, pp. 28–43.

<sup>4</sup> E.R. Babbie, *Podstawy badań społecznych*, Warszawa 2008, pp. 349–369; C. Frankfort-Nachmias, D. Nachmias, *Metody badawcze w naukach społecznych*, Poznań 2001, pp. 320–350.

<sup>5</sup> D. Kędzierski, *Metodologia i paradygmat polskich szczegółowych nauk prawnych*, „Transformacje Prawa Prywatnego”, no. 3/2019, pp. 34–51; R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, pp. 67–80.

the early 1980s. Thus, he became a member of the British Association of Snowsport Instructors (BASI), a private British organisation, and took instructors' courses. BASI awarded him the highest-class instructor's diploma at an international level (level 4, ISTD).<sup>6</sup>

Shortly after obtaining the ISTD, Butler went to the French Alps, where he found excellent geographic and economic conditions for ski tuition. He also found a home there. He began to run a sole proprietorship, registered in the UK, in the Rhône-Alpes region. For the next 20 years, the Briton taught skiing on the alpine slopes. He was a valued instructor who mainly taught his fellow citizens, increasingly spending time in the highest mountains of Europe. He ran a UK-registered company, employed other British ski instructors, paid taxes, and met insurance requirements.<sup>7</sup>

Twenty years passed, during which Butler and his staff trained thousands of people. They settled in France, and obtained the right of residence or citizenship. They fitted into the landscape of instructors in the Alps. However, this entirely normal situation changed during the 2004/2005 ski season. Unexpectedly, Simon Butler was summoned to the prefecture of the Haute-Savoie department, where he was informed that he was running business without the permission of the authorities. The prefect issued Butler with a 10,000 euros administrative fine, and the administration indicated that the instructor should re-register his activity because the previous registration was incorrect. They underlined that he had inadequate civil liability insurance and lacked French qualifications for teaching winter sports. Butler did not appeal against the administrative penalty; he promptly paid the penalty, and it seemed that the case was over.

However, these events of the 2004/2005 season were merely the beginning of Simon Butler's problems. He was regularly summoned to the authorities of Haute-Savoie department, and to the police. Administrative and criminal penalties were imposed on him, on the grounds of running a company without appropriate permits, and provision of ski instructor services without appropriate French professional qualifications. Each time, however, Butler emphasised that he was a professional ski instructor, with a certificate issued by the British BASI instructor association. Moreover, as a citizen of the European Union, he had the right to provide services, migrate, and run a company in other EU countries without any obstacles.

In the years 2005–2013, 11 administrative and penal fines were imposed on Butler for practising the profession of instructor without

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<sup>6</sup> <https://www.basi.org.uk/> (access 11.03.2021); <https://www.j2ski.com/ski-chat-forum/posts/list/0/16320/simon-butler-basi.page> (access 26.10.2019).

<sup>7</sup> <https://www.sbski.com/> (access 3.08.2019); <https://beta.companieshouse.gov.uk/company/05211662> (access 3.08.2019).

French certification, employing instructors without French licences, and running a business without a French instructor's licence. Demand for his services was growing from year to year, and he became increasingly involved in his instruction activity. He already employed six British ski instructors in the winter season 2013/2014.

Simon Butler and his instructors certainly did not expect a raid by the gendarmerie and officials. On one ordinary day, they were training their students on the alpine slopes in Megève. The arrival of dozens of gendarmes stunned the instructors and other skiers; the gendarmerie detained Butler and six other instructors employed by him. The British were subjected to criminal charges of running a regulated ski instructor profession without permission, and failure to comply with penalties from previous years. In addition, Butler was charged with employing instructors who did not have the proper certificates. Simultaneously, the administrative authorities of the Haute-Savoie department imposed on him an administrative penalty of 30,000 euros, because of his running a business without permission. The police and administrative authorities set forth reasons for the judgement that the British did not have French instructor licences, on the basis that British licences are not recognised by the French authorities.<sup>8</sup>

The real problems of Simon Butler and his employees were only just beginning in the winter of 2014. The Briton was accused of employing people without appropriate qualifications and providing instructor services without appropriate French certificates. In addition, the prefect of the Haute-Savoie department issued the next administrative penalty for running an enterprise without permission to conduct regulated activity. The instructor strongly disagreed with this interpretation of the law by the French authorities and emphasised that he had been running a legal company for 30 years, had an English certificate of qualification, and employed only people who had similar certificates. Unfortunately, his explanations were deemed unacceptable to the authorities. Butler decided to fight back, on the grounds of both criminal and administrative law. Over the years, he did everything possible to convince the courts and institutions of his freedom to provide services, migrate, and run a business in another EU country. His legal team of lawyers, Jean-Yves Lapeyrère and Philippe Planes, would support him in his campaign.<sup>9</sup>

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<sup>8</sup> Decision of the Tribunal Administratif de Lyon, 1403050, Lyon 22.11.2016; H. Druce, op.cit.

