



E-4/20-17

REPORT FOR THE HEARING

in Case E-4/20

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 Borgarting Court of Appeal (*Borgarting Lagmannsrett*), in the case between

Tor-Arne Martinez Haugland and Others,

and

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

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 13 read in conjunction with Article 4 thereof, as well as Articles 28 and 31 of the EEA Agreement.

I Introduction

1. By letter of 11 May 2020, registered at the Court as Case E-4/20 on 11 May 2020, Borgarting Court of Appeal (*Borgarting Lagmannsrett*) requested an Advisory Opinion in the case pending before it between Tor-Arne Martinez Haugland and Others and the Norwegian Government, represented by the Ministry of Health and Care Services.

2. The case concerns the validity of a decision of the Norwegian Directorate of Health (*Helsedirektoratet*) and the Norwegian Appeal Board for Health Personnel (*Statens helsepersonellnemnd*) rejecting an application for an authorisation/licence as a psychologist and a claim for compensation for alleged improper exercise of authority.

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. At the material time, Article 1 of the Directive, headed “Purpose”, read:

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.

8. Article 3(1) of the Directive, headed “Definitions”, reads, in extract:

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

(a) ‘regulated profession’: a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession;

(b) ‘professional qualifications’: qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a) (i) and/or professional experience;

...

(e) ‘regulated education and training’: any training which is specifically geared to the pursuit of a given profession and which comprises a course or courses complemented, where appropriate, by professional training, or probationary or professional practice.

The structure and level of the professional training, probationary or professional practice shall be determined by the laws, regulations or administrative provisions of the Member State concerned or monitored or approved by the authority designated for that purpose;

...

9. 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;

10. At the material time, Article 4 of the Directive, headed “Effects of recognition”, 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.

11. At the material time, Article 13(1) and (2) of the Directive, headed “Conditions for recognition”, read:

1. If access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory.

Attestations of competence or evidence of formal qualifications shall satisfy the following conditions:

(a) they shall have been issued by a competent authority in a Member State, designated in accordance with the legislative, regulatory or administrative provisions of that Member State;

(b) they shall attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State, as described in Article 11.

2. Access to and pursuit of the profession, as described in paragraph 1, shall also be granted to applicants who have pursued the profession referred to in that paragraph on a full-time basis for two years during the previous 10 years in another

Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications.

Attestations of competence and evidence of formal qualifications shall satisfy the following conditions:

- (a) they shall have been issued by a competent authority in a Member State, designated in accordance with the legislative, regulatory or administrative provisions of that Member State;*
- (b) they shall attest a level of professional qualification at least equivalent to the level immediately prior to that required in the host Member State, as described in Article 11;*
- (c) they shall attest that the holder has been prepared for the pursuit of the profession in question.*

The two years' professional experience referred to in the first subparagraph may not, however, be required if the evidence of formal qualifications which the applicant possesses certifies regulated education and training within the meaning of Article 3(1)(e) at the levels of qualifications described in Article 11, points (b), (c), (d) or (e). The regulated education and training listed in Annex III shall be considered as such regulated education and training at the level described in Article 11, point (c). The list in Annex III may be amended in accordance with the procedure referred to in Article 58(2) in order to take account of regulated education and training which provides a comparable professional standard and which prepares the trainee for a comparable level of responsibilities and functions.

12. At the material time, Article 14 of the Directive headed “Compensation measures” read, in extract:

1. Article 13 does not preclude the host Member State from requiring the applicant to complete an adaptation period of up to three years or to take an aptitude test if:

- (a) the duration of the training of which he provides evidence under the terms of Article 13, paragraph 1 or 2, is at least one year shorter than that required by the host Member State;*
- (b) the training he has received covers substantially different matters than those covered by the evidence of formal qualifications required in the host Member State;*

(c) *the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant's home Member State within the meaning of Article 4(2), and that difference consists in specific training which is required in the host Member State and which covers substantially different matters from those covered by the applicant's attestation of competence or evidence of formal qualifications.*

2. If the host Member State makes use of the option provided for in paragraph 1, it must offer the applicant the choice between an adaptation period and an aptitude test.

...

4. For the purpose of applying paragraph 1 points (b) and (c), 'substantially different matters' means matters of which knowledge is essential for pursuing the profession and with regard to which the training received by the migrant shows important differences in terms of duration or content from the training required by the host Member State.

