The CJEU and EFTA Court decisions in a comparative perspective

MoveS legal report 2023

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Contents

List of tables

1. Executive Summary

Coordination of the national social security systems is an integral part of the legal framework of the European Union (EU) and the European Economic Area (EEA). Although the legal system is to a large extent the same, different courts decide on interpretation and application. The Court of Justice of the European Union (CJEU) is competent to decide on EU law and EEA law, when applied by EU Member States and the Court of Justice of the European Free Trade Association (EFTA Court) decides on EEA law when applied by the EEA States Iceland, Liechtenstein and Norway.

The scope of the EEA Agreement is more limited than the EU Treaties, but for free movement of workers and social security coordination, the same regulations apply. This means that it is possible to make direct comparisons between the CJEU and the EFTA Court in this field of law. As of August 2023, the EFTA Court had ruled on 18 cases of social security coordination, either under Regulations (EEC) Nos 1408/71 and 574/72 or Regulations (EC) Nos 883/2004 and 987/2009, depending on the relevant period. Ten cases concern Norway, six Liechtenstein and two Iceland.

Over the years, the CJEU has ruled on a large number of social security issues, thus covering most legal aspects of the coordination. The EFTA Court, on the other hand, has only covered a smaller number of aspects: Applicable legislation (three cases) family benefits (two cases), sickness benefits (five cases), unemployment benefits (three cases) and administrative cooperation (three cases). In addition, concerning social protection there has been e.g. one case on equal treatment of women and men, which will not be dealt with in this Report.

In all 18 rulings the EFTA Court cites relevant rulings from the CJEU, and the findings and conclusions seem to rely wholly or partly on the jurisprudence of the CJEU – more often wholly than partly. An analysis of all rulings shows that most of them follow the same line as rulings of the CJEU in comparable cases, while some add new elements and deal with questions the CJEU has not so far been asked to rule on. Some could even be seen as going into another direction than the rulings of the CJEU. Of course, these rulings also have to be seen in the specific light of the concrete scenario in which they were given, where factual situations might not be comparable.

The Agreement on the European Economic Area (‘the EEA Agreement’) would provide a procedure to settle such differences (under Article 105 of that Agreement the EEA-Joint Committee should try to arrive at a uniform interpretation within the EU and the EEA), but it has never been applied to social security coordination. Therefore, further and more in-depth analysis of the rulings of the EFTA Court in comparison with the rulings of the CJEU is recommended to achieve greater knowledge and, if possible, a more synchronised means of interpretation in the EU and the EEA. This report is meant to be an incentive for such further steps and raise the interest of the readers in the very often neglected rulings of the EFTA Court.

2. Introduction

2.1. Preliminary remarks

Social security coordination is regulated within the EU through Regulations Nos 1408/71 and 574/72 or 883/2004 and 987/2009, depending on the temporal elements of a case. Their application has been extended to the EFTA States. In relation to the EEA States (Iceland, Liechtenstein and Norway), the EEA Agreement applies. In relation to Switzerland, social security coordination is provided by the EU-Swiss Agreement on Free Movement of Persons. However, the supervisory bodies are distinct. This Report explores how the highest EU and EFTA international courts, i.e. the CJEU and the EFTA Court, interpret the rules on coordination of social security, which in principle are exactly the same, but which are applicable through different instruments (Treaty on the Functioning of the European Union (TFEU) and the EEA Agreement).[1] It is interesting to analyse whether the two international courts learn from each other when dealing with similar issues related to social security coordination within Europe.

This Report starts with some general remarks on the legal framework applicable to the CJEU and the EFTA Court (Parts 2.3. and 2.4.). The focus is on the different rulings of the EFTA Court in the field of social security coordination; each ruling is analysed and the relationship with the rulings of the CJEU is elaborated on; the rulings are not dealt with in their chronological order but corresponding to the matter they concern (Part 3.). Finally, these different analyses are evaluated from a cross-cutting perspective (Parts 4.1. and 4.2.) and conclusions are drawn, especially on what further actions could be taken (Part 4.3.).

2.2. Glossary

Throughout the report, the following abbreviations are used:

“AG” = Advocate General.

"CJEU” = Court of Justice of the European Union.

“Coordination Regulations” = Regulations 1408/71 and/or 574/72 and/or Regulation 883/2004 and/or 987/2009 as the case may be (especially when reference would have to be made otherwise to both sets of Regulations).

“E 101” = A document issued by the competent EEA state, confirming an individual’s applicable legislation under Regulations 1408/71 and 574/72. See also “PD A1”.

“E 121” = A document issued by the competent EEA state, confirming rights to health care for pensioners and their family members under Regulations 1408/71 and 574/72. See also “PD S1”.

“E 213” = A form used for a detailed medical report issued by a doctor in the insured person’s state of residence when the person does not reside in the competent EEA state.

[1] As under the EU-Swiss Agreement on Free Movement only the national Swiss courts are competent, the application of the coordination rules in relation to Switzerland are not covered in this Report as it is not the scope of this report.

"ECJ" = European Court of Justice

"EEA Agreement" = Agreement on the European Economic Area of 2.5.1992.

"EEA State" = EU MS and Iceland, Liechtenstein and Norway.

"EFTA" = European Free Trade Association.

"EFTA EEA State" = Iceland, Liechtenstein and Norway.

"EHIC" = European Health Insurance Card[2].

"ESA" = EFTA Surveillance Authority.

"MS" = Member State of the EU.

"PD A1" – Portable Document A1 = A document issued by the competent EEA state, confirming an individual's applicable legislation under Regulations (EC) No 883/2004 and (EC) No 987/2009. See also "E101".

"PD S1" – Portable Document S1 = A document issued by the competent EEA state, confirming rights to health care under Regulations (EC) No 883/2004 and (EC) No 987/2009. See also "E121".

"Regulation 1612/68" = Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2; [which has been replaced by Regulation (EC) No. 492/2011 of the European Parliament v. OJ L 141, 27.5.2011, p. 1].

"Regulation 1408/71" = Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2, as amended.

"Regulation 574/72" = Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27.3.1972, p. 1, as amended.

"Regulation 883/2004" = Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1, as amended.

"Regulation 987/2009" = Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1.

"RoP CJEU" = Rules of Procedure of the CJEU.

"RoP EFTA" = Rules of Procedure of the EFTA Court.

"S1" = see PD S1.

"SCA" = Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement").

[2] As defined by Decision S2 of the Administrative Commission OJ C 106, 24.4.2010, p. 26.

2.3. General Principles of the EEA Agreement

The EEA Agreement was concluded in 1992 between the EU and seven EFTA countries, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland[3]. The agreement entered into force on 1.1.1994. In 1995 Austria, Finland and Sweden joined the EU, and since then the EFTA Pillar of the agreement has consisted of Iceland, Liechtenstein and Norway while the list of signatories has been extended progressively to cover the accession of additional Member States (while the UK is no longer a contracting party following its withdrawal from the EU).

The EEA Agreement consists of a main part that has never been revised, and 22 annexes and 49 protocols. The annexes and protocols are updated on a regular basis to reflect developments in EU legislation relevant for the EEA. One example is Annex VI, which consists of the Social Security Coordination Regulations (Regulations 883/2004, 987/2009 with later amendments and changes).

In this way the EEA Agreement is dynamic concerning developments within the EU in the field of social security coordination when the amendments to the Coordination Regulations are included also through corresponding Decisions of the EEA-Joint Committee. But this does not mean that all provisions relevant for the coordination of the social security systems are applicable in the EEA in the same way as within the EU. One example, that will be discussed in relation to the judgment in case E-8/20, *N*, is that Article 21 TFEU ("Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States […]")[4] is not included in the EEA Agreement.

The scope of the EEA Agreement is defined in Article 1 (2) of the Agreement:

Article 1 (2) of the EEA Agreement

> In order to attain the objectives set out in paragraph 1[5], the association shall entail, in accordance with the provisions of this Agreement:
>
> (a) the free movement of goods;
>
> (b) the free movement of persons;
>
> (c) the free movement of services;
>
> (d) the free movement of capital;
>
> (e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as
>
> (f) closer cooperation in other fields, such as research and development, the environment, education and social policy.

The scope of the EEA Agreement is more limited than the EU Treaties, but for free movement of workers and social security coordination, the same regulations apply (cfr.

[3] Switzerland subsequently decided not to take part.

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E021

[5] The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

Annex V and Annex VI to the EEA Agreement, respectively). This means that it is possible to make direct comparisons between the CJEU and the EFTA Court in this field of law. It should however be noted that due to the so-called "two-pillar structure" of the EEA Agreement, new directives and regulations are normally adopted later in the EFTA States than in the EU. One well-known example from social security coordination is that Regulations 883/2004 and 987/2009 took effect on 1.5.2010 in the EU, but only on 1.6.2012 in the EFTA Pillar. This meant that different rules applied, e.g. for applicable legislation, for more than two years.

The two-pillar structure of the EEA Agreement means that important functions in the EU institutions are duplicated in the EFTA pillar. For this report, the relevant functions are the monitoring function (the European Commission in the EU, the ESA in the EFTA Pillar), and the two Courts, the CJEU and the EFTA Court. Both EFTA functions are established in a separate Agreement between the EFTA States, the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement" - SCA).[6]

This two-pillar structure implies that the EU side and the EFTA side are to supervise and control their internal matters separately and independently. In the event of a dispute on the interpretation or application of the EEA Agreement between institutions in the EU and the EFTA pillars, Article 105 of the EEA Agreement foresees a procedure for synchronising the rulings of the two courts and Article 111 of the EEA Agreement a procedure for reaching an agreement between the Contracting Parties in the EEA Joint Committee. This possibility to achieve homogeneity and the dispute settlement procedure have never been used, seeming to indicate that cooperation between the two pillars in the EEA Agreement functions well in practice.

For more information on the EEA Agreement and the Agreement on ESA and the EFTA Court, see https://www.efta.int/Legal-Text/EEA Agreement-1327.

The following provisions of the EEA Agreement relate to the coordination of social security systems:

Article 28 of the EEA Agreement (corresponds to Article 45 TFEU)

> 1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of EC Member States and EFTA States for this purpose;
>
> (c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

[6] https://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols/Surveillance-and-Court-Agreement-consolidated.pdf

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

Article 29 of the EEA Agreement (corresponds to Article 48 TFEU)

In order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Contracting Parties.

Article 36 of the EEA Agreement (corresponds to Article 56 TFEU)

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.

2.4. Comparison of the legal framework and the underlying principles of the two courts

Both courts have a comparable function, but the legal structure is not always the same.

Table 1 - Comparison of the rules concerning the CJEU and the EFTA Court

	CJEU	EFTA Court
Seat	Luxembourg	Luxembourg
Legal basis	TFEU (Articles 251-281)	SCA, part IV (Articles 27 to 41)
Composition	27 Judges • Sit in chambers (3-5 Judges) • Grand Chamber (15 Judges) • Full Court (not relevant for social security) 11 Advocates General 1 Registrar	3 Judges 1 Registrar

	CJEU	EFTA Court
How can cases concerning the Coordination Regulations come to the court?	• Infringement procedure by the Commission against a MS (Article 258 TFEU) • Infringement procedure by an MS against another MS (Article 259 TFEU) • Action of annulment by an MS, the European Parliament, Council or the Commission (Article 263 TFEU) • Preliminary rulings asked for by a national court (Article 267 TFEU)	• Infringement procedure by ESA against an EFTA EEA state (Article 31 SCA) • Infringement procedure by an EFTA EEA State against another EFTA EEA State (Article 32 SCA) • Advisory opinions asked for by a national court (Article 34 SCA) • Action of annulment by an EFTA EEA State or by an affected individual against a decision from ESA (Article 35 SCA)
Languages used	Language of the Member State concerned;[7] the preliminary questions, opinion of the Advocate General and rulings usually are translated into all official EU languages	Language of the EFTA EEA State concerned and English
Possible judgements	• Judgement (Article 86 et seq. RoP CJEU) • Order (Article 99 RoP CJEU)	• Judgement (RoP EFTA Article 81) • Order (RoP EFTA 83)
Steps in the procedure before the Court if asked by a national court	• Questions of the national court • Observations submitted by the parties involved, MS, EFTA EEA States, the Commission, the ESA • [Oral hearing – not necessarily] • [Opinion of the Advocate General – not necessarily] • Ruling	• Questions of the national court • Observations submitted by the parties involved, EFTA EEA States, MS, the Commission, the ESA • Report for the hearing. From 2022, the report includes written observations submitted to the Court. • [Oral hearing – not necessarily, see RoP EFTA Article 70] • Ruling
Effect of a ruling	Binding for the national court	Advisory opinion for the decision of the national court

[7] As working documents, the statements of intervening parties are translated to French,., However, these are not official documents.

3. Rulings of the EFTA Court on social security coordination

3.1. General remarks concerning the rulings of the EFTA Court

The analysis of the rulings of the EFTA Court in this report uses the following structure:

Factual situation and procedures: The main elements which are necessary to understand the situation and the reason for the questions put before the EFTA Court are explained.

Relevant EEA law: Only those provisions of EEA law mentioned by the EFTA Court which are of predominant importance for the case are replicated. As all cited provisions of Regulations 1408/71, 574/72 and 1612/68 as well as those of Regulations 883/2004 and 987/2009 are based on Articles 28 and 29 EEA, these provisions of the EEA are not replicated, but a reference is made to them, whenever they are important for the case. The provisions of national law are also not replicated but only their content, if relevant for a better understanding of the case, is explained under “Factual situation and procedures”.

Questions referred to the EFTA Court: The concrete questions are replicated as the answers of the EFTA Court always refer to them.

Findings of the EFTA Court: The main reasoning of the EFTA Court is summed up and made as concise as possible. This part ends with the concrete answers of the EFTA Court, which are replicated.

Rulings of the CJEU cited by the EFTA Court: Those rulings of the CJEU which concern social security coordination and are explicitly mentioned by the EFTA Court are listed with a short explanation of the purpose for which they are mentioned. The paragraph of the ruling of the EFTA Court where these rulings of the CJEU are mentioned is indicated. This is important to better understand the referencing technique of the EFTA Court. Rulings which are mentioned by the parties of the case are not mentioned when the EFTA Court did not refer to them. References of the EFTA Court to its own rulings are not mentioned.

Analysis: In this final part concerning every ruling of the EFTA Court, the main conclusions concerning the impact of the ruling are drawn, including a comparison with the way the CJEU has already dealt with comparable issues, if applicable. This analysis is more detailed when it is important to see trends or disparities compared to the CJEU. Finally, if possible, an assessment is made of whether the ruling could also be of interest for MS or whether their application in the MS could be doubtful taking into account different approaches of the CJEU.

3.2. List of rulings of the EFTA Court on coordination of social security systems

Table 2 - Chronologic list of rulings of the EFTA Court[8]

Nr.	Date	Parties	State	Provisions
E-3/04	14.12.2004	Tsomakas	Norway	Applicable Legislation: Title II Reg. 1408/1
E-3/05	3.5.2006	ESA v. Norway	Norway	Equal Treatment: Art. 3 Reg. 1408/71
E-5/06	14.12.2007	ESA v. Liechtenstein	Liechtenstein	Sickness: Title III/1 Reg. 1408/71
E-4/07	1.2.2008	Porkelsson	Iceland	Pensions: Title III/2 and 3 Reg. 1408/71
E-11/07 + 1/08	19.12.2008	Rindal and Slinning	Norway	Sickness: Art 36 and 37 EEA
E-3/12	20.3.2013	Jonsson	Norway	Unemployment: Art. 71 Reg. 1408/71
E-6/12	11.9.2013	ESA v. Norway	Norway	Family benefits: Art. 1(f)(i) and 76 Reg. 1408/71
E-13/15	16.12.2015	Bautista	Liechtenstein	Administrative cooperation: Art. 87 Reg. 987/2009
E-24/15	2.6.2016	Waller	Liechtenstein	Administrative cooperation: Art. 87 Reg. 987/2009
E-11/16	20.7.2017	Mobil Betriebskrankenkasse	Norway	Administrative cooperation: Art. 93 Reg. 1408/71
E-2/18	14.5.2019	Concordia	Liechtenstein	Sickness: Title III/1 Reg. 883/2004
E-8/20	5.5.2021	Criminal proceedings against N	Norway	Sickness: Art. 36 EEA and Art. 21 Reg. 883/2004
E-13/20	30.6.2021	O v. Arbeids- og velferdsdirektoratet	Norway	Unemployment: Title III/6 Reg. 883/2004
E-15/20	30.6.2021	Criminal proceedings against P	Norway	Unemployment: Title III/6 Reg. 883/2004
E-1/21	14.12.2021	ISTM International Shipping & Trucking Management	Liechtenstein	Applicable legislation: Art. 13 Reg. 883/2004 and Art. 14 (5a) Reg. 987/2009
E-5/21	29.7.2022	Einarsdóttir	Iceland	Sickness: Art. 6 and 21 Reg. 883/2004

[8] The following part, which will analyse every ruling, will not be based on this chronologic order but will group the rulings corresponding to their content.

Nr.	Date	Parties	State	Provisions
E-2/22	29.7.2022	A v. Arbeids- og velferdsdirektoratet	Norway	Family benefits: Art 3 Reg. 883/2004
E-5/22	24.1.2023	Maitz	Liechtenstein	Applicable legislation: Title II Reg. 883/2004 and Art 19 Reg. 987/2009

3.3. Analysis of the judgements

3.3.1. Rulings on applicable legislation

3.3.1.1. Case E-3/04, Tsomakas

Factual situation and procedures

Greek mariners who resided in Greece, were employed and remunerated by an enterprise with a place of business in Greece and worked on vessels registered with the Norwegian International Ship Register. The Norwegian competent institution requested E 101s from the Greek institution, which were issued in most cases but not all and especially not for the plaintiff. The Norwegian competent institution decided that due to the decision of the Greek competent institution not to issue the E 101, Norwegian legislation was applicable.

Relevant EEA law

Important for the case: Article 13 (2) (c) and Article 14b (4) of Regulation 1408/71.

Question referred to the EFTA Court

The national Norwegian court asked the EFTA Court if it was compatible with Regulation 1408/71 that if no E 101 was issued by the MS of residence of the person concerned that the flag MS assumed the legislation of the flag State applies. The following question was asked of the EFTA Court:

Is it compatible with the choice of law rules contained in Title II of Regulation (EEC) No 1408/71, that the flag State proceeds from the premise that the State of residence must have issued a form E 101 or a statement containing information equivalent to that found in form E 101, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c)?

Findings of the EFTA Court[9]

The obligation of sincere cooperation obliges the flag MS to assess whether the conditions under Article 14 b (4) of Regulation 1408/71 are met when the MS of residence of the person concerned has not issued an E 101. It must evaluate other evidence presented to it including unofficial evidence. Therefore, an E 101 is not a precondition for the application of Article 14 b (4) of Regulation 1408/71. If the flag MS comes to the conclusion that the conditions of this article are met, it must notify the MS of residence of this. If the MS of residence does not agree with this conclusion, this dispute has to be settled, if necessary by referring the case to the EFTA Joint Committee.

Answer of the EFTA Court:

It is not compatible with the choice of law rules contained in Title II of Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and as referred to in Annex VI, point 1 to the EEA Agreement, that a flag State proceeds from the premises that a State of residence must have issued a form E 101 or a statement containing equivalent information, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c).

Rulings of the CJEU cited by the EFTA Court

Case C-196/90, 4.10.1991, *Fonds voor Arbeidsongevallen v. De Paep*, ECLI:EU:C:1991:381: Title II of Regulation 1408/71 shall ensure simultaneous application of the legislation of more than one MS or the lack of any coverage by a social security system is avoided (cited in para. 27).

Case C-202/97, 10.2.2000, *FTS*, ECLI:EU:C:2000:75: The aim of the E 101 certificate is to facilitate the implementation of Regulation 1408/71 and the free movement of workers (cited in para. 29).

Cases C-178/97, 30.3.2000, *Banks a.o*., ECLI:EU:C:2000:169 and C-202/97, 10.2.2000, *FTS*, ECLI:EU:C:2000:75: Due to the obligation of sincere cooperation, MS must carry out a proper factual assessment and guarantee the correctness of an E 101 (cited in para. 30). Once a form E 101 (or an equivalent official statement) is issued, it is binding on other MS; the issuing institution of the MS of residence has to reconsider and if necessary withdraw the document when the flag MS doubts its correctness (cited in para. 31).

Analysis

This ruling of the EFTA Court could be seen as the “missing link” in many rulings of the CJEU on the binding effect of the E 101 form (now PD A1). While the CJEU has had to deal with situations in which such a form has been issued by a MS and is contested by another

[9] Case E-3/04, 14.12.2004, T*somakas Athanasios and Others with Odfjell ASA as an accessory intervener v. The Norwegian State*, [2004] EFTA Ct. Rep. 95.

MS,[10] or has been withdrawn independently,[11] this ruling of the EFTA Court dealt with the opposite situation, in which no such form had been issued and the question arose as to whether this means that in such cases the legislation of that MS which would be competent, applies automatically if a special rule is not applicable. This concerns e.g. cases like the one dealt with, in which the general rule of Article 13 (2) (c) of Regulation 1408/71 is applicable when the specific conditions of Article 14 b (4) of that Regulation are not fulfilled, or more generally, in which e.g. the general rule of Article 11 (3) (a) of Regulation 883/2004 (*lex loci laboris*) is applicable when the specific conditions for the exemption from that rule under Article 12 of Regulation 883/2004 (posting) are not fulfilled. The EFTA Court clarified that such an automaticity would not be correct and that the MS which would be competent under the general rule must carefully examine whether or not the conditions of the specific rule are fulfilled and in the event of doubt start a dialogue with the other MS which would be competent under the specific rule. The CJEU has up until now only once[12] had to deal with a comparable situation.

In this ruling by the EFTA Court is one new element compared to rulings from the CJEU. The latter clearly indicated that only E 101 or PD A1 forms can produce in another MS a binding effect and other documents, e.g. national decisions can never have such an effect and overrule an E 101 or PD A1 issued afterwards, which was the situation in the *Alpenrind* case.[13] Even when an E 101 has been used for the purposes of another instrument than the Coordination Regulations (e.g. the Rhine Agreement for boatmen[14]), the CJEU decided that it cannot have the binding force of the same document issued under these Regulations.[15] Compared to this rather restrictive interpretation of the CJEU, the EFTA Courts seems to give other "equivalent official statements" the same legal value as the E 101 or PD A1.[16] Of course, this ruling of the EFTA Court concerned a case where no other State has issued an E101 or PD A1 for the same case. This seemingly more extensive interpretation of the content of the term "documents issued by the institution of a Member State and showing the position of a person for the purposes of the application" of the Coordination Regulations used in Article 5 of Regulation 987/2009 is repeated and explained in more detail in case E-5/22, *Maitz*.[17]

Taking into account that the CJEU has not up until now – with one exception – had to deal with the situation in which no E 101 or PD A1 had been issued, this aspect of the ruling of the EFTA Court could also be of interest for the EU MS, but that is probably not the case of the ruling in relation to the binding effect of other documents.

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[10] Case C-527/16, 6.9.2018, *Alpenrind a.o*., ECLI:EU:C:2018 :669; but also cases C-178/97, 30.3.2000, *Banks a.o.*, ECLI:EU:C:2000:169; C-202/97, 10.2.2000, *FTS*, ECLI:EU:C:2000:75; C-3/98, 5.10.2000, *Schacht a.o*., [not published]; C-115/11, 4.10.2012, *Format Urządzenia i Montaże Przemysłowe*, ECLI:EU:C:2012:606; C-356/15, 11.7.2018, *Commission v. Belgium*, ECLI:EU:C:2018:555; C-620/15, 27.4.2017, *A-Rosa Flussschiff*, ECLI:EU:C:2017:309; C-359/16, 6.2.2018, *Altun a.o*., ECLI:EU:C:2018:63; C-474/16, 24.10.2017, *Belu Dienstleistungs GmbH and Nikless,* ECLI:EU:C:2017:812; C-17/19, 14.5.2020*, Bouygues traveaux publics,* ECLI:EU:C:2020:379.

[11] In case C-422/22, 16,11,2023, *ZUS v TE*, ECLI:EU:C:2023:869, the Polish competent institution withdrew a PD A1 certificate without initiating the dialogue and conciliation procedure laid down in Article 76(6) of Regulation 883/2004. The certificate was issued based on the fact that the recipient was self-employed in both Poland and France. On a review, the Polish institution found that he performed all his professional activity in France, and they subsequently withdrew the certificate. The CJEU ruled in favour of the Polish institution, saying that it is not obliged to initiate a dialogue procedure with another MS as long as the institution that issued the certificate finds that it was based on incorrect evidence.

[12] Case C-33/21, 19.5.2022, *INAIL und INPS [Ryanair]*; ECLI:EU:C:2022:402, where the CJEU did not refer to the ruling of the EFTA-Court in case E-3/04.

[13] Case C-527/16, 6.9.2018, *Alpenrind a.o.,* ECLI:EU:C:2018 :669; C-17/19, 14.5.2020, para. 75.

[14] https://www.ccr-zkr.org/12060300-en.html

[15] Cases C- 72/14 and C-197/14, 9.9.2015, *X and van Dijk*, ECLI:EU:C:2015:564.

[16] Para. 31 of the Judgement of the EFTA Court.

[17] Case E-5/22, 24.1.2023, *Christian Maitz v. AHV-IV-FAK*, para. 31 and 33.

3.3.1.2. Case E-1/21, *ISTM*

Factual situation and procedures

ISTM International Shipping & Trucking Management is a limited liability company under Liechtenstein law with a registered office in Liechtenstein; it is in the business of transport on inland waterways (the Rhine). The employees of ISTM reside in Germany, the Netherlands or Czechia and habitually exercise their activities in more than one MS (Belgium, France, Germany, Luxembourg, the Netherlands); the activity in each MS of residence is never substantial.

The Liechtenstein institution decided that the employees were not subject to Liechtenstein legislation, as ISTM did not make the essential decisions and carry out the central administrative functions of its business operations at its registered office in Liechtenstein. This decision was taken even though in some cases the institution of the employees' place of residence had already provisionally determined that Liechtenstein was the competent MS and that these determinations had become final.

Relevant EEA law

Important for the case: Article 13 of Regulation 883/2004, Articles 14 (5a) and 16 (1) to (4) of Regulation 987/2009.

Question referred to the EFTA Court

The referring national court wanted to know if the registered office under national law[18] was sufficient to be regarded as the registered office within the meaning of Article 13 of Regulation 883/2004. How are the criteria cited in Article 14 (5a) of Regulation 987/2009 to be understood? What effect has a provisional determination of the institution of the place of residence under Article 16 of Regulation 987/2009? The EFTA Court was asked the following questions:

I. Registered office of an undertaking

1. Does the registered office (statutarischer Sitz or satzungsmässiger Sitz) of an undertaking suffice to be regarded as the registered office (Sitz) within the meaning of Article 13(1)(b)(i) 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 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and thus as a connecting factor for subjecting the employees of the undertaking to the legislation of the Member State in which the registered office (statutarischer Sitz or satzungsmässiger Sitz) is situated?

[18] It might be that for this question the German wording used by the referring court "statutarischer (satzungsmässiger) Sitz" has a slightly different meaning from the "Sitz" which is used in Article 13 of Regulation 883/2004; as it means only the seat of an undertaking as indicated in the statutes of the undertaking.

2. If Question 1 is answered in the negative: According to which criteria must the registered office (statutarischer Sitz or satzungsmässiger Sitz) or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, as provided for in Article 14(5a) of Regulation (EC) No 987/2009, be determined? For these purposes, must reference be had to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems, as set out in Part II, Section 7 (page [35] et seq.) of the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland of December 2013?

II. Questions on the interpretation of Article 16(3) of Regulation (EC) No 987/2009:

1. From what time is the institution of the Member State in which the person pursues an activity regarded as having been informed of the provisional determination by the institution of the place of residence? Does it suffice when, in whatever form, the provisional determination reaches the institution of the place in which the person pursues an activity (for example via the undertaking or the employee)?

2. Is the "definitive nature" of the determination of the applicable legislation that arises as a result of the two-month period expiring without use being made of it not susceptible to further challenge by the designated institution of the Member State and, in particular, even where the person concerned does not pursue any activity in this Member State?

3. If Question II (2) is answered to the effect that the determination, notwithstanding the fact that it has become definitive, may be challenged: What are the legal consequences? Can this result in a retroactive setting aside of the determination?

