Registered at the EFTA Court under N° E-15/23-8 on 19th of February 2024

ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 19 February 2024

Written Observations by National Office for Health Service Appeals (Nasjonalt klageorgan for helsetjenesten)

represented by Andreas Runde, trainee lawyer at the Office of the Attorney General for Civil Affairs, submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court, in

> **Case E-15/23 K v National Office for Health Service Appeals (Nasjonalt Klageorgan for Helsetjenesten)**

in which Trygderetten (the National Insurance Court) has requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

• • •

1 INTRODUCTION

(1) The National Insurance Court (hereinafter "the referring court") has, by reference dated 1 December 2023, requested the EFTA Court to give an advisory opinion on the interpretation of 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 ("Directive 2011/14/EU"), Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ("Directive 2005/36/EC"), and Article 36 of the Agreement on the European Economic Area ("EEA Agreement").

(2) The questions referred have arisen in a dispute between K and the National Office for Health Service Appeals on whether K may claim reimbursement for costs incurred for dental treatment in Poland.

Universitetsgata 8, 0164 Oslo
P.O. Box 8012 Dep. NO-0030 Oslo
postmottak@regjeringsadvokaten.no
aru@regjeringsadvokaten.no
+47 22 99 02 00

(3) The case before the EFTA Court essentially concerns whether an EEA State may make the right to reimbursement of costs incurred when receiving health care in another EEA State, subject to the condition that the treating practitioner possess a certain specialisation, where this condition also applies for the right to reimbursement of costs for such health care in the service recipient's home State.

2 THE RELEVANT FACTS AND NATIONAL LAW

(4) K is a Norwegian national who underwent dental treatment for severe marginal periodontitis in Poland in the period 16 August to 24 October 2017.[1] The treatment had two stages: (i) surgical placement of dental implants and (ii) prosthetics treatment.[2]

(5) Pursuant to 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"), the treating practitioner must have a certain specialisation in order for the patient to be entitled to receive benefits to cover the expenses (hereinafter referred to as "the requirement of specialisation").[3] The purpose of the requirement of specialisation is to reduce the risk of patient harm. The specialisations required are the following:

- The surgical placement of dental implants must be performed by a specialist in either (a) oral surgery and oral medicine, (b) maxillofacial surgery or (c) periodontics; and

- The prosthetics part of the treatment must be performed by either (a) specialist in oral prosthetics or (b) by a dental practitioner having the necessary competence approved by the Norwegian Directorate of Health.

(6) These are cumulative conditions for reimbursement. If the requirement of specialisation is only fulfilled with regards to one part of the treatment, the reimbursement will be denied in full, irrespective of whether the other part was performed by a relevant specialist.

(7) In cases where the treatment is received in another EEA State, the Regulation on benefits for healthcare received in another EEA country ("the Reimbursement Regulation") adds an important extension to the requirement of specialisation. Pursuant to its Section 6,[4] the treatment may also be performed by "*a healthcare professional having equivalent specialist approval that is valid in the country where the healthcare is received*". Further, if the specialisation in question does not exist in the country where the healthcare is received, the requirement of specialisation may also be fulfilled by an "*equivalent substantive competence or other doctor with specialisation in medicine which is clearly comparable to the specialty required in Norway*".

---

[1] Order for reference para. 10.
[2] See the order for reference paras. 10 and 13.
[3] The provision is set out in the order for reference para. 28.
[4] The provision is set out in the order for reference para. 26.

(8) In a previous decision from the National Insurance Court, K was denied reimbursement for the costs related to the surgical part of the treatment.[5] The reason for the denial was that the treating practitioner did not have any of the three alternative specialisations required in Section 3 of the dental Regulation, nor any other equivalent specialisation from another EEA State in accordance with Section 6 of the Reimbursement Regulation.

(9) The present case concerns K's application for reimbursement for the second part of the treatment, the prosthetics treatment. Since the requirements of specialisation are cumulative, K was denied reimbursement again, for the same reason as in the previous decision: that the treating practitioner lacked relevant specialisation for the surgical part of the treatment.[6] Consequently, whether the treating practitioner possessed the specialisation or competence required for the prosthetics part of the treatment, is not a question in the proceedings before the referring court.

3 LEGAL ANALYSIS

3.1 The first question

(10) By its first question, the referring court asks whether it is compatible with Article 36 EEA and Article 7 of Directive 2011/24/EU 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.

