COMMISSION DECISION

of 9 January 1997

on a request from France for a derogation under Article 14 of Council Directive 92/51/EEC

(Only the French text is authentic)

(Text with EEA relevance)

(97/42/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [1], and in particular Article 14 thereof,

After receiving, on 19 June 1996, a request from France for a derogation under Article 14 of Directive 92/51/EEC with regard to the supervision of certain sporting activities,

After consulting, on 8 July 1996, the national coordinators for Directive 92/51/EEC,

After sending a letter seeking further information from France on 12 September 1996,

After receiving a reply to that letter on 17 October 1996,

Whereas:

I. GENERAL FRAMEWORK

1. Directive 92/51/EEC introduced a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [2] (which had introduced a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at the last three years' duration). Directive 92/51/EEC deals with diplomas of a different level to those covered by Directive 89/48/EEC.

2. Directive 92/51/EEC is based on the principle of mutual trust. This means that where, in a host Member State, the taking up or pursuit of a profession is subject to possession of a diploma, certificate or attestation of competence, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorize a national of a Member State to take up or pursue that profession under the same conditions as those which apply to its own nationals, if the applicant has, in another Member State, been awarded the diploma required there in order to take up or pursue the same profession.

3. However, in certain cases provided for by Directive 92/51/EEC, this rule does not prevent the host Member State from requiring the applicant to undergo an adaptation period or take an aptitude test, the conditions of which are laid down in Articles 4, 5 and 7 of Directive 92/51/EEC. Should the host Member State make use of this possibility, it must allow the applicant to choose between an adaptation period and an aptitude test.

II. ARTICLE 14 OF DIRECTIVE 92/51/EEC

Article 14 of Directive 92/51/EEC states the following:

'1. If, pursuant to the second sentence of the second subparagraph of Article 4 (1) (b), the third subparagraph of Article 5, or the second sentence of the second subparagraph of Article 7 (a), a Member State proposes not to grant applicants the right to choose between an adaptation period and an aptitude test, it shall immediately communicate to the Commission the corresponding draft provision. It shall at the same time notify the Commission of the grounds which make the enactment of such a provision necessary.

The Commission shall immediately notify the other Member States of any draft which it has received; it may also consult the coordinating group referred to in Article 13 (2) on the draft.

2. Without prejudice to the possibility for the Commission and the other Member States to make comments on the draft, the Member State may adopt the provision only if the Commission has not taken a decision to the contrary within three months.

3. At the request of a Member State or the Commission, Member States shall communicate to them, without delay, the definitive text of any provision arising from the application of this Article.'

III. THE FRENCH REQUEST

1. By memorandum dated 17 June 1996, which the Commission received on 19 June 1996, France requested a derogation under Article 14 of Directive 92/51/EEC with regard to the supervision of certain sporting activities. The French authorities submitted a

[1] OJ No L 209, 24. 7. 1992, p. 25.
[2] OJ No L 19, 24. 1. 1989, p. 16.

draft decree and detailed arguments together with the memorandum, which concerns the profession of sports trainer and calls for the possibility of derogating from the principle of free choice for applicants in the case of certain sports professions.

2. The request is concerned solely with the question of establishment. The question of the Supply of services by sports trainers is now governed by a separate set of rules in France (provision laid down by Decree No 96-1011 of 25 November 1996 on the practice of the profession of sports trainer by nationals of a Member State of the European Union or another State belonging to the European Economic Area).

3. The draft decree submitted by France provides for the introduction of a recognition procedure which respects the right of migrants to choose between an adaptation period and an aptitude test. However, in the case of the five professions listed in an annex to the draft decree, provision is made for the Minister for Sports to impose an apitude test. According to the draft submitted to the Commission, the aptitude test could be imposed for the following five professions: ski instuctors, high-altitude mountain guides, diving instructors, parachuting instructors and potholing instructors.

4. The French authorities specified that this request, which was formulated under Article 14, does not call into question the principle of mutual trust but is designed instead to uphold it in the case of activities where common objectives, such as safety, are at stake.

5. The French authorities take the view that this request is justified by the dangerous nature of the activities concerned, and that an aptitude test is the most appropriate compensation measure in such cases. In their view, allowing applicants to choose between two types of compensation measure does not provide all the necessary safeguards, and technical shortfalls that are incompatible with the pursuit of the profession could be concealed as a result.

6. The French authorities also regard the aptitude test as the most effective way of ensuring that applicants have the requisite technical skills for the activity in question and that they are capable of managing and organizing assistance.

7. Lastly, the French authorities point out that the dangers associated with the five activities in question are aggravated by inherently unpredictable environmental factors.