Findings of the EFTA Court[19]

The rules under Title II of Regulation 883/2004 on the applicable legislation cannot be applied in such a way that employers are able to resort to purely artificial arrangements in order to exploit legal acts incorporated into the EEA Agreement with the sole aim of obtaining an advantage from the differences that exist between the national rules. Therefore, the mere presence of a registered office is not sufficient for the competence of a MS.

For the determination of the registered office under Article 14 (5a) of Regulation 987/2009, the place where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out is essential and should have the same meaning as in the *Planzer* ruling of the CJEU[20]. A series of factors have to be taken into consideration. Foremost amongst these are the registered office, the place of the central administration, the place where the directors meet and the place, usually identical, where the general policy of the company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account. A letterbox company cannot fulfil these requirements.

The provisional determination of the applicable legislation by the institution of the MS of residence under Article 16 of Regulation 987/2009 can only become final when the

[19] Case E-1/21, 14.12.2021, *ISTM International Shipping & Trucking Management GmbH v. AHV-IV-FAK*.

[20] Case C-73/06, 28.6.2007, *Planzer Luxembourg*, ECLI:EU:C:2007:397 (cited subsequently in relation to this case).

information is sent by this institution to the institutions where the activity is exercised. Any other route (e.g. the presentation by the employer or the person concerned) is not sufficient.

In the event of a dispute (which is also the case when the MS designated as competent by the institution of the place of residence of the person concerned thinks that it is not competent), the institutions involved have to follow the procedure provided under the Coordination Regulations (especially Articles 16 (4) of Regulation 987/2009 and 6 of Regulation 987/2009). There is no time limit for the application of this procedure. Therefore, the determination of the institution of the place of residence of the person concerned may have to be re-examined even when it has become final (especially when it did not reflect the person's objective situation). In such a case the new decision has retroactive effect (Article 6 (4) of Regulation 987/2009), and Article 73 of Regulation 987/2009 govern the contributions paid and benefits granted in the meantime.

Answer of the EFTA Court:

"1. Point (b)(i) of Article 13(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, read in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, must be interpreted as meaning that the mere presence of the registered office of an undertaking does not suffice for the purposes of that provision. In determining where the essential decisions of an undertaking are adopted and where the functions of its central administration are carried out, in accordance with Article 14(5a) of Regulation (EC) No 987/2009, a series of factors must be taken into consideration. These factors include its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account.

2. In order for a provisional determination to become definitive in accordance with Article 16(2) and (3) of Regulation (EC) No 987/2009, the designated institution of the place of residence must have informed the designated institutions of each EEA State in which an activity is pursued. It does not suffice for the purposes of Article 16 (2) and (3) of Regulation (EC) No 987/2009 if the provisional determination reaches the designated institution of an EEA State in which an activity is pursued in whatever form, such as through the undertaking or person concerned."

Rulings of the CJEU cited by the EFTA Court

Case C-610/18, 16.7.2020, *AFMB Ltd. a.o.*; ECLI:EU:C:2020:565: an exploitation of the provisions of the Coordination Regulations could lead to a "race to the bottom" of social security systems (cited in para. 23). The coverage of a person depends not on the free choice of the employed person, employers or competent national authorities, but on the objective situation of the employed person (cited in para. 35). The institution is obliged, irrespective of its previous decisions, to base its findings on the employed person's actual situation (cited in para. 36). The Coordination Regulations provide for the information and cooperation mechanism to ensure the correct application of the Regulations (cited in para. 37). Articles 76 of Regulation 883/2004 and 16 of Regulation 987/2009 contain the necessary procedures for the correct application of Article 13 of Regulation 883/2004 (cited in para. 37).

Case C-784/19, 3.6.2021, *Team Power Europe,* ECLI:EU:C:2021:427: The Coordination Regulations do not have the purpose of allowing "forum shopping" (cited in para. 23).

Case C-631/17, 8.5.2019, *Inspecteur van de Belastingdienst*, ECLI:EU:C:2019:381: As to the criteria for determining where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, the Practical Guide of the Administrative Commission is only a tool for interpretation, but it is not legally enforceable (cited in para. 25).

Case C-73/06, 28.6.2007, *Planzer Luxembourg*, ECLI:EU:C:2007:397: The interpretation of the registered office in Regulation 883/2004 took this ruling as a basis (cited in para. 26). This ruling lists the elements which may be taken into account (cited in para. 27). A letterbox company cannot be considered to be the registered office (cited in para. 28).

Case C-345/09, 14.10.2010, *van Delft a.o.,* ECLI:EU:C:2010:610: The applicable legislation is binding for the MS and depends only on the objective situation of the persons concerned (cited in para. 35).

Case C-543/13, 4.6.2015, *Fischer-Lintjens*, ECLI:EU:C:2015:359: The continuation of the coverage by the legislation of a MS must not be changed by discretionary decisions of the person concerned or the authorities involved (cited in para. 35).

Case C-527/16, 6.9.2018, *Alpenrind a.o.*, ECLI:EU:C:2018:669: The institutions which decide on the applicable legislation are bound by the obligation of sincere cooperation and, therefore, have to guarantee the correctness of the information given (cited in para. 36).

Analysis

This ruling of the EFTA Court adds important clarity to the rulings already delivered by the CJEU (especially in the *AFMB* case). A later ruling of the CJEU support the opinion of the EFTA Court that it depends on the economic realities.[21] The main question concerns the determination of the competent MS under Article 13 of Regulation 883/2004 (when no substantial part of the activity is exercised in the MS of residence of the person concerned), when in one MS only formal criteria (the labour law contracts – *AFMB* case, or the statutory seat of an undertaking – *ISTM* case) are fulfilled, and whether this is sufficient to become the competent MS, because the registered office or place of business of the undertaking or employer is situated there. While in *AFMB* it was sufficient for the CJEU to state that the existence of a labour law contract with an undertaking was not enough to make it the person's employer, in *ISTM* the EFTA Court further analyses the criteria and elements which are decisive for the determination of the registered office or place of business of the undertaking or the employer. The EFTA Court sets forth the elements developed in the Practical Guide based on the CJEU's *Planzer Luxembourg* ruling.

In addition, the EFTA Court had to examine the procedural aspects of the determination of the applicable legislation by the institution of the place of residence of the person concerned. There is a difference in this respect between *AFMB* and *ISTM*. In the former case, the MS where the undertaking with which the labour law contracts had been concluded was not declared competent by the institution of the place of residence, in the latter case the MS, where the statutory seat of the undertaking is situated, did not accept the decision of the

[21] Cases C-410/21 and C-661/21, *DRV Intertrans*, ECLI:EU:C:2023:138, where the CJEU decided that a Community license for road transport issued by the competent authorities of a MS does not automatically constitute a proof that the registered office is in that MS.

MS of residence, i.e. that it was the competent institution. Thus, this case before the EFTA Court has elements of the E-3/04, *Tsomakas a.o*. case.[22]

Taking into account the new elements and clarifications in this ruling of the EFTA Court, it could also be of interest for the EU MS.

3.3.1.3. Case E-5/22, *Maitz*

Factual situation and procedures

The plaintiff is an Austrian national who transferred his residence from Austria to Switzerland. He was registered as a lawyer in Austria and was entitled to exercise the profession of lawyer in Austria. He was also registered as a lawyer in Liechtenstein. The plaintiff was only receiving income from the activity as a lawyer in Liechtenstein (where he was also insured in the general scheme for old age, invalidity and survivors) and none in Austria. He did not exercise any activity in Switzerland. Under Austrian legislation, registered lawyers have to pay contributions to the pension insurance scheme for lawyers unless they are covered by the social security scheme of another MS. The plaintiff was exempt from contributions to the Austrian scheme for lawyers. However, the Austrian institution requested a PD A1 to guarantee that Austrian legislation was not applicable. The Liechtenstein institution declared that its legislation was applicable but that it could not issue a PD A1. Nevertheless, they issued an official attestation on the plaintiff's coverage for old age in Liechtenstein.

Relevant EEA law

Important for the case: Articles 2 (1), 7, 11 (1), 13 of Regulation 883/2004, Articles 5 and 19 (2) of Regulation 987/2009.

Question referred to the EFTA Court

The referring court started with the question of whether the EEA Agreement requires that the person concerned must have his/her residence in an EEA State to make the Coordination Regulations applicable in the relationship between an EU-MS and Liechtenstein. What effect could the agreement between the EFTA EEA States and Switzerland have?

Is it necessary that the form indicating the applicable legislation must be issued in the format of the PD A1 or could it be also in another format? The following questions were asked of the EFTA Court:

1. Is it necessary for the scope ratione personae of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 166, p. 1), incorporated in the EEA Agreement by Decision of the EEA Joint Committee of 1 July 2011 (LGBl. 2012 No 202), that the Member State national who is subject to the legislation of one or more

[22] EFTA-Court case E-3/04, 14.12.2004, *Tsomakas a.o.,* [2004] EFTA Ct. Rep. 95.

Member States within the meaning of Article 2(1) of that Regulation is resident in one of the Member States?

If the answer to that question is in the negative:

Can an agreement concluded by the EU or an EEA Member State with a third country by which the scope of application of the Regulation mentioned was extended to the third country change the answer to this question?

2. Must an attestation within the meaning of Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), incorporated into the EEA Agreement by Decision of the Joint Committee of 1 July 2011 (LGBl. 2012 No 202), be issued necessarily by means of a form (PD A1) laid down by the Administrative Commission for the Coordination of Social Security Systems in order to produce the legal effects specified in Article 5(1) of that Regulation?

Findings of the EFTA Court[23]

The residence condition in Article 2 (1) of Regulation 883/2004 concerns only refugees and stateless persons. For EEA nationals it is not necessary that they reside in an EEA State. If a person falls within the personal scope of the Regulation, the principle that only one legislation applies has to be respected.

If Article 11 (3) (a) of Regulation 883/2004 applies, application depends on the legislation of the EEA State where the activity is exercised, whether under the legislation of that State the activity is recognised as an employed or self-employed activity (Article 1 (a) and (b) of Regulation 883/2004). The legislation of the EEA State of residence applies in particular only when it is an inactive person (Article 11 (3) (e) of Regulation 883/2004) or in the case of activities being habitually exercised in more than one EEA State (Article 13 of Regulation 883/2004).

An EEA State cannot make the rights conferred by EEA law subject to the provisions of another international agreement. This applies to an agreement concluded between an EEA State and a third State. Therefore, an agreement concluded with a third State cannot have any influence on the legislation applicable between the EEA States under Title II of Regulation 883/2004. The fact that the third State, for its part, is or is not obliged to comply with any obligation stemming from EEA law cannot be of relevance in this assessment. The principle of equal treatment obliges an EEA State which has concluded an agreement with a third State to grant the same advantages to the nationals of the other EEA States as it grants its own nationals under this agreement, unless there is an objective justification not to do so.

Concerning the forms to be used for the purpose to determine applicable legislation, Recommendation No A1 of the Administrative Commission[24] has been taken note of by the EEA States in the context of the EEA Agreement. This Recommendation points out that the Administrative Commission determines the content and the structure of the PD A1. The PD A1 must be accepted by the relevant institutions under Regulation 987/2009. Under Article 5 of Regulation 987/2009 a document issued for the purposes of the Coordination

[23] Case E-5/22, 24.1.2023, *Christian Maitz v. AHV-IV-FAK*.

[24] Recommendation No. A1 of the Administrative Commission of 18 October 2017 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council, OJ C 183, 29.5.2018, p. 6.

Regulations is binding as long as it has not been withdrawn. A decision of the Administrative Commission cannot oblige the EEA States to use certain methods or adopt certain interpretations. Therefore, Recommendation No A1 cannot force the institutions of the EEA States to adopt a particular form of documentation when fulfilling its obligations under Article 19 (2) of Regulation 987/2009. The principle of sincere cooperation enshrined in Article 3 of the EEA Treaty obliges the issuing institution to draw up any document used for the purposes of Article 5 with the same care, regardless of whether or not the document takes the form of a PD A1. The institutions must correctly apply the Coordination Regulations even when no PD A1 is available. Article 19 (2) of Regulation 987/2009 does not prescribe any specific form or format for the attestation.

Article 19 (2) of Regulation 987/2009 obliges the EEA States to provide an attestation that the entirety of the legislation of an EEA State applies and not only a specific part of it. Therefore, such a restricted attestation (which concerns only pension insurance) as that in the case before the EFTA Court does not fulfil the requirements of Article 19 (2) of Regulation 987/2009.

Answer of the EFTA Court:

"1. It is not a condition under Article 2(1) of Regulation (EC) No 883/2004 on the coordination of social security systems for nationals of an EEA State to also be resident in an EEA State in order to be covered by the personal scope of that regulation.

An agreement concluded by an EEA State with a third country, which aims to extend the scope of application of Regulation (EC) No 883/2004 to that third country, cannot impose the residence of an individual as a condition deviating from Articles 2 (1) and 11 of that regulation.

2. Article 19 (2) of Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 must be interpreted as not requiring an attestation to be issued exclusively in the form of a Portable Document A1 in order to produce the legal effects set out in Article 5 (1) of that regulation."

Rulings of the CJEU cited by the EFTA Court

Case C-784/19, 3.6.2021, *Team Power Europe,* ECLI:EU:C:2021:427: The Coordination Regulations prevent a person falling within the material scope of the Regulations not being protected because the legislation of no EEA State applies to him/her (cited in para. 36). The principle of only one applicable legislation (Article 11 (1) of Regulation 883/2004) has to be respected for any person falling within the personal scope of the Regulation (cited in para. 38 and para. 47). A person, who exercises an activity in one EEA State is usually subject to the legislation of that State (Article 11 (3) (a) of Regulation 883/2004 – cited in para. 40).

Case C-331/06, 3.4.2008, *Chuck*, ECLI:EU:C:2008:188: Only for refugees and stateless persons is the residence in an EEA State required in order to fall under the personal scope of the Coordination Regulations (cited in para 37). The rights under Regulation 883/2004 are limited to other EEA States (cited in para. 49).

Case C-266/13, 19.3.2015, *Kik*, ECLI:EU:C:2015:188: Title II of Regulation 883/2004 determines which EEA State's legislation is applicable (cited in para. 39).

Case C-451/17, 25.10.2018, *Walltopia*, ECLI:EU:C:2018:861: Title II of Regulation 883/2004 determines which EEA State's legislation is applicable (cited in para. 39).

Case C-527/16, 6.9.2018, *Alpenrind a.o.*, ECLI:EU:C:2018:669: A person who exercises an activity in one EEA State is usually subject to the legislation of that State (Article 11 (3) (a) of Regulation 883/2004 – cited in para. 40). The institution of the EEA State whose legislation applies, has to decide whether and for how long its legislation applies (cited in para. 53). A document issued for the purpose of application of the Coordination Regulations is binding as long as it has not been withdrawn (cited in para. 56).

Case C-569/15, 13.9.2017, *X v. Staatssecretaris van Financiën*, ECLI:EU:C:2017:673: For the application of Article 11 (3) (a) of Regulation 883/2004 it is necessary that the person concerned exercise an activity as an employed or self-employed person within the meaning of Article 1 (a) and (b) of Regulation 883/2004 (cited in paragraph 41).

Case C-801/18, 5.9.2019, *Caisse pour l'avenir des enfants*, ECLI:EU:C:2019:684: The fact that the third State, with which an EEA State has concluded an agreement, for its part, is or is not obliged to comply with any obligation stemming from EEA law cannot be of relevance (cited in para. 48). There is an obligation to treat the nationals of the other EEA States in the same way as the EEA State's own nationals under an agreement concluded with a third State (cited in para. 49).

Case C-102/91, 8.7.1992, *Knoch v. Bundesanstalt für Arbeit*, ECLI:EU:C:1992:203: A decision of the Administrative Commission cannot be binding for the EEA States (cited in para. 57).

Analysis

This ruling of the EFTA Court deals with a very important topic, the simultaneous applicability of more than one international instrument. This has especial relevance in the countries around Lake Constance where the following international instruments are applicable:

- EU law (Regulations 883/2004 and 987/2009) apply between EU MS (e.g. between Austria and Germany).
- The EEA Agreement (which declares Regulations 883/2004 and 987/2009 as applicable in the parties' relations) applies between the EU MS and the EFTA EEA States (Iceland, Liechtenstein and Norway e.g. between Austria and Liechtenstein).
- The free movement Agreement between the EU and Switzerland[25] (which declares Regulations 883/2004 and 987/2009 as applicable in these relations – e.g. between Austria and Switzerland).
- The EFTA Convention[26] between the EFTA EEA States (Iceland, Liechtenstein and Norway) and Switzerland (which declares Regulations 883/2004 and 987/2009 as applicable in these relations – e.g. between Liechtenstein and Switzerland).

[25] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21.6.1999 (OJ L 114, 30.6.2002, p. 6).

[26] Annex K Appendix 2 of the Convention establishing the European Free Trade Association, signed in Stockholm on 4.1.1960, as amended.

What is missing is the bridge between these different instruments where there are trilateral connecting factors.[27] However, even in the parallel application of more than one of these instruments, problems occur as the personal scope is restricted[28]:

- Under EU Law, in principle all persons concerned are covered either directly under the personal scope of Regulation 883/2004 (extended to the nationals of Iceland, Liechtenstein, Norway or Switzerland by the EEA Agreement or the free movement Agreement with Switzerland) or under Regulation 1231/2010[29] for any person not yet covered.

- Under the EEA Agreement only the nationals of the EU MS and the EFTA EEA States (Iceland, Liechtenstein and Norway) are covered.

- Under the free movement Agreement with Switzerland only the nationals of the EU MS and Switzerland are covered.

- Under the EFTA Convention only the nationals of the EFTA EEA States (Iceland, Liechtenstein and Norway) and Switzerland are covered.

While not mentioning it, the EFTA Court has in principle also applied the *Gottardo* judgement[30] in the relationship between these different instruments, as it states that Liechtenstein should be obliged to grant Austrian nationals the same rights in relation to Switzerland as its own nationals (although the EFTA Convention does not apply to Austrian nationals). Of course, in the *Gottardo* judgement, it was clear that this was only enforceable in a MS when it did not require cooperation with the third State, which in that case this State was not willing to accept.

The instruments concerned in the *Maitz* case are different from *Gottardo* because partners of the EU are involved in each case. Therefore, it could be argued that the EFTA Court sees an obligation to re-negotiate the EEA Agreement, the free movement agreement with Switzerland and the EFTA Convention, at least to broaden the personal scope of these instruments accordingly. It could be argued that from this point of view this ruling of the EFTA Court has the greatest impact of all this court's rulings in the field of social security coordination. This clear message from the EFTA Court is all the more astonishing in that this aspect was not relevant in the specific case on which it had to decide. The residence in Switzerland did not play a role in the answers to the questions as it was not important, and the case could have been solved solely on the basis of the EEA Agreement (in the same way as if the residence had been in another third State and not in Switzerland).

The statement of the EFTA Court that the residence of the person concerned is not relevant for the application of the Coordination Regulations does not add any new elements as the CJEU had already clarified that in the past (especially in the *Chuck* ruling).

What is interesting is that the EFTA Court again decided that the binding effect is not limited to the PD A1, but any other document issued by the institution of an EEA State for the purposes of the application of the Coordination Regulations must also have the same value

[27] The CJEU is asked to deal with that issue in the new case C-329/2023, *Sozialversicherungsanstalt der Selbständigen*.

[28] For the sake of clarity, the situation of family members and survivors as well as of refugees and stateless persons is not dealt with.

[29] Regulation (EU) No 1231/2010 of 24.11.2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1.

[30] CJEU case C-55/00, 15.1.2002, *Gottardo*, ECLI:EU:C:2002:16.

under Article 5 of Regulation 987/2009. Thus, the EFTA Court repeated the position it had already taken in the *Tsomakas*-case,[31] (see the analysis of the *Tsomakas*-case).

3.3.2. Rulings on sickness benefits

3.3.2.1. Case E-11/07 + E-1/08, *Rindal and Slinning*

Factual situation and procedures

Under Norwegian law, regional health undertakings are required to provide necessary (secondary) health care. If treatment cannot be provided within fixed time limits the patient is entitled to receive such treatment from private health service providers or service providers outside Norway. The necessary health care does not include experimental or test treatments (unless such treatment complies with sound professional practice). The national system does not require prior authorisation for treatment abroad; patients can go abroad immediately for treatment and claim reimbursement afterwards. Patients may however opt for prior authorisation in order to reduce their financial insecurity.

Ms Rindal was diagnosed with whiplash. Despite several treatments and operations, the back pain did not go away. Taking into account the dangers involved no further surgical treatment was offered in Norway. She received further surgical treatment in Germany, which seemed to improve her state of health. The reimbursement of the costs incurred was rejected on the grounds that treatment in Norway would have been possible, but it was not offered in order not to endanger Ms Rindal's health and the surgical intervention in Germany could not be considered to be the norm in international medical circles.

Ms Slinning suffered a serious brain injury. After treatment in Norwegian rehabilitation institutions she went to Denmark for rehabilitation arrangements which were not available in Norway at that time. Reimbursement of this treatment was rejected because adequate treatment was available in Norway although the treatment in Denmark could be regarded as more comprehensive and intensive, but that this treatment could also be considered as experimental and not scientifically documented.

Relevant EEA law

Important for the case: Article 36 (1) of the EEA Agreement and Article 22 of Regulation 1408/71.

Question referred to the EFTA Court

The referring national courts asked how the legal system and practice in Norway is in line with the freedom to provide services enshrined in Article 36 of the EEA Agreement.

Questions in the Rindal case:

1. Is it compatible with Articles 36 and 37 of the EEA Agreement and Article 22 of Council Regulation (EEC) No 1408/71 to refuse coverage of expenses for treatment abroad which

[31] Case E-3/04, 14.12.2004, *Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v. The Norwegian State*, [2004] EFTA Ct. Rep. 95.

according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State?

2. Is it of significance for the answer to Question No 1 that the method of treatment itself is internationally recognised and documented, but where this only applies to other medical indications than those which the patient in question has?

3. Is it compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit? Is it of significance for the answer to Question No 3 whether coverage of such expenses may be refused even if the treatment abroad is considered as possibly more advanced than the treatment in the home State?

4. Is it of significance for the answers to the questions above whether

a) the home State as a matter of fact does not offer the treatment received abroad?

b) the patient as a matter of fact has not been offered the treatment in question in the home State even if the treatment is offered there?

c) the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment?

d) the treatment given abroad actually resulted in an improvement of the specific patient's state of health?

Questions in the Slinning case:

1. Is it compatible with Articles 36 and 37 of the EEA Agreement and Article 22 of Council Regulation (EEC) No 1408/71 to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State?

2. Is it of significance for the answer to Question No 1 that the method of treatment in question must be considered to be implemented in the home State or the home State is considering its implementation in the future?

3. Is it compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit? Is it of significance for the answer to this question that

a) coverage of such expenses may be refused even if the treatment abroad is considered as possibly more advanced than the treatment in the home State?

b) the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage for the costs of treatment abroad to the same extent as the treatment offered in the home State would have cost?

4. Is it of significance for the answers to the questions above whether

a) the patient in question, within a medically justifiable time limit, as a matter of fact has not been offered a treatment in the home State which can be considered adequate treatment?

b) the treatment given abroad actually led to an improvement of the specific patient's state of health?

Findings of the EFTA Court[32]

First, the EFTA Court had to deal with the question of whether it is compatible with EEA Law for reimbursement to be refused because the treatment is considered to be experimental or a test treatment and when there is no entitlement to such treatment in the competent EEA State or if this treatment exists in the competent State but is only applied in case of other medical indications. As it was not clear whether an authorisation under Article 22 of Regulation 1408/71 had been sought, the case was only examined under Article 36 of the EEA Agreement. In any event, Article 22 would also allow a refusal of reimbursement when such a refusal would also be justified under Article 36 of the EEA Agreement. It is not decisive that a specific treatment be covered by the healthcare system of the other MS. The arguments which can be adduced in favour of a prior authorisation scheme for hospital care treatment abroad are also valid for experimental and test treatments, even when such treatment is used in the competent State, but the person in question has not been chosen for such a test. EEA law cannot oblige a MS to extend the range of medical services paid for.

Second, the EFTA Court had to decide whether it might be important that the treatment abroad might be more advanced or that it was apparently more expensive than the alternative treatment in Norway. The EFTA Court found that an experimental or test treatment usually is more advanced. Therefore, going abroad is motivated more by the intention to get a treatment which is more advanced than getting a treatment faster.

In cases of treatments that are not more advanced, even when there is no overcapacity to grant a specific treatment in the competent State, an obligation to reimburse the same treatment abroad, which was only sought to get treatment faster, without taking into account the individual situation of the person concerned, could undermine the health care system of the competent State.

If the treatment has to be regarded as more advanced, account must be taken of the fact that EEA States are not obliged to extend the range of their medical services. Even if a treatment is recognised in the competent State, this State may decide not to offer it (even when this State does not have an adequate alternative to the more advanced treatment abroad). If the competent State offers the same or equally effective treatment within a medically justifiable time limit, prioritising treatment in that State can be justified. When a treatment is established by international medicine as indeed more effective, there is no justification for prioritising home State treatment, even if the treatment abroad is "possibly" more advanced. Anyhow, when a treatment is successful in an individual case does not mean that this treatment is no longer experimental.

Answer of the EFTA Court:

1. It may be compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment when there is no entitlement to such treatment in the home State. Firstly, that will be the case if the system for reimbursement of costs for treatment abroad does not place a heavier burden on those who receive treatment abroad than on those who receive treatment in hospitals forming part of the social security system of the home State. Secondly, it will be the case if any such heavier burden only results from

[32] Case E-11/07 19.12.2008, *Olga Rindal and Therese Slinning v. Staten v/Dispensasjons - og klagenemnda for bidrag til behandling i utlandet*.

necessary and reasonable means being employed to attain aims which may legitimately justify restrictions on the free movement of hospital services.

2. It is without significance that the method of treatment itself is internationally recognised and documented for other medical indications than those which the patient in question has. It is without significance for the answer to the first question that the method of treatment in question must be considered to be implemented in a home State which only provides it in the form of research projects or, exceptionally, on a case-by-case basis. Nor does it matter that the home State is considering its implementation in the future.

3. It may be compatible with Articles 36 and 37 EEA to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a justifiable time limit. It is without significance for the answer to the third question that the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage for the costs of treatment abroad to the same extent as the adequate treatment offered in the home State would have cost.

4. It is without significance for the answers to the first question and to the third question, first paragraph, that

− the home State as a matter of fact does not offer the treatment received abroad;

− the patient as a matter of fact has not been offered the treatment in question in the home State, because the patient was never assessed for that treatment, even if the treatment is offered there;

− the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment;

− the treatment given abroad actually resulted in an improvement of the specific patient's state of health. However, it may be of significance to the third question, first paragraph, that the patient in question, within a medically justifiable time limit, as a matter of fact has not been offered an adequate treatment in the home State. This is so when the home State refuses to cover treatment abroad in a situation where it has not been able, within a medically justifiable time limit, to honour an obligation under its own social security law to provide the treatment to the patient in one of its own hospitals."

Rulings of the CJEU cited by the EFTA Court:

Case C-372/04, 16.5.2006, *Watts*, ECLI:EU:C:2006:325: Medical services fall within the scope of the provisions on the freedom to provide services (cited in para. 42). MS are free to organise their social security systems but must comply with relevant EEA law (cited in para. 43). Article 36 of the EEA Agreement precludes the provision of services in another MS being made more difficult than in the competent MS (cited in para. 44). It must be possible to challenge a decision which refuses a claim for reimbursement or to grant an authorisation (cited in para. 48). If a treatment granted abroad is not more advanced than in the competent MS and a national waiting list tries to manage the sustainability of the system taking into account the available resources, an obligation to reimburse the costs of the treatment abroad before entitlement under the national waiting list could endanger the national system (cited in para. 78).

