

EFTA Court
1, rue du Fort Thüngen
L-1499 LUXEMBOURG
Luxembourg

Your ref.: [Skriv inn]

Our ref.: Appeal case No 21/3857

Date: 01.12.2023

REQUEST FOR AN ADVISORY OPINION IN APPEAL CASE NO 21/3857

K V NASJONALT KLAGEORGAN FOR HELSETJENESTEN

1. INTRODUCTION AND BACKGROUND TO THE REQUEST

- (1) Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) and Section 20(5) of the National Insurance Court Act (*trygderettsloven*), the National Insurance Court (*Trygderetten*) hereby requests an Advisory Opinion from the EFTA Court in Appeal Case No 21/3857, which are appeal proceedings involving K and the National Office for Health Service Appeals (*Nasjonalt klageorgan for helsetjenesten (Helseklage)*).
- (2) The case concerns the issue of entitlement to reimbursement of costs in connection with for dental treatment received in Poland.
- (3) The appellant's application for reimbursement of expenses incurred for dental treatment received in Poland was refused on the ground that the treating dental practitioner in Poland does not have the specialisation required to be able to claim reimbursement for similar treatment in Norway, see the third paragraph of Section 3 of the Norwegian Regulation on benefits to cover expenses for sickness-related examination and treatment by dental practitioners and dental hygienists ("the Dental Regulation") (*forskrift om stønad til dekning av utgifter til undersøkelse og behandling hos tannleger og tannpleier for sykdom (tannforskriften)*).
- (4) Inter alia, the case raises questions about the interpretation of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare ('the Patients' Rights Directive'), Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ('the Professional Qualifications Directive'), and the right to provide and receive services under Article 36 of the EEA Agreement on.
- (5) The appellant has argued that the requirement of specialisation is contrary to Article 36 of the EEA Agreement and Article 7 of the Patients' Rights Directive.

- (6) The respondent, for its part, has argued that the requirement of specialisation does not place any restrictions on the freedom to provide services, but rather regulates only reimbursement of costs for certain forms of dental treatment. It is submitted that this type of regulation is possible under Article 7(7) of the Patients' Rights Directive. It is stated that, in the assessment of whether the relevant specialist competence exists in the country in question, regard is had to the Professional Qualifications Directive. The parties have also referred to Article 20 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, but there is agreement that that provision is not relevant in the present case.
- (7) The Court has not found case-law from the European Court of Justice or the EFTA Court ruling on the question whether it is permissible to have such national requirements on specialisation for being able to claim reimbursement for treatment received in other EEA countries. On that basis, the National Insurance Court has found it necessary to obtain an Advisory Opinion from the EFTA Court on the interpretation of the Patients' Rights Directive, the Professional Qualifications Directive and Article 36 of the EEA Agreement.
- (8) The Court has also noted that the EFTA Surveillance Authority (ESA) has recently brought two actions against Norway concerning the right to receive treatment in other EEA countries, and the right to be reimbursed for such treatment.¹ Although those cases concern different issues than the present case, this nevertheless supports obtaining an Advisory Opinion from the EFTA Court, so as to avoid the risk of contradictory interpretations of the relevant EEA law rules.

2. PARTIES TO THE CASE

- (9) The parties to the case are:

Appellant:	K
Counsel:	Lasse Nikolai Simonsen
Respondent:	National Office for Health Service Appeals (<i>Nasjonalt klageorgan for helsetjenesten (Helseklage)</i>)
Counsel:	Mari Emilie Haaland Axelsen

¹ "ESA launches infringement proceedings against Norway reimbursing patients only 80% of health costs abroad":

<https://www.eftasurv.int/newsroom/updates/esa-launches-infringement-proceedings-against-norway-reimbursing-patients-only-80:nb>

"Norway infringes EEA rules on patients' rights for hospital treatment abroad":

<https://www.eftasurv.int/newsroom/updates/norway-breach-eea-rules-patients-rights-hospital-treatment-abroad:nb>

