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The impact of Brexit on the freedom of movement of professionals and on the market for professional services

1. Background

In European history, since the modern age, the free movement of professionals has contributed to the formation of a community of technical and cultural knowledge, essential to the identity of Europe. Since the Treaty of Rome, the free movement of professionals has been one of the fundamental rights of workers and one of the most important vehicles of cultural and social integration, even before economic integration, of the European community.

Today, the Free Trade Agreement between the European Union and the United Kingdom, which entered into force on the 31st of December, raises a thick fog on the present and future of the cross-border market for professional services, on the freedom of establishment and on the freedom to provide services.

Indeed, the Treaty sought to safeguard the freedom to provide services, including professional services, with a particular reference to legal and financial services. However, the recognition of freedom to provide services in the new legal framework has not been followed by the necessary transposition of the EU system of mutual recognition of professional qualifications, which is an essential requirement for the pursuit of the majority of professional activities in Europe. The Treaty did not refer to the "Qualifications" Directive (2005/36/EC) as one of the legislative acts transposed and incorporated into UK law. The future cooperation between the United Kingdom and the European Union in the field of mutual recognition of professional qualifications imposes the respect of the rules of the host nation and unprecedented forms.

From now on, in the absence of any enhanced cooperation agreement, citizens of the Union and citizens of the United Kingdom are, in the eyes of foreign law, third-country nationals and are subject to the traditional processes of recognition of qualifications, inevitably complex and messy.

The only exceptions are:

- (i) the field of the legal professions, for which an ad hoc discipline allows the exercise of the profession and the use of professional titles valid in the state of origin, without any administrative fulfilment, in matters expressly provided for;
- (ii) persons whose professional qualifications have been recognised before the 2019 Brexit Agreement, for whom the recognition obtained at the time continues to be valid

2. The new legal framework

The new legal framework for the recognition of professional qualifications is governed by Art. 5.13 of the Treaty. It follows the provisions of the recent Free Trade Agreements signed by the European Union with other States, and in particular CETA between the European Union and Canada, which entered into force provisionally in 2017.

The rule begins by recognising the discretion of the parties in the regulation of the liberal professions in their respective legal systems, also imposing new requirements and conditions for their exercise, related to the possession of qualifications and qualifying skills.

At the same time, however, the article provides for a mechanism for the conclusion of bilateral agreements on the mutual recognition of qualifications, to be set up between the United Kingdom and the Member States of the Union, profession by profession.

According to this mechanism:

- a) The initiative falls under the competent authorities (professional bodies and public authorities) for each profession in each individual State, which must adopt a recommendation, addressed to the Partnership Council established by the Treaty.
- b) Recommendations should be based on two assumptions:
 - (i) the economic value of advancing mutual recognition of qualifications in the specific profession, and
 - (ii) the appropriate level of compatibility of the respective legal frameworks.
- c) It is therefore up to the Council to assess the feasibility of the request and to draw up a mutual recognition agreement. This agreement will not, in any case, provide for systems of automatic recognition of qualifications, but must always provide for a formal act of recognition by the competent authority of the United Kingdom and the EU Member State.
- d) The annexes (Annex SERVIN 6) provide a model agreement on the mutual recognition of qualifications, but this is not binding. It represents, in any case, a fundamental contribution in the direction of the tendency homogeneity of mutual recognition systems, evoking the typical forms adopted by the "Qualifications" Directive, such as compensatory measures, periods of practice, aptitude tests, temporary partial access.

3. The risks arising from the new legal framework

The risks associated with the new legal framework seem far more important than the opportunities.

Admittedly, the provision for relatively simplified conditions allowing to initiate the procedure will facilitate a rapid and homogeneous process in the direction of enhanced recognition agreements. However, we must be aware that during the three years of the Free Trade agreement between the

European Union and Canada – which was adopted with an identical regulatory mechanism – mutual recognition wasn't enhanced.

In addition, the need for convergence of the 27 national authorities in each sector on the Union side raises a major concern. It is true that the annexes contain standard forms for the competent national authorities called upon to carry out this assessment, but it is not binding. The forms are useful in accelerating the process. And yet, national authorities often include professional associations, independent of national governments, whose positions on the issue of the recognition of foreign qualifications has often been hostile, and in any case very different from country to country and from profession to profession.

These processes of rapid convergence of the assessments of the competent authorities of the 27 Member States and the United Kingdom should be encouraged in order to avert the real risk behind this Treaty, the establishment of bilateral cooperation routes between the United Kingdom and individual Member States of the Union. The Treaty does not exclude this option, and the complexity of the mechanism foreshadowed by the article SERVING 5.13 even seems to suggest the path of bilaterality. From the perspective of European professionals, bilateral agreements on the mutual recognition of professional qualifications should be avoided, and should be prevented by very rapid processes of agreements extending to the whole Union, as you are trying to do for the profession of architect. Indeed, bilaterality would cause an unacceptable differentiation of the value of titles between professionals from different Member States - and for professionals from the United Kingdom, in the different EU Member States - injuring the legal equality of European professionals and prejudicing to the efficiency of professional services. It is perfectly understandable that some countries, which have always had a special relationship with the United Kingdom, such as Ireland and Malta, feel a particular urgency to reach enhanced cooperation agreements. In such cases, bilateral agreements should only be the first step towards a widespread system of cooperation, to be achieved in a short time.

4. Problems and development of perspectives

It is difficult to avoid feeling that, in the conclusions of the Treaty on this issue, reciprocal rigidities and partisan interests have finally prevailed, that the needs and legitimate expectations of professionals and citizens, on both sides, have remained completely in the background. The choice of ignoring the recognition of the basic legal conditions that guarantee the mobility of professionals ends up reducing professional services on their purely economic dimension, guaranteeing only legal and financial services, which do not necessarily imply the presence of the professional in the foreign state. Instead, the essential human component of professional services is devalued, which is its salient feature; with particularly problematic repercussions on some professional realities that are completely identified with the human component.

This is a huge loss for the freedom of movement of European professionals and for the development of the market for professional services, which comes at a stage of particular complexity for the sector, characterized - as the statistics attest - by an unfocused growth of the self-employment in the Member States, but also by a tendency of market stability in terms of volume of transactions and produced wealth.

The consequences of a hard Brexit from the point of view of professional mobility will be particularly evident for health professionals, who generally choose to move to another country for personal reasons, and without the support of a structured economic organization. Within the framework of European mobility in recent years, the United Kingdom has been one of the privileged destinations of European professionals, particularly from the field of the health professions. In this field, for which there is an automatic system of recognition of qualifications in the Union made possible by the extraordinary effort to harmonise training paths made over decades, the possibility of a step backwards towards bilateral agreements on mutual recognition would be an unbearable obstacle to a process of professional mobility that had reached a very high level of fluidity, with mutual benefits.

It is therefore necessary to launch accelerated initiatives for the adoption of enhanced cooperation agreements, starting with the professions currently subject to the automatic recognition system. The European Council of Liberal Professions, in its role as a body coordinating professional bodies and associations on a European scale, intends to take a leading role in these initiatives.