

**Case C-940/19**

**Request for a preliminary ruling**

**Date lodged:**

30 December 2019

**Referring court:**

Conseil d'État (France)

**Date of the decision to refer:**

19 December 2019

**Applicants:**

Les Chirurgiens-Dentistes de France

Confédération des Syndicats médicaux français

Fédération des Syndicats pharmaceutiques de France

Syndicat des Biologistes

Syndicat des Médecins libéraux

Conseil national de l'Ordre des Chirurgiens-Dentistes

Conseil national de l'Ordre des Masseurs-Kinésithérapeutes

Conseil national de l'Ordre des Infirmiers

Union dentaire

**Defendants:**

Ministre des Solidarités et de la Santé

Ministre de l'Enseignement supérieur, de la Recherche et de l'Innovation

Premier ministre

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[...]

**FRENCH REPUBLIC  
IN THE NAME OF THE FRENCH PEOPLE**

[...]

**The Conseil d'État (Council of State, France) [...]**  
(Litigation Section, Combined 5<sup>th</sup> and 6<sup>th</sup> Chambers)

[...]

Having regard to the following procedure:

1. [Action No 416964] [...] The Confédération nationale des syndicats dentaires, now 'Les chirurgiens-dentistes de France', the Confédération des syndicats médicaux français, the Fédération des syndicats pharmaceutiques de France, the Syndicat des biologistes, the Syndicat des laboratoires de biologie clinique, the Syndicat des médecins libéraux and the Union dentaire claim that the Council of State should:

(i) annul as ultra vires Articles 1, 2, 4 and 6 of décret n° 2017-1520 du 2 novembre 2017 relatif à la reconnaissance des qualifications professionnelles dans le domaine de la santé (Decree No 2017-1520 of 2 November 2017 on the recognition of professional qualifications in the health sector); the arrêté du 4 décembre 2017 relatif à la déclaration préalable de prestation de services pour les professions médicales et les pharmaciens (Order of 4 December 2017 on prior declarations of service provision for medical professions and pharmacists) issued by the Ministre des solidarités et de la santé (Minister for Solidarity and Health); and the arrêté du 8 décembre 2017 relatif à l'avis rendu par les commissions d'autorisation d'exercice ou par les ordres des professions de santé en cas d'accès partiel à une profession dans le domaine de la santé (Order of 8 December 2017 relating to the opinions of practice approval committees or associations of health professions in connection with partial access to a profession in the health sector), also issued by the Minister for Solidarity and Health;

(ii) [...] [*claim relating to costs*]

Les chirurgiens-dentistes de France and others also submit that: **[Or. 2]**

– Article L. 4002-3 of the code de la santé publique (Public Health Code), which is the legal basis for the contested decree, is incompatible with Article 4f(6) of Directive 2005/36/EC of 7 September 2005 in so far as the former provision applies to the professions of doctor, dental surgeon, midwife and nurse;

– the contested decree and contested orders therefore unlawfully include the professions covered by Chapter III of Title III of the directive within the scope of partial access.

[...] [*withdrawal of the Syndicat des laboratoires de biologie clinique*]

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

[...]

2. [Action No 417078] [...] The Conseil national de l'ordre des chirurgiens-dentistes claims that the Council of State should:

(i) annul as ultra vires the abovementioned Decree of 2 November 2017 [...]

(ii) [...] [*expenses*]

[...] It submits that the contested decree:

– [...] [*formal defect*]

– is based on Article L. 4002-3 of the Public Health Code, which is incompatible with Article 4f(6) of Directive 2005/36/EC of 7 September 2005 in so far as the former provision applies to the professions of doctor, dental surgeon, midwife, nurse and midwife;

– [...] [*point of national law*]

– infringes Article L. 4002-4 of the Public Health Code by providing that a committee should be consulted on applications for partial access in addition to consulting the relevant professional association; **[Or. 3]**

– inserts into that code Article R. 4002-4, which is unlawful in so far as it enables partial access to be imposed on the applicant even though such access was not requested;

– inserts into that code, by means of Article 2 of the contested decree, provisions that are vitiated by a manifest error of assessment in so far as they establish, for the different professions concerned, an appeal before the tribunal administratif (Administrative Court) against the decision by which the competent authority adjudicates on the applicant's command of the French language.

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

[...] The Ministre de l'enseignement supérieur, de la recherche et de l'innovation (Minister for Higher Education, Research and Innovation) contends that the application should be dismissed. She endorses the observations submitted by the Minister for Solidarity and Health.

