

Case No: 72376  
Document No: 1385036  
Decision No: 107/23/COL

## **EFTA SURVEILLANCE AUTHORITY DECISION**

of 26 July 2023

to bring a matter against Norway before the EFTA Court in accordance with Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

### **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(2) thereof,

Whereas:

By several letters sent in the period 2009-2013,<sup>1</sup> the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had received complaints against Norway regarding access to in-patient medical treatment in other EEA States. In light of these complaints, the Authority decided to open a general own-initiative case. On 14 May 2014, having concluded that the criteria in Norwegian law concerning access to in-patient treatment in other EEA States were not in line with the requirements of the EEA Agreement, the Authority issued a letter of formal notice to Norway (Doc No 692126).<sup>2</sup> On 3 February 2016, the Authority issued a supplementary letter of formal notice to Norway (Doc No 772442).<sup>3</sup>

Following further correspondence and meetings, on 20 September 2017, the Authority issued a reasoned opinion (“RDO”) to Norway (Doc No 828764).<sup>4</sup> The RDO required the Norwegian Government to take the necessary measures to comply with the RDO within two months of its receipt. Having examined the Norwegian Government’s reply to the RDO of 19 January 2018 (Doc No 894509),<sup>5</sup> the Authority decided on 18 December 2019 to refer the matter to the EFTA Court.<sup>6</sup>

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<sup>1</sup> See letters of 29 July 2009 (Doc No 525862), 6 November 2012 (Doc No 652021), 13 September 2012 (Doc No 646466), 6 December 2013 (Doc No 692434) and 13 December 2013 (Doc No 693405).

<sup>2</sup> The Norwegian Government replied to this letter by letter dated 15 August 2014 (Doc No 718533).

<sup>3</sup> The Norwegian Government replied to this letter by letter dated 3 May 2016 (Doc No 803414).

<sup>4</sup> For further details on the correspondence and meetings up to this point, see paragraphs 2-14 of the Authority’s RDO of 20 September 2017.

<sup>5</sup> And in light of the Authority’s letter of 26 February 2018 and the Norwegian Government’s response of 11 April 2018, as well as a letter of 15 June 2018 which informed the Authority of further legislative proposals. See Doc Nos 899934, 908910 and 918787 respectively.

<sup>6</sup> Decision No 091/19/COL.

In the course of preparing its application to the EFTA Court, the Authority received additional information from a complainant (Case No 74770).<sup>7</sup> Having assessed this information, the Authority on 7 May 2021 sent a request for information to the Norwegian Government (Doc No 1200103). In light of the reply to that request for information on 18 June 2021 (Doc No 1208723, “the Reply to the RQI”) and having examined further legislative changes which the Norwegian Government introduced after the expiry of the compliance date set out by the RDO,<sup>8</sup> the Authority decided to issue a second supplementary letter of formal notice on 18 May 2022 (Doc No 1256687).

Having examined the Norwegian Government’s reply of 8 July 2022<sup>9</sup> to the second supplementary letter of formal notice, the Authority decided to issue a supplementary reasoned opinion on 20 October 2022 in which it maintained its assessments and conclusions as set out in the second supplementary letter of formal notice (“the supplementary RDO”).<sup>10</sup> In that supplementary RDO, the Authority concluded that Norway had failed to comply with its obligations under Article 20 of Regulation 883/2004 on the coordination of social security systems and/or Article 36 EEA, in breach also of Article 3 EEA. The supplementary RDO was further discussed at the package meeting in Norway on 28 October 2022, in which it was *inter alia* agreed that Norway would provide certain information and administrative decisions. The Norwegian Government replied to the supplementary RDO on 20 December 2022,<sup>11</sup> and on the same date provided the information and administrative decisions.<sup>12</sup>

On 15 February 2023, in light of this information and Norway’s reply, the Authority requested anonymised copies of certain national administrative decisions with a view to obtaining clarifications as to on what grounds applications for in-patient treatment abroad are typically rejected.<sup>13</sup> The reply was received on 16 March 2023.<sup>14</sup> Moreover, by way of a letter dated 24 April 2023 and with a view to ensuring a fair assessment of the national administrative practice, Norway was requested to provide anonymised copies of national administrative decisions *granting* approval for treatment abroad.<sup>15</sup> The reply was received on 24 May 2023.<sup>16</sup>

In its supplementary RDO, the Authority maintained that Norwegian legislation and/or practice was not compatible with EEA law.

Firstly, the Authority concluded that both past and present Norwegian legislation contained requirements relating to in-patient treatment abroad which in various forms have failed to ensure the effectiveness of Article 20 of Regulation 883/2004 and/or Article 36 EEA, in breach also of Article 3 EEA. Further, the Authority concluded that Norway had failed to give full effect and priority to the relevant provisions of EEA law over conflicting provisions of national law, in breach of Articles 3, 7 and Protocol 35 EEA.

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<sup>7</sup> Since 2009 and until today, the Authority has received a number of other letters and e-mails from patients and patient groups in Norway with similar difficulties accessing in-patient treatment in other EEA States. For instance, on 2 March 2020, the Authority received an e-mail expressing hope that it is able to bring the case to the EFTA Court and attaching a petition document with the title “*Ensure patients’ rights to treatment in other EEA-states*” (In Norwegian “*Sikre pasienters rettigheter til behandling i andre EØS-land*”), signed by 846 people (Doc No 1117886). On 6 February 2020, the Authority received an email from a group of 293 patients that had covered their own expenses for medical treatment in other EEA States because they were not offered treatment in Norway (Doc No 1115687).

