



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

12 September 2013*

(Freedom to provide medical services — Service provider travelling to another Member State to provide the service — Applicability of the rules of professional conduct of the host Member State, in particular those relating to fees and advertising)

In Case C-475/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Berufsgesicht für Heilberufe bei dem Verwaltungsgericht Gießen (Germany), made by decision of 2 August 2011, received at the Court on 19 September 2011, in the proceedings against

Kostas Konstantinides,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), acting as President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2012,

after considering the observations submitted on behalf of:

- Dr Konstantinides, by G. Fiedler, Rechtsanwalt,
- Landesärztekammer Hessen, by R. Raasch,
- the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,
- the Spanish Government, by S. Martínez-Lage Sobredo, acting as Agent,
- the French Government, by G. de Bergues and N. Rouam, acting as Agents,
- the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent, and N. Sancho Lampreia, advogado,
- the European Commission, by H. Støvlbæk and K.-P. Wojcik, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 31 January 2013,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 5(3) and 6(a) of 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).
- 2 The request has been made in judicial proceedings for professional misconduct brought against Dr Konstantinides on application by the Landesärztekammer Hessen (Association of Doctors of the *Land* of Hesse).

Legal context

European Union law

- 3 Recitals 3, 8 and 11 in the preamble to Directive 2005/36 read as follows:

‘(3) The guarantee conferred by this Directive on persons having acquired their professional qualifications in a Member State to have access to the same profession and pursue it in another Member State with the same rights as nationals is without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the latter Member State, provided that these are objectively justified and proportionate.

...

(8) The service provider should be subject to the application of disciplinary rules of the host Member State having a direct and specific link with the professional qualifications, such as the definition of the profession, the scope of activities covered by a profession or reserved to it, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety.

...

(11) In the case of the professions covered by the general system for the recognition of qualifications, hereinafter referred to as “the general system”, Member States should retain the right to lay down the minimum level of qualification required to ensure the quality of the services provided on their territory. ... The general system for recognition, however, does not prevent a Member State from making any person pursuing a profession on its territory subject to specific requirements due to the application of professional rules justified by the general public interest. Rules of this kind relate, for example, to organisation of the profession, professional standards, including those concerning ethics, and supervision and liability. ...’

- 4 Article 1 of Directive 2005/36, ‘Purpose’, provides:

‘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.’

5 Article 3 of that directive, ‘Definitions’, provides in paragraph 1:

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

...

(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;

...’

6 Article 4 of the directive, ‘Effects of recognition’, provides in paragraph 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.

...’

7 In Title II of the directive, ‘Free provision of services’, Article 5, ‘Principle of the free provision of services’, provides:

‘1. Without prejudice to specific provisions of Community law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State:

(a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (hereinafter referred to as the Member State of establishment) ...

...

2. The provisions of this title shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1.

The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.

3. Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.’

8 Article 6 of the directive, 'Exemptions', provides:

'Pursuant to Article 5(1), the host Member State shall exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to:

(a) authorisation by, registration with or membership of a professional organisation or body. In order to facilitate the application of disciplinary provisions in force on their territory according to Article 5(3), Member States may provide either for automatic temporary registration with or for pro forma membership of such a professional organisation or body, provided that such registration or membership does not delay or complicate in any way the provision of services and does not entail any additional costs for the service provider. ...

...'

9 In Title III of the directive, 'Freedom of establishment', Article 13, 'Conditions for recognition', provides in paragraph 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.

...'

German law

Regulation on doctors' fees

10 The Regulation on doctors' fees (Gebührenordnung für Ärzte) is a regulation of the Federal Ministry of Health. Paragraph 1, 'Scope', provides:

'1. Remunerations for professional services of doctors are determined in accordance with this regulation, unless provided otherwise by Federal law.

2. A doctor may charge remunerations only for services which are required for medically necessary medical treatment in accordance with the rules of medicine. He may charge for services which go beyond the bounds of medically necessary medical treatment only if they have been provided at the request of the person liable for payment.'

