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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
C(2009)yyy

Draft

COMMISSION DECISION

of [...]

on a request for derogation submitted by the Czech Republic on the basis of Article 14(2) of Directive 2005/36/EC of the European Parliament and Council in respect of authorised architects, authorised engineers and authorised technicians

(Only Czech text is authentic)

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(Only Czech text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2005/36/EC¹ of 7 September 2005 of the European Parliament and of the Council on the recognition of professional qualifications, and in particular Article 14(1) and (2) thereof,

Having regard to the letters of the Czech Republic of 27 March 2008 and 3 July 2009 seeking a derogation under Article 14(2) of Directive 2005/36/EC of the European Parliament and of the Council in respect of authorised architects, authorised engineers and authorised technicians,

Whereas:

I Legal framework

- (1) Directive 2005/36/EC consolidates and updates 15 directives on the recognition of professional qualifications. It provides for three separate systems for the recognition of professional qualifications: automatic recognition of professional qualifications in the case of doctors, nurses, dental practitioners, veterinary surgeons, midwives, pharmacists and architects (Chapter III), automatic recognition of qualifications based on professional experience in the case of certain industrial, commercial and craft activities (Chapter II) and a general system for the recognition of qualifications applicable to professions not covered by those two chapters, and to professions which are covered by Chapter II, where a professional from another Member State does not have the professional experience required under Chapter II (Chapter I).
- (2) Chapter I of Directive 2005/36/EC is based on the principle of mutual trust. This means that, in the host Member State, the competent authorities in that Member State may not deny a person for lack of the necessary qualifications, access to or the right to pursue a profession on the same terms as its own nationals if the applicant is a national of a Member State and possesses the professional qualifications which are required by another Member State for that profession on its own territory. The same applies in cases where the latter Member State does not regulate that profession or the training leading to pursue that profession, and if the applicant received in that Member State

¹ OJ L255, 30.9.2005, p.22 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

the necessary training and has two years professional experience gained in that profession in a Member State.

- (3) However, a host Member State may require, pursuant to Article 14(1) of the Directive, that the applicant completes an adaptation period or takes an aptitude test where the applicant's training is at least one year shorter than that required in the host Member State or where there are substantial differences between the training received by the applicant in its home Member State and that dispensed on its own territory. Where the host Member State exercises this option it must, by virtue of Article 14(2) of the Directive, allow the applicant to choose between an adaptation period and an aptitude test. If it is considering not offering such a choice it must apply for a derogation in accordance with Article 14(2) of the Directive.
- (4) By virtue of the third sub-paragraph of Article 14(2) of Directive 2005/36/EC if, after receiving all necessary information, the Commission considers that the derogation is inappropriate or that it is not in accordance with Community law, it must, within three months, ask the Member State in question to refrain from adopting the measure concerned.
- (5) The request for derogation covers solely cases in which automatic recognition does not apply. It covers only those cases falling under the general system of recognition set in Title III, Chapter I of the Directive (cf. in particular Article 10 of the Directive).

II Application for a derogation submitted by the Czech Republic

- (6) By letter of 27 March 2008 the Czech Republic applied for derogation pursuant to Article 14(2) of Directive 2005/36/EC in respect of the following professions which are regulated in the Czech Republic: authorised architect, authorised engineer and authorised technician.
- (7) The derogation sought is aimed at enabling the Czech authorities to require that persons qualified in another Member State and who wish to become established in the Czech Republic in order to pursue the profession of either authorised architect, authorised engineer or authorised technician take an aptitude test. Such persons could accordingly not opt for an adaptation period.

Request covering authorised architects²:

- (8) The Czech authorities indicated in their request covering authorised architects that this profession is regulated by Act No. 360/1992 Coll.,³ on the professional practice of certified architects and on the professional practice of certified engineers and technicians active in construction as amended (hereinafter the "Czech Authorisation Act").
- (9) They specifically refer to the selected activities and other professional activities in construction as listed in Section 17 of the Czech Authorisation Act. Authorised architects are granted either generic authorisation or authorisation for the fields listed in Section 4 of the Czech Authorisation Act. Chambers are authorised to specify sub-specialisations within the fields listed; they also grant authority for specialisations (Section 6 of the Czech Authorisation Act).

