Case No: 85598
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EFTA SURVEILLANCE AUTHORITY DECISION

of 18 September 2024

closing a complaint case arising from an alleged failure by Norway to comply with Article 36 EEA and Articles 7(4) c.f. 7(1), and 9(1) of Directive 2011/24 on patients' rights by maintaining in force national provisions and administrative practices relating to the reimbursement of costs for cross-border healthcare

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Introduction

By way of a letter dated 12 March 2020, the EFTA Surveillance Authority ("the Authority") received a complaint against Norway alleging that Norwegian legislation and administrative practice relating to the reimbursement of costs for cross-border healthcare were in breach of EEA law, in particular Directive 2011/24/EU on patients' rights.[1]

Based on the complaint and following dialogue with national authorities, the Authority decided to open a formal infringement procedure against the Government of Norway, identifying several breaches of EEA law.

As will be explained in further detail below, it is the Authority's view that Norway has amended its national legislation and/or administrative practices to the effect that the breaches identified in the infringement procedure have been rectified.

2 Correspondence

By way of a letter dated 30 September 2020, the Authority informed the Norwegian Government of the complaint (Doc No 1152080). The letter recalled that similar issues had been addressed previously in the context of case 80137, which had been discussed at the package meeting in 2017 and subsequently closed. In its letter, the Authority also noted that numerous enquiries had been received pertaining to the issues raised by the complaint. The Authority raised several questions with a view to clarifying the Norwegian legislation and administrative practices applicable to the reimbursement of costs related to cross-border healthcare.

[1] Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, which entered into force in the EEA on 1 August 2015.

Following the Norwegian Government's reply to that letter, received on 30 October 2020 (Doc No 1160689), a further set of questions was sent to Norway by way of a letter dated 23 September 2021 (Doc No 1227746). Norway provided its answers on 21 October 2021 (Doc No 1237151). The case was subsequently discussed at the package meetings in 2021 and 2022.

On 15 December 2022, the Authority issued a letter of formal notice to Norway (Doc No 1255341), identifying the following breaches of EEA law:

- the Norwegian administrative practice whereby the reimbursement of costs related to cross-border healthcare was limited to 80% of the relevant national "diagnosis-related-group" ("DRG"), in breach of Article 7(4) of the Directive, c.f. Article 7(1) thereof.
- the Norwegian administrative practice whereby the national legislation's generic deadline was applied strictly to claims relating to cross-border healthcare, in breach of the principle of proportionality as expressed by Article 9(1) of the Directive and the principles of equivalence and effectiveness; and
- the Norwegian translation requirements applicable to claims relating to cross-border healthcare, in breach of Article 9(1), Article 9(2) of the Directive and/or the freedom to provide services c.f. Article 36 EEA and creating a state of ambiguity and legal uncertainty in breach of Article 3 EEA.

In its reply to the letter of formal notice, dated 31 March 2023, the Norwegian Government explained that it had provided for satisfactory solutions to the third and final issue set out above (Doc No 1364226).[2] That issue, pertaining to national translation requirements, was therefore not pursued any further in the reasoned opinion issued on 5 July 2023 (Doc No 1365385).

Norway responded to the reasoned opinion by way of a letter dated 28 September 2023 (Doc No 1400998). The case was subsequently discussed at the package meeting in October 2023.

3 Assessment

3.1 National translation requirements

3.1.1 The obligation to provide translations of necessary documentation - Article 9(1) of the Directive

Pursuant to Section 11(5) of the Norwegian regulation implementing the Directive[3], a claim for reimbursement must be accompanied by "necessary information". The relevant documentation must – as a main rule – be translated unless available in Norwegian, Danish, Swedish or English. This requirement may be waived if the competent authority considers that there is no need for a translation.

According to the complainant, the provision referred to immediately above was applied strictly by the competent national authority (Helfo[4]). Hereunder, the option to waive the translation requirement was, to the complainant's knowledge, never made use of. The

[2] Reference is also made to a letter of 25 January 2023 in which the Norwegian Government informed the Authority of specific, legislative amendments concerning the national translation requirements (Doc No 1347751).
[3] Forskrift om stønad til helsetjenester mottatt i et annet EØS-land, FOR-2010-11-22-1466.
[4] The Norwegian Health Economic Administration.

requirement to translate epicrisis' was specifically questioned. The complainant emphasised that the translation requirement entailed substantive costs for those seeking reimbursement.