<sup>9</sup> <http://ec-oe.eu/press-release-simon-butler-the-eu-forerunner-wins-the-final-slalom/> (access 11.03.2021); *Decision of the Tribunal Administratif de Lyon*, op.cit.; <https://www.planetski.eu/news/8476> (access 3.08.2019).

Here we can observe two kinds of proceedings – criminal and administrative. The prosecutor accused Butler of pursuing the regulated profession of ski instructor without the proper qualifications required in France, and employing people without appropriate training. The Briton was accused according to Article 446-1 – 446-4 of the *French Penal Code*.<sup>10</sup> The prosecutor recommended punishing the Briton with a fine of 30,000 euros and one year's imprisonment. The court of first instance complied with the demands of the prosecutor, but limited the prison sentence to six months. However, the execution of the prison sentence was suspended. At the same time, Butler appealed against the administrative decision of the Haute-Savoie department prefect to the Minister of Sport, but this appeal was also dismissed.

In both cases, the instructor was accused also of violating Article 212–184 of the *Sports Code*: performing the regulated profession of instructor without professional qualifications.<sup>11</sup> To explain the judgement, it was emphasised that only the French Minister of Sport defines what kind of certificates must be held by people providing regulated professions; at that time, Eurotest certification was required for ski instructors.<sup>12</sup>

Butler and his lawyers highlighted that he himself was a highly qualified person; he had a top-rated British certificate issued by the BASI association (ISTD, level 4). Based on *Directive 2005/36/EC* (implemented as Article 212–90 of the Sports Code), a person with a qualification obtained in one Member State should be able to work as an instructor in France without any problems.<sup>13</sup> Moreover, the lawyers pointed out that Articles 45, 49, and 56 of the *Treaty on the Functioning of the European Union* (TFEU) allow people to work, provide services, migrate, and operate companies in other EU countries without any obstacles.<sup>14</sup>

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<sup>10</sup> Code pénal, Paris 11.03.1994.

<sup>11</sup> Code du sport de la République Française, Paris 15.07.2019.

<sup>12</sup> Arrêté du 11 avril 2012 relatif à la formation spécifique du diplôme d'Etat de ski – moniteur national de ski alpin; Arrêté du 25 octobre 2004 fixant les conditions d'obtention de la partie spécifique du brevet d'Etat d'éducateur sportif du premier degré, option ski alpin; <https://www.thefrenchsnowsportsacademy.com/euro-test-training> (access 11.03.2021); *Mapping of professional qualifications and relevant training for the profession of ski instructor in the EU-28, EEA and Switzerland*, Brussels 2015, pp. 14–16.

<sup>13</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, L 255/22, OJ L 255, Brussels 7.09.2005.

<sup>14</sup> Treaty on the Functioning of the European Union, C 326, OJ C 326, Brussels 26.10.2012.

The verdict of the criminal court and the decision of the Minister of Sport were legally invalid. A criminal verdict appeal was entered to the court of second instance in Chambéry, and an administrative complaint was filed with the Administrative Court of Lyon. The arguments from the first instances were repeated.

The appellate criminal hearing was held at the district court in Chambéry in April 2015. The court upheld all the arguments of the Briton and his legal team, and freed him from all imputations. He was also awarded high procedural costs from the French Republic. The court stated that he could now provide his instructor services wherever he wanted in France. The judge stressed that the British instructor had appropriate British professional qualifications that were recognised in France and went on to unequivocally emphasise that EU law requires the recognition of professional qualifications obtained in other countries. *Directive 2005/36/EC* was implemented incompletely in the French legal system, omitting the *Penal Code*. In addition, the interpretation of criminal law and sports law by the court of first instance, prosecution and gendarmerie was not a pro-EU interpretation. Individuals who have vocational qualifications based on *Eurotest* and persons with foreign qualifications have the same rights to practise in France, but only after meeting the conditions presented in the *French Sport Code*.