Case C-157/99, 12.7.2001, *Geraets-Smits and Peerbooms*, ECLI:EU:C:2001:404: [In several places added to the references to the *Watts* judgement.] In addition: The freedom

to provide services not only protects the access to a treatment abroad but also the reimbursement of the costs (cited in para. 44). To decide whether a treatment is normal, recourse must be had to what has been sufficiently tried and tested by international medical science (cited in para. 50). For this purpose, all relevant information available must be taken into account (cited in para. 51). The aim of safeguarding sufficient and permanent access to high quality hospital treatment is one of the aims of justifying restrictions to the freedom to provide services (cited in para. 55). A system of prior authorisation appears to be necessary to achieve the goals of a sustainable system of hospital care (cited in para. 57). In case of the necessity of a prior authorisation, there must be an examination of whether the conditions can be justified (cited in para. 60). Prioritisation of the treatment in the competent State cannot be justified unless it can be provided within a medically justifiable time limit (cited in para. 83).

Case 238/82, 7.2.1984, *Duphar*, ECLI:EU:C:1984:45: To safeguard service providers abroad from discrimination, rules and standards for the cases in which benefits can be provided under national law, even when they are considered as experimental, must be based on objective and non-discriminatory criteria (cited in para. 48).

Case C-385/99, 13.5.2003, *Müller-Fauré and van Riet*, ECLI:EU:C:270: [In several places added to the references to the *Smits and Peerbooms* judgement.] In addition: The aim of safeguarding sufficient and permanent access to high quality hospital treatment is one of the aims justifying restrictions to the freedom to provide services (cited in para. 55). One specific treatment can never have a significant impact on the social security system of the competent State; an overall approach is necessary (cited in para. 56). References to national waiting lists as grounds for the refusal to reimburse the costs without taking into account the medical and personal circumstances of the person concerned cannot be justified (cited in para. 79). Reimbursement is limited to the costs of the treatment which the patient would have had in the competent State (cited in para. 86).

Analysis

This ruling is the “EEA branch” of the numerous rulings of the CJEU on the impact of the freedom to provide services on health care (especially hospital treatment) granted in another MS.[33] Its importance for the EEA States can also be seen from the high number of intervening States (Denmark, Iceland, the Netherlands, Poland and the United Kingdom, in addition to Norway). It deals with one of the trickiest questions of patient mobility. In principle, in the case of standard treatment abroad (e.g. in the case of appendicitis, the removal of the appendix), there will be no dispute about the question of whether the “same” treatment could also be granted in the competent State within a medically reasonable time. If a treatment has been granted in another State, and this treatment is not exactly the same as in the competent State, there is always the question of whether it is “comparable” to the national basket of treatments. Only then would the question of reimbursement occur, as EEA law does not oblige EEA States to harmonise their national basket of treatments. This applies especially to: treatment which might not be medically recognised in the competent State but is recognised in the State of treatment, experimental or test treatments, treatments

[33] Cases C-158/96, 28.4.1998, *Kohll*, ECLI:EU:C:1998:171; C-368/98, 12.7.2002, *Vanbraekel*, ECLI:EU:C:2001:400; C-157/99, 12.7.2001, *Geraets-Smits and Peerbooms*, ECLI:EU:C:2001:404; C-385/99, 13.5.2003, *Müller-Fauré and van Riet*, ECLI:EU:C:2003:270; C-56/01, 23.10.2003, *Inizan*, ECLI:EU:C:2003:578; C-8/02, 18.3.2004, *Leichtle*, ECLI:EU:C:2004:161; C-372/04, 16.5.2006, *Watts*, ECLI:EU:C:2006:325; C-444/05, 19.4.2007, *Stamatelaki*, ECLI:EU:C:2007:231; C-211/08, 15.6.2010, *Commission against Spain*, ECLI:EU:C:2010:340; C-512/08, 5.10.2010, *Commission against France*, ECLI:EU:C:2010:579; C-173/09, 5.10.2010, *Elchinov*, ECLI:EU:C:2010:581; C-255/09, 27.11.2011*, Commission against Portugal*, ECLI:EU:C:2011:695; C-490/09, 27.11.2011, *Commission against Luxemburg*, ECLI:EU:C:2011:34; C-562/10, 12.7.2012, *Commission against Germany*, ECLI:EU:C:2012:442; C-430/12, 11.7.2013, *Luca*, ECLI:EU:C:2013:467; C-268/13, 9.10.2014, *Petru*, ECLI:EU:C:2014:2271, C-777/18, 23.9.2020, *Vas Megyei Kormányhivatal [Cross-border healthcare]*, ECLI:EU:C:745; C-243/19, 29.10.2020, *Veselības ministrija*, ECLI:EU:C:2020:872; C-538/19, 6.10.2021, *Casa Națională de Asigurări de Sănătate et Casa de Asigurări de Sănătate Constanţă*, ECLI:EU:C:2021:809 .

which might be recognised in the competent State but which would not be applied in the specific case because it could be dangerous for the patient or which would only be applied in case of other medical situations etc.

The EFTA Court further develops the rulings of the CJEU on patient mobility. The CJEU has had to deal with other important questions e.g. concerning national schemes, which were national health systems, and where on the territory of that MS no reimbursement at all was granted when private service providers were involved. The question of how to deal with different treatments (less invasive and effective at least to the same extent) was first subsequently touched on by the CJEU in the *Elchinov* case.[34] The CJEU could have drawn some arguments from this ruling of the EFTA Court but did not do so.

One interesting element is that the Norwegian system does not require prior authorisation when a treatment is sought in a hospital in another EEA State. Instead, the question of whether the treatment could give the right to reimbursement is decided when the claim for reimbursement is submitted after the treatment (para. 45 and 46 of the ruling). The EFTA Court does not consider this element as relevant, as it leads – afterwards – to a system comparable to a prior authorisation system. This reasoning could be questioned, as the CJEU puts great emphasis on the necessity to provide for a transparent system through prior authorisation. The uncertainty until the submission of a claim for reimbursement could be seen as not very effective in the light of this obligation. Therefore, it seems to be questionable whether the CJEU would accept such a system where, instead of requiring a prior authorisation, a decision is only taken after a claim for reimbursement is submitted. However, the lack of mandatory prior authorisation might be considered mitigated as the patient can opt for a prior authorisation voluntarily.

Thus, this ruling of the EFTA Court is important also for the MS as it deals with elements and aspects not dealt with by the CJEU up until now. Nevertheless, some caution is to be recommended as it is not sure that the CJEU would come to the same conclusions in all the different aspects of the case.

In July 2023, following years of dialogue with the Norwegian government, ESA referred Norway to the EFTA Court in an infringement process over national legislation and practice that restricts individuals' rights to seek hospital treatment in other EEA States. ESA claims that Norway is in breach of Article 20 of Regulation 883/2004, as well as Article 36 of the EEA Agreement, by applying national rules that are stricter than EEA rules. Furthermore, ESA claims that the current Norwegian system creates ambiguity and legal uncertainty, making it excessively difficult or impossible for individuals to claim their EEA rights. The case (E-9/23) was brought in on 26 July 2023 and was pending before the EFTA Court at the time this report was completed.

3.3.2.2. Case E-2/18, *Concordia*

Factual situation and procedure

C was a Spanish national who had resided in Spain since 2003. He was receiving a disability pension from and had mandatory health insurance in Liechtenstein, having worked and resided there. The insurance provided for the mandatory cover prescribed by Liechtenstein law and additional benefits, including the free choice of doctor worldwide (under the so

[34] Case C-173/09, 5.10.2010, *Elchinov*, ECLI:EU:C:2010:581.

called “OKP Plus scheme”). The plaintiff was registered with the Spanish healthcare system by way of an E 121 (now S1).

For several years C received benefits in kind in various private healthcare institutions outside the national health system in Spain at the expense of his insurance company Concordia. In 2017, Concordia issued two orders according to which it would only cover C’s costs at the private healthcare institutions for a specified period. After that period, C was required to claim reimbursement of benefits in kind received in Spain from the Spanish National Social Security Institution (“the Spanish institution”). Invoices rejected partly or fully by the Spanish institution could then be submitted to Concordia.

C challenged Concordia’s two orders before the national court. The national court referred questions to the EFTA Court.

Relevant EEA law

Important for the case: Articles 1 (l), 3 (1) (a), 9 (1), 24, 35, 76 (4) 83 and Annex XI of Regulation 883/2004 and Articles 22 (1) and 24 (1) and (3) of Regulation 987/2009.

Questions referred to the EFTA Court

The referring court asked about the nature of the Liechtenstein system (choice of insurance providers, which have many elements of a private insurance) in the light of the Coordination Regulations and about the rights deriving from such a system when treatment was sought outside the competent State in private institutions which are not part of the local social security system. The following questions were put forward:

1. Does [the Basic Regulation] merely lay down a minimum framework which must be complied with in order to prevent distortions of competition or are the rules of that regulation mandatory in so far as they also affect and restrict benefit obligations to be performed worldwide under the insurance contract? Is [the Basic Regulation] applicable to social insurance systems which merely oblige workers to demonstrate adequate health insurance but allow them, by way of contractual autonomy, to choose between several different insurers governed by private law and only require proof that an appropriate insurance contract has been concluded?

2.(a) Is a policyholder required, on account of the validity of [the Basic Regulation], to submit invoices which are covered by the insurance contract concluded within the framework of the statutory health insurance scheme to the social insurance institution in his place of residence, with the result that the social insurance institution which is situated in the Member State responsible for payment of the pension can be made liable for payment only once the institution in his place of residence has refused to pay or can a policyholder none the less rely on his rights under the insurance contract?

(b) If, in accordance with point (a), it is not possible for the policyholder to rely on the insurance contract: Is that also the case where the insurance contract is concluded within the framework of the statutory insurance requirement, but the contractual insurance goes beyond the minimum required by law and has thus been concluded to some extent ‘voluntarily’?

3. If policyholders are obliged, in accordance with Question 2, to submit invoices first to the institution in their State of residence:

(a) Does this also apply to an insured person who has already been provided benefits under the contractual relationship for several years or is reliance by the social insurance scheme on [the Basic Regulation] contrary to the principle of good faith?

(b) Is a social insurance scheme entitled, relying on [the Basic Regulation], to make claims for recovery to an insured person because in the past it has provided insurance cover in excess of the level specified in the regulation, that is to say, it has provided benefits which do not have to be paid under the rules of that regulation, or it is contrary to the principle of good faith to make claims for recovery?

(c) Does, in the light of [the Basic Regulation], the provision of benefits by the social insurance scheme, without invoices having been submitted through the social insurance institution in the place of residence, also entitle the policyholder to the future provision of benefits, without the need to submit invoices through the social insurance institution in the place of residence?

Findings of the EFTA Court[35]

As the various insurances under Liechtenstein legislation have been notified under Article 9 of Regulation 883/2004, they fall within the material scope of that Regulation. This includes the OKP Plus insurance with Concordia. It does not matter that a national social security system offers a choice of different insurance providers to the persons concerned.

Under Article 24 of Regulation 883/2004 a person is entitled to benefits in kind at the expense of the MS which pays a pension if he/she can prove that there is no entitlement in the MS of residence. A person can also directly claim reimbursement from the MS which pays the pension if the reimbursement has been denied in the MS of residence. The competent institution is required to inform the person concerned of all the choices and possibilities this person has. As the concrete benefits are in this case not provided by the Spanish health care system covered by the Coordination Regulations, the bill concerning the costs of these benefits can be presented directly to the competent institution.

Answer of the EFTA Court:

1. When a pensioner is not entitled to benefits in kind in the EEA State of residence, due to the fact that the benefits fall outside the scope of its social security system, the pensioner is entitled, pursuant to Article 24(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, to receive benefits in kind at the expense of the competent institution in the EEA State under whose legislation the pension is paid.

2. The pensioner has a right to submit claims for reimbursement directly to the competent institution in the EEA State under whose legislation the pension is paid, in particular, but not only, if he has been refused reimbursement by the State of residence. In accordance with Article 22(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and Article 76(4) of Regulation (EC) No 883/2004, if the competent institution does not provide the pensioner with information as to the procedure to be followed, that must not adversely affect the pensioner's rights vis-à-vis the institution

[35] Case E-2/18, 14.5.2019*, C and Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein.*

The EFTA Court found that it was not necessary to answer question 3, in light of the answers to questions 1 and 2.

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-345/09, 9.2.2011, *van Delft and Others*, ECLI:EU:C:2010:610: Article 24 of Regulation 883/2004 contains specific derogating rules with regard to sickness benefits for pensioners and is part of a complete system of conflict rules. Insured persons falling within the scope of the rules cannot elect to counteract their effects by withdrawing voluntarily from their application (cited in para. 31).

Case C-69/79, 10.1.1980, *Jordens-Vosters*, ECLI:EU:C:1980:7:

a) Article 24 of Regulation 883/2004 does not prevent the competent institution from providing to pensioners falling within the scope of its national legislation benefits which are more favourable than those which it is bound to provide for them under EEA rules (cited in para. 40 and 53).

b) It follows from Recitals 20 and 22 of Regulation 883/2004 that the aim of Article 24(1) is to afford protection to pensioners residing in an EEA State other than the competent EEA State. It would be contrary to that purpose to hold that Article 24 prohibits an EEA State from granting pensioners better protection than that arising from the application of that provision. As stated in Recital 17 of Regulation 987/2009, EEA States may apply more favourable national provisions, in particular with regard to the reimbursement of costs incurred in another EEA State. See also case C-208/07, 16.07.2009, *von Chamier-Glisczinski*, ECLI:EU:C:2009:455 (cited in para. 53).

Case C-60/93, 29.6.1994, *Aldewereld*, ECLI:EU:C:1994:271: Article 24 of Regulation 883/2004 applies not only to situations where the pensioner is not entitled to any benefits in kind, but also to situations where the pensioner is not entitled to a specific benefit in kind, as in the present case. In both cases, the key point is that the pensioner should not lose entitlement to the benefits in kind he would otherwise have enjoyed if still resident in the competent State (cited in para. 42).

Analysis

This case has interesting aspects for those MS schemes, which include elements of a private insurance as they cover e.g. medical treatment worldwide. They do not follow the principles under national health systems, which grant benefits in kind by their own service providers or institutions, normally free of charge for the patient. The main question in this case is, whether such schemes – when they are covered by the Coordination Regulations – can oblige the insured person to follow the path of these Regulations (which is registration in the MS of residence, receiving benefits under the same conditions as other residents of that MS and subsequent reimbursement between the institutions) or if they can instead use the private-insurance path (which would be the free choice of service provider, including those which are outside the local national health insurance scheme, and reimbursement by the insurance afterwards).

It seems that the EFTA Court misinterpreted some elements of the relevant provisions of the Coordination Regulations.[36]

First, Article 24 of Regulation 883/2004 is not a provision which applies to concrete benefits but concerns a person's overall situation. The application of this provision depends on whether this person is entitled to (any) benefits in kind under the legislation of the MS of residence. Very often, this provision is applied to persons who do not receive a pension from their MS of residence.[37] Of course, there could also be cases where a person also receives a pension from the MS of residence, but this pension is not connected to sickness insurance coverage (e.g. because the pension is above some income thresholds). Reading the reasoning of the EFTA Court it could be deduced that in the case of a pensioner who receives a pension from their State of residence and, therefore, gets benefits from this State under Article 23 of Regulation 883/2004, Article 24 of Regulation 883/2004 could also become applicable for a specific treatment in a concrete case if the legislation of the State of residence does not provide for this specific treatment. It has to be stressed, however, that the relationship between Articles 23 and 24 of Regulation 883/2004 does not allow such an interpretation. Anyhow, this possible interpretation of the EFTA Court's findings is not relevant for the present case as C does not receive a Spanish pension.

Therefore, in the case at hand, because of Article 24 of Regulation 883/2004, Liechtenstein generally remains the competent MS for the sickness insurance as there is no Spanish pension. Under this provision, benefits in kind are granted under Spanish legislation, and under Article 35 of Regulation 883/2004 Liechtenstein has to reimburse the Spanish institution of the place of residence for these benefits.

Second, the assumption of the EFTA Court that Article 24 of Regulation 883/2004 opens up entitlement to benefits in kind (or their reimbursement) in the State granting the pension if a concrete benefit cannot be granted in the MS of residence is not correct. Article 24 of Regulation 883/2004 deals only with the situation in Spain. As already stated, the person concerned is entitled to all the benefits in kind which are granted to a person insured in Spain and does not say anything about benefits in the competent State (here Liechtenstein).

It is not explicitly clear in the Coordination Regulations if a person is entitled to direct reimbursement by the competent institution if benefits have been granted in the State of residence and the person had to pay upfront for them. Usually this should not happen if the benefits were provided within the national health insurance system of the MS of residence (because benefits have to be provided under the same conditions as for locally insured persons, which should also include subsequent reimbursement by the institution of the place of residence). Article 27 (2) of Regulation 883/2004 only provide for the granting of benefits in kind in the MS, where the competent institution is situated and does not deal with the situation of benefits in kind granted in the MS of residence, which had to be paid to the service provider.

It is of interest that only the provisions on the benefits granted in an MS other than the competent one during a (temporary) stay contain specific provisions on direct reimbursement by the competent institution when the treatment had to be paid for in the MS of stay (Article 25 (4) et seq. and Article 26 (6) et seq. of Regulation 987/2009). In the case of residence outside the MS competent for the sickness insurance, such clear provisions are missing. Additions to the provisions of (temporary) stay outside the competent State mentioned above are based on the rulings of the CJEU on the freedom to provide services (following the ruling in case C-158/96, 28.4.1998, *Kohll*, ECLI:EU:C:1998:171, and

[36] As it seems evident that some of the provisions have not the same meaning as interpreted by the EFTA Court and this ruling has to be read only in connection with the national laws of Liechtenstein it should not result in a general different application of these provisions in the EFTA EEA States and the EU MS.

[37] The additional exemption from national health systems, which would open up entitlement to benefits in kind for any resident, is provided for in Article 25 of Regulation 883/2004.

especially C-368/98, 12.7.2002, *Vanbraekel*, ECLI:EU:C:2001:400). The CJEU has already clarified that the principles that can be deduced from the freedom to provide services do not apply to persons who transfer their residence to another MS (case C-208/07, 16.07.2009, *von Chamier-Glisczinski*, ECLI:EU:C:2009:455). Therefore, the question of whether the plaintiff can still request reimbursement from the Liechtenstein institution seems to be based on national law alone, which allows worldwide treatment with reimbursement afterwards.

Are there aspects which could hinder the application of this national Liechtenstein law, and could the Liechtenstein institution oblige the plaintiff to take the treatment provided by the Spanish system? This would imply that, if he wanted to have coverage by Spain's sickness insurance, he could no longer go to private service providers outside the Spanish system but could only visit service providers affiliated with Spain's public health system.

In relation to Spain, there is an additional aspect hidden in this case which was not addressed in the proceedings before the EFTA Court. Spain is one of the MS which does not request reimbursement for every single benefit provided for the competent institution. Instead, this State requests lump-sum reimbursement for every pensioner registered with an E 121 (or S1) form (Article 63 (1) and Annex 3 of Regulation (EC) No 987/2009). Therefore, as the plaintiff is registered with the Spanish institution of the place of residence, it must be assumed that Spain requests these lump sums from the Liechtenstein institution (the assumption of ESA – cited in para. 40 of the ruling – that the Spanish institution has not requested reimbursement by the Liechtenstein institution therefore seems not to be correct). The obligation on Concordia to reimburse the plaintiff for the bills presented could, therefore, lead to a double burden on the institution, which is not mentioned anywhere in the case. One question, which could still be decisive, is whether the national Spanish healthcare system would provide benefits which could be regarded as appropriate for the state of health of the plaintiff. In such a case the choice of private clinics could be regarded in another light, especially when Concordia has anyhow to reimburse a certain percentage of the cost of the corresponding public clinics taking into account the lump sum it has to reimburse to Spain.

Therefore, in relation to schemes, which provide worldwide coverage, it could make a difference whether the pensioner resides in a State which asks for reimbursement on the basis of the actual costs of every single benefit provided by the scheme of the State of residence (where no double payment would result) or in a State like Spain with reimbursement by lump sums irrespective of whether benefits have been granted by the national scheme or not. In the latter case, a choice (either registration with an E 121 or PD S1 in the local system and taking the benefits provided by it or no registration and reimbursement under the scheme of the competent institution) could be of note. The EFTA Court did not address this question and the result of this case to a large degree rests on the general argument of the Commission (see para. 42 of the judgement): "… the key point is that the pensioner should not lose entitlement to the benefits in kind he would otherwise have enjoyed if still resident in the competent State."

3.3.2.3. Case E-8/20, *Criminal proceedings against N*

Factual situation and procedures

In 2016, N was indicted for intentional aggravated social security fraud under Section 271 of the Norwegian Penal Code. The basis for the indictment was that N was considered to have misled the Norwegian Labour and Welfare Administration ("NAV") into making total payments to him in the amount of NOK 309 458 in work assessment allowance. N had failed

to inform NAV that he had been abroad for certain periods without NAV's approval. He was thus not entitled to a work assessment allowance during that time.

The District Court delivered a verdict of aggravated fraud and sentenced N to 75 days in prison. The District Court based the conviction on the fact that, in November 2008, N was granted a rehabilitation allowance. In the decision, he was informed that he "must report to NAV if he travels outside Norway". From 1 March 2010, N's rehabilitation allowance was replaced with a work assessment allowance due to legislative amendments.

N and his spouse were offered the use of a house in Italy, andduring the material time, they spent a total of 14 three and four-week stays in Italy. The Court did not consider that the accused was in good faith when he stayed abroad without notifying his absence or applying for an exemption from the requirement in national legislation to stay in Norway.

The criminal case went all the way to the Norwegian Supreme Court, which upheld the District Court's judgment. In the autumn of 2019, however, NAV became uncertain as to whether its prevailing practice was contrary to Article 21 of Regulation 883/2004. NAV modified its practice later that autumn in accordance with the interpretation that the term "stays" includes all temporary stays that do not amount to establishing residence. NAV did not consider, however, that its earlier practice had been contrary to Regulation 1408/71.

Following petitions from both N and the Prosecuting Authority to have the criminal case reopened, the Criminal Cases Review Commission decided that the case should be reopened before the Supreme Court.

Relevant EEA law

Important for the case: Articles 28 (1) and (2) and 36 (1) of the EEA Agreement, Articles 1 (h) and (I), 4 (1), 19 (1) and 22 (1) of Regulation 1408/71, Articles 1 (j) and (k), 2, 3 (1) and 21 (1) of Regulation 883/2004

Questions referred to the EFTA Court

In this case, the Norwegian Supreme Court referred a total of 16 questions to the EFTA Court. Questions 1-11 related to the state of the law before 1.6.2012 (Regulation 1408/71), while questions 12-16 related to the period after 1.6.2012 (Regulation 883/2004)[38]. Please note that some of the questions (e.g. questions 1 and 12) are the same question, but they refer to Regulation 1408/71 and Regulation 883/2004 respectively.

Questions about the state of the law before 1.6.2012:

1. Is the term "sickness benefits" in Article 4(1)(a) of Regulation No 1408/71 to be interpreted as encompassing a benefit such as the work assessment allowance (arbeidsavklaringspenger)?

2. Is Article 22 of Regulation No 1408/71, or possibly Article 19, to be interpreted as conferring entitlement to receive cash benefits only when residing (bosetting) in an EEA State other than the competent State, or are shorter stays (opphold) such as in the present case also included?

[38] Regulation 883/2004 took effect in the EFTA EEA States on 1.6.2012.

3. If shorter stays such as in the present case are also included, is Article 22 of Regulation No 1408/71 and its reference to authorisation from the competent institution, or possibly Article 19, to be interpreted as meaning that the competent State may make a person's entitlement to be able to bring their work assessment allowance along subject to the condition that that person must have applied for and obtained authorisation to stay (oppholde seg) in another EEA State?

4. Should Regulation No 1408/71 be found not to confer entitlement to bring work assessment allowance along during a stay in another EEA State, or possibly not without authorisation from the competent institution pursuant to national rules, must it also be determined whether the national rules come within the scope of other EEA rules?

5. Do Articles 28 or 36 of the EEA Agreement apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State?

6. If that question is answered in the affirmative, is it a restriction on free movement under Article 28 of the EEA Agreement or Article 36 that national law lays down the following conditions:

(i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four – 15 – weeks per year; and

(ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and

(iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?

7. If the condition in (i) constitutes a restriction, can the condition be justified as a general safeguarding of the considerations underlying condition (ii), that is to say, ensuring performance of defined activity obligations and also follow-up and control?

8. If condition (i) cannot be justified and conditions (ii) and (iii) constitute a restriction, can conditions (ii) and (iii) be justified on the basis of the same considerations?

9. If conditions (ii) and (iii) can be justified, is it compatible with Articles 28 and 36 of the EEA Agreement for a person who has failed to apply for and obtain authorisation to bring benefits along to another EEA State and who provides the competent institution with incorrect information about the place of stay (oppholdssted) to be ordered to repay the benefit which was thus unlawfully acquired under national law?

10. If that question is answered in the affirmative, is it compatible with Articles 28 and 36 of the EEA Agreement for the person concerned potentially to be subject to criminal sanctions for having provided incorrect information and thus having misled the competent institution into making unfounded payments?

11. If question 5 is answered in the negative, do Articles 4 or 6 of Directive 2004/38 apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State? In so far as Article 6 applies, does that provision impose obligations on the home State? If Articles 4 or 6 is applicable and may be relied on as against the home State, the same question as questions 6 to 10 are asked in so far as they fit.

Questions about the state of the law after 1.6.2012:

12. Is the term "sickness benefits" in Article 3(1)(a) of Regulation No 883/2004 to be interpreted as encompassing a benefit such as a work assessment allowance?

13. Is the term "staying" in Article 21(1) of Regulation No 883/2004, which is defined as "temporary residence" in Article 1(k), to be interpreted as encompassing each and every short-term stay in another EEA State not constituting residence, including stays such as in the present case?

14. If that question is answered in the affirmative, is Article 21 of Regulation No 883/2004 to be interpreted as only covering situations where the medical diagnosis is given during the stay in the other EEA State, or also situations where – as in the present case – the diagnosis is recognised by the competent institution before departure?

15. If Article 21 is applicable in a situation such as that in the present case, is that provision, including the condition "in accordance with the legislation it applies", to be interpreted as meaning that the competent EEA State may maintain the following conditions: (i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four weeks per year; and (ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and (iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?

16. If Article 21 precludes condition (i), but not (ii) and (iii), do (ii) and (iii) come within the scope of other EEA rules (see question 4 et seq.)?

Findings of the EFTA Court[39]

The EFTA Court started by answering the questions as to whether the work assessment allowance must be considered a social security benefit – question 1 (on Regulation 1408/71) and 12 (on Regulation 883/2004). The Court's answer was that in the present case, as observed by all the parties, a scheme such as the work assessment allowance established by Section 11-1 of the National Insurance Act qualified as a Social Security benefit covered by the material scope of both regulations.

The work assessment allowance is a "hybrid" benefit with some characteristics found in sickness, unemployment and invalidity benefits. The EFTA Court therefore examined in more detail what risks the benefit covered and concluded that it was a sickness benefit.

The EFTA Court then examined the second to fourth questions together, as the referring court, in essence, was asking whether Article 19 and/or Article 22 of Regulation 1408/71 should be interpreted as precluding a requirement to stay in the competent State in order to receive a benefit such as that at issue in the main proceedings.

According to settled case law, sickness benefits fall within Chapter 1 of Title III of Regulation 1408/71. In this regard, Recital 15 states that, in the field of sickness and maternity benefits, it is necessary to guarantee the protection of persons living or staying in an EEA State other than the competent EEA State. Thus, provisions which derogate from the exportability of social security benefits must be interpreted strictly.

The situation at issue does not fall within the scope of Article 19 as it is apparent from the request that N was resident in Norway. Furthermore, it is clear from the request that a person such as N – spending short-term stays in Italy – does not belong to the categories of persons targeted by point (b) of Article 22 (1) of Regulation 1408/71, which is limited to the retention of sickness benefits in case of transferring "residence" to another EEA State. Accordingly, a person in a situation such as that at issue in the main proceedings does not

[39] Case E-8/20, 5.5.2021, *Criminal proceedings against N*

come within the scope of point (b) of Article 22 (1). However, that finding does not have the effect of removing national rules such as a presence requirement in the case at hand from the scope of the provisions of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement.

By its fifth to eighth questions, the referring court sought, in essence, to ascertain whether conditions such as those laid down in the third paragraph of Section 11-3 of the National Insurance Act, limiting entitlement to benefits such as those at issue in the present proceedings, were compatible with Articles 28 and 36 of the EEA Agreement.