² The following descriptions are taken from the English language version of the initial request as submitted by the Czech authorities.

³ The version of Act No. 360/1992 Coll., to which the Czech Republic refers to in its initial request is the one enclosed as Annex No. 8, Reg. No. 1327/2008-SZEU/SEB, implementing Directives 85/384/EEC and 1992/42/EC.

- (10) According to Section 14 of the Czech Authorisation Act, authorised architects perform activities for which they were granted authorisation, as independent architects performing activities according to the Authorisation Act, persons performing activities according to the Trade Licensing Act, employees in private business, public service, or via membership or other similar relationship, and partners in a public corporation.
- (11) According to Section 158(1) of the Czech Building Act, selected construction activities are activities whose result affects the protection of the public interest in construction. Authorised architects can produce project documentation for all phases of building design and zoning, especially for the issuance of a zoning decision, for the issuance of a construction permit, for filed construction projects, for performing construction and for necessary modifications (project designer activity) and professional guidance for building structures or changes thereto (construction supervision activity).
- (12) Professional activities that are not selected construction activities according to the Czech Building Act can also be performed by qualified individuals who do not have authorisation according to the Czech Authorisation Act.
- (13) According to the Czech Trade Licensing Act, an authorised architect has also the right to conduct regulated trades in the construction sector listed in Appendix No. 2 of this legislation, which are project design in construction, and construction, modification and removal of structures.
- (14) The Czech Republic provided the following explanations concerning the activities an architect is authorised to carry out:
An authorised architect is exclusively entitled to perform selected activities in construction, whose result fundamentally influences the protection of the public interest in construction, which are primarily the life and health of persons and animals, safety, the environment or the property of third parties. He bears responsibility for the professional level of performance of selected activities and other professional activities in construction; aside from disciplinary responsibility to the Chamber's professional tribunal, he bears civil liability (civil or commercial legal liability for damages) and criminal liability (a criminally negligent act of public peril). An authorised architect who does not perform his activity in an employment, public service, membership or other similar relationship is obliged to, no later than the initiation of the performance of the activity, take out liability insurance for damages caused by the performance of this activity according to Section 16 of the Czech Authorisation Act.
- (15) During the performance of his activity, an authorised architect should consider the following areas: construction, public law (notably the Administrative Act), care for healthy living conditions, care for nature and landscapes, care for cultural wealth (including historical monuments), infrastructure, technical standardization, metrology and state quality control, civil and business law and intellectual property law.
- (16) As to the specific Czech legislation, an authorised architect should consider the following:
- Act No. 360/1992 Coll., on professional practice of certified architects and on the professional practice of certified engineers and technicians active in construction as amended (the Authorisation Act);
 - Act No. 183/2006 Coll., on town planning and the building code (the Building Act), as amended by Act. No. 68/2007 Coll.,

- Decree No. 498/2006 Coll., on authorised inspectors,
- Decree No. 526/2006 Coll., by which some stipulations of the Building Act in matters of the building code are performed,
- Decree No. 499/2006 Coll., on construction documentation,
- Decree No. 501/2006 Coll., on general land use requirements,
- Decree No. 137/1998 Coll., on general technical requirements for construction, as amended,
- Decree No. 369/2001 Coll., on general technical requirements enabling use of buildings by mobility and orientation-impaired individuals, as amended by Decree No. 492/2006 Coll.

(17) As to the **verification** of the professional qualifications of architects from abroad, the Czech Republic provided the following information:

According to Section 8(6) of the Czech Authorisation Act, the subject of a professional aptitude test is the verification of knowledge necessary to perform appropriate professional activities, if it is not part of the recognized professional education of the applicant, and verification of knowledge of applicable legislation administering the performance of relevant professional activities, or related activities. The manner and course of professional aptitude test is stipulated in Section 12 of the Certification Code. According to this professional code, the written test is designed to allow verification of knowledge of Czech public and private building law, including legislation related to zoning and structures, horticulture and landscaping. The oral test consists of a professional discussion of submitted professional documents in order to verify the ability of the applicant to apply his theoretical knowledge in the practical and independent performance of professional activities concerned. An independent test is taken for each field of specialisation. The required field of education and type of school, content of professional aptitude tests, the content of professional experience and the form of authorisation certification for individual fields and specialisations are stipulated by the Chamber.