(11) As the referring court refers to both Directive 2011/24/EU and Article 36 EEA, it may be useful to start by reiterating some of the principles developed by the CJEU and EFTA Court in the field of cross-border healthcare under the treaty provisions on free movement of services.

(12) It is well established that medical treatment provided to a person in another EEA State for remuneration, falls within the scope of the freedom to provide services.[7] Further, it has been repeatedly held that EEA law does not detract from the power of the EEA States to organise their social security systems and that it is for the legislation of each EEA State to set out the conditions for the granting of social security benefits.[8]

(13) The CJEU has held that the conditions on which benefits are granted in a Member State "*remain enforceable where treatment is provided in a Member State other than that of*

[5] Order for reference para. 10.

[6] Order for reference para. 13, first paragraph of the citation.

[7] C-372/04 *Watts* para. 86–90; C-157/99 *Smits and Peerbooms* para. 53; C-173/09 *Elchinov* para. 36; Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* para. 42. The Court has, however, not ruled on "*whether the provision of hospital treatment in the context of a national health service… is in itself a service*", see *Watts*, para. 91.

[8] C-157/99 *Smits and Peerbooms*, paras. 44–45; Case C-385/99 *Müller-Fauré* para. 100; C-372/04 *Watts*, para. 92; Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* para. 43, all with further references.

affiliation".[9] However, as the EEA States must always comply with EEA law, this only applies as long as these conditions are "*neither discriminatory nor an obstacle to freedom of movement of persons*".[10]

(14) These principles are reflected in Directive 2011/24/EU, which codifies CJEU case law relating to cross-border healthcare, in particular the reimbursement of costs of that healthcare.[11]

(15) Pursuant to Article 7(3), "*It is for the Member State of affiliation to determine […] 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*."

(16) Further, Article 7(7) states that the Member State of affiliation may impose on an insured person "…*the same conditions, criteria of eligibility and regulatory and administrative formalities […] as it would impose if this healthcare were provided in its territory*". Again, this reflects that the EEA States are free to set out the material conditions on the granting of benefits, regardless of where the treatment is received. In order not to conflict with the rules on free movement, however, Article 7(7) *in fine* sets out that such conditions shall not "*be discriminatory or constitute an obstacle to the free movement of patients, services or goods […]*" unless objectively justified.[12]

(17) Consequently, both under Directive 2011/24 and Article 36 EEA, the question in the case at hand is whether the requirement of specialisation is either discriminatory or constitute an obstacle to the free movement of patients, services or goods, i.e., whether it constitutes a *restriction* on the right to free movement. If this is answered in the affirmative, the next question is whether that requirement may be objectively justified. However, the latter question does not arise in the case at hand, as the requirement of specialisation does not constitute a restriction on the right to free movement.

(18) When determining whether the requirement of specialisation constitutes a restriction under Article 7(7) of Directive 2011/24/EU, it is essential to consider the case law from the CJEU and EFTA Court on the concept of restriction in the context of patients' right to reimbursement for expenses related to cross-border healthcare.[13]

(19) In that respect, it has been repeatedly held that the freedom to provide services precludes national rules which "*have the effect of making the provision of services <u>between Member States</u> more difficult than the provision of services <u>purely within a Member State</u>.*"[14]

---

[9] C-385/99 *Müller-Faurè* para. 106; C-777/18 *WO* para. 63.
[10] Ibid.
[11] Recital 8 and C-777/18 WO para. 65.
[12] This provision codifies the CJEU judgment in C-385/99 *Müller-Faurè* para. 106, cited above. The provision must thus clearly be interpreted in the light of the case law on cross-border healthcare under the treaty provisions on services.
[13] Because, as held in fn. 6, the provision codifies CJEU case law on cross-border health care.
[14] C-372/04 Watts, para. 94, and Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* para. 44, both with further references.

(20) This formulation of what constitutes a restriction must be held together with the settled conception that it is for the Member States alone to determine the conditions for entitlement to benefits from their national social security scheme.[15] To this effect, the Court has held that EEA law "*cannot in principle have the effect of requiring a Member State to extend the list of medical services paid for by its social insurance system: the fact that a particular type of medical treatment is covered or not covered by the sickness insurance schemes of other Member States is irrelevant in this regard*."[16]

(21) Thus, if the states are not required to extend the list of services paid for, it follows that the states cannot be obliged to pay for services abroad that are not recoverable at home. This can be seen from a number of examples in case law:

(22) In *Leichte*, the CJEU assessed several conditions in German legislation for coverage of costs incurred for receiving a health cure in other Member States. As regards conditions that applied for treatment both in Germany and abroad, the CJEU stated:

> *"As regards, first, the actual principle of the requirement for prior recognition of eligibility for assistance of expenditure on board, lodging, travel, visitors' tax and the making of a final medical report, and leaving aside the conditions on which such recognition may be obtained, it is appropriate to note that it follows from Paragraphs 8(3) and 13(3) of the BhV that <u>that principle applies in respect of the expenditure occasioned by a health cure taken either inside or outside Germany. It follows that that requirement does not, as such, have the effect of making the provision of services between Member States, in this case the services offered by cure centres in other Member States, more difficult than the provision of services purely within one Member State</u>, namely those offered by cure centres in Germany."*[17]

(23) In *Rindal and Slinning*, paragraph 46, the EFTA Court held that:

> *"the Court can see no restriction on the free movement of services when patients are refused reimbursement of costs for treatment abroad, according to rules <u>which apply in the same way to treatment in Norway in excluding experimental and test treatment from coverage</u>."*[18]

(24) Correspondingly, in regard to consistent case law establishing that it constitutes a restriction to make reimbursement of costs incurred in another Member State subject to *prior authorization*, the CJEU has always held that this only applies when "*reimbursement of costs incurred by that person <u>in that Member State is not subject to that authorisation</u>*".[19] This means that if – hypothetically – reimbursement for healthcare provided in a State's own

[15] See Article 7(3) of Directive 2011/24/EU and the case law referred to in fn. 8 above.
[16] C-157/99 *Smits and Peerbooms*, para. 87. A similar formulation can be seen in Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* para. 60, 82 and 105.
[17] C-8/02 *Ludwig Leichtle v Bundesanstalt für Arbeit* para. 37.
[18] Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* para. 46.
[19] See C-777/18 *WO*, para. 58, with further references.

territory were subject to prior authorisation, it would not constitute a restriction to require an equivalent prior authorisation for healthcare provided abroad.

(25) Accordingly, the requirement of specialisation set out in Section 3 of the Dental Regulation - leaving aside the conditions on which such a specialisation may be obtained – does not *as such* constitute a restriction, as it applies irrespective of whether the treatment takes place in Norway or in any other EEA State. It merely entails a criterion detailing which treatment is to be covered by the Norwegian state. If that requirement was deemed to constitute a restriction pursuant to Article 36 EEA or Article 7(7) of Directive 2011/24/EU it would be contradictory to the settled case law from the EEA Courts and the national autonomy in the field of health services, as well as the States' right under Article 7(3) of Directive 2011/24/EU to determine which treatment is to be covered.

(26) However, the requirement of specialisation might have constituted a restriction if it was designed in such a way that it in practice would deter patients from seeking treatment abroad. This could be the case if, for example, the specialisation required was obtainable in Norway only, as this would in practice favour Norwegian service providers to the detriment of service providers in other EEA states.

(27) That is, however, not the way in which the requirement of specialisation is applied in Norway. By way of Section 6 of the Reimbursement Regulation, the requirement of specialisation may also be fulfilled by an *equivalent* specialist approval that is valid in the country where the healthcare is received. In addition, in situations where the EEA State in question does not have any equivalent specialist title or formal competence, the provision allows for reimbursement where the treating dental practitioner possesses an equivalent "substantive" competence or other specialisation clearly comparable to the speciality required in Norway.

(28) By these provisions, the requirement of specialisation is applied in a completely neutral manner: the dentist abroad may either have an equivalent specialisation from another EEA State, or, if that does not exist in the EEA State in question, a substantive competence similar to the Norwegian specialisation. Accordingly, the requirement of specialisation does not make the provision of services between the EEA States, in this case implant treatment in other EEA States, more difficult than the provision of such services purely within Norway, and does not constitute any restriction in the sense of Article 36 EEA and Article 7(7) of Directive 2011/24/EU.

(29) It must be emphasized that patients are free to *receive* treatment from treating practitioners who do not have the required specialisation or any other equivalent specialisation from another EEA State, both domestically and abroad. In such cases, however, the patient will not be entitled to reimbursement according to the Dental Regulation, irrespective of whether the treatment is provided in Norway or abroad.

(30) Consequently, the answer to the first question must be that it is compatible with both Article 36 EEA and Article 7 of Directive 2011/24/EU to deny reimbursement of costs for dental treatment in another EEA State where the treating dental practitioner neither has the

required specialisation from the service recipient's home State nor any other equivalent specialisation from another EEA State.

