REPORT FOR THE HEARING

in Case E-3/20

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

The Norwegian Government, represented by the Ministry of Health and Care Services,

and

Anniken Jenny Lindberg,

concerning the interpretation of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, and in particular Article 21, as adapted to the Agreement on the European Economic Area.

I Introduction

1. By letter of 27 March 2020, registered at the Court as Case E-3/20 on 14 April 2020, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between the Norwegian Government, represented by the Ministry of Health and Care Services, and Anniken Jenny Lindberg.

2. The case concerns the right to authorisation in Norway as a dental practitioner based on a five-year training programme from a Danish university. By decision of 6 December 2017, the Norwegian Appeal Board for Health Personnel (*Statens helsepersonellnemnd*) upheld the refusal of Ms Lindberg's application for authorisation as a dental practitioner. The grounds for the refusal were that Ms Lindberg had not obtained a "permit to practise independently" ("tilladelse til selvstændig virke") as a dental practitioner in Denmark.

II Legal background

EEA law

3. Article 28(1) and (2) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

4. Article 31(1) EEA reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

5. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) ("the Directive") was incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 142/2007 (OJ 2008 L 100, p. 70, and EEA Supplement 2008 No 19 p. 70), which amended Annex VII and inserted it as point 1 of that Annex. Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled on 22 December 2008 and the decision entered into force on 1 July 2009.

6. The Directive was 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') (OJ 2013 L 354, p. 132) ("Directive 2013/55") which was incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 94/2017 (OJ 2019 L 36, p. 52, and EEA Supplement 2019 No 11, p. 62). Constitutional requirements were indicated

by Norway, Iceland and Liechtenstein. The requirements were fulfilled on 28 November 2018 and the decision entered into force on 1 January 2019.

7. Recital 1 of the Directive reads:

Pursuant to Article 3(1)(c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services is one of the objectives of the Community. For nationals of the Member States, this includes, in particular, the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than the one in which they have obtained their professional qualifications. In addition, Article 47(1) of the Treaty lays down that directives shall be issued for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

8. Recital 9 of the Directive reads:

While maintaining, for the freedom of establishment, the principles and safeguards underlying the different systems for recognition in force, the rules of such systems should be improved in the light of experience. Moreover, the relevant directives have been amended on several occasions, and their provisions should be reorganised and rationalised by standardising the principles applicable. It is therefore necessary to replace Council Directives 89/48/EEC and 92/51/EEC, as well as Directive 1999/42/EC of the European Parliament and of the Council on the general system for the recognition of professional qualifications, and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, by combining them in a single text.

9. Recital 14 of the Directive reads:

The mechanism of recognition established by Directives 89/48/EEC and 92/51/EEC remains unchanged. As a consequence, the holder of a diploma certifying successful completion of training at post-secondary level of a duration of at least one year should be permitted access to a regulated profession in a Member State where access is contingent upon possession of a diploma certifying successful completion of higher or university education of four years' duration, regardless of the level to which the diploma required in the host Member State belongs. Conversely, where access to a regulated profession is contingent upon successful completion of higher or university education of more than four years, such access should be permitted only to holders of a diploma certifying successful completion of higher or university education of at least three years' duration.

10. Recital 17 of the Directive reads:

In order to take into account all situations for which there is still no provision relating to the recognition of professional qualifications, the general system should be extended to those cases which are not covered by a specific system, either where the profession is not covered by one of those systems or where, although the profession is covered by such a specific system, the applicant does not for some particular and exceptional reason meet the conditions to benefit from it.

11. Recital 19 of the Directive reads:

Freedom of movement and the mutual recognition of the evidence of formal qualifications of doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects should be based on the fundamental principle of automatic recognition of the evidence of formal qualifications on the basis of coordinated minimum conditions for training. In addition, access in the Member States to the professions of doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife and pharmacist should be made conditional upon the possession of a given qualification ensuring that the person concerned has undergone training which meets the minimum conditions laid down. This system should be supplemented by a number of acquired rights from which qualified professionals benefit under certain conditions.

12. Article 1 first paragraph of the Directive reads:

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.

13. Article 3(1)(c) of the Directive reads:

For the purposes of this Directive, the following definitions apply:

(c) 'evidence of formal qualifications': diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community. Where the first sentence of this definition does not apply, evidence of formal qualifications referred to in paragraph 3 shall be treated as evidence of formal qualifications;

14. Following the entry into force of Directive 2013/55, Article 3(1)(j) of the Directive reads:

> *(j) 'professional traineeship': without prejudice to Article 46(4), a period of professional practice carried out under supervision provided it constitutes a condition for access to a regulated profession, and which can take place either during or after completion of an education leading to a diploma;*

15. At the material time, Article 4 of the Directive read:

> *1. The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is 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.*

16. Article 10 of the Directive reads, in extract:

> *This Chapter applies to all professions which are not covered by Chapters II and III of this Title and in the following cases in which the applicant, for specific and exceptional reasons, does not satisfy the conditions laid down in those Chapters:*
>
> *(a) for activities listed in Annex IV, when the migrant does not meet the requirements set out in Articles 17, 18 and 19;*
>
> *(b) for doctors with basic training, specialised doctors, nurses responsible for general care, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives, pharmacists and architects, when the migrant does not meet the requirements of effective and lawful professional practice referred to in Articles 23, 27, 33, 37, 39, 43 and 49;*
>
> *…*
>
> *(d) without prejudice to Article 21(1), 23 and 27, for doctors, nurses, dental practitioners, veterinary surgeons, midwives, pharmacists and architects holding evidence of formal qualifications as a specialist who must have taken part in the training leading to the possession of a title listed in Annex V, points 5.1.1, 5.2.2, 5.3.2, 5.4.2, 5.5.2, 5.6.2 and 5.7.1, and solely for the purpose of the recognition of the relevant specialty;*
>
> *…*

17. Article 21(1) of the Directive reads:

1. 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.

Such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates 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.

The provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23, 27, 33, 37, 39 and 49.

18. At the material time, Article 21(6) and (7) of the Directive read:

6. Each Member State shall make access to and pursuit of the professional activities of doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives and pharmacists subject to possession of evidence of formal qualifications referred to in Annex V, points 5.1.1, 5.1.2, 5.1.4, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2 and 5.6.2 respectively, attesting that the person concerned has acquired, over the duration of his training, and where appropriate, the knowledge and skills referred to in Articles 24(3), 31(6), 34(3), 38(3), 40(3) and 44(3).

The knowledge and skills referred to in Articles 24(3), 31(6), 34(3), 38(3), 40(3) and 44(3) may be amended in accordance with the procedure referred to in Article 58(2) with a view to adapting them to scientific and technical progress.

Such updates shall not entail, for any Member State, an amendment of its existing legislative principles regarding the structure of professions as regards training and conditions of access by natural persons.

7. Each Member State shall notify the Commission of the legislative, regulatory and administrative provisions which it adopts with regard to the issuing of evidence of formal qualifications in the area covered by this Chapter. In addition, for evidence of formal qualifications in the area referred to in Section 8, this notification shall be addressed to the other Member States.

The Commission shall publish an appropriate communication in the Official Journal of the European Union*, indicating the titles adopted by the Member States for evidence of formal qualifications and, where appropriate, the body which issues the evidence of formal qualifications, the certificate which accompanies it and the corresponding professional title referred to in Annex V, points 5.1.1, 5.1.2, 5.1.4, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2, 5.6.2 and 5.7.1 respectively.*

19. Article 21(7) of the Directive was deleted by Directive 2013/55/EU and was replaced by Article 21a, entitled "Notification procedure".

20. Following the entry into force of Directive 2013/55, Article 21a(4) of the Directive reads:

In order to take due account of legislative and administrative developments in the Member States, and on condition that the laws, regulations and administrative provisions notified pursuant to paragraph 1 of this Article are in conformity with the conditions set out in this Chapter, the Commission shall be empowered to adopt delegated acts in accordance with Article 57c in order to amend points … 5.3.2 … of Annex V, concerning the updating of the titles adopted by the Member States for evidence of formal qualifications and, where appropriate, the body which issues the evidence of formal qualifications, the certificate which accompanies it and the corresponding professional title.

21. The Joint Committee Decision implementing Directive 2013/55 made the following adaptation to Article 21a of the Directive:

(C) In Article 21a(4), the following subparagraph shall be added:

"Where the laws, regulations and administrative provisions notified by an EFTA State pursuant to paragraph 1 of this Article are in conformity with the conditions set out in this Chapter, the EFTA Surveillance Authority shall issue a recommendation to amend Annex VII to the EEA Agreement to update the titles adopted by the EFTA States for evidence of formal qualifications and, where appropriate, the body which issues the evidence of formal qualifications, the certificate which accompanies it and the corresponding professional title. The EEA Joint Committee shall take recommendations issued by the EFTA Surveillance Authority into account when amending Annex VII to the EEA Agreement."

22. At the material time, Article 34(2) of the Directive read, in extract:

Basic dental training shall comprise a total of at least five years of full-time theoretical and practical study, comprising at least the programme described in Annex V, point 5.3.1 and given in a university, in a higher institute providing

training recognised as being of an equivalent level or under the supervision of a university.

...

23. Following the entry into force of Directive 2013/55, Article 34(2) of the Directive reads, in extract:

Basic dental training shall comprise a total of at least five years of study, which may in addition be expressed with the equivalent ECTS credits, and shall consist of at least 5 000 hours of full-time theoretical and practical training that comprises at least the programme described in point 5.3.1 of Annex V and that is provided in a university, in a higher institute providing training recognised as being of an equivalent level or under the supervision of a university.

...

24. Article 36(2) of the Directive reads:

The profession of dental practitioner shall be based on dental training referred to in Article 34 and shall constitute a specific profession which is distinct from other general or specialised medical professions. Pursuit of the activities of a dental practitioner requires the possession of evidence of formal qualifications referred to in Annex V, point 5.3.2. Holders of such evidence of formal qualifications shall be treated in the same way as those to whom Articles 23 or 37 apply.

25. Article 50 of the Directive reads, in extract:

1. Where the competent authorities of the host Member State decide on an application for authorisation to pursue the regulated profession in question by virtue of this Title, those authorities may demand the documents and certificates listed in Annex VII.

...

2. In the event of justified doubts, the host Member State may require from the competent authorities of a Member State confirmation of the authenticity of the attestations and evidence of formal qualifications awarded in that other Member State, as well as, where applicable, confirmation of the fact that the beneficiary fulfils, for the professions referred to in Chapter III of this Title, the minimum training conditions set out respectively in Articles 24, 25, 28, 31, 34, 35, 38, 40, 44 and 46.

...