EEA law does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. Nevertheless, when exercising that power, the EEA States must comply with EEA law. The right to retain social security benefits when going to another EEA State is an embodiment of this fundamental objective and a corollary of the exercise of the fundamental freedoms guaranteed by the EEA Agreement. It is therefore necessary to determine whether a situation such as that at issue in the main proceedings falls within the scope of Articles 28 and 36 of the EEA Agreement. In that regard, both the Norwegian Government and the Commission expressed doubts as to the applicability of Article 28 of the EEA Agreement, and the response from the EFTA Court is that it is for the referring court to determine the facts of the case as regards the applicability of Article 28 of the EEA Agreement in the main proceedings.

The EFTA Court then discussed the applicability of Article 36 of the EEA Agreement - The freedom to provide services. The Court noted that Article 36 of the EEA Agreement also includes the “passive” freedom to provide services, namely the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions. Likewise, persons established in an EEA State who travel to another EEA State as tourists or for the purposes of education must be regarded as recipients of services. It follows that a person such as N who has exercised his freedom to move and to receive services in an EEA State other than his home State comes within the scope of Article 36 of the EEA Agreement.

In paras. 79 to 90, the EFTA Court discussed whether the application of national legislation such as that at issue in the main proceedings constituted an obstacle to the free movement of services under Article 36 of the EEA Agreement. The conclusion of the Court was that it does constitute a restriction. The Court then, in paras. 91 to 129 discussed whether a restriction of Article 36 could be justified by overriding reasons in the public interest and whether any such restrictions are appropriate to securing the attainment of the legitimate objective pursued and proportionate, having regard to that objective.

According to the EFTA Court, the objective of encouraging labour market recruitment constitutes a legitimate aim of social policy and in choosing the measures capable of achieving the aims of their social and employment policy, the EEA States have a broad margin of discretion (this possible justification has been chosen as the Norwegian benefit shows also elements related to labour market policy). However, given the particular characteristics of the measure at issue[40], the obstacle which it entails clearly cannot be justified in the light of such objectives. At the hearing, the Commission emphasised the importance of the distinction between sickness benefits and unemployment benefits. Only ancillary elements of a sickness benefit may concern the labour market, since the primary purpose pertains to the health of the insured individual. However, labour market considerations cannot prevail over the classification of work assessment allowance as a sickness benefit and may not alter its fundamental character. The Court observed that mere

[40] Here, the EFTA Court refers to the provision in national legislation that states that a benefit will only be paid for a period of four weeks if the recipient is absent from Norway.

generalisations concerning the capacity of a specific measure to encourage recruitment, such as those submitted by the Norwegian Government, were not enough to show that the aim of that measure was capable of justifying derogations from one of the fundamental freedoms of EEA law and did not constitute evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim. Thus, considerations devised to fit the specific purposes of the employment policy of re-integrating persons into the labour market could not justify the restriction in question.

The EFTA Court then examined the time-limit for a 'normal holiday trip' (four weeks) and the requirement for pre-authorisation. The Court noted that it is legitimate for an EEA State to monitor compliance with the requirements of social security benefits. However, in the case of a criterion predicated upon a maximum stay abroad in the territory of another State, in circumstances such as those of the main proceedings, such a condition went beyond what was necessary to achieve the objective pursued.

The Court recalled that the need to monitor compliance with the requirements for social security benefits is a legitimate objective. However, as with the limited time condition, the prior authorisation condition did not apply to travel within Norway. For travels within Norway, a fortnightly reporting requirement was regarded as sufficient, and no similar assessment of non-scheduled activities or offers of other relevant activities appeared to take place. Travels within Norway were thus treated more favourably than travels to other EEA States without sufficient justification. Therefore, the measures were not suitable for coherent pursuit of the stated objectives.

With respect to the principle of proportionality, it was necessary that any condition, such as a system of prior authorisation, would have to be justified with regard to the overriding considerations mentioned above, i.e. that it did not exceed what was objectively necessary for that purpose and that the same result could not be achieved by less restrictive rules. It had not been demonstrated why less restrictive measures, such as a prior notification system, would not be sufficient, whilst minimising the restriction upon the free movement of services. In any event, the reasons invoked by an EEA State by way of justification would need to be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. Accordingly, such a system of prior authorisation had to be considered disproportionate.

As already noted, all parties to the case agree that Article 21 of Regulation 883/2004 became applicable to the present case when it went into effect on 1.6.2012. In its answers to questions 13 to 15, the EFTA Court discussed certain aspects of the interpretation of the article.

By its thirteenth question, the referring court asked whether the term "staying" in Article 21 (1) of Regulation 883/2004 was to be interpreted as encompassing each and every short-term stay in another EEA State not constituting residence, including stays such as those at issue in the main proceedings. The answer of the EFTA Court was that the terms "residing" and "staying" in Article 21 (1) are intended to cover all forms of presence or residence in another EEA State. It should be noted that a "stay" was considered to encompass both a short-term stay as well as a visit of longer duration as long as they did not constitute "residence" within the meaning of Article 1 (j) of Regulation 883/2004.

By its fourteenth question, the referring court asked whether Article 21 of Regulation 883/2004 was to be interpreted as only covering situations where the medical diagnosis was made during a stay in an EEA State other than the competent EEA State or also situations where, as in the main proceedings, the diagnosis was recognised by the competent institution before departure. The EFTA Court's answer was that there was no basis in the wording of Article 21 for limiting the applicability of that article to situations where

a medical diagnosis was made during a stay in an EEA State other than the competent EEA State.

By its fifteenth question, the referring court asked whether Article 21 of Regulation 883/2004, in particular its wording “in accordance with the legislation it applies”, was to be interpreted as meaning that the competent EEA State could maintain conditions that: (i) the benefit could be provided only for a maximum of four weeks per year outside Norway; (ii) the stay abroad was compatible with the activity obligations and did not impede follow-up and control by the competent institution; and (iii) the person concerned had to obtain authorisation and comply with the notification duty through the use of a notification form.

The EFTA Court noted that, in circumstances such as those of the main proceedings, a presence requirement, which excluded entitlement to sickness benefits during short stays abroad, was in fact significantly more restrictive than a residence requirement. Article 7 of Regulation 883/2004 provided that EEA States could not make benefits conditional on residence. It follows that an EEA State could not either make such benefits conditional on continuous physical presence.

Article 21 of Regulation 883/2004 does not provide a basis for derogating from the right to retain social security benefits when going to another EEA State as expressed in that provision. Thus, provided that the criteria for entitlement in national law are fulfilled, Article 21 (1), including its wording “in accordance with the legislation it applies”, cannot be interpreted as permitting an EEA State to impose any further conditions, such as requiring an insured person to be physically present on its territory. An interpretation permitting the entitlement conferred by Article 21 (1) to be defeated by a requirement as to physical presence on an EEA State’s territory would render that provision devoid of purpose. In effect, it would require an insured person to be physically present in Norway for a minimum of 11 months per year, with any authorised absence being classified as an exception to the general requirement that the insured person remain in Norway. Article 21 (1) of Regulation 883/2004 precludes an EEA State, in situations covered by that provision, from making retention of entitlement to a cash benefit subject to conditions, such as for example a condition as to physical presence on its territory or subjecting the right to prior authorisation.

Answer of the EFTA Court

1. The answer to the first and twelfth questions is that a benefit such as the work assessment allowance at issue in the main proceedings constitutes a sickness benefit within the meaning of point (a) of Article 4(1) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and point (a) of Article 3(1) of Regulation (EC) No 883/2004 on the coordination of social security systems.

2. The answer to the second, third, and fourth questions must be that a situation such as that at issue in the main proceedings does not come within the scope of Articles 19 or 22 of Regulation (EEC) No 1408/71. However, that finding does not have the effect of removing national rules such as those at issue in the main proceedings from the scope of the provisions of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement.

3. The answer to the fifth, sixth, seventh, and eight questions must be that Article 36 EEA must be interpreted as precluding legislation of an EEA State, such as that at issue in the main proceedings, which makes the right of insured persons to retain sickness benefits in cash within the meaning of point (a) of Article 4(1) of Regulation (EEC) No 1408/71 in the case of a stay in another EEA State subject to - a requirement that the recipient of sickness benefits may stay abroad only for a limited period of time which may not usually exceed four weeks per year; and - a system of prior authorisation, which provides for such authorisation to be refused unless it can be demonstrated that the stay in another EEA State is compatible

with the performance of defined activity obligations and does not impede follow-up and control by the competent institution.

4. In light of the answer given to the fifth, sixth, seventh and eighth questions, it is not necessary to answer the ninth, tenth and eleventh questions.

5. The answer to the thirteenth question must be that the term "staying" in Article 21(1) of Regulation (EC) No 883/2004 must be interpreted as encompassing short-term stays in another EEA State not constituting "residence" within the meaning of point (j) of Article 1 of that regulation, such as those at issue in the main proceedings.

6. The answer to the fourteenth question must be that Article 21 of Regulation (EC) No 883/2004 must be interpreted as covering situations where a medical diagnosis is given during a stay in an EEA State other than the competent EEA State as well as situations where, as in the main proceedings, the diagnosis is recognised by the competent institution before departure.

7. The answer to the fifteenth question must be that Article 21(1) of Regulation (EC) No 883/2004 must be interpreted as precluding conditions such as (i) that the benefit may be provided only for a maximum of four weeks per year outside of Norway; (ii) that it must be demonstrated that the stay abroad is compatible with the activity obligations and does not impede follow-up and control by the competent institution; and (iii) that the person concerned must obtain authorisation and comply with the notification duty through the use of a notification form. Accordingly, a further assessment of such conditions under other provisions of EEA law is not necessary.

8. Having regard to the answer given to the fifteenth question, as well as the fifth, sixth, seventh and eighth questions, it is not necessary to answer the sixteenth question.

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-388/09, 27.8.2011, *da Silva Martins*, ECLI:EU:C:2011:439: The aim of Regulation 1408/71 and Regulation 883/2004 would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one EEA State (cited in para. 47).

Case C-517/16, 30.5.2018, *Czerwiński,* ECLI:EU:C:2018:350: Social security benefits must be regarded as being of the same kind when their purpose and subject matter as well as the basis on which they are calculated and the conditions for granting them are identical. Characteristics, which are purely formal must not be considered relevant criteria for the classification of benefits. In order to distinguish between the various categories of social security benefits, the risk covered by each benefit must be taken into consideration (cited in para. 52).

Case C-135/19, 5.3.2020, *Pensionsversicherungsanstalt,* ECLI:EU:C:2020:177: A sickness benefit covers the risk connected to a state of ill health involving temporary suspension of the concerned person's activities. By contrast, an invalidity benefit is intended, as a general rule, to cover the risk of disability of a stipulated degree, where it is probable that such disability will be permanent or long-term. An unemployment benefit covers the risk associated with the loss of income suffered by a worker following the loss of his or her employment, even though he or she is still able to work (cited in para. 54).

Case C-208/07, 16.07.2009, *von Chamier-Glisczinski*, ECLI:EU:C:2009:455:

1) The benefit at issue is a social security benefit within the meaning of Article 4 (1) of Regulation 1408/71 and is therefore exportable. In the field of sickness and maternity benefits, it is necessary to guarantee the protection of persons living or staying in an EEA State other than the competent EEA State. Thus, provisions which derogate from the exportability of social security benefits must be interpreted strictly (cited in para. 62, with reference to cases C-215/99, 8.3.2001, *Jauch*, ECLI:EU:C:2001:139, and C-286/03, 21.2.2006, *Hosse,* ECLI:EU:C:2006:125).

2) A person in a situation such as that at issue in the main proceedings does not come within the scope of Article 22 (1) (b) [of Regulation 1408/71]. This interpretation of Regulation 1408/71 must be understood without prejudice to the solution which flows from the potential applicability of provisions of the main part of the EEA Agreement (cited in para. 68).

3) With respect to Article 36 of the EEA Agreement, it should be noted that no provision of the EEA Agreement affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services. Thus, services within the meaning of Article 36 of the EEA Agreement may vary widely in nature, including those which are provided over an extended period, even over several years (cited in para. 76). See also case C-171/02, 29.4.2004, *Commission v. Portugal*, ECLI:EU:C:2004:270, paragraph 26.

Case C-430/15, 1.2.2017, *Tolley* ECLI:EU:C:2017:74:

a) Article 19 of Regulation 1408/71, headed ‘Residence in a Member State other than the competent State — General rules’, guarantees, at the expense of the competent State, the right for an employed or self-employed person, as well as for members of that person’s family, residing in another Member State the condition of whom requires treatment in the territory of the Member State of residence to receive sickness benefits in kind provided by the institution of the latter Member State (cited in para. 63).

b) Article 22 (1) (b) of Regulation 1408/71 concerns, inter alia, the situation where an employed or self-employed person transfers his residence during sickness to an EEA State other than that of the competent institution (cited in para. 66).

c) Provided that the criteria for entitlement in national law are fulfilled, Article 21 (1), including its wording “in accordance with the legislation it applies”, cannot be interpreted as permitting an EEA State to impose any further conditions, such as requiring an insured person to be physically present on its territory. An interpretation permitting the entitlement conferred by Article 21 (1) to be defeated by a requirement as to physical presence on an EEA State’s territory would render that provision devoid of purpose (cited in para. 143).

d) Article 21 (1) of Regulation 883/2004 prevents a competent EEA State from making retention of entitlement to a cash benefit such as that at issue in the main proceedings subject to a condition as to physical presence on its territory.

Case C-173/09, 5.10.2010, *Elchinov*, ECLI:EU:C:2010:581:

1) The fact that national legislation may possibly be in conformity with a provision of secondary legislation, in this case Article 22 of Regulation 1408/71, does not have the effect of removing that legislation from the scope of the provisions of the EC Treaty (cited in para. 68).

2) With respect to the principle of proportionality, it is necessary that any condition, such as a system of prior authorisation, be justified with regard to the overriding considerations mentioned above, that it does not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (cited in para. 118).

See also cases C-157/99, 12.7.2001, *Smits and Peerbooms*, ECLI:EU:C:2001:404, and C-385/99, 13.5.2003, *Müller-Fauré and van Riet*, ECLI:EU:C:2003:270.

Case C-396/05, C-419/05 and C-450/05, 18.12.2007, *Habelt and Others*, ECLI:EU:C:2007:810: The right to retain social security benefits when going to another EEA State is an embodiment of this fundamental objective [free movement of persons] and a corollary of the exercise of the fundamental freedoms guaranteed by the EEA Agreement (cited in para. 72).

Case C-342/15, 9.3.2017, *Piringer*, ECLI:EU:C:2017:196: The freedom to provide services conferred by Article 36 of the EEA Agreement also includes the "passive" freedom to provide services, namely the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions. Likewise, persons established in an EEA State who travel to another EEA State as tourists or for the purposes of education must be regarded as recipients of services. See also cases C-897/19, 2.4.2020, *PPU - Ruska Federacija*, EU:C:2020:262, C-509/12, 6.2.2014, *Navileme and Nautizende*, EU:C:2014:54, and C-286/82 and C-26/83, 31.1.1984, *Luisi and Carbone*, EU:C:1984:35 (cited in para. 75).

Case C-211/08, 15.6.2010, *Commission v. Spain*, ECLI:EU:C:2010:340: [Unlike the situation that gave rise to case C-211/08] The possible retention of the sickness benefits at issue depends, not on a future and hypothetical event occurring for the insured person concerned but on a circumstance linked directly to the exercise of the right to freedom of movement for reasons of tourism or other purposes (cited in para. 88).

Case C-651/16, 7.3.2018, *DW*, ECLI:EU:C:2018:162:

a) It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it (cited in para. 95).

b) the reasons invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (cited in para. 119).

Case C-176/12, 15.1.2014, *Association de médiation sociale*, ECLI:EU:C:2014:2: The encouragement of recruitment is a legitimate aim of social policy and the Member States have, in choosing the measures capable of achieving the aims of their social policy, a broad margin of discretion (cited in para. 99).

Case C-379/11, 13.12.2012, *Caves Krier Frères*, ECLI:EU:C:2012:798: The margin of discretion which the EEA States enjoy in matters of social policy cannot have the effect of frustrating the implementation of one of the fundamental principles enshrined in primary law. See also case C-208/05, 11.1.2007, *ITC*, ECLI:EU:C:2007:16 (cited in para. 100).

Case C-388/07, 5.3.2009, *Age Concern England*, ECLI:EU:C:2009:128: Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (cited in para. 104).

Case C-503/09, 21.7.2011, *Stewart*, ECLI:EU:C:2011:500: The term "sickness benefits" must be interpreted uniformly for the purpose of applying the Coordination Regulations, not

according to the type of national legislation containing the provisions giving those benefits (cited in para. 105).

Case C-255/13, 5.6.2014, *I,* ECLI:EU:C:2014:1291: Article 1 (k) of Regulation 883/2004 defines 'stay' as 'temporary' residence. However, such a 'stay' does not necessarily involve a visit of short duration (cited in para. 133).

Case C-345/09, 9.2.2011, *van Delft and Others*, ECLI:EU:C:2010:610: Each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions for granting benefits under a social security scheme (cited in para. 141).

Analysis

Due to the major consequences suffered by the affected individual, including a wrongful prison sentence served for committing social security fraud, this is one of the most high-profile social security cases in the history of the EFTA Court. In addition, the outcome of the case was decisive for more than 30 other persons who were wrongfully imprisoned. In addition, more than 800 people received wrongful repayment claims without being charged with fraud.

Yet it could be argued that the most interesting parts of the EFTA Court opinion are not those that refer to the Social Security Coordination Regulations, but rather those on the application of primary law (the EEA Agreement), more specifically Articles 28 (free movement of workers) and 36 (free movement of services).

For periods after 1.6.2012, all parties to the case agreed that Article 21 (1) is the legal basis for the right to receive sickness benefits during a temporary stay in another MS. However, the EFTA Court did not find the same legal basis in Articles 19 or 22 of Regulation 1408/71 for periods before 1.6.2012. Furthermore, as N was receiving rehabilitation benefits, he was not considered a "worker" within the meaning of Article 28 of the EEA Agreement, so he could not rely directly on the provisions of the EEA Agreement that guarantees free movement for workers. (The EFTA Court left it up to the national court to decide whether he was a "worker" who was covered by Article 28 of the EEA Agreement.)

The so-called "main part" of the EEA Agreement has not been amended since it was ratified in 1992. At that time, the relevant EU primary law did not contain provisions that safeguarded free movement for all EU citizens (Article 21 of the TFEU). The EEA Agreement therefore contains no provision on "free movement of *persons*". Instead, it is based on the concept of the "four freedoms": Free movement of goods, labour, services and capital, which was also EU primary law at the time the EEA Agreement was concluded.

The EFTA Court, therefore, examined Article 36 of the EEA Agreement – free movement of services – and concluded that a person who travels to another EEA State for a period, either shorter or longer, will be the recipient of services provided in that State. The person should, therefore, be able to go there without being hindered by restrictions. Likewise, persons established in an EEA State who travel to another EEA State as tourists or for the purposes of education must be regarded as recipients of services (see paras. 75-78 of the judgement).

The EFTA Court cites several rulings from the CJEU on the freedom to provide services. Of special interest is their reference to case C-897/19 *PPU - Ruska Federacija,* ECLI:EU:C:2020:262. This is not a case on social security, the topic is extradition of a

national of an EFTA State (Iceland) to Russia[41]. In this case, para. 41, the CJEU states that [TFEU Article 21] "does not apply to a national of a third State".

Thereafter, in para 57, the CJEU refers directly to Article 36 of the EEA Agreement:

> In so doing, such rules are liable to affect, in particular, the freedom enshrined in Article 36 of the EEA Agreement. It follows that, in a situation such as that at issue in the main proceedings, the unequal treatment which allows the extradition of a national of an EFTA State, which is a party to the EEA Agreement, such as I.N., gives rise to a restriction of that freedom (see, by analogy, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, para. 32 and 33).

Article 36 of the EEA Agreement mirrors Article 56 TFEU. There are, however, no cases from the CJEU on Article 56 in relation to cash benefits. Based on the ruling from the CJEU in case C-897/19, it is likely that a similar ruling from the CJEU on social security benefits in cash would be based on Article 21 TFEU – not on Article 56 as long as the person is an EU citizen. If the person should happen to be a national of an EFTA EEA state, the CJEU might, in certain circumstances, choose to apply Article 36 of the EEA Agreement[42].

The Court thereafter examined whether the restrictions on travelling to other EEA States in Norwegian social security legislation were justified, and the conclusion was that the answer was negative: the restrictions were disproportionate.

The main line of argumentation of the EFTA Court was based on "Treaty provisions", which clearly implied a hindrance of free movement in the national Norwegian legislation. Nevertheless, as the EFTA Court noted, justifications for these restrictions might be possible. One example would be the need to monitor compliance with the requirements for social security benefits. The Court found that a general requirement of prior authorisation was disproportionate, but at the same time it stated that Norway has failed to consider less restrictive measures, such as a prior notification system. Health issues could also be such a justification. It could be argued that a guarantee that the stay abroad – or the travel itself – did not endanger the state of health could lead to such justification[43]. In such situations, however, it would be necessary to design restrictive measures in a non-discriminatory way.

Finally, it should be noted that in the follow-up to this judgement from the EFTA Court, the Norwegian Supreme Court made some general remarks concerning the status of an advisory opinion from the EFTA Court. In its judgement[44], para. 64, the Supreme Court stated that:

> The EFTA Court's advisory opinions are not formally binding. The national court must, therefore, take an independent position on how EEA law is to be understood and applied in the specific case. When interpreting EEA law, however, the national

[41] The person, I.N, is a Russian national who had been granted asylum in Iceland, and later had become a citizen of Iceland.

[42] However, in a case involving sickness benefits in cash, the outcome would probably be based on Regulation 883/2004 Article 21 in both the CJEU and the EFTA Court, as long as this regulation is applicable (see case E-8/20, para. 132)

[43] In a case from 2019 (TRR-2019-12**)**, the National Insurance Court of Norway ruled that a person could not be denied the right to sickness benefits only because she travelled to another EEA State. The person had a serious lower back injury and her doctor had stated that she could stay on a plane for four hours if she had the opportunity to vary body positions. (By way of comparison, the longest domestic flights in Norway last less than 2 hours). The Court stated that due to Article 21, the risk of exacerbating the condition "probably" would not apply in the EEA Area. Then, the Court stated that if she could endure a four-hour flight, she probably only qualified for a partial sickness benefit, not a full benefit, and they returned the case for review by the insurance administration. The case is thus an interesting example of the interplay between EEA obligations and provisions in national legislation – in this case, the obligation to work part time if the capacity for work is partially reduced. However – based on the judgement in case E-8/20, it could be argued that the initial requirement (prior authorisation) was invalid, so she could have travelled for holiday anyway.

[44] HR-2021-1453-S. The letter "S" (S= Storkammer, i.e "Grande Chambre") means that 11 of the 20 judges in the Norwegian Supreme Court participated in the decision. This means the statement holds considerable legal weight.

court must put "considerable emphasis on EFTA Court interpretations on how EEA law should be understood".

According to the preamble of the SCA, the purpose of the EFTA Court is, amongst others, 'to arrive at and maintain an equal interpretation and application of the EEA Agreement and the provisions of the Community's regulations which are essentially reproduced in the said agreement, and to arrive at equal treatment of individuals and market participants with regard to the four freedoms and the terms of competition'. National courts must, therefore, normally follow the EFTA Court's understanding of EEA law and cannot deviate from an interpretation statement by the EFTA Court without there being 'special reasons'. In order for the EFTA Court to fulfill its intended role, the Court's understanding of EEA law cannot consequently be waived without there being good and weighty reasons for doing so.

3.3.2.4. Case E-5/21, *Einarsdóttir*

Factual situation and procedures

Ms Einarsdóttir was employed as a medical doctor in Denmark from September 2015. In September 2019 she moved to Iceland, when she began working at a hospital there. She was pregnant at that time. In January 2020 she applied for payments from the Maternity/Paternity Leave Fund, and the application was approved in March 2020. She gave birth in the same month.

According to Icelandic legislation, the qualifying period for income-related maternity benefits is six months. The reference period for the calculation of benefits is, however, the last 12 months before the start of the six-month qualifying period. Over this period, Ms Einarsdóttir had only been working in Denmark. With reference to Article 21 (2) and (3) of Regulation 883/2004, the Leave Fund did not take her income earned in Denmark into consideration when determining her maternity benefit. Accordingly, she had no income relevant to the calculation of benefits, even though she had been employed as a medical doctor for more than four years before her maternity leave. The result was that she was only to receive a basic minimum payment during her maternity leave.

Ms Einarsdóttir brought an action before the Reykjavík District Court to annul the decision concerning her application for payments during her maternity leave. The Court decided to ask the EFTA Court for an advisory opinion.

Relevant EEA law

Important for the case: Articles 28 (1) and 29 of the EEA Agreement, Article 21 (2) and (3) of Regulation 883/2004.

Questions referred to the EFTA Court

The Reykjavík District Court referred the following question to the Court:

Does Article 6 of Regulation (EC) No 883/2004, on the coordination of social security systems (cf. also Article 21(3) of the Regulation), oblige an EEA State, when calculating

payments in connection with maternity/paternity leave, to calculate reference income on the basis of a person's aggregate wages on the labour market across the entire European Economic Area?

Does it infringe the aforementioned provision and the principles of the EEA Agreement (see, for example, Article 29 EEA) if only a person's aggregate wages on the domestic labour market are taken into account?

Findings of the EFTA Court[45]

Article 21 (2) of Regulation 883/2004 provides that the competent institution of an EEA State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation. Under Article 21 (3) of Regulation 883/2004, the same applies to cases where the calculation of the cash benefits is based on standard income.

Irrespective of whether the qualifying income for the calculation of the cash benefit is determined under Article 21 (2) or (3), the calculation of the cash benefit is linked to the income paid in the domestic labour market. Accordingly, the calculation of a cash benefit is not to be based on income received in other EEA States. However, attributing no income to periods of employment completed in other EEA States is incompatible with Article 21 (2) and (3). The Regulation seeks to prevent the situation in which a worker who, having exercised his or her right of free movement, has worked in more than one EEA State is treated less favourably than a worker who has worked in only one EEA State. The right to free movement of persons would be impeded if an EEA national were to be placed at a disadvantage in his or her State of origin solely for having exercised that right.

Article 21 of Regulation 883/2004 must be interpreted in the light of Article 29 of the EEA Agreement. The obligation not to put migrant workers who have availed themselves of their right to free movement at a disadvantage does not mean, however, that Article 21 (2) and (3) of the Regulation, by not allowing the income earned in another EEA State to be taken into account for the calculation of cash benefits, must be regarded as contrary to the objective set down in Article 29 of the EEA Agreement. That obligation merely implies that those benefits must be the same for the migrant worker as they would have been if he or she had not availed themselves of their right to free movement. Accordingly, Article 21 (2) and (3) of the Regulation, interpreted in accordance with the objective set out in Article 29 of the EEA Agreement, require that the qualifying income of a migrant worker must be calculated by taking into account the notional income of a person who is employed in the EEA State of the competent institution in a situation comparable to the migrant worker's situation.

Answer of the EFTA Court

Articles 6 and 21(2) and (3) of Regulation (EC) No 883/2004 on the coordination of social security systems do not oblige the competent institution of an EEA State to calculate the amount of a benefit, such as that at issue in the main proceedings, on the basis of income received in another EEA State. However, Article 21(2) and (3) of Regulation (EC) No 883/2004, interpreted in accordance with the objective set out in Article 29 of the EEA Agreement, requires that the amount of a benefit, such as that at issue in the main proceedings, granted to a migrant worker who, during the reference period set out in

[45] Case E-5/21, 29.7.2022, *Anna Bryndis Einarsdóttir v/ the Icelandic Treasury*

national law had only had income in another EEA State, must be calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which that benefit is sought

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-866/19, 21.10.2021, *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie*, ECLI:EU:C:2021:865: The principle of aggregation of periods is intended to ensure that the exercise of the right to free movement does not have the effect of depriving workers of social security advantages that they would have been entitled to if they had spent the relevant working time in only one EEA State. Such a situation might discourage EEA workers from exercising their right to freedom of movement and would, therefore, constitute an obstacle to that freedom (cited in para. 23).

Case C-769/18, 12.3.2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, ECLI:EU:C:2020:203: Article 5 of Regulation 883/2004 enshrines the principle of equal treatment of benefits, income and facts (cited in para. 25).