(18) According to the Czech Government, the application for derogation is **justified** on the grounds that the activities of an authorised architect working as a designer or building inspector are regulated by an extensive and varied set of substantive and procedural legal standards. Aside from public works legislation standards related directly to the design, permission, performance, usage and elimination of buildings, construction is affected by many related regulations, which are used to protect the public interest in the areas of protection of the environment, nature and waterworks, mineral deposits, waste management, human health, veterinary hygiene, care for historical monuments, road, rail, water and aerial transport, national defence, civil and fire safety and worker health and safety. There are almost 100 such special regulations in the Czech Republic.

(19) Any insufficiencies in the legal knowledge of the designer or building inspector would represent an inordinate risk for the endangerment of public and private interests in construction that need to be guaranteed by the state. This is why, for reasons of prevention and precaution, the Czech Authorisation Act expressly stipulates the obligation, without exception, to successfully pass an aptitude test, within the scope of which knowledge of current legislation governing the performance of the stated and other related professional activities is in particular verified. Verifying such legal knowledge is particularly important when such knowledge is not part of the recognized professional education of the applicant for authorisation. Most legal issues would also be governed by Czech legislation and not by Community law.

- (20) Therefore the competent Czech authorities take the position that the sole compensatory measure that provides sufficient guarantees for the protection of public and private interests in construction can be an aptitude test (or differential test). Such a measure is – according to the Czech Republic – in accordance with the principles of Community law, i.e. it is non-discriminatory, is based on imperative reasons related to a public interest, is commensurate with the given goal of the public interest, is clear and unambiguous, and guarantees standard conditions for the verification of professional aptitude.
- (21) An adaptation period would not provide sufficient guarantees to protect public and private interests in construction. Though a migrant professional would need supervision during an adaptation period, a simple statement by a professionally qualified individual under whose supervision the citizen of another Member State performed the given regulated activities in the Czech Republic for the stipulated time period (the supervisor) cannot offer a sufficient basis to assess whether such an individual did or did not in fact gain the necessary legal knowledge .

Request covering authorised engineers:

- (22) The Czech authorities indicated in their request covering authorised engineers that this profession is regulated by the Czech Authorisation Act. They specifically refer to the selected activities and other professional activities in construction as listed in Section 18 of the Authorisation Act. As for the fields for which authorisation is granted reference is made to Section 5. Chambers are authorised to specify sub-specialisations within the fields listed; they also grant authority for specialisations (Section 6 of the Authorisation Act).
- (23) According to Section 14 of the Czech Authorisation Act, authorised engineers perform activities for which they are granted authorisation, as independent engineers performing activities according to the Czech Authorisation Act, persons performing activities according to the Trade Licensing Act, employees in private business, public service, or via membership or other similar relationship, and partners in a public corporation.
- (24) According to Section 158(1) of the Czech Building Act, selected construction activities are activities whose result affects the protection of the public interest in construction. Authorised engineers can produce project documentation for the issuance of a construction permit, for filed construction projects, for performing construction and for necessary modifications (project designer activity) and professional guidance for building structures or changes thereto (construction supervision activity). Professional activities that are not selected construction activities according to the Building Act can also be performed by qualified individuals who do not have authorisation according to the Authorisation Act.
- (25) According to the Czech Trade Licensing Act, an authorised engineer has the right to conduct regulated trades in the construction sector as listed in Appendix No. 2 of this legislation.
- (26) The Czech Republic provides further explanation as concerns the activities of an authorised engineer as follows:
- (27) An authorised engineer is exclusively entitled to perform selected activities in construction, whose result fundamentally influences the protection of the public interest in construction, which are primarily the life and health of persons and animals, safety, the environment or the property of third parties. He bears responsibility for the

professional level of performance of selected activities and other professional activities in construction; aside from disciplinary responsibility to the Chamber's professional tribunal, he bears civil liability (civil or commercial legal liability for damages) and criminal liability (a criminally negligent act of public peril). An authorised engineer who does not perform his activity in an employment, public service, membership or other similar relationship is obliged to, no later than the initiation of the performance of the activity, take out liability insurance for damages caused by the performance of this activity according to Section 16 of the Authorisation Act.

