

MEMO

To Norsk Psykologforening

From Advokatfirmaet Thommessen

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RECOGNITION OF QUALIFICATIONS FROM HUNGARY

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1 INTRODUCTION

We have been asked to review and comment the EFTA Surveillance Authority's Letter of formal notice to Norway concerning the recognition procedure of Hungarian qualifications of psychologist from the EFTA Court of 12 June 2018 (hereinafter "The Notice"). This memo presents our initial comments. As agreed, our main focus is concentrated on the substantive issues under the relevant Directive.

The Surveillance Authority holds that Norway is responsible for three separate breaches of EEA rules, by:

- refusing to recognize the Hungarian qualification of Master's degree in Clinical and Health Psychology (I e one of the possible specializations within the Masters in psychology) under Directive 2005/36 on recognition of professional qualifications (hereinafter "The Directive"), or, in the alternative, Directive 2006/123 on services in the internal market (hereinafter "The Services Directive") and/or Article 28 and/or 31 of the EEA Agreement,
- exceeding on a regular basis the four month deadline when processing recognition applications set out in Article 51(2) under the Directive or, alternatively, Article 13 of the Services Directive, and
- by not having a system in place for appealing against the failure to reach a decision within the timeframe of four months, as required by Article 51(2) of the Directive

We have identified five issues that should be addressed in order to substantially review ESA's notice. These will be addressed in this memo.

- Firstly, under which circumstances does the Directive apply? (Section 2)
- Secondly, does Article 4 (1) of the Directive grant a right for recognition for those with a master in psychology from Hungary as a psykolog in Norway? (Section 3)
- Thirdly, if persons holding a psychologist degree from Hungary are entitled to have this qualification recognized in Norway, which compensatory measures is the state allowed to put in place? (Section 4)
- Fourthly, to what extent is the State allowed to impose further limitations on the right to recognition in addition to the compensatory measures, in order to ensure a high level of health security? (Section 5)
- If the Directive does not apply, a question also arises of to whether the Services Directive and the EEA Agreement set out limitations to Norway's current practice. (Section 6)

In the following text "okleves pszichológus" will be used about those with a master degree in psychology from Hungary and "psykolog" about those with an integrated 6-year degree in psychology from Norway.

2 UNDER WHICH CIRCUMSTANCES DOES THE DIRECTIVE APPLY?

Article 2(1) of the Directive define the scope of the Directive (our emphasis):

This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, ... , other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.

Hence, two conditions must be satisfied for the Directive to be applicable to the case at hand.

First, psykolog must be a "regulated profession". This is defined in Article 3(1)(a) as a professional activity that by law can only be exercised when one is in a possession of a specific professional

qualification.¹ As mentioned in the notice by ESA, a Norwegian psykolog is required by law to have an authorization pursuant to section 48a of the Norwegian Health Personnel Act ("HPA"), cf. section 48 of the same act. Psykolog is therefore a regulated profession.

Second, the nationals must have obtained their "professional qualification" in another Member State. A professional qualification is a "*qualification attested by evidence of formal qualifications,² an attestation of competence referred to in Article 11, point (a) (i) and/or professional experience*", cf. Article 3(1)(b). Clearly, the requirements of this wording are met by the Norwegians with a okleves pszichológus-qualification from Hungary seeking employment in Norway.

Consequently, the Directive applies to the case at hand.

3 DOES ARTICLE 4(1) OF THE DIRECTIVE GRANT A RIGHT FOR RECOGNITION FOR THOSE WITH A MASTER IN PSYCHOLOGY FROM HUNGARY AS A PSYKOLOG IN NORWAY?

3.1 Introduction

Article 4(1) of the Directive reads (our emphasis):

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.

In our case, the "host Member State" is Norway and "home Member State" is Hungary.

A holder of a master in psychology from Hungary is allowed to practice as a okleves pszichológus in that country. The central issue is therefore whether okleves pszichológus and psykolog are the "same profession". This requirement is defined in Article 4(2) (our emphasis):

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.

According to the wording of article 4 (2), the decisive point is whether the "activities covered" by a psykolog in Norway are "comparable" to the "activities covered" by a okleves pszichológus in Hungary.

