



REPUBLIC OF ESTONIA
MINISTRY OF FOREIGN AFFAIRS

EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg
Sent by e-EFTACourt

19 February 2024 No 15.3-3/2023/484-1

REQUEST FOR AN ADVISORY OPINION E-15/23 (*K v Nasjonalt klageorgan for helsetjenesten*)

(Court requesting an Advisory Opinion: National Insurance Court (*Trygderetten*), Norway)

WRITTEN OBSERVATIONS OF THE GOVERNMENT OF THE REPUBLIC OF ESTONIA

Submitted in accordance with Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court

Service of documents may be made via e-EFTACourt or at Ministry of Foreign Affairs,
Islandi väljak 1, 15049 Tallinn; fax + 372 6377 098

I. INTRODUCTION

1. The National Insurance Court (*Trygderetten*) requesting an Advisory Opinion 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')¹, 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')², and the right to provide and receive services under Article 36 of the Agreement on the European Economic Area ('the EEA Agreement')³. In substance, a situation has arisen where the Norwegian Health Economics Administration (*Helseøkonomiforvaltningen*) refused to reimburse the costs in connection with dental treatment K received in Poland, 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, and the National Office for Health Service Appeals (*Nasjonalt klageorgan for helsetjenesten*) upheld this decision. K appealed to the National Insurance Court against the latter decision.

2. The National Insurance Court referred the following questions 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

¹ 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, OJ L 88, 4.4.2011, p. 45–65.

² Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance), OJ L 255, 30.9.2005, p. 22–142.

³ Agreement on the European Economic Area, OJ L 001 3.1.1994, p. 3.

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?

II. RELEVANT PROVISIONS

Agreement on the European Economic Area

Article 36

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

Recitals 11, 13, 33, and 34

Article 7

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

Recital 3

Articles 1 and 2

III. FACTUAL BACKGROUND

3. The Government of the Republic of Estonia ('Estonia') summarises the circumstances of the case in question as follows.
4. K received dental treatment for severe marginal periodontitis in Poland between August and October 2017, but K's application filed in November 2017 for reimbursement of expenses incurred for that treatment was refused in Norway in February 2018. The refusal was based on the treating dental practitioner in Poland not having the specialisation

required to be able to claim reimbursement for similar treatment in Norway. 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 Norwegian law.

5. K argues that the 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 contrary to Article 36 of the EEA Agreement and Article 7 of the Patients' Rights Directive, especially when the specialist has the necessary competence in the other EEA State. K claims that receiving treatment in other EEA States 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, and the Norwegian requirement for reimbursement is a restriction whose purpose can be achieved through less restrictive means, such as an individual assessment of the treatment provider's competence. Even though the specialisation required in the service recipient's home State is included in Annex V to the Professional Qualifications Directive, this does not regulate whether the treatment provider's home State can have treatment providers having other specialisations who can perform the same treatment. The dental treatment provider's formal competence should be assessed according to the system set out in Norwegian law in some cases, so as to safeguard the freedom to provide services.
6. According to the National Office for Health Service Appeals, the requirement of specialisation does not place any restrictions on the freedom to provide services, and only regulates reimbursement of costs for certain forms of dental treatment. According to Article 7(3) and 7(7) of the Patients' Rights Directive, it is possible to impose the same conditions for reimbursement in Norway as well as for treatment abroad. The Norwegian specialisation requirement applies irrespective of where the dental treatment is received. This requirement 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. Should it be held that the requirement of specialisation is contrary to Norway's EEA law obligations, the Norwegian requirement of

specialisation must also be removed, since it would lead to discrimination if the requirement applied only to those receiving dental treatment in Norway. This will lead to a situation where the quality of healthcare worsens and Norway will incur greater expenditure related to reimbursement of costs for healthcare that has not been performed sufficiently well.

IV. LEGAL ANALYSIS

First question

7. The National Insurance Court enquires whether it is compatible with Article 36 of the EEA Agreement and Article 7 of the Patients' Rights Directive 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.
8. Firstly, Estonia points out that the wording of Article 7 of the Patients' Rights Directive is clear and precise. According to Article 7(1) of the Patients' Rights Directive, 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*. Article 7(3) of the same Directive specifies that *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.
9. Recital 13 of the Patients' Rights Directive explains that it is clear that the obligation to reimburse costs of cross-border healthcare should be limited to healthcare to which the insured person is entitled according to the legislation of the Member State of affiliation. Recital 33 adds that this Directive does not aim to create an entitlement to reimbursement of the costs of healthcare provided in another Member State, if such healthcare is not among the benefits provided for by the legislation of the Member State of affiliation of the insured person. Recital 34 clarifies that Member States of affiliation should give patients the right

to receive at least the same benefits in another Member State as those provided for by the legislation of the Member State of affiliation.