The failure of the French justice system was significant. Butler's lawyers immediately complained to the Lyon Administrative Court about the Ministry's decision. The hearing took place in November 2016. The court's verdict was unequivocal: *cancel all sentences and penalties imposed on Butler. The activity of ski instructors in France is possible under EU rules.*

The administrative court based his arguments almost entirely on the same principles as the criminal court. He emphatically foregrounded the insufficient implementation of the directive, that it was not a pro-EU interpretation, and underlined numerous errors in the administrative procedure. He also drew attention to ensuring the freedoms of the EU's internal market, even when the implementation and interpretation of EU law are insufficient. The court also specified when a person migrating for work must undergo an adaptation period or meet other conditions to recognise qualifications. The Lyon court also noted the problem of recognising professional qualifications when the specific profession is regulated in the country of arrival, but not in the immigrant's country of origin.<sup>15</sup>

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<sup>15</sup> *Decision of the Tribunal Administratif de Lyon, op.cit.*



Butler's victory was complete; his instructors also obtained similar judgements. The Briton's case became famous throughout Europe, because many famous Britons had spent their holidays in the Alps and met Butler. The instructor also decided to bring an action against the French government and the British ski association BASI. He argued that he was excluded from BASI because of inappropriate behaviour. Fortunately, both cases ended amicably.<sup>16</sup> We are indebted to the British ski instructor for promoting the recognition of professional qualifications. As a result, Europe realised the importance of recognising professional qualifications in the internal market.<sup>17</sup>

Simon Butler still lives in Megève, but runs his company in the UK. He employs UK citizens who are ski instructors with BASI qualifications and Butler and his instructors can still be found on the Alpine slopes, teaching young Britons to ski.

Simon Butler's case is typical. Thousands of specialists in Europe are victims of the inadequate system of recognising professional qualifications. Representatives of the sport and tourism, education, construction, financial industries and others, regularly face problems in providing services outside their country of origin, and recognition of qualifications. The French case is only one example of these problems in Europe. Despite the growing mobility of people providing free services, we still rarely hear about such spectacular problems as Butler's.

The *Court of Justice* (CJEU) of the EU still deals very rarely with matters related to the freedom to provide services and the recognition of professional qualifications. In fact, the European Union and its Member States have not yet developed a coherent system for this. Butler's case features two main problems: the lack of recognition of professional qualifications, and the illogical system of obtaining and recognising vocational qualifications and education in Europe.

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<sup>16</sup> Andriana, *Press Release Simon Butler: The EU "forerunner" wins the final slalom*, <http://ec-oe.eu/press-release-simon-butler-the-eu-forerunner-wins-the-final-slalom/> (access 11.03.2021); J. Peele, *GB ski instructor wins historic case in France*, <https://www.planetski.eu/news/8476> (access 3.08.2019).

<sup>17</sup> Commission Delegated Regulation (EU) 2019/907 of 14 March 2019 - establishing a Common Training Test for ski instructors under Article 49b of Directive 2005/36/EC of the European Parliament and of the Council on the recognition of the professional qualifications (L 145/7); *EU law regarding ski instructors in France P-005974/2019*, <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2019-005974&format=XML&language=EN> (access 26.10.2019); *Mapping of professional qualifications and relevant training for the profession of ski instructor in the EU-28, EEA and Switzerland*.

## The System of Recognising Professional Qualifications in Europe

The recognition of professional qualifications is the cornerstone of the common market of the European Union. Without mutual recognition of professional qualifications in the Union, it is impossible to create a common market for services in Europe. The issue of recognising qualifications mainly concerns free professions and people providing services on their own account or in small enterprises, such as lawyers, doctors, sports instructors, builders or guides. Therefore, it influences small entities that require special public protection, and whose services are also highly desirable in the market.