11 Paragraph 2 of that regulation, 'Divergent agreement', provides:

'1. A fee diverging from this regulation may be determined by agreement. ...

2. An agreement in accordance with the first sentence of subparagraph 1 must be made in writing, after personal agreement in the individual case between the doctor and the person liable for payment, before provision of the doctor's service. ...

...'

12 Paragraph 6 of the regulation, 'Fees for other services', provides in subparagraph 2:

'Separate medical services which are not included in the list of fees may be charged for by analogy with a service in the list of fees which is equivalent as to nature, cost and time spent.'

Law of the *Land* of Hesse on health professions

13 Paragraph 2(1) of the Law of the *Land* of Hesse on professional representations, professional practice, further training, and professional tribunals of doctors, dentists, veterinarians, pharmacists, psychological psychotherapists and child and youth psychotherapists (Hessisches Gesetz über die Berufsvertretungen, die Berufsausübung, die Weiterbildung und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Tierärzte, Apotheker, Psychologischen Psychotherapeuten und Kinder- und Jugendlichenpsychotherapeuten), as amended by the Law of 15 September 2011, ('the Hesse Law on health professions') provides:

'There belong to the associations, as members of the professions, all

1. doctors,

...

who practise their profession in Hesse. ...'

14 In accordance with Paragraph 3 of that law:

'1. Members of the professions who, as nationals of a Member State of the European Union or of another State party to the Agreement on the European Economic Area of 2 May 1992 [(O) 1994, L 1, p. 3)], within the territory in which this law applies, practise their profession temporarily and occasionally in the framework of the freedom to provide services under the law of the European Communities, without having a professional establishment here, as an exception to the first sentence of Paragraph 2(1) do not belong to the associations, as long as they are professionally established in another Member State of the European Union or in another State party to the Agreement on the European Economic Area. The service shall be provided under the professional titles listed in the first sentence of Paragraph 2(1).

...

3. Members of professions referred to in subparagraph 1 have, with respect to the exercise of the profession, the same rights and obligations as members of professions referred to in the first sentence of Paragraph 2(1), in particular the rights and obligations in accordance with Paragraphs 22 and 23 relating to conscientious practice, further training, participation in the emergency service and keeping of records, and the obligation to acknowledge the professional rules of a professional, statutory or administrative nature in accordance with Article 5(3) of Directive [2005/36]. The professional codes adopted under Paragraphs 24 and 25, and Section 6 of this law, apply by analogy.'

15 The first sentence of Paragraph 49(1) of that law provides that breaches by members of the associations of their professional obligations are to be brought before the professional tribunals. In this connection, Paragraph 50 of the law states that the measures ordered in those proceedings may be a warning, a reprimand, temporary withdrawal of the right to vote, a fine of up to EUR 50 000, or a declaration that a member of the profession is unfit to practise the profession.

Code of professional conduct for doctors in Hesse

16 The Code of professional conduct for doctors in Hesse was adopted by the Association of Doctors of that *Land* pursuant to Paragraphs 24 and 25 of the Hesse Law on health professions. The code defines the professional obligations of doctors and, as stated in its preamble, pursues the objectives of maintaining and promoting trust between doctor and patient, ensuring the quality of medical activity in the interests of the health of the population, preserving the freedom and reputation of the profession of doctor, and promoting conduct worthy of the profession and preventing conduct unworthy of the profession.

17 Paragraph 12 of that code, ‘Fee and agreements on remuneration’, provides:

‘1. The fee claimed must be reasonable. The official Regulation on Doctors’ Fees is the basis of calculation, except where other statutory rules on remuneration apply. The doctor must not unfairly charge less than the rates laid down in the Regulation. When concluding an agreement on fees, the doctor must take account of the income and wealth situation of the person liable for payment.

...

3. On request by a person concerned, the Association of Doctors shall give an expert opinion on the reasonableness of the fee claimed.’