10. Consequently, Estonia is convinced that Article 7 of this Directive together with recitals 13, 33 and 34 leave no doubt regarding the right of the Member State to determine the limits and requirements that apply to the reimbursement of costs incurred for cross-border healthcare. This standpoint is supported by the case law of the Court of Justice, as the Court has found that Article 7(1) of the Patients' Rights Directive, by requiring Member States to ensure that the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question forms part of the benefits to which the insured person has a right in the Member State of affiliation, contains a clear, precise and unconditional obligation imposed on Member States, intended to confer rights on individuals, such that they are able to rely directly on that provision before a national court.⁴
11. Secondly, Article 36 of the EEA Agreement constitutes a provision forbidding restrictions to the right to provide services. The EFTA Court has indeed found in the context of free movement of workers that Article 36 also guarantees the freedom for recipients of services to go to another EEA State in order to *receive* a service there, without being hindered by restrictions⁵. Nevertheless, the EFTA Court has decided that the freedom to provide services may only be restricted by rules that are justified by overriding reasons in the public interest, which are appropriate to securing the attainment of the legitimate objective pursued, and proportionate having regard to that objective⁶.
12. In this aspect, Estonia wishes to emphasise the presence of such legitimate objective. According to Article 1(1) and (2) of the Patients' Rights Directive, read in the light of recitals 10 and 11 thereof, the Directive aims to establish rules for facilitating access for individual patients to safe and high-quality cross border healthcare⁷. It remains in the hands of the Member State to decide upon the safety and quality issues in the context of regulating which benefits the insured person is entitled in the Member State of affiliation. The

⁴ Judgment of the Court of Justice of 28 October 2021, Case C-636/19 (*Y v Centraal Administratie Kantoor*), EU:C:2021:885, para 61.

⁵ Judgment of the EFTA Court of 5 May 2021, Case E-8/20 (*Criminal Proceedings against N*), para 75.

⁶ Judgment of the EFTA Court of 10 May 2016, Case E-19/15 (*EFTA Surveillance Authority v the Principality of Liechtenstein*), para 86.

⁷ Judgment of the Court of Justice of 18 September 2019, C-222/18 (*VIPA*), EU:C:2019:751, para 42.

preconditions of reimbursement are set in place due to overarching concerns of public health and avoidance of waste of financial, technical and human resources. Moreover, a medical practitioner providing a treatment is not restricted from providing a service, only the costs incurred to a certain service recipient will not be reimbursed, if the treatment provider does not meet the additional requirements of the service recipient's home State.

13. The EFTA Court has explained in two cases concerning the reimbursement of expenses for experimental or test treatment abroad when there is no entitlement to such treatment in the home State, that EEA law cannot in principle have the effect of requiring an EEA State to extend the range of medical services paid for by its social insurance system. EEA States may even decide that, given the need to prioritise within the overall resources available, certain treatments cannot be offered under the national health system.⁸

14. In accordance with the abovementioned principles, Estonia's legal regulation concerning the reimbursement of cross-border healthcare and the administrative practice of the competent agency, the Health Insurance Fund (*Tervisekassa*)⁹ follow the same general logic as those of Norway. In order to be reimbursed in Estonia, the treatment offered in another Member State must correspond to the same conditions as the treatment offered and reimbursed in Estonia.

15. More precisely, Estonia has transposed the Patients' Rights Directive in the relevant articles of the Health Insurance Act¹⁰. Subsection 1 of Article 66² of the Health Insurance Act, titled 'Reimbursement for cross-border health service' stipulates that the insured person has the right to obtain reimbursements provided in this Act in connection with the provision of a cross-border health service specified in Article 50³ of the Health Services Organisation Act¹¹ in a Member State of the European Union other than Estonia. Subsection 2 of Article 66² of the Health Insurance Act provides that the Health Insurance Fund will

⁸ Judgment of the EFTA Court of 19 December 2008, Cases E-11/07 and E-1/08 (Olga Rindal and Therese Slinning v Staten v/Dispensasjons - og klagenemnda for bidrag til behandling i utlandet), paras 60, 82.

