

JUDGMENT OF THE COURT (First Chamber)

27 June 2013 (*)

(Recognition of diplomas and other evidence of formal qualifications – Directive 2005/36/EC
– Profession of physiotherapist – Partial and limited recognition of professional qualifications
– Article 49 TFEU)

In Case C-575/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Simvoulio tis Epikratias (Greece), made by decision of 10 November 2011, received at the Court on 16 November 2011, in the proceedings

Eleftherios-Themistoklis Nasiopoulos

v

Ipourgos Igiias kai Pronoias,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger and A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after considering the observations submitted on behalf of:

- Eleftherios-Themistoklis Nasiopoulos, by A.N. Dendrinou, dikigoros,
- the Greek Government, by E. Skandalou, Z. Chatzipavlou and I. Bakopoulos, acting as Agents,
- the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,
- the German Government, by J. Möller, acting as Agent,
- the French Government, by G. de Bergues, N. Rouam and F. Gloaguen, acting as Agents,
- the Italian Government, by W. Ferrante, avvocato dello Stato,
- the Austrian Government, by A. Posch, acting as Agent,
- the Polish Government, by B. Majczynna and M. Szpunar, acting as Agents,

- the European Commission, by H. Tserepa-Lacombe and H. Støvlbæk, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.
- 2 The request has been made in a dispute between Mr Nasiopoulos and Ipourgos Igiias kai Pronoias (Minister for Health and Social Welfare; ‘the Minister for Health’) concerning a request by Mr Nasiopoulos, a Greek national, for authorisation to access the profession of physiotherapist in Greece on the basis of a professional qualification obtained in Germany.

Legal context

European Union legislation

- 3 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of professional qualifications (OJ 2005 L 255, p. 22; ‘Directive 2005/36’), replacing the various recognition systems repealed with effect from 20 October 2007, in particular Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration (OJ 1989 L 19, p. 16) and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25), without altering their mechanism, provides, in Article 1:

‘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.’

- 4 Article 4 of the directive lists the effects of recognition:

‘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.’

- 5 Article 11 of the directive describes the levels of qualification as follows:

‘ ...

- (a) an attestation of competence issued by a competent authority in the home Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State ...

...

- (b) a certificate attesting to a successful completion of a secondary course,

...

...

- (d) a diploma certifying successful completion of training at post-secondary level of at least three and not more than four years' duration, or of an equivalent duration on a part-time basis, at a university or establishment of higher education or another establishment providing the same level of training, as well as the professional training which may be required in addition to that post-secondary course;
- (e) a diploma certifying that the holder has successfully completed a post-secondary course of at least four years' duration, or of an equivalent duration on a part-time basis, at a university or establishment of higher education or another establishment of equivalent level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course.'

6 Article 13(1) of Directive 2005/36 lays down the conditions for recognition:

'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 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 which is required in the host Member State, as described in Article 11.'

7 Article 14 of the Directive deals with the compensation measures:

'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 ...

...

4. For the purpose of applying paragraph 1 ..., "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.'

Greek law

- 8 Under Presidential Decree 90/1995 – Professional rights of the holders of diplomas from the Physiotherapy Division of the Faculty for Health and Caring Professions of technical education establishments, the profession of physiotherapist is a regulated profession, given that its pursuit requires graduation from that faculty, which is a higher (tertiary) education establishment at the same level as universities and higher education establishments, issued after a course of at least three years' duration.
- 9 Thus, in order to allow access to the profession of physiotherapist in the case of a person who has acquired a professional qualification in another Member State, the competent authority must establish that that qualification constitutes not only an attestation of competence or a certificate within the meaning of Article 11 of Directive 2005/36, but also a diploma.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 10 Mr Nasiopoulos is a Greek national who holds a certificate of secondary education from a Greek lyceum (upper-level secondary school). After completing, in Germany, training as a medical masseur-hydrotherapist ('Masseur und medizinischer Bademeister') lasting two and a half years and including theoretical tuition and practical work, he obtained the certificate authorising him to exercise that profession. In Germany, training as a medical masseur-hydrotherapist is at the level of intermediate professional education and training (secondary).
- 11 Relying on his professional qualifications obtained in Germany, the applicant filed an application with the Minister for Health in Greece for recognition of his right of access to the profession of physiotherapist, since that is the nearest profession in Greece to that of medical masseur-hydrotherapist.
- 12 That application was not accepted. Firstly, the profession of 'medical masseur-hydrotherapist' is not regulated in Greece. Secondly, the applicant cannot exercise the profession of physiotherapist, since he holds merely a certificate of training lasting two and a half years, while access to the profession of physiotherapist is subject, in Greece, to possession of a diploma of higher education issued following studies lasting at least three years.
- 13 Mr Nasiopoulos appealed against that decision before the Simvoulio tis Epikratias (Council of State, Greece), arguing that it infringed the European Union system of recognition of professional qualifications and his right to freedom of establishment laid down in Article 49 TFEU.
- 14 The referring court is of the view that the fact that the Greek authorities did not grant him even partial access to the regulated profession of physiotherapist in Greece so that he might

carry out part of the professional activities of a physiotherapist in that country (massage and hydrotherapy services), which he can lawfully exercise in Germany, is not proof against reasonable doubts, particularly in the light of the case-law of the Court (Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* [2006] ECR I-801).