3. FACTS

- (10) On 30 November 2017, K (or “the appellant”) applied for benefits to cover dental treatment in Poland in the period 16 August to 24 October 2017. The application related to stage two of treatment for severe marginal periodontitis that had been commenced in 2016. K has previously applied for, and been refused, reimbursement for the first stage of the treatment, also on the ground that the treating dental practitioner lacked the necessary specialisation. The refusal of reimbursement for the first stage of the treatment was upheld by the National Insurance Court’s ruling in Appeal Case No 20/00406 delivered on 9 April 2021.
- (11) By decision of 1 February 2018, the Norwegian Health Economics Administration (*Helseøkonomiforvaltningen (Helfo)*) rejected K’s application for reimbursement for that portion of the treatment relating to the present reference. The grounds given for the rejection were the treating dental practitioner’s lack of specialisation.
- (12) Following a complaint by the appellant, Helfo’s decision was upheld by decision of 25 February 2021 of the National Office for Health Service Appeals.
- (13) On 7 April 2021, the appellant appealed against the decision of the National Office for Health Service Appeals to the National Insurance Court. As part of the preparation of the appeals case, the National Office for Health Service Appeals re-examined the decision under appeal in accordance with Section 13(1) of the National Insurance Court Act. Following the re-examination, the National Office for Health Service Appeals arrived at the same conclusion as in the appealed decision. In the cover letter dated 10 September 2021, the following was stated with regard to the requirement of specialisation:

“As mentioned, it follows from the third paragraph of Section 3 of the Dental Regulation that expenses for implant-anchored dental prosthetics treatment are covered only if the surgical placement of dental implants is performed by a specialist in oral surgery and oral medicine, specialist in maxillofacial surgery or a specialist in periodontics. In the present case, the surgical part of the treatment was not performed by a specialist in oral surgery and oral medicine, a specialist in maxillofacial surgery or a specialist in periodontics (see ruling 20/00406 of the National Insurance Court). Nor, accordingly, can the prosthetics part of the treatment be covered.

The appellant submits that the requirement of specialisation in order to be able to claim reimbursement is contrary to the EU rules on non-discrimination. In that respect, reference is made, inter alia to case 205/84 *Commission v Germany* and Case C-398/95 *Symvoulio Epikrateias - Greece*.

The National Office for Health Service Appeals wishes to point out that it is not the right to place implants that is restricted under section 3 of the Regulation, but rather the right to claim reimbursement for the placed implants. There is nothing preventing a person from receiving treatment from a dental practitioner not in possession of the necessary specialisation. The regulations concern only the right to claim reimbursement for the treatment in

question, and in no way regulate who has a right to perform dental treatment. Since the judgments referred to concern the requirements for providing services in another EEA country, and not which national requirements that may be imposed for awarding reimbursement, those judgments are not relevant in the present case.

In its ruling 20/00406, the National Insurance Court held that the regulation on the requirement of specialisation in order to claim reimbursement was not contrary to EEA law. The National Office for Health Service Appeals also refers to Article 7 of the Patients' Rights Directive, which regulates the right to receive reimbursement for healthcare received in another EEA/EU country than the state of affiliation.

Article 7(3) of the Directive provides that it is the Member State of affiliation itself that to determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs. [...]

This means that it is the State itself that determines which healthcare services can be covered and how much is to be covered. It further follows from Article 7(7) that the Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if that healthcare were provided in its territory.

This means that it is possible to impose the same conditions for reimbursement in Norway as for treatment abroad. This is also in keeping with the EU principle of non-discrimination, because if less stringent requirements were to be imposed for reimbursement for dental treatment received in another EEA country, that would amount to a discriminatory scheme towards those who receive dental treatment in Norway.

The requirement that implant-anchored dental prosthetics treatment must be performed by a dental practitioner with a given specialisation in order for reimbursement to be granted applies irrespective of where you receive the treatment. Accordingly, it makes no difference if you visit your dental practitioner in Norway or if you travel to Poland. The requirement imposed for reimbursement is the same.

In the light of the foregoing, the National Office for Health Service Appeals finds that the conditions for benefits under Section 5-24 a of the National Insurance Act (*folketrygdloven*), read in conjunction with Section 5-6, are not fulfilled, both because the time of and background to the loss of teeth is not sufficiently documented and the requirement of specialisation is not satisfied.”

- (14) The parties to the case before the National Insurance Court are in disagreement as to whether a requirement may be imposed to the effect that the treating dental

practitioner must have the same specialisation as what is required for reimbursement under the third paragraph of Section 3 of the Dental Regulation.

- (15) For a more detailed explanation of the substance of the disagreement between the parties, the Court refers to the parties' submissions in part 5 below.

4. LEGAL BACKGROUND

4.1 Relevant Norwegian legislation

4.1.1 Introduction and overview of the rules

- (16) The relevant national rules are set out in Chapter 5 of the National Insurance Act, the Dental Regulation and the administrative circular accompanying the Regulation on benefits for healthcare received in another EEA country.

4.1.2 National Insurance Act rules on reimbursement for treatment abroad

- (17) Chapter 5 of the National Insurance Act has the heading "Benefits for healthcare" and is placed in Part IV "Sickness benefits, etc."
- (18) Section 5-1 of the National Insurance Act, as it read at the time of the claim, states the purpose of the benefits under Chapter 5:

"5-1. Purpose, etc.