5. Paragraph 1 shall be applied with due regard to the principle of proportionality. In particular, if the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first ascertain whether the knowledge acquired by the applicant in the course of his professional experience in a Member State or in a third country, is of a nature to cover, in full or in part, the substantial difference referred to in paragraph 4.

National law

13. In Norway the title “*psykolog*” (“psychologist”) is protected under the Health Care Professionals Act (*Lov om helsepersonnel (helsepersonelloven) av 2. juli 1999 nr. 64*).

14. Authorisation is required in order to practise as a psychologist (“*psykolog*”) in Norway, as provided for in point (t) of the first paragraph of Section 48 of the Health Care Professionals Act. Section 48a lays down the conditions for obtaining authorisation, which, according to point (a) of the first paragraph of Section 48a and the accompanying regulation, require the successful completion of the professional training programme in psychology leading to the title cand. psychol.

15. Authorisation is also granted to parties entitled under the Directive. This is apparent from point (b) of the first paragraph of Section 48a and Section 52 of the Health Care Professionals Act, and the Regulation on authorisation, licences and specialist recognition for health care professionals with professional qualifications from other EEA States and 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”).

16. Persons not entitled to an authorisation may obtain a licence pursuant to Section 49 of the Health Care Professionals Act. The licence is a limited public authorisation allowing for the use of the title “*psykolog*” within a given framework. Persons who must complete a period of practice as a compensation measure under Article 14 of the Directive are granted a licence.

III Facts and procedure

Background

17. The proceedings have been brought before Norwegian courts as a class action pursuant to Section 35-6 of the Norwegian Dispute Act (*tvisteloven*) with 163 class members. The class representative pursuant to Section 35-1(7) of the Dispute Act is Tor-Arne Haugland.

18. Haugland and the other class action members have Master’s degrees in psychology with a specialisation in “clinical and health psychology” from universities in Hungary. Upon completion of their training they attained the title “*okleveles pszichológus*”. None of them has opted to commence the further training in Hungary leading to the title “*klinikai szakpszichológus*”.

19. Until the spring of 2016, the Norwegian authorities granted a licence and subsequently authorisation as a psychologist (*psykolog*) to persons having attained the title of “*okleveles pszichológus*” in Hungary, on the basis of the Hungarian Master’s degree. This was based on professional advice to the effect that the training at ELTE University (Eötvös Loránd University) was aimed at educating clinical psychologists and that they were prepared to take up regular Norwegian posts as psychologists (“*psykolog*”). As the training was one year shorter than the professional training programme in Norway, a licence was granted for a fixed period in order to enable the applicant to complete one year of supervised practice as a psychologist in the specialist healthcare service.

20. Norwegian authorities altered their recognition practice in the spring of 2016. The reason given for the change in practice was that the authorities had received new information about the profession of psychologist in Hungary in an IMI report of 30 April 2016. In this report, the Hungarian authorities gave the following description of the professions of “psychologist” (“*psykolog*” in Norwegian, “*okleveles pszichológus*” in Hungarian) and “clinical psychologist” (“*klinisk psykolog*” in Norwegian, “*klinikai szakpszichológus*” in Hungarian) in Hungary:

“Psychologist is not a regulated profession in Hungary, but the psychologist qualification entitles to practise many regulated professions, such as family assistant

in child welfare services, psychological advisor, methodological consultant, tutor in children temporary homes. Please also note that clinical psychologist '*klinikai szakpszichológus*' is a regulated profession in Hungary."

21. In March 2017 in connection with the complaint proceedings, a new expert panel considered whether the Master's degree from Hungary was equivalent to the professional psychology training programme in Norway. The panel concluded that the Master's degree from Hungary had significant deviations from the Norwegian professional training programme in psychology, and that the deviations could not be remedied through supplementary training and/or supervised practice. The expert panel also concluded that the Hungarian Master's programme was comparable to a Norwegian Master's degree in psychology.

22. Following the change in practice, candidates holding a Hungarian Master's degree had their applications for a licence as a psychologist rejected. Persons who were already working on the basis of a licence had their applications for authorisation as a psychologist rejected.