The topic of the recognition of qualifications has been present in public discourse since the 1980s. Originally, the European Commission wanted to establish a common, single market for services and employment. Unfortunately, Member States started to oppose this, claiming that many migrating professionals and small enterprises do not know the language and regional culture, or that they provide low-quality services. However, the real reason for the opposition was to protect domestic markets against a surge of equally good competition. European Union states have begun to increasingly regulate their internal markets. Nowadays, more than 5,500 kinds of professions in Europe must meet special conditions in order to provide services.<sup>18</sup>

Certainly, this system of regulations is targeted mainly at the internal state markets; however, it has mostly limited the migration of European foreigners. This behaviour of the States resulted in an artificial increase in the demand for services, increased prices, and numerous system distortions. The best example of this absurdity might be the situation of ski instructors in France; the Republic decided to protect the domestic market of ski services, and to inhibit the migration of instructors from Switzerland, Austria, and Germany. For that reason, the regulated profession of ski instructors was created.<sup>19</sup>

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<sup>18</sup> T. Heremans, *Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation*, Oxford 2012, *passim*; [https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition\\_en](https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition_en) (access 27.10.2020); <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?newlang=en> (access 4.04.2019).

<sup>19</sup> L. de Haan, J. Sniijders, *Easing legal and administrative obstacles in EU border regions. Case Study No. 9, Labour mobility : obstacles in the recognition of professional qualifications (Germany – Luxembourg – France – Belgium)*, Brussels 2019, pp. 6–20; L. Moustakas, H. Smulders, C. Collins, *Provision and Use of Qualifications in Active Leisure*, Brussels 2020, pp. 8–19.

After many such examples of protectionism, the topic of regulated professions grabbed the headlines; thus, it has become present in EU and state law. The consequence of this strategy was limitations on many professions in Europe, and barriers to the migration of specialists. The European institution did not have enough power to encourage countries of the European community to adopt the professional deregulation. Therefore, the European Commission designed the system of mutually homologating other professionals. Finally, this legislation took the form of the system of recognising professional qualifications in Europe.<sup>20</sup>

*Directive 2005/36/EC, on the recognition of professional qualifications*, indicates that if a person wants to work or provide services in a country other than their country of origin, in a profession regulated in a new country, that person must have appropriate qualifications. They can do it in two ways: fulfil requirements in the new country by obeying the same rules as the citizens, or through the recognition of qualifications from other European countries. However, the host country has the right to say that qualifications acquired in another Member State are incomplete (different from national requirements). They may request the person arriving to complete their qualification by passing a language exam, competence exam or an adaptation internship. However, after undergoing such a procedure, the newcomer has the right to provide services in a regulated profession under the same conditions as nationals. If the profession is not regulated in the country of arrival or both countries, then it is permitted to provide services without recognition. When the profession is not regulated in the country of origin but is regulated in the second country, the immigrant has to fulfil the new country's requirements. The specific recognition procedures may vary slightly according to whether the provision of services is temporary or permanent. Additionally important is where the qualifications have been acquired: in member countries, or outside the European Union.<sup>21</sup>

## **The Practice of the CJEU and Administration**

The case of the British ski instructor was very famous; however, it is not the only case of this type in Europe. Since June 2016, we have

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<sup>20</sup> [https://ec.europa.eu/internal\\_market/scoreboard/performance\\_per\\_policy\\_area/professional\\_qualifications/index\\_en.htm](https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/professional_qualifications/index_en.htm) (access 27.10.2020); *Study evaluating the Professional Qualifications Directive against recent educational reforms in EU Member States*, London 2013, pp. 7–31.

<sup>21</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, L 255/22, OJ L 255, Brussels 7.09.2005.

heard about ski instructors' problems in Tyrol and Styria in Austria. The administrations of these provinces have doubts regarding the arrival of ski instructors from other EU countries; they dispute their rights to teach skiing in the Alps, due to those instructors having foreign qualifications. Austrians emphasise that foreigners do not know the specificities of skiing and safety in Tyrol and Styria. However, the authorities of these regions already know the outcome of the case of Simon Butler; they are aware that they cannot punish foreign-qualified instructors. Consequently, local governments have introduced rules that foreign instructors can only train foreign clients. Moreover, advertising and promotion directed at Austrians is prohibited, with administrative fines and the prohibition of work in Tyrol and Styria.