Below, we will give our legal interpretation of Article 4 (section 3.2) and provide our opinion on whether the professions are the same (section 3.3).

3.2 Interpretation of the right for recognition in Article 4 of the Directive

3.2.1 The wording of Article 4

While the wording in Article 4(2) ("comparable") indicates that activities need not be identical in order to form part of the same profession, the wording does in our opinion not define the degree of

¹ "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"; cf. Article 3(1)(a)

² I.e. diplomas or certificates issued by an authority, cf. Article 3(1)(c)

comparability required. Apart from showing that the activities do not need to be 100 % identical, this wording does in our view not add much to the interpretation

3.2.2 *Rationale*

First and foremost, the objective with the Directive is to abolish the obstacles to free movement of persons and services, so that nationals of EU Member states can pursue a profession in another Member States than in the in which they have obtained their professional qualifications.³

The preamble does, however, clearly reflect that the Directive does not prejudice national measures necessary to ensure a high level of health and consumer protection.⁴

In other words, the Directive clearly allows for a balancing of free circulation based on national public health considerations. It does however not add helpful guidance to the interpretation of the term "same profession" or "comparable activities" or to that balancing.

3.2.3 *The system of mutual recognition*

There are different ways for states to regulate recognition of foreign qualifications in international agreements. Two main approaches are harmonization and mutual recognition. Whilst harmonization requires that the same standards apply in all the involved countries, mutual recognition rests on a system of rules stating when a qualification in one country is deemed equivalent to qualifications in another country. Article 4 of the Directive rests on the mutual recognition approach.

Harmonization is harder to achieve than mutual recognition standards, because all involved states must agree on a common set of rules. That exercise almost always requires a change of national legislation. Harmonization of rules are therefore not always possible or desirable, because the states want more leeway than harmonization can provide. When this is the case, the mutual recognition approach seeks to allow recognition of foreign qualifications provided that a certain set of conditions are fulfilled. However, it is up to the states to assess whether an applicant meets these requirements or not.⁵

Some sectors operate with a hybrid of these two regulatory approaches – automatic mutual recognition. Here, the qualifications vary in several countries, but the state has no discretion with regard to acknowledgement of these. This has been possible in some sectors, like for certain health services.⁶ Psychologists have not been a part of this development.

Thus, as a point of departure, Norway has discretion in its definition of the activities a psykolog may undertake and a certain discretion the criteria for being authorized to this profession.

3.2.4 *Case law in the CJEU*

3.2.4.1 Introduction

Recognition of foreign qualifications has been discussed by the Court of the European Union in several cases over the years. The notion of "same profession" under Article 4(1) of the Directive has not been addressed directly. There are however examples of interpretations of similar

³ Recital 1.

⁴ Recital 44.

⁵ Heremans, Tinne, Professional Negligence, Professional Services and EU Law, P.N. 2013, 29(3), 144-171.

⁶ European Parliament, mutual recognition of diplomas, Achievements (accessed 11 July 2018) Link: <http://www.europarl.europa.eu/factsheets/en/sheet/42/the-mutual-recognition-of-diplomas> and European Commission, Recognition of professional qualifications in practice (accessed 11 July 2018) Link: https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition_en

provisions in the Directives that is relevant to the interpretation of "same profession" under Article 4.

The case-law is built on the old Directive on recognition of higher-education diplomas⁷ ("the old Directive"), but has developed in line with the renewal of the Directives covering the area. The focus has changed, from an emphasis on *formal qualifications* towards the *activities* performed by the profession.

Under the old Directive, recognition partly depended on the education, partly on mandatory practice after graduation in order to pursue a profession, cf. Article 3, 4 and 7 of the old Directive. When someone fulfilled the qualifications to pursue a profession in one state, that person was also to be qualified in another member state. Thus, in the 1990's, case law under this old Directive focused on "making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules" in order to determine whether a qualification could be recognized or not.⁸

In the following, we will analyze three decisions from the CJEU (section 3.2.4.2 – 3.2.4.4). Then, we will summarize our findings and comment on the applicability of the decisions (section 3.2.4.5).