23. On 14 June 2018, Tor-Arne Martinez Haugland and the others brought a class action against the Norwegian Government, represented by the Ministry of Health and Care Services, seeking to have the decisions rejecting their applications declared invalid and to be awarded compensation. They claimed that they were entitled to an authorisation/licence under both national law and under EEA law. The Government contended that the complainants were qualified for a profession other than psychologist and that they therefore could not claim access to the profession under the Directive, primary EEA law or national law.

24. Oslo District Court (*Oslo tingrett*) delivered judgment on 11 November 2019. The District Court concluded that the profession for which Tor-Arne Martinez Haugland and the other class action members are qualified in Hungary is not the "same profession" as a psychologist in Norway and that their professional qualifications do not confer access to the profession of "*psykolog*" in Norway under either the Directive or Articles 28 and 31 of the EEA Agreement. The District Court accordingly concluded that the health authorities' decisions to refuse the class members authorisations and licences as "*psykolog*" in Norway were valid and found in favour of the Government. Tor-Arne Martinez Haugland and the other class action members brought an appeal against the judgment to Borgarting Court of Appeal.

25. On 12 June 2018 ESA initiated infringement proceedings against Norway on grounds of infringement of the Directive and Articles 28 and 31 of the EEA Agreement. By reply of 26 September 2018, Norway disputed that it had infringed its Treaty obligations. ESA issued a reasoned opinion on 29 April 2020, in which it found that the

Norwegian recognition practice for psychologists trained in Hungary is contrary to the EEA Agreement.

Education and training and the pursuit of the profession in Norway

26. There are two possible courses of study in the field of psychology in Norway: one is a professional training programme (Norwegian: *profesjonsutdanning*), whilst the other is a field of study (Norwegian: *fagretning*).

27. The professional training programme in psychology ("*proffesjonsstudiet i psykologi*") leads to the academic title cand. psychol. The training programme spans six years and is rated at 360 ECTS (European Credit Transfer and Accumulation System) credits ("credits"). It is intended to prepare students to become clinical psychologists.

28. When the professional training programme is followed, no further practice is required in order to obtain authorisation as a "*psykolog*", and an individual who has completed the programme is able to work independently as a psychologist ("*psykolog*"), as that profession is defined in Norway. The professional training programme is the only programme at a teaching institution in Norway conferring entitlement to authorisation as a "*psykolog*".

29. A psychologist ("*psykolog*") can then opt to specialise as a psychology specialist ("*psykologspesialist*") in a given professional field. The further training consists in five years of relevant work in the specialist healthcare service, comprising 256 course hours, supervision by a psychology specialist and scientific work. Although common, it is not necessary to be a psychology specialist ("*psykologspesialist*") in order to pursue clinical work or work independently as a psychologist ("*psykolog*"). In the specialist healthcare service, however, certain tasks must be quality-controlled by a psychology specialist ("*psykologspesialist*").

30. The other possible course of study in the field of psychology in Norway is to follow one of the various one-year studies, Bachelor's and Master's programmes in psychology subjects that are offered by colleges and universities. Bachelor's programmes are rated at three years ([180] credits), whilst a Master's programme is rated at two years ([120] credits). These programmes are more theoretically oriented and do not involve integrated clinical practice.

31. In Norway, there are a number of professional paths in the field of psychology. A distinction is drawn between the pursuit of the profession as a clinical psychologist ("*klinisk psykolog*") and non-clinical posts.

32. In order to work as a clinical psychologist ("*klinisk psykolog*") in Norway, it is necessary to hold an authorisation or licence as a psychologist ("*psykolog*"), as provided for in Section 48 of the Health Care Professionals Act. "Clinical psychologist" ("*Klinisk*

psykolog”) is not a separate title in Norway, since clinical treatment belongs to the profession of “*psykolog*”. In the preparatory works to the Health Care Professionals Act, the pursuit of the profession as a “*psykolog*” is described as follows: “The pursuit of the profession encompasses analysis, diagnostics and treatment of mental disorders. Psychologists have independent and direct responsibility for patients. The professional role involves risk in relation to mental distress.”

33. In addition to clinical work, there are also other relevant non-clinical posts in the field of psychology in Norway, such as in research, consulting, environmental therapy, in healthcare institutions, lecturing, human resources (HR) and recruitment. These posts are open to both authorised psychologists (“*psykolog*”) and persons having followed other academic programmes in psychology subjects.

