Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 1 October 2020 [1]

Case C-940/19

Les Chirurgiens-Dentistes de France,
Confédération des Syndicats médicaux français,
Fédération des Syndicats pharmaceutiques de France,
Syndicat des Biologistes,
Syndicat des Médecins libéraux,
Union dentaire,
Conseil national de l'Ordre des Chirurgiens-Dentistes,
Conseil national de l'Ordre des Masseurs-Kinésithérapeutes,
Conseil national de l'Ordre des Infirmiers
v
Ministre des Solidarités et de la Santé,
Ministre de l'Enseignement supérieur, de la Recherche et de l'Innovation,
Premier ministre

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling – Recognition of professional qualifications – Directive 2005/36/EC – Article 4f(6) – National regulation establishing partial access to certain health professions)

I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 4f(6) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2] as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [3] . That provision allows for the first time for partial access to a professional activity in the context of a system of mutual recognition of qualifications.

2. While the mutual recognition of professional qualifications is generally recognised as one of the great achievements of the internal market, it is also fair to observe that this has not been without its own difficulties. One issue which has emerged is that experience has shown that within each Member State there can be a variety of sub-categories and specialties within various professions. In many instances these particular practitioners may not have the requisite qualifications such as would enable them to qualify for recognition for full professional purposes in another Member State.

1 Original language: English.
2 OJ 2005 L 255, p. 22.
3 OJ 2013 L 354, p. 132.

3. It is to address that particular problem that, as we shall presently see, the Union legislator has introduced the concept of partial access in order to deal with these sub-categories and specialties. Since dentistry forms the background to this case, dental hygienists are a case in point. A qualified dental hygienist may wish to practice in another Member State but find that he or she is not entitled to do so without also qualifying as a dental surgeon. Provision for partial access in the more recent directive on recognition of professional qualifications seeks to address this issue.

4. This request was made in the context of proceedings instituted by the Confédération nationale des Syndicats dentaires, now Les Chirurgiens-Dentistes de France, and other organisations representing professionals operating in the health sector. The defendants in these proceedings are the Ministre des Solidarités et de la Santé (Minister for Solidarity and Health), the Ministre de l'Enseignement supérieur, de la recherche et de l'innovation (Minister for Higher Education, Research and Innovation) and the Premier Ministre (Prime Minister). The applicants contend, in effect, that the French Government has acted unlawfully in the manner in which several regulatory acts have sought to transpose the requirements of Directive 2013/55 into French domestic law.

II. Legal context

A. EU law

1. Directive 2013/55

5. Recital 7 of Directive 2013/55 states:

'Directive 2005/36/EC applies only to professionals who want to pursue the same profession in another Member State. There are cases where, in the host Member State, the activities concerned are part of a profession with a larger scope of activities than in the home Member State. If the differences between the fields of activity are so large that a full programme of education and training would be required from the professional to compensate for shortcomings, and if the professional so requests, a host Member State should under these particular circumstances grant partial access. However, where there are overriding reasons of general interest, as defined by the Court of Justice of the European Union in its case-law relating to Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) and which may continue to evolve, a Member State should be able to refuse partial access. This may in particular be the case for health professions if they have public health or patient safety implications. Granting partial access should be without prejudice to the right of social partners to organise themselves.'

2. Directive 2005/36

6. Article 1 of Directive 2005/36, entitled 'Purpose', is worded as follows:

'This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

This Directive also establishes rules concerning partial access to a regulated profession and recognition of professional traineeships pursued in another Member State.'

7. Article 4 of Directive 2005/36, entitled 'Effects of recognition', provides:

'1. The recognition of professional qualifications by the host Member State shall allow beneficiaries to gain access in that Member State to the same profession as that for which they are qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

2. For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.

3. By way of derogation from paragraph 1, partial access to a profession in the host Member State shall be granted under the conditions laid down in Article 4f.'

8. Under Article 4f of Directive 2005/36, introduced by Directive 2013/55 and entitled 'Partial access':

'1. The competent authority of the host Member State shall grant partial access, on a case-by-case basis, to a professional activity in its territory only when all the following conditions are fulfilled:

(a) the professional is fully qualified to exercise in the home Member State the professional activity for which partial access is sought in the host Member State;

(b) differences between the professional activity legally exercised in the home Member State and the regulated profession in the host Member State as such are so large that the application of compensation measures would amount to requiring the applicant to complete the full programme of education and training required in the host Member State to have access to the full regulated profession in the host Member State;

(c) the professional activity can objectively be separated from other activities falling under the regulated profession in the host Member State.