3.2.4.2 Colegio de Ingenieros de Caminos (C- 330/03)

In *Colegio de Ingenieros de Caminos* from 2006,⁹ the Court changed its approach compared to previous practice. While this case is known for formulating a rule on partial qualifications, it also shows a shift in focus towards *activities in the profession* instead of formal qualifications.

The legal issue in the case was whether the old Directive allowed for partial recognition of qualifications of a hydraulic engineer from Italy wishing to work as a civil engineer in Spain.

The Spanish government submitted two questions to the Court. Firstly, the government asked whether it is possible *under the old Directive* to partly allow an application of qualifications from another Member state, so that the applicant would only be able to pursue parts of the profession. In the case at hand, this was relevant because hydraulic engineer was considered an independent profession in Italy, whilst it was considered one out of several specializations a civil engineer could pursue in Spain. Secondly, the Court asked whether such partial recognition was allowed *under the Treaty* Articles 39 (freedom of movement of workers) and 43 EC (freedom of establishment).

The Court answered both questions in the affirmative.

In answering the first question, the Court referred to the preamble of the old Directive, showing that its primary objective was to make it easier for persons holding diplomas awarded in a Member State to take up corresponding professional activities in the other Member States and to strengthen the right of European nationals to utilize their professional experience in any Member State.¹⁰

The Court went on to interpret when a qualification gave access to a "profession in question".

⁷ Council Directive 89/48/EEC 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

⁸ C-340/89 Vassopoulou paragraph 16- 23, C-424/97 Haim paragraph 46 and C-238/98 Hocsman paragraph 44.

⁹ *Colegio de Ingenieros de Caminos, Canales y Puertos*, Case C- 330/03 of 19 January 2006, European Court reports 2006, p. I-801

¹⁰ Paragraph 23.

The Court stated that this depends on whether the covered professions in the different Member States were "identical or analogous or, in some cases, simply equivalent in terms of the activities they cover".¹¹

When this was the case, recognition of the qualification should be granted, either in whole or in part.

In answering the second question, the Court laid out the possibilities of limiting the freedoms of movement of workers and of establishment due to reasons based on public interest.¹² In assessing the legality of when such a limitation would be possible for persons with foreign qualifications, the Court reiterated that such limitations could not go beyond what is necessary to obtain that objective. In order to decide when limitations would be necessary, the Court set up two alternative scenarios.

The first scenario was when the qualifications were similar to an extent that shortcomings could "be effectively made up for through the application of compensatory measures".¹³ In such cases, limitations beyond those prescribed in the old Directive would not be legal under EU law.

In contrast, the cases in which "the differences between the fields of activity are so great that in reality the full programme of education and training is required", would not fall under the obligation to recognize foreign qualifications under the old Directive.¹⁴ This would be the case there the compensatory measure would in fact amount to a "fresh, complete programme of education and training."¹⁵

3.2.4.3 Nasipoulos (C-575/11)

The doctrine from Colegio de Ingenieros de Caminos was later taken up in the interpretation of the 2005 Directive, in the Nasipoulos-case.¹⁶ Here, a Greek national had completed his education in Germany as a medical masseur-hydrotherapist, and wanted to receive recognition for his education in Greece. In Greece, the nearest profession to hydrotherapist was the profession of physiotherapist. The education in Germany lasted for two and a half years, while the physiotherapy education in Greece lasted for at least three years.

The question issued to the CJEU was whether Mr. Nasipoulos could be denied partial recognition as a physiotherapist in Greece, due to public health concerns, under Article 49 TFEU (freedom of establishment). Since the profession at the time was not harmonized, the Directive did not apply in the matter at hand.¹⁷

The Court answered the question in the negative.

As a starting point, the Court referred to the Colegio de Ingenieros de Caminos-case and provided that the principle laid out in this case was also applicable in the case at hand. It also reiterated that

¹¹ Paragraph 20.

¹² Paragraph 30.

¹³ Paragraph 34.

¹⁴ Paragraph 35.

¹⁵ Paragraph 36.