26. Following the entry into force of Directive 2013/55, Article 55a(1) of the Directive reads:

> *If access to a regulated profession in the home Member State is contingent upon completion of a professional traineeship, the competent authority of the home Member State shall, when considering a request for authorisation to exercise the regulated profession, recognise professional traineeships carried out in another Member State provided the traineeship is in accordance with the published guidelines referred to in paragraph 2, and shall take into account professional traineeships carried out in a third country. However, Member States may, in national legislation, set a reasonable limit on the duration of the part of the professional traineeship which can be carried out abroad.*

27. At the material time, point 5.3.2 of Annex V to the Directive, entitled "Evidence of basic formal qualifications of dental practitioners" contained the following entries regarding Denmark:

Country	**Evidence of formal qualifications**	**Body awarding the evidence of qualifications**	**Certificate accompanying the evidence of qualifications**	**Professional title**	**Reference date**
Denmark	Evidence graduate exam in dentistry (cand. odont.) (*Bevis for tandlægeeksamen (odontologisk kandidateksamen)*)	Tandlægehøjskolene, Sundhedsvidenskabeligt universitetsfakultet	Authorisation as dental practitioner, issued by the Danish Health Authority (*Autorisation som tandlæge, udstedt af Sundhedsstyrelsen*)	Dental practitioner (*Tandlæge*)	28 January 1980

28. In 2008, the Commission published Communication from the Commission — Notification of evidence of formal qualifications — Directive 2005/36/EC on the recognition of professional qualifications (Annex V) (OJ 2008 C 322, p. 3) ("Communication 2008/C 322/03") in accordance with Article 21(7) of the Directive. Under the heading "6. Dental practitioners", in point 2 regarding Denmark, a second certificate was added to the column entitled "Certificate accompanying the evidence of qualifications" which reads as follows:

> *1. Authorisation as dental practitioner, issued by the Danish Health Authority* (Autorisation som tandlæge, udstedt af Sundhedsstyrelsen)

2. Permit to practise independently as a dental practitioner (Tilladelse til selvstændig virke som tandlæge)

29. Commission Delegated Decision (EU) 2016/790 of 13 January 2016 amending Annex V to Directive 2005/36/EC of the European Parliament and of the Council as regards the evidence of formal qualifications and the titles of training courses (OJ 2016 L 134, p. 135) ("Commission Delegated Decision 2016/790") was incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 303/2019 (OJ 2020 L 68, p. 49, and EEA Supplement 2020 No 14, p. 55) ("Decision No 303/2019"). The decision entered into force on 14 December 2019.Commission Delegated Decision 2016/790 was adopted pursuant to Article 21a(4) of the Directive, as introduced by Directive 2013/55.

30. As a result of Commission Delegated Decision 2016/790, in point 5.3.2 of Annex V to the Directive, the entry for Denmark was updated with respect to column 1 entitled "Evidence of formal qualifications" and column 2 entitled "Body awarding the evidence of qualifications" . The content of point 5.3.2 for Denmark was otherwise identical to Communication 2008/C 322/03.

National law

31. The Norwegian Health Care Professionals Act (*Lov 2 July 1999 nr. 64 om helsepersonell m.v.*) regulates the requirements which health care professionals in Norway are subject to, including the conditions for obtaining authorisations, licences and specialist approvals.

32. The title "dental practitioner" is protected in Norway, as provided for in the Health Care Professionals Act Section 48, first paragraph, point (x).

33. Section 48a of the Act sets out criteria that the individual health care professional, including dental practitioners, must fulfil in order to obtain authorisation as a health care professional in Norway. Persons entitled to an authorisation following an application includes those who:

> *(b) have passed an examination abroad which is recognised under an agreement on mutual recognition under Section 52 …*

34. Applicants who are able to verify the necessary theoretical and practical qualifications for practising the profession, and who fulfil other criteria as laid down by law or regulation, are entitled to authorisation.

35. An agreement on mutual recognition mentioned in point (b) of the first paragraph of Section 48a of the Health Care Professionals Act includes the Directive.

36. As regards health care professionals, the Directive is implemented in the Regulation on authorisation, licences and specialist recognition for health care professionals with professional qualifications from other EEA States or from Switzerland (*Forskrift 8. oktober 2008 nr. 1130 om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-land eller fra Sveits*) ("the EEA Regulation"). Chapter 2 of that regulation lays down rules for "Authorisation, licence and specialist recognition for harmonised training". In Section 5 it is stated that:

> *Applicants shall be entitled to an authorisation or licence as a … dental practitioner… if the applicant produces evidence of formal qualifications which*
>
> *…*
>
> *c) for dental practitioners is referred to in point 5.3.2 of Annex II of the regulation and attached any certificates of practical service, etc.…*

37. Annex II was amended by Regulation of 10 December 2009 No 1310 on the amendment of the Regulation on authorisation, licences and specialist recognition for health care professionals with professional qualifications from other EEA States or from Switzerland (*Forskrift 10. desember 2009 nr 1310 om endring i forskrift om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-lan*d), which on page 2 then read:

> *The Annex is based on Directive 2005/36/EC, with the following amendments:*
>
> *• Communication from the Commission - Communication of qualifications - Directive 2005/36 EC on recognition of professional qualifications (Annex V) 2008 / C 322/03*
>
> *• Communication from the Commission - Communication of qualifications - Directive 2005/36 EC on recognition of professional qualifications (Annex V) 2009 / C 114/01*

38. Additional communications and regulations were added to page 2 of Annex II by an amending regulation of 29 February 2012. By an amending regulation of 19 December 2016, the section on page 2 of Annex II was amended so that it referred to Commission Delegated Decision 2016/790.

39. Column 4 entitled "Certificate accompanying the evidence of qualifications" for Denmark in Point 5.3.2 of Annex II to the EEA Regulation has been identical to point 5.3.2 of Annex V to the Directive as it currently reads since the amendment in 2009.

40. The Norwegian authorities have only listed the university diploma in Annex V. The authorisation is given automatically upon graduation and is therefore not listed in the

Annex. Dental practitioners educated in Norway are granted authorisation, and thereby full professional recognition, after completing university studies. There is no requirement to undergo professional traineeship after graduation. An authorised dental practitioner may work without supervision and may run their own dental clinic.

III Facts and procedure

41. Anniken Jenny Lindberg is a Norwegian national. In the autumn of 2011, she commenced a training programme to become a dental practitioner at Aarhus University in Denmark. Ms Lindberg graduated with the university degree cand. odont. on 27 June 2016 and was granted the Danish authorisation as a dental practitioner on 30 June 2016.

42. In a confirmation from the Danish Patient Safety Authority (*Styrelsen for patientsikkerhed*), it is stated that Ms Lindberg's evidence of formal qualifications meets the standards laid down in Article 34 of the Directive and that she is entitled to work as a dentist under the supervision of a dentist with a permission to practise independently.

43. The Danish authorisation to work as a dental practitioner is issued following completion of dental training at a university in Denmark. This authorisation gives the holder the right to use the title "dental practitioner" ("*tandlæge*") and to pursue the professional activities of a dental practitioner.

44. Section 47 of Chapter 11 of the Danish Law on the authorisation of health care professionals and health care practice (*lov om autorisation af sundhedspersoner og om sundhedsfaglig virksomhed*) provides that the authorisation as a dental practitioner (*tandlæge*) is given to those who have passed an examination as a dental practitioner in Denmark (*tandlægeeksamen*), or a foreign examination which is equivalent to it. Only persons with an authorisation as a dental practitioner are granted the right to use the title dental practitioner and to pursue the professional activities of a dental practitioner (*udøve tandlægevirksomhed*).

45. However, dental practitioners with authorisation do not have a "permit to practise independently as a dental practitioner" ("*tilladelse til selvstændig virke som tandlæge*") without one year of post-graduate practice. According to Section 48 of Chapter 11, a permit to practise independently as a dental practitioner shall be granted by the Patient Safety Authority to a dental practitioner who has been in a subordinate position for one year at the practice of a dental practitioner with a permit to practise independently as a dental practitioner. A dental practitioner who has not obtained the permit to practise independently may work in a subordinate position at a clinic under a dental practitioner with a permit to practise independently as a dental practitioner.

46. The condition for the post-graduate certificate "permit to practise independently" is experience working as a dental practitioner in the ordinary labour market for at least 12 months (1 440 hours), of which at least 3 months (360 hours) must be on children/youth

and adult patients respectively, either in Denmark or abroad. There is no review or further examination, and no deadline to obtain the certificate.

47. Following completion of post-graduate practice, a dental practitioner is issued with a certificate entitled "permit to practise independently as a dental practitioner". This certificate is currently included by Denmark in the list in column 4 of point 5.3.2 of Annex V to the Directive.

48. The post-graduate certificate is necessary if a dental practitioner wishes to be self-employed and have their own dental clinic in Denmark. It is not required in order to work as a dental practitioner in Denmark in an employed capacity.

49. Ms Lindberg has not completed her post-graduate practice.

50. Ms Lindberg moved back to Norway in the summer of 2016. On 10 August 2016 she used the online application for authorisation and licence (*Søknad om autorisasjon og lisens*), in which she provided documentary evidence of her training and the authorisation from Denmark.

51. In a decision entitled "Application for authorisation as a dental practitioner – refusal" ("*Søknad om autorisasjon som Tannlege – avslag*") of 29 September 2016, the following grounds were given by the Norwegian Directorate of Health (*Helsedirektoratet*) for refusing the application:

> "Your completed graduate training programme as a dental practitioner largely corresponds to the Norwegian training for dental practitioners. You have been granted an authorisation in Denmark, without entitlement to practise independently. Under the Danish rules, you are required to practise for at least one year following completion of the training programme before you can work as an independent dental practitioner. In Denmark, permission to practise independently is granted after a minimum of one year's practice. Norway does not have a similar system of practice for dental practitioners like the one in Denmark.
>
> Applicants with Danish training as dental practitioners and who have not completed their practice for permission to practice independently in Denmark, have not completed their training programme and are, therefore, not entitled to authorisation in Norway, neither on the basis of the Nordic Agreement, nor on Section 5 of the EEA Regulation (FOR-2008-10-08-1130), with accompanying Annex II, see letter (b) of the first paragraph of Section 48a of the Act relating to health care professionals ("the Health Care Professionals Act") (*Helsepersonelloven*).
>
> You do not fulfil the requirement to practice independently and are, therefore, not entitled to authorisation in Norway under letter (d) of the first paragraph of Section 48a of the Health Care Professionals Act.

Neither does an incomplete training programme give entitlement to authorisation following an individual assessment under letters (c) and (d) of the first paragraph of Section 48a of the Health Care Professionals Act.