<sup>8</sup> See Parts 3.2.1.2 and 3.2.2.3 below.

<sup>9</sup> Letter from the Norwegian Government dated 8 July 2022 (Doc No 1301709).

<sup>10</sup> Decision 191/22/COL – RDO of 20 October 2022 (Doc No 1311515).

<sup>11</sup> Letter from the Norwegian Government dated 20 December 2022 (Doc No 1338999).

<sup>12</sup> Email from the Norwegian Government on 20 December 2022 (Doc No [1338939](#)).

<sup>13</sup> Request for information dated 15 February 2023 (Doc No 1351936).

<sup>14</sup> Letter from the Norwegian Government dated 15 March 2023 (Doc No 1360446).

<sup>15</sup> Request for information dated 24 April 2023 (Doc No 1368411)

<sup>16</sup> Letter from the Norwegian Government dated 24 May 2023 (Doc No 1374972).

In its reply, Norway maintained *inter alia* that the three schemes available at national level for publicly paid in-patient treatment are alternative and complimentary. Moreover, Norway confirmed that by the deadline of the supplementary RDO, it had adopted legislative amendments to the effect that Regulation 883/2004 was transposed into the national legal order by a legislative act, rather than by a national regulation. As regards the alternative and complementary nature of the schemes, the Authority maintains its position that all such schemes must comply with EEA law. In respect of the identified specific breach of Articles 3, 7 and Protocol 35 EEA the Authority considers that this matter has been sufficiently resolved.

Secondly, in its supplementary RDO, the Authority upheld its conclusion that both past and present Norwegian legislation provided for an appeals and procedural structure which prevents or discourages the relevant appeal bodies from correctly applying all conditions of Article 20 of Regulation 883/2004 and/or Article 36 EEA. In its reply, Norway stressed *inter alia* that the mere fact that the competence to handle applications and complaints under different schemes is allocated to different bodies is not contrary to EEA law. The Authority observes, that in its reply Norway failed to engage with the fact that no single complaint body appears to be vested with the competence to apply the proper legal test as required by Article 20 of Regulation 883/2004 and/or Article 36 EEA.

Thirdly, in its supplementary RDO, the Authority maintained that the current system in place under national law continues to create a state of ambiguity and lack of legal certainty, in breach of Articles 3 and 36 EEA and/or Article 20 of Regulation 883/2004. In its reply, Norway *inter alia* referred to certain upcoming measures aiming at making the different national schemes and system easier for the patients. In the Authority's view, those measures do not appear to fundamentally address the state of ambiguity and lack legal certainty identified by the Authority.

The Authority therefore considers that the matter should be brought before the EFTA Court.

#### HAS ADOPTED THIS DECISION:

1. Proceedings should be commenced before the EFTA Court to seek a declaration to the effect that:
  - (i) by maintaining in force legislation, such as ss. 2-1b(4) PRA and 6 PR, which unjustifiably restricts or does not include the right to seek in-patient treatment in another EEA State when a medically-justifiable deadline for providing treatment cannot be met, the Kingdom of Norway has failed to fulfil its obligations under Article 20(2) of Regulation 883/2004 and/or Article 36 EEA;
  - (ii) by maintaining in force legislation, such as ss. 2-1b(5) and 3(4) PR and ss.2-4a(2)a PRA and 3 PR, which failed or fails correctly to reflect the rights of patients to seek treatment in another EEA State where the same or equally-effective treatment cannot be provided in the home State within a time limit which is medically justifiable, the Kingdom of Norway has failed to fulfil its obligations under Article 20(2) of Regulation 883/2004 and/or Article 36 EEA;
  - (iii) by maintaining in force an appeals and procedural structure under Section 7-2 PRA and Sections 7 and 8 PR which prevents and/or discourages the PRA/PR complaint/appeal bodies from correctly applying and securing the rights of patients to seek treatment in another EEA State where the same

or equally-effective treatment cannot be provided in the home State within a time limit which is medically justifiable, and/or by maintaining an administrative practice in which such rights are not secured, the Kingdom of Norway has failed to fulfil its obligations under Article 20(2) of Regulation 883/2004 and/or Article 36 EEA, in breach also of Article 3 EEA;

- (iv) by maintaining in force and applying the above unclear and/or conflicting national rules and practice in relation to patients' rights to seek treatment in another EEA State, the Kingdom of Norway has breached the principle of legal certainty and undermined the effectiveness of Article 36 EEA and Article 20(2) of Regulation 883/2004, in breach of those provisions, and/or of Article 3 EEA.
2. The Director of Legal and Executive Affairs is instructed to seize the EFTA Court, liaising with the Internal Market Affairs Directorate and subject to control by the competent College Member, and to represent the EFTA Surveillance Authority before the EFTA Court in these proceedings.

For the EFTA Surveillance Authority

Arne Røksund  
President

Stefan Barriga  
Responsible College Member

Árni Páll Árnason  
College Member

Melpo-Menie Joséphidès  
Countersigning as Director,  
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*This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.*