(28) As to the Czech legislation, an authorised engineer should in particular consider the following:

- Act No. 360/1992 Coll., on professional practice of certified architects and on the professional practice of certified engineers and technicians active in construction as amended (the Authorisation Act);
- Act No. 183/2006 Coll., on town planning and the building code (the Building Act), as amended by Act. No. 68/2007 Coll.,
- Decree No. 498/2006 Coll., on authorised inspectors,
- Decree No. 526/2006 Coll., by which some stipulations of the Building Act in matters of the building code are performed,
- Decree No. 499/2006 Coll., on construction documentation,
- Decree No. 501/2006 Coll., on general land use requirements,
- Decree No. 137/1998 Coll., on general technical requirements for construction, as amended,
- Decree No. 369/2001 Coll., on general technical requirements enabling use of buildings by mobility and orientation-impaired individuals, as amended by Decree No. 492/2006 Coll.,
- Act No. 500/2004 Coll., the Administrative Code,
- Act No. 513/1991 Coll., the Commercial Code
- Act No. 40/1964 Coll., the Civil Code

(29) As to the **verification** of the professional qualifications the Czech Republic provided the following information:

According to Section 8(6) of the Czech Authorisation Act, the subject of a professional aptitude test is the verification of knowledge necessary to perform appropriate professional activities, if it is not part of the recognized professional education of the applicant, and verification of knowledge of applicable legislation administering the performance of relevant professional activities, or related activities. The manner and course of professional aptitude test is stipulated in Section 8 of the Czech Authorisation Code of the Chamber. According to this professional code, the written test is designed to allow verification of knowledge of legislation in the area of public and private building law; the content of the test is the same for all fields and specialisations. The oral test consists of a professional discussion of submitted professional documents to verify the ability of the applicant to apply theoretical knowledge in the professional activities concerned. An independent test is taken for each field of specialisation, with the exception of the test for a technician in the field of building environmental equipment (or technical building equipment), which the applicant can achieve by taking the test for an authorised engineer in the field of technical building equipment (or building environmental equipment); specialisations

within the scope of one field are verified with one test. The required field of education and type of school, content of professional aptitude tests, the content of professional experience and the form of authorisation certification for individual fields and specialisations are stipulated by the Chamber.

- (30) According to the Czech Government, the application for derogation is **justified** on the grounds that the activities of an authorised engineer working as a designer or site manager are regulated by an extensive and varied set of substantive and procedural legal standards. Aside from public works legislation standards related directly to the design, permission, performance, usage and elimination of buildings, construction is affected by many related regulations, which are used to protect the public interest in the areas of protection of the environment, nature and waterworks, mineral deposits, waste management, human health, veterinary hygiene, care for historical monuments, road, rail, water and aerial transport, national defence, civil and fire safety and worker health and safety. There are almost 100 such special regulations in the Czech Republic.
- (31) Any insufficiencies in the legal knowledge of the designer or site manager represent an inordinate risk of the endangerment of public and private interests in construction that are guaranteed by the state. This is why, for reasons of prevention and precaution, the Czech Authorisation Act expressly stipulates the obligation, without exception, to successfully pass an aptitude test, within the scope of which knowledge of current legislation governing the performance of the stated and other related professional activities is in particular verified. Verifying such legal knowledge is particularly important when such knowledge is not part of the recognized professional education of the applicant for authorisation. Most legal issues would also be governed by Czech legislation and not by Community law.
- (32) Therefore the competent Czech authorities take the same position as for authorised architects. Only an aptitude test would provide sufficient guarantees whilst an adaptation period during which the migrant professional would act under a supervisor would not be appropriate.

Request covering authorised technicians:

- (33) The Czech authorities indicated in their request covering authorised technicians that this profession is regulated by the Czech Authorisation Act. They specifically refer to the selected activities and other professional activities in construction as listed in Section 19 of the Authorisation Act. As for the fields for which authorisation is granted reference is made to Section 5. Chambers are authorised to specify sub-specialisations within the fields listed; they also grant authority for specialisations (Section 6 of the Authorisation Act).
- (34) According to Section 158(1) of the Czech Building Act, selected construction activities are activities whose result affects the protection of the public interest in construction. Authorised technicians can produce project documentation for the issuance of a construction permit, for filed construction projects, for performing construction and for necessary modifications (project designer activity) and professional guidance for building structures or changes thereto (construction supervision activity). Professional activities that are not selected construction activities according to the Building Act can also be performed by qualified individuals who do not have authorisation according to the Authorisation Act.