With reference to the above, the complainant found Norway to be in breach of Article 9(1) of the Directive, which stipulates that any administrative procedures regarding the use of cross-border healthcare shall be necessary and proportionate.

In its letter of formal notice, the Authority noted that the Norwegian Government had provided it with explanations of what criteria are generally applied when Helfo decides whether to request translation of documents deemed necessary. Moreover, the Authority observed that it had received anonymised examples both of cases where translation had been deemed necessary and where that requirement had been waived.

Having given due consideration to the explanations and examples provided by the Norwegian Government, the Authority concluded in its letter of formal notice that there were not sufficient indications that the obligation to provide translations of necessary documentation was applied restrictively and consistently in such a manner to constitute a breach of Article 9(1) of the Directive.[5]

3.1.2 The requirement that translations shall be undertaken by a state authorised translator – Article 9(1) and (2) / freedom to provide services

While examining the national translation requirement, the Authority became aware that insofar as a translation was deemed necessary, Section 11(5) of the national implementing regulation provided that such translation be undertaken by a "state authorised translator" ("*statsautorisert translatør*"). The Authority observed, *inter alia*, that this referred to a specific, Norwegian certification system governed by a national regulation, which does not necessarily exist in all other EEA States, some of which lack any national certification system whatsoever for translators.

On that matter, the Norwegian Government had emphasised, *inter alia,* that the objective of this requirement was to ensure a minimum level of quality of translations. As such, it was not to be perceived as a predisposition towards a specific Norwegian classification system. Moreover, Norway stressed that in practice, translations performed by individuals exercising the profession of translator in another EEA State may be accepted by Helfo. Additionally, the Authority was informed that the relevant administrative circular had been amended, whereby the requirement to use a state authorised translator had been removed.

Observing that the national provision at issue and the explanatory text accompanying the relevant application form, at the time of issuing the letter of formal notice, remained unamended, the Authority concluded that the national legislation and ensuing practice were in breach of both Article 9(1) of the Directive and constituted an unjustified restriction on the freedom to provide services safeguarded by Article 36 EEA. Additionally, the letter of formal notice concluded that this inconsistency under national law gave rise to an unclear and ambiguous legal situation, in breach of Article 9(2) of the Directive and Article 3 EEA.

In its response to the letter of formal notice, the Norwegian Government informed the Authority that in addition to the preceding amendments made to the relevant circular[6], the national provision at issue would be amended in order to dispense with the requirement to make use of a state authorised translator.

[5] Reference is made to p. 8-9 of the letter of formal notice for further detail.
[6] Rundskriv til forskrift om stønad til helsetjenester mottatt i et annet EØS-land, § 11 (R05-24A-FOR, as revised per 2 October 2023, last accessed by the Authority on 21 November 2023).

Subsequently, in its reasoned opinion, the Authority took note that the legislative amendments had been adopted and, moreover, that the explanatory text accompanying the application form had been revised accordingly. On that basis, the Authority decided not to pursue the matter further.

3.2 Claim deadline

Section 10(1) of the national regulation implementing the Directive, as it read at the time of issuing the reasoned opinion, provided that claims for reimbursement relating to cross-border healthcare should be submitted after the healthcare had been received and paid for. The claim deadline was to be calculated in accordance with the generic provisions set out in Section 22-13 of the National Insurance Act ("NIA")[7].

The general rule set out in Section 22-13(2) NIA stipulates that claims for benefits disbursed as a one-time payment shall be submitted within six months from the earliest moment in time that a claim could have been submitted. The provision does not specify further what constitutes the "earliest moment in time".

In its reasoned opinion, the Authority observed that, for the purposes of applying that generic provision of national law to claims for reimbursement relating to cross-border healthcare, the relevant administrative circular required a specific, stringent application: the earliest moment in time that a claim could have been submitted should, as regards claims relating to cross-border healthcare, be counted from the day of treatment.

The Authority noted *inter alia* that, to its understanding, the generic provision set out in Section 22-13(2) NIA had not been given a similarly stringent interpretation in other areas or whether, on the contrary, this concerned singularly claims relating to cross-border healthcare. Moreover, the Authority had not been presented with any arguments as to why such a specific and strict application was considered necessary.