For the purpose of point (c), the competent authority of the host Member State shall take into account whether the professional activity can be pursued autonomously in the home Member State.

2. Partial access may be rejected if such rejection is justified by overriding reasons of general interest, suitable for securing the attainment of the objective pursued, and does not go beyond what is necessary to attain that objective.

3. Applications for the purpose of establishment in a host Member State shall be examined in accordance with Chapters I and IV of Title III.

4. Applications for the purpose of providing temporary and occasional services in the host Member State concerning professional activities that have public health or safety implications shall be examined in accordance with Title II.

5. By derogation from the sixth subparagraph of Article 7(4) and Article 52(1), the professional activity shall be exercised under the professional title of the home Member State once partial access has been granted. The host Member State may require use of that professional title in the languages of the host Member State. Professionals benefiting from partial access shall clearly indicate to the service recipients the scope of their professional activities.

6. This Article shall not apply to professionals benefiting from automatic recognition of their professional qualifications under Chapters II, III and IIIa of Title III.'

9. According to Article 21(1) of Directive 2005/36, entitled 'Principle of automatic recognition':

'Each Member State shall recognise evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as pharmacist and as architect, listed in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1 respectively, which satisfy the minimum training conditions referred to in Articles 24, 25, 31, 34, 35, 38, 44 and 46 respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

…'

B. French law

10. The ordonnance du 19 janvier 2017 relative à la reconnaissance des qualifications professionnelles dans le domaine de la santé (Order No 2017-50 of 19 January 2017 on the recognition of professional qualifications in the health sector) was adopted in order to transpose Directive 2013/55 into French law. It introduced Articles L. 4002-3 to L. 4002-6 into the code de la santé publique (Public Health Code).

11. Article L. 4002-3 of the Public Health Code opens up the possibility of partial access to all health professions governed by Part IV of the same code, including, consequently, the professions to which the mechanism of automatic recognition of professional qualifications applies.

12. The Décret du 2 novembre 2017 relatif à la reconnaissance des qualifications professionnelles dans le domaine de la santé (Decree No 2017-1520 of 2 November 2017, on the recognition of professional qualifications in the field of health), was issued for the application, in particular, of Article L. 4002-3 of the Public Health Code. The orders of the Minister of Solidarity and Health of 4 and 8 December 2017 were issued to implement Decree No 2017-1520 of 2 November 2017.

III. The facts of the main proceedings

13. Les Chirurgiens-Dentistes de France and the other organisations mentioned above have, by several applications, brought an action for excess of power before the Conseil d'État (Council of State, France) requesting, depending on the case, the annulment, in whole or in part, of Decree No 2017-1520 of 2 November 2017, and/or the annulment of the Order of the Minister of Solidarity and Health of 4 December 2017, and/or the annulment of the Order of the Minister of Solidarity and Health of 8 December 2017.

14. In support of their action, the applicants have alleged, inter alia, that the abovementioned national legal provisions unlawfully include within the scope of partial access the professions covered by Chapter III of Title III of Directive 2005/36, namely professions benefiting from the mechanism for the automatic recognition of professional qualifications.

15. Since those various provisions are based on the order transposing Directive 2013/55 into French law, the national court held that the question whether Article 4f(6) of Directive 2005/36 – introduced by Directive 2013/55 – precludes a Member State from providing for the possibility of partial access to one of those professions was therefore decisive for the resolution of the dispute.

IV. The request for a preliminary ruling and the procedure before the Court

16. It is in those circumstances that, by decision of 19 December 2019, received at the Court on 30 December 2019, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 4f(6) of [Directive 2005/36] preclude a Member State from introducing the possibility of partial access to one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive?'

17. Written observations were submitted by Les Chirurgiens-Dentistes de France, the Conseil national de l'Ordre des Chirurgiens-Dentistes, the Conseil national de l'Ordre des Infirmiers, the French, Czech, and Austrian Governments and by the European Commission.

18. At the end of the written part of the procedure, the Court considered that it had sufficient information to proceed to judgment without a hearing, in accordance with Article 76(2) of the Court's Rules of Procedure.

V. Analysis

19. Following the case-law of the Court, especially the judgment of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45), and, in the health sector, the judgment of 27 June 2013, *Nasiopoulos* (C-575/11, EU:C:2013:430), the Union legislator introduced into Directive 2005/36 the concept of 'partial access' to a professional activity. Thus, in accordance with Article 4f(1) of Directive 2005/36, the competent authority of the host Member State must now, on a case-by-case basis and if the conditions laid down in that provision are fulfilled, grant partial access to a professional activity in its territory.