The purpose of benefits under the present chapter is to provide total or partial compensation for insured persons' necessary expenses for healthcare in the event of sickness, injury, impairment, family planning, pregnancy, birth or termination of pregnancy.

No benefits shall be paid for interventions which are essentially carried out on cosmetic grounds, or for treatment of foreseeable consequences of such intervention.

In so far as public benefits are paid pursuant to other legislation, no benefits shall be paid under this chapter."

- (19) Section 5-1a of the National Insurance Act was added on 25 November 2022 and regulates the relationship with provisions on international coordination of national social security.²

"5-1 a. Relationship with provisions on international coordination of national social security

Benefits for healthcare are sickness benefits paid under the social security regulation. The provisions of this chapter shall be disapplied in so far as

² For the sake of completeness, the Court notes that the provision was not in force at the time of the claim.

necessary in favour of relevant provisions of the Main Part of the EEA Agreement, the social security regulation, the implementation regulation and bilateral and multilateral social security agreements: see sections 1-3 a and 1-3 b.”

- (20) Section 5-6 of the National Insurance Act regulates benefits for coverage of examination and treatment by a dental practitioner:

“5-6. Dental practitioner care

The social security scheme shall pay benefits for coverage of expenses for sickness-related examination and treatment by a dental practitioner.

The benefits shall be paid according to pre-established rates.

The Ministry shall issue regulations on benefits pursuant to the present paragraph, including on grants for common measures for dental practitioners.”

- (21) Section 5-24a of the National Insurance Act regulates benefits for healthcare in another EEA country:

“5-24a. Benefits for healthcare in another EEA country

Benefits shall be paid for coverage of expenses for healthcare incurred by the insured person in another EEA country under rules laid down by the Ministry by regulation.

The Regulation may contain more detailed provisions on inter alia:

- a. which healthcare services and goods for which benefits are to be paid;
- b. who is entitled to benefits;
- c. conditions for benefits, including prior approval and requirements in respect of the service provider;
- d. calculation of the benefits;
- e. coverage of travel and subsistence expenses;
- f. requirements in respect of documentation and translation of documents;
- g. relationship to other rules on benefits for healthcare received in other countries.”

- (22) Such rules are laid down in the Regulation on benefits for healthcare received in another EEA country.

4.1.3 Regulation on benefits for healthcare received in another EEA country

- (23) Section 1 of the Regulation on benefits for healthcare in the EEA (*Forskrift om stønad til helsetjenester i EØS*), as it read at the time of the claim, states the scope of that regulation:

“1. General scope

The Regulation shall apply to benefits for coverage of expenses for healthcare received in another country in the European Economic Area (EEA), hereinafter called EEA countries.

Where telemedicine is used, the healthcare shall be deemed to be received in the country where the service provider is established.”

- (24) Section 2 of the Regulation on benefits for healthcare in the EEA lays down the main conditions for being able to receive benefits for healthcare received in another EEA country:

“2. Main conditions

Benefits shall be paid only for healthcare for which the insured person would have received benefits or a contribution under the National Insurance Act or had covered by the public health and care service had the healthcare in question been received in Norway.

Unless exceptions or adaptations are provided for in the present Regulation, the same conditions shall apply as for equivalent healthcare at public expense in Norway.”

- (25) Section 3 of the Regulation on benefits for healthcare in the EEA lays down which types of healthcare for which benefits are paid:

“3. Which types of healthcare for which benefits are paid

Benefits shall be paid to cover expenses for healthcare equivalent to healthcare:

- a. for which benefits are paid under for under sections 5-4 to 5-12, 5-14 and 5-25 of the National Insurance Act;
- b. for which contributions are made under Section 5-22 of the National Insurance Act, limited to the contribution-related purposes hormonal contraceptives and medicinal products in connection with fertility treatment;
- c. is provided totally or partially free of charge under the first paragraph of section 1-3 of the Dental Health Services Act (*tannhelsetjenesteloven*), read in conjunction with Section 2-2 thereof;
- d. is provided totally or partially free of charge under the Specialist Healthcare Act (*spesialisthelsetjenesteloven*).

Benefits shall not be paid for substitution treatment for opioid dependency, even if the insured person is undergoing medicinal product-assisted rehabilitation in Norway.”

- (26) Section 6 of the Regulation on benefits for healthcare in the EEA, as it read at the time of the claim, imposes certain requirements in respect of the treatment provider (referred to in the Regulation as “the service provider”):

“6. Authorisation and other requirements for the service provider

The healthcare must be performed by a healthcare professional having official authorisation in the profession in question which is valid in the country where the healthcare is received.