Education and training and the pursuit of the profession in Hungary

34. In Hungary the basic psychology training consists in a three-year Bachelor’s degree (BA) and a two-year Master’s degree, which can be either a Master of Science (MSc) in health psychology or a Master of Arts (MA). Tor-Arne Martinez Haugland and the other class action members hold this type of MA degree, which leads to the title “*okleveles pszichológus*”. The training programme is rated at 300 credits.

35. The title “*okleveles pszichológus*” is not a title protected by law or a regulated profession protected under the Directive.

36. The MA degree offers a generalist platform, but the students choose from among seven different areas of specialisation. Tor-Arne Martinez Haugland and the other class action members all opted for the specialisation “clinical and health psychology”.

37. Hungarian Decree 18/2016 (VIII.5.) sets out the knowledge and skills that graduates of the MA degree are to have. According to this decree, the graduate psychologists are intended to have generalist expertise:

“The aim of the training is to educate skilled psychologists who are familiar with several branches of psychology based on their knowledge gained in the different scientific fields of psychology. They know and can apply the methods and tools of psychology in order to recognise and develop individuals, groups or organisations. They have the necessary qualifications in order to obtain further professional certifications in the different fields of psychology defined by special rules and regulations. ...”

38. Following completion of the MA degree in psychology, further training may be undertaken in clinical psychology, leading to the title “clinical psychologist” (“*klinikai szakpszichológus*”). That training spans three to four years and includes 400 course hours and relevant professional activity under supervision. The profession of “clinical

psychologist” (“*klinikai szakpszichológus*”) is a regulated profession in Hungary. The various specialisations coming within “*klinikai szakpszichológus*” constitute regulated professions under the Directive.

39. The parties disagree on how the training programme to become a “clinical psychologist” (“*klinikai szakpszichológus*”) is to be categorised. Tor-Arne Martinez Haugland and the other class action members take the view that it is a specialisation training programme leading to a specialist title, comparable to the Norwegian specialisation training for psychologists to become a “psychology specialist” (“*psykologspesialist*”). The Norwegian Government, for its part, contends that it is separate training required to practise as a “*klinikai szakpszichológus*” in Hungary.

40. Only a “clinical psychologist” (“*klinikai szakpszichológus*”) can provide independent healthcare, whilst a “psychologist” (“*okleveles pszichológus*”) can work in a clinical setting only under supervision in connection with further training, either commenced or planned, pursuant to points (b) and (c) of Hungarian Decree 60/2003 (X.20.).

41. The parties disagree on how much weight is to be attached to the conditions set out in points (b) and (c) of Hungarian Decree 60/2003 (X.20.) in the determination of whether the Hungarian “*okleveles pszichológus*” and the Norwegian “*psykolog*” are the “same profession” for the purposes of the Directive. The parties also disagree on whether “*okleveles pszichológus*” is a profession or an academic title qualifying its holder for various professions and – assuming it is deemed to be a profession – whether it is the same profession as “*klinikai szakpszichológus*” under the Directive. The parties further disagree on which activities an “*okleveles pszichológus*” can perform as compared to a “*klinikai szakpszichológus*” and on the possible implications this may have for the determination of “same profession” for the purposes of the Directive.

42. Against this background, Borgarting Court of Appeal has referred the following questions to the Court:

1. In connection with the assessment of “same profession”, see Articles 1 and 4 of the Directive, answers are requested to the following questions:

- a. What is the legal assessment and what are the legally relevant factors in the determination of whether a profession in the State where the qualification was obtained and that in the host State constitute the “same profession”?**
- b. In the determination of “same profession”, must the host State take account of professional activities which the applicant in question may pursue in the State where the qualification was obtained, only under supervision and on the condition that the applicant has commenced**

a course of further education and training or undertaken to commence such a course of education and training within two years? If so, is it of any consequence that the applicant has opted not to commence or undertake to commence such a course of further education and training?