The European Commission noted this practice of the Austrian authorities in 2014. The Commission warned the federal government twice that the implementation of such regulations by Tyrol and Styria violates the freedoms of the EU internal market and the principles of recognition of professional qualifications. The Austrian government was in discussion with the Commission for nearly 2.5 years. Fortunately, at the beginning of 2017, Austria recognised its mistake and withdrew these rules. The monitoring conducted by the European Commission was effective. Today, throughout the Alps, ski instructors can work freely.<sup>22</sup>

Ski instructors are only one example of the Member States and European Union's approach to the liberalisation of internal market freedoms and the recognition of professional qualifications. Incidents such as those in Austria and France occur regularly in Europe. They concern many professions, usually those related to mobility (e.g. in the tourism, transport, maritime, and sports industries). From the point of view of the European administration and the CJEU, these are marginal issues. However, over the past decades, they have appeared as an object of interest for the Luxembourg court.<sup>23</sup>

Matters considered by the Tribunal should be divided into two kinds: non-implementation or wrong implementation of the *Directive on the recognition of professional qualifications*, and the recognition procedure itself.

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<sup>22</sup> <https://www.snowinstructors.info/magazine/austria-to-eu-court-because-of-foreign-ski-instructors> (access 26.10.2019); [http://europa.eu/rapid/press-release\\_IP-16-2493\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2493_en.htm) (access 26.10.2019); C. Weakley, *European Commission takes Austria to court over discrimination against foreign ski instructors*, "The Telegraph", 1.08.2016.

<sup>23</sup> V. Donlevy et al., *Study on obstacles to recognition of skills and qualifications*, Luxembourg 2016, pp. 40–62; Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities ({SWD(2016) 439 final} {SWD(2016) 442 final}), Brussels 10.01.2019.

The second type of cases also concern the recognition of professional qualifications before the adoption of *Directive 2005/36/EC* and some time before its transposition into national law (20 October 2007).

Many countries have had problems with implementing the directive, mainly due to extending the protection of their own national markets against the inflow of professionals from other countries. The European Commission decided to bring complaints to the CJEU against seven countries because of transposition failure. One of those countries was France, which had a long discussion with the Commission on the purpose of implementing the directive. The court upheld all Commission complaints; each time the Tribunal stated that the member country had not transposed the directive in a timely or relevant manner. The court charged France with omitting the rules of the directive and only partially implementing its rules in the national legal system. Unfortunately, despite the verdict, France did not fully adapt its law to the European principles of recognising professional qualifications. It was only in 2016, after the British instructor scandal, that the Republic fully accepted the European principles and completed implementation of the directive's principles.

The CJEU dealt with several legal questions and Commission complaints, concerning recognition of the right to work in a foreign country based on foreign qualifications. However, these cases had arisen prior to the introduction of the directive on the recognition of professional qualifications. The case presented in the tribunal in 2009 is particularly interesting, because it is related to Butler's case in France. The European Commission charged France with non-implementation of *Directive 92/51/EEC*, on the recognition of professional qualifications (the second system of recognition). The case strictly concerned the provision of services by snowboard instructors from Germany and the UK. Previously, France had also built obstacles to foreign ski instructors: the Republic denied ski instructors the ability to work providing services to people from Germany and the UK because those instructors did not possess French Eurotest qualifications. The French and British ski associations, which held opposing positions, took part in the court proceedings. For the first time, more than five years before Butler's case, the British BASI and the topic of recognising British skiing qualifications arose. Eventually, this case was withdrawn from the list at the request of the Commission, because of the agreement with France. However, the Advocate General confirmed that all ski instructors from the UK and Germany may legally work in France. The case is very interesting because in 2009, the same issue as Butler's case came under the deliberations of the tribunal, and

similar actors took part in it. The British ski instructor would never have encountered trouble if all the parties had complied with the agreement and the opinion of the Advocate General.<sup>24</sup>

Meanwhile, the CJEU dealt with two substantively similar issues. The basis of these proceedings was another issue. The court found that obtaining the right to exercise a regulated profession in another Member State must not be based on the issue of recognising professional qualifications, but the recognition of education under *Directive 89/48/EEC*.<sup>25</sup>

Thus, it appears that there are two ways of obtaining the right to work or provide services in other EU states. The first is the recognition of professional qualifications, while the second is the recognition of education. The apparent problem is the existence of two systems of recognition, and the lack of a clear link between them. Unfortunately, both the institutions of the EU and the CJEU do not acknowledge the issue of double recognition. Nevertheless, in both cases, the court found that a person holding a relevant vocational training diploma has the right to take up employment or provide services in regulated professions in another Member State, under the same conditions as nationals.