18 Paragraph 27 of the code, ‘Permitted information and unprofessional advertising’, states:

‘1. The purpose of the following provisions of the Code is to ensure protection of patients by means of appropriate and reasonable information and to avoid any commercialisation of the medical profession contrary to the doctor’s image of himself.

2. On that basis, the doctor is allowed to provide objective information relating to the profession.

3. The doctor is prohibited from effecting unprofessional advertising. In particular, advertising which is laudatory, misleading or comparative in content or form is unprofessional. The doctor must not cause or tolerate such advertising by other persons. Prohibitions of advertising on the basis of other statutory provisions are not affected.

...’

19 Part D, point 13, of the code, ‘Cross-border medical activity of doctors from other Member States of the European Union’, provides:

‘If a doctor who is established in another Member State of the European Union or exercises his professional activity there acts temporarily as a doctor on a cross-border basis in the territory in which this Code applies without setting up an establishment there, he must observe the rules of this Code. This applies also if the doctor intends to confine himself to drawing attention, in the territory in which this Code applies, to his activity; the announcement of his activity is permitted him only to the extent that it is allowed under this Code.’

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

- 20 Dr Konstantinides, a Greek doctor, obtained a diploma of doctor of medicine in Athens (Greece) in 1981. In particular, from 1986 to 1990 he was head of the andrology department of the Athens University Hospital, and since 1990 has practised on his own account in a practice called the 'Andrology Institute Athens'. He is a member of the association of doctors of Athens and of the Greek association of doctors, and is established in Athens.
- 21 Throughout the period from 2006 to 2010 Dr Konstantinides visited Germany for one or two days a month on average, in order to perform andrological surgical operations, within the territory for which the Association of Doctors of the *Land* of Hesse is competent, in the out-patient surgery department of the medical centre of the Elisabethenstift in Darmstadt (Germany). Dr Konstantinides's activity was limited exclusively to performing highly specialised surgical operations, with the other services linked to those operations, such as arranging appointments and providing in-house post-operative care, being entrusted to the staff of that medical centre.
- 22 In August 2007 a patient was successfully operated on by Dr Konstantinides in an out-patient operation performed in that medical centre. Following a complaint by that patient disputing the amount of the bill sent to him by Dr Konstantinides, the Association of Doctors of the *Land* of Hesse carried out an investigation, which led to the bringing of disciplinary proceedings against Dr Konstantinides before the referring court, for infringement of the Regulation on doctors' fees and breach of the prohibition of unprofessional advertising.
- 23 The disciplinary proceedings were brought on the grounds that Dr Konstantinides had 'in the context of an agreement on fees charged by reference to a fee code for a service for which that fee code could not be freely agreed', thereby committing professional misconduct within the meaning of Paragraph 12 of the Code of professional conduct for doctors in Hesse in conjunction with Paragraphs 2, 6(2) and 12 of the Regulation on doctors' fees. The Association of Doctors of the *Land* of Hesse considered that the fees charged were excessive and justified disciplinary measures.
- 24 According to the information provided by the referring court, in the absence of a relevant fee code corresponding to the operation performed, Dr Konstantinides issued an invoice for that operation in a total of EUR 6 395.96, applying another code by analogy as base tariff, increased by a coefficient of 16.2, together with other fee codes, some of which were also applied by analogy, all increased by various coefficients. Dr Konstantinides claimed that those coefficients had been applied pursuant to a divergent agreement concluded with the patient.
- 25 As regards the breach of the prohibition of unprofessional advertising, the Association of Doctors of the *Land* of Hesse contends that Dr Konstantinides infringed Paragraph 27 of the Code of professional conduct for doctors in Hesse by effecting unprofessional advertising. More precisely, he is accused of advertising on his website his activity at the medical centre of the Elisabethenstift in Darmstadt, using the terms 'German Institute' and 'European Institute', even though he performs operations only 'temporarily' and 'occasionally' in that medical centre without having a proper hospital infrastructure, and the operations are not performed in a public institution or a scientific institution subject to public supervision.
- 26 The Association of Doctors of the *Land* of Hesse considers that Paragraph 3(1) and (3) of the Hesse Law on health professions, which required Dr Konstantinides to observe the Code of professional conduct for doctors in Hesse adopted pursuant to Paragraphs 24 and 25 of that law, is a correct transposition of Directive 2005/36, in particular Articles 5 and 6, and is consequently consistent with European Union law.