Joined cases C-398/18 and C-428/18, 5.12.2019, *Bocero Torrico*, ECLI:EU:C:2019:1050: Article 5 (a) of Regulation 883/2004 provides that, where, under the legislation of the competent EEA State, the receipt of income has certain legal effects, the relevant provisions of that legislation also apply to income acquired in another EEA State (cited in para. 25).

Case C-257/10, 15.12.2011, *Bergström*, ECLI:EU:C:2011:839: Irrespective of whether the qualifying income for the calculation of the cash benefit is determined under Article 21 (2) or (3) of Regulation 883/2004, the calculation of the cash benefit is linked to the income paid in the domestic labour market. Accordingly, the calculation of a cash benefit is not to be based on income received in other EEA States (cited in para. 29).

Case C-29/19, 23.1.2020, *Bundesagentur für Arbeit*, ECLI:EU:C:2020:36: The right to free movement of persons would be impeded if an EEA national were to be placed at a disadvantage in his or her State of origin solely for having exercised that right [to free movement] (cited in para. 30).

Case C-352/06, 20.5.2008, *Bosmann*, ECLI:EU:C:2008:290: The objective pursued by Article 29 of the EEA Agreement entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised their right to free movement (cited in para. 31).

Case C-205/05, 9.11.2006, *Nemec*, C-205/05, ECLI:EU:C:2006:705: The obligation not to put migrant workers who have availed themselves of their right to free movement at a disadvantage […] merely implies that those benefits must be the same for the migrant worker as they would have been if he or she had not availed themselves of their right to free movement (cited in para. 32).

Analysis

This ruling from the EFTA Court does not have a direct parallel in rulings from the CJEU. Article 21 (2) and (3) of Regulation (EC) No 883/2004 are, *inter alia*, intended to ensure that migrant workers are treated equally with resident workers. In this case, however, the effect is the opposite, as Ms Einarsdóttir lost her entitlement to an income-based maternity benefit solely for the reason that she is a migrant worker. The EFTA Court therefore interpreted the Regulation based on Article 29 of the EEA Agreement.

Several of the rulings from the CJEU cited by the EFTA Court concern situations where a literal interpretation of Regulation 883/2004 could have a negative impact on the situation of migrant workers compared to non-migrant workers. According to both the CJEU and the EFTA Court, such an outcome is incompatible with the principle of free movement of persons.

In the opinion by the AG in case C-205/05, *Nemec*, ECLI:EU:C:2006:269, para. 65, the AG stated that:

> "*The Court has itself emphasised in consistent case-law that Regulation (EEC) No 1408/71 must be interpreted in the light of the objectives of Article 39 et seq. EC. In similar cases, the Court has in particular interpreted comparable provisions in the light of the objectives of Article 39 et seq. EC.*"

The EFTA Court does not cite this opinion of the AG, but it is apparent that they applied the same reasoning in case E-5/21.

In the jurisprudence of the CJEU, it is possible to distinguish three different ways of taking income received in another MS into account when no income has been received in the MS competent to calculate a benefit during the national reference period:

- The *Nemec* principle: Income received in the competent MS before or after the national reference period, duly adjusted, has to be taken into account (see case C-205/05, *Nemec*);

- The *Bergström* principle: Treating the activity in the other MS during the reference period as if it had been exercised in the competent MS – what income would have been achieved with a similar or identical activity? (see case C-257/10, *Bergström*);

- The *Moser* principle: Taking into account the income actually received in another MS (see case C-32/18, 18.9.2019, *Moser*, ECLI:EU:C:2019:752 - not cited in case E-5/21).

A very important clarification of the EFTA Court is that Article 5 of Regulation 883/2004 concerning the assimilation of income received under the competence of another State is only applicable for the calculation of benefits when Regulation 883/2004 does not provide otherwise. Regulation 883/2004 contains provisions that deviate from this principle for several types of benefits, i.e. Article 21 in relation to sickness and maternity benefits, or Article 56 (1) (c) and (d) for invalidity, old age and survivors' benefits. These provisions clarify that foreign income does not have to be taken into account. Article 62 of Regulation 883/2004 contains a specific and nuanced provision for unemployment benefits. Thus, especially for family benefits, no specific provision can be found in Regulation 883/2004; therefore, Article 5 of the Regulation may have an impact on the calculation of family benefits.

Therefore, it seems that the *Moser* principle is an aspect of the assimilation of facts under Article 5 of Regulation 883/2004 as it concerns a family benefit; therefore, it can only apply when the Regulation does not provide differently. Thus, this principle mainly applies to family benefits but not to sickness and maternity benefits as in case E-5/21. Of course, it could be questioned why this has not been the case in the *Bergström* case, where also a family benefit was concerned. One reason for the CJEU not to apply the (later) *Moser* principle in *Bergström* might be that the case concerned Regulation 1408/71, which did not contain a provision on assimilation of facts comparable to Article 5 of Regulation 883/2004. Another reason might be that the family benefit under the Swedish legislation in *Bergström* was based on the hypothetical amount of the sickness cash allowance, which also under Regulation 1408/71 would have been calculated on the base of the income in the competent MS and not the actual income gained abroad (Article 23 of Regulation 1408/71). Thus, it

seems that the *Bergström* principle could cover any benefit for which Article 5 of Regulation 883/2004 is not applicable, because there are specific rules on the calculation of the benefit and there is no income available in the competent MS.

In case E-5/21 the EFTA Court seems to favour the *Bergström* principle but mixes it with the *Nemec* principle, as it takes into account the income received after the national reference period in Iceland and also takes into account that both activities (in Denmark during the reference period and afterwards in Iceland) were exercised as a doctor in a hospital and, therefore, are comparable. It could be argued that the EFTA Court in this case missed an opportunity to clarify some general principles on taking into account occupational activities in another EEA State during national reference periods.

3.3.3. Rulings on pensions

3.3.3.1. Case E-4/07, *Porkelsson*

Factual situation and procedures

The plaintiff was a mariner who had worked in Iceland and in Denmark. While working in Denmark, he suffered an accident at work causing 75% invalidity. While working in Iceland he had paid contributions to different Icelandic pension funds. He received a lump-sum payment from the Danish pension fund and invalidity pensions from the Icelandic pension funds based on the points he had accrued because of the contributions paid in Iceland. However, an Icelandic pension based on “projected” pension points (pension points he would have accrued had he remained active in Iceland until retirement age) was denied because he had not paid contributions in Iceland for at least six months during the 12 months preceding the accident. The claim for the Icelandic pension was filed directly with the Icelandic institution although the plaintiff still resided in Denmark.

Relevant EEA law

Important for the case: Articles 1 (j), 45 as well as Annex VI Point ZA of Regulation 1408/71 and Article 36 of Regulation 574/72.

Question referred to the EFTA Court

The referring Icelandic court wanted to know, whether the social security schemes covered by Regulation 1408/71 included pension fund schemes as the Icelandic one and if the condition of most recent affiliation to the Icelandic pension fund for entitlement to projected pension points was in accordance with EEA law. Finally, the referring court wanted to know whether a claim for a pension had to be filed with the institution of residence. The following questions were asked:

1. Does the term ‘social security’ as it is to be understood under the EEA Agreement, and in particular Article 29 of the main text of the Agreement and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, cover the entitlement to invalidity benefit that arises in pension fund schemes such as the Icelandic one?

2. Whether or not the answer to Question 1 is in the affirmative, the District Court asks whether the provisions of the EEA Agreement on the free movement of workers, and in particular Articles 28 and 29, can be interpreted as meaning that a rule in the Articles of Association of Icelandic pension funds which makes the right to a specific benefit (the right to projection of entitlements) subject to the condition that the individual involved has paid premiums to an Icelandic pension fund that is a party to the Agreement on Relations between the Pension Funds, for at least 6 of the 12 months preceding the date of an accident, is compatible with the EEA Agreement when the reason why the individual is unable to meet this condition is that he has moved to another State within the EEA in order to pursue employment comparable to that which he pursued previously, and he has paid into a pension fund in that State?

3. Is Council Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident and in which they had social security entitlements at the time of their injury?

Findings of the EFTA Court[46]

The benefit under Icelandic law was granted on the basis of invalidity without any individual and discretionary assessment. The Coordination Regulations do not distinguish between acquired rights and projected rights (Article 29 of the EEA Agreement speaking about aggregation for the purpose of acquiring rights cannot lead to another result). Therefore, pensions based on projected rights also fall within the material scope of Regulation 1408/71.

If the creation of a pension system is entirely left to workers' and employers' organisations it could fall outside the material scope of Regulation 1408/71 as an "industrial agreement"; but if the minister can impose this type of benefit on the fund, this would be an implementing measure, which would make the system fall under the material scope.

As Iceland had included the previous national law in its declaration under Article 5 of Regulation 1408/71, even if it updated this declaration only with some delay, and as Annex VI of Regulation 1408/71 also contains a provision on how the invalidity benefits with projected entitlements have to be calculated, the Icelandic scheme falls under the material scope of the Regulation.

If an invalidity benefit is also based on projected periods, it cannot be regarded as independent of the duration of periods of insurance and, therefore, the calculation has to be based on Article 46 and not on Article 39 of Regulation 1408/71. Iceland's entry in Annex VI of Regulation 1408/71 has to be taken into account for the purposes of Article 45 (5) of the Regulation. The condition of 6 months of contributions within the last 12 months can be met by periods of contributions in another MS. The fact that this might be a better situation than a purely internal situation when a person moves from one Icelandic pension fund to another Icelandic is not relevant as Regulation 1408/71 does not preclude better results by comparison with purely internal situations.

The Coordination Regulations (especially Article 36 of Regulation 574/72) cannot be interpreted as meaning that only claims filed with the correct institution are valid claims. Any claim has to be forwarded to the competent institution. Although under Article 48 of Regulation 574/72 the right to appeal starts only when the investigating institution has

[46] Case E-4/07, 1.2.2008, *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóðu*, [2008] EFTA Ct. Rep. 3.

received the decision of all the institutions involved, this cannot take away the possibility of an earlier appeal provided for under national law.

Answer of the EFTA Court:

"1. The term "social security", as it is to be understood under Article 29 EEA and Regulation 1408/71, covers the entitlement to an invalidity benefit that arises in pension fund schemes such as the one at issue in the main proceedings, including pensions based on projected rights.

2. It is not compatible with Article 45(5) of Regulation 1408/71 to subject the entitlement to invalidity benefits based on projected rights, such as those at issue in the main proceedings, to the condition that a member of a pension fund must have paid contributions to a fund belonging to a certain group of funds for a specific period preceding the date of an accident and thereby exclude contributions paid into social security systems in other EEA States in relation to work there.

3. Under Regulation 574/72, persons shall present their claims in the State where they were resident and where they had social security entitlements at the time of their injury. However, the lodging of a claim with the relevant institution of another EEA State is without prejudice to the right to benefits under Regulation 1408/71. It is in any case for each institution concerned to make the final decision as to whether the claimant must be awarded the benefit claimed from that institution."

Rulings of the CJEU cited by the EFTA Court

Case C-78/91, 16.7.1992, *Hughes v. Chief Adjudication Officer,* ECLI:EU:C:1992:331: For a benefit to be covered by Regulation 1408/71 the constituent elements of the particular benefit are decisive and not the national classification (cited in para. 36).

Case 35/77, 29.11.1977, *Beerens*, ECLI:EU:C:1977:194: If a benefit is not listed in the declaration under Article 5 of Regulation 1408/71, this in itself is not proof that the benefit is not covered by the Regulation (cited in para. 47).

Case C-168/99, 14.12.1989, *Dammer v. Securex und RKW*, 1989 04553, and C-227/89, 7.2.1991, *Rönfeldt v. Bundesversicherungsanstalt für Angestellte*, ECLI:EU:C:1991:52: When examining how pensions are to be calculated under Regulation 1408/71, the Regulation has to be interpreted in the light of the principle of free movement (cited in para. 54); the Coordination Regulations cannot take away rights which have already been established under national law at an earlier stage (cited in para. 74).

Analysis

In this ruling, the EFTA Court deals with important questions concerning pensions:

1) Which pensions fall under the material scope of the Coordination Regulations?

This question is especially important for pension schemes which only cover employees in specific economic sectors, as they could be also based not on legislation but on industrial agreements, which would exclude them from the material scope of the Coordination

Regulations.[47] The EFTA Court rightly referred this question back to the referring national court as this question depends on the concrete details of the national system. Taking into account Iceland's declarations (under the obligation to notify the systems covered by the Coordination Regulations – although the necessary update due to developments in national legislation were made with some delay – and the specific provision on the calculation of benefits with projected periods in Annex VI of Regulation 1408/71), the EFTA Court concluded that Iceland had adequately declared that the scheme concerned fell under the material scope (even thought it had elements which could argue for exclusion). Thus, the EFTA Court further developed the rulings of the CJEU, which gave the notification of a MS in its declaration of the schemes covered by the material scope of the Coordination Regulation constitutive power, even when the system would otherwise not be covered by this scope.[48]

2) What effect do the Coordination Regulations have on pension benefits with projected rights?

In principle, this question refers to the wording of the Coordination Regulations: does the obligation of aggregation of periods only concern the right to a benefit or also the creation of additional rights? While the specific aggregation provision for pensions in Article 45 (1) of Regulation 1408/71 is not sufficiently clear on this point, Regulation 883/2004 is much more explicit, as the general aggregation provision of Article 6 also covers the "access to insurance", which would make it much clearer that aggregation must also be applied for the accrual of projected rights. Therefore, it can be stated that this ruling of the EFTA Court already anticipated the clarifications of Regulation 883/2004, which had already been adopted, although it was not in force, at the time of the ruling. The CJEU followed the same approach under Regulation 1408/71 e.g. concerning the taking into account of additional contribution-free periods under Polish legislation, where the periods completed in other MS also have to be taken into account.[49]

3) What are the consequences if a pension claim is made in a MS other than the one prescribed by the Coordination Regulations?

The CJEU has not dealt with this question up until now. Taking into account all the other provisions of the Regulations, which clearly also try to protect migrant workers from administrative provisions and procedures that are too complex (e.g. Article 86 (1) of Regulation 1408/71), it would be absurd to deny any legal value to a claim for a pension, which was not filed with the institution of residence. Therefore, the EFTA Court could not refer to any specific ruling of the CJEU in this respect but protected the migrant worker by not giving Article 36 of Regulation 574/72 its seemingly exclusive possibility of claiming in the MS of residence.

Taking into account that the CJEU has not up until now had to deal with all these situations, the ruling of the EFTA Court could also be of interest for the EU MS. It should also be noted that the arguments of the EFTA Court were later indirectly supported by the legislator. The preamble of Regulation 987/2009 Recital 9 reads:

> "*The inherent complexity of the field of social security requires all institutions of the MS to make a particular effort to support insured persons in order to avoid penalising those who have not submitted their claim or certain information to the institution*

[47] E.g. the French supplementary pensions (CJEU case C-57/90, 16.1.1992, *Commission v. France*, ECLI:EU:C:1992:10) or the Belgium supplementary pensions (CJEU case C-253/90, 6.2.1992, *Commission v. Belgium*, ECLI:EU:C:1992:58).

[48] See also (in addition to the rulings in case *Beerens* cited by the EFTA-Court) e.g. CJEU case C--225/10, 20.10.2011, *Pérez Garcia a.o*., ECLI:EU:C:2011:678.

[49] CJEU case C-440/09, 3.3.2011, *Tomaszewska*, ECLI:EU:C:2011:114.; and case Rs C-866/19, 21.10.2021, *Zakład Ubezpieczeń Społecznych I Oddzial w Warszawie Wydział Realizacji Umów Międzynarodowych*, ECLI:EU:C:2021:865; where the CJEU confirmed that Regulations 1408/71 and 883/2004 follow the same principles in this regard.

responsible for processing this application in accordance with the rules and procedures set out in Regulation 883/2004 and in this Regulation."

Even though the preamble itself is not legally binding, the statements are useful in the interpretation of the text of the articles. In this case, the statement from the legislators clearly supports the ruling of the EFTA Court in case E-4/07.

3.3.3.2. Case E-3/23 *A v Arbeids- og velferdsdirektoratet* (Pending)

In June 2023, the National Insurance Court of Norway asked the EFTA Court for an advisory opinion on whether the minimum invalidity benefit in the second paragraph of Section 12-13 of the National Insurance Act constitutes a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004.

According to the National Insurance Act, a period of 40 years or more of insurance is required in order to receive a full minimum benefit, both in old-age and the invalidity scheme. 40 years of residence can be completed both through residence in Norway, and by aggregation of periods according to Article 6 of Regulation 883/2004.

The reason for the request of an advisory opinion is that Norway does not pay an Article 58-supplement to the minimum invalidity benefit. This practice is based on the CJEU in case C-22/81 *Browning*, ECLI:EU:C:1981:316, where it is stated that Article 50 of Regulation 1408/71 (which corresponds to Article 58 of Regulation 883/2004) only applies to a "minimum benefit" where the legislation of the State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits' a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions. The National Insurance Court is, however, uncertain as to whether that viewpoint may be upheld in the light of the CJEU case C-189/16, *Zaniewicz-Dybeck,* ECLI:EU:C:2017:946.

The case was pending before the EFTA Court at the time this report was completed.

3.3.4. Rulings on unemployment benefits

3.3.4.1. Case E-3/12, *Jonsson*

Factual situation and procedures

Mr Jonsson was a Swedish national living in Sweden. For many years he frequently worked in Norway, where he also held his last job, for a Norwegian company on Svalbard[50], before he became unemployed in 2008. During his last employment, Mr Jonsson stayed in Norway during work periods and normally travelled back home to Sweden during off-duty periods. After becoming unemployed, he returned to his home in Sweden, where he resided.

[50] The archipelago of Svalbard holds a special legal status, and it is not part of the EEA territory, cfr. Protocol 40 to the EEA Agreement. However, the Nordic Convention on Social Security of 18.8.2003 contains a specific clause pursuant to which Regulation 1408/71 applies to persons covered by the Convention who reside in a Nordic country. By virtue of this Convention, the Regulation thus applies to the circumstances of the *Jonsson* case.

The Norwegian Labour and Welfare Administration ("NAV") rejected Mr Jonsson's claim for unemployment benefits on the grounds that he was not staying in Norway and, therefore, having regard to Article 71 of Regulation 1408/71 and the Norwegian National Insurance Act Section 4-2, failed to meet the conditions for entitlement to unemployment benefits. Mr Jonsson was granted unemployment benefits in Sweden starting on 2.3.2009. The benefit amount paid in Sweden was lower than unemployment benefits under Norwegian rules would have been on account of the fact, *inter alia*, that Mr Jonsson had not been a member of the relevant unemployment insurance fund in Sweden.

Mr Jonsson appealed against the decision to the Norwegian National Insurance Court, which ruled in his favour. In line with the National Insurance Court's ruling, Mr Jonsson received unemployment benefits from Norway for the year 2009. The Norwegian State subsequently brought an action before the Court of Appeal (Borgarting lagmannsrett) challenging the National Insurance Court's ruling in which it sought to have that ruling set aside. Having heard the parties' views on the substance of the questions, Borgarting lagmannsrett decided to request an advisory opinion from the EFTA Court.

Relevant EEA law

Important for the case: Articles 1 (b) and (h), 13 (2) (a) and 71 (b) of Regulation 1408/71 and Article 84 of Regulation 574/72.

Questions referred to the EFTA Court

Borgarting lagmannsrett asked the following questions:

When national legislation requires, inter alia, actual stay in the State in order to be entitled to unemployment benefits, is it then compatible with Council Regulation (EEC) No 1408/71 Article 71 (1) (b) to require continued stay in the competent State (the State of last employment) in order to be granted such benefits from this State, also in the case of a wholly unemployed person who, during his/her last employment, has stayed there as a "non-genuine" frontier worker?

Is it relevant to the answer to this question whether:

1. the unemployed person lives in a country near the competent State (the State of last employment), so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there?

2. the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State?

Findings of the EFTA Court[51]

Article 13 (2) (a) in Title II of Regulation 1408/71 lays down the general rule that a worker employed in the territory of one EEA State shall be subject to the legislation of that State, even if he resides in the territory of another EEA State. This applies also with regard to unemployment benefits. However, Article 71 (1) (b) of the Regulation lays down specific

[51] Case E-3/12, 20.3.2013, Staten v/Arbeidsdepartementet v. Stig Arne Johnsson.

provisions for unemployed persons other than frontier workers who, during their last employment, resided in an EEA State other than that in which they had been employed.

It is for the legislation of each EEA State to lay down those conditions. However, although EEA States retain the power to organise the conditions of affiliation to their social security schemes, they must nonetheless, when exercising that power, comply with EEA law. In particular, those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom that legislation applies pursuant to the Regulation. It is incompatible with Article 71 (1) (b) of the Regulation for the national legislation of the State of last employment to impose on unemployed persons other than frontier workers a requirement of actual presence in that State for entitlement to unemployment benefits. The choice of the unemployed person pursuant to Article 71 (1) (b) of the Regulation is intended to facilitate migrant workers receiving unemployment benefit under the most favourable conditions for seeking new employment. With a requirement of actual presence, that choice is seriously compromised and rendered nugatory, as it will deter the person concerned from returning to their State of residence. Moreover, such a requirement would make it unduly difficult for an unemployed person to seek employment opportunities in another EEA State. In this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement.

Furthermore, the general aim of the Regulation of contributing to the establishment of the greatest possible freedom of movement for migrant workers would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one EEA State, especially where those advantages represent a counterpart of contributions paid. Finally, legislation such as that at issue in the main proceedings, which makes acquisition of the right to unemployment benefits subject to actual presence is likely, by its very nature, to put unemployed workers residing outside the territory of Norway at a particular disadvantage.

Answers of the EFTA Court*:*

Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to in Article 71(1)(b)(i) of that regulation.

a. It is not relevant for the answer to this question whether the unemployed person lives in a country near the State of last employment.

b. Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-385/99, 13.5. 2003, *Müller-Fauré and van Riet,* EU:C:2003:270: In the absence of harmonisation at EEA level, it is thus for each EEA State to determine in national legislation the conditions on which social security benefits are granted. However, in such circumstances the EEA States must nevertheless comply with EEA law, in particular the freedom to provide services and the freedom of movement for workers, when exercising that power. See also case C-347/10, 17.1.2012, *Salemink*, EU:C:2012:17 (cited in para. 55).

Case C-341/05, 18.12.2007, *Laval un Partneri*, ECLI:EU:C:2007:809: Directive 96/71/EC did not harmonise the material content of those mandatory rules for minimum protection.

That content may accordingly be freely defined by the MS, in compliance with the Treaty and the general principles of Community law. See also case C-490/04, 18.7.2007, *Commission v. Germany,* ECLI:EU:C:2007:430 (cited in para. 56).

Case C-37/92, 12.10.1993, *Vanacker*, ECLI:EU:C:1993:836: Where a question has been regulated in a harmonised manner at EEA level by a directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of primary EEA law (cited in para. 57).

Case C-577/10, 19.12.2012, *Commission v. Belgium,* ECLI:EU:C:2012:814: Where the national legislation of the host State defines restrictive terms and conditions of employment that undertakings established in other EEA States must observe when they post workers to their territory, such restrictions may be justified where they meet overriding requirements relating to the public interest, including the social protection of workers (cited in para. 58).

Case C-341/02, 14.4.2005, *Commission v. Germany,* ECLI:EU:C:2005:220: Even though coordination directives in the field of labour law contain certain aspects which must be made part of the national legal order, the EEA rules relating to labour law are also characterised by leaving a margin of appreciation to the EEA States and the social partners in their application (cited in para. 59).

Case C-102/91, 8.7.1992, *Knoch,* ECLI:EU:C:1992:194: [Article 71 (1) (b) of Regulation 1408/71 lays down specific provisions for unemployed persons other than frontier workers who, during their last employment, resided in an EEA State other than that in which they had been employed.] These provisions are intended to guarantee that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment. See also case C-227/81, 27.5.1982, *Aubin,* ECLI:EU:C:1982:209 (cited in para. 63).

Case C-1/85, 12.6.86, *Miethe,* ECLI:EU:C:1986:243: Under Article 71 (1) (b) of Regulation 1408/71, workers, other than frontier workers, who are wholly unemployed are entitled to make a choice between the benefits offered by the MS in which they were last employed and those offered by the MS in which they reside. They exercise that option by making themselves available either to the employment services of the State in which they were last employed or the State of residence (cited in para. 63).

Case C-76/76, 17.2.1977, *Di Paolo,* ECLI:EU:C:1977:32: The concept of residence does not necessarily exclude non-habitual residence in another MS (cited in para. 64).

Case C-454/93, 27.6.1995, *van Gestel,* ECLI:EU:C:1995:205: The possibility of receiving unemployment benefits from the MS of residence is justified for certain categories of workers who retain close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside. It is reasonable that workers who have such links with the State in which they reside should be accorded the best conditions in that State for finding new employment […] It is true that application of the provision thus interpreted allows workers to receive unemployment benefits from a MS in which they had not paid contributions during their last employment. However, that is a consequence intended by the Community legislature, which meant to ensure that workers were given the best chance of finding new employment (cited in para. 65).

Case C-2/89, 3.5.1990, *Kits van Heijningen,* ECLI:EU:C:1990:183: When the MS lay down the conditions creating the right or the obligation to become affiliated to a social security scheme, they are under an obligation to comply with the provisions of the Community law in force. In particular, those conditions may not have the effect of excluding from the scope of any such legislation persons to whom it applies pursuant to Regulation 1408/71. See also case *Salemink*, cited above (cited in para. 67).

Case C-308/94, 1.2.1996, *Naruschawicus,* ECLI:EU:C:1996:28: The fact that the person concerned resides in the territory of a MS other than the competent State does not preclude the application of that provision (i.e. Article 71 (1) (b) of Regulation 1408/71] — on the contrary, it is a precondition for its application. Consequently, the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change their residence. With regard to the general provision in Article 13 (2) (a) of the Regulation, see *Kits van Heijningen*, cited above (cited in para. 68).

Case C-284/84, 25.2.1986, *Spruyt,* ECLI:EU:C:1986:79: The general aim of the Regulation to contribute to the establishment of the greatest possible freedom of movement for migrant workers would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one MS, especially where those advantages represent a counterpart of contributions paid (cited in para. 73).

Analysis

This is a case under Article 71 (1) (b) of Regulation 1408/71. Thus, there is a choice between the benefits in the MS of last employment and the MS of residence. The judgment in the *Jonsson* case is founded upon CJEU jurisprudence on this article.

It is not clear why the EFTA Court elaborates on totally different fields of law (such as the postings Directive 96/71/EC or Directive 75/439/EEC on the disposal of waste oils – paras. 56 and 57). It is not disputed that Norway was the competent MS for the last employment, neither is it disputed that the country of residence is Sweden.

The MS of last employment cannot oblige the unemployed person to reside on its territory, as this would make the right to choose meaningless. Although an obligation actually to stay in Norway (which means actual presence in Norway) is not the same as an obligation to reside there, such a condition would also contradict the obligations under Article 71 (1) (b) as it would make the right to choose seriously compromised and would make it very difficult for the person concerned to seek new employment in the MS of last employment (as they would need e.g. to rent a flat or a hotel room for that purpose).

The EFTA Court also found that it is irrelevant whether the unemployed person lives in a country near the State of last employment, so that it is possible in practice for that person to appear at the employment office in that State even if they do not stay there. Such an interpretation is not supported by the provisions of the Regulation. Moreover, it could affect the predictability and effectiveness of the application of the coordination rules of the Regulation negatively and disproportionately.

Another issue is the fact that the plaintiff applied for unemployment benefit in Sweden, the MS of residence, after the application for the Norwegian benefits was turned down. The EFTA Court seems to allow a reversion of the choice, but a general right to review the choice (of the benefit under the legislation of the MS of residence) cannot be deduced from the ruling. The Court seems instead to put emphasis on the fact that another interpretation would effectively entail an applicant who has been forced to seek unemployment benefit in their State of residence in order to secure a means of subsistence having no choice as to where they seek their unemployment benefit. Such an interpretation would run contrary to the aim of Article 71 (1) (b) of the Regulation, which is to guarantee unemployment benefits to migrant workers under the most favourable conditions for seeking new employment, and to enable the workers to make a choice in that respect. That aim would not be attained if, after having had an application for unemployment benefits in the EEA State of last employment turned down, the person concerned were deprived of all right to benefits in the

same State solely as a result of subsequently applying for unemployment benefits in the State of residence.