¹⁶ Case C-575/11, Eleftherios-Themistoklis Nasiopoulos v Ipourgos Igias kai Pronoias, 27 June 2013

¹⁷ Paragraph 20.

the freedom of establishment was subject to limitations in cases where the state sought to meet other public policy objectives.¹⁸

In the case at hand, the justification for the limitations set out by the Greek government was to ensure health and consumer protection.¹⁹

The Court rejected that denial of partial recognition was proportional in order to ensure consumer protection, and held that such protection could be secured in other, less extensive ways.²⁰

Further, the Court denied that limitations in partial recognition could be justified in order to ensure health protection. While recognizing that a special vigilance was required when examining measures for the protection of public health, the Court found that such considerations were not relevant in the case at hand.

Firstly, the Court pointed out that the profession of physiotherapist did not fall within the sector of medical professions proper, but to the "paramedical sector".²¹ Secondly, the Court said that the services supplied in this case consisted

*"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."*²²

In order to complete its assessment, the Court then went on to reiterate the two scenarios mentioned in the Colegio de Ingenieros de Caminos-case,²³ and pointed out that it was up to the national courts to decide which category applied to the matter at hand.

In these two cases, the Court set up a quite rigid dichotomy in order to address when restrictions in the freedom of establishment was necessary. This dichotomy is however only applied in assessing whether restrictions can be justified, not in the assessment of whether the Directives apply or whether a restriction has taken place. In both cases, the Court seems to presuppose that the failure to recognize the qualifications constitutes a restriction. As we will show below, the use of this dichotomy is a point where ESA's approach in the Notice may be challenged. ESA does not distinguish between medical services and paramedical services to the degree required under the case law.

3.2.4.4 Malta Dental Technologists Association/Reynaud (C-125/16)

A third case of relevant for the recognition of foreign qualifications is the Malta Dental Technologists Association and Reynaud.²⁴

¹⁸ Paragraphs 17-20.

¹⁹ Paragraph 22.

²⁰ Paragraph 24-25.

²¹ Paragraph 28.

²² Paragraph 29.

²³ Paragraphs 31-32.

²⁴ Malta Dental Technologists Association and John Salomone Reynaud v Superintendent tas-Saħħa Pubblika and Kunsill tal-Professjonijiet Kumplimentari għall-Mediċina, Case C-125/16, Judgment of the Court (Third Chamber) of 21 September 2017.

The question in this case was whether a CDT²⁵ with qualifications from abroad would be able to work independently in Malta, even though this profession did not exist as an independent profession in Malta, with the consequence that CDTs had to work together with a dental practitioner. The Court answered the question in the negative.

Since dental practitioners were not covered by the automatic recognition rules in the Directive, a concrete assessment had to be made whether the profession was the same or not.²⁶ In order to find that out, the Court went on to interpret the conditions for recognition of professions requiring specific professional qualifications under article 13 of the Directive. Article 13 (1) states that "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* (...)" [emphasis added].

In interpreting the term "that profession", the Court made a reference to the interpretation under the first question in the Colegio de Ingenieros de Caminos-case:

"The expression 'that profession' in the first subparagraph of Article 13(1) of Directive 2005/36 must be construed as covering professions which, in the home Member State and the host Member State, are identical or analogous or, in some cases, simply equivalent in terms of the activities they cover"²⁷ [emphasis added].

The question for the national courts were thus whether the activities covered by profession the person pursued was identical, analogous or equivalent to the one he was qualified in from another Member State.

The Court then went on to assess whether limitations in the recognition in this case would be contrary to the freedom of movement establishment.²⁸ The Court reiterated from the Nasipoulos-case that the Directive did not remove the power of the Member States to adopt provisions aimed at organizing their health services.²⁹ However, such restrictions of the freedom of establishment had to comply by the ordinary rules of justifying restrictions under EU law.³⁰ Since the justification for the limitation here was to protect public health, the Court found that the restriction was legal under Article 49 TFEU and Articles 4(1) and 13(1) of the Directive.³¹

3.2.4.5 Summary and discussion of the decisions

In sum, these cases illustrate two main points relevant for answering when two professions are "the same".

- Firstly, the Court mainly focuses on the activities of the profession in question. As long as the background is similar enough to fall within the same category of education level in the Directive, the decisive issue is whether the activities covered by the profession are equivalent, analogous or identical in the two jurisdictions.