- c. What importance does differences in degree of independence in pursuing a profession and responsibility for patients have in the determination of whether it is the “same profession”?**
- 2. Does the possibility of requiring compensation measures, see Article 14 of Directive 2005/36/EC, have any bearing on the interpretation of what constitutes “same profession”? If so, what importance does this have?**
 - 3. What is the specific legal assessment under Article 3(1)(e) of Directive 2005/36/EC, which provides that regulated education and training must be “specifically geared to the pursuit of a given profession”?**
 - 4. In connection with Articles 28 and 31 of the EEA Agreement, answers are requested to the following:**
 - a. Where an applicant does not fulfil the requirements for having qualifications recognised under Article 13 of the Professional Qualifications Directive, read in conjunction with Article 14, may the applicant rely on Articles 28 and 31 of the EEA Agreement as a basis for pursuing the regulated profession in the host State?**
 - b. If question a is answered in the affirmative, what is then the legally relevant assessment for the examination under Articles 28 and 31?**

IV Written observations

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

- Tor-Arne Martinez Haugland and others, represented by Per Andreas Bjørgan and Hilde K. Ellingsen, advocates;
- the Norwegian Government, represented by Kaija Bjelland and Torje Sunde, acting as Agents;
- the Austrian Government, represented by Albert Posch and Julia Schmoll, acting as Agents;

- the Hungarian Government, represented by Miklós Zoltán Fehér and Katalin Szíjjártó, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman and Joost Hoogveld, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Claire Simpson, 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.

44. The written observations received have been distributed to all those entitled to submit written observations pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure.

V Summary of the arguments submitted

Haugland and Others

45. Haugland and Others respectfully propose the following answers to the questions referred:

1. The term the “same profession” in Article 1 and 4 of the Directive should be interpreted broadly, in light of the objective of facilitating free movement within the EEA. It is the basic nature and type of the professional activities that determines whether two professions are “the same”. A profession is the same in the home state and the host state if the activities covered are “comparable”, cf. Article 4(2) of the Directive. The professions are not the same if the differences in the field of activity of the relevant profession are so substantial that the applicant would have to follow a full programme of education and training in order to obtain the required qualifications in the host state.

2. In the determination of what constitutes the “same profession”, the host state must take account of each of the professional activities which characterise the profession concerned. Formal requirements for carrying out certain professional activities in the home state, such as a requirement to commence or undertake to commence post graduate specialist training within two years, is not relevant in this regard.

3. The organisational and regulatory framework for the pursuit and exercise of the profession in the home state is not relevant for the host state’s assessment of “the same” profession, unless those conditions for pursuing the profession define the very nature of the professional activities in question to such an extent that

differences in professional qualifications cannot be mitigated through compensation measures in accordance with Article 14 of the Directive.

4. The possibility of mitigating differences in professional qualifications through compensation measures should be taken into account in the assessment of “the same profession”. Article 14 entails that the profession is “the same” despite differences both with regard to training and professional activities in the home state. If the applicant, after completion of the range of compensation measures described in Article 14, would be unqualified for the pursuit of the profession in the host state, the activities covered are not comparable within the meaning of Article 4(2) of the Directive.

5. Education and training is “specifically geared to the pursuit of a given profession” if the training, according to the regulatory framework of the home state, is designed to prepare candidates to exercise a particular profession. Whether that profession or the professional activities are regulated in the home state is of no significance.

6. The host state must examine an application for recognition under Articles 28 and 31 of the EEA Agreement if an applicant does not fulfil the criteria for recognition under Article 13, cf. Article 14 of Directive 2005/36. The host state must take into account learning, skills and qualifications already acquired by the applicant in another EEA state, and grant access to the profession if the applicant demonstrates qualifications equivalent to those required in the host state.

The Norwegian Government

46. The Norwegian Government respectfully asks the Court to answer the questions in the following way:

Question 1A:

When considering the concept of “same profession” in Articles 1 and 4 of Directive 2005/36/EC

- the host state must take account of the activities which the applicant is qualified to practice in his/her home state, but only insofar as he/she is fully qualified to practice those activities;*
- assess whether those activities are identical or analogous or, in some cases, simply equivalent to the activities covered by the profession sought in the host state;*

- *and may in that assessment take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity, while respecting the principles of non-discrimination and mutual trust.*

Question 1B:

In the determination of “same profession”, the host State is only obliged to take account of activities which the applicant is fully qualified for, and is under no obligation to take account of activities which the applicant may only perform on the condition that the applicant has commenced a course of further education and training or undertaken to commence such a course of education and training within two years.