- (35) According to the Czech Trade Licensing Act, an authorised technician has the right to conduct regulated trades in the construction sector as listed in Appendix No. 2 of this legislation.
- (36) The Czech Republic provides further explanation as concerns the activities of an authorised technician, which are similar to the ones submitted to justify the derogations for architects and engineers.
- (37) When performing this activity, an authorised technician follows the same legislation as indicated above for engineers.
- (38) As to the **verification** of the professional qualifications, the information on the conduct of aptitude test provided by the Czech authorities on technicians is similar to the one provided on engineers.
- (39) According to the Czech Government, the application for derogation as far as technicians are concerned is **justified** on the same grounds as for engineers.

III Request for additional information and Czech response

- (40) By letter of 11 June 2008, the competent Commission services asked the Czech Government to provide further information regarding the modalities of the recognition process, the scope and content of the aptitude test to be imposed as a compensatory measure, missing texts of reference, and, as far as engineers and technicians were concerned, the level of education required in the Czech Republic.
- (41) The Czech authorities replied to the Commission's request by letter of 3 July 2009. In this reply, they reiterate and substantiate further their requests for derogations for architects, engineers and technicians and accompanied it by the following laws and regulations⁴ of the Czech Republic:

- Act No. 360/1992 Coll. of 7 May 1992 on the Professional Practice of Certified Architects and on the Professional Practice of Certified Engineers and Technicians Active in Construction, as amended by Act No. 164/1993 Coll., Act No. 275/1994 Coll., Act No. 224/2003 Coll. and Act No. 189/2008 Coll.,

- Certification Code of the Czech Chamber of Architects,

- Authorisation Chart of the Czech Chamber of Chartered Engineers and Technicians engaged in construction.

Request covering authorised architects:

- (42) The initial application for derogation has been amended by the Czech Republic and contains some responses to the Commission's request for additional information. First, the Czech Republic enclosed an amended version of the Czech Authorisation Act. Second, the Czech authorities also indicated that the derogation request does not concern architects, whose education and training is to be automatically recognized under the conditions set out in the Directive, but only zoning and landscaping architects.
- (43) According to Section 4 of the Authorisation Act, authorised architects are granted a generic certification or a certification for architecture, urban planning or landscape

⁴ From this point onwards, reference is made to the documents submitted on 3 July 2009 by the Czech authorities as Annexes to their reply to the Commission's request for additional information.

architecture. According to Section 2 of the Certification Code, certification is granted for the type of certification of "architect" (with general competence) with the protected title "certified architect" or "certified architect with general competence" and in the areas of land-use planning, with the protected title of "certified architect – land-use planning" or "certified urban planner", and landscape architecture with the protected title of "certified architect – landscape architecture" or "certified landscape architect".

- (44) Articles 21(1) and 46 of the Directive organises the automatic recognition of the qualifications of fully qualified architects who wish to exercise their profession in a Member State other than that in which they acquired their qualifications. In the case of these professionals, no compensatory measures, such as an aptitude test, can be required under Community law. Article 10 c) of the Directive organises the recognition of the qualifications of those architects who do not fulfil the conditions for the automatic recognition. It is not the intention of the Czech authorities to go against these provisions.
- (45) Therefore, the request for derogation for authorised architects has to be interpreted as covering only the professions of certified urban planner and certified landscape architect, excluding certified architects and certified architects with general competence whether under automatic recognition or based on the general system.
- (46) It is further argued that the importance of proficiency in Czech building law and related legal regulations is also given by the fact that a substantial part of legal relationships governed by such national regulations is not yet incorporated in the *acquis communautaire*.
- (47) Therefore the competent Czech authorities hold the principal opinion that a differential test focusing on a check of proficient legal knowledge of regulations governing the relevant specialised activities, potentially also related activities, represents the only suitable compensation measure. An adaptation period would represent excessive risk to the state-guaranteed interests in the building trade.