When specialist approval is a condition for entitlement to benefits or healthcare at public expense in Norway, the healthcare must be performed by a healthcare professional having equivalent specialist approval that is valid in the country where the healthcare is received. The same is true of other particular competence requirements. Exceptions may be made to this condition if the speciality in question or equivalent formal competence does not exist in the country where the healthcare is received. It is a condition that, instead, it must be documented that the service provider actually has equivalent substantive competence or other doctor specialisation in medicine which is clearly comparable to the speciality required in Norway.

The healthcare professional must have permission to practise lawfully in the country where the healthcare is received.

It is not a condition that the healthcare must be performed by a healthcare professional who is part of the public health service, although this is a condition for equivalent healthcare at public expense in Norway.”

4.1.4 Regulation on benefits to cover expenses for sickness-related examination and treatment by dental practitioners and dental hygienists (“the Dental Regulation”)

- (27) Section 1 of the Dental Regulation, as it read at the time of the claim, lays down which examinations and treatments are eligible for benefits. Periodontitis is listed in point 6:

“1. Benefits-eligible examination and treatment

Under Section 5-6 of the National Insurance Act, benefits shall be paid for coverage of expenses for examination and treatment performed by a dental practitioner in the event of the following conditions/cases:

1. Unusual medical condition;
2. Lip-jaw-cleft palate;
3. Tumours in the oral cavity, adjacent tissue or cephalic area in general;
4. Infection-preventing dental treatment for particular medical conditions;
5. Sickness or anomalies in the mouth or jaw;
6. Periodontitis;
7. Dental development disorders;

8. Bite anomalies;
9. Pathological loss of tooth substance through attrition/erosion;
10. Hyposalivation;
11. Allergic reactions to dental restoration materials;
12. Tooth damage, approved occupational injury;
13. Tooth damage, accident other than occupational injury;
14. Significantly reduced self-care ability in persons having a permanent sickness or permanently reduced functional ability;
15. Total or partial loss of teeth, without own teeth in lower jaw.

Under section 5-6a of the National Insurance Act, benefits shall be paid for coverage of expenses for examination and treatment of periodontitis performed by a dental hygienist pursuant to Nos 1, 4, 6 and 14 of the first paragraph.

The individual dental practitioner or dental hygienist shall be responsible for determining whether an insured person is entitled to benefits pursuant to section 5-6 or 5-6a of the National Insurance Act. The dental practitioner/dental hygienist shall also determine whether the treatment is within the parameters of necessary and appropriate dental treatment. The dental practitioner/dental hygienist must be able to document their determinations, and the patient log shall contain all relevant and necessary information: see the Healthcare Professionals Act with accompanying regulations.

The Directorate of Health (*Helsedirektoratet*) shall lay down comprehensive provisions and detailed guidelines for which treatments and conditions are covered by the scheme under section 1.

It is a condition for benefits under the present Regulation that the person in question is an insured person under the social security scheme: see section 5-2 of the National Insurance Act.”

- (28) Section 3 of the Dental Regulation lays down requirements for the dental practitioner’s and the dental hygienist’s competence:

“3. The dental practitioner’s and the dental hygienist’s competence

Benefits shall be paid only if the examination or treatment is performed by a dental practitioner or dental hygienist who is permitted to perform dental treatment pursuant to Act No 64 of 2 July 1999 on healthcare professionals, etc. (the Healthcare Professionals Act) (*Lov 2. juli 1999 nr. 64 om helsepersonell m.v.*) *lov 2. juli 1999 nr. 64 om helsepersonell m.v. (helsepersonelloven)*, including dental practitioners or dental hygienists from other EEA States providing temporary services in Norway: see Section 16 of Regulation 8 October 2008 nr. 1130 on authorisation, licensing and specialist approval for healthcare professionals having professional qualifications from other EEA countries and Switzerland (*forskrift 8. oktober 2008 nr. 1130 om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-land og Sveits*).

In the event of examination and possible start of orthodontics treatment, a referral is required from another dental practitioner or dental hygienist before treatment with the orthodontist may begin. A referral for insured persons covered by Section 1(8), group (b) or (c) shall be valid for 24 months from the date of the referral. The treatment must be performed by an orthodontist or by a dental practitioner undergoing specialist education in orthodontics. If the treatment is performed by a dental practitioner undergoing specialist education in orthodontics, the treatment must be performed as part of the training. If tasks are delegated to other professionals: see Sections 4 and 5 of the Healthcare Professionals Act (*helsepersonelloven*), it is assumed that delegated tasks are performed under the responsibility, presence and full attention of the orthodontist.