20. Nevertheless, Article 4f(6) of Directive 2005/36 states that this Article 4f 'shall not apply to professionals benefiting from automatic recognition of their professional qualifications under Chapters II, III and IIIa of Title III'.

21. By its question, the Conseil d'État (Council of State) seeks precisely to ascertain whether Article 4f(6) of Directive 2005/36 precludes partial access to one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive.

22. In the light of the wording of the provisions of the directive in question, its system and overall scheme and the objectives pursued by it, I am of the opinion that the Court should answer this question in the negative. I reach this conclusion for the following reasons.

23. First, in regard to the wording of Article 4f(6) of Directive 2005/36, it must be noted that, contrary to other provisions of that directive, the legislator used the term 'professionals' instead of 'professions'.[4] This choice of words does not seem to be other than a deliberate one. While the Commission's proposal did not contain a provision such as the current sixth paragraph of Article 4f of Directive 2005/36, the European Parliament proposed an amendment to exclude 'certain professions' from the partial access as a whole, and not on a case-by-case basis.[5] However, the term 'professionals' was preferred after agreement between the institutions involved in the legislative process.

24. Given that Directive 2005/36 provides no definition of the concept of 'professionals', the meaning and scope of that concept must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.[6]

25. In those circumstances, the choice of the words used in Article 4f(6) of Directive 2005/36 tends to limit the scope of the derogation provided for in that provision to professionals – that is to say persons who exercise one of the professions referred to in Chapters II, III and IIIa of Title III of Directive 2005/36 and who, as such, benefit from automatic recognition of their professional qualifications in accordance with the conditions laid down in the directive – and not to the profession envisaged as a whole.

26. Second, an analysis of the scheme of Article 4f of Directive 2005/36 confirms that interpretation since such a contextual analysis or systematic approach requires that the paragraphs that make up an article form a whole, the provisions of which cannot be taken in isolation.[7]

27. In that context, it is indisputable that the first paragraph of Article 4f of Directive 2005/36 establishes the principle of partial access to professional activities and lays down the conditions under which such partial access is authorised, while the second paragraph provides for the possibility of refusing partial access by overriding reasons of general interest. The third and fourth paragraphs then explain the procedure according to which the applications are to be examined and the fifth paragraph specifies under which title the professional activity must be exercised and what information is to be provided to the service recipient. The sixth and last paragraph then specifies that these provisions of Article 4f are not applicable to professionals benefiting from automatic recognition of their professional qualifications under Chapters II, III and IIIa of Title III. It is therefore clear from this structure that the last paragraph is an exception to the principle set out in the first paragraph and framed in the following paragraphs. As an exception to the principle of partial access, Article 4f(6) of Directive 2005/36 must, therefore, be interpreted strictly.

28. Third, the objective pursued by Article 4f of Directive 2005/36 and, more broadly, by this directive, leads to the same interpretation.

29. As regards the purpose of Directive 2005/36, as the Court has already ruled, the objective of this directive is to allow the holder of a professional qualification giving access to a regulated profession in the holder's home Member State to gain access, in the host Member State, to the same profession as that for which he is qualified in the home Member State.[8]

4 See, by comparison, Article 6(a), 7(4) or 10 of Directive 2005/36.

5 Compare the Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System (COM(2011) 883 final) and amendment 34 in the Draft Report of the Committee on the Internal Market and Consumer Protection of 16 July 2012 on Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System (2011/0435 (COD)).

6 See, to that effect, judgment of 12 June 2018, *Louboutin and Christian Louboutin* (C-163/16, EU:C:2018:423, paragraph 20).

7 See, to that effect, judgment of 3 September 2015, *Sodiaal International* (C-383/14, EU:C:2015:541, paragraph 25).

8 See, to that effect, judgment of 16 April 2015, *Angerer* (C-477/13, EU:C:2015:239, paragraphs 36 and 44).

30. With regard to the objective of Article 4f of Directive 2005/36, it may be added, firstly, that the directive which introduced this provision – namely Directive 2013/55 – was adopted on the basis of Article 53(1) TFEU. However, it is apparent from the wording of the latter provision that the purpose of directives adopted on that basis is to facilitate the mutual recognition of diplomas, certificates and other evidence of formal qualifications by laying down rules and common criteria which result, as far as possible, in automatic recognition of those diplomas, certificates and other evidence of formal qualifications.[9] Secondly, recital 7 of Directive 2013/55 confirms that the authorisation of partial access – for professions for which the differences between the fields of activity in the professional's home Member State and the host Member State are so large that a full programme of education and training would be required of the professional in order to compensate for its shortcomings – is clearly part of this objective of facilitated mutual recognition.