Request covering authorised engineers:

- (48) The initial application for derogation has been amended by the Czech Republic. First, the Czech Republic enclosed an amended version of the Czech Authorisation Act.
- (49) Second, the Czech Republic indicated the level of education and training which is required for authorised engineers performing the activities listed in section 5 a) to k) of the Czech Authorisation Act which is considered to be that of Article 11 clause e) of the Directive.
- (50) Third, the Czech Republic added an explanatory paragraph on Schedule No. 2 to the new Czech Authorisation Act which was amended by Act No. 189/2008 Coll. to become a Schedule (see the Annex), where Article 2, Recognition of Expertise in Conformity with Acquired Rights, confirms that automatic recognition pursuant to specialised experience and education attained applies to authorised engineers.
- (51) Fourth, in relation to the Trade Licensing Act the Czech Republic amended the information provided in the initial request and indicated that an authorised engineer has the right to do business in regulated trades in the construction sector listed in Appendix No. 2 of this legislation, which are design activities in construction, and construction of objects, their modification as well as their removal. In connection with the two trades, graduation from a secondary educational institution specialising in construction, along with 5 years of experience in design or construction of structures, would be sufficient.

- (52) Fifth, the Czech Republic provided additional information on the necessity for persons wanting to obtain authorisation to exercise selected and other specialised activities in the construction field and that they must demonstrate actual knowledge of Czech public works legislation and of technical standards (in particular the Building Act and the relevant implementing regulations), but also at least reliable general knowledge of the broader range of related public and private law regulations. For that reason the Czech Authorisation Act contains - among its provisions dealing with the essentials of the test of applicants' expertise - an unconditional requirement concerning verification of expertise in applicable valid legal regulations dealing with the specialised activities concerned, potentially also with related activities, while the material (construction-specific) knowledge is in principle checked only if such knowledge is not incorporated in the acknowledged education requested from the applicant.
- (53) In addition, the Czech authorities raise the same arguments as for architects, presented under points 46 and 47.

Request covering authorised technicians:

- (54) The initial application for derogation has been amended by the Czech Republic and contains some responses to the Commission's request for additional information. In particular, the Czech authorities raised the same arguments as for architects, presented under points 46 and 47.

IV Notification of the other Member States

- (55) The Czech Republic has complied with the requirement of Article 14(2) and informed the other Member States of its request of 27 March 2008 and of its amended request of 3 July 2009. The Group of Coordinators has been informed about the request on 22 April 2008 and received a copy of the updated request on 14 July 2009.

V Analysis of the request

- (56) The main argument put forward by the Czech Republic as justification of the derogation request is that it is justified on the grounds that authorised architects, authorised engineers and authorised technicians are exclusively entitled to perform selected activities in construction, whose result fundamentally influences the protection of the public interest in construction, which are primarily the life and health of persons and animals, safety, the environment or the property of third parties. They bear responsibility for the professional level of performance of selected activities and other professional activities in construction; aside from disciplinary responsibility to the Chambers' professional tribunals, they bear civil liability (civil or commercial legal liability for damages) and criminal liability (a criminally negligent act of public peril).
- (57) The second argument put forward by the Czech Republic in justification of the derogation request is that the activities of an authorised engineer and the activities of an authorised technician working as a designer or site manager, and the activities of an authorised architect working as a designer or building inspector are regulated by an extensive and varied set of substantive and procedural legal standards. Any insufficiency in the legal knowledge of the designer, site manager or building inspector represents an inordinate risk of the endangerment of public and private interests in construction that are guaranteed by the state.

The requirement to comply with a compensatory measure and the scope of the aptitude test

- (58) The conditions under which a compensatory measure can be required are set out in Article 14(1) of Directive 2005/36/EC: the host Member State may not subject the

migrant to a compensation measure - an aptitude test or an adaptation period, the choice being left to the migrant - unless the duration of the migrant's training is at least one year less than that required on its own territory or unless there are **substantial** differences between the training received by the migrant and that dispensed on its territory, and those differences cannot be compensated for by the migrant's professional experience.