Expenses for implant-anchored dental prosthetics treatment shall be covered only if the surgical placement of dental implants is performed by a specialist in oral surgery and oral medicine, specialist in maxillofacial surgery or specialist in periodontics. In addition, the prosthetics-related part of the treatment must be performed by a specialist in oral prosthetics or by a dental practitioner having the necessary competence approved by the Directorate of Health. Treatment tasks requiring specialist competence, or particular competence approved by the Directorate of Health, may not be delegated to another healthcare professional where reimbursement for treatment is claimed pursuant to the present provision.

Expenses for maxillofacial radiology examinations done using CT/MR shall be covered only if the examinations are performed by a specialist in maxillofacial radiology.”

4.1.5 Administrative circular accompanying Section 5-24a of the National Insurance Act – Benefits for healthcare received in another EEA country (*Rundskriv til folketrygdloven § 5-24a – Stønad til helsetjenester mottatt i et annet EØS-land*) (as it read at the time of the claim)

- (29) In the part entitled “Introduction” of the administrative circular accompanying Section 5-24a of the National Insurance Act, the following is stated which is of interest for the present case:

“Section 5-24a confers entitlement to benefits for healthcare received in another EEA country. Detailed provisions are laid down by regulation.

The reimbursement scheme provides an option to choose to receive treatment to which a person is entitled in Norway also in other EEA countries. Thus, Section 5-24a does not broaden which types of healthcare services a person is entitled to receive but does entail greater freedom of choice in terms of place of treatment.

In order to assess a claim for reimbursement under Section 5-24a, regard is had to the national conditions applicable to the healthcare in question (medicinal products, dental health, doctor care, etc.). The general rule is that treatment should take place as if the healthcare was received in Norway. The patient may, however, make use of private healthcare providers. Which

conditions apply in respect of the healthcare in question will not be discussed in the administrative circular, unless there are particular matters which should be commented on.”

- (30) In the part “Background to the scheme”, the following is stated which is of interest for the present case:

“The ECJ has held that the EU Treaty’s principle of freedom to provide services encompasses healthcare services. Thus, the principle of freedom to provide services entails that patients have rights as recipients of services.

The Patients’ Rights Directive was implemented in the EU in October 2013, and is a codification of the ECJ’s case-law. Section 5-24a implements the Patients’ Rights Directive in Norwegian law.”

- (31) Part 6 of the administrative circular, “Authorisation and other requirements for the service provider”, lays down the requirements imposed in respect of the service provider in order for the healthcare to qualify as eligible for reimbursement:

“6. Authorisation and other requirements for the service provider

In order for the healthcare to be eligible for reimbursement, the service provider must, as a main rule, have authorisation and, as the case may be, specialist approval, etc., in an equivalent manner as if the treatment had been performed in Norway.”

- (32) In part 6.1 of the administrative circular, “Requirement of official authorisation”, a general requirement of official authorisation is laid down:

“6.1 Requirement of official authorisation

An authorisation is a confirmation that a person fulfils the formal and professional requirements for the applicable professional title in question.

It follows from the first paragraph of Section 6 that the healthcare must be provided by a healthcare professional having official authorisation. The authorisation must be valid in the country where the healthcare is received. Norwegian authorisation is not required.”

- (33) In part 6.2 of the administrative circular, “Specialist approval and other particular competence requirements”, the requirement of specialist approval is described:

“6.2 Specialist approval and other particular competence requirements

Where specialist approval is a requirement for receiving benefits for healthcare in Norway, the treatment abroad must be performed by a healthcare professional having equivalent specialist approval. The specialist approval must be valid in the country where the healthcare is received. Norwegian specialist approval is not required.

For specialist doctors in medicine, approved specialities are largely harmonised through the Professional Qualifications Directive, 2005/36/EC.

Thus, the requirement of doctor speciality in medicine will generally be satisfied in most cases. For a more detailed description of qualification requirements, see Annex V – approval of harmonised courses of education.

Where particular competence requirements are imposed with respect to the service provider for entitlement to benefits under Norwegian rules, they shall apply accordingly. Examples include additional courses/education for certain rates for care by a doctor in medicine, manual therapy and psychomotor physiotherapy, and psychological care.

The Regulation allows for exceptions to be made from the condition on equivalent specialist approval or particular competence. Two conditions must be satisfied in order for an exception to be made. First, the speciality in question or equivalent formal competence must not exist in the country where the healthcare is received. Second, it must be documented that the service provider instead actually has equivalent substantive competence or other doctor specialisation in medicine which is clearly comparable to the speciality required in Norway.

