Translation of a Request for an Advisory Opinion from
Oslo tingrett
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OSLO DISTRICT COURT (*OSLO TINGRETT*)

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

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	14-089009TVI-OTIR/05	**31 August 2016**

Request for an Advisory Opinion

Pursuant to Section 51(a) of the Courts of Justice Act, cf. Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), Oslo District Court requests an Advisory Opinion from the EFTA Court in Case No 14-089009TVI-OTIR/05.

Plaintiff:	Mobil Betriebskrankenkasse Hünerposten 2 20097 Hamburg, Germany
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Defendant:	Tryg Forsikring P.O. Box 7070 NO-5020 Bergen, Norway
Third-party intervener:	The Norwegian Motor Insurers' Bureau (*Trafikkforsikringsforeningen*) P.O. Box 2551 Solli NO-0202 Oslo, Norway
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Introduction

The case before Oslo District Court concerns the settlement of recourse claims between a German insurance company and a Norwegian insurance company after a German national was injured in a car accident in Norway. The parties disagree on the interpretation of an act of EEA law, namely Article 85(1) 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 **('the Coordination Regulation')**. The parties agree that the question of interpretation should be submitted to the EFTA Court. The judge presiding over the preparatory proceedings before Oslo District Court presumes that it is necessary to obtain an advisory opinion from the EFTA Court before passing judgment; see Article 34 SCA.

More about the background to the case and the disputed issues

On 6 May 2011, [redacted] in Germany, was injured in a traffic accident while on holiday in Søgne in Norway. [redacted] was driving his German-registered car. The car that was responsible for the injury was registered in Norway and covered by a liability insurance taken out with the insurance company Tryg Forsikring **('Tryg').**

Immediately after the accident, [redacted] was taken to the hospital of Southern Norway *(Sørlandet sykehus HF)* in Kristiansand, where he was an in-patient from 6 May until 11 May 2011 and received emergency treatment for a number of orthopaedic and internal injuries. He was offered surgery for an arm injury and a knee injury at the hospital of Southern Norway, but wished instead to be transferred to his local hospital in Germany to have the surgeries performed there.

Complications arose in connection with the surgery in Germany, and his hospital stay there was therefore longer than planned.

The parties agree that the orthopaedic and internal injuries healed in the course of the first six months after the accident. However, [redacted] developed serious psychiatric disorders which caused him to become fully occupationally disabled. He had also had such problems prior to the accident, and the parties agree that his psychiatric disorders with related occupational disability were not a consequence of the traffic accident in Norway.

Tryg accepted liability under Section 8 of the Norwegian Automobile Liability Act[1] for the problems and losses [redacted] suffered as a consequence of the traffic accident. Damages were assessed in accordance with the provisions of the Compensatory Damages Act[2] and non-statutory Norwegian tort law. The parties agree that Tryg has paid full compensation for [redacted] losses that warranted compensation, including his expenses and loss of income as a result of the traffic accident.

[redacted] was covered by a mandatory German insurance policy taken out with Mobil Betriebskrankenkasse **('Mobil').**

Mobil made a number of payments under this insurance policy and subsequently filed recourse

[1] Act of 3 February 1961 relating to liability for damages caused by motor vehicles (Automobile Liability Act).
[2] Act of 13 June 1969 No 26 relating to compensatory damages (Compensatory Damages Act).

claims against Tryg.

Tryg accepted several of Mobil's recourse claims and covered these claims by a total of EUR 21,400, while at the same time rejecting liability for several claim items. The grounds for these rejections were that the remaining expenses did not warrant compensation to the directly injured party under Norwegian law. These were partly losses that were not in fact causally related to the traffic accident in question, partly losses that were not incurred by the directly injured party and partly losses that concerned claim items that are not protected under Norwegian tort law.

The following disputed claims are at issue in the case:

1. Expenses for hospital treatment in Norway. [redacted] was not liable to pay these expenses due to the European Health Insurance Card scheme. The claim rejected under this item amounts to EUR 11,310. Mobil is obliged to pay this pursuant to German law.

2. Expenses for the hospital stay in Germany, and related ambulance expenses. The reason was that [redacted] duty of loss limitation meant that he should have accepted the offer of having the surgeries performed at the Hospital of Southern Norway. The claim rejected under this item amounts to EUR 55,210.45.

3. Expenses for treatment that is not deemed compensable under Norwegian law, including lymph drainage and general massage. The claim rejected under this item amounts to EUR 5,873.16.

The dispute concerns limited amounts, when seen in isolation. However, the parties take the view that it raises questions of principle that are important to clarify for the sake of future cases. This is also the reason for the third-party intervention by the Norwegian Motor Insurers' Bureau.