²⁵ Certified Dental Technician, experts in the field of dental appliances, including the crafting of dentures or false teeth, and other ancillary services such as repairs, additions and modifications to dentures and prostheses, cf. paragraph 1.

²⁶ Paragraph 38-41.

²⁷ Paragraph 40, with reference to paragraph 20 in the Colegio de Ingenieros de Caminos-case.

²⁸ Paragraph 52-53.

²⁹ Paragraph 54.

³⁰ Paragraph 56.

³¹ Paragraph 62.

- Secondly, the Court clearly states that restrictions in the recognition can be justified in order to pursue public health policies. The state enjoys a wide discretion when ensuring a high level of public health. This discretion only applies however, to professions belonging to the health sector proper, and not simply paramedical services. In the assessment of whether a service is a paramedical service or a health service proper, it is relevant to see whether the practitioner independently decide on the content of the service granted to the patient, or whether this is decided by a doctor. If the service simply consist of implementing treatment described by a doctor, the service is most probably a paramedical service. As we will see below, the Services Directive follows up on this distinction.

Finally, there are some challenges relating to the applicability of the above mentioned cases as none of them directly concerns the wording of Article 4(1) of the Directive. We do however believe that they are relevant for two reasons. First, the Court uses the same legal standard when they discuss different provisions. This is apparent in both Malta Dental Technologists Association/Reynaud (which concerned Article 13 of the Directive) and Nasipoulos as both apply the test set out in Colegio de Ingenieros de Caminos although neither of these relates to the same provisions as in this case. Second, all the rules discussed in the chapter above have the same purpose; to enable the free flow of persons and services between Member States. This purpose will be best achieved with a coherent application of said rules through a common legal standard.

We also believe that, for the same reasons, the decisions can also be used to interpret the relevant provisions of the EEA Agreement that ESA mention in their Notice (see section 6.2 below).

3.2.5 EU Commission user guide

The EU Commission has made a user guide on the application of the 2005 Directive.³² Here, the Commission answers some frequently asked questions regarding the application of the Directive. The document does not give thorough elaborations on the content of the different rules, but provides examples that individuals can make use of.

On page 13, the Commission raises the question "Is the regulated profession that you want to practice the same as the one for which you are qualified?" Here, the Commission explains that the Directive allows for recognition of "the same profession" in which a person is qualified. As an example, the Commission states that a real estate agent in Spain cannot be recognized as a lawyer in France under the Directive.

In our opinion, the comparison between a real-estate agent and a lawyer in the EU Commission handbook does not add much to our case. The purpose of the guide is to give some general examples of when the Directive applies, not to draw the lines for when a rule is applicable or not. Furthermore, the Commission may not through user guides amend the rules developed by the Court.

3.3 Is oklevés pszichológus and psykolog the "same profession"?

As explained above, Article 4 of the Directive merely imposes on Norway to recognize the qualification as oklevés pszichológus as a psykolog if Hungarian degree relates to the "same profession" as the Norwegian. To determine whether this standard is satisfied, one must assess the activities covered by the two professions and compare these. If the professions are "*identical or*

³² "User Guide. Directive 2005/36/EC. Everything you need to know about the recognition of professional qualifications, 66 questions, 66 answers".

*analogous or, in some cases, simply equivalent in terms of the activities they cover*³³, then they are the "same".

3.3.1 Which activities are covered by a psykolog

Psykologer are considered as health personnel³⁴ and are subject to the provisions of the Health Personnel Act (HPA), such as the general requirement to provide proper and secure treatment in HPA Section 4. The Travaux préparatoires of the Act set out that for psykologer, proper and secure treatment entails that a psykolog is qualified to make decisions in questions within the field of psychology, and to independently treat mental illnesses.³⁵ Consequently, they can both diagnose and treat illnesses. We understand this to mean that a psykolog working in the primary health service may provide services to individuals without supervision. A psykolog cannot issue pharmacological treatment, i.e. prescribe medicines.³⁶

Further, pursuant Section 1-4 of the Norwegian Mental Healthcare Act a clinical psykolog³⁷ can issue invasive treatments to patients. When a patient is under invasive treatment, treatment with medicines is the only field that lies outside the competence of psykologer.³⁸

Also, Section 3-9 of the Specialist Healthcare Act sets out that hospitals must have a responsible manager on each level of the organization. The provision applies to public as well as private hospitals, cf. Section 1-2 of the Act. Apart from the requirement of proper and secure treatment, there are no specific requirements as to what type of medical competence a manager must have. Hence, psykologer may (and do) hold the positions of department, division or hospital manager.