Licence

A licence may only be granted where there are minor deficiencies. One year's practice is such a considerable deficiency in terms of training that there neither are grounds to grant a licence under Section 49 of the Health Care Professionals Act.

Conclusion

The Directorate of Health refuses your application, as you do not fulfil the criteria for authorisation under Section 48a of the Health Care Professionals Act. Nor do you fulfil the criteria for a licence under Section 49 of the Health Care Professionals Act.

Information

In order to obtain authorisation in Norway at a later time, you must demonstrate that you are entitled to practise independently in Denmark by completing practice in Denmark."

52. On 6 October 2016, Lindberg appealed against the decision. In her appeal, she argued that the training programme at Aarhus met the EU standards, that she had availed herself of one of seven admissions for dental training in Denmark reserved for Norwegian nationals, that the Aarhus School of Dentistry (*Aarhus Tandlægeskole*) is ranked number 17 among the best dental training programmes in the world, that she had received a written reply from the Directorate of Health in February 2016 stating that she would receive a licence in Norway for supervised practice, and that she had now secured employment in Norway subject to her obtaining a licence.

53. On 7 March 2017, the Directorate of Health upheld its refusal to grant an authorisation and licence and forwarded the matter to the National Office for Health Service Appeals (*Helseklage*) for final decision by the Norwegian Appeal Board for Health Personnel. By decision of 6 December 2017, the Norwegian Appeal Board for Health Personnel upheld the Directorate of Health's decision of 29 September 2016.

54. Lindberg brought legal proceedings against the decision before Larvik District Court (*Larvik tingrett*) by writ of 28 February 2018. By judgment of 1 October 2018, the District Court concluded that Ms Lindberg had to submit "evidence of a graduate degree in dentistry" ("*bevis for kandidatuddannelsen i odontologi*"), "authorisation as a dental practitioner" ("*autorisation som tandlæge*") as well as a certificate showing that she had a "permit to practise independently as a dental practitioner" ("*tilladelse til selvstændig virke*

som tandlæge”), in order to be entitled to authorisation under the EEA Regulation. Since Ms Lindberg was not able to produce a certificate indicating a permit to practise independently as a dental practitioner, the District Court concluded that she was not entitled to authorisation under the rules of the EEA Regulation on authorisation and licence for harmonised training, or on any other basis.

55. By judgment of 2 July 2019 of Agder Court of Appeal (*Agder lagmannsrett*), the Court of Appeal came to the opposite conclusion, holding that the criteria for obtaining authorisation under the automatic recognition scheme provided for in Article 21(1) of the Directive were fulfilled. The Court of Appeal held that Ms Lindberg’s completed university training in Denmark fulfils the minimum requirements laid down in Article 34(2) of the Directive. The submission of “evidence of a graduate degree in dentistry (cand. odont.)” (“*Bevis for kandidatuddannelsen i odontologi (cand. odont.)*”) was considered sufficient. It did not matter that Ms Lindberg was not able to produce a certificate of post-graduate practice as listed in column 4 of point 5.3.2 of Annex V to the Directive concerning a permit to practise independently as a dental practitioner. The Court of Appeal pointed out that the principle of automatic recognition in the second subparagraph of Article 21(1) provides for a consideration of appropriateness (*hensiktsmessighetsvurdering*) as to which certificates must be presented. The Court of Appeal further held that Ms Lindberg also could have based her entitlement to authorisation on the general recognition scheme provided for in Article 10 of the Directive.

56. The Norwegian Government brought an appeal against the judgment to the Supreme Court. By decision of the Appeals Selection Committee of the Supreme Court of 9 December 2019, leave to appeal was granted.

57. Against this background, the Supreme Court of Norway has referred the following questions to the Court:

I. Article 21 of the Professional Qualifications Directive

1. **Is Article 21(1) of the Professional Qualifications Directive to be interpreted as meaning that the host State may, in each case, require the applicant to produce both the relevant “evidence of formal qualifications” referred to in column 2 of point 5.3.2 of Annex V to the Directive and the specified “certificates” the home State may have included in column 4 for the profession in question, or should the term “appropriate” be interpreted as meaning that the host State must determine whether it is appropriate to require the specified certificates in a given case?**

   If the term “appropriate” is to be understood as requiring the host State to determine whether it is appropriate to require the specified certificates in a given case:

2. **What is the legal assessment and which factors will be legally relevant in the determination of whether it is “appropriate” to require listed certificates?**

3. **Is it of any consequence if the evidence of formal qualifications alone provides documentary evidence of training that is deemed to fulfil the minimum criteria laid down in Article 34(2) of the Directive and if the certificate that cannot be produced relates to post-graduate practice?**

II. Rights under the Main Part of the EEA Agreement

1. **Is the host State under an obligation to examine the application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant with training from a member country for a profession with harmonised minimum training requirements does not fulfil the criteria for recognition under Article 21 or Article 10 of the Professional Qualifications Directive?**

   If so:

2. **What is the legal assessment and what are the legally relevant factors in the determination of whether such an applicant may derive additional rights under Article 28 or Article 31 of the EEA Agreement?**

3. **What importance does it have that an applicant does not have a certificate for post-graduate practice which the home State has listed in column 4 of point 5.3.2 of Annex V to the Professional Qualifications Directive, if the host State does not require post-graduate practice of applicants trained in the host State and the training completed by the applicant is deemed to be equivalent to the training offered in the host State?**

4. **May it be required to give an applicant full rights in the host State if the evidence of formal qualifications the applicant is able to produce does not give the applicant corresponding professional rights in the home State?**

IV Written observations

58. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

— the Norwegian Government, represented by Kaija Bjelland and Torje Sunde, acting as Agents;

- Anniken Jenny Lindberg, represented by Tone Christin Galaasen and Per Andreas Bjørgan, advocates;
- the Government of Austria, represented by Albert Posch and Julia Schmoll, acting as Agents;
- the Kingdom of Spain, represented by Juan Rodríguez de la Rúa Puig, acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Ingibjörg Ólöf Vilhjálmsdóttir, Erlend Møinichen Leonhardsen and Carsten Zatschler, acting as Agents; and
- the European Commission ("the Commission"), represented by Lorna Armati and Hans Christian Støvlbæk, acting as Agents.

V Summary of the arguments submitted

The Norwegian Government

59. In response to Question 1 of the first set of questions concerning Article 21 of the Directive, the Norwegian Government submits that host States may require the applicant to be fully qualified in their home State, and therefore require the evidence of formal qualifications and certificates listed in Annex V to the Directive. No individual assessment of appropriateness (*hensiktsmessighetsvurdering*) should be conducted in that regard.[1]

60. The Government takes the view that an individual assessment of appropriateness would be contrary to the purpose and overall scheme of the Directive and the rules on automatic recognition based on minimum training requirements.

61. The Norwegian Government emphasises, first, that the purpose of the Directive is to facilitate the movement of fully qualified professionals. Different EEA States may have various requirements for practising a profession. Those who are fully qualified in country A may therefore encounter barriers when attempting to pursue their profession in country B. The Directive aims to remedy this. Articles 1 and 4(1) of the Directive state that the Directive is applicable to persons with professional qualifications that entitle them to practise their profession in the home State, and who have moved to another Member State to pursue their profession.[2]

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[1] Reference is made to the judgment in *Ordre des architectes*, C-365/13, EU:C:2014:280, paragraph 22.

[2] Reference is made to the judgments in *Ordre des architectes*, cited above, paragraph 19, and *Angerer*, C-477/13, EU:C:2015:239, paragraph 37, and to the Commission's *User guide - Directive 2005/36/EC - Everything you need to know about the recognition of professional qualifications*.

62. Second, professional recognition based on minimum training conditions is automatic and unconditional. If an applicant provides the relevant documents listed in Annex V to the Directive, a Member State must recognise her evidence of formal qualification.[3]

63. The automatic recognition scheme is a formal recognition process based on mutual trust. This means that a professional who has the documents that the home State has reported in Annex V to the Directive will be approved, without any further assessments by the host State. The host State cannot assess the content of the training or the applicant's skills.[4] Accordingly, the Norwegian Government asserts, it would be incorrect to require the host State to examine the substantive content of the applicant's training in order to determine whether it is "appropriate" to require the applicant to submit the certificates listed by the home State in Annex V.

64. As regards the wording of Article 21 of the Directive, the Norwegian Government submits that a comparison of the different language versions shows that the term "appropriate" is not to be interpreted as being a criterion of suitability, but rather as "where applicable" or "where relevant". Reference is made to the English, German, Spanish, French and Italian terms. The reason for this reservation is that only some countries have listed such additional certificates in Annex V to the Directive. For dental practitioners, Denmark, France, Italy, Latvia, Lithuania, Poland, Slovenia, Finland, and Sweden have listed accompanying certificates. Thus, it would be "appropriate" (applicable or relevant) to require a dental practitioner educated in Sweden to submit such a certificate, but not a dental practitioner educated in Germany (where accompanying certificates are not listed).

65. In the Norwegian Government's view, this is also how the term "appropriate" must be understood in relation to other articles in the Directive. For example, under Article 21a(4), the Commission is given the power to update Annex V to the Directive concerning the different titles and, "where appropriate", the issuing body and relevant documents. Again, the term is used to indicate "where applicable" or "where relevant". It is there because the EEA States may submit partial updates to Annex V. It does not mean that the Commission should carry out an individual assessment of whether a relevant update is suitable.

66. The Norwegian Government disagrees with the submission that column 4 of the tables in Annex V to the Directive (certificate accompanying the evidence of qualifications) must be viewed as a procedural regulation or information on purely national matters. It would be counter-intuitive to include documents in the Annex which States could not require applicants to present. Further, Articles 55a and 3(j) of the Directive underline the fact that post-graduate practice can be set as a condition for full professional

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[3] Reference is made to the judgment in *Ordre des architectes*, cited above, paragraph 24.

[4] Reference is made to the judgments in *Ordre des architectes*, cited above, paragraph 22, and *Preindl*, C-675/17, EU:C:2018:990, paragraph 31.

rights. Such practice can take place both during and after the education leading to the diploma. The information in column 4 is therefore vital to assess access to a regulated profession.

67. The Norwegian Government further submits that it is the lack of the document listed in column 4 that proves that Lindberg is not a fully qualified professional. It means that she lacks the one-year supervised clinical training that makes her fit to work independently and which gives full access to the profession of dental practitioner in Denmark.

68. The Norwegian Government takes the view that Article 21 of the Directive must be interpreted to the effect that the host State may, in each case, require the applicant to submit both the relevant "evidence of formal qualifications" referred to in column 2 of point 5.3.2 of Annex V to the Directive and any "certificates accompanying the evidence of qualifications" listed which the home State has included in column 4 with regard to the profession in question. As a result of the answer to Question 1, the Norwegian Government considers Questions 2 and 3 to be superfluous.