On that basis, the Authority concluded that the administrative practice at issue amounted to a breach of Article 9(1) of the Directive, the principle of equivalence and the principle of effectiveness.

The Authority observes that, as pledged by the Norwegian Government in its response to the reasoned opinion, the national legislative provision at issue and the administrative circular have now been amended, to the effect that the claim deadline shall run from the date of the invoice in cases where this is received by the claimant after the day of treatment. As regards claims for reimbursement submitted after the amendment came into force, the Authority takes note of the transitional provision included to that effect.[8]

On that basis, the Authority concludes that the breach identified in the reasoned opinion has been rectified.

3.3 Reimbursement level – 80% of national DRG

At the time of the reasoned opinion, the relevant administrative circular provided that the reimbursement of costs related to cross-border healthcare was to be limited to 80% of the relevant DRG. The rationale behind the practice was *inter alia* that the reimbursement

[7] LOV-1997-02-28-Lov om folketrygd (folketrygdloven).
[8] FOR-2023-09-21-1466 amending Forskrift om stønad til helsetjenester mottatt i et annet EØS-land (FOR-2010-11-22-1466).

should reflect only the treatment costs themselves, excluding other costs encompassed by DRGs such as service, administration, education etc.[9]

In its reasoned opinion, the Authority maintained its conclusion that the administrative practice at issue was in breach of Article 7(4) of Directive 2011/24, c.f. Article 7(1) thereof.

Notably, the Authority stressed that the provision set out in Article 7(4) of the Directive required reimbursement up to the level of costs *"that would have been assumed by the Member State (…)".* This entailed, in the Authority's view, that the relevant benchmark was what costs the EEA State of affiliation – as a whole – would have borne had the treatment taken place in its territory. The Authority found support for its view in the judgment of the European Court of Justice in *Veselības ministrija.*[10]

In its reply to the reasoned opinion, the Norwegian Government maintained that the administrative practice at issue was not in breach of EEA law. Nevertheless, the Norwegian Government informed the Authority that the level of reimbursement would be raised to 100 % of the DRG with effect from 2 October 2023.[11]

The Authority, taking due account of the commitment of the Norwegian Government to amend the administrative practice accordingly and, moreover, noting that such change has been duly reflected in the relevant circular, concludes that the breach identified in the reasoned opinion has been rectified.

3.4 Conclusion

In light of the above, the Authority concludes that Norway has provided sufficient information to demonstrate that the breaches identified in the reasoned opinion have been rectified.

By letter of 7 May 2024, the Internal Market Affairs Directorate of the Authority informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 7 June 2024.

The complainant did not reply to that letter.

There are, therefore, no grounds for pursuing this case further.

The Authority recalls that, in its view, Norway was in breach of several provisions of EEA law at the time of the reasoned opinion, namely in particular the provisions of Articles 7(4), c.f. 7(1), and 9(1) of Directive 2011/24. The Authority observes that an EEA State is bound to eliminate all unlawful consequences that individuals and companies have suffered due to a breach of EEA law.[12]

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[9] Reference is made to p. 6-8 of the reasoned opinion for further detail.
[10] Case C-243/19, *Veselības ministrija*, EU:C:2020:872, paragraphs 74-75.
[11] In this respect, the Authority recalls that by virtue of FOR-2023-09-21-1466, amending Forskrift om stønad til helsetjenester mottatt i et annet EØS-land (FOR-2010-11-22-1466), transitional provisions apply. This entails, for example, that applications for reimbursement submitted after the amendment came into force, are processed in accordance with the deadline provisions in force at the time of payment, if the provisions in force before 2 October 2023 would be more favorable for the applicant.
[12] See from the EFTA Court, Case E-11/22 *RS*, paragraph 53, and from the CJEU, e.g., Cases C-201/02 *Wells*, EU:C:2004:12, paragraph 64, C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 75, Case C-177/20 *"Grossmania"*, EU:C:2022:175, paragraph 63 and Joined Cases C-615/20 and C-671/20, *YP and Others*, EU:C:2023:562, paragraph 64.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with Article 36 EEA and Articles 7(4) c.f. 7(1), and 9(1) of Directive 2011/24 on patients' rights, is hereby closed.

For the EFTA Surveillance Authority

Arne Røksund President	Stefan Barriga Responsible College Member	Árni Páll Árnason College Member

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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.