Psykologer are also required to comply with the rest of the HPA, which includes, among other things, more specific requirements on how they ought to exercise their profession, how they are allowed to organize their business, duties of confidentiality, an obligation to provide relevant information to government agencies such as the social service and the child welfare authorities, and a duty to document their professional activities.

To become a psykolog one must, as mentioned, complete an integrated 6 year education in psychology. We have, however, also an additional separate track that allow for a fundamentally different study of psychology. This is a regular bachelor (BA) and master (MA)- program where one obtain a master degree in psychology after studying for 3+2 years. The former track concern prevention, diagnosing and the treatment of mentally ill people and is the only one with practical training as an integral part of the education, while the latter program concern "normal psychology" and does not focus on mental illness.³⁹ The difference between the two tracks clearly indicates what activities the Norwegian model reserves for psykologer.

We have been informed that there has been a national political debate in the 1990-ies on whether the integrated psykolog-education should be subject to the European Bologna-model, possibly resulting in opening up for individuals with other combinations of degrees than psykolog to the activities presently reserved for psykologer in Norway. It was apparently argued that a programme without comprehensive integrated skills training and practice would be insufficient to meet the

³³ Malta Dental Technologists Association/Reynaud (C-125/16) Paragraph 40, with reference to paragraph 20 in the Colegio de Ingenieros de Caminos-case

³⁴ Rundskriv til helsepersonelloven I -20/2001 – page 14

³⁵ Innst. O nr. 58 (1998-99) p. 23 (In Norwegian) and Rundskriv til helsepersonelloven I -20/2001 – page 18

³⁶ Helse- og omsorgsdepartementet, 29 August 2007

³⁷ This is a psykolog which have specialized in clinical psychology and satisfy the requirements in § 5 of the regulatory guidelines to the Mental Healthcare Act

³⁸ Helsetilsynet, 21 August 2008.

³⁹ <https://www.ntnu.no/studier/bpsy/faq>

needs for patient safety and standards of treatment quality, given the independent position and responsibility of psykologer,. Finally, the proposed change was rejected by the Norwegian government and the 6-years integrated model was retained for the programme of psychologists and medical doctors. This is an indication that the Norwegian Government distinguishes between health care serviced (activities) reserved for psykologer and other assignments which also those holding a Master in Psychology may take. We do not have an overview of the documents reflecting this discussion. It might be useful to study this in more detail when developing these arguments.

3.3.2 Which activities are covered by a okleves pszichológus

The title of okleves pszichológus is obtained after achieving a master in psychology.⁴⁰ The title is rewarded regardless of which specialization the student has chosen, and it is not protected. Consequently, one does not need any authorization from an official body to call oneself a okleves pszichológus and their professional tasks are not subject to specific legislation.

Further, upon graduation "a psychologist with a master specialization in clinical and health psychology is able to work independently and carry out multilateral and critical analysis in the field of clinical and health psychology, to use practical methods, analytical and intervening procedures applied in clinical and health psychology and to apply basic diagnostic and intervening procedures professionally".⁴¹ Despite this, the Hungarian legislation does not allow okleves pszichológus to "independently" participate in activities related to healthcare, such as diagnosing and treatment of patient.⁴²

To do this, the okleves pszichológus must take additional training and education for 2 years to become a "specialized clinical psychologist". Pursuant to Hungarian law,⁴³ only specialized clinical psychologists are eligible to work in healthcare establishments and to deliver healthcare services in the health sector. Other groups of psychologists must be under the supervision of a specialized clinical psychologist to perform the same tasks.⁴⁴ The extent of this supervision is not defined by law,⁴⁵ but specialized clinical psychologist are the only one that can pursue healthcare activities independently.⁴⁶

3.3.3 Are the activities identical, analogous or equivalent?

The discussion above clearly points to several major differences between the activities that are covered by a psykolog and a okleves pszichológus. A psykolog is considered as health personnel and can diagnose patient in a professional capacity, he/she can act as a manager in a hospital and, in some instances, issue invasive treatment. A okleves pszichológus cannot exercise any of these activities independently, whereas they are the main tasks that a psykolog perform.