Exceptions may not be made if the specialisation in question exists in the country where the healthcare is received.

Specific remarks on specialist approval for implant-based prosthetics

In the regulation for benefits for dental treatment under Section 5-6 of the National Insurance Act, for reimbursement for implant-based prosthetics and implant surgery, particular competence requirements are set out for the dental practitioner who performs the treatment. In order to receive benefits for implant-based prosthetics in Norway, both the dental practitioner who places the implants (the surgeon) and the dental practitioner who performs the prosthetics-related work must have a specified specialist approval.

Dental/oral surgery is referred to in Annex V to the Professional Qualifications Directive. Hence documentation may be required showing that the dental practitioner who performed the surgical placement of implants in another EEA country is in possession of the relevant specialities.

The speciality in oral prosthetics is not, however, referred to in the Professional Qualifications Directive, and not all EEA countries have such specialist approval. Nevertheless, allowance is made for reimbursement for the prosthetics-related part of the treatment in countries where an oral prosthetics speciality does not exist. In such cases, a specific assessment must be made of whether the service provider's competence can be deemed to be almost the same as the specialist competence required in Norway.

Annex 2 accompanying the Regulation on authorisation, licensing and specialist approval for healthcare professionals having professional qualifications from other EEA countries can offer some guidance for the assessment of confirmation of authorisation and the like from other EEA countries. The Annex contains a list of names of diplomas, levels of education, etc., for different groups of healthcare professionals.”

- (34) In part 6.4, it is stated that it is not a requirement that the treating healthcare professional must be part of the public health service:

“6.4 No requirement that treatment provider must be part of the public health service

It is not a requirement for benefits under this reimbursement scheme that the treatment received is performed by a healthcare professional who is part of the public health service.”

4.2 Main Part of the EEA Agreement

- (35) Article 36 of the EEA Agreement provides for the fundamental freedom to provide services throughout the European Economic Area:

“Article 36

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.”

- (36) Article 36 also guarantees the right to *receive* services in other EEA countries: see inter alia the EFTA Court’s judgment in Case E-8/20 *Criminal proceedings against N*, paragraph 75 with further references.
- (37) The EFTA Court has held that all measures which prohibit, impede or render less attractive the exercise of the free movement of services must be regarded as restrictions: see Case E-8/20 *Criminal proceedings against N*, paragraph 79.
- (38) Article 36 also applies to any national rules that render the provision of services between EEA States more difficult than the provision of services purely within an EEA State: see Case E-8/20 *Criminal proceedings against N*, paragraph 80 with further references.

4.3 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare

- (39) The preamble to the Patients’ Rights Directive has a number of recitals relating to reimbursement of costs for healthcare provided in another Member State than where the recipient of the care is resident, which are presumed to have implications for the present case. See, in particular, recitals 8, 11, 13, 27, 29, 31, 32, 33, 34, 35, 37, and 47.

- (40) Chapter III of the Patients' Rights Directive has the heading "Reimbursement of costs of cross-border healthcare". Article 7 of the Patients' Rights Directive sets out general principles for reimbursement of costs:

"Article 7

General principles for reimbursement of costs

1. Without prejudice to Regulation (EC) No 883/2004 and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.

2. By way of derogation from paragraph 1:

(a) if a Member State is listed in Annex IV to Regulation (EC) No 883/2004 and in compliance with that Regulation has recognised the rights to sickness benefits for pensioners and the members of their families, being resident in a different Member State, it shall provide them healthcare under this Directive at its own expense when they stay on its territory, in accordance with its legislation, as though the persons concerned were residents in the Member State listed in that Annex.

(b) if the healthcare provided in accordance with this Directive is not subject to prior authorisation, is not provided in accordance with Chapter 1 of Title III of the Regulation (EC) No 883/2004, and is provided in the territory of the Member State that according to that Regulation and Regulation (EC) No 987/2009 is, in the end, responsible for reimbursement of the costs, the costs shall be assumed by that Member State. That Member State may assume the costs of the healthcare in accordance with the terms, conditions, criteria for eligibility and regulatory and administrative formalities that it has established, provided that these are compatible with the TFEU.

3. It is for the Member State of affiliation to determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs, regardless of where the healthcare is provided.

4. The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

Where the full cost of cross-border healthcare exceeds the level of costs that would have been assumed had the healthcare been provided in its territory the Member State of affiliation may nevertheless decide to reimburse the full cost.

The Member State of affiliation may decide to reimburse other related costs, such as accommodation and travel costs, or extra costs which persons with disabilities might incur due to one or more disabilities when receiving cross-

border healthcare, in accordance with national legislation and on the condition that there must be sufficient documentation setting out these costs.