- 27 Dr Konstantinides submits principally that, in accordance with the principle of freedom to provide services, he carries on his activity in Germany on a temporary and occasional basis, and is not therefore subject to the German rules of professional conduct. In his view, complaints made by German professional associations, such as those at issue in the main proceedings, must be addressed to ‘the competent authority of the State of origin’, that is, in the present case, the Association of Doctors of Athens. In the alternative, Dr Konstantinides contests the complaints made against him.
- 28 The referring court observes that it must be determined whether the relevant content of Paragraphs 12 and 27 of the Code of professional conduct for doctors in Hesse, interpreted in the light of Article 5(3) of Directive 2005/36, corresponds to the objective pursued by Article 5. On this point, the referring court entertains serious doubts as to whether the rules for calculating fees in Paragraph 12 of the code and the rules prohibiting unprofessional advertising in Paragraph 27(1) and (3) of the code fall within the scope of Article 5(3) of that directive.
- 29 The referring court further considers that the host Member State must, on the basis of Article 5(3) of Directive 2005/36, differentiate between service providers who exercise their profession on a temporary and occasional basis in its territory and members of the profession who exercise that profession there, which would not be ensured if the disciplinary rules of that Member State were to apply to those service providers generally. It therefore has doubts as to the compatibility with European Union law of Paragraph 3(1) and (3) of the Hesse Law on health professions.
- 30 In those circumstances, the *Berufsgesicht für Heilberufe bei dem Verwaltungsgericht Gießen* (Professional tribunal for health professions attached to the Administrative Court, Gießen) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘[Questions relating to Article 5(3) of Directive 2005/36:]

- (1) Is Paragraph 12(1) of the Code of professional conduct for doctors in Hesse ... a professional rule the breach of which by the service provider in the host State may give rise to professional disciplinary proceedings for serious professional malpractice which is directly and specifically linked to consumer protection and safety?
- (2) If so, does this also apply in the event that no relevant fee code exists for the operation performed by the service provider (in this case the doctor) in the Regulation on doctors’ fees applicable in the host State?
- (3) Are the provisions on unprofessional advertising (Paragraph 27(1) to (3) in conjunction with Part D, point 13, of the [Code of professional conduct for doctors in Hesse]) professional rules the breach of which by the service provider in the host State may give rise to professional disciplinary proceedings for serious professional malpractice which is directly and specifically linked to consumer protection and safety?

[Question relating to Article 6(a) of Directive 2005/36:]

- (4) Do the amendments to Paragraph 3(1) and (3) of the [Hesse Law on health professions] adopted in order to transpose Directive 2005/36 represent the correct transposition of the above provisions of Directive 2005/36, in that both the relevant codes of professional conduct and the provisions on professional disciplinary tribunals in Section VI of [that law] are declared to be fully applicable to service providers (in this case doctors) who exercise an activity temporarily in the host State in the context of freedom to provide services under Article 57 TFEU ...?’