The application was notified to the Premier ministre (Prime Minister) and the Président de la République (President of the French Republic), who did not file pleadings.

3. [Action No 417937] [...] The Conseil national de l'ordre des chirurgiens-dentistes claims that the Council of State should:

(i) annul as ultra vires the Minister for Solidarity and Health's Order of 4 December 2017 on prior declarations of service provision for medical professions and pharmacists;

(ii) [...] [*expenses*]

[...] [It] submits that the contested order:

– [...] [*point of national law*]

– unlawfully includes the professions covered by Chapter III of Title III of Directive 2005/36/EC of 7 September 2005 within the scope of partial access;

– infringes Article L. 4112-7 of the Public Health Code by allowing practitioners established in a third State to practise under the freedom to provide services;

– is vitiated by a manifest error of assessment as regards the requirements relating to probative value and authenticity that must be met by the documents proving that the applicant has pursued his profession in his State of establishment full-time for a period of three years or part-time for an equivalent total period. **[Or. 4]**

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

4. [Action No 417963] [...] The Conseil national de l'ordre des masseurs-kinésithérapeutes claims that the Council of State should:

(i) annul as ultra vires the arrêté du 8 décembre 2017 relatif à la déclaration préalable de prestation de services pour les conseillers en génétique, les physiciens médicaux et les préparateurs en pharmacie et en pharmacie hospitalière, ainsi que pour les professions figurant au livre III de la partie IV du code de la santé publique (Order of 8 December 2017 on prior declarations of service provision for genetic counsellors, medical physicists, pharmacy and hospital pharmacy assistants, and the professions listed in Book III of Part IV of the Public Health Code) issued by the Minister for Solidarity and Health;

(ii) [...] [*expenses*]

[...] [It] submits that the contested order:

– [...] [*point of purely national law*]

– infringes Article R. 4311-38 of the Public Health Code by failing to require the production of documents enabling the nature and content of the basic training undertaken to be checked, by failing to include particulars concerning the place of first performance of the services, by failing to include information on the length of time during which the services were provided and, lastly, by failing to require, in the case of professional insurance, information other than the name of the insurance company and policy number;

– infringes Article L. 4321-11 of the Public Health Code by failing to require the production of documents evidencing the applicant’s language skills.

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

5. [Action No 418010] [...] The Conseil national de l’ordre des chirurgiens-dentistes claims that the Council of State should:

(i) annul as ultra vires the arrêté du 8 décembre 2017 désignant les préfets de région compétents pour l’examen des demandes d’autorisation d’exercice ou de prestation de services des professions de santé (Order of 8 December 2017 designating the regional prefects responsible for examining applications for approval to practise or provide services in the health professions) issued by the Minister for Solidarity and Health; **[Or. 5]**

(ii) [...] [*expenses*]

[...] [It] submits that the contested order is unlawful in so far as it relates to the profession of dental surgeon, which is excluded from the partial access mechanism laid down by the directive of 7 September 2005.

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

6. [Action No 418013] [...] The Conseil national de l’ordre des chirurgiens-dentistes claims that the Council of State should:

(i) annul the Minister for Solidarity and Health’s Order of 8 December 2017 relating to the opinions of practice approval committees or associations of health professions in connection with partial access to a profession in the health sector;

(ii) [...] [*expenses*]

[...] [It] submits that the contested order:

– is unlawful in so far as it relates to the professions covered by Chapter III of Title III of the directive, particularly that of dental surgeon, since those professions are excluded from the partial access mechanism by Article 4f(6) of Directive 2005/36/EC;

[...] [*objection under national law*]

[...] [*objection under national law*]

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded. **[Or. 6]**

7. [Action No 419746] ... The Conseil national de l'ordre des infirmiers claims that the Council of State should:

(i) annul the implied decision resulting from the Minister for Solidarity and Health's failure to respond to its informal appeal of 28 December 2017 seeking the withdrawal of Decree No 2017-1520 of 2 November 2017 and that minister's Order of 8 December 2017 relating to the opinions of practice approval committees or associations of health professions in connection with partial access to a profession in the health sector;

(ii) [...] [*expenses*]

[...] [It] submits that:

[...] [*points of national law*]

– Article L. 4002-3 of the Public Health Code, resulting from the ordonnance du 19 janvier 2017 (Ordinance of 19 January 2017), is incompatible, in so far as it applies to the professions of doctor, dental surgeon, midwife, nurse and midwife, with the directive of 7 September 2005, which excludes the professions covered by Chapter III of Title III of the directive from the partial access mechanism;

– the contested decree and contested order unlawfully include the professions covered by Chapter III of Title III of that directive within the scope of partial access.