31. In that context, I am of the opinion that harmonisation of the professional qualifications necessary for the automatic recognition of professions whose scope of activity is clearly defined by the directive – such as dental practitioners[10] – does not mean that some Member States do not accept the parallel and autonomous pursuit of some of the activities which fall within the definition of a 'harmonised profession'.[11] However, it would be contrary to the aforementioned objectives to prevent such professionals from practising in another Member State on the sole pretext that this activity is one of those covered by another profession with a larger scope.

32. Thus, the introduction of partial access in Directive 2005/36, in my view, renders inapplicable the case-law based on the previous directives which did not provide for the creation of a category of practitioners which did not correspond to any category provided for in the directives applicable at the time.[12]

33. Contrary to what may have been argued in one way or another by the applicants in the main proceedings, I do not see how authorising partial access for activities included in the professions benefiting from the automatic recognition of their professional qualifications under Chapters II, III and IIIa of Title III of Directive 2005/36 would be contrary to the harmonisation sought by the legislature. Such harmonisation does not prevent the fact that those professions may consist of different activities which may be, from an objective point of view, dissociated from the activities covered by the 'harmonised profession' and, as such, pursued autonomously.

34. By contrast, a person – the 'professional' within the meaning of Article 4f(6) of Directive 2005/36 – who has all the qualifications required to practise one of the professions covered by the automatic recognition of professional qualifications must necessarily be admitted to practise all the activities covered by the profession in question. This is how the effectiveness – *effet utile* – of Directive 2005/36 is preserved and how I understand the prohibition of partial access referred to in Article 4f(6) of Directive 2005/36.

35. Although Directive 2005/36 treats these professions whose qualifications are harmonised as a whole, it nevertheless recognises the reality that in many Member States there are separate professional activities operating within the rubric of one profession. These professional activities may, of course, involve corresponding education and training. Indeed, Directive 2005/36 does not preclude for example a specialised training course, the title of which does not correspond to those listed in

9 See, to that effect, judgment of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45, paragraph 23).

10 According to Article 36(1) of Directive 2005/36 and for the purposes of that directive, 'the professional activities of dental practitioners are the activities defined in paragraph 3 and pursued under the professional qualifications listed in Annex V, point 5.3.2'.

11 A good example here is the situation of Belgian dental hygienists cited by the Commission.

12 See order of 17 October 2003, *Vogel* (C-35/02, EU:C:2003:570, paragraphs 28, 30 and 31).

Annex V to that directive, from being open both to persons who have completed only a basic medical training course and to those who have completed and validated only studies in the context of a basic dentistry training course,[13] even if, in that case, such specialised training cannot lead to the issuing of evidence of basic medical training or evidence of basic dental training.[14]

36. In those circumstances, I am of the opinion that, as for other professions referred to by the Court in its judgments of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45), and of 27 June 2013, *Nasiopoulos* (C-575/11, EU:C:2013:430), when the activity in question may objectively be separated from the rest of the activities of one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive, the dissuasive effect caused by the preclusion of any possibility of partial access would be too serious to be offset by the fear of potential harm to recipients of services or what is required as regards protection of health.[15]

37. In such a case, those legitimate objectives may be achieved through less restrictive means, particularly the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in its original form, and in the official language of the host Member State.[16] That safeguard is now expressly provided for by Article 4f(5) of Directive 2005/36. Article 4f(5) further adds that professionals benefiting from partial access must clearly indicate to the service recipients the scope of their professional activities. In addition, it must be recalled that partial access can only be granted on a case-by-case basis and that Member States may, in any case, reject partial access on overriding reasons of general interest such as public health, in accordance with Article 4f(2) of Directive 2005/36.

38. Consequently, in the light of the foregoing considerations, I consider that Article 4f(6) of Directive 2005/36 does not preclude a Member State from providing for partial access to one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive.

VI. Conclusion

39. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the question referred by the Conseil d'État (Council of State, France) as follows:

Article 4f(6) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013, does not preclude a Member State from providing for partial access to one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive.

13 See, to that effect, judgment of 19 September 2013, *Conseil national de l'ordre des médecins* (C-492/12, EU:C:2013:576, paragraph 39).

14 See, to that effect, judgment of 19 September 2013, *Conseil national de l'ordre des médecins* (C-492/12, EU:C:2013:576, paragraph 40).

15 See, to that effect, judgments of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45, paragraph 38), and of 27 June 2013, *Nasiopoulos* (C-575/11, EU:C:2013:430, paragraphs 30 and 34).

16 See, to that effect, judgment of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos* (C-330/03, EU:C:2006:45, paragraph 38).