- (59) The Czech Republic indicates in its application for derogation that an authorised architect, an authorised engineer and an authorised technician perform the activities listed in Section 17, 18 and respectively 19 of the Czech Authorisation Act under conditions stipulated by the Building Act, the Authorisation Act, the Trade Licensing Act and other legislation in the function of a designer, building inspector or site manager.
- (60) On the basis of this statement and the additional explanations provided in view of the justification of the aptitude test it seems that the Czech Republic already applies the Czech Authorisation Act as well as the Authorisation Chart and respectively the Certification Code and all other relevant legislation to qualified EU engineers, technicians and architects who wish to obtain the recognition of their professional qualifications in the Czech Republic. This would derogate from Act No. 18/2004 as modified by Act No. 189/2008 that transposes Directive 2005/36 of the European Parliament and of the Council on recognition of professional qualifications. The Commission concludes that in deviation from Art. 14 (2) the Czech Republic would apply the aptitude test as the only option for a compensatory measure even before informing the other Member States and the Commission.
- (61) While according to Section 8(7) of the Czech Authorisation Act the objective of a professional competence examination shall be to demonstrate knowledge necessary for the performance of relevant professional activities, in particular the demonstration of professional knowledge, if it was not part of the applicant's recognized professional education, and the demonstration of knowledge of the valid legal statutes regulating the practice of relevant professional and associated, if any, activities, it is neither clear from the Authorisation Act nor from the Authorisation Chart and the Certification Code, nor from the request for derogation that compensatory measures would be applied only in case of **substantial** difference between the education and training which the migrating professional has obtained in his home Member State and which are required under the host Member State's legislation.
- (62) The Czech authorities do not demonstrate that they would carry out a comparative analysis of the migrant's qualifications with the qualifications required under national law to identify **substantial** differences before determining the scope of the compensatory measure which should be imposed.
- (63) In addition, the applicable legislation does not provide for any indication whether professional experience of the migrant can compensate for the substantial differences, which would, where relevant, exempt migrants from taking the aptitude test according to Article 14(5) of the Directive.
- (64) Therefore, the modalities for requiring a compensatory measure as set out in the request would be incompatible with Community law, more specifically with Article 14(1) and 14(5) of Directive 2005/36/EC

- (65) In addition, it appears to the Commission that the same provisions of the Authorisation Chart and of the Certification Code would apply equally to national professionals and migrating EU professionals.

Article 8 of the Czech Authorisation Chart provides for the examination of applicants for authorisation by the Czech Chamber of Chartered engineers and technicians. Article 8 (4) provides that only applicants passing both the written and the verbal part of the test may receive authorisation. Section 12 to 15 of the Certification Code provides for the examination of applicants for authorisation by the Czech Chamber of Architects. Section 14(3) provides that a person who fails the written examination shall not be admitted to the oral part of the examination.

Concerning the scope of the compensatory measure therefore the wording of Article 8(4) of the Czech Authorisation Chart and the wording of Section 14(3) of the Certification Code leads the Commission to conclude that authorisation would only be granted after a written and oral test and situations in which no such tests would be justified because no substantial differences can be determined between the education and training obtained by the migrant and that required under Czech legislation are not considered an option.

The proportionality of the derogation request to apply an aptitude test

- (66) The free movement of persons is one of the fundamental freedoms guaranteed by the Treaty. Accordingly, the Court of Justice of the European Communities has consistently held (in particular in its Judgement in Case *Gebhard*⁵) that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may be authorised provided they are applied in a non-discriminatory manner, are justified by imperative requirements in the general interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it. In so far as derogation from the migrant's right to choose between an aptitude test and an adaptation period makes it more difficult for the professionals concerned to become established in the Czech Republic, the application submitted by the Czech Republic must be assessed in the light of those criteria.
- (67) The Commission recognises that the protection of public and private interest in construction can in this case be invoked as imperative requirements in the general interest. The knowledge of the substantive and procedural legal standards in the fields listed by the Czech authorities for authorised architects, authorised engineers and authorised technicians and designers, building inspectors or site managers more specifically is the guarantee for public and private interests not to be endangered.
- (68) The Czech Government states that it is exclusively the aptitude test which provides reasonable guarantees to protect public and private interests in construction because a citizen of another Member State of the EU can only in this way prove legal knowledge that is necessary for the performance of given regulated activities in the Czech legal environment. Such a measure is – according to the Czech Republic – in accordance with the principles of Community law.
- (69) However, the Commission considers that knowledge, and in particular legal knowledge, which a migrant is lacking in his theoretical education and capacity to carry out the activities of an authorised architect, of an authorised engineer or of an

⁵ ECJ C-55/94, *Gebhard*, of 30 November 1995, ECR 1995, I – 4165.

authorised technician can just as effectively be gained by means of an adaptation period.