The EU Court of Justice also worked on the recognition of professional qualifications in the context of the 2005 directive. However, it seems that this topic was not popular in cases pending before the Tribunal. Nonetheless, the conclusions were similar; a foreigner who acquired professional rights in one European state has the right to exercise a regulated profession or provide services in another Member State, on the same provisions as citizens of that country. Building any barriers or improper implementation of the directive is a violation of principles of the EU internal market, as indicated in the *Treaty on the Functioning of the European Union* (TFEU).<sup>26</sup>

The caselaw of the Luxembourg Tribunal is unambiguous. Nevertheless, the cases of *Butler* and *Tyrol* point to the fact that European countries and local administrations have different opinions on the provision of services by foreigners and the recognition of professional qualifications. This

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<sup>24</sup> Commission vs France (CJEU, C-200/08).

<sup>25</sup> Colegio de Ingenieros de Caminos, Canales y Puertos vs Administración del Estado (CJEU, C-330/03); Ingeborg Beuttenmüller vs Land Baden-Württemberg (CJEU, C-102/02); Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, L 019, 31989L0048, Brussels 21.12.1988.

<sup>26</sup> P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford, New York 2020, pp. 860–882; European Commission vs Portuguese Republic (CJEU, C-458/08); Treaty on the Functioning of the European Union, C 326, OJ C 326, Brussels 26.10.2012.

happens despite the clear European law, correct transposition, and the unequivocal position of CJEU.

National governments, regional authorities, and even private entities build challenging formal and informal barriers for migrating professionals. Bureaucracy, document translation, disorganisation, information in foreign languages, the necessity of personal appearance in offices, insurance obligations, and many more, are the main examples of informal barriers to the provision of services by foreigners. The biggest, semi-formal barrier designed by countries, cities, and organisations is the meretricious raising of access requirements to occupations. For instance, a candidate is legally required to take multi-annual training only in places indicated by the national legislator. Formally, this does not violate the 2005 directive, because every foreigner can apply for the recognition of his or her native qualifications. However, the administration of the host country always forces newcomers to complete an examination or adaptation internship. Requirements are set so that the foreigner cannot pass the exam or take an internship; often, is also difficult for immigrants to take part in internships.

Seemingly, the law of the country is fully adapted to the directive on the recognition of professional qualifications. The state, the regional and local administration do not impose any barriers against foreigners if they are professionals. Internal regulations of the activity, place, time, and organisation are the greatest problems. Only people who satisfy internal conditions have the right to provide services in those places, and in most cases, foreigners with non-local qualifications do not satisfy these rules. Countries where the professions are not legally regulated or are poorly regulated support such practices, often creating them through a network of dependent entities.<sup>27</sup>

The French and Austrian situations provide only one set of examples. The basic problem arises in a situation when a profession is not legally regulated; in a case such as this, the recognition procedure is not possible. However, the Member State protects the domestic market from foreigners providing their professional services.

Many countries try to protect their own national markets from the provision of services by foreigners. National authorities try to circumvent and distort the law, in spite of the unambiguous European law and the clear

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<sup>27</sup> V. Donlevy et al., op.cit., pp. 62–102; M. Riemsdijk van, *Obstacles to the Free Movement of Professionals: Mutual Recognition of Professional Qualifications in the European Union*, “European Journal of Migration and Law”, no. 15/2013, pp. 47–68; [https://ec.europa.eu/growth/content/effects-reforms-regulatory-requirements-access-professions-country-based-case-studies-0\\_en](https://ec.europa.eu/growth/content/effects-reforms-regulatory-requirements-access-professions-country-based-case-studies-0_en) (access 15.07.2020).

jurisprudence of the CJEU. Typically, informal or semi-formal barriers to the internal market and rules for the recognition of professional qualifications are introduced. It is common for the public administration to cede the alleged protection of local markets to local governments, subsidiaries or private entities. Specialists such as tourist guides and sports instructors are professionals working with people; they cannot fight with local authorities when working with clients. Therefore, their position is very weak when faced with the negative practices of public authority. A universal system of recognising qualifications, and a free internal market in Europe, cannot be realised until such practices are abolished.

## Conclusions

The situation of Simon Butler exemplifies the problems related to the recognition of professional qualifications, the recognition of education, and regulated professions in Europe. The British ski instructor's case shows the extent of the unpleasantness and costs that can be borne by a representative of a freelance profession who provides services outside their homeland. Fortunately, the French and European judicial system has acted correctly here. Because of the pro-EU interpretation of the law, the French courts accepted the instructor's explanations and dismissed the accusations of providing services without permission and running a business without the authorities' approval.