Consideration of the questions referred

Questions 1 to 3

- 31 By its first to third questions the referring court asks essentially whether Article 5(3) of Directive 2005/36 must be interpreted as meaning that national rules such as, first, Paragraph 12(1) of the Code of professional conduct for doctors in Hesse, under which fees must be reasonable and, unless provided otherwise by law, calculated on the basis of the official Regulation on doctors' fees, and, secondly, Paragraph 27(3) of that code, which prohibits doctors from engaging in unprofessional advertising, fall within its scope.
- 32 As regards the fee calculation rules applicable in the main proceedings, it should be noted that the referring court states that Paragraph 12 of the Code of professional conduct for doctors in Hesse must be read in conjunction *inter alia* with Paragraph 6(2) of the Regulation on doctors' fees, under which separate medical services which are not included in the list of fees may be charged for by analogy with a service in the list of fees which is equivalent as to nature, cost and time spent.
- 33 In accordance with Article 1 of Directive 2005/36, the object of the directive is to establish 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 is to recognise, for access to and pursuit of that profession, professional qualifications obtained in another Member State which allow their holder to pursue the same profession there.
- 34 With respect to establishment in a host Member State, as governed by the provisions of Title III of that directive, Article 13 of the directive provides that the host Member State is to permit access to and pursuit of the regulated profession concerned, 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. Such recognition of professional qualifications thus enables the person concerned to have full access to the regulated profession in the host Member State and to pursue it there under the same conditions as apply to nationals, with that access including the right to use the professional title provided for by that Member State.
- 35 Within the framework of the freedom to provide services, as governed by the provisions of Title II of Directive 2005/36, where the service provider travels to the territory of the host Member State to pursue, on a temporary and occasional basis, his profession under his professional title of origin, Article 5(1) of that directive sets out the principle that the Member States may not restrict, for any reason relating to professional qualifications, the free provision of services if the service provider is legally established in another Member State for the purpose of pursuing the same profession there.
- 36 It is in that specific context that Article 5(3) of Directive 2005/36 requires that the service provider, when pursuing his professional activity on a temporary and occasional basis, is to be subject to professional rules of a professional, statutory or administrative nature which are directly linked to his professional qualifications, as well as to disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession there.
- 37 It should be noted that these are disciplinary provisions imposing penalties for failure to comply with the professional rules mentioned in Article 5(3) of Directive 2005/36, as referred to in recital 8 in the preamble to that directive.

- 38 As regards the content of those rules, which must be directly linked to professional qualifications, Article 5(3) of Directive 2005/36 refers to rules on the definition of the profession, the use of titles, and serious professional malpractice which is directly and specifically linked to consumer protection and safety. Recital in the preamble to that directive also mentions rules relating to the scope of activities covered by a profession or reserved to it.
- 39 It appears from the object and purpose and from the general scheme of Directive 2005/36 that professional rules are covered by Article 5(3) of the directive only if they are directly linked to the actual practice of medicine and failure to observe them harms the protection of patients.
- 40 It follows that neither the rules for calculating fees nor the rule prohibiting unprofessional advertising by doctors, as applied in the dispute in the main proceedings, are professional rules which are directly and specifically linked to professional qualifications relating to access to the regulated profession concerned within the meaning of Article 5(3) of Directive 2005/36.
- 41 Consequently, it must be concluded that national rules such as those in Paragraphs 12(1) and 27(3) of the Code of professional conduct for doctors in Hesse do not fall within the material scope of Article 5(3) of Directive 2005/36.
- 42 In the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the Court to provide the national court with an answer which will be of use to it and enable it to determine the case before it. In that light, the Court may have to reformulate the questions referred to it (see, inter alia, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraphs 22 and 23, and Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39 and the case-law cited). To that end, the Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of European Union law that require interpretation in view of the subject-matter of the dispute in the main proceedings (see, to that effect, inter alia, Case 83/78 *Redmond* [1978] ECR 2347, paragraph 26; Case C-56/01 *Inizan* [2003] ECR I-12403, paragraph 34; and *Fuß*, paragraph 40).
- 43 In this respect, it must be observed that in circumstances such as those at issue in the main proceedings, having regard to the considerations in paragraphs 40 and 41 above, the compatibility with European Union law of the provisions at issue in the main proceedings must be examined by reference not to Directive 2005/36 but to the principle of freedom to provide services in Article 56 TFEU.
- 44 According to settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-577/10 *Commission v Belgium* [2012] ECR, paragraph 38 and the case-law cited).
- 45 It should also be observed that, in particular, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect the freedom to provide services in other Member States (see, to that effect, inter alia, Case C-565/08 *Commission v Italy* [2011] ECR I-2101, paragraph 46 and the case-law cited).
- 46 It is common ground in the main proceedings that the provisions at issue apply without distinction to all doctors providing services in the *Land* of Hesse.