- 15 Accordingly, the Simvoulio tis Epikratias decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘For the purposes of Article 49 TFEU, is the aim of safeguarding the provision of a high level of health services sufficient, taking account also of the principle of proportionality, to justify a restriction on the freedom of establishment which arises in the system of provisions that are in force in a certain Member State (the host Member State) and that:

- (a) allow only persons who have a right to engage, in that Member State, in the regulated profession of physiotherapist to carry out certain professional activities,
- (b) preclude the possibility of partial access to that profession and
- (c) therefore mean that a national of the host Member State who has acquired in another Member State (the Member State of origin) a qualification which permits him to engage in a profession regulated in the latter Member State that is connected with the provision of health services (but does not permit him, because the requirements of [the directive] are not fulfilled, to engage in the profession of physiotherapist in the host Member State) is entirely unable to carry out in the host Member State, by way of partial access to the profession of physiotherapist, just some of the activities coming under the latter profession, that is to say, those which the person concerned has the right to carry out in the Member State of origin?’

The question referred for a preliminary ruling

- 16 By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding national legislation which precludes partial access to the profession of physiotherapist, which is regulated in the host Member State, being granted to a national of that State who has obtained, in another Member State, a qualification, such as that of medical masseur-hydrotherapist, which authorises him to carry out, in that second Member State, some of the activities coming under the profession of physiotherapist.
- 17 It is appropriate to examine this question in the light of the principles laid down in the judgment in *Colegio de Ingenieros de Caminos, Canales y Puertos*, which examined the partial recognition of professional qualifications.
- 18 In that judgment, the Court examined whether Article 49 TFEU prevents the competent authorities of the host Member State from excluding the possibility of partial taking-up of a regulated profession, restricted to the pursuit of one or more activities covered by that profession.
- 19 In that regard, the Court recalled that, under the second paragraph of Article 49 EC, freedom of establishment is to be exercised under the conditions which the legislation of the country of establishment lays down for its own nationals. It follows that, where the taking up or pursuit of a specific activity is regulated in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with the conditions of that regulation (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 36).

- 20 Since the conditions for access to the profession of physiotherapist have not, to date, been harmonised at European Union level, the Member States remain competent to define such conditions since Directive 2005/36 does not restrict their powers on that point. They must, however, exercise their powers in this area in a manner which respects the basic freedoms guaranteed by the Treaty (see Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraphs 24 and 25, and *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraphs 28 and 29).
- 21 Thus, legislation of a host Member State which excludes all partial access to a regulated profession and, accordingly, is liable to hinder or make less attractive the exercise of freedom of establishment may be justified, inter alia, by overriding reasons relating to the public interest, provided that it does not go beyond what is necessary in order to attain the objective which it pursues.
- 22 With regard to the objective of legislation such as that at issue in the main proceedings, the overriding reasons relating to the public interest relied upon by the Governments which submitted observations are, firstly, consumer protection and, secondly, health protection.
- 23 As regards consumer protection, it must be noted that, indeed, partial recognition of professional qualifications could, theoretically, have the effect of fragmenting the professions regulated in a Member State into various activities. That would lead essentially to a risk of confusion in the minds of the recipients of services provided by professionals established in that Member State, which recipients might well be misled as to the scope of the qualifications associated with the profession of physiotherapist.
- 24 However, exclusion from even partial access to the profession of physiotherapist goes beyond what is necessary to achieve the objective of consumer protection.
- 25 As the Court has already pointed out in the judgment in *Colegio de Ingenieros de Caminos, Canales y Puertos*, the legitimate objective of protection of consumers may be achieved through less restrictive means than total exclusion of even partial access to a profession, particularly the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in its original form, and in the official language of the host Member State (see, by analogy, *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraph 38).
- 26 As regards health protection, the Czech Government argues that healthcare professions fall within a particularly sensitive area and the French Government is of the opinion that those professions are specific and cannot be equated with other regulated professions. That approach is shared, inter alia, by the Italian Government, which does not see how professional activities in the healthcare profession can be detachable without the protection of public health, the standard of the services and the confidence of consumers in the corresponding qualification being affected.
- 27 In that regard, it must be held that, indeed, a particular vigilance is required, as stated, moreover, in Article 52 TFEU, when examining national measures for the protection of public health. As the French Government points out, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted (see, inter alia, *Mac Quen and Others*, paragraphs 33 and 34; Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraphs 46 and 47; and Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paragraph 51).