- (70) First, the Czech authorities do not demonstrate why an adaptation period may not sufficiently protect public and private interests in construction to avoid legal errors.
- (71) Second, the argument of the Czech Republic that a substantial part of the relevant Czech legislation which governs legal relationships is not yet incorporated in the *acquis communautaire* is in the view of the Commission not a valid justification as there is no possible link of reason between this Czech argument and the derogation from the migrant's right to choose the compensatory measure. The non-harmonisation of legislation at EU level for areas of policy which the Czech authorities consider of relevance for the professions of architect, engineer and technician, is not a justification for derogating from the migrant's choice of compensatory measure.
- (72) Third, the Czech Republic can set rights, obligations and responsibilities of supervisors during an adaptation period to ensure the necessary legal knowledge. The adaptation period, which is a period of supervised practice, may effectively be accompanied by further training, as provided for in Article 3(1)(g) of Directive 2005/36/EC. This further training could cover subjects which are essential for the exercise of the profession concerned and the knowledge of which migrating professionals are lacking. In the same vein, the period of supervised practice shall be subject to an assessment by the competent authorities. Therefore, the adaptation period can, just as effectively as the aptitude test, be used to verify that the person concerned has obtained the lacking theoretical knowledge and skills to carry out the concerned activities.
- (73) Finally, the attestation of knowledge of the Czech language can not be part of a recognition procedure. The knowledge of the language of the host country can however be examined outside the framework of the recognition procedure, but within the borders of proportionality as set out by the European Court of Justice⁶ in its jurisprudence. Article 53 of Directive 2005/36/EC confirms with the conclusions drawn by the ECJ.
- (74) On the basis of the above the Commission takes the view that the criteria which would need to be fulfilled for the derogation to be considered proportional and in line with the constant jurisprudence of the European Court of Justice are not fulfilled.

Equal conditions for the performance of regulated activities

- (75) The Czech Republic considers that the adaptation period for the given regulated activities cannot come into consideration because its selection would effectively contravene the principle of non-discrimination.
- (76) The Commission underlines that professionals satisfying the conditions of Article 13 of Directive 2005/36/EC are to be considered as fully qualified professionals. Czech nationals who have to pass an aptitude test are not yet fully qualified professionals: indeed, the aptitude test is one of the requirements to be fulfilled in order to be considered such a professional. Therefore, there is no discrimination in allowing a fully qualified migrant professional to undergo an adaptation period while national students have to sit exclusively an aptitude test. Moreover, the scope, the content and the aim of the aptitude test is different in the two cases.

⁶ ECJ C-424/97, Haim II, of 4.7.2000, ECR 2000, I – 5123.

- (77) Consequently, the Commission considers that the Czech Republic has failed to demonstrate the necessity to derogate from the migrant's right to choose between an aptitude test and an adaptation period in the case of authorised engineer, authorised architect and authorised technician. Such derogation does not appear to be justified in the light of the objective of the protection of public and private interest in construction in so far as this objective can be achieved in equal measure by an aptitude test and an adaptation period. Such derogation would thus be both inappropriate and contrary to Community law.
- (78) In the light of the above, the Commission takes the view that the Czech Republic shall abstain from derogating from the freedom of choice which migrants would otherwise be allowed when seeking access to the profession of authorised architect, authorised engineer and authorised technician.

HAS ADOPTED THIS DECISION:

Article 1

The Czech Republic shall refrain from taking measures requiring that zoning and landscape architects, engineers and technicians, qualified in other Member States of the European Union, take an aptitude test where there are differences between the training received by those professionals and the training dispensed in the Czech Republic, differences which cannot be compensated by their professional experience.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels,

For the Commission
Charlie McCreevy
Member of the Commission