Finally, it should be noted that the EFTA Court does not mention the findings of the CJEU in the case C-443/11, *Jeltes and others* ECLI:EU:C:2013:224. These two cases were processed in parallel, and the CJEU gave its ruling in *Jeltes* a month after the EFTA Court gave their advisory opinion in case E-3/12 *Jonsson.* In *Jeltes*, the CJEU stated that "The provisions of Article 65 of Regulation 883/2004 are not to be interpreted in the light of the judgment of the Court of Justice of 12 June 1986 in Case 1/85 *Miethe*." It is therefore not likely that the *Jonsson* case is relevant for the coordination of unemployment benefits under Regulation 883/2004.

3.3.4.2. Cases E-13/20, *O v. Arbeids- og velferdsdirektoratet, and E-15/20, Criminal proceedings against P*

Preliminary remarks

The factual situation, as well as the questions put forward to the EFTA Court for an advisory opinion are to a large degree similar in the two cases E-13/20 and E-15/20. The main difference between the two cases is that E-13/20 is a civil case from the National Insurance Court of Norway while E-15/20 is a criminal case from Borgarting Lagmannsrett[52]. In para. 40 of case E-15/20, the EFTA Court stated that: "The Court notes that, except for Questions 4 and 5[53], the questions referred essentially correspond to the questions answered by the Court in Case E-13/20, *O v. the Norwegian Government* (judgment of 30 June 2021). Accordingly, a general reference is made to Case E-13/20, which is applied and adjusted for the purposes of the present case."

In accordance with this statement from the EFTA Court, only case E-13/20 is presented and discussed in this case. On criminal law, the findings of the EFTA Court were in line with relevant CJEU jurisprudence and not relevant for social security coordination.

Factual situation and procedures

O is a Norwegian national. He resided and worked in Norway until November 2012, when he became unemployed and registered as a jobseeker. He received unemployment benefits from December 2012 to October 2014.

While he was receiving unemployment benefits, O spent a number of stays at an apartment available to him in Germany. O did not inform the Norwegian Labour and Welfare Administration ("NAV") of the stays in Germany. O stated that the stays in Germany were of a temporary nature. He had family and a social network in Norway and wished to return to permanent employment in Norway as soon as possible.

O's stays in Germany were discovered when NAV carried out a check on whether he fulfilled the conditions for receiving unemployment benefits. NAV then adopted a decision to order the recovery of the unemployment benefits paid during the period from December 2012 to

[52] The *Lagmansrett* is a general regional court, the second highest level in the Norwegian legal system. There are six such courts in total. A judgment by the National Insurance Court can be appealed to the regional courts. The regional courts are the Norwegian courts that most frequently ask the EFTA Court for an advisory opinion.

[53] Questions 4 and 5 are on criminal law.

October 2014. O appealed against that decision. The NAV Appeals Body concluded that O was not entitled to retain the unemployment benefits during the stays in Germany on the grounds that he did not fulfil the condition of staying in Norway laid down in Section 4-2 of the National Insurance Act. The recovery order was reduced to the amounts paid to O in the periods when he was staying in Germany. O appealed against that decision to the National Insurance Court, who decided to ask the EFTA Court for an advisory opinion.

Relevant EEA law

Important for the case: Articles 28 (1) and (2), 31 (1) and 36 (1) of the EEA Agreement, Articles 1 (j) and (k), 3 (1), 5 (b), 7, 63 and 64 of Regulation 883/2004.

Questions referred to the EFTA Court

The National Insurance Court referred the following questions to the Court:

1. Is it compatible with the provisions of Regulation (EC) No 883/2004, including Article 5(b), for entitlement to a cash benefit in the event of unemployment to be subject to the condition that the unemployed person stay in the competent State in cases where Articles 64, 65 or 65a are not applicable?

2. Does Article 36 of the EEA Agreement apply in the case of temporary stays in another EEA State as described in this case?

3. Does a condition as described in question 1 constitute a restriction on the right of free movement under Article 31 or Article 36 of the EEA Agreement?

4. If so, can the restriction be justified on the ground that:

> *- a stay in the competent State provides the unemployed person with better incentive and opportunities for seeking and finding employment?*
>
> *- a stay in the competent State ensures that the unemployed person is available for the employment services, so that they (the employment services) are able to monitor whether the unemployed person fulfils the requirements for the unemployment benefit?*
>
> *- a stay in the competent State provides the employment services with better opportunities in assessing whether the unemployed person is being followed up in a suitable manner?*
>
> *- the requirement of a stay ensures the economic equilibrium of the social security scheme?*

5. If the condition can be justified, is it compatible with Articles 31 and 36 of the EEA Agreement that a person who has had a stay in another EEA State than the competent State without complying with the obligation to inform the competent institution about the stay may be ordered to repay the benefit, which was thus received unlawfully under national law? If so, is it compatible with Articles 31 and 36 of the EEA Agreement for an interest surcharge of 10 per cent to be levied on the person concerned?

6. If question 3 is answered in the negative, does Article 4, 6 or 7 of Directive 2004/38/EC apply in a situation where an unemployed person has a temporary stay in another EEA

State? If Article 4, 6 or 7 applies and may be relied on as against the home State, the same questions as in questions 3 to 5 are put in as far as applicable.

Findings of the EFTA Court[54]

An interpretation to the effect that a requirement to be present in an EEA State does not fall within the scope of Article 7 of Regulation 883/2004 would deprive this provision of its effectiveness. That Article 7 also prevents EEA States from making benefits conditional on physical presence is supported by the fact that, according to Article 63 of the Regulation, Article 7 applies to unemployment benefits only in the cases provided for by Articles 64, 65 and 65a. Thus, those Articles exhaustively regulate the three situations in which the competent EEA State is required to allow recipients of an unemployment benefit to reside or stay in the territory of another EEA State. The Court added that the Regulation confers on unemployed workers certain advantages, such as those laid down by Articles 64, 65 and 65a, which they would not otherwise enjoy, and which thus help to ensure the freedom of movement for workers. These advantages are the exception and may, therefore, be granted only under the strict conditions provided for in those articles.

O does not satisfy the conditions of Article 64 of the Regulation, as he was not seeking employment in another EEA State. In such circumstances, the competent State is permitted by the Regulation to impose a requirement to stay in Norway. The same line of reasoning applies to Article 5 (b) of the Regulation, to which the first question refers. Article 5 (b) codifies the general coordination principle of equal treatment of facts or events occurring in other EEA States. In that context, it should be noted that Article 5 applies only "unless otherwise provided for by this Regulation". Chapter 6 of Title III of the Regulation contains a special provision for unemployment benefits and allows EEA States to impose residence rules. Therefore, Article 5 (b) should not be interpreted as meaning that, in the context of unemployment benefits, stays in another EEA State are to be equated with stays in the competent State.

By Questions 2 to 4 and 6, the National Insurance Court asked, in essence, whether Articles 31 or 36 of the EEA Agreement and/or Directive 2004/38/EC apply in the case of temporary stays in another EEA State such as those described in the main proceedings. The answer was that outside the situations expressly mentioned in Articles 64, 65 and 65a of the Regulation, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 31 and 36 of the EEA Agreement. According to the same considerations, the condition does not fall to be assessed in the light of Directive 2004/38/EC.

Answers of the Court

1. A requirement that the unemployed person must stay in the competent State to be entitled to a cash benefit in the event of unemployment in cases where the conditions of Articles 64, 65 or 65a are not fulfilled is compatible with Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, including Article 5(b) thereof.

2. Outside the situations expressly mentioned in Articles 64, 65 and 65a of Regulation (EC) No 883/2004, a condition to stay in the competent EEA State for entitlement to unemployment benefits does not fall to be assessed under Articles 31 and 36 of the EEA Agreement and is not incompatible with Directive 2004/38/EC of the European Parliament

[54] Case E-13/20, 30.6.2021, *O v. The Norwegian Government, represented by the Labour and Welfare Directorate (Arbeids- og velferdsdirektoratet)* and Case E-15/20, 30.6.2021, *Criminal Proceedings Against P.*

and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

3. EEA States retain the power to determine whether or not unlawfully acquired allowances and benefits should be repaid. The EEA States must, however, exercise that power in accordance with EEA law and its general principles, including the principles of equivalence and effectiveness.

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-551/16, 21.3.2018, *Klein Schiphorst,* ECLI:EU:C:2018:200:

1. According to Recitals 4 and 45 of Regulation 883/2004, the purpose of that regulation is to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively (cited in para. 38).

2. It is clear from Article 5 (b) of Regulation 883/2004, in particular the words 'unless otherwise provided for by [Regulation 883/2004]', that that regulation contains special provisions derogating from the principle of the waiving of residence rules (cited in para. 55).

Case C-503/09, 21.7.2011, *Stewart*, ECLI:EU:C:2011:500: In certain cases, a condition of past presence could be equivalent, in practice, to an habitual residence clause, if, in particular, such condition requires long periods of presence in the MS concerned and/or if that condition must be met for as long as the benefit in question is paid (cited in para. 40).

Case C-62/91, 8.4.1992, *Gray*, ECLI:EU:C:1992:177: Unemployed workers seeking work in another MS are for a limited period to retain entitlement to unemployment benefits provided for by the legislation of the State in which they were last employed even though they are not available to the employment services of that State. Regulation 1408/71 confers on those workers' rights which they would not otherwise enjoy, and which thus help to ensure freedom of movement for workers in accordance with Article 51 of the Treaty. See also cases C-41/79, C-121/79 and C-796/79, 19.6.80, *Testa and Others*, ECLI:EU:C:1980:163, para. 15 (cited in para. 43 and 44).

Case C-406/04, 18.7.2006, *De Cuyper*, ECLI:EU:C:2006:491:

1. The monitoring to be carried out as far as it concerns unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring in respect of other benefits (cited in para. 45).

2. Regulation 1408/71 provides for only two situations in which the competent MS is required to allow recipients of an unemployment allowance to reside in the territory of another MS while retaining their entitlement to it. Firstly, there is the situation provided for in Article 69 of the Regulation, allowing unemployed persons who go to a MS other than the competent State 'in order to seek employment there' to retain their entitlement to unemployment benefit. Secondly, there is the situation referred to in Article 71 of that Regulation, relating to unemployed persons who, during their last employment, were residing in the territory of a MS other than the competent State. It is clear from the order for reference that a situation such as that of Mr De Cuyper is not covered by either of those articles. See also case C-228/07,11.9.2008, *Petersen*, ECLI:EU:C:2008:494, para. 39 and 40 (cited in para. 52).

Case C-135/19, 5.3.2020, *Pensionsversicherungsanstalt,* ECLI:EU:C:2020:177: Unemployment benefits cover the risk associated with the loss of income suffered by a

worker following the loss of employment, even though the worker is still able to work (cited in para. 46).

Case C-215/00, 21.2.2002, *Rydergård*, ECLI:EU:C:2002:111: The conditions set out in Article 69 (1) of Regulation 1408/71 must be construed as being exhaustive, the competent authorities of the MS are not entitled to impose additional conditions (cited in para. 47).

Case C-372/02, 11.11.2004, *Adanez-Vega*, ECLI:EU:C:2004:705: Article 5 (b) of Regulation 883/2004 should not be interpreted as meaning that, in the context of unemployment benefits, stays in another EEA State are to be equated with stays in the competent State. See also case C-551/16, 21.3.2018, *Klein Schiphorst,* ECLI:EU:C:2018:200 (cited in para. 55).

Case C-345/09, 9.2.2011, *van Delft and Others*, ECLI:EU:C:2010:610: Since Article 48 of the TFEU provides for the coordination, not the harmonisation, of the legislations of the MS, substantive and procedural differences between the social security systems of individual MS, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each MS retains the power to determine in its legislation, in compliance with European Union law, the conditions for granting benefits under a social security scheme (cited in para. 63).

Analysis

These cases were the second on unemployment benefits to be brought before the EFTA Court, the first being case E-3/12, *Jonsson.* Although all three cases concerned the requirement to “stay in Norway” in order to receive unemployment benefits, there are important differences. The *Jonsson* case was related to the situation of a cross-border worker. These two 2020 cases concerned persons who resided and worked in Norway at the time they became unemployed. Thus, Article 65 of Regulation 883/2004 (cfr. Article 71 of Regulation 1408/71) was not relevant for the 2020 cases.

The main question before the EFTA Court was whether the provisions of Regulation 883/2004 (Articles 63 to 65a) are exhaustive or must be supplemented by the provisions on free movement for workers (Article 28 of the EEA Agreement) or services (Article 36 of the EEA Agreement).

The EFTA Court stated that it was not necessary to refer to the provisions of the EEA Agreement, as the Regulation must be considered exhaustive. One important argument for this conclusion is taken from the judgment in the *Gray* case cited above: the Regulation confers on those workers rights which they would not otherwise enjoy, and which thus help to ensure freedom of movement for workers in accordance with the Treaty. The argument was also confirmed in the *Klein Schiphorst* case cited above. At the same time, it should be remembered that the CJEU once set the wording of Regulation 1408/71 aside and decided that a specific unemployment benefit (the Austrian pension advance in the *Petersen* case cited above) had to be exported although the Regulation did not create an obligation to do that. The EFTA Court was aware of the ruling in *Petersen* and argued that this benefit was different, as the person was not required to remain available on the labour market in order to receive the benefit. The Norwegian benefit in question is, however a rather traditional unemployment benefit, and, therefore, the conclusions of the EFTA Court are in line with jurisprudence of the CJEU, regardless of the *Petersen* case.

The advisory opinions of the EFTA Court were delivered in June 2021. Normally, when the EFTA Court has delivered its ruling, questions of EEA Law are considered to be settled. In these two cases, however, the judgments in no way put an end to the internal debate in Norway, and the follow-up in Norwegian courts is summarised below.

Borgarting Lagmannsrett (Borgarting LMR) gave its ruling first, in case E-15/20. This court fully embraced the EFTA Court ruling. Then, two months later came the National insurance Court (case E-13/20). It came to the same conclusion as the EFTA Court (and Borgarting LMR), but at the same time, provided a rather long comment in its own ruling in which it criticised the EFTA Court ruling. One short extract: "In that context, the Court [The National Insurance Court] points out that the need for residential and residence conditions depends not only on the content of the terms and whether this is a general duty to be available for work but also on what the duty actually entails and not least how it is enforced. […] It is possible that residential and residence requirements would have been set aside had they been subject to the general proportionality assessment."

Soon after, two Norwegian professors of law, Tarjei Bekkedal and Mads Andenæs, published a joint article[55] criticising the two EFTA Court rulings on unemployment benefits for failing to recognise the importance of the EEA provisions on free movement for workers and services. A legal debate between scholars, mostly on a forum for lawyers, followed. Then, later in 2022 another similar case was heard by another regional court (Eidsivating Lagmannsrett), with the same result as in case E-15/20. This case was appealed to the Supreme Court, which ruled in accordance with the EFTA Court and Eidsivating in January 2023. This ruling finally ended the debate.

3.3.5. Rulings on family benefits

3.3.5.1. Case E-3/05, *ESA v. Norway*

Factual situation and procedures

Under Norwegian Law a regional supplement (the Finnmark Supplement) to the Norwegian family allowance is only granted when the parents and the child reside in the county of Finnmark. The intention behind this additional benefit was to counter negative trends in the region e.g. due to depopulation. A person working in Finnmark but resident in the neighbouring State of Finland did not receive the regional supplement.

Relevant EEA law

Important for the case: Article 73 of Regulation 1408/71 and Article 7(1) and (2) of Regulation 1612/68.

Question referred to the EFTA Court

ESA brought an action before the EFTA Court demanding a declaration that Norway had failed to fulfil its obligations under Article 73 of Regulation 1408/71 or, alternatively, under

[55] Tarjei Bekkedal og Mads. Andenæs: Er mottakere av dagpenger beskyttet av EØS-avtalens grunnleggende rett til fri bevegelighet? ("Are recipients of unemployment benefits protected by the right to free movement in the EEA Agreement?"). *Lov og rett,* vol. 61, issue 3. Oslo 2022 (Norwegian only)

Article 7 (2) of Regulation 1612/68 by not granting the Finnmark Supplement to a person, who resides with the family in another State but works in Finnmark.

Findings of the EFTA Court[56]

The Finnmark Supplement is a family benefit within the definition of Article 1 (u) (i) of Regulation 1408/71. A condition of residence in the State in which the worker works may not be imposed under Article 73 of Regulation 1408/71. However, it is not necessary to interpret this provision in such a way that the family has to be regarded as residing at the actual place of employment of the worker and thereby be entitled automatically to regional benefits. There is no obligation of better treatment of migrant workers compared to those working in the region and having family members resident in another region of Norway. Therefore, the regional residence requirement is not directly discriminatory. Nevertheless, it could be indirectly discriminatory as most of the workers who fulfil the regional residence requirement are Norwegian nationals.

When examining the possibility of an objective justification for the measure, the Court acknowledged that it stems from a regional policy goal (to promote sustainable settlement), which can be regarded as a legitimate aim. For the measure to be justified, the principle of proportionality relative to the goal must apply. It is important that children reside and grow up in a sparsely populated region if the population is to be maintained or increased. Therefore, the measure is suitable to achieve the goal and there are no lesser restrictive means to achieve the same objective. Consequently, this national measure may indirectly be discriminatory against migrant workers but can be regarded as objectively justified.

As the measure falls under Regulation 1408/71, Article 7 (2) of Regulation 1612/68 is not applicable (due to Article 42 (2) of the latter Regulation).

Answer of the EFTA Court: It

"1. Dismisses the application.

2. Orders the EFTA Surveillance Authority to pay the costs of the Defendant."

Rulings of the CJEU cited by the EFTA Court

Case C-543/03, 7.6.2005, *Dodl and Oberhollenzer*, ECLI:EU:C:2005:364: the granting of family benefits for family members resident in another State safeguards workers not being deterred from exercising their right to free movement (cited in para. 47); Article 73 of Regulation 1408/71 must be interpreted uniformly in all States regardless of the arrangements under national law for the acquisition of family benefits (cited in para. 48).

Case C-266/95, 12.6.1997, *Merino Garcia v. Bundesanstalt für Arbeit,* ECLI:EU:C:1997:292: Family benefits are granted on the basis of the relevant provisions of national law; there is no entitlement on the basis of Article 73 of Regulation 1408/71 alone (cited in para. 49).

Case C-372/02, 11.11.2004, *Adanez-Vega*, ECLI:EU:C:2004:705: The cases are different as it is not necessary to rewrite Article 73 of Regulation 1408/71 when Article 3 of Regulation 1408/71 (equal treatment) is applied to regional benefits (cited in para. 52).

[56] Case E-3/05, 3.5.2006, *EFTA Surveillance Authority v. The Kingdom of Norway*, [2006] EFTA Ct. Rep. 102.

Case C-237/94, 23.5.1996, *O'Flynn v. Adjudication Officer*, ECLI:EU:C:1996:206: It is sufficient that a provision is liable to have the effect of a disadvantage for a substantially higher percentage of migrant workers to create indirect discrimination (cited in para. 56).

Cases C-266/95, 12.6.1997, *Merino Garcia v. Bundesanstalt für Arbeit*, ECLI:EU:C:1997:292, C-281/98, 6.6.2000, *Angonese*, ECLI:EU:C:2000:296, and C-388/01, 16.1.2003, *Commission v. Italy,* ECLI:EU:C:2003:30: Indirect discrimination is not excluded because the measure affects also national workers (cited in para. 56).

Cases C-302/97, 1.6.1999, *Konle*, ECLI:EU:C:1999:271: Regional policy aims can be regarded as legitimate aims for the purpose of an objective justification (cited in para. 57).

Case 122/84, 27.3.1985, *Scrivner v. Centre public d'aide sociale de Chastre*, ECLI:EU:C:1985:145: If a case falls under Regulation 1408/71, Regulation 1612/68 does not apply (cited in para. 63).

Analysis

This ruling of the EFTA Court concerning regional social security benefits is an important one. In the same way that the CJEU ruled on benefits which have to be understood as sickness benefits (especially in the *Hosse*-case),[57] so the EFTA Court is of the opinion that such regional benefits are not special compared to nationwide benefits and, therefore, cannot be excluded from the application of the general principles of the Coordination Regulations only because they are regional. The CJEU has decided that such benefits, if they fall under the material scope of the Coordination Regulations, have to be exported if the potential recipients reside outside the competent MS (e.g. a father working in the Austrian region of Salzburg is entitled to the regional long-term care benefit, which under national law is restricted to the residents of the Salzburg region, for a disabled child residing in Germany). Differently from the case dealt with by the EFTA Court, in these cases the aspect of indirect discrimination was not discussed. The obligation to export was directly deduced from the rules of Regulation 1408/71 concerning sickness benefits for a person residing outside the competent MS (Article 19).

Subsequent to the ruling of the EFTA Court, the CJEU had to decide on another regional benefit where the special situation was that this benefit (the Flemish long-term care allowance) is only granted to a person residing in the region of Flanders and the other Belgian regions do not grant comparable benefits. Therefore, this case is comparable to case E-3/05 decided by the EFTA Court. Although the CJEU decided that the benefit falls within the material scope of Regulation 1408/71,[58] it did not continue with the examination of the rules of this Regulation (as it did in the *Hosse*-case) but examined the prohibition of discrimination under the Treaty Establishing the European Community (now TFEU). The CJEU found in this case that EU law cannot be applied to a person who resides outside the regions in which this benefit is granted if that person has never made use of their right to free movement, but that EU law applies to all persons who have made use of their free movement rights.[59] Therefore, every person resident outside Belgium, and working anywhere where the Flemish long-term care allowance is granted, is affected, but so is anyone who has previously made use of the right to free movement and now resides in

[57] Cases C-286/03, 21.2.2006, *Hosse*, ECLI:EU:C:2006:125, concerning Austrian regional long-term care benefits and later on confirmed by C-206/10, 5.5.2011, *Commission v. Germany*, ECLI:EU:C:2011:283, concerning regional benefits for blind, deaf and disabled.

[58] CJEU case C-212/06, 1.4.2008, *Gouvernement de la Communauté française et Gouvernement wallon*, ECLI:EU:C:2008:178, para. 23.

[59] Case *Gouvernement de la Communauté française et Gouvernement wallon*, para. 37 and 48.

Belgium but in another region. The CJEU did not find any reason for a justification of this discrimination under Belgian regional law.

Seen in this light, the ruling of the EFTA Court could be disputed, and it is not a given that the CJEU would have decided in the same way. Had only Regulation 1408/71 been examined by the EFTA Court, it would have been clear that family benefits have to be granted – without any exception – to any family member resident in the territory of another State (Article 73 – as in the *Hosse*-case).[60] But even when the general principle of discrimination is examined, the clear ruling in the case of the Flemish long-term care benefit could lead to the result that there would not either be any justification for the Finnmark supplement in the eyes of the CJEU. Of course, there might be other reasons of general interest involved. Anyhow, it is not necessary to protect the regions concerned in Belgium against depopulation. However, any other difference in the situations might not be considered strong enough to constitute a justification for the outcome, especially when the directly applicable rules of the Coordination Regulations are also taken into consideration.

Taking into account the different situations and the fact that the CJEU seems to have a strict attitude towards regional benefits, EU MS cannot rely on the assumption that the CJEU would accept a denial of any regional social security benefits for migrant workers residing outside this region but working therein. It should also be noted that the Finnmark supplement was abolished in 2014. Since then, Norway has had no regional social security benefits, so the question may not arise again at a later time.

3.3.5.2. Case E-6/12, *ESA v. Norway*

Factual situation and procedures

In 2011, ESA delivered a reasoned opinion maintaining that the Kingdom of Norway was in breach of Articles 1 (f) (i) and 76 of Regulation 1408/71 due to an administrative practice of refusing to pay family benefits in certain cases to EEA workers in Norway. The practice in question concerned a failure to assess whether a child of a person working in Norway was mainly dependent upon that parent, although the parents were separated or divorced, and the child lived with the other parent in an EEA State other than Norway.

Norway rejected the reasoned opinion and ESA took the question before the EFTA Court.

Relevant EEA law

Important for the case: Articles 1 (f) (i) and (u) (i), 4 (1), 73, 75 and 76 (1) of Regulation 1408/71.

Question referred to the EFTA Court

ESA requested the EFTA Court to declare that:

[60] Concerning the obligation to grant family benefits without any restriction for family members resident in another MS see most recently also CJEU case C-328/20, 16.6.2022, *Commission v. Austria [Indexation of family benefits],* ECLI:EU:C:2022:468.

By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of Regulation (EEC) No 1408/71.

Findings of the EFTA Court[61]

The EFTA Court assessed ESA's two pleas separately.

The first plea was the alleged infringement of Article 76 of Regulation 1408/71. The Government of Norway questioned whether Article 76 of the Regulation was the proper legal basis for ESA's claim and argued that Article 73 of the Regulation would have been more appropriate. The purpose of Article 73 is to prevent an EEA State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in an EEA State other than that providing the benefits. Such a refusal could deter EEA workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. Where there is an overlap between rights under the legislation of the State of residence of the family members and rights under the legislation of the State of employment, provisions such as Articles 13 and 73 of Regulation 1408/71 must be compared with the "anti-overlap" rules appearing in that Regulation and also in Regulation 574/72. The first relevant anti-overlap rule, Article 76 of the Regulation, was the subject of this plea.

After discussing relevant jurisprudence from the CJEU, the EFTA Court concluded that ESA had failed to show that, in a consistent and general manner, the Norwegian Labour and Welfare Administration ("NAV") had applied the anti-overlap rules laid down in Article 76 of Regulation 1408/71 in a way that infringed the EEA Agreement. It followed that ESA's plea alleging that the administrative practice in question infringed Article 76 of the Regulation had to be dismissed (para. 92 and 93 of the judgement).

The second plea was the alleged infringement of Article 1 (f) (i) of Regulation 1408/71.

The basic rule in allocating competence in respect of social security benefits is laid down in Article 13 of the Regulation which, in its first paragraph, establishes that an EEA worker shall be subject to the legislation of a single EEA State and, in its second paragraph, provides that that State shall be the EEA State of employment, even if the worker resides in the territory of another EEA State. Article 73 of the Regulation extends that rule to the enjoyment of family benefits. Family benefits are defined in Article 1 (u) (i) of the Regulation as all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h) of the Regulation. Benefits under Norway's Child Benefits Act constitute a "family benefit" within the meaning of Article 4 (1) (h) of the Regulation. Article 73 of the Regulation is intended to prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the EEA State providing the benefits, so that EEA workers are not deterred from exercising their right to freedom of movement. Article 73 must be interpreted uniformly in all EEA States regardless of the arrangements made by national law on the acquisition of entitlement to family benefits. It is clear from the wording of Article 73 read together with Article 1 (f) (i) of the Regulation that the purpose of those provisions is to ensure that if the main provider of a family makes use of the right to move freely within the EEA, family benefits for dependent family members should not be lost. It is of no importance whether the parents are divorced.

[61] Case E-6/12, 29.7.2022, *ESA v. the Kingdom of Norway*

Although the Regulation does not expressly cover family situations following a divorce, there is nothing to justify the exclusion of such situations from the scope of the Regulation. When the Regulation is applied, for example, where, in accordance with Article 73 of the Regulation, benefits are provided pursuant to Section 2, paragraph 1, of the Child Benefits Act, the national authorities such as the NAV must respect Article 1 (f) (i) of the Regulation when national legislation on family benefits regards as a "member of the family" only a member of the household or a person living under the same roof as the employed or self-employed person or student. It is for the national authorities, taking the wording and purpose of the Regulation into account, to determine whether a member of the family is mainly dependent on a person falling under the Regulation. By not making this assessment, the Norwegian administrative practice renders the choice of law rules in the Regulation ineffective. The administrative practice therefore infringes Article 1 (f) (i) of Regulation 1408/71.

Answers of the EFTA Court

1. The Court declares that, by maintaining in force the administrative practice under the Child Benefits Act of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, of Regulation (EEC) No 1408/71.

2. The Court dismisses the application as to the remainder.

Rulings of the CJEU cited by the EFTA Court

Case C-363/08, 26.11.2009, *Slanina,* ECLI:EU:C:2009:732: The correct application of Article 1 (f) (i) requires that in cases where the migrant worker is found not to have his regular abode with his child, the competent institution must assess whether the child living together with the other parent is "mainly dependent on" the parent working in the competent state (cited in para. 41).