Relevant act of EEA law

The Coordination Regulation was incorporated into the EEA Agreement by EEA Joint Committee Decision No 76/2011 of 1 July 2011. By the same decision, Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 **('the Implementing Regulation')** was also incorporated into the EEA Agreement. The parties disagree on the interpretation of Article 85(1) of the Coordination Regulation. The provision reads as follows:

> **1. If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, any rights of the institution responsible for providing benefits against a third party liable to provide compensation for the injury shall be governed by the following rules:**
>
> **a) where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party, such subrogation shall be recognised by each Member State;**
>
> **b) where the institution responsible for providing benefits has a direct right against the third party, each Member State shall recognise such rights.**

The dispute concerns whether the obligation to recognise recourse/subrogation rights means that the claim or scope of the claims under the claimant's national legislation must also be accepted, even if more limited coverage is warranted pursuant to the legislation of the country in which the injury occurred. The question in the present case is whether Tryg is obliged to pay compensation to Mobil as assessed under German law, given that Mobil was obliged under German law to cover the costs in question regardless of whether they were compensable under Norwegian law.

Summary of the parties' pleas in law

The plaintiff – Mobil:

The statutory obligation to pay benefits exists under Sections 2, 5, 20 ff of Book V of the German Social Code (Sozialgesetzbuch V – SGB V). Pursuant to Section 116 in Book X of the German Social Code (Sozialgesetzbuch X – SGB X), Mobil is subrogated to the claim for compensation resulting from [redacted] accident in Norway insofar as Mobil, as a result of the accident, subject to a causality assessment based on German law, is obliged to pay social benefits under the aforementioned German Social Code.

Mobil argues that the rule in Article 85(1) of the Coordination Regulation means that Tryg must pay compensation for all the expenses that Mobil has had to pay to [redacted] under the terms of the insurance agreement.

Article 85(1) of the Coordination Regulation, read in conjunction with German law, entails that the subrogation to the claim must be accepted in Norway, even if [redacted] could not himself claim coverage of these costs because the assessment of damages is governed by Norwegian law.

Article 85(1) of the Coordination Regulation regulates the Member States' recognition of subrogation, in this case recognition of Section 116 SGB X and Sections 20 ff SGB V (German Social Code) in Norway. In Mobil's view, this means that German social institutions (such as Mobil) have a separate claim for damages as a result of the accident in Norway.

The benefits that Mobil is obliged to pay as a result of the accident in Norway are treated as if the accident had occurred in Germany. Mobil is of the opinion that the actual place of the accident has no influence whatsoever for the injured party with respect to the scope of the benefits that the injured party may claim – in this case from Mobil.

Mobil's view is that Article 85(1) of the Coordination Regulation protects the insured person travelling abroad in that he shall not risk any loss of benefits should an accident occur. The background to that article is the establishment of the idea of a single Europe, including the freedom of travel. Under German legislation, the subrogation is carried out pursuant to Section 116 SGB X from the second the accident is legally deemed to have occurred, whereby the insured can establish an insurance claim.
It is Mobil's view that subrogation pursuant to Section 116 SGB X must be recognised in Norway, and that this follows from Article 85(1) of the Coordination Regulation. This means, at the same

time, that what medical treatment the injured party would have received in Norway is of no relevance. Seen from Mobil's side, the costs for the injured party of a possible hospital stay in Norway are thus irrelevant. The decisive factor is that the hospital stay was causally related to the accident and necessary due to the injured party's injuries.

Mobil also takes the view that the same applies to all other benefits. For example, if Norway does not pay compensation for a necessary course of treatment, this will not have any relation to the actual claim, because it is only German law – here the above-mentioned German Social Code (SGB) – that is applicable. In Mobil's view, the question of liability and the injuries and types of loss the injured party is entitled to compensation for, is governed by Norwegian law (*lex delicti*). However, the question of which types and methods of treatment that may be invoked by the injured party, that is, what kind of medication, rehabilitation measures etc., depends on the social law of the injured party, in this case German law.

Concerning the injured party's duty of loss limitation, Mobil takes the view that this only applies to the injured party's obligation to prevent the causally related injuries from worsening, and does not mean that the injured party must consider what constitutes the most favourable treatment. Under German law, the injured party is entitled to all benefits that contribute to improving his health, if the treatment is regulated by German law. In Mobil's view, the duty of loss limitation lapsed when the hospital in Norway agreed that the injured party could be transported to his home country Germany. Consideration of financial issues is not an obligation on the injured party, but a task to be performed within the German social regulatory framework, something that all Member States must recognise in accordance with Article 85(1) of the Coordination Regulation.

Summary: Article 85(1) of the Coordination Regulation regulates EEA States' recognition of subrogation, in this case recognition in Norway of Section 116 SGB X and Sections 20 ff SGB V. This means that German social institutions (such as Mobil) have a separate claim for damages as a result of the accident in Norway.