Question 1C:

When considering the concept of “same profession”, the referring court may also take into account differences in degree of independence in pursuing a profession and responsibility for patients. The precise value to attach to such experience will be for the competent national authority to determine in the light of the objective differences at hand.

Question 2:

The possibility of requiring compensation measures, see Article 14 of Directive 2005/36/EC, does not have any bearing on the interpretation of what constitutes “same profession”.

Question 3:

The wording “specifically geared to the pursuit of a given profession” in Article 2(1)(e) of Directive 2005/36/EC, requires that the training has specifically aimed to prepare the candidate for the immediate pursuit of a specific profession, which in the context of Article 13 (2) third paragraph must be the same as the one which the applicant is seeking to pursue in the host state; a regulated education and training is not at hand if that training gives access to a wide range of professions.

Question 4A:

An applicant who does not fulfil the requirements for having qualifications recognised under Article 13 of the Professional Qualifications Directive, may not rely on Articles 28 and 31 of the EEA Agreement as a basis for pursuing a regulated

profession in the host State which is not the same as he/she is qualified for in his/her home State.

Question 4B:

When an EEA State assesses an application for access to a profession, access to which depends, under national legislation, on the possession of a diploma or professional qualification or on periods of practical experience, Article 28 and 31 EEA require that this EEA State considers 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. In the course of that examination, a Member State may, however, take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity.

The Austrian Government

47. The Austrian Government proposes that the Court should answer the questions as follows:

1. The term 'the same profession' in Articles 1 and 4 of Directive 2005/36/EC must be interpreted as meaning that the Hungarian 'okleveles pszichológus' and the Norwegian 'psykolog' do not constitute 'the same profession'.

2. In the determination of 'the same profession' in the sense of Articles 1 and 4 of Directive 2005/36/EC, the host Member State must not take into account the applicant's professional activities in the home member State which he or she pursued under supervision.

3. The possibility of requiring compensation measures pursuant to Article 14 of Directive 2005/36/EC has no bearing on the interpretation of what constitutes 'the same profession'.

4. Article 3(1)(e) of Directive 2005/36/EC must be interpreted as meaning that university studies – except those which, because of their particular nature, are aimed to improve their students' general knowledge rather than preparing them for an occupation – must be deemed 'regulated education and training'.

5. Articles 28 and 31 of the EEA Agreement must be interpreted as meaning that, in cases where the preconditions for the recognition of qualifications according to the Directive 2005/36/EC are not met, the right to professional recognition of acquired knowledge and skills can be derived from Articles 28 and 31 of the EEA Agreement.

The Hungarian Government

48. The Hungarian Government proposes the following answers to the questions referred:

1. The requirement of the “same profession” in Article 1 and 4 of the Directive must be interpreted broadly, this requirement being met if there is a high degree of similarity between the fields of activity of the respective professions. In this case, any potential differences can be bridged by compensation measures under the Directive. In assessing the condition of the “same profession” the focus should be on the examination of activities as they are actually carried out. The definition of the fields of activity and the way in which they are exercised are matters of fact which must be determined by the host State, taking into account, where appropriate, information provided by the State of origin.

2. The possibility of compensation measures provided for in Article 14 of the Directive confirms the broad interpretation of the "same profession" requirement.

3. There is no need to answer the third question. Alternatively, "regulated education and training" defined in Article 3 (1) a) of the Directive must be interpreted in a sense that it refers to trainings specifically designed to prepare candidates to exercise a given profession.

4. If (quod non), for some reason, the applicants do not fulfil the requirements for having their qualifications recognised under the Directive, they are entitled to rely on the fundamental freedoms guaranteed by Articles 28 and 31 of the EEA Agreement. In this case, it is necessary to examine whether the practice of the Norwegian authorities does not constitute an undue and disproportionate restriction of the fundamental freedoms in question.