[...] The Minister for Solidarity and Health contends that the application should be dismissed. She submits that the grounds of challenge are unfounded.

The application was notified to the Prime Minister and the President of the French Republic, who did not file pleadings.

Having regard to the other documents in the files;

Having regard to: [**Or. 7**]

– the Treaty on the Functioning of the European Union, in particular Article 267 thereof;

– Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005;

– Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013;

– the Public Health Code;

– the loi n° 2016-41 du 26 janvier 2016 (Law No 2016-41 of 26 January 2016);

- the loi n° 2018-132 du 26 février 2018 (Law No 2018-132 of 26 February 2018);
- the ordonnance n° 2016-1809 du 22 décembre 2016 (Ordinance No 2016-1809 of 22 December 2016);
- the ordonnance n° 2017-50 du 19 janvier 2017 (Ordinance No 2017-50 of 19 January 2017);
- the code de justice administrative (Administrative Justice Code);

[...] [*procedural matters*]

Whereas:

1. The abovementioned applications brought by Les Chirugiens-dentistes de France and others, the Conseil national de l'ordre des chirurgiens-dentistes, the Conseil national de l'ordre des masseurs-kinésithérapeutes and the Conseil national de l'ordre des infirmiers seek a ruling on similar matters. It is appropriate that they be joined so that they may be determined in a single decision.

[...]

2. [*observation concerning the withdrawal of the Syndicat des laboratoires de biologie clinique*]

Contested decree and contested orders:

3. Article 4f(1), which was inserted into Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013, provides as follows:

*'The competent authority of the host Member State shall grant partial access, on a case-by-case basis, to a professional activity in its territory only when all the following conditions are fulfilled:*

*(a) the professional is fully qualified [Or. 8] to exercise in the home Member State the professional activity for which partial access is sought in the host Member State;*

*(b) differences between the professional activity legally exercised in the home Member State and the regulated profession in the host Member State as such are so large that the application of compensation measures would amount to requiring the applicant to complete the full programme of education and training required in the host Member State to have access to the full regulated profession in the host Member State;*

*(c) the professional activity can objectively be separated from other activities falling under the regulated profession in the host Member State.*

*For the purpose of point (c), the competent authority of the host Member State shall take into account whether the professional activity can be pursued autonomously in the home Member State.'*

The ordonnance du 19 janvier 2017 relative à la reconnaissance des qualifications professionnelles dans le domaine de la santé (Ordonance of 19 January 2017 on the recognition of professional qualifications in the health sector), transposing those provisions into French law, inserted, inter alia, Articles L. 4002-3 to L. 4002-6 into the Public Health Code, which lay down the conditions for partial access to the health professions governed by Part IV of that code. Those provisions acquired force of law upon the ordinance's ratification by the Law of 26 February 2018.

The applicants seek the annulment as ultra vires of the Decree of 2 November 2017 on the recognition of professional qualifications in the health sector, implementing those legislative provisions, and the Minister for Solidarity and Health's Orders of 4 and 8 December 2017, implementing the decree.

[...] [consideration of the decree's formal legality]

4. [...]

5. [...]

Substantive legality of the decree:

6. In the first place, Article R. 4002-2 of the Public Health Code, inserted into that code by the contested decree, provides that, in the case of applications for partial access for the purpose of establishment, it is necessary to obtain the opinion not only of the competent professional association, where appropriate, but also of the committees responsible for deciding, under the provisions of Part IV of the Public Health Code concerning the different health professions, on individual approvals to practise the professions in question.

7. Although Article L. 4002-4 of the Public Health Code provides for consultation of the professional associations concerned, where appropriate, this does not prevent the contested decree from also providing for consultation of the committees referred to in the preceding paragraph or from specifying the matters to be, in particular, covered by the opinions of those committees and of the associations' bodies. Furthermore, the argument that Article R. 4002-2 is unlawful in that it thus requires opinions to be obtained from a professional association on decisions that are for that association to take is ineffective, since the competent **[Or. 9]** authority for deciding on an application for approval to practise is the minister, not the professional association, which is required to decide only on entry in its roll.

8. In the second place, [*rejection of the ground of challenge that the reference to a ministerial order infringes the provisions of the Public Health Code which require the conditions and detailed rules of application to be laid down by decree of the Council of State*].