- 28 None the less, firstly, it must be pointed out that the profession of physiotherapist and, accordingly, that of any type of masseur, do not fall within the sector of medical professions proper but within the paramedical sector. That sector, covering a wide range of different activities, cannot by definition avoid the system of mutual recognition of regulated professions as established by European Union law.
- 29 Secondly, it must be noted that the recipient of the services provided by a medical masseur-hydrotherapist *de facto* enjoys the particular vigilance required as regards the protection of health. As the Greek Government, *inter alia*, stated at the hearing, the provision of the services supplied by a medical masseur-hydrotherapist consists merely of the implementation of a therapy prescribed to the patient not by that masseur but by a doctor. It is that doctor whom the patient sees first and that doctor who then indicates to the masseur what is to be done as regards the technical execution of the therapy. Thus, the medical masseur-hydrotherapist is not chosen directly by the patient and does not act on his instructions, but is designated by and acts in close liaison with a representative of the medical profession, depending on and cooperating with each other.
- 30 Although it follows from the foregoing that exclusion from even partial access to the profession of physiotherapist goes beyond not only what is necessary to achieve the objective of consumer protection but also what is required as regards protection of health, the two following scenarios must nevertheless be distinguished.
- 31 The first scenario concerns cases where, in the Member State of origin and the host Member State, the degree of similarity between the two professions is such that they may be regarded as 'comparable' and, accordingly, 'the same profession' within the meaning of Article 4(2) of Directive 2005/36. In such a case, any shortcomings in the applicant's education or training in relation to that required in the host Member State may be effectively made up for through the application of the compensation measures provided for in Article 14(1) of Directive 2005/36, thereby ensuring full integration of the party concerned into the professional system in the host Member State (see *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraph 34). Consequently, in such circumstances, there is no infringement of Article 49 TFEU where the host Member State does not grant partial access to a profession.
- 32 The second scenario, by contrast, concerns cases which are not covered by Directive 2005/36 because the differences between the fields of activity are so great that in reality the applicant should follow a full programme of education and training in order to pursue, in another Member State, the activities for which he is qualified. Viewed objectively, this is a factor which is liable to discourage the party concerned from pursuing those activities in the host Member State (see *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraph 35). In such circumstances, there is likely to be an infringement of Article 49 TFEU.
- 33 In that regard, the Court has noted, firstly, that it is for the authorities and, in particular, the competent courts in the host Member State to determine, in each specific case, to what extent the content of the education and training obtained by the party concerned is different from that required in that State (see *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraph 36).
- 34 Secondly, the Court has also stated that one of the decisive issues to be considered at the outset by the national authorities is whether the professional activity which the party concerned wishes to pursue in the host Member State may, objectively, be separated from the rest of the activities covered by the corresponding profession in that State, the issue of whether that activity may be pursued, independently or autonomously, in the Member State where the professional qualification in question was obtained serving as a guideline in that

regard. If that is the case, the conclusion is that the dissuasive effect caused by the preclusion of any possibility of partial recognition of the professional qualification in question is too serious to be offset by the fear of potential harm to the rights of recipients of services (see *Colegio de Ingenieros de Caminos, Canales y Puertos*, paragraphs 37 and 38).

- 35 Having regard to the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as precluding national legislation which excludes partial access to the profession of physiotherapist, regulated in the host Member State, by a national of that State who obtained, in another Member State, a qualification such as that of medical masseur-hydrotherapist, authorising him to carry out, in that second Member State, part of the activities coming under the profession of physiotherapist, when the differences between the fields of activity are so great that in reality the applicant should follow a full programme of education and training in order to pursue the profession of physiotherapist. It is for the national court to determine whether that is the case.

Costs

- 36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding national legislation which excludes partial access to the profession of physiotherapist, regulated in the host Member State, by a national of that State who obtained, in another Member State, a qualification such as that of medical masseur-hydrotherapist, authorising him to carry out, in that second Member State, part of the activities coming under the profession of physiotherapist, when the differences between the fields of activity are so great that in reality the applicant should follow a full programme of education and training in order to pursue the profession of physiotherapist. It is for the national court to determine whether that is the case.

[Signatures]

* Language of the case: Greek.