Case C-278/03, 12.5.2005, *Commission v. Italy,* ECLI:EU:C:2005:281: Even if the applicable national legislation itself complies with EEA law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes EEA law when the practice is, to some degree, of a consistent and general nature. See also cases C-135/05, 26.4.2007, *Commission v. Italy,* ECLI:EU:C:2007:250 and C-416/07, 10.9.2009, *Commission v. Greece,* ECLI:EU:C:2009:528 (cited in para. 58).

Case C-441/02, 27.4.2006, *Commission v. Germany,* ECLI:EU:C:2006:253: The two single cases alone, which concern two different situations, would in any event be insufficient to show a practice of a consistent and general nature[62]. See also cases C-156/04, 14.9.2006, *Commission v. Greece,* ECLI:EU:C:2006:561, C-342/05, 14.6.2007, *Commission v. Finland,* ECLI:EU:C:2007:341, and C-489/06, 19.3.2009, *Commission v. Greece,* ECLI:EU:C:2009:165 (cited in para. 59).

Case C-228/88, 22.2.1990, *Bronzino,* ECLI:EU:C:1990:85: The purpose of Article 73 of Regulation 1408/71 is to prevent an EEA State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in an EEA State other than that providing the benefits. Such a refusal could deter EEA workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. See also cases C-321/93, 5.10.1995, *Imbernon Martínez,*

[62] However, the Norwegian Government had confirmed that the administrative practice in question was indeed the general approach of the competent institution, see para. 60 of case E-6/12.

ECLI:EU:C:1995:306, C-245/94 and C-312/94, 10.10.1996, *Hoever and Zachow,* ECLI:EU:C:1996:379, and C-255/99, 5.2.2002, *Humer,* ECLI:EU:C:2002:73 (cited in para. 78).

Case C-543/03, 7.6.2005 *Dodl and Oberhollenzer,* ECLI:EU:C:2005:364: Whilst Article 73 of Regulation 1408/71 constitutes a general rule, it is not an absolute rule. The entitlement which the claimants in the main proceedings derive, in their capacity as 'employed persons', from Article 13 and Article 73 of Regulation 1408/71 must be set against the rules against overlapping in that regulation and in Regulation 574/72. See also case C-16/09, 10.10.2010, *Schwemmer,* ECLI:EU:C:2010:605 (cited in para. 79).

Case C-119/91, 9.12.1992, *McMenamin,* ECLI:EU:C:1992:503: It is irrelevant in the context of Article 10 of Regulation 574/72 whether the parents are divorced. See also *Dodl and Oberhollenzer,* cited above (cited in para. 84).

Case C-195/04, 26.4.2007, *Commission v. Finland,* ECLI:EU:C:2007:248: The Court cannot assess whether the administrative practice in question may infringe Article 73 of Regulation 1408/71 or Article 10 of Regulation 574/72. That would have widened the subject matter of the action as delimited in the pre-litigation procedure and the application (cited in para. 89).

Case C-212/00, 16.10.2001, *Stallone,* ECLI:EU:C:2001:548: National authorities cannot justify a condition of living together which has the consequence that a person with dependent members of his/her family resident in another EEA State may not receive child benefits only because he/she is separated from the other parent. To do so would deprive that aspect of the definition of member of the family in the Regulation of its effectiveness (cited in para. 112).

Analysis

In this case, the ruling from the EFTA Court is in line with jurisprudence from the CJEU. Although the CJEU had declared that it was irrelevant that the parents were divorced in the *McMenamin* case in 1992, it was in the landmark *Slanina*-case from 2009 that the Court made it clear that a child is "mainly dependant" as long as the other parent is required to pay maintenance. The fact that maintenance is not paid is irrelevant as regards the issue of whether the child is a member of the family (Case C-363/08, *Slanina*, para. 28). The EFTA Court followed the same approach in this ruling.

The situation for divorced parents claiming family benefits from different EEA countries has been further interpreted and clarified through later jurisprudence from the CJEU, see cases C-378/14, 22.10.2015, *Trapkowski,* ECLI:EU:C:2015:720, and C-199/21, 13.10.2022, *Finanzamt Österreich*, ECLI:EU:C:2022:789.

Initially, the ruling of the EFTA Court was only given effect in Norway for the child benefit scheme. Later, the effect was extended to the cash-for-care scheme. This is a benefit that is granted to parents with children between the age of 1 and 2 years who do not attend kindergarten.

3.3.5.3. Case E-2/22, *A v. the Directorate of work and labour*

Factual situation and procedures

The case concerns a decision by the Norwegian Labour and Welfare Administration ("NAV") to reject the grant of transitional benefits to A. The transitional benefit is payable to a single mother or father who has sole care of a child up to the age of 8. The maximum benefit period is three years, and the benefit is a flat rate, and it is reduced against income from work.

A is a Swedish national who was expecting a child. The basis for the rejection was that the National Insurance Act required three[63] years of prior insurance in the Norwegian social security system. At the time she gave birth, A had been insured in Norway for less than two years. She had previously been insured in Sweden.

The transitional benefit is not listed among Norwegian social security benefits covered by Regulation 883/2004, cfr. Article 9 of the Regulation. Norway, therefore, argued that the requirement of three years previous membership could not be met by the aggregation of periods of insurance in another EEA country. The National Insurance Court decided to ask the EFTA Court whether the transitional benefit falls under the material scope as defined in Article 3 of Regulation 883/2004.

Relevant EEA law

Important for the case: Articles 1 (z), 3 (1) (b) and (j), (3) and (5), 6 and 70 (2) of Regulation 883/2004.

Question referred to the EFTA Court

The referring court asks two questions:

1. Does a benefit such as the transitional benefit (overgangsstønad) come within the material scope of Regulation (EC) No 883/2004 according to:

a. Article 3(1), in particular (j) or

b. Article 3(3), read in conjunction with Article 70?

2. Is it of any significance for the assessment under question 1) that there is a requirement of occupational activity for continued entitlement to a benefit when the youngest child becomes one year old?

[63] From 2021, five years of prior insurance is required.

Findings of the EFTA Court[64]

The transitional benefit has been considered to be excluded from the material scope of EEA social security coordination ever since the EEA Agreement was negotiated in 1992. By its first question, the referring court asked whether this was the correct interpretation.

The EFTA Court found that the transitional benefit is granted in respect of one or more children who require care and maintenance. Therefore, the benefit objectively alleviates the financial burden involved in the maintenance of one or more children by a single parent. Accordingly, there is a close link between family expenses and the transitional benefit in the main proceedings, so that such a benefit must be regarded as a family benefit within the meaning of Article 3 (1) (j) of Regulation 883/2004.

The EFTA Court furthermore answered that the transitional benefit is not a special non-contributory benefit. As the benefit is not listed in Annex X of Regulation 883/2004, the Court did not examine whether it meets the other criteria set out in Article 70 of the Regulation.

The answer from the EFTA Court to the second question was that in relation to a benefit such as the transitional benefit, it is not relevant in the context of the assessment under the first question that there is a requirement of occupational activity for continued entitlement to the benefit in question when the youngest child reaches the age of one year.

Answers of the EFTA Court

1. A benefit such as the transitional benefit at issue in the main proceedings constitutes a family benefit within the meaning of point (j) of Article 3(1) of Regulation (EC) No 883/2004 on the coordination of social security systems and is not a non-contributory cash benefit within the meaning of Article 3(3) of that regulation, read in conjunction with Article 70.

2. In relation to a benefit such as the transitional benefit, it is not relevant in the context of the assessment under the first question that there is a requirement of occupational activity for continued entitlement to the benefit in question when the youngest child reaches the age of one year.

Rulings of the CJEU cited by the EFTA Court

Case C-769/18, 12.3.2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle,* ECLI:EU:C:2020:203: It is clear from the wording of Article 70 (2) (c) of Regulation 883/2004 that special non-contributory cash benefits are to be understood as solely those listed in Annex X to that Regulation. Since the transitional benefit does not appear in that Annex, it does not constitute such a benefit (cited in para. 32).

Case C-350/20, 2.9.2021, *INPS,* ECLI:EU:C:2021:659: The distinction between benefits within the scope of the Regulation and those outside its scope is based on the constituent elements of each benefit, in particular its purpose and the conditions for its grant. It does not depend on whether it is classified as a social security benefit by national legislation (cited in para. 33 and 47).

Case C-372/18, 12.4.2019, *Dreyer,* ECLI:EU:C:2019:206: A benefit may be classified as a social security benefit when it satisfies two conditions: first, the benefit in question is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position; second, the benefit must relate to one

[64] Case E-2/22, 29.7.2022, *A v. the Directorate of work and labour.*

of the risks expressly listed in Article 3 (1) of Regulation 883/2004. The first condition is satisfied if a benefit is granted in the light of objective criteria, which, if they are met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances (cited in para. 35).

Case C-503/09, 21.7.2011, *Stewart*, ECLI:EU:C:2011:500: The second condition is fulfilled if the benefit covers one of the risks expressly listed in Article 3 (1) of Regulation 883/2004. The concept of the benefit is to be interpreted and applied not according to the respective criteria of any national legislation, but in accordance with EEA law (cited in para. 38).

Case C-85/99, 15.3.2001, *Offermanns,* ECLI:EU:C:2001:166: The meeting of such family expenses is compatible with the aims mentioned in Recital 1 of Regulation 883/2004, namely to contribute towards improving the standard of living and conditions of employment of persons who have exercised their right to freedom of movement (cited in para. 43).

Cases C-245/94 and C-312/94, 10.10.1996, *Hoever and Zachow,* ECLI:EU:C:1996:379: The transitional benefit is granted in respect of a child and, apart from the age criterion, there is no other criteria linked to the child. It is care for one or more children that is the essential feature of the benefit (cited in para. 44).

Case C-333/00, 7.11.2002, *Maaheimo,* ECLI:EU:C:2002:641: A close link between family expenses and a benefit entails that such a benefit constitutes a family benefit within the meaning of Regulation 883/2004 (cited in para. 45).

Case C-275/96, 11.6.1998, *Kuusijärvi*, ECLI:EU:C:1998:279: A benefit intended to enable one of the parents to devote him/herself to the raising of a young child, and designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity, must be treated as a family benefit (cited in para. 45).

Analysis

Classification of the transitional benefit as a family benefit

In this ruling, the EFTA Court was asked to consider whether a benefit should be defined as a social security benefit under Article 3 of Regulation 883/2004 even though it is not listed in the declarations in accordance with Article 9 of the same Regulation. In its answer to the National Insurance Court, the EFTA Court relied on the jurisprudence developed by the CJEU over a number of years, especially in the 1990's. In that respect, the ruling has not added new or unknown elements that the CJEU had not already clarified.

In the procedures before the Court, the Norwegian Government argued that the transitional benefit covers a special risk, namely that of single parents not being able to support themselves, which is not one of the risks listed in Article 3 (1) of Regulation 883/2004. The Norwegian Government further noted that the transitional benefit predates the EEA Agreement, and that its understanding has always been that the transitional benefit falls outside the scope of the Regulation entirely (see para. 40 of the judgement).

The EFTA Court's answer to the latter argument was that in its interpretation of the EEA Agreement, it could not be bound by mere expectations of the EEA States as to the exact content of the obligations they have entered into. Reference was made to case E-5/06, *ESA v. Liechtenstein*.

As shown in the analysis of case E-5/06, the CJEU has not made similar references to "expectations". Therefore, it could be argued that the EFTA Court missed the opportunity to clarify when the actual outcome of a negotiation is part of the final agreement versus when is it an expectation but not a given fact. In this respect, case E-2/22, however, differs from case E-5/06. Unlike in E-5/06, the outcome of the negotiations on the transitional benefit is not found in an official EEA document but only in national Norwegian legal preparatory work.

Consequences of the classification of the benefit

The direct effect of the ruling was that the claimant A would be able to fulfil the required three years of prior insurance in the Norwegian social security system by aggregation of periods according to Article 6 of Regulation 883/2004. This was to be expected as an outcome, as the principle of equal treatment in the EEA Agreement and the Coordination Regulations is secured by the principle of aggregation of periods.

The classification of the benefit as a family benefit does, however, add new layers of complication to the coordination of this benefit. According to established EEA law, a family benefit is granted to the *family* as such – this means two parents (provided both are alive), and one or more children. According to Norwegian legislation, the constituting condition for this benefit is that the recipient must be a single parent. In this respect, the history of this benefit is interesting. It was originally introduced in a national insurance scheme in 1964 which offered benefits to "widows and single mothers". The idea behind this was that both groups faced a similar social risk: "loss of the breadwinner[65]". Furthermore, treating unmarried mothers and widowed women with children on equal terms has long roots in Norwegian social policy. The world's first social benefit directed at single mothers was established as early as 1920 by the Oslo City Council.

As long as the person who claims the benefit is insured in Norway like the claimant in this case, the consequences of the ruling are rather straightforward. Other questions were not dealt with by the EFTA Court. The role of divorced parents where one party no longer takes any interest in the situation of the rest of the family is an issue that has complicated the coordination since the *Slanina*-case[66].

The transitional benefit provides a good illustration of several of these complications. If the parents are divorced (or have never been married or are cohabitants), a variety of new questions arises, e.g:

- If the parent insured in Norway does not live with the child, and the other parent claims the benefit, would it even be possible for Norwegian administrators to assess whether – and for how long – the conditions in Norwegian legislation are fulfilled, such as the claimant's actual family situation, or the condition that the claimant be working or a job-seeker when the child is more than one year old?

- How about primary and secondary competence – what happens when and if the other parent stops being insured in Norway?

- The relationship with the GDPR[67] (protection of private data): does a person (the parent working in Norway) have to accept that personal information about him or her is sent to other institutions – or even to the claimant – contrary to their wishes?

[65] The term "breadwinner" is neither found in Regulation 883/2004 nor in Norwegian Social Security legislation, but it can be found in other legal instruments, e.g. ILO Convention 102.

[66] For an in-depth analysis, see the article "Family benefits in the EU - Is It Still Possible to Coordinate them?" by *Grega Strban*, University of Ljubljana, in [23 MJ 5 (2016)]

[67] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119,4.5.2016, p. 1.

There are other issues as well that would have to be addressed and solved. It is worth mentioning in this context that the issues arising from the current interpretation of the coordination rules for family benefits will be avoided if the proposal for a revised Regulation (EC) No 883/2004 still under negotiation is adopted. One of the proposals was to divide family benefits into two separate categories – family benefits in cash intended to replace income during the period of child raising on the one hand and all other family benefits on the other. The Norwegian transitional benefit would fit into the first category. The proposed new Article 68b of Regulation 883/2004[68] would have solved these issues:

> "Family benefits referred to in paragraph 2a (a) of Article 68 which are listed in Part I of Annex XIII shall be awarded under the legislation of the competent Member State solely to the person subject to that legislation. There shall be no derived right to such benefits." […]

3.3.6. Rulings on special non-contributory cash benefits

3.3.6.1. Case E-5/06, *ESA v. Liechtenstein*

Factual situation and procedures

The legislation of Liechtenstein requires that a recipient of the so-called helplessness allowance (*Hilflosenentschädigung*) reside in Liechtenstein. This allowance takes the form of a monthly payment. The central question in this case was whether the helplessness allowance constitutes a sickness benefit within the meaning of Article 4 (1) of Regulation 1408/71, or a special non-contributory benefit within the meaning of Article 4 (2a) of the Regulation.

In March 2006, ESA delivered a reasoned opinion, stressing that, irrespective of the basis for listing the allowance in Annex IIa to Regulation 1408/71, the case law of the CJEU had confirmed that the listing itself did not have constitutive effect. This interpretation was, according to ESA, equally valid in the EEA. ESA further maintained that the helplessness allowance should be classified as a social security benefit in accordance with Article 4(1) of Regulation 1408/71 since it was based on a legally defined position, without any individual and discretionary assessment of personal needs.

In its reply, the Liechtenstein Government maintained its position. It put forward as an alternative argument that, should the helplessness allowance be a sickness benefit, the allowance, in any event, constituted a benefit in kind and not a cash benefit. In November 2006, ESA brought an action before the EFTA Court seeking an order that Liechtenstein had failed to fulfil its obligations pursuant to the EEA Agreement.

Relevant EEA law

Important for the case: Article 29 of the EEA Agreement, Articles 4, 10a (1), 19, 25 (1) and 28 (1) as well as Annex IIa of Regulation 1408/71.

[68] E.g: Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 - provisional agreement 7698/19 ADD 1 REV 1 SOC 231 EMPL 184 CODEC 725.

Questions referred to the EFTA Court

ESA brought an action under the second paragraph of Article 31 of the SCA. ESA was seeking an order from the EFTA Court that Liechtenstein had failed to fulfil its obligations pursuant to Articles 19 (1) and (2), 25 (1) and 28 (1) of Regulation 1408/71. The application raised the Liechtenstein residence requirement for helplessness allowance as a general issue.

Findings of the EFTA Court[69]

In its ruling, the EFTA Court declared that Liechtenstein, by applying a requirement of residence for entitlement to the helplessness allowance, had failed to fulfil its obligations pursuant to Articles 19 (1) and (2), 25 (1) and 28 (1) of Regulation 1408/71.

The EFTA Court found that the benefit in question is a sickness benefit, not a non-contributory special benefit. Furthermore, the Court found that the benefit was to be classified as a benefit in cash, not in kind.

Rulings of the CJEU cited in the rulings of the EFTA Court

Case C-215/99, 8.1.2001, *Jauch*, ECLI:EU:C:2001:139: The listing of the helplessness allowance in Annex IIa to Regulation 1408/71 does not have constitutive effect. See also cases C-286/03, 21.8.2006, *Hosse,* EU:C:2006:125, C-43/99, 31.5.2001, *Leclere and Deaconescu*, ECLI:EU:C:2001:303, C-160/02, 29.4.2004, *Skalka,* ECLI:EU:C:2004:269 and C-154/05, 6.7.2006, *Kersbergen-Lap,* ECLI:EU:C:2006:449 (cited in para. 32).

Case C-160/96, 5.3.1998, *Molenaar,* ECLI:EU:C:1998:84:

a) The CJEU has found that German and Austrian long-term care allowances do not fall under Article 4 (2a) but rather under Article 4 (1) (a) as sickness benefits in cash. See also cases *Jauch, Hosse* and C-502/01 and C-31/02, 8.7.2004, *Gaumain-Cerri and Barth,* ECLI:EU:C:2004:413 (cited in para. 34).

b) The allowance may be used by the recipients to remunerate a member of their family or entourage who is assisting them on a voluntary basis. This is so, ESA contends, even if the benefit in question is designed to cover certain costs entailed by reliance on care rather than to compensate for loss of earnings on the part of the recipient. See also cases *Jauch, Hosse*, *Gaumain-Cerri* and C-466/04, 15.6.2006, *Herrera,* ECLI:EU:C:2006:55 (cited in para. 43).

Case C-286/03, 21.8.2006, *Hosse,* ECLI:EU:C:2006:125:

a) The aims of Articles 39-42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one MS (cited in para. 35).

b) benefits to persons reliant on care must be regarded as ‘sickness benefits’ within the meaning of Article 4 (1) (a) of Regulation 1408/71 (cited in para. 38).

[69] Case E-5/06, 14.12.2007, *ESA v. The Principality of Liechtenstein*

Case C-249/83, 27.3.1985, *Hoeckx,* ECLI:EU:C:1985:139: A benefit may be regarded as a social security benefit within the meaning of Article 4 (1) of Regulation 1408/71 in so far as it is: first, granted without any individual or discretionary assessment of personal needs to recipients on the basis of a legally defined position, and second, provided that it concerns one of the risks expressly listed in Article 4 (1) of Regulation 1408/71. See also cases C-122/84, 27.3.1985, *Scrivner,* ECLI:EU:C:1985:145 and C-78/91, 16.7.1992, *Hughes*, ECLI:EU:C:1992:331 (cited in para. 38).

Case C-61/65, 30.6.1966, *Vaassen-Goebbels v. Beambtenfonds Mijnbedrijf*, ECLI:EU:C:1966:39: The term 'benefits in kind' does not exclude the possibility that such benefits may comprise payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses (cited in para. 43).

Case C-20/96, 4.11.1997, *Snares,* ECLI:EU:C:1997:518: A benefit [such as Disability Living Allowance] must, by reason of the fact that it is listed in Annex IIa, be regarded as being exclusively governed by the coordination rules of Article 10a and, consequently, as being a special non-contributory benefit within the meaning of Article 4 (2a). See also cases C-297/96, 11.6.1998, *Partridge,* ECLI:EU:C:1998:280 and C-90/97, 25.2.1999, *Swaddling*, ECLI:EU:C:1999:96 (cited in para. 46).

Case C-299/05, 18.10.2007, *Commission v. European Parliament and Council*, ECLI:EU:C:2007:608: A benefit is to be regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to the recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed in Article 4 (1) of Regulation 1408/71. See also cases *Molenaar*, *Jauch* and *Hosse* (cited in para. 71).

Analysis

This judgment was the EFTA Court's first ruling on the classification of benefits in Regulation 1408/71. At the time it was delivered, the CJEU had quite recently delivered several judgments on classification and exportability of long-term care benefits, as well as judgments on the classification of benefits as non-exportable "special non-contributory benefits". The judgment in this case relies on this jurisprudence.

The judgment raises at least two questions for debate. The first question concerns para. 63 of the EFTA Court's ruling, where the court declares that:

> "*Moreover, in its interpretation of the EEA Agreement, the Court cannot be bound by mere expectations of the Contracting Parties as to the exact content of the obligations the Parties enter into."* [See the judgement, para 47][70].

It should be noted that in several rulings up to 1998 – i.e after the EEA Agreement was negotiated – the CJEU seemingly held the position that *"the fact that [the benefit] is listed in Annex IIa, be regarded as being exclusively governed by the coordination rules of Article 10a"* […].[71] The first rulings indicating that the CJEU would take another approach regarding so-called "care benefits" was delivered from 1998 onwards.[72] The expectations of Liechtenstein could, therefore, be regarded as well-founded at the time the EEA Agreement was concluded. Mere expectations have never played a role in CJEU

[70] The same argument was invoked by the Norwegian government in case E-2/22, on the transitional benefits for single parents. In that case, the argument was dismissed by the EFTA-Court, with reference to case E-5/06. The two situations are not entirely comparable, cfr. the analysis of case E-2/22.

[71] E.g. C-20/96, Snares.

[72] See C-160/96, *Molenaar*, C-215/99, *Jauch*, etc.

jurisprudence, unless where the CJEU also decided that – as an exception – the ruling should not have retroactive effect[73]. It could therefore be argued that the EFTA Court, in this case, missed an opportunity to clarify whether the entry into force of the EEA Agreement in relation to Liechtenstein and the modifications contained therein concerning the Coordination Regulations[74] is binding in the same way as the Accession Act of an EU MS. However, it is unclear whether such a clarification would have changed the outcome of the EFTA Court's decision. Mentioning a benefit in the Accession Act (e.g. the listing of the Austrian long-term care allowance in Annex IIa of Regulation 1408/71 already in Austria's Accession Act) also did not hinder the CJEU from declaring such a listing as not correct (in case C-215/99, *Jauch*).

The second question is the classification of the helplessness allowance as a sickness benefit. The EFTA Court argued that *"The ECJ has consistently held that benefits which aim to improve the state of health and the quality of life of persons reliant on care are essentially intended to supplement sickness insurance benefits and must be regarded as 'sickness benefits'"* (para. 74 of the judgement). The EFTA Court then continues: *"If the helplessness allowance were to be considered a different type of benefit where the recipient's need for care does not result from sickness in the strict sense of the word, the export of the allowance would have to follow several different sets of rules. That would make the legal situation less transparent for all parties involved. This would go against the aim of Regulation 1408/71, which is to facilitate the free movement of persons.*"

In another case a decade later (case C-679/16, 25.7.2018, *A*, ECLI:EU:C:2018:601), the CJEU seems to modify its former position slightly. In para. 43 of that judgment, the CJEU stated that "*treating the risk of reliance on care in the same way as the risk of sickness assumes that the purpose of benefits designed to provide cover against the risk of reliance on care is to improve the state of health and the quality of life of persons reliant on care*". Subsequently, they declare that a scheme aimed at improving a disabled person's everyday life does not qualify as a "sickness benefit".[75]

In case C-679/16, *A*, the CJEU went on to rule that the person in question could still collect the benefit in another MS based on the general rules on free movement in Articles 20 and 21 of the TFEU. This is another interpretation than that which the EFTA Court advocates when the latter states that *"If the helplessness allowance were to be considered a different type of benefit where the recipient's need for care does not result from sickness in the strict sense of the word, the export of the allowance would have to follow several different sets of rules. That would make the legal situation less transparent for all parties involved. This would go against the aim of Regulation 1408/71, which is to facilitate the free movement of persons"* (para. 74). Thus, the CJEU does not seem to think that following different sets of rules would go against the aim of the Regulations.

To conclude: As the EU Commission in its proposal for a revised Social Security Regulation[76] has already recognised, benefits aimed at covering various forms of long-term

[73] To this effect, see C-262/88, 17.5.1990, *Barber v. Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209, on age discrimination in occupational pension systems. It should, however, be noted that the "expectations" in question in the Barber case are the expectations of individual citizens, not the expectations of a State.

[74] Decision of the EEA Council No 1 /95 of 10.3.1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, OJEU L 86/1995, 20.4.1995, p. 58.

[75] The CJEU explains that the Finnish benefit has the purpose to promote conditions which enable a disabled person to live and act with others as an equal member of society and to prevent and eliminate hindrances and barriers caused by disability, to help severely disabled persons to make their own choices regarding the carrying out of the activities listed in that paragraph, namely everyday activities, work and studies, hobbies, participation in society and the maintenance of social interaction and that the care needs which relate to medical care, treatment or supervision are expressly excluded from the scope of personal assistance (para. 47 to 49 of the ruling). This clear exclusion of the care needs mentioned might have been the reason for considering the benefit not covered by Regulation 883/2004.

[76] Proposal of 13.12.2016 for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM (2016) 815 final 2016/0397 (COD).

care – for different purposes – do not always fit the traditional categories of social security. This case, among others, demonstrates some challenges in the current classification of these benefits, and serves as an example of the need to establish "long-term care" (LTC) as a separate, clearly defined, category of benefits for coordination purposes.

3.3.7. Rulings on administrative cooperation

3.3.7.1. Case E-13/15, *Bautista*

Factual situation and procedures

The plaintiff was living in Spain and receiving an invalidity pension from Liechtenstein. Due to a medical examination carried out by a Spanish doctor chosen by the competent Spanish institution at the request of the Liechtenstein institution, which led to the conclusion that the plaintiff could carry out light work, the Liechtenstein institution suspended the benefit. The plaintiff appealed against this decision through the Liechtenstein courts.

Relevant EEA law

Important for the case: Article 82 of Regulation 883/2004, Articles 5 (1), 49 (2) and 87 (1) and (2) of Regulation 987/2009.

Question referred to the EFTA Court

The referring national court wanted to know if the competent institution was bound by the findings of the institution of the place of residence and these findings could not be challenged in a procedure before the competent institution and follow-on court proceedings. The following questions were asked of the EFTA Court:

1. Is a recipient of benefits (claimant) prohibited, because the debtor institution is bound by the findings of the institution of the place of stay or residence under the second sentence of Article 87(2) of Regulation (EC) No 987/2009, from challenging those findings in the procedure before the debtor institution?

2. If the first question is answered in the affirmative: does that binding effect also apply in court proceedings, which under national procedural rules, follow on from the proceedings before a debtor institution?

Findings of the EFTA Court[77]

The EFTA Court drew a dividing line between Article 49 (2) and 87 (2) of Regulation 987/2009: while the first provision states that documents, medical reports and administrative information collected by the institution of another MS are to be taken into account as like

[77] Case E-13/15, 16.12.2015, *Abuelo Insua Juan Bautista v. Liechtensteinische Invalidenversicherung*, [2015] EFTA Ct. Rep. 720.

documents in the competent MS, the second provision contains a specific rule concerning an examination requested in another MS, after which the requesting institution is bound by the findings of the requested institution. Article 87 (2) of Regulation 987/2009 allows the competent institution to have the person concerned examined by a doctor of its own choice, which was not the case here. The binding effect of Article 87 (2) of Regulation 987/2009 concerns only the medical findings and not the legal assessment of the impact of these findings on an entitlement to benefits. This decision has to be taken by the competent institution. Moreover, these provisions do not hinder the person concerned from challenging the medical findings in an administrative procedure before the competent institution. Similarly, under national Liechtenstein law any person has the right to challenge a decision of the institution, including its medical findings. Therefore, the equal treatment provision would require that such a right must also be given to a migrant worker residing in another MS.