- 47 In addition, it must be recalled that rules of a Member State do not constitute a restriction within the meaning of the FEU Treaty solely by virtue of the fact that other Member States apply less strict, or economically more favourable, rules to providers of similar services established in their territory (see *Commission v Italy*, paragraph 49 and the case-law cited).
- 48 The existence of a restriction within the meaning of the Treaty cannot therefore be deduced from the mere fact that doctors established in Member States other than the Federal Republic of Germany have to submit, for calculating their fees for services provided in the territory of the *Land* of Hesse, to the rules applicable in that *Land*.
- 49 However, in the absence of any flexibility of the system at issue in the main proceedings, that being for the national court to assess, the application of such a system, which would be liable to have a deterrent effect on doctors from other Member States, would constitute a restriction within the meaning of the Treaty.
- 50 As regards the justification for such a restriction, it is settled case-law that national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, inter alia, Case C-202/11 *Las* [2013] ECR, paragraph 23 and the case-law cited).
- 51 It is for the referring court to examine whether, on the assumption that their application in circumstances such as those described in the order for reference constitutes a restriction of the freedom to provide services, the rules at issue in the main proceedings are based on an objective in the public interest. In general, it should be observed that the protection of the health and life of humans, as provided for by Article 36 TFEU, and the protection of consumers are among the objectives which may be regarded as overriding reasons in the public interest capable of justifying a restriction of the freedom to provide services (see, to that effect, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 64 and the case-law cited, and Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-9623, paragraph 27 and the case-law cited).
- 52 As to whether such rules founded on an objective in the public interest are appropriate to ensuring the attainment of the objective pursued and do not go beyond what is necessary for attaining it, it is for the referring court to ascertain whether those rules genuinely reflect a concern to attain the objective pursued in a consistent and systematic manner. The analysis of proportionality requires account to be taken in particular of the severity of the penalty envisaged.
- 53 It is thus for the referring court to ascertain whether the provisions at issue in the main proceedings constitute a restriction within the meaning of Article 56 TFEU, and, if so, whether they pursue an objective in the public interest, are appropriate to ensuring that it is attained, and do not go beyond what is necessary for attaining it.
- 54 As regards unprofessional advertising, Paragraph 27(3) of the Code of professional conduct for doctors in Hesse provides, in general terms, that doctors are prohibited from engaging in unprofessional advertising.
- 55 This is not a complete prohibition of engaging in advertising or a particular form of advertising. Paragraph 27(3) of the code does not prohibit the advertising of medical services as such, but requires that the content of such advertising should not be unprofessional.
- 56 Even though it does not lay down a complete prohibition of advertising or a particular form of advertising, which, according to settled case-law, is capable of constituting in itself a restriction of the freedom to provide services (see, inter alia, Case C-500/06 *Corporación Dermoestética* [2008] ECR

I-5785, paragraph 33 and the case-law cited), a rule laying down a prohibition relating to the unprofessional nature of the content of advertising, such as Paragraph 27(3) of the Code of professional conduct for doctors in Hesse, which suffers from a certain ambiguity, is liable to constitute an obstacle to the relevant freedom to provide medical services.