Also, the Norwegian two-track system suggest that the knowledge accumulated through the psykolog-track and the activities which a psykolog is expected to perform upon graduation is inherently different from those relating to a MA-degree in psychology.

Psykologer are subject to supervision by specialists **only** in the secondary health care system (hospitals). A large number of psykologer work in primary health care, employed at the

⁴⁰ According to Hungarian Decree no. 18/2016 (VII 5.) EMMI, see also Statement from Nagy és Trócsányi Lep. 7 and 8

⁴¹ Amendment No.1 to the Hungarian Regulation No. 18/2016. (VIII 5.) of the Ministry of Human Resources

⁴² Statement from Nagy és Trócsányi p. 3

⁴³ Decree no. 60/2003. (X.20.) ESzCsM on the minimum professional requirements necessary for the provision of healthcare services

⁴⁴ The Hungarian Ministry of Human Capacities, 30 May 2017

⁴⁵ Statement from Nagy és Trócsányi p. 2 and 4

⁴⁶ Statement from Nagy és Trócsányi p. 8

municipality level or self-employed. These psykologer are not subject to supervision by law and are both expected and authorised to perform their work independently.

Consequently, it seems clear that these activities cannot be identical, analogous or equivalent.

This conclusion is seen as consistent with the division of tasks and responsibilities established under Norwegian law in relation to health care and other uses of psychology. We understand that many of the Norwegian okleves pszichológus have taken their bachelor degree in Norway. Hence, allowing okleves pszichológus to practice as psykologer would result in a circumvention of a legitimate Norwegian system and the public health policy choices that the two different educational tracks are built on.

3.4 Conclusion

Based on the above discussion, we conclude that Article 4 (1) of the Directive does not grant a right for recognition for those with a master in psychology from Hungary as a psykolog in Norway.

4 IF PERSONS HOLDING A PSYCHOLOGY DEGREE FROM HUNGARY ARE ENTITLED TO HAVE THIS QUALIFICATION RECOGNIZED IN NORWAY, WHICH COMPENSATORY MEASURES IS THE STATE ALLOWED TO PUT IN PLACE? COULD IT REFUSE TO ALLOW COMPENSATORY MEASURES AT ALL?

If we assume that psykolog and okleves pszichológus are the "same profession", Norway has an obligation to allow a okleves pszichológus to practice as a psykolog. Norway may however use different compensatory measures to ensure proper professional quality pursuant to Article 14 of the Directive.

A practical question in this regard is *to which extent*, Norway may and/or must impose compensatory measures. Is it ruled out that Norway based on Treaty provisions and previous case law may refuse to recognize qualifications from other EEA States relating to the same profession as the Norwegian psykolog?

The starting point for this discussion would be the Colegio de Ingenieros de Caminos- judgement discussed in Section 3.2.4.2 above. Pursuant to this decision, a Member State is not obliged to establish compensatory measure which amount to a "fresh, complete programme of education and training"⁴⁷ as the differences between the two activities would then be so great that they would not be comparable in the first place.⁴⁸ In our view, this judgment implied that a Member State based on such reasoning and the Treaty provisions could refuse to recognize foreign qualifications.

Thus, the question is whether the subsequent Directive has restricted the discretion of the Member States in this regard, or if the Member States still may refer to the rule provided for in the judgment. The wording of the Directive is unclear regarding the exact relationship between the exemptions under the Directive and the Treaty Provisions/the EEA Agreement. Paragraph 15 of the preamble of the Directive states that the compensatory measures imposed (our emphasis) "*should be proportionate and, in particular, take account of the applicant's professional experience. Experience shows that requiring the migrant to choose between an aptitude test or an adaptation period offers adequate safeguards as regards the latter's level of qualification, so that any*

⁴⁷ Paragraph 36.