Answer of the EFTA Court:

"Article 87(2) of Regulation (EC) No 987/2009 does not prevent a recipient or claimant of benefits from challenging the findings of an institution of the place of stay or residence made under the said provision in an administrative procedure before a debtor institution."

Rulings of the CJEU cited by the EFTA Court

Case C-114/13, 12.2.2015, *Bouman*, ECLI:EU:C:2015:81: This ruling is not relevant as it concerned a legal question (periods of insurance completed in another MS) and not a medical report (cited in para. 38).

Case C-45/90, 3.6.1992, *Paletta,* ECLI:EU:C:1992:236: The competent institution has the right to have a person examined by a doctor of its own choice (cited in para. 39).

Analysis

This ruling again (see also the ruling of the EFTA Court in case E-3/04, *Tsomakas*) deals with the other side of the coin related to the binding effect of documents issued by the institution of another MS. It concerns not the question of whether the requesting institution is bound by such documents but if the person concerned can challenge a decision of the competent institution based on such documents. While the CJEU has had to deal only with the first situation up until now,[78] the EFTA Court was asked to decide on the second situation (in case E-24/15, *Waller*, the EFTA Court was again confronted with Article 87 (2) of Regulation 987/2009 and had to decide on the first situation).

The ruling of the EFTA Court draws a dividing line between the intention of these rules concerning the binding effect of medical findings of an institution of another MS to protect the migrant worker and the rights of these persons to contest any decision of the competent institution.

Taking into account that the CJEU has not up until now had to deal with these situations, the ruling of the EFTA Court could also be of interest for the EU MS.

[78] CJEU cases 22/86, 12.3.1987, *Rindone v. Allgemeine Ortskrankenkasse Bad Urach-Münsingen*, ECLI:EU:C:1987:130, C-344/89, 27.6.1991, *Martínez Vidal v. Gemeenschappelijke Medische Dienst*, ECLI:EU:C:1991:277, C-45/90, 3.6.1992, *Paletta v. Brennet*, ECLI:EU:C:1992:236, C-206/94, 2.5.1996, *Brennet v. Paletta*, ECLI:EU:C:1996:182, and C-279/97, 10.12.1998, *Voeten and Beckers*, ECLI:EU:C:1998:599.

3.3.7.2. Case E-24/15, *Waller*

Factual situation and procedures

This case is comparable to Case E-13/15, *Bautista*. Therefore, reference is made to that case whenever possible.

The plaintiff was living in Germany and receiving an invalidity pension from Liechtenstein. A medical examination carried out by a German doctor at the request of the Liechtenstein institution led to the conclusion that the plaintiff's ability to work was still reduced but by a slightly different amount, with the result that the Liechtenstein institution reduced the benefit from 100% (full pension) to 50% (half pension). In the light of an appeal by the plaintiff against this reduction, the Liechtenstein institution contacted the German medical officer again, who stated that the work capacity that had been communicated of less than three hours per day corresponded to full invalidity under German law and that a more precise quantification of the incapacity to work could not be carried out.

Relevant EEA law

Important for the case: Article 82 of Regulation 883/2004, Articles 5 (1), 49 (2), 87 (1) and (2) of Regulation 987/2009.

Question referred to the EFTA Court

The referring national court wanted to know if the competent institution is precluded from challenging the findings of the institution of the place of residence and does this also apply to follow-on court proceedings. The following questions were asked of the EFTA Court:

(1) Does the fact that under the second sentence of Article 87(2) of Regulation (EC) No 987/2009 the debtor institution shall be bound by the findings of the institution of the place of stay or residence preclude the debtor institution from challenging those findings – and thus the information stated in the detailed medical report provided in form E 213 – in its procedure?

(2) If the answer to the first question is in the affirmative: Does that binding effect also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.

Findings of the EFTA Court[79]

The EFTA Court referred to its findings in case E-13/15, *Bautista*. The competent institution is bound by the medical findings of the German doctor. A deviation by the competent institution would be equivalent to challenging these findings. This binding effect is an aspect

[79] Case E-24/15, 2.6.2016, *Walter Waller v. Liechtensteinische Invalidenversicherung*, [2016] EFTA Ct. Rep. 527.

of mutual trust between the institutions of the MS. This effect is only applicable in relation to the institution but not in relation to the person concerned.

Answer of the EFTA Court:

(1) Article 87(2) of Regulation (EC) No 987/2009 precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in the administrative procedure.

(2) The binding effect mentioned in Article 87(2) of Regulation (EC) No 987/2009 applies in court proceedings following on from an administrative proceeding before the debtor institution in a situation such as that of the present case.

Rulings of the CJEU cited by the EFTA Court

Case C-2/05, 26.1.2006 *Herbosch Kiere*, ECLI:EU:C:2006:69: Courts do not have the right to scrutinise the medical findings of an examination made by the institution of another MS when the institutions are also bound by it.

Analysis

The ruling fits with the ruling in case E-13/15, *Bautista*. There could be doubt as to whether the ruling really answered all the questions which arose before the referring court. It could be assumed that the main question could also be how to deal with the decision that a working capacity of less than three hours a day constitutes full invalidity under German law while this leads only to 50% invalidity under Liechtenstein law. Therefore, the question could be raised as to whether the binding effect concerns the "full invalidity" or the "working capacity of less than three hours a day"?

This could be seen as the difference between the medical findings and the legal assessment of those findings. This means that the Liechtenstein institution and court are bound by a working capacity of less than 3 hours a day but not by the fact that this constitutes full invalidity under German law. What degree of invalidity this constitutes under Liechtenstein law can be decided under that law. Thus, the outcome could be seen as corresponding to the relevant rulings of the CJEU (see case E-13/15, *Bautista*).

3.3.7.3. Case E-11/16, *Mobil Betriebskrankenkasse*

Factual situation and procedures

A German national insured by German mandatory health insurance had a car accident while on holiday in Norway. The car which caused the accident was registered in Norway and covered by Norwegian liability insurance. The victim of the accident was first treated in a Norwegian hospital and then transferred to a German hospital for continued treatment. The Norwegian liability insurance paid full compensation for the compensable losses, including the personal expenses and the loss of income as a result of the traffic accident.

The German health insurance had to make a number of payments for which it filed for recourse from the Norwegian liability insurance. Some of these requests were rejected by

the Norwegian insurance because the victim would not have been entitled to claim compensation under Norwegian law. These rejections related to three items: the costs of hospital treatment in Norway (EUR 11 310), because, after presentation of a European Health Insurance Card (EHIC), the victim did not have to bear these costs, and under Norwegian law the Norwegian health service is not entitled to reclaim these costs; the costs of hospital treatment in Germany (EUR 55 210.45) as the victim should have stayed in Norway for the continued treatment; and benefits like lymph drainage and general massage (EUR 5 873.16) which are not compensable under Norwegian law.

Relevant EEA law

Important for the case: Article 93 (1) of Regulation 1408/71.

> If a person receives benefits under the legislation of one Member State in respect of an injury resulting from an occurrence in the territory of another State, any rights of the institution responsible for benefits against a third party bound to compensate for the injury shall be governed by the following rules:
>
> (a) where the institution responsible for benefits is, by virtue of the legislation which it administers, subrogated to the rights which the recipient has against the third party, such subrogation shall be recognised by each Member State;
>
> (b) where the said institution has direct rights against the third party, such rights shall be recognised by each Member State.

Question referred to the EFTA Court

The referring national court wanted to know how the provisions of the Coordination Regulations (reference was made to Article 85 of Regulation 883/2004, which corresponds to Article 93 of Regulation 1408/71) have to be understood in relation to the subrogation; whether this depends on the legislation of the MS in which the competent institution is situated or of the MS where the injury occurred, or whether the Coordination Regulations do not have any influence on that question which depends on the choice of law as regards the existence and scope of the claim. If an institution has a direct right against a third party, does the existence and scope of these rights depend on the legislation of the MS, in which the competent institution is situated, or of that MS, where the injury occurred? The following questions were asked of the EFTA Court:

Question 1, concerning the interpretation of Article 85(1)(a) of [Regulation (EC) No 883/2004]:

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 Social Security Regulation [Regulation (EC) No 883/2004] 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 [Regulation (EC) No 883/2004]:

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?

Findings of the EFTA Court[80]

As the case concerns a period before the entry into force of Regulation 883/2004 in relation to the EEA States, Regulation 1408/71 is applicable. This does not change the substance of the answers, as the provisions are essentially identical.

The rights of the responsible institution (the one required to provide benefits) under the laws to which it is subject have to be recognised by other MS (especially that in which the injury occurred), but it does not change the extent of non-contractual liability on the part of the third party (e.g. the liability insurer) under the laws of the MS in which the injury occurred. Therefore, it follows from the law of the MS of the responsible institution (Germany) whether the institution is subrogated to the rights of the injured person, while the scope of those rights depends on the law of the MS where the injury occurred (Norway, including applicable rules of private international law). Therefore, the institution cannot have more rights than those which the injured person has against the third party (i.e. the liability insurer).

The right of the responsible institution also covers the costs, e.g. of medical treatment, even if the injured person him/herself does not have any claim because the treatment has been granted free of charge. The responsible institution has to bear the costs under the obligation of reimbursement to the institution of the place of stay or residence; therefore, the compensation under Article 93 of Regulation 1408/71 cannot be refused (despite national Norwegian law which might limit such rights).

Concerning the lymph drainage and general massage, the EFTA Court notes that the parties involved appear to agree that such costs are not compensable under Norwegian tort law. The EFTA Court consequently finds that the costs must be compensable under Norwegian law for the responsible institution to have a valid claim for reimbursement.

Answer of the EFTA Court:

"1. Where an institution responsible for benefits has, by virtue of the legislation which it administers, a subrogated or direct right against a third party responsible for an injury sustained in another EEA State, Article 93(1) of Regulation (EEC) No 1408/71 requires other EEA States to recognise such rights as provided for under the law of the EEA State to which that institution is subject.

[80] Case E-11/16, 20.7.2017, *Mobil Betriebskrankenkasse v. Tryg Forsikring*, [2017] EFTA Ct. Rep. 384.

2. However, that subrogated or direct right cannot exceed the rights that the injured person has against the third party responsible for the injury under the national law of the EEA State where the injury occurred, including any applicable rules of private international law.

3. Nevertheless, the fact that, under the law of the EEA State in which the injury occurred, necessary treatment has been provided without giving rise to any costs for the injured person himself does not preclude the institution responsible for providing benefits from claiming compensation from the third party for costs incurred due to such treatment."

Rulings of the CJEU cited by the EFTA Court

Case C-428/92, 2.6.1994, *DAK v. Lærerstandens Brandforsikring*, ECLI:EU:C:1994:222 (and rulings cited therein: case 27/69, 12.11.1969, *Caisse de maladie des CFL a.o. v. Compagnie d'assurances sur la vie und contre les accidents*, ECLI:EU:C:1969:56, 33/64, 11.3.1965, *Betriebskrankenkasse der Heseper Torfwerke v. Van Dijk*, ECLI:EU:C:1965:19, and 44/65, 9.12.1965, *Hessische Knappschaft v. Singer et fils*, ECLI:EU:C:1965:122: Article 93 of Regulation 1408/71 has the objective of allowing an institution to exercise the rights of action provided for by its legislation against the third party which is liable for the injury (cited in para. 44).

Case C-397/96, *Kordel a.o.*, 21.9.1999, ECLI:EU:C:1999:432: Article 93 of Regulation 1408/71 is a conflict-of-law rule which states that the laws of the MS of the responsible institution apply (cited in para. 45). The substantive rules concerning the extent of non-contractual liability usually applied in the MS in which the injury occurred are not altered (cited in para. 46 and 47 – and rulings cited in case C-397/96: cases 44/65, 9.12.1965, *Hessische Knappschaft v. Singer et fils*, ECLI:EU:C:1965:122, 78/72, 16.5.1973, *Ster - Algemeen Syndikaat v. De Waal*, ECLI:EU:C:1973:51, and C-428/92, 2.6.1994, *DAK v. Lærerstandens Brandforsikring*, ECLI:EU:C:1994:222).

Analysis

The ruling of the EFTA Court deals with Article 93 of Regulation 1408/71 and – as the content is largely the same – also with Article 85 of Regulation 883/2004. These provisions concern a rather complex issue under the Coordination Regulations, which tries to build a bridge from public social security law to private tort law. The ruling is based on the previous rulings of the CJEU concerning these provisions,[81] and further develops and clarifies them.

The first part of the ruling sums up what the CJEU has already elaborated on: it depends on the legislation of the MS of the competent ("responsible") institution (the one which had to grant benefits because of the injury in another MS) if the institution has a subrogated or direct right against a third party and other MS must recognise these rights. The concrete content of these rights depends on the laws of the MS where the injury occurred. Therefore, the legislation and laws of both MS involved are relevant and could set limits on the claims of the institution which had to grant the benefits.

[81] Some of the cases even related to the provisions of the predecessor of Regulation 1408/71 – Regulation (EEC) No. 3: CJEU cases 31/64, 11.3.1965, *Sociale Voorzorg v. Bertholet*, ECLI:EU:C:1965:18; 33/64, 11.3.1965, *Betriebskrankenkasse der Heseper Torfwerke v. Van Dijk*, ECLI:EU:C:1965:19; 44/65, 9.12.1965, *Hessische Knappschaft v. Singer et fils*, ECLI:EU:C:1965:122; 27/69, 12.11.1969, *Caisse de maladie des CFL a.o. v. Compagnie d'assurances sur la vie und contre les accidents*, ECLI:EU:C:1969:56; 72/76, 16.2.1977, *Landesversicherungsanstalt Rheinland-Pfalz v.Töpfer*, ECLI:EU:C:1977:27; C-313/82, 15.3.1984, *Tiel-Utrecht Schadeverzekering v. FCGA*, ECLI:EU:C:1984:107; C-428/92, 2.6.1994, *DAK v. Lærerstandens Brandforsikring*, ECLI:EU:C:1994:222; C-397/96, 21.9.1999, *Kordel a.o.*, ECLI:EU:C:1999:432.

The ruling of the EFTA Court provides specifics on some aspects relating to the concrete content, which have not so far been dealt with by the CJEU with such clarity: it is not necessary that the injured person him/herself be at a financial disadvantage because of the injury and, therefore, have a claim him/herself, (which is the case e.g. when sickness benefits in kind have been granted without any additional costs, e.g. by a national health system, and the treatment has been reimbursed by the competent institution under the Coordination Regulations). Compensation may also not be denied because the victim has chosen to be transferred to his/her MS of residence and continue the treatment there, even though continued treatment would have been possible in the MS where the injury took place. The benefits in both MS concerned were necessary treatment, which is covered by the laws of both MS. However, the costs of benefits which cannot be compensated under the tort law of the MS where the injury occurred (in the concrete case lymph drainage and general massage) cannot be claimed by the institution which provided them.

Taking into account the new elements and clarifications of this ruling of the EFTA Court, it could also be of interest for the EU MS.

4. Horizontal aspects and conclusions

4.1. Assessment of the role of the two Courts

To better assess the role of the EFTA Court and its 18 rulings on the Coordination Regulations, it is necessary to compare it to the role of the CJEU in this field of European law. CJEU[82] statistics can provide some valuable information and it is possible to compare the numbers of rulings in the field of social security for migrant workers for the years 2018 to 2022 (for the list of the rulings of the EFTA Court during this period see table 2).

Table 3 - Rulings of the CJEU and the EFTA Court on social security coordination 2018-22

Court	2018	2019	2020	2021	2022	Total
CJEU	10	12	6	3	6	37
EFTA Court	-	1	-	4	2	7

Source: CJEU statistics (CJEU), this report (EFTA Court)

Of course, it would not be appropriate to estimate the general importance of rulings on social security based on these figures, as these five years might not be representative and there might be different factors exerting an influence over five years. Moreover, the CJEU's statistic may understate the number of relevant rulings.[83]

The 18 rulings of the EFTA Court on the Coordination Regulations delivered until now and analysed in this report concern Norway in ten cases, Liechtenstein in six cases and Iceland in two cases. Taking into account the small number of citizens and, thus also that there are fewer cross-border movements between the three EFTA EEA States (7 million inhabitants compared to about 450 million in the EU MS) the importance of this number of rulings of the EFTA Court should not be underestimated. There are many more rulings per inhabitant in the three EEA States than in the EU MS.

Another aspect is also interesting: the attitude towards involving the CJEU varies between some MS or groups of MS. While national courts in e.g. Austria, Belgium, Germany and the Netherlands frequently send questions to the CJEU asking for a

[82] https://curia.europa.eu/jcms/jcms/Jo2_7032/de/.

[83] Instead of the six rulings mentioned in the CJEU statistics for 2022, nine rulings on the Coordination Regulations can be found: Cases C-33/21, 19.5.2022, *INAIL and INPS*, ECLI:EU:C:2022:402; C-328/20, 16.6.2022, *Commission v. Austria [Indexation des prestations familiales]*, ECLI:EU:C:2022:20; C-576/20, 7.7.2022, *Pensionsversicherungsanstalt [Périodes d'éducation d'enfants],* ECLI:EU:C:2022:75; C-25/22, 14.7.2022, *Finanzamt Österreich*, ECLI:EU:C:2022:590; C-411/20, 1.8.2022, *Familienkasse Niedersachsen-Bremen*, ECLI:EU:C:2022:602; C-58/21, 15.9.2022, *Rechtsanwaltskammer Wien*, ECLI:EU:C:2022:691; C-3/21, 29.9.2022, *Chief Judication Officer a.o.*, ECLI:EU:C:2022:737; C-713/20, 13.10.2022, *Raad van bestuur van de Sociale verzekeringsbank*, ECLI:EU:C:2022:782; C-199/21, 13.10.2022, *Finanzamt Österreich [Recouvremenet de prestations familiales]*, ECLI:EU:C:2022:789.

preliminary ruling, this is seldom or even never the case of other courts e.g. in the Nordic Countries Denmark, Finland or Sweden. Of course, this largely depends amongst others on the national legislation, the application of the Coordination Regulations by national administrations, but also the attitude of national courts especially on their understanding of "*acte claire*". It is not the task of this report to further analyse these aspects. Nevertheless, it could be interesting if these groups can also be detected in the EFTA EEA States. Could it be that the referral of only very few cases to a European Court is a Nordic tradition, which can also be found in Iceland and Norway? Looking at Iceland, this could be an affirmative example, as only two cases have been brought before the EFTA Court until now (of course, Iceland has only a very small population). However, the practice of Norway does not support this argument. Ten cases on the Coordination Regulations is a large number compared even to some other EU MS outside the Nordic region. Of course, of these ten rulings, two were infringement procedures, which still leaves eight in which the EFTA Court has been asked for an advisory opinion by a national Norwegian court.[84]

The number of Norwegian cases reflects the importance and the perception of EEA law in the field of social security in Norway. This field of European law has also been the focus of political debate and interest in the media in recent times, initiated by the so-called "NAV-Scandal" after doubts arose as to whether the rescinding of several social security sickness benefits in cash, fines and even imprisonment of recipients of benefits who had not declared their stay abroad, was in line with EEA rules.

Therefore, it is in fact very difficult to compare the role of the two courts and the attitude of the EU MS compared to that of the EFTA EEA States.

What is also interesting is the role each of the two courts attributes to the other. The EFTA Court refers frequently and widely to the rulings of the CJEU, as listed in all the analysis above (references which are sometimes not completely self-explanatory as the reference only deals with one abstract element of a ruling of the CJEU, which – in principle – concerns a totally different case[86]). However, there are no references to cases decided by the EFTA Court to be found in rulings of the CJEU in those cases which could have some similarities with cases already decided by the EFTA Court.

4.2. Assessment of the content of the rulings of the EFTA Court

It is not easy to summarise the analysis of the 18 different ruling of the EFTA Court and to draw conclusions valid for all of them. The rulings deal with different types of benefits or provisions of the Coordination Regulations, different States and different national schemes and traditions. Nevertheless, the rulings – in principle – could be split into three groups which are discussed in more detail below, i.e. those which

[84] This argument is even more valid as, at the time of the completion of this Report, two more Norwegian cases were pending but had not yet been decided by the EFTA Court.

[85] E.g. reference to the *Aldewereld*-case in case E-2/18, *Concordia* (although the EFTA Court refers to the opinion of the European Commission in para. 42 of the ruling, where the reference is made, it is not clear what exactly is meant by it).

tend to align with the CJEU, those which answer questions not yet dealt with by the CJEU, and those which could be seen as contradicting the CJEU. The categorisation is not comprehensive in categorising all 18 rulings of the EFTA Court, but only mentions some examples. Moreover, as the analysis of the different rulings has shown, it is not easy to make clear-cut categorisations. Many rulings have elements that fall into more than one category. The rulings are, of course, of importance for the EFTA EEA States; nevertheless, the impact they could have on EU MS is of interest. Therefore, these categories should be looked more from the perspective of an EU MS than that of these three EFTA EEA States.

4.2.1. Rulings which tend to align with the rulings of the CJEU

This group are those rulings which follow the same principles as the jurisprudence of the CJEU and therefore do not cause any problems for EU MS. Examples are rulings dealing with the categorisation of specific benefits in an EFTA EEA State, e.g. case E-5/06, *ESA v. Liechtenstein*, concerning the helplessness allowance under Liechtenstein legislation. The classification in this ruling corresponds to the rulings of the CJEU on long-term care benefits (although another aspect, the non-export of this benefit provided in an international treaty, might be seen as not that clear; but it has no relevance for EU MS).

4.2.2. Rulings which answer questions not yet dealt with by the CJEU

The EFTA Court has sometimes also had the task of pioneering when it has had to answer questions not yet asked of the CJEU. These rulings are of importance for the EU MS as they could add elements that the CJEU has not yet developed. Of course, there is no way of predicting whether the CJEU would decide along the same lines in a comparable case. As an example, reference can be made to three cases. One is E-3/12, *Jonsson* concerning entitlement to unemployment benefits, where the EFTA Court decided that a prerequisite of actual presence in the State granting unemployment benefits to cross-border workers would be contrary to the Coordination Regulations. The others are E-13/15, *Bautista* and E- 24/15, *Waller* on the legal effects of medical examinations carried out in another State.

Unfortunately, the EFTA Court missed some opportunities to add even more new aspects to its rulings e.g. concerning the impact of the Coordination Regulations on sickness insurance schemes which have elements of private insurance, as in case E-2/18, *Concordia*.

4.2.3. Rulings which could be seen as different compared to rulings of the CJEU

This, of course, is the most complicated and challenging category. Of course, EU MS are bound by the interpretation of the CJEU and would have to ignore any ruling of the EFTA Court, which deviates from the CJEU's rulings. However, it is not easy to decide whether there really is a divergence between the two Courts as the facts and the concrete situation are never the same. Nevertheless, there are arguments in favour of a possible difference in two areas: the binding effect of documents (cases E-3/04, *Tsomakas*, and E-5/22, *Maitz*) and the possibility of restricting local

and regional benefits to the residents of a given region (case E-3/05, *ESA v. Norway*).

To start with the binding effect: Reading the *Tsomakas* and *Maitz* cases, it seems that the EFTA Court would attribute a binding effect to any document issued for the purpose of the application of the Coordination Regulations (including national documents), while the CJEU up until now explicitly attributed this effect only to standardised European documents established by the Administrative Commission for the purpose of the application of the Coordination Regulations (in particular the E 101 or PD A1 forms). This could lead to very different solutions depending on which States are involved. The situation in the *Alpenrind*-case[86] could be cited as an example: in this case the institution in Austria, where the activity was exercised, issued a national decision stating that its legislation was applicable to employees working in a slaughterhouse in Austria who had been sent to this workplace by a Hungarian employer. For the Austrian institution, inter alia, this work was seen as contradicting the ban on replacement in the posting provisions and Hungary had not issued a PD A1. The CJEU decided that these national decisions could not result in a binding effect and the PD A1 issued subsequently by the Hungarian institution had a binding effect which prohibited Austria from applying its legislation as long as these documents had not been withdrawn by the Hungarian institutions. It would be interesting to know how the EFTA Court would have dealt with such a case. Had he attributed the binding effect to the national Austrian decision and Hungary would have been prohibited from issuing the PD A1 subsequently or is there a difference because Hungary has issued a PD A1 subsequently which was not the case in the situations examined by the EFTA Court?

The impact on regional benefits is another example of possible differences. In the *ESA v Norway* case the EFTA Court seems to acknowledge the specific nature of such benefits and also the situation within the territory of the State concerned (a person resident in the same State but outside the specific region would also not be entitled to these benefits), which leads to a denial of the benefit for a person resident in another State but working in the specific region. Compared to that the CJEU decided in the case of the Flemish long-term care allowance[87] that a person residing in another EU MS but working in the Flemish Region as well as even a person residing in another Belgian Region, who had previously made use of the free movement provisions, could claim this benefit although not resident in that specific Region. Again, it would be interesting to know, how the EFTA Court would have dealt with such a case. It seems to be clear that in EU MS these benefits must also be granted in some cases to persons who do not reside in the region but work there, while it is not totally clear, if the three EFTA EEA States can restrict them to persons residing in the region. It could be important for that question that the Norwegian benefit was special insofar as it had a strong link to political aims outside social security while the Flemish benefit was not special but a standard long-term care benefit.

A different interpretation of the same legal texts and the impact of these interpretations, depending on which court finally decides on a matter, would not be

[86] CJEU case C-527/16, 6.9.2018, *Alpenrind a.o.*, ECLI:EU:C:2018:669.

[87] CJEU case C-212/06, 1.4.2008, *Gouvernement de la Communauté française et Gouvernement wallon*, ECLI:EU:C:2008:178.

satisfactory for the States involved. This would not only be of importance for the social policy of the States but could affect citizens and the institutions.

4.3. Conclusions

Rulings of the CJEU in the field of the Coordination Regulations usually attract a significant amount of attention. Many journals, other publications and academic research deal with them and analyse them in depth. Usually this is not the case with rulings of the EFTA Court. Therefore, an analysis of them has its merits. As shown in this Report, all 18 rulings of the EFTA Court on the Coordination Regulations have interesting details and could add new elements which the CJEU has not yet developed. Nevertheless, it could happen that the CJEU and the EFTA Court at a first glimpse do not achieve the same results, which could be regarded as problematic. Article 105 of the EEA Agreement contains a provision which could tackle such a situation:

Article 105

> 1. In order to achieve the objective of the Contracting Parties to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement, the EEA Joint Committee shall act in accordance with this Article.
>
> 2. The EEA Joint Committee shall keep under constant review the development of the case-law of the Court of Justice of the European Communities and the EFTA Court. To this end judgments of these Courts shall be transmitted to the EEA Joint Committee which shall act so as to preserve the homogeneous interpretation of the Agreement.
>
> 3. If the EEA Joint Committee within two months after a difference in the case-law of the two Courts has been brought before it, has not succeeded to preserve the homogeneous interpretation of the Agreement, the procedures laid down in Article 111[88] may be applied.

Therefore, if they occur, differences in interpretation should be solved by the EEA Joint Committee. This has never been the case in the field of social security coordination. One reason might be that it is not that easy to decide that such a different interpretation exists – it could be that the seeming existence of a difference, such as those mentioned under Part 4.2.3., is only a consequence of factual situations that are not comparable.

This report could be seen as an incentive to continue and deepen an analysis of the rulings of the EFTA Court and the comparison of them with the rulings of the CJEU. This could help in better establishing any differences, including for the purpose of Article 105 of the EEA Agreement. It is recommended that this be done periodically by the Administrative Commission for the Coordination of Social Security Systems, where rulings of the EFTA Court until now have not played any significant role. There

[88] Dispute settlement.

is also a case for supporting academic research on this matter to gain better insight into the mutual impact of the work of the two courts. It would also be good to see the CJEU refer to rulings of the EFTA Court in the same way the EFTA Court does to rulings of the CJEU.

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