The defendant – Tryg:

Tryg contests the plaintiff's understanding of Article 85(1) of the Coordination Regulation. It is argued that Article 85 has no bearing on the choice of law and assessment of damages. Under point (a) a right of recourse may only be claimed insofar as compensation to the directly injured party is warranted under the legislation of the country in which the injury occurred. The provision does not confer recourse rights to a greater extent than what the party that caused the injury may be held liable for under the legislation of the country where the question of liability and assessment of damages is regulated. Hence, subrogation does not confer on Mobil a better legal position in relation to Tryg than [redacted] had. Insofar as [redacted] could not claim compensation for the expenses, Mobil cannot do so either.

Concerning the expenses for the hospital stay in Norway, and for the hospital stay in Germany which was due to non-fulfilment of [redacted] duty of loss limitation, Tryg pleads as follows:

Where the loss was not incurred by the directly injured party, but by a third party, it is argued that the third party must accept the limitations provided for under tort law in the country where the injury occurred. Article 85(1)(b) must be understood on that basis. The factual and legal causality issues must be assessed pursuant to the legislation of the country where the injury occurred. The limits that the legislation in the country where the injury occurred sets for the liability of the party that caused the injury are not broadened solely by virtue of the insurance or social security legislation in another country giving the injured party rights beyond what is compensable in the country where the injury occurred. Settlement between Member States for health services provided is regulated by Article 35 of the Coordination Regulation and Articles 62 to 69 of the Implementing Regulation.

When the public health service in one Member State has treated a resident of another Member State, the public health service may demand that the costs of the treatment be covered by that person's home country. It is the actual costs that must be covered.

In the present case, the loss was initially incurred by the Norwegian public health service. [redacted] was entitled to free treatment, which the Norwegian public health service was obliged to offer him. This did not confer on the health service any right to claim damages from Tryg. The reason for this is that, under Norwegian law, this loss constitutes a third-party loss that is not protected under tort law. When the German public health service, by Mobil, refunded the expenses incurred by the Norwegian public health service, a subrogation took place. However, neither in this context was Mobil placed in a better position in relation to Tryg than was the position of the Norwegian public health service, and there is thus no legal basis for holding Tryg liable for the expenses.

Questions of interpretation

The parties largely agree on the content of the German rules of law under which Mobil had to cover the disputed treatment expenses that [redacted] incurred in Germany. The parties agree, inter alia, that Mobil was liable under German law to cover the three disputed treatment expense items that in the recourse proceedings are disputed between the parties in the lawsuit in Norway. The parties agree that Mobil is an 'institution' that 'is responsible for providing benefits' within the meaning of these terms as used in Article 85(1) of the Coordination Regulation. The parties also agree that, under German law, Mobil is on certain conditions subrogated to [redacted] claim against a third party liable to pay damages pursuant to Section 116 SGB X.

The parties further agree that Mobil's recourse rights against Tryg do not include the disputed items if the claim is assessed pursuant to Norwegian domestic law. The law of the country in which the injury occurred warrants less coverage than the law of the injured party's home country.

The parties consider that the resolution of this dispute largely depends on the interpretation of Article 85(1) of the Coordination Regulation. The provision concerns a situation in which an injured party receives benefits under the legislation of his home country for an injury resulting from events occurring in another Member State (another EEA State), in our case Norway. Points (a) and (b) of that provision govern 'any rights of the institution responsible for providing benefits against a third party liable to provide compensation for the injury'. The court requests an answer to the following

questions:

Question 1, concerning the interpretation of Article 85(1)(a) of the Coordination Regulation:

> **When an institution in the injured party's home country that is responsible for providing benefits, under that country's legislation 'is subrogated to' the injured party's right against a 'third party', other EEA States must recognise the institution's subrogation to the claim. Does this mean**
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution and that the existence and scope of the claim depends on the home country's legislation,**
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution and that the existence and scope of the claim depends on the legislation in the country where the injury occurred, *or***
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution, but that the Coordination Regulation has no bearing on the choice of law as regards the existence and scope of the claim?**

Question 2, concerning the interpretation of Article 85(1)(b) of the Coordination Regulation:

> **Where the institution responsible for providing benefits has a direct right against the third party, other EEA States shall recognise such rights. Does this mean**
>
> – **that other EEA States must recognise the right in full, including that its existence and scope depends on the home country's legislation, *or***
>
> – **that other EEA States must recognise the right, subject to those limitations that follow from the rules of law in the country where the injury occurred?**

Oslo District Court

Frode Støle (signature)

Frode Støle

District Court Judge

CC: Counsel for the parties