5. Member States may adopt provisions in accordance with the TFEU aimed at ensuring that patients enjoy the same rights when receiving cross-border healthcare as they would have enjoyed if they had received healthcare in a comparable situation in the Member State of affiliation.

6. For the purposes of paragraph 4, Member States shall have a transparent mechanism for calculation of costs of cross-border healthcare that are to be reimbursed to the insured person by the Member State of affiliation. This mechanism shall be based on objective, non-discriminatory criteria known in advance and applied at the relevant (local, regional or national) administrative level.

7. The Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine, the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

8. The Member State of affiliation shall not make the reimbursement of costs of cross-border healthcare subject to prior authorisation except in the cases set out in Article 8.

9. The Member State of affiliation may limit the application of the rules on reimbursement for cross-border healthcare based on overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

10. Notwithstanding paragraph 9, Member States shall ensure that the cross-border healthcare for which a prior authorisation has been granted is reimbursed in accordance with the authorisation.

11. The decision to limit the application of this Article pursuant to paragraph 9 shall be restricted to what is necessary and proportionate, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of goods, persons or services. Member States shall notify the Commission of any decisions to limit reimbursement on the grounds stated in paragraph 9.”

4.4 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications

- (41) Article 1 of the Professional Qualifications Directive states the purpose of the directive:

“Article 1

Purpose

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.”

- (42) Article 2 of the Professional Qualifications Directive states the scope:

“Article 2

Scope

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

[...]

2. Each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of Article 3(1)(a) on its territory in accordance with its rules. In the case of professions covered by Title III, Chapter III, this initial recognition shall respect the minimum training conditions laid down in that Chapter.

3. Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provisions of this Directive shall not apply.”

- (43) Annex V.3 to the Professional Qualifications Directive has the heading “DENTAL PRACTITIONER”. Under point 5.3.3. “Evidence of formal qualifications of specialised dentists”, the following is stated under “Orthodontics” for Poland:

Polska	Dyplom uzyskania tytułu specjalisty w dziedzinie ortodoncji	Centrum Egzaminów Medycznych	1 May 2004
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- (44) Under point 5.3.3. “Evidence of formal qualifications of specialised dentists”, the following is stated under “Oral surgery” for Poland:

Polska	Dyplom uzyskania tytułu specjalisty w dziedzinie chirurgii stomatologicznej	Centrum Egzaminów Medycznych	1 May 2004
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5. PARTIES’ SUBMISSIONS ON THE EEA LAW QUESTIONS

- (45) The parties’ submissions are summarised below.

5.1 Appellant’s submissions

- (46) **Re question 1:** Restrictions on reimbursement for treatment performed by treatment providers in other Member States must be necessary and reasonable in terms of their purpose and must not lead to arbitrary discrimination. In addition, restrictions must not go beyond what is objectively necessary for specific purposes and it is necessary that the same result cannot be achieved by less restrictive rules. Reference is made to Article 7(11) of Council Directive 2011/24/EU and the settled case-law of the ECJ following *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 75; *Elchinov*, C-173/09, EU:C:2010:581, paragraph 44; *Watts*, C-372/04, U:C:2006:325, paragraph 106; and *Stamatelaki*, C-444/05, EU:C:2007:231, paragraph 23.
- (47) The ECJ has rejected submissions to the effect that the service recipient’s home country may not verify the quality of the treatment provided in other Member States: see *Stamatelaki*, C-444/05, EU:C:2007:231, paragraphs 36-37.
- (48) A refusal of reimbursement of costs for dental treatment in another EEA State on the ground that the treating dental practitioner does not possess the specialisation required for obtaining reimbursement for equivalent treatment in the treatment recipient’s home State is not compatible with Article 36 of the EEA Agreement and Article 7 of Directive 2011/24/EU, especially when the specialist has the necessary competence.
- (49) It entails a restriction on the possibility for such treatment providers to treat patients if the home State does not give reimbursement for their treatment. The fact that patients have the possibility of receiving treatment in other Member States from specialists having the professional competence required to perform the necessary dental treatment also contributes to the free movement of goods and

services, and improved public health, through a better offer of health services to patients with a broader selection of treatment providers.