Regrettably, in most similar cases in Europe, the situation is worse: foreign employees and service providers are often considered as pests in other EU countries. However, their punishments are not as spectacular as in Butler's case. Usually, local governments impose small fines on foreign professionals, prevent them from working in certain places, or hinder the process of recognising their professional qualifications. It is not profitable for immigrants to start a court dispute with the authorities to contest these fines and impediments. It is better to pay 50 or 100 Euros in penalties, move into the "grey area", or avoid certain places and institutions, rather than enter into long-term lawsuits. Such behaviour increases the grey zone, reduces professional mobility, and leads to a decreased quality of services. These are the visible negative effects of the hostile actions of the Member States and the civic responses to them.<sup>28</sup>

The range of problems is very large and it is difficult to find a single solution, especially given that some European countries persistently make

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<sup>28</sup> <http://www.romefile.com/living/working-as-a-tour-guide-in-rome.php> (access 3.08.2019); <https://www.touristguides-ngreece.gr/info/> (access 13.03.2021); <https://sifnaiko-fos.gr> (access 13.03.2021).



it difficult for professionals to access their markets. Poland, Austria, Italy, France, and Greece are the countries where it is most difficult for foreigners to provide their services in regulated professions, with recognition of their foreign professional qualifications. At the opposite extreme, there are dynamic Nordic countries, the Netherlands, and the United Kingdom, where foreigners' provision of services often does not require the recognition of professional qualifications. It is also difficult to present an effective problem-solving scenario. The main stakeholders – migrant professionals – are often unaware of the necessity to recognise professional qualifications, or try to avoid requiring them. Simply, for the performance of individual activities, no one tries to have their own qualifications recognised, even when it is legally required. Unfortunately, in many countries, professional mobility is very low; this topic of qualifications for regulated professions is therefore marginal. From a cultural point of view, the recognition of qualifications has little importance in countries such as the Netherlands or those in Scandinavia, where mobility is a special advantage. Thus, people highly interested in facilitating the provision of services or taking up work abroad will not be advocates of facilitating the recognition of professional qualifications. A lack of real support for the idea of recognising professional qualifications and a lack of lobbying for change is the result of this situation.<sup>29</sup>

From an objective and scientific perspective, the system of recognising professional qualifications and facilitating the provision of services for European foreigners must undergo radical reform. Certainly, it would be desirable to deregulate as many professions as possible; the issue of the recognition of professional qualifications would then be solved. It would be highly beneficial to simplify and harmonise the system of recognition in Europe; to do so, it would be necessary to combine the recognition of education and professional qualifications in one system. It is worth assuming that every educational qualification equates to a set of professional qualifications with a specific scope. Working together with the Council of Europe, one single European system of recognition should be created, combining the EU and Council of Europe systems. During dialogue with the member countries, it should be concluded that a single system of recognition should be created, replacing all national and inter-state forms

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<sup>29</sup> Look at all national reports: <https://op.europa.eu/en/search-results?> (access 13.03.2021); E. Athanassiou et al., *The effects of liberalisation of professional requirements in Greece*, Athens 2015; L.W. Chini et al., *Effects of Liberalisation in Austria using the Example of Liberal Professions*, Wien 2016; M. Pagliero, *The effects of recent reforms liberalising regulated professions in Italy*, Turin 2015; M. Rojek, M. Masiór, *The Effects of Reforms liberalising Professional Requirements in Poland*, Warsaw 2016.

of recognition. It should also be assumed that all learning outcomes lead to the acquisition of professional qualifications. Therefore, qualifications and quasi-professional qualifications acquired in other education systems, in non-formal and informal form, should be included in the recognition system. The best solution would be a two-sided recognition of private and other qualifications, first by an accredited state unit, then in the process of European recognition. Alternatively, private institutions issuing their certificates could obtain state accreditation directly.<sup>30</sup>

The recommendation to eliminate the need to recognise professional qualifications for short-term service (work) is a natural consequence of these changes. A ski instructor, lawyer, a doctor or a guide coming from another country for a trial, consultation, or leading an international group would not have to apply for recognition of their own qualifications in a host country, but would use their own national qualification. The obvious consequences of these changes would be the decriminalisation of providing services without the recognition of qualifications, building an information policy in the area of qualifications, and reducing bureaucracy. An effective form of the recognition process should be coordinated by the EU institutions; moreover, a standardised procedure should be constructed, which is accessible online (such as via the SOLVIT or ODR platforms).<sup>31</sup>