69. For the sake of completeness, in relation to Question 3, the Norwegian Government submits that the minimum training requirements laid down in Article 34 of the Directive are of no relevance for determining which of the documents the host State may require an applicant to submit. These minimum training requirements are conditions that the EEA States must fulfil in order to include a profession for automatic recognition under the system. It is the sole responsibility of the State of training to ensure that the training fulfils the minimum requirements.[5]

70. Furthermore, the Norwegian Government disagrees with the premise that university training alone can fulfil the requirements laid down in Article 34 of the Directive, as indicated by Question 3. It is the complete training – including any practical training – that must fulfil the minimum requirements to be included in the Directive.

71. The Norwegian Government submits that the training programme in the host State cannot be relevant when determining which of the documents the host State may require an applicant to submit pursuant to Article 21 of the Directive. Linking the assessment of which documents to require pursuant to Article 21(1) to the educational programme in different host States would also lead to unsatisfactory results. A relativisation of which documents different States may require professionals to submit would complicate and hinder the free movement of professionals. It would also make the work of harmonising the minimum training conditions, and updating Annex V to the Directive, futile.

72. As regards the questions on the main part of the EEA Agreement, the Norwegian Government argues that the fundamental purpose of mutual recognition is to allow fully qualified applicants to access the profession that they are qualified for. The Norwegian

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[5] Reference is made to the judgment in *Preindl*, cited above, paragraph 34.

Government submits that host States are under no obligation to examine an application for professional recognition under the main part of the Agreement if an applicant has started, and not finished, a harmonised training programme and therefore cannot avail themselves of the automatic or general recognition system under the Directive. There is no room for a subsequent assessment of applicants who are not fully qualified for a profession in their home State.

73. In the Norwegian Government's view, it is essential to differentiate between professions with and without harmonised minimum training requirements. For professions without any harmonised training, it follows from the case law of the Court of Justice of the European Union ("the ECJ") that the applicants can be assessed for recognition directly under the Treaty (or the main part of the EEA Agreement). For professions with harmonised minimum training requirements, the situation is different. For these professions, the alternative assessment is regulated by Article 10 of the Directive, which codifies the case law of the ECJ.

74. The Norwegian Government notes that failure to recognise professional qualifications obtained in another EEA State can serve as a barrier to the free movement and establishment of European professionals. The Directive was adopted with the objective that recognition of professions with coordinated minimum training requirements should be based on the automatic recognition system under the Directive, as stated in recitals 17 and 19 of the Directive.[6]

75. The general system provides for a case-by-case examination of the professional qualifications obtained by an applicant in her home State.[7] For professions with harmonised minimum training requirements, the general system was made applicable as a fallback scheme if an applicant for "specific and exceptional reasons" did not satisfy certain conditions of the automatic system, as set out in Article 10 of the Directive.

76. The Norwegian Government submits that the more detailed regulation in Article 10 of the Directive means that recourse can no longer be made to the main part of the EEA Agreement in a situation where an applicant in a profession with harmonised minimum training requirements does not fulfil the conditions for automatic recognition or the conditions for being evaluated under the general system as *lex generalis*. Were such applicants to be assessed under primary law, Article 10 of the Directive, as interpreted by the ECJ, would lose its significance. In support of this argument, the Norwegian Government relies on the preparatory works to the Directive and the judgment of the ECJ in *Angerer*.[8]

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[6] Reference is made to Case E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 65.
[7] Reference is made to the judgment in *Angerer*, cited above, paragraph 24.
[8] Reference is made to the judgment in *Angerer*, cited above.

77. The Norwegian Government takes the view that host States are under no obligation to examine an application for full professional recognition under the main part of the EEA Agreement if applicants with training for a profession with harmonised minimum training requirements cannot avail themselves of either the Directive's automatic mechanism or the general system. Consequently, in the Government's view, there is no need to answer Questions 2 to 4.

78. For the sake of completeness, the Norwegian Government submits that neither Article 28 nor Article 31 of the EEA Agreement requires host States to examine an application for full professional recognition under the main part of the Agreement by an applicant that has started, and not finished, a harmonised training programme. Applicants who interrupt their training before the practical training is completed, and thus before professional qualifications have been obtained, cannot rely on Articles 28 and 31 EEA for full access to a profession in other EEA States, even if their home State has a more stringent educational system. Applicants cannot exempt themselves from practical training required by their home State to gain full access to the profession there, by moving to a State which does not have relevant traineeships and claim full access to the profession.

79. Relying on the judgment of the ECJ in *Vlassopoulou*,[9] the Norwegian Government submits that a comparative assessment under the main part of the EEA Agreement presupposes that the applicant has full professional rights in their home State.

80. An interpretation according to which host States do not have regard to whether the education (including practical training) has been completed and professional qualifications been obtained would undermine the effectiveness of the rules on mutual recognition of professional qualifications.[10]

81. In the view of the Norwegian Government, it is important to distinguish between professional recognition, academic recognition and the case law relating to access to remunerated traineeships for graduates. The case law regarding traineeships is of no relevance to assessing professional recognition as such. The case law does, however, illustrate that applicants who lack practical training cannot be assessed for full professional recognition.[11]

82. The Norwegian Government contends that it would be incorrect to undertake an equivalence assessment of the training programmes' substantive content, as suggested by Question 3. It is for individual States to design their education and training systems and to determine which documents operate as evidence of formal qualifications. Recognition of professional qualifications must not be confused with recognition of foreign education and

[9] Reference is made to the judgment in *Vlassopoulou*, C-340/89, EU:C:1991:193, paragraphs 15 to 17.
[10] Reference is made to the judgments in *Morgenbesser*, C-313/01, EU:C:2003:612, and *Peśla*, C-345/08, EU:C:2009:771.
[11] Reference is made to the judgments in *Morgenbesser* and *Peśla*, both cited above.

training (academic recognition). The Government submits that an applicant with limited professional access in their home State may not derive a right to full access to the profession in another EEA State, regardless of the content of the partial training that they have completed and the content of the training programme in the host State.

83. The Norwegian Government proposes that the questions referred be answered as follows:

Article 21 of the Professional Qualifications Directive

1. *Article 21(1) of Directive 2005/36/EC must be interpreted to the effect that the host State may, in each case, require the applicant to produce both the relevant "evidence of formal qualifications" referred to in column 2 of point 5.3.2 of Annex V to the Directive and any listed "certificates accompanying the evidence of qualifications" which the home State has, potentially, included in column 4 with regard to the profession in question.*

Rights under the Main Part of the EEA Agreement

2. *The host State is not obliged to examine the application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant with training from an EEA State for a profession with harmonised minimum training requirements does not fulfil the criteria for recognition under Article 21 and Article 10 of the Professional Qualifications Directive.*

Anniken Jenny Lindberg

84. Lindberg notes that the Directive does not give detailed guidance with regard to what can be included in Annex V as a "certificate accompanying the evidence of qualifications". For that reason, the list may contain documents that are of limited relevance for the host State's assessment. For the same reason, the reference in Article 21(1) of the Directive to "certificates" and the phrase "where appropriate" must be understood in the light of the Directive's specific provisions on certificates.

85. According to Lindberg, the Directive does not preclude more stringent post-graduate conditions relating to various forms of professional activities in the home State, as is the situation, for example, in Denmark and Poland.

86. Lindberg submits that Norway (and most other EEA States) have no similar post-graduate requirement for dentists who want to open their own clinic. A Norwegian graduate who has completed a similar 5-year basic dental training in Norway will be entitled to authorisation as a dentist and then may work in Norway as a dentist in an employed or self-employed capacity. Applicants with a similar basic dental training from Denmark are thus

not treated in the same manner in Norway. The fact that the Danish dentist is fully qualified, according to the Norwegian standard, is, in other words, deemed irrelevant. According to Lindberg, this is problematic from a free movement perspective.

87. Lindberg submits that dental practitioners educated in Denmark and Poland were treated equally until autumn 2016 and were granted a licence as a dental practitioner in Norway on the same conditions. From that time, dental practitioners with a five-year education from Poland have been granted an authorisation in Norway, without the post-graduate certificate and the Polish state exam, both listed as "certificates" in Annex V to the Directive.

88. According to Lindberg, the permit to practise independently was not included in the original Annex V to the Directive but was notified by Denmark at a later stage. In 2013, Directive 2013/55 was adopted which amended the Directive to include a delegated power for the Commission to adopt implementing acts, including adaptations of point 5.3.2 of Annex V. By Commission Delegated Decision 2016/790, Annex V was replaced with a new list which adds the "permit to practise independently" in column 4 for Denmark.

89. Commission Delegated Decision 2016/790 states that the Commission considers that the updates to the list notified by the Member States are in conformity with the conditions set out in Chapter III of Title III of the Directive. However, Lindberg contends that the inclusion of the Danish permit to practise independently does not appear to be in line with those conditions. The permit to practise independently concerns a non-mandatory, post-graduate practice that is required in Denmark only for those dentists who are already authorised and who wish to establish their own practice/clinic. The permit to practise independently does not limit access to professional activities, but merely limits the capacity in which those activities may be pursued.

90. According to Lindberg, in awarding the authorisation as a dental practitioner, the Danish authorities confirm that the holder possesses the formal requirements to work as a dentist. She relies on Article 21(6) of the Directive to support this view. In Lindberg's assessment, it would constitute a breach of that provision to grant such authorisation and thus give the holders access to the professional activities of dentists, unless the holder had obtained the necessary evidence of formal qualifications attesting that the holder has the required skills to be a dental practitioner. Therefore, the permit to practise independently should not be considered a document that "accompanies the formal evidence of qualification" within the meaning of Annex V to the Directive.

91. Lindberg submits that had the Norwegian Government had reasons to doubt whether Lindberg had completed the training in accordance with the Directive, they should have

contacted the home State to ask for confirmation in accordance with Article 50(2) of the Directive.[12]

92. Lindberg considers that the first three questions concerning Article 21(1) of the Directive may be assessed together.

93. Article 21(1) of the Directive is a general provision that introduces the principle of mutual recognition based on evidence of formal qualifications for the professions mentioned. In accordance with Article 4 of the Directive, that principle entails that a host State shall give such evidence of formal qualifications the same effect on its territory as the evidence which it issues itself. Such evidence shall satisfy the minimum training conditions for basic dental training set out in Article 34 of the Directive. Any applicant who submits the required evidence for the completion of such basic training is, as such, in principle qualified to pursue professional activities as a dentist anywhere in the EEA. Lindberg relies on recital 19 of the Directive to support this view.