⁴⁸ Paragraph 35.

derogation from that choice should in each case be justified by an imperative requirement in the general interest."

We have not found any legal precedence or provisions in the Directive which disapply the case law rule for qualifications referring to the "same profession" as the professions of the host state. Thus, we suggest that the relevance of this alternative should be considered based on the facts. Clearly, the general principle of proportionality requires national rules justified with respect to "public health" that limit the free flow pursuant to EEA/EU-law to be suitable, necessary and proportional (*stricto sensu*).⁴⁹ It is important that the justification is a non-economic public policy goal.

5 DOES THE SERVICES DIRECTIVE AND THE EEA AGREEMENT SET OUT LIMITATIONS TO NORWAY'S CURRENT PRACTICE.

5.1 The Service Directive (Directive 2006/123)

As explained in the Notice by ESA,⁵⁰ the Service Directive does not apply to "*healthcare services*", cf. Article 2(2)(f).

Pursuant to paragraph 22 of the preamble of said Directive, this limitation only apply to "... *healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided*". Further, the Commission Handbook on the implementation of the Service Directive emphasize that "*Services which can be provided without specific professional qualification being required have thus to be covered by implementing measures.*"

So, the relevant question regarding the applicability of the Service Directive is whether the activities performed by a psykolog is a "*healthcare service*".

As mentioned in section 3.3, a psykolog with an authorization is considered a health personnel and is subject to the provisions of the Health Personnel Act (HPA). This act allows a psykolog to make decisions in questions within the field of psychology and to independently treat mental illnesses as a health professional. Further, the act contains both several restrictions on the activities that a psykolog can perform (eg. through the general requirement to provide proper and secure treatment) and several duties (eg. duties of confidentiality and obligations to provide relevant information to government agencies). Similar restrictions and duties pursuant to the HPA does not apply to a psychologist without a psykolog-authorization. Also, the knowledge acquired with a psykolog- qualification is very different from a MA-degree. Consequently, the ability to "*assess, maintain or restore ... [the patients] state of health*" is "*reserved to*" individuals hold a qualification as psykolog.

Finally, we have already concluded in Section 2 that the psykolog-profession falls within the scope of the Directive on recognition of qualifications. The legislation becomes more coherent if one does not apply the Service Directive to the same matters. There would not have been a reason to have a Directive on recognition had the same rights followed from the Services Directive.

We are therefore of the opinion that the Service Directive is not applicable.

⁴⁹ Agreement on the European Economic Area – A Commentary (2018), Arnesen et. al., p 430

⁵⁰ Paragraph 186-188

5.2 Article 28 and 31 of the EEA

Article 28 of the EEA allows workers to move freely and participate in economic activity in other Member states. Limitation on this right is justified on the grounds of, amongst others, public health, cf. Article 28(3). Article 31 and 33 have the same structure in relation to freedom of establishment.

First, it is not given that the refusal to authorize okleves pszichológus is a restriction. Hungarian psychologist are allowed to work and establish themselves in Norway as a regular psychologist on the same conditions as someone with a Norwegian MA-degree in psychology. They cannot, however, act as a psykolog as this is a profession subject to the Directive, cf. Section 2 above.

Second, any potentially illegal limitations are justified on public health grounds. This was discussed in the Nasiopoulus-decision (see section 3.2.4.3). Here, the Court said that the limitations is only justifiable if it is applied to professions belonging to the health sector proper and not simply a paramedical services. The difference between the two groups depend on whether the practitioner can independently decide on the content of the service granted to the patient, or whether this is decided by an external doctor.

Psykologer are, as a health personnel, able to treat and diagnose patients independently. Thus, they clearly can decide on the content of the service granted to the patient and belong to the health sector proper. This provides the state with a wide discretion to deploy measures to ensure a high level of public health.

The fact that there exist different educational tracks related to the study of psychology and that those with a Norwegian MA-degree in psychology are not allowed to practice as a health personnel also indicates that the purpose of the psykolog-authorization is to ensure proper quality of the treatment of mental illness. The same can be said for the decision to uphold the two-track system despite political attempts to subject the psykolog-track to the Bologna-model.

Therefore, we do not believe that there is an infringement of Article 28 and/or 31 of the EEA.