Undoubtedly, the envisaged changes must have social support. However, the European Union should be the organisation that coordinates the reforms, as only this body has the necessary tools and overview of the European situation. The European Commission's activities in improving the existing procedures for recognising professional qualifications should be appreciated. Certainly, the Services Directive<sup>32</sup> greatly facilitated the provision of cross-border services; nevertheless, it did not change the system of recognition. SOLVIT, a platform for resolving disagreements

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<sup>30</sup> E.M. Hołuszko, *Ekspertyza dotycząca uznawania świadectw, dyplomów zagranicznych uczelni oraz stopni tytułów naukowych w Polsce*, Warszawa 2014; *Mapping of professional qualifications and relevant training for the profession of ski instructor in the EU-28, EEA and Switzerland*, pp. 6–16; M. Pilch, M. Ponikowska, E. Skibińska, *Prawne aspekty porównywania i uznawania kwalifikacji w Unii Europejskiej*, Warszawa 2015.

<sup>31</sup> U. Jeretina, *Consumer Online Dispute Resolution (ODR) – As a key cultural change – Mechanism for innovative Public Administration in EU*, Kazan 2019; C.E. Koops, *EU Compliance Mechanisms: The Interaction between the Infringement Procedures, IMS, SOLVIT and EU-Pilot*, Rochester, NY 2011, pp. 4–38; M. Mikiel, *System SOLVIT jako nieformalne narzędzie rozwiązywania sporów obywateli z administracją państw EOG*, „Metrologia i Probiernictwo – Biuletyn Głównego Urzędu Miar”, no. 2/2013, pp. 24–25.

<sup>32</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L 376/36, Brussels 12.12.2006.

between the citizens and the administration of member countries, should perform a specific role. Sadly, this tool is unpopular, but much of the friction in the process of recognising professional qualifications could be removed by this platform. There are also high hopes for using an e-card (European Professional Card), which is a system to simplify the creation and provision of business in other EU countries.<sup>33</sup> It should be possible to complete application procedures in one's home country without the need for the recognition of professional qualifications in a host country. Unfortunately, during negotiations, it was established that this procedure would only apply to real estate agents, mountain guides, and medical professionals. In addition, work on this solution is still ongoing. The Commission's efforts to verify and encourage member countries to enact professional deregulation are also highly valued, particularly as part of studying the formal barriers in the recognition process (such as via National Action Plans and a proportionality test).<sup>34</sup>

It is noteworthy to consider legislative activities aimed at unifying the substantive conditions of access to professions and education, based on the mutual recognition of learning outcomes. Particularly promising from an educational and economic point of view are the European Qualification Framework and the Common Training Principles.<sup>35</sup> These solutions lead to establishing a certain core, principles, and priorities for vocational competences, courses and teaching units, for all countries. As a result, European confidence in professionals from other countries should increase, due to the assumption that everyone has similar competences. It will be problematic only if these solutions are not common in addressing education and internal market issues.

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<sup>33</sup> Commission Implementing Regulation (EU) 2015/983 of 24 June 2015 on the procedure for issuance of the European Professional Card and the application of the alert mechanism pursuant to Directive 2005/36/EC of the European Parliament and of the Council, OJ L 159, Brussels 25.06.2015; H. Horak, K. Dumancic, *European Professional Card-Dream Came True?*, in: *Conference Proceedings*, Sofia 2016, pp. 603–610, [https://ec.europa.eu/growth/single-market/services/free-movement-professionals/european-professional-card\\_en](https://ec.europa.eu/growth/single-market/services/free-movement-professionals/european-professional-card_en) (access 22.10.2020).

<sup>34</sup> [https://ec.europa.eu/growth/content/consultation-regulation-professions-member-states-national-action-plans-and-0\\_en](https://ec.europa.eu/growth/content/consultation-regulation-professions-member-states-national-action-plans-and-0_en) (access 13.03.2021); Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions (COM/2016/0822 final-2016/0404 (COD)), Brussels 10.01.2019.

<sup>35</sup> *Study evaluating the Professional Qualifications Directive against recent educational reforms in EU Member States*, London 2013; <https://europa.eu/europass/en/european-qualifications-framework-eqf> (access 6.03.2021).

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