94. As regards the term "appropriate", Lindberg submits that this indicates a certain limitation. If the purpose of the provision was simply to say that all certificates listed in Annex V always must be required, wording to that effect would have been chosen instead.

95. According to Lindberg, it seems clear that the Directive does not grant any general discretion for the host State to determine what documents it should require in each case. The host State should not second guess the home State's organisation of its basic training, in particular by requiring documentation or requirements additional to what is listed in Annex V to the Directive.[13] If the applicant submits the documents that the home State has listed in point 5.3.2 of Annex V, there will be no reason or possibility for the host State to impose additional requirements. That is the core of the principle of automatic recognition. Normally that should mean that the applicant should provide the documentation, evidence as well as certificates that are listed for the respective home State in point 5.3.2 of Annex V.

96. However, according to Lindberg, this case concerns a different situation. From the certificates listed by EEA States in column 4 of point 5.3.2 of Annex V to the Directive, it can be observed that several States have organised the basic training to culminate with a state exam, which is confirmed by a certificate. In such cases the certificates could be seen as verification of the required knowledge and skills and would therefore be considered a necessary supplement to document the required training and skills. A permit to practise independently is however not an inherent or necessary part of the evidence for completion of the required basic training.

97. In Lindberg's view, there is no basis in the Directive or the case law that the corollary of automatic recognition is automatic rejection of applicants in a case where some

[12] Reference is made to the judgment in *Preindl*, cited above, paragraphs 38 and 39.
[13] Reference is made to *Dr. A*, cited above, paragraph 66.

of the listed documentation is not presented. On the contrary, the Directive provides in Article 50 and Annex VII specific rules as to what certificates the host State may require and a legal basis for host States, in cases of justified doubt, to obtain necessary confirmation from the home State authorities that the applicant fulfils the minimum training conditions set out in Article 34. This is not limited to questions regarding the authenticity of the submitted documentation but also to clarify justified doubts with regard to whether the applicant's evidence of formal qualifications encompasses the required minimum basic training under the Directive.

98. Lindberg notes that Article 21(6) of the Directive does not refer to "certificates" but merely to the evidence of formal qualification referred to in Annex V, point 5.3.2. In her view, this is natural given that the provision reflects the substantive basis for automatic recognition whereas Article 21(1) relates to procedural aspects for applications for recognition. The evidence of formal qualification shall as such attest that the applicant has both the knowledge and skills to meet the requirements of the harmonised system.

99. In addition, Article 36 of the Directive makes it clear that the pursuit of the professional activities of dental practitioners is based on the possession of evidence of formal qualification referred to in point 5.3.2 of Annex V to the Directive.

100. In Lindberg's assessment, the basis for the automatic recognition of dental practitioners under the Directive is thus the evidence of formal qualification listed in Annex V to the Directive, for which the Directive imposes specific requirements, also with regard to knowledge and skills. Consequently, an applicant who can demonstrate that he/she fulfils the minimum training conditions set out in Article 34 of the Directive should be entitled to automatic recognition.

101. Hence, in Lindberg's view, in circumstances such as the present case, where an applicant can demonstrate that the evidence of formal qualifications in itself, without a listed certificate, documents fulfilment of the minimum training conditions in Article 34 of the Directive, the host EEA State should grant automatic recognition of that qualification. Such approval does not raise any concern with regard to whether the applicant meets the required, harmonised standard of dental practitioner and is thus, as shown above, fully consistent with Articles 21(6), 34 and 36 of the Directive. Such recognition is fully in line with the aim and purpose of the harmonised system of Chapter III of the Directive. The disputed certificate does not form an inherent part of the minimum training conditions but is rather a non-mandatory, post-graduate certificate that does not relate to access to the profession but solely to a certain form of self-employed exercise of that activity.

102. Lindberg submits that the wording "where appropriate" in Article 21(1) of the Directive does not grant host State authorities any general discretion but merely reflects a certain reservation consistent with the aim and purpose of the automatic system in Chapter III of the Directive.

103. Thus, , in certain cases the host State's authorities should not limit their assessment to a mere document control but focus on whether the applicant has submitted the necessary evidence required for automatic recognition of the profession in question. If the certificate is not necessary for that purpose it will not be appropriate to reject the application on the basis that the certificate is lacking. The condition "where appropriate" is a reminder for host State authorities that some applications may need further assessment. That further assessment should always include a consideration of whether the application without a listed certificate fulfils the minimum training conditions in Article 34 of the Directive. This view is consistent with the basic principles of proportionality in the EEA Agreement.

104. Regarding the questions concerning rights under the main part of the EEA Agreement, Lindberg submits that the main provisions of the EEA Agreement do not only come into play in situations where the applicant falls outside the scope of the Directive as such. The main provisions and the legal test developed may also be applied in parallel with the Directive, in the sense that they supplement what national authorities must take into account in their application of a legal test under the Directive.[14]

105. In Lindberg's assessment, there is no basis in the Directive for an intention to substantially amend the principles for mutual recognition that followed from the previous directives. Relying on recitals 1 and 9 of the Directive, Lindberg asserts that the Directive was adopted on the same basis as the previous directives and with the same objective of removing obstacles and thereby facilitating the mutual recognition of diplomas, certificates and other evidence of formal qualifications. It follows from recital 14 of the Directive that the mechanism of recognition established by the previous directives remains unchanged. Lindberg therefore rejects the interpretation of the Norwegian Government that the Directive introduced full harmonisation of free movement of professionals and thereby set aside previous case law.

106. Lindberg further rejects the argument that Article 10 of the Directive codifies previous case law to such an extent that the main provisions of the EEA Agreement are no longer applicable, and that the judgment of the ECJ in *Angerer* can be interpreted to this effect. In that case, there was no question from the national court that addressed the application of primary law.[15] According to Lindberg, the adoption of Article 10 was meant to safeguard and catch two specific situations addressed in two previous judgments. The fact that the Directive improved the system for recognition lends no support to the idea that the Directive fully harmonised the conditions for free movement and excluded the application of the main provisions of the EEA Agreement as such.

[14] Reference is made to the judgments in *Dreessen*, C-31/00, EU:C:2002:35, paragraph 28, and *Vandorou*, C-422/09, C-425/09 and C-426/09, EU:C:2010:732, paragraphs 68 to 71.

[15] Reference is made to the judgment in *Angerer*, cited above, and, to the contrary effect, to the judgment in *Dreessen*, cited above, paragraph 21.

107. Lindberg submits that the harmonised systems for recognition focus on simplification to ensure that professionals qualified in their home State may exercise the same profession in other EEA States. That simplification is however often obstructed by the fact that Member States to a large extent still may organise and apply their national rules both for the organisation of education, training, authorisation and subsequent exercise of the specific profession. The harmonised rules therefore tend to base the recognition on formalities rather than actual qualifications. The parallel application of the main provisions of the EEA Agreement is therefore a necessary safeguard to ensure the correct assessment from the point of view of the fundamental freedoms.

108. Regarding the second question on the legal assessment and relevant factors under the main part of the EEA Agreement, Lindberg submits that the test to be applied is a restriction test. The substantive core of the legal test is that of equivalence. An EEA State may not refuse access to a regulated profession if the applicant can demonstrate the qualifications equivalent to those required in the host State.[16] Whether the applicant is formally qualified for the same profession in the home State is not a condition under the main provisions.

109. The comparison of qualifications, in particular the requirement for host State authorities to take account of diplomas, certificates and other evidence of formal qualifications of the person concerned, and his relevant experience will in many cases constitute a complex and resource demanding administrative procedure. In Lindberg's view, that procedure must be consistent with the principles of effective protection of the fundamental rights enshrined in the EEA Agreement.[17]

110. Lindberg considers that the third and fourth questions on the main part of the EEA Agreement have largely been replied to under the second question, but notes that the questions are based on the presumption that a person has to be fully qualified in his home State in order to exercise the right of free movement, which, in her view, is incorrect.[18]

111. Lindberg reiterates that subsequent, national requirements for the exercise of the dental profession in a self-employed capacity are of no relevance for the test under the main provisions of the EEA Agreement.

112. As a final remark, Lindberg submits that the Danish permit to practise independently was only made part of the EEA Agreement by Decision No 303/2019 which incorporated Commission Delegated Decision 2016/790 into the EEA Agreement. Thus, the permit to practise independently was not applicable EEA law at the time Lindberg applied for authorisation and a licence as a dental practitioner in Norway in 2016.

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[16] Reference is made to the judgment in *Vlassopoulou*, cited above, paragraphs 15 to 19.
[17] Ibid., paragraph 22.
[18] Reference is made to the judgments in *Vlassopoulou*, cited above, paragraph 16; *Dreessen*, cited above; *Vandorou*, cited above; and *Peśla*, cited above, paragraphs 34 and 25.

113. Lindberg submits that amendments to the list of qualifications in point 5.3.2 of Annex V to the Directive are to be introduced by way of a Commission decision. Thus, amendments to the list in Annex V made by EEA States must under the current system be incorporated into the EEA Agreement to take effect as EEA law.[19] Lindberg requests the Court to give guidance concerning the consequences of Norway's wrongful implementation.

114. Lindberg proposes that the Court give the following answer to the questions referred:

> *Article 21 read in conjunction with Articles 34, 36 and 50 entails that the host State shall recognise evidence of formal qualifications as dental practitioner, as listed in Annex V, point 5.3.2 which satisfy the minimum training conditions referred to in Articles 34 and attest that the person concerned has acquired, over the duration of his training, the knowledge and skills referred to in Article 34(3).*
>
> *In addition, certificates to confirm that this evidence of formal qualifications is that covered by the Directive may be required.*
>
> *In the event of justified doubts, the host State may require confirmation from the home State of the fact that the beneficiary fulfils the minimum training conditions set out in Article 34.*
>
> *The host State is upon request obliged to also examine the application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant with training from an EEA State for some reason does not fulfil the criteria for recognition under Article 21 or Article 10 of Directive 2005/36.*
>
> *Articles 28 and 31 EEA are to be interpreted as meaning that where an EEA national applies to the competent authorities of an EEA State for authorisation to practise a profession, access to which depends, under national legislation, on the possession of a diploma or professional qualification or on periods of practical experience, those authorities are required to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned, and his relevant experience, by comparing the specialised knowledge and abilities so certified, and that experience, with the knowledge and qualifications required by the national legislation.*

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[19] Reference is made to Case E-1/02 *EFTA Surveillance Authority* v *The Kingdom of Norway* [2003] EFTA Ct. Rep. 1, paragraph 55; Case E-3/97 *Jaeger* [1998] EFTA Ct. Rep. 1; and Case E-5/17 *Merck* [2017] EFTA Ct. Rep. 939, paragraph 49.