IV. DISCUSSION BY THE COORDINATING GROUP

Pursuant to Article 14 of Directive 92/51/EEC, the French request for a derogation was submitted to the other Member States and transmitted to all coordinators of the general system for the recognition of diplomas. In addition, as also provided for in Article 14, it was discussed at the meeting of the coordinating group held on 8 July 1996. The French delegation presented its request and answered the questions raised by the Commission and the other delegations.

V. THE REQUEST FOR FURTHER INFORMATION

After its own initial examination of the French request, and following the meeting of the coordinating group held on 8 July, the Commission took the view that there were five further questions which it ought to put to France. It did so in a letter dated 12 September. France provided a full answer in a memorandum dated 14 october, which reached the Commission on 17 October.

VI. GENERAL CONSIDERATIONS

1. The free movement of persons is one of the fundamental freedoms guaranteed by the Treaty. The Court of Justice has consistently held that it prevents not just overt discrimination on grounds of nationality, but also measures which in practice produce the same result even though the apply to nationals of the country and other Community nationals without distinction. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed, provided that they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which the pursue; and they must not go beyond what is necessary to attain it. Freedom of establishment is a fundamental freedom, and the French request has accordingly to be examined in the light of these four conditions.

2. The French request states that the only activities concerned are those which raise considerations of general interest, such as the maintenance of safety. They draw attention to the special features of the five professions involved: an unpredictable environment, real danger, surroundings, which are not marked off or signposted, the need for a knowledge of the organization of rescue services, etc. The Commission accepts that the five occupations are particularly dangerous and that safety may here be invoked as an imperative requirement in the general interest. It also accepts that, where a migrant's training has covered matters substantially different from those covered by the diploma required in France, making the aptitude test compulsory may be a measure likely to achieve the objective in view, namely the maintenance of safety. The Commission likewise accepts that in these five occupations an aptitude test may provide a better way than an adaptation period to establish how the applicant will react in real situations, while ensuring that the applicant has the necessary technical mastery of the job and the capacity to orgnaize and manage

rescue operations. The measure would seem to be in proportion to the objective. Lastly, there is nothing in the French request to suggest any discrimination: the French state certificates in the five professions concerned are awarded following selective tests in which the examiners establish the candidate's technical knowledge, teaching ability and ability to ensure safety and to organize assistance.

There are thus grounds for accepting the principle that there shoud be no free choice between an adaptation period and an aptitude test in this case. The conditions outlined above, however, must be fully respected when the measures proposed by the French authorities are applied in practice.

3. However, as the freedom of establishment is a fundamental freedom the Commission judges it advisable to give its agreement for a limited time only: a trial period will allow any practical difficulties which may arise as a result of the derogation to be evaluated with certainty.

The Commission will accordingly agree to the French request for a limited period ending on 31 July 1999.

4. The period allowed should enable the French authorities to evaluate whether the measures proposed in the request for a derogation are in fact those best suited to the purpose. It should also allow all the interested parties to observe any practical difficulties and to report them to the Commission.

5. At the end of this period France must produce a report evaluating the application of the derogation under Article 14. The report must provide the Commission with all the necessary figures and assessments regarding the aptitude tests. At that time, the Commission will also consider the observations of interested Member States, trade unions, trade agencies, ski schools, associations and any other interested parties. The French evaluation report and the observations of interested parties are to reach the Commission before 30 April 1999. If France then wishes the derogation to continue, it should attach a request to that effet to its report.

6. If at the end of the trial period the Commission proposes to refuse the French request, it will take a negative decision under Article 14 of Directive 92/51/EEC within three months of the request and by 31 July 1999 at the latest. If the Commission does not take a negative decision within that time, the derogation will be renewed automatically, without any time-limit, in accordance with the same Article 14,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 4 (1) (b) of Directive 92/51/EEC, France is hereby authorized for a limited period ending on 31 July 1999 to require applicants who are seeking to have a sports instructor's or trainer's diploma recognized for the purpose of establishing themselves in France and whose training displays substantial differences from that required in France to undergo an aptitude test. This derogation is authorized only in respect of the five following professions: ski instructor, high-altitude mountain guide, diving instructor, parachuting instructor and potholing instructor.

Article 2

France shall send the Commission a report evaluating the application of this Article 14 derogation before 30 April 1999.

Article 3

Member States who so desire and any other interested parties are hereby asked to submit their observations to the Commission by 30 April 1999.

Article 4

If France wishes the derogation authorized in Article 1 to be confirmed without any time-limit beyond 31 July 1999, it shall submit a fresh request to the Commission under Article 14 of Directive 92/51/EEC before 30 April 1999. The Commission shall take a decision in accordance with Article 14 of the Directive within three months of the French request.

Article 5

This Decision shall enter into force upon notification.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 9 January 1997.

For the Commission

Mario MONTI

Member of the Commission