- 57 None the less, as the Advocate General observes in point 68 of his Opinion, the application in non-discriminatory fashion to a medical professional established in another Member State of national or regional rules defining, by reference to a criterion of professional ethics, the conditions under which those professionals may promote their activities in the field in question may be justified by overriding considerations in the public interest relating to public health and consumer protection, provided that – this being for the referring court to ascertain – the application of any penalties to a professional making use of the freedom to provide services is proportionate to the conduct of which he is accused.
- 58 In the light of the above considerations, the answer to Questions 1 to 3 is that Article 5(3) of Directive 2005/36 must be interpreted as meaning that national rules such as, first, Paragraph 12(1) of the Code of professional conduct for doctors in Hesse, under which fees must be reasonable and, unless provided otherwise by law, calculated on the basis of the official Regulation on doctors' fees, and, secondly, Paragraph 27(3) of that code, which prohibits doctors from engaging in unprofessional advertising, do not fall within its material scope. It is, however, for the referring court to ascertain, taking into account the indications given by the Court, whether those rules constitute a restriction within the meaning of Article 56 TFEU, and, if so, whether they pursue an objective in the public interest, are appropriate to ensuring that it is attained, and do not go beyond what is necessary for attaining it.

Question 4

- 59 By its fourth question, the referring court asks essentially whether Article 6(a) of Directive 2005/36 precludes national provisions, such as those at issue in the main proceedings, under which the Code of professional conduct for doctors in Hesse and the related rules on professional tribunals are declared to be fully applicable to service providers who travel to the territory of the host Member State to pursue their profession on a temporary and occasional basis.
- 60 It must be recalled that, according to settled case-law, the procedure established by Article 267 TFEU is an instrument of cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-370/12 *Pringle* [2012] ECR, paragraph 83 and the case-law cited).
- 61 In the present case, the order for reference gives no information on the relevance for the outcome of the main proceedings of the question whether European Union law, in particular Directive 2005/36, precludes the application of all the provisions of that code of professional conduct and the related rules on professional tribunals.
- 62 Consequently, the fourth question is inadmissible in so far as it relates to the entirety of the provisions of that code of professional conduct and the related rules on professional tribunals.
- 63 In so far as the answer to this question must be limited to the provisions at issue in the main proceedings, it must be stated that Article 6(a) of Directive 2005/36 does not prescribe the rules of conduct or disciplinary procedures to which a service provider may be subject, but merely states that Member States may provide either for automatic temporary registration with or for pro forma membership of a professional organisation or body, in order to facilitate the application of disciplinary provisions in accordance with Article 5(3) of that directive.

⁶⁴ The answer to Question 4 is therefore that Article 6(a) of Directive 2005/36 must be interpreted as not laying down the rules of conduct or disciplinary procedures to which a service provider who travels to the territory of the host Member State to pursue his profession on a temporary and occasional basis may be subject, but as merely stating that Member States may provide either for automatic temporary registration with or for pro forma membership of a professional organisation or body, in order to facilitate the application of disciplinary provisions in accordance with Article 5(3) of that directive.

Costs

⁶⁵ 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 (Fourth Chamber) hereby rules:

- 1. Article 5(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications must be interpreted as meaning that national rules such as, first, Paragraph 12(1) of the Code of professional conduct for doctors in Hesse, under which fees must be reasonable and, unless provided otherwise by law, calculated on the basis of the official Regulation on doctors' fees, and, secondly, Paragraph 27(3) of that code, which prohibits doctors from engaging in unprofessional advertising, do not fall within its material scope. It is, however, for the referring court to ascertain, taking into account the indications given by the Court of Justice of the European Union, whether those rules constitute a restriction within the meaning of Article 56 TFEU, and, if so, whether they pursue an objective in the public interest, are appropriate to ensuring that it is attained, and do not go beyond what is necessary for attaining it.**
- 2. Article 6(a) of Directive 2005/36 must be interpreted as not laying down the rules of conduct or disciplinary procedures to which a service provider who travels to the territory of the host Member State to pursue his profession on a temporary and occasional basis may be subject, but as merely stating that Member States may provide either for automatic temporary registration with or for pro forma membership of a professional organisation or body, in order to facilitate the application of disciplinary provisions in accordance with Article 5(3) of that directive.**

[Signatures]