The Government of Austria

115. The Government of Austria notes that, in some EEA States, the mere completion of the training referred to in column 2 of Annex V to the Directive (for example, completion of university studies) does not entitle graduates to pursue the respective profession in the home EEA State. The full professional qualification is only acquired with one or more additional certificates (for example after completing a professional traineeship). Therefore, these EEA States have listed a "certificate accompanying the evidence of qualifications" in the respective sections of Annex V to the Directive. Other Member States do not require any additional training in order to pursue the sectoral profession in question on their territory. Accordingly, these Member States have not listed any accompanying certificate(s).

116. According to the Government of Austria, the term "where appropriate" in the second subparagraph of Article 21(1) of the Directive is to be interpreted as "where applicable", in the sense that evidence of formal qualifications from a certain Member State has to be accompanied by the relevant certificate(s) if this Member State has listed such certificate(s) in the respective column of Annex V. The qualifications possessed by a professional trained in a Member State which has listed one or more certificates in the respective column of Annex V can only be recognised automatically by the host Member State if he or she submits both the evidence of formal qualifications and the accompanying certificate(s).

117. This interpretation is confirmed by various language versions of this provision, inter alia, the German, French, Spanish, Italian and Polish language versions.

118. The Government of Austria argues, relying on Article 1 and recital 19 of the Directive, that the opposite interpretation, where the host Member State must determine whether it is appropriate to require the specified certificates in a given case, would be contrary to the purpose and the overall scheme of Directive.[20] This system is based on the EEA States' mutual trust in the adequacy of the evidence of formal qualifications issued by other EEA States. Therefore, recognition of evidence of formal qualifications is automatic and unconditional.[21] The responsibility for ensuring that the training requirements laid down by the Directive are fully complied with falls wholly on the competent authority of the EEA State awarding the evidence of a formal qualification.[22] A system for automatic and unconditional recognition of evidence of formal qualifications, such as that provided for in Article 21 of the Directive, would be seriously jeopardised if it were open to EEA States at their discretion to question the merits of a decision taken by the competent authority of another EEA State to issue such evidence.[23]

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[20] Reference is made to the judgment in *Preindl*, cited above, paragraph 27 and case law cited.
[21] Ibid., paragraph 31.
[22] Ibid., paragraph 34.
[23] Ibid., paragraph 36.

119. Accordingly, the system of automatic recognition does not foresee a substantive assessment of the applicant's qualifications by the host Member State in the individual case. Therefore, in the view of the Government of Austria, in proceedings regarding the automatic recognition of a professional's formal qualifications, the host EEA State may only conduct a formal examination of whether the applicant is in possession of the evidence of formal qualification and the accompanying certificate(s) listed in the respective section of Annex V to the Directive. They must not conduct an assessment of the substantive content of the applicant's training.

120. The Republic of Austria proposes that the question referred be answered as follows:

> *Article 21(1) of Directive 2005/36/EC on the recognition of professional qualifications must be interpreted as obliging the host Member State, in each case, to require the applicant to produce both the relevant "evidence of formal qualifications" referred to in Annex V to Directive 2005/36/EC as well as the specified "certificates" the home Member State may have listed therein for the profession in question. The term "appropriate" must be interpreted as meaning that the host Member State must not determine whether it is appropriate to require the specified certificates in a given case.*

The Kingdom of Spain

121. The Kingdom of Spain considers that the certificates listed in point 5.3.2 of Annex V to the Directive should be taken into account, together with the evidence of formal qualifications issued by the competent bodies in the Member States, in order to apply the automatic recognition scheme for dental practitioners provided for in Article 21(1) of the Directive, insofar as their inclusion reveals that the home EEA State considers such certificates necessary to substantiate that the formal qualifications satisfy the minimum training conditions referred to in Article 34 of the Directive.

122. Referring to recital 3 of the Directive, the Kingdom of Spain notes that the purpose of the Directive is to guarantee that persons having acquired their professional qualifications in an EEA State have access to the same profession and may pursue it in another EEA State with the same rights as nationals. Pursuant to Article 4(1) of the Directive, the recognition of professional qualifications by the host EEA 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 EEA State and to pursue it in the host EEA State under the same conditions as its nationals.[24]

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[24] Reference is made to the judgments in *Ordre des architectes*, cited above, paragraph 19, and *Angerer*, cited above, paragraph 36.

123. As regards the structure of the Directive, it regulates freedom of establishment in Title III and provides for a general recognition scheme of qualifications (Chapter I, Articles 10 to 14); for the recognition of professional experience (Chapter II, Articles 16 to 20); and for a scheme of automatic recognition of qualifications (Chapter III, Articles 21 to 49).

124. The automatic recognition scheme applies to evidence of formal qualifications as a professional giving access to the professional activities listed in Annex V to the Directive, which satisfy the minimum training conditions referred to in the Directive. The EEA State shall, for the purposes of access to and pursuit of the professional activities, give evidence of formal qualifications the same effect on its territory as the evidence of formal qualifications which it itself issues. Such evidence must be issued by the competent bodies in the EEA States and accompanied, where appropriate, by the certificates listed in Annex V.

125. The Kingdom of Spain notes that, in accordance with the settled case law of the ECJ, in order to interpret a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[25]

126. The Kingdom of Spain submits that, from the wording, it should be noted that certificates, as such, are part of the definition of "evidence of formal qualifications" in Article 3(1)(c) of the Directive. Further, the use of the conjunction "and" in the second subparagraph of Article 21(1) of the Directive implies that both evidence of formal qualifications and the certificates listed in point 5.3.2 of Annex V to the Directive must be presented to the host Member State in order for it to recognise such evidence of formal qualifications.

127. Moreover, the expression "where appropriate" in the second subparagraph of Article 21(1) of the Directive must be construed as "where applicable". Some EEA States have not included such certificates in point 5.3.2 of Annex V to the Directive (for example Belgium, Bulgaria and Germany), while others have included such certificates (for example Denmark, France and Italy). The expression must refer to the obligation of considering such certificates when the EEA States have provided for them in point 5.3.2 of Annex V. In support of this argument, the Kingdom of Spain refers to the Spanish, French, Italian and Portuguese language versions of the Directive.

128. According to the Kingdom of Spain, in this same line of thought, Article 21a(4) of the Directive expressly empowers the Commission to amend point 5.3.2 of Annex V to the Directive "concerning the updating of the titles adopted by the Member States for evidence

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[25] Reference is made to the judgments in *Mediterranean Shipping Company (Portugal)*, C-295/18, EU:C:2019:320, paragraph 36 and the case law cited; and *ING-DiBa Direktbank Austria*, C-191/17, EU:C:2018:809, paragraph 19 and the case law cited; and *Angerer*, cited above, paragraph 26 and the case law cited.

of formal qualifications and, where appropriate, the body which issues the evidence of formal qualifications, the certificate which accompanies it and the corresponding professional title".

129. For Denmark, the certificate included in point 5.3.2 of Annex V to the Directive consisting of the "permit to practise independently as a dental practitioner" was first added by means of Commission Delegated Decision 2016/790. Should such permit have no direct relevance it would be superfluous to expressly include it in point 5.3.2 of Annex V by means of a specific regulatory act.

130. The Kingdom of Spain submits that, as regards the context and the objective, the automatic recognition scheme leaves no discretion to host EEA States to decide whether or not to recognise evidence of formal qualifications and certifications listed in point 5.3.2 of Annex V to the Directive.[26] Accordingly, where a national of an EEA State holds any of the formal qualifications and certificates set out in point 5.3.2 of Annex V to the Directive, he must be permitted to practice the profession of dental practitioner in another EEA State, without the latter being able to require him to obtain additional professional qualifications or to prove that he has done so.

131. It is the home EEA State that determines which evidence of formal qualifications and accompanying certificates substantiate that the applicant satisfies the minimum training conditions for dental practitioners referred to in Article 34 of the Directive.[27] If, in the case at hand, Denmark has considered that a "permit to practise independently as a dental practitioner" is needed in order to ensure such "suitable clinical experience under appropriate supervision", Norway cannot disregard this requirement.

132. For the sake of completeness, the Kingdom of Spain points out that Article 50(2) of the Directive allows a host EEA State, where there is justified doubt, to require confirmation from the competent authorities of an EEA State of the authenticity of the attestations and evidence of formal qualifications awarded in that other EEA State, as well as, where applicable, confirmation of the fact that the beneficiary fulfils the minimum training conditions. Such means allow the host EEA State to satisfy itself that the attestations and evidence of formal qualifications submitted to it are entitled to automatic and unconditional recognition.

133. The Kingdom of Spain submits that, if a host EEA State could assess the requirements established by the home EEA State as regards evidence of formal qualifications and certificates which accompany them, the mutual trust upon which the Directive is founded would be affected, and it could give way to undesired situations of

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[26] Reference is made to the judgments in *Ordre des architectes*, cited above, paragraph 21; *Preindl*, cited above, paragraphs 31 and 36; and *Dr A*, cited above, paragraph 66.
[27] Reference is made to the judgment in *Preindl*, cited above, paragraph 34.

arbitrariness and discrimination regarding a "regulated profession" as defined in Article 3(1)(a) of the Directive.

134. In light of the above, the Kingdom of Spain considers that Article 21(1) of the Directive should be interpreted as meaning that the host Member State may in each case require the applicant to produce both the relevant "evidence of formal qualifications" referred to in column 2 of point 5.3.2 of Annex V to the Directive and the specified "certificates" the home EEA State may have included in column 4 for the profession in question. The automatic and unconditional nature of the scheme provided for in Chapter III, Title III precludes the possibility that a host EEA State questions the assessment taken by the competent authority of the home EEA State to issue the evidence of formal qualifications and, where applicable, the certificates that accompany such evidence. Therefore, it is of no consequence if the evidence of formal qualifications alone provides documentary evidence of training that is deemed to fulfil the minimum criteria laid down in Article 34(2) of the Directive and if the certificate that cannot be produced relates to post-graduate practice.