9. In the third place, Article R. 4002-4 of the Public Health Code, inserted into that code by the contested decree, provides as follows: *'In the case of an application for approval to practise for the purpose of establishment, where the committee's opinion contains a more restrictive proposal for partial access and the applicant's profession is covered by an association, the opinion of that association shall be sought under the conditions laid down by Article R. 4002-3.'* Contrary to the applicants' claims, those provisions have neither the object nor the effect of enabling partial access to practise to be imposed on a professional seeking approval to practise a health profession for the purpose of establishment. The argument alleging that they are, for that reason, unlawful must therefore be rejected.

10. In the fourth place, Article R. 4112-1 of the Public Health Code provides that, in order to be entered in the roll of the association of doctors, dental surgeons or midwives, the applicant must provide, inter alia, *'evidence that [he] possesses the linguistic ability necessary for practising the profession'*. Furthermore, a decision of the local board refusing entry in the roll, in particular on the ground of insufficient linguistic ability, may be the subject of an administrative appeal to the regional or interregional board, and thereafter to the national board of the association, those appeals being prerequisites for appeal proceedings before the Council of State.

11. In order to transpose the provisions of Article 53 of the directive of 7 September 2005, under which *'any language controls shall be proportionate to the activity to be pursued. The professional concerned shall be allowed to appeal such controls under national law'*, Article 2 of the contested decree inserted Article R. 4112-6-2 into the Public Health Code. Article R. 4112-6-2 applies to the procedure governing entry in the roll of associations of medical professions and provides as follows: *'The control by the competent authority of the applicant's command of the French language shall be recorded in a decision which may be the subject of an appeal before the Administrative Court with territorial jurisdiction'*. Although the Conseil national de l'ordre des chirurgiens-dentistes submits that the introduction, by that article, of the requirement for a specific decision by the local board of the association on the applicant's linguistic ability, coupled with a special redress procedure against that decision before the Administrative Court, is, by reason of its coexistence with the procedure referred to in paragraph 10, liable to complicate the procedure for challenging a refusal to enter an applicant in the roll of the association, such complexity does not mean that the contested decree is vitiated by a manifest error of assessment. **[Or. 10]**

12. However, in the fifth place, Article 4f(6), which was inserted into the abovementioned directive of 7 September by the directive of 20 November 2013,

provides that *‘this Article shall not apply to professionals benefiting from automatic recognition of their professional qualifications under Chapters II, III and IIIa of Title III’*. Chapter III of Title III relates to the recognition of professional qualifications on the basis of coordination of minimum training conditions, which concerns evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as midwife and as pharmacist. In France, those professions are regulated professions governed by Part IV of the Public Health Code. Article L. 4002-3 of that code opens up the possibility of partial access to all the health professions governed by Part IV of the code, including, therefore, professions to which the mechanism for the automatic recognition of professional qualifications applies. The applicants claim that, in so doing, that article is incompatible with Article 4f(6) of the directive of 7 September 2005 cited above. The answer to the ground of challenge raised thus depends on whether that article of the directive must be interpreted as precluding a Member State from introducing the possibility of partial access to one of the professions covered by the mechanism for the automatic recognition of professional qualifications laid down by the provisions of Chapter III of Title III of that directive.

13. Since the contested decree was adopted on the basis of the provisions of Article L. 4002-3 of the Public Health Code, that question is decisive for the resolution of the dispute before the Council of State and presents a serious difficulty. It is, accordingly, appropriate to refer the matter to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and, pending the ruling of that Court, to stay the proceedings brought by the Confédération nationale des syndicats dentaires and others against the contested decree.

Contested orders:

14. Since the legality of the contested orders depends on the legality of the decree constituting their legal basis, it is also appropriate to stay the proceedings seeking annulment of those orders until the Court of Justice of the European Union has adjudicated on the question referred to it for a preliminary ruling.

HAS DECIDED AS FOLLOWS:

[...]

[...] The proceedings relating to the applications are stayed until the Court of Justice of the European Union has given a preliminary ruling on the following question: **[Or. 11]**

Does Article 4f(6) of Directive 2005/36/EC of 7 September 2005 preclude a Member State from introducing the possibility of partial access to one of the professions covered by the mechanism for the automatic recognition of

professional qualifications laid down by the provisions of Chapter III of Title III of that directive?

[...] [*standard procedural wording*]

Deliberation following the sitting on 29 November 2019 [...]

Delivered in open court on 19 December 2019.

[...]

WORKING DOCUMENT