- (50) Such a specific requirement for reimbursement for such treatment as provided for under Norwegian law is a restriction whose purpose can be achieved through less restrictive means, such as an individual assessment of the treatment provider's competence. Nor is allowing reimbursement for dental treatment provided by specialists having equivalent specialisation in other EEA countries a discriminatory scheme in relation to persons receiving dental treatment in Norway. See also submissions regarding question 3.
- (51) **Re question 2:** The purpose of Directive 2005/36/EC is to allow persons with certain professional qualifications to practise their profession in Member States other than their own, as stated in recital 1 and 3 of the preamble thereto. The Directive does not have the purpose of codifying which professional specialisations are to be included in certain professional fields, but rather to ensure workers the right to work in their field in other EEA countries.
- (52) Most Member States have more dental specialisations than what is required under the Directive. Other Member States, such as Denmark, approve only those that Denmark is bound to approve under Directive 2005/36/EC. In certain other countries, such as Poland, dental practitioners obtain dental specialisation through continuing education and courses after their basic education. This has meant that Poland has established more dental specialist branches than, for example, Norway.
- (53) Even though the specialisation required in the service recipient's home State is included in Annex V to Directive 2005/36/EC, that does not regulate whether the treatment provider's home State can have treatment providers having other specialisations who can perform the same treatment.
- (54) **Re question 3:** In those cases where it is likely that the dental treatment provider can perform the treatment in a safe and proper manner from a health perspective, the dental treatment provider's formal competence should be assessed so as to safeguard the freedom to provide services.
- (55) For implant-based prosthetics, Norwegian law allows for such an assessment in cases where the prosthetics-related part of the treatment takes place in a country where an oral prosthetics speciality does not exist: see Administrative circular for section 5-24a of the National Insurance Act - Benefits for healthcare received in another EEA country. This allows for an assessment of the dental treatment provider's competence in those cases where a Member State has a limited number of dental specialisations, but does not allow for assessment in those cases where the treatment provider's home State has a broad range of specialisations, such as both specialists in implantology and specialists in oral prosthetics.
- (56) It is submitted that this is arbitrary discrimination, unreasonable and unnecessarily restrictive.

5.2 Respondent's submissions

- (57) The requirement that implant treatment must be done by a dental practitioner having a specialisation under section 3 of the Dental regulation, read in conjunction with section 6 of the Regulation on benefits for healthcare received in another EEA country, is not contrary to Norway's EEA law obligations under Directive 2011/24/EU or Article 36 of the EEA Agreement.
- (58) Under Article 7(3) of the Directive, the Member State of affiliation, in this case Norway, can itself determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs, irrespective of where the healthcare is provided.
- (59) Article 7(7) further provides that the Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare:
- “[...] the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.”
- (60) The Norwegian rules requiring that implant treatment must be performed by a dental practitioner having the necessary specialisation applies irrespective of where the dental treatment is received, be that in Norway or another EEA country. It also applies irrespective of the nationality of the treating dental practitioner.
- (61) We submit, therefore, that the rules do not give rise to improper discrimination or an obstacle contrary to Norway's EEA law obligations.
- (62) We furthermore do not agree that each and every potential obstacle to freedom to provide services must be assessed in the light of Article 36 of the EEA Agreement, and that this also holds true in those cases where the Norwegian requirement of specialisation does not apply in respect of a specialisation that is included in Annex V to Directive 2005/36/EC. We do submit, however, that that consideration is safeguarded when we determine whether the treatment provider's experience and competence are comparable to what is inherent in the specialisation in question in Norway. The condition on reimbursement is accordingly not linked

solely to the treatment provider's title, but rather to the competence held by the treatment provider.

- (63) We would further observe that, should it be held that the requirement of specialisation under section 3 of the Dental regulation, read in conjunction with section 6 of the Regulation on benefits for healthcare received in another EEA country, is contrary to Norway's EEA law obligations, then the Norwegian requirement of specialisation must also be removed, since it would lead to improper discrimination if that requirement applied only to those receiving dental treatment in Norway.
- (64) This will in turn lead to a situation where the quality of healthcare worsens and Norway will incur greater expenditure related to reimbursement of healthcare that has not been performed sufficiently well because the treatment provider lacks sufficient competence.

6. QUESTIONS REFERRED TO THE EFTA COURT

1. Is it compatible with Article 36 of the EEA Agreement and Article 7 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare to refuse reimbursement of costs for dental treatment in another EEA State on the ground that the treating dental practitioner does not possess the required specialisation in order to have equivalent treatment reimbursed in the service recipient's home State?
2. Does it affect the answer to question 1 if the specialisation required in the service recipient's home State is included in Annex V to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications?
3. If the specialisation is not included in Annex V to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, must the competent authorities in the service recipient's home State also conduct an assessment under Article 36 of the EEA Agreement in order to determine whether the treating dental practitioner has equivalent competence to that required under national law?

Oslo, 1 December 2023

Dag Sørli Lund
Member of the Court