135. As regards the questions on the application of Articles 28 and 31 of the EEA Agreement, the Kingdom of Spain considers that these provisions cannot be applied.[28]

136. Under the regime that preceded the Directive, applicants who could not avail themselves of mutual recognition of professional qualifications were entitled to an assessment under the fundamental freedoms, regardless of whether such professional qualifications were subject to an automatic scheme of recognition or not. However, under the Directive, professional qualifications related to "regulated professions", as defined in Article 3(1)(a) of the Directive, can only be assessed under the scheme provided for in Title III and not elsewhere, not even by reference to the fundamental freedoms.[29]

137. In this regard, the Kingdom of Spain observes that Article 10 of the Directive provides for a case-by-case examination by the authorities of the host EEA State of the professional qualifications obtained by the applicant in his home EEA State.[30] As regards the concept of "specific and exceptional reasons", according to the Kingdom of Spain, it refers to such circumstances that give rise to the fact that a particular applicant does not hold a formal qualification listed in Annex V to the Directive. In the case of a "regulated profession" under the Directive where the applicant does not state such "specific and exceptional reasons" for the application of the general recognition scheme, the ECJ has precluded the host EEA State from examining the evidence of formal qualifications held even though the applicant does not have the qualifications necessary to pursue the

[28] Ibid., paragraph 31.
[29] Reference is made to the judgment in *Angerer*, cited above, paragraph 43.
[30] Ibid., paragraph 24.

corresponding profession in his Member State of origin. To do so would be contrary to the purpose of the Directive.[31]

138. In view of the above, the Kingdom of Spain considers that the host Member State is under no obligation to examine the application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant with training from an EEA State for a profession with harmonised minimum training requirements does not fulfil the criteria for recognition under Article 21 or Article 10 of the Directive.

139. The Kingdom of Spain submits that, in any event, the fact that an applicant does not have a certificate for post-graduate practice which the home EEA State has listed in column 4 of point 5.3.2 of Annex V to the Directive is essential, because it determines that the applicant is not fully qualified to act as an independent dental practitioner, even if the host EEA State does not require postgraduate practice and the training completed by the applicant is deemed to be equivalent to the training offered in the host EEA State.

140. The Kingdom of Spain respectfully submits that the Court should answer the questions referred to it as follows:

Article 21 of Directive 2005/36

i. *Article 21(1) of Directive 2005/36 should be interpreted as meaning that the host Member State may, in each case, require the applicant to produce both the relevant "evidence of formal qualifications" referred to in column 2 of point 5.3.2 of Annex V to the Directive and the specified "certificates" the home Member State may have included in column 4 for the profession in question.*

ii. *The automatic and unconditional nature of the scheme provided for in Chapter III, Title III of Directive 2005/36 precludes that a host Member State questions the assessment taken by the competent authority of the home Member State to issue the evidence of formal qualifications and, where applicable, the certificates that accompany such evidence. Therefore, it is of no consequence if the evidence of formal qualifications alone provides documentary evidence of training that is deemed to fulfil the minimum criteria laid down in Article 34(2) of the Directive and if the certificate that cannot be produced relates to post-graduate practice.*

Rights under the Main Part of the EEA Agreement

[31] Reference is made to the judgments in *Angerer*, cited above, paragraph 37, and *Brouillard*, C-298/14, EU:C:2015:652, paragraphs 35 to 45.

i. *The host Member State is under no obligation to examine the application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant with training from a member country for a profession with harmonised minimum training requirements does not fulfil the criteria for recognition under Article 21 or Article 10 of Directive 2005/36.*

ESA

141. ESA submits that the principal issue raised by the present case is one concerning the effects in the EEA EFTA States of clarifications and modifications of secondary legislation in the EU before their incorporation into the EEA Agreement. In accordance with the settled case law of the Court, legislative developments in the EU pillar have no formal effect in the EFTA pillar before their incorporation into the EEA Agreement. Moreover, ESA submits that EEA EFTA States are precluded from relying on such developments to the detriment of individuals exercising rights conferred by acts incorporated into the EEA Agreement at the relevant time.

142. ESA begins by noting that the refusal by a host State to recognise qualifications acquired in other EEA States has represented a serious practical obstacle to the free movement of workers and the freedom of establishment. EEA law in this area has developed in parallel through case law and secondary legislation, most relevantly for present purposes the Directive.[32] The system for mutual recognition establishes a presumption that the qualifications of an applicant entitled to pursue a regulated profession in one EEA State are sufficient for the pursuit of that profession in the other EEA States.[33]

143. The intensity of the mutual recognition requirements is increased for those professions where the standards of the training system for the profession are determined by mutual agreement between EEA States. In those circumstances, a different system of mutual recognition is in effect applied, where mutual recognition is both automatic and unconditional.[34] The dental practitioner professions fall within that category.

144. ESA contends that since the aim of the system for recognition is that qualifications should be given recognition which is both automatic and unconditional, the system would be jeopardised if it were open to EEA States to question the merits of a decision taken by the competent institution of another EEA State to award the diploma.[35] By way of consequence – and to safeguard legal certainty for the beneficiaries of the recognition

[32] Reference is made to the judgment in *Vlassopoulou*, cited above, and Directives 89/48, 92/51 and 99/42.
[33] Reference is made to the judgment in *Commission* v *Greece*, C-274/05, EU:C:2008:585, paragraph 30.
[34] Reference is made to the judgments in *Tennah-Durez*, C-110/01, EU:C:2003:357, paragraphs 30, 32 and 33, and *Preindl*, cited above, paragraph 31.
[35] Reference is made to the judgments in *Tennah-Durez*, cited above, paragraphs 75 and 81.

obligation – once the requirements specified in the Directive are satisfied, the host State has no discretion in recognising the qualifications in question.

145. According to ESA, at the time of Lindberg's application for recognition of her qualification in Norway, and of the rejection decisions issued in 2016 and 2017 ("the relevant time"), the version of the Directive in force in the EEA EFTA States listed in relation to Denmark in point 5.3.2 of Annex V thereto as evidence the "*Bevis for kandidatuddannelsen i odontologi (cand. odont.)*", and as accompanying certificate the "*Autorisation som tandlæge*" relied upon by Lindberg in her application for recognition.

146. In ESA's view, it is clear that Commission Delegated Decision 2016/790, which added the certificate of "*Tilladelse til selvstændig virke som tandlæge*" to the listing in point 5.3.2 of Annex V to the Directive, was incorporated into the EEA Agreement only some three years after the relevant time. In this respect, ESA observes that the Request for an Advisory Opinion appears to be based on a version of Annex V to the Directive which only came into effect in the EEA from 13 December 2019. However, Lindberg's situation falls to be assessed on the basis of EEA law as it stood at the relevant time, that is in 2016 and 2017.[36] Provisions which have not been made part of EEA law do not provide a legal basis to decide a case either directly or by analogy.[37]

147. In summary, ESA submits that there are at least five distinct and independent reasons why Communication 2008/C 322/03 could not have had any effect in the EFTA pillar at the relevant time. First, communications cannot amend legislative acts. Second, the Commission did not have the power to amend Annex V until Directive 2013/55 introduced the new Article 21a(4) of the Directive. Third, Communication 2008/C 322/03 was never incorporated into the EEA Agreement by the Joint Committee. Fourth, in order to produce any legal effects, the Communication would have had to have been published in the EEA Supplement to the Official Journal, which it was not. Fifth, in order to be relied upon to the detriment of a Norwegian citizen and/or in Norway, as a matter of EEA law, the Communication would have had to have been published in Norwegian, which it was not.

148. ESA notes that Article 21(7) of the original version of the Directive, on which Communication 2008/C 322/03 is expressly based, does not envisage any modification of the Directive. The publication of newly adopted provisions in Commission communications appears to be designed to inform other national authorities of newly established or defined professions in respect of which national provisions are adopted. This would then trigger the obligation to recognise the formal qualifications, professional titles, etc. and allow individuals holding those qualifications to invoke the provisions of the Directive for their benefit. Conversely, had it been intended to restrict the types of evidence

[36] Reference is made to *Merck*, cited above, paragraph 49.
[37] Reference is made to *EFTA Surveillance Authority* v *The Kingdom of Norway*, cited above, paragraph 55.

or certificates entitling a holder to recognition, that would have had to have been provided for by way of legislative amendment, published in the L Series of the Official Journal.

149. ESA contrasts the approach taken in relation to Annex V to the Directive, where communications could be adopted, with the approach taken in relation to Annexes II and III. The Commission was granted an express power to amend the lists set out in Annexes II and III. No such power was provided for the entries in Annex V.

150. In ESA's view, it was to permit amendments to Annex V to the Directive while ensuring legal certainty and complying with fundamental principles of EEA law that the Article 21(7) mechanism was, by means of Directive 2013/55, replaced by Article 21a(4) and the Commission was formally empowered to amend Annex V. That mechanism was first applied in the EEA context with effect from December 2019, so that it could not have had any effect on the position of Lindberg at the relevant time.

151. ESA submits that the same conclusion – that Communication 2008/C 322/03 could not have had a detrimental impact on rights derived from the Directive – is supported by the fact that it appears never to have been published in the Norwegian-language EEA Supplement to the Official Journal. According to ESA, an act adopted by an EEA institution cannot be enforced against natural and legal persons in an EEA State before they have the opportunity to make themselves acquainted with it by its proper publication in the Official Journal.[38] ESA refers to the principles of legal certainty and equal treatment.[39]

152. In light of these considerations, ESA submits that the answer to the Request for an Advisory Opinion should be that the Directive, in its version as incorporated into the EEA Agreement at the relevant time, must be interpreted to the effect that EEA States were required to recognise, for the purposes of access to and pursuit of the professional activities of dental practitioners, the qualifications of an EEA national who had acquired a "*Bevis for kandidatuddannelsen i odontologi (cand.odont.)*" as well as an "*Autorisation som tandlæge*" in Denmark, without being able to also require such an applicant to produce a "*Tilladelse til selvstændig virke som tandlæge*".

153. For the sake of completeness, ESA makes the following observations concerning the specific questions.

154. ESA notes that the automatic recognition system of the Directive is formalistic in referring to the evidence of formal qualification and the certificates listed in point 5.3.2 of Annex V thereto, which provides a conclusive and binding list of the documents giving rise to automatic recognition. An applicant seeking recognition in another EEA State must show the evidence of formal qualification and the certificates listed in point 5.3.2 of Annex

[38] Reference is made to the judgments in *Racke*, 98/78, EU:C:1979:14, paragraph 15, and *Heinrich*, C-345/06, EU:C:2009:140, paragraphs 43 and 63.

[39] Reference is made to the judgment in *Skoma-Lux*, C-161/06, EU:C:2007:773, paragraphs 38 and 39 and case law cited.

V for the State where he has acquired the qualifications in question. Where these documents can be produced, individuals are entitled to automatic and unconditional recognition of their qualification.[40] In this context, the phrase "where appropriate" in the second subparagraph of Article 21(1) of the Directive can only mean "where such certificate is listed in Annex V, point 5.3.2" as such certificates do not exist in all States. Consultation of other language versions confirms that "where appropriate" is intended, in effect, to mean "where such a certificate is listed", in the sense of "if the case arises". ESA points to the French "le cas échéant", German "gegebenenfalls", Spanish "en su caso", Dutch "in voorkomend geval", Romanian "după caz", Greek "ενδεχομένως" and Italian "eventualmente" versions.