⁹ The Health Insurance Fund organizes Estonian national health insurance to provide insured people with access to necessary healthcare services, medicines, medical equipment and cash benefits. Further information: <https://www.tervisekassa.ee/en>.

¹⁰ Ravikindlustuse seadus (*Health Insurance Act*). RT I, 15.12.2023, 5. Available online in English: <https://www.riigiteataja.ee/en/eli/522122023007/consolide>.

¹¹ Tervishoiuteenuste korraldamise seadus (*Health Services Organisation Act*). RT I, 15.12.2023, 12. Available online in English: <https://www.riigiteataja.ee/en/eli/520122023008/consolide>.

reimburse the costs of provision of a cross-border health service provided for medical reasons *on the conditions and based on the threshold prices set out in the list of health services* without exceeding the sum paid by the insured person for the cross-border health service. This list is established by a regulation of the Government of the Republic¹², based on subsection 1 of Article 30 of the same Act, titled ‘List of health services of Health Insurance Fund’.

16. Estonia is of the opinion that in order to assure the equal treatment of insured persons and guarantee the safety and high quality of treatment, it is necessary to continue to follow the principle of reimbursing the costs incurred in cross-border medical treatment based on the national system of reimbursements. This means that the same criteria of reimbursement should continue to apply to medical treatment received in Estonia and to that received by a person insured in Estonia in another Member State. In other words, the obligation to reimburse the costs incurred by an insured person who receives cross-border healthcare should be limited to such healthcare services that are reimbursed to them according to the legal acts in the Member State of affiliation. If the Member State of affiliation has prescribed specific qualification requirements to the provider of a specific treatment and if the fulfilment of those requirements is a condition of reimbursing the costs incurred, the same requirements must be followed in case of deciding the reimbursement for costs incurred for cross-border healthcare.

17. Thus, Estonia finds that it is compatible with Article 36 of the EEA Agreement and Article 7 of the Patients’ Rights Directive 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.

Second question

18. The National Insurance Court enquires 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 to

¹² Tervisekassa tervishoiuteenuste loetelu. RT I, 20.12.2023, 23. Available online in Estonian: <https://www.riigiteataja.ee/akt/120122023023>.

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

19. Firstly, Estonia would like to draw attention to the fact that according to recital 3 of the Professional Qualifications Directive, the purpose of this Directive is to guarantee that persons having acquired their professional qualifications in a Member State have access to the same profession and pursue it in another Member State with the same rights as nationals. It should be taken into account that the recognition of professional qualifications is an issue separate from reimbursement of costs for medical treatment. The precondition of receiving reimbursement of costs is that the qualification of the treating medical practitioner corresponds to the qualification set as a precondition for reimbursement in the Member State of affiliation. On a national level, the qualification obtained in another Member State may be recognised and a medical practitioner may be registered and allowed to access a profession, but this does not correspond directly to fulfilling the requirements of reimbursement of costs incurred neither for healthcare in the Member State nor for cross-border healthcare.

20. Secondly, Estonia observes that the Professional Qualifications Directive provides a general framework. Member States' regulations of competence for specific medical professions may be different to a certain extent. Some services, for example the treatment of severe periodontitis may be in the competency of a dentist in some Member States. Nevertheless, in other Member States, due to differences in training, it may only be in the competency of a specialised dentist who has acquired a specialty studying in residency, regardless of the fact that the basic training of doctors and dentists and the general requirements of residency programmes may be similar. In a system of solidarity-based health insurance, the services for which costs are reimbursed need to be of high quality, and the financial resources of health insurance must be used purposefully. It is precisely the aim of imposing additional competency requirements on top of qualification requirements to guarantee the high quality of the medical service. As Estonia explained in point 16 above, every Member State has the right to establish their own quality requirements and thus also prerequisites of reimbursement. The reimbursement of the costs of cross-border medical services and those provided in the Member State need to take place on equal grounds, as otherwise the equal treatment of insured persons would not be guaranteed.

21. Thus, Estonia finds that 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 the Professional Qualifications Directive.
22. Based on the response to the first and second question, Estonia does not consider it necessary to analyse the third question.

V. CONCLUSION

23. Estonia proposes the following response to the first and second question:
 1. It is 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. 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 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.



Merili Kriisa

Agent for the Government of the Republic of Estonia