The Netherlands Government

49. The Netherlands Government proposes the following answers to the questions of the referring court:

Questions 1 and 2:

When the differences between the fields of activity of a profession in the Member State where the qualification was obtained and a profession in the host Member State are so substantial that the applicant would have to follow a full programme of education and training in order to pursue the profession in the host Member State, the professions in question cannot be considered “the same profession” within the meaning of Articles 1 and 4 of the Professional Qualifications Directive. The competent authorities of the host Member State should decide on each case

separately, in compliance with EU law, taking into account each of the activities covered by the professions in question in both Member States concerned when assessing whether professions can be considered the same. As appropriate, the competent authorities may impose compensation measures on the applicant to effectively make up for any shortcomings in the applicant's education, pursuant to Article 14 of this Professional Qualifications Directive. This article is not relevant when assessing whether a profession is covered by the term "same profession", as compensation measures only come into play when professions are the same.

Question 3:

In order to qualify as regulated education and training within the meaning of Article 3(1)(e) of the Professional Qualifications Directive, education and training must provide the necessary qualification for the pursuit of the activities that are, in general, needed for the regulated profession concerned.

Question 4:

The host Member State is under an obligation to examine the application for recognition in the light of Articles 28 and 31 of the EEA if an applicant does not fulfil the criteria for recognition under the Professional Qualifications Directive because the activities involved in two professions are so different that these professions cannot be considered the same profession.

ESA

50. ESA submits that the Court should respond as follows to the request for an advisory opinion:

1. Articles 1, 4 and 13 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications are to be interpreted to the effect that the requirement of recognition imposed by that directive applies to professions which in the home and host states cover comparable activities from a qualitative and a quantitative point of view. This means that the core professional activities exercised need to be concerned with similar matters so that the functions performed by the professionals can be said to be similar. There must also be an overlap of sufficient breadth of the number of activities exercised, without any requirement for all activities covered in the host state to also be covered in the home state

The way in which activities covered by the profession in the home state are pursued, and in particular whether they are pursued in full independence or under supervision by more experienced members of the profession, is of no relevance for the purposes of determining whether the profession is the same as one in the host

state covering comparable activities. It may only be taken into account in the context of imposing compensation measures where there is a relevant discrepancy in the education and training or between the professional activities covered.

The formal conditions applicable to the exercise of a profession in the state where the qualifications giving access thereto were obtained cannot be applied to professionals pursuing their careers in another EEA state following recognition of those qualifications.

2. The possibility of requiring measures to compensate for relevant discrepancies in the education and training or between the professional activities covered as between the home and host states pursuant to Article 14 of Directive 2005/36 in itself has no bearing on what constitutes the same profession for the purposes of that directive but is rather the logical consequence of the fact that the conditions for access and pursuit to professions, as well as the education and training geared towards them, differ as between EEA states.

3. Article 3(1)(e) of Directive 2005/36 is to be interpreted to the effect that education and training is specifically geared to the pursuit of a given profession in situations such as those in the case pending before the national court where training is intended to prepare individuals for that profession, or is habitually completed by individuals for the purposes of pursuing the profession in question.

4. In a situation where a national of an EEA state wishes to practice a profession in another EEA state but is not entitled to recognition by virtue of Directive 2005/36, Articles 28 EEA and 31 EEA are to be interpreted as requiring the national authorities to take into consideration all the diplomas, certificates and other evidence of formal qualifications and their relevant experience, by comparing the specialised knowledge and abilities certified by those diplomas and that experience with the knowledge and qualifications required by the national rules. To the extent that there are disparities between the specialised knowledge and abilities conferred by the qualifications and experience invoked by the individual in question and those required by national rules, it is incumbent on the national authorities to examine, in order to comply with the principle of proportionality, what compensatory measures might be imposed so as to fill any gaps identified.

The Commission

51. The Commission suggests the following answer to the questions of the referring court:

1. In the absence of a professional qualification recognition of which is being sought, Directive 2005/36/EC does not apply and interpretation of the expression

“same profession” as used in that Directive is not helpful in resolving the dispute before the referring court.

2. In the absence of a professional qualification recognition of which is being sought, Directive 2005/36/EC does not apply and there is therefore no question of requiring compensation measures as described in Article 14 thereof.

3. In the absence of a professional qualification recognition of which is being sought, Directive 2005/36/EC and in particular Article 13(2) thereof does not apply and interpretation of the expression “regulated education and training” as used in that provision is not helpful in resolving the dispute before the referring court.

4. 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 has not completed the education and training necessary in his home State to have full access to the profession in question is not relevant to that assessment.

Per Christiansen
Judge-Rapporteur