155. In ESA's view, there is no basis for suggesting that the formalistic approach of the automatic recognition system of the Directive would allow for a discretionary test of "appropriateness" on behalf of the host State. This would create legal uncertainty as the Directive does not contain any criteria to assess appropriateness and would be contrary to the objective of the automatic recognition system.

156. As regards the question on mutual recognition on the basis of Articles 28 and 31 EEA, ESA contends that, in this context, it is not necessary to determine whether Article 28 EEA, concerning workers, or Article 31 EEA, concerning self-employed persons, applies to Lindberg, as the content of those rights is in practice identical.

157. According to ESA, it is settled case law that the obligation on EEA States to take into account all the applicant's relevant experience does not cease to exist as a result of the adoption of directives on mutual recognition of diplomas.[41] The effective exercise of the fundamental freedoms guaranteed by Articles 28 and 31 EEA can be unjustifiably hindered if the competent national authorities disregard relevant knowledge and qualifications already acquired by an applicant seeking entitlement to pursue a profession which according to national legislation is subject to holding a diploma or professional qualification.[42]

158. Accordingly, ESA continues, host States that are confronted with situations of professional recognition which are not regulated by the Directive must take into consideration and make a comparison with their own requirements to pursue the profession, by comparing all diplomas, certificates and other evidence of formal qualification and experience of the person concerned.[43]

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[40] Reference is made to *Dr A*, cited above, paragraphs 65 to 66.

[41] Reference is made to the judgments in *Vandorou*, cited above, paragraph 71; *Hocsman*, C-238/98, EU:C:2000:440, paragraphs 23 and 31; *Commission* v *Spain*, C-232/99, EU:C:2002:291, paragraph 22; and *Morgenbesser*, cited above, paragraph 58.

[42] Reference is made to the judgment in *Angerer*, cited above, paragraph 42.

[43] Reference is made to the judgments in *Vlassopoulou*, cited above; *Hocsman*, cited above, paragraphs 33 and 40; *Dreessen*, cited above, paragraph 31; and *Knoors*, 115/78, EU:C:1979:31, paragraph 24.

159. ESA submits that, in a case such as the present, where an applicant for authorisation holds a qualification which appears to cover substantially the same areas as those studied by Norwegian graduates who are able to access the profession concerned immediately upon completion of their studies, the Norwegian authorities would have to demonstrate that there nevertheless are disparities between the specialised knowledge and abilities conferred by the respective qualifications such as to justify a refusal. It would moreover be incumbent on the national authorities to examine what compensatory measures might be imposed to fill any gaps in order to comply with the principle of proportionality.

160. ESA submits that the Court should provide the following answer to the questions referred:

> *Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, in its version as incorporated into the EEA Agreement by Joint Committee Decision No 142/2007 until the entry into force, on 14 December 2019, of Joint Committee Decision No 303/2019 must be interpreted to the effect that EEA States were required to recognise, for the purposes of access to and pursuit of the professional activities of dental practitioners, the qualifications of an EEA national who had acquired a "Bevis for kandidatuddannelsen i odontologi (cand.odont.)" as well as an "Autorisation som tandlæge" in Denmark, without being able to also require such an applicant to produce a "Tilladelse til selvstændig virke som tandlæge".*

The Commission

161. The Commission starts by observing that two basic approaches to the training of dentists prevail in Europe. The first places emphasis on mainly theoretical training at the outset, followed by a period of practical training once the theoretical part of the course has been completed. The second seeks to bring students into contact with patients as early as possible and in parallel with the theoretical part of the training. The choice of approach lies entirely with each EEA State and the rules on recognition of professional qualifications apply indistinctly to both systems.

162. In the Commission's view, it is clear from Article 1 of the Directive, that the Directive's purpose is to establish rules according to which an EEA EFTA State, which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications, shall recognise professional qualifications obtained in one or more other EEA States and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession. The same concept is repeated in Article 4(1) of the Directive.[44]

[44] Reference is made to the judgment in *Angerer*, cited above, paragraph 36.

163. The Commission contends that the recognition of professional qualifications obtained other than in the EEA State in which the professional wishes to practise may be based on the general system described in Article 13 of the Directive, or may take place automatically in accordance with Article 21. In both cases, it applies to persons that are entitled to have access to and to pursue a particular profession in their home State.

164. For a number of professions, including dental practitioner, the Directive sets out minimum conditions for training such that, once the training is completed (no matter in which EEA State), access to that profession is granted automatically. Unlike the general system of recognition, which leaves it open to a host State to look into the nature and content of the training received by an applicant, for the professions in relation to which minimum training conditions have been harmonised, it is the possession of the qualification that, in and of itself, is a necessary and sufficient basis for access to the profession. The host State is not entitled to look behind the qualification.

165. The Commission contends further that automatic recognition is based on both a substantive (satisfaction of the minimum training requirements) and a formal (documents listed in Annex V to the Directive) requirement, both of which are essential. The substantive requirement is verified when a particular qualification is notified for inclusion in the lists in Annex V. The formal requirement operates on the basis of the mutual trust in competent authorities that underpins the legal framework established by the Directive.[45] Pursuant to the second subparagraph of Article 21(1) of the Directive, in order to constitute "evidence of formal qualifications" a document "must be issued by the competent bodies in the EEA States and accompanied, where appropriate, by the certificates listed in Annex V, [point 5.3.2]". The Commission considers two points important in this regard.

166. First, Article 3(1)(c) of the Directive defines "evidence of formal qualifications" as documents that certify "successful completion of training". This definition is explained by the fact that the Directive is concerned with professional (as opposed to academic) qualifications and seeks to cover persons that are qualified professionals in their home State.

167. Second, the requirements notified by an EEA State as necessary to that end may go beyond the possession of a university diploma in the sense that further "certificates" may need to be produced. The structure of the tables in Annex V to the Directive reflects the resulting need to cater for different types of evidence, where column 4 provides an opportunity to list any additional requirements.

168. Where additional requirements are listed in column 4, they form an essential part of the steps to be completed in order to gain full access to the profession in question. In this

[45] Reference is made to the judgment in *Preindl*, cited above, paragraph 31.

respect, the Commission contends that there is no merit in the argument seeking to insert an element of discretion or a case-by-case assessment into the analysis.

169. In the Commission's view, the use of the expression "where appropriate" in the second subparagraph of Article 21(1) of the Directive is intended solely to reflect the differences in approach to training in the various EEA States. For some States, the qualification listed in the second column will suffice, for others, additional steps must be completed and the manner in which those steps are documented is included in column 4 and must accompany the evidence of the academic qualification indicated in column 2. When additional certificates are required by an EEA State as a condition for access to a given profession, those certificates are listed in Annex V to the Directive. They form an integral part of the evidence on the basis of which a person may seek automatic recognition of his qualifications in another EEA State. On that basis, according to the Commission, there is no need to answer the second part of the first question asked by the referring court.

170. The Commission notes that Denmark has notified the diploma of cand. odont. as the professional qualification fulfilling the minimum training requirements laid down in Article 34 of the Directive. It has also indicated two further certificates that are necessary in order to be fully qualified as a dental practitioner in Denmark, namely the *Autorisation som tandlæge, udstedt af Sundhedsstyrelsen* and the *Tilladelse til selvstændig virke som tandlæge* listed in the fourth column of point 5.3.2 in Annex V to the Directive. Lindberg is in possession of the qualification listed in column 2 (cand. odont. from Aarhus University – which happens to fulfil all of the conditions set out in Article 34 of the Directive). She has received the *Autorisation som tandlæge, udstedt af Sundhedsstyrelsen* (the certificate authorising her to commence practice under the responsibility of a qualified dental practitioner), but she is not in possession of the *Tilladelse til selvstændig virke som tandlæge* (the certificate attesting to the completion of the period of practice under the responsibility of a qualified dental practitioner). In other words, she is not yet considered to be fully professionally qualified and therefore does not fall within the scope of the Directive.[46] Consequently, there can be no question of any application of either the general system or any acquired rights.

171. With regard to rights under the main part of the EEA Agreement, the Commission submits that EEA States must give due consideration to diplomas certificates and other evidence of formal qualifications obtained in another EEA State and that they must comply with their obligations as regards mutual recognition of professional qualifications when examining an application for authorisation to practise in a profession. This applies even if secondary law has been adopted in relation to the professional field in question and when the person concerned, while in possession of a diploma in a field in which a directive on mutual recognition has been adopted, is not able to avail himself of the mechanism for

[46] Reference is made to the judgment in *Morgenbesser*, cited above, paragraph 45.

automatic recognition contained in that directive because he does not meet the conditions for its application.[47]

172. According to the Commission, in order to comply with Articles 28 and 31 EEA, the competent national authorities must allow an applicant to demonstrate the knowledge acquired by them. However, an EEA State may take account of objective differences in the legal framework applicable to the profession in question in the home State when examining the application. In particular, the national authorities may assess whether the knowledge and experience of the applicant is sufficient when measured against what is required for access to the profession in question on its territory.[48]

173. The Commission submits that, when seeking recognition pursuant to Articles 28 and 31 EEA, it is not sufficient to demonstrate that the training followed fulfils the requirements laid down in Article 34 of the Directive. Rather, the host State is entitled to look behind the qualification, inquire as to the specific content of the training and to apply its own (potentially higher) standards, for example, through compensatory measures. If and to the extent that the knowledge and training attested to by the foreign qualification corresponds to that required in the would-be host State, then the competent authorities of that State must recognise that fact and issue a decision to that effect.

174. The Commission proposes the following answer to the questions of the referring court:

> *1. Article 21(1) of Directive 2005/36/EC must be interpreted as meaning that, in order to benefit from the automatic recognition provided for in that provision, an applicant must be in possession of any certificates listed in column 4 of point 5.3.2 of Annex V to the Directive as well as the evidence of formal qualifications indicated in column 2 of that same point, even if the training followed in order to obtain the formal qualification listed in column 2 itself fulfils the minimum training requirements laid down in Article 34 of the Directive.*
>
> *2. Articles 28 and 31 EEA must be interpreted as requiring a host State to carry out an individual assessment of the knowledge and training attested to by an applicant and to grant access to the profession in question to that applicant where that knowledge and training is found to correspond to the requirements in place in the host State for the purposes of access to and pursuit of that profession. The fact that the applicant does not hold a particular certificate or is not entitled in his home*

[47] Reference is made to the judgment in *Dreessen*, cited above, and case law cited.
[48] Reference is made to the judgment in *Morgenbesser*, cited above, paragraph 57.

State to have full access to the profession in question are not relevant to that assessment.

Per Christiansen
Judge-Rapporteur