3.2 The second and third question

(31) By question two, the referring court asks whether it affects the answer to the first question if the specialisation required in the service recipient's home State is included in Annex V of Directive 2005/36/EC.

(32) Directive 2005/36/EC establishes rules on mutual recognition of professional qualifications.[20] According to Article 2(1), the Directive applies to "*nationals of a Member State wishing to pursue a regulated profession in a Member State […] other than that in which they obtained their professional qualifications […]*". Further, the legal effects of recognition of professional qualifications under the Directive is, pursuant to Article 4(1), that it "*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*".

(33) Consequently, the Directive only regulates the extent to which a service provider established in one EEA State may gain access to a regulated profession in another EEA State. Conversely, it does not regulate the conditions on which a recipient of services may receive services from a service provider in another EEA state. As the requirement of specialisation in the Dental Regulation concerns the latter situation, it falls outside the scope of Directive 2005/36/EC.

(34) The simple answer to the second question is, accordingly, that the list in Annex V to Directive 2005/36/EC does not affect the compatibility with EEA law of the requirement of specialisation (the first question).

(35) However, another question is whether the lists in Annex V may provide guidance for the competent authorities in the service recipient's home State in assessing whether the qualification possessed by the foreign treating practitioner may be deemed *equivalent* to the one required in that state. If the Court finds it appropriate to elaborate on that question, the National Office for Health Service Appeals submits that the following aspects of Annex V should be taken into consideration.

(36) Annex V to the Directive lists certain evidence of formal qualifications covered by the system of automatic recognition on the basis of coordinated minimum requirements in Article 21 of the Directive. Contrary to the general system of recognition in Article 13 of the Directive, which leaves it open to a host State to look into the nature and content of the qualification possessed by a person, it is the possession of the qualification that in itself gives access to the profession in the host state.[21]

---

[20] See Article 1(1).

[21] See Article 21(1), stating that if a professional possesses a formal qualification from its state of residence, and a competent body in that state has listed that qualification in Annex V, the host State shall give such qualification "*the same effect on its territory as the evidence of formal qualifications which it itself issues*".

(37) Such a system of automatic recognition based on coordinated minimum requirements may at first sight imply that the various qualifications listed by the EEA States within a particular profession or specialisation in Annex V are automatically considered equivalent to each other. However, it is important to note that the minimum requirements set for the qualifications covered by that system only provide for partial harmonisation. For instance, the requirements set within specialist medicine training and specialist dental training only concern the length of the education, not the content.[22] Moreover, the lists in Annex V do not aim to draw up which qualifications are equivalent to each other but merely identifies which qualifications the EEA States have notified as fulfilling minimum requirements, thereby enabling individuals possessing such qualifications access to regulated professions in the host State.

(38) Consequently, the fact that the foreign treating practitioner is in possession of a qualification listed under the relevant specialisation in Annex V, is not necessarily sufficient to demonstrate that he or she possess a qualification equivalent to the one required in the service recipient's home State. On the other hand, it implies that the treating practitioner has undergone training that satisfies the minimum conditions set out in the Directive, which simplifies and facilitates the comparison of the qualifications obtained by the treating practitioner with the requirements in the service recipient's home State.

(39) Conversely, it cannot be concluded that the treating practitioner does not have an equivalent qualification as the one required in the service recipient's home State simply because their qualifications are not listed under the relevant specialisation in Annex V. It is up to each member state to lists the qualification issued by its competent authorities in Annex V. The absence of a particular qualification in Annex V, may have many explanations, and does not necessarily imply that the qualification in question is not equivalent to qualifications required in other EEA States.

(40) Turning to Question three, that question appears to be based on the premise that the second question is answered in the affirmative. As the answer to that question is no, there is no need to examine the third question.

4 ANSWER TO THE QUESTIONS REFERRED

(41) Based on the above, the National Office for Health Service Appeals considers that the questions referred to the EFTA Court by the National Insurance Court should be answered as follows:

1. It is compatible with both Article 36 EEA and Article 7 of Directive 2011/24/EU to deny reimbursement of costs for dental treatment in another EEA State where the treating dental practitioner neither has the required specialisation from the service recipient's home State nor any other equivalent specialisation from another EEA State.

[22] Article 25(2) second paragraph (medicine) and Article 35(2) second paragraph (dentistry).

2. It does not affect the answer to the first question if the specialisation required in the service recipient’s home State is included in Annex V to Directive 2005/36/EC.

Oslo, 19/02/2024

Andreas Runde
Trainee lawyer

Attorney General - Civil Affairs