THE CJEU AND EFTA COURT RULINGS ON SOCIAL SECURITY COORDINATION IN A COMPARATIVE PERSPECTIVE

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This article is a presentation of a legal report published in February 2024, comparing the rulings of the Court of Justice of the European Union (CJEU) and the EFTA Court on social security coordination. 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 ruled on 18 cases of social security coordination in total since it was established in 1994. 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. In this article, two examples of the analyses are included. The first example is a ruling on a regional family benefit, while the second is a ruling on sickness benefits that partly deal with a question that the CJEU has not yet been asked to rule on. Finally, these different analyses are evaluated from a cross-cutting perspective.

1 INTRODUCTION

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 as applied by the 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 EU 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 October 2024, the EFTA Court had ruled on 19 cases of social security coordination, either under Regulations 1408/71 and 574/72 or Regulations 883/2004 and 987/2009, depending on the relevant period. Eleven cases concern Norway, six Liechtenstein and two Iceland. Sixteen cases are Advisory Opinions to national courts, three cases are infringement procedures that were raised by the EFTA Surveillance Authority ('ESA') against an EFTA state (two against Norway, one against

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Note from the author: My presentation at the seminar in Sandefjord October 2024 consisted of two parts: A presentation of the report "The CJEU and EFTA Court rulings in a comparative perspective" (MoveS legal report 2023), written by Bernhard Spiegel (Austria) and Martin Andresen (Norway), and a review of recent case law on social security coordination and free movement of workers from the same two courts. This article is an extended version of the first part, the presentation of the legal report.

Liechtenstein).

The report starts with some general remarks on the legal framework applicable to the CJEU and the EFTA Court. This includes a short presentation of the EEA Agreement, a comparison between the two courts, and a table with an overview of all rulings by the EFTA Court in the field of social security coordination up to October 2023.

In the main part of the report, each ruling of the EFTA Court in the field of social security coordination is analysed, and the relationship with the rulings of the CJEU is elaborated on.[1] The rulings are not dealt with in their chronological order but corresponding to the issues they concern. In this article, two examples of the analyses are included. Finally, these different analyses are evaluated from a cross-cutting perspective.

2 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.[2] The agreement entered into force on 1 January 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 EU Member States. 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, 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 and 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, as amendments to the Regulations are included also through corresponding Decisions of the EEA-Joint Committee.

This means that it is possible to make direct comparisons between the CJEU and the EFTA Court in this field of law. It should be noted, however, 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 May 2010 in the EU, but only from 1 June 2012 in the EFTA Pillar. This meant that different rules applied, for example concerning applicable national 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 the comparative report, the relevant functions are the monitoring function (the European Commission in the EU, the ESA in the EFTA Pillar), and the judicial function (the two Courts, the CJEU and the EFTA Court). Both EFTA functions are established in a separate Agreement between the EFTA States, the

[1] 18 rulings are analyzed. Case E-3/23 *A v Arbeids- og velferdsdirektoratet* [2024] EFTA Court Judgement of 18 April 2024, on the minimum guarantee that is provided for in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, article 58, was still pending when the report was completed. Therefore, the case is mentioned only briefly in the report.

[2] Switzerland subsequently decided not to take part.

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (– 'SCA').[3]

3 FEATURES OF THE TWO COURTS COMPARED

Both courts have a comparable function, but their legal bases and structure differ. In table 1, some features of the two courts are compared.

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
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	Language of the EFTA EEA

[3] Available here: <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> accessed 30 March 2025.

	concerned; the preliminary questions, opinion of the Advocate General and rulings usually are translated into all official EU languages and published on Curia.	State concerned and English. The requests, the report for the hearing and the rulings are published on the EFTA Court website.
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

4 CHRONOLOGICAL LIST OF EFTA COURT RULINGS ON COORDINATION OF SOCIAL SECURITY SYSTEMS

Table 2 – Chronologic list of rulings of the EFTA Court

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	Þorkelsson	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
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

5 STRUCTURES OF THE ANALYSES

The analysis of the rulings of the EFTA Court 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. If relevant for a better understanding of the case, their content is explained under 'Factual situation and procedures'.

Questions referred to the EFTA Court: The specific 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 specific 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 to the case are not mentioned, unless referred to by the EFTA Court. 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 Member States or whether their application in the Member State could be doubtful taking into account different approaches of the CJEU.

6 THE ANALYSES – TWO EXAMPLES

It is almost impossible to summarise the analyses of the 18 different rulings of the EFTA Court and then draw conclusions that are valid for all of them. The rulings deal with different types of benefits or provisions of the social security regulations, different states and different national schemes and traditions. Nevertheless, for the analyses we found that the rulings could be split into three groups:

- Rulings that tend to align with the CJEU;
- Rulings that could – possibly – be seen as contradicting the CJEU;
- Rulings that answer questions not (yet) dealt with by the CJEU.

The majority of the rulings fall into the first category – rulings that tend to align with the CJEU. In this article, I will present two examples of the analyses. The first ruling is Case E-3/05 *ESA v. Norway*.[4] This is the second ruling ever on social security coordination by the EFTA Court, and it concerns certain considerations on regional benefits that might be seen as deviating from rulings of the CJEU on such benefits. It should be noted, however, that – as always – there are differences, both in the factual situation and benefits concerned that could help to explain the different outcomes. It should also be noted that this is an infringement case, while the cases from the CJEU are preliminary rulings.

The second ruling is case E-2/18 *Concordia*.[5] This ruling concerned the impact of the social security regulations on sickness insurance schemes which have elements of private insurance. This is a topic that the CJEU has not yet dealt with, and the case raises certain questions in a situation where these elements are not directly comparable with the system that the regulations designate for the coordination of sickness benefits in kind. As the analyses show, however, it seems that the EFTA Court to a certain degree missed the opportunity to further discuss the effect of these differences.

6.1 EXAMPLE 1 – CASE E-3/05 *ESA V. NORWAY*

6.1[a] Factual Situation and Procedures

Under Norwegian Law, the Finnmark Supplement (a regional supplement to the Norwegian family allowance) is only granted when the parents and the child reside in the county of Finnmark, located in the very north. The intention behind this additional benefit was to counter negative trends in the region, for example due to depopulation. A person working

[4] Case E-3/05 *EFTA Surveillance Authority v The Kingdom of Norway* [2006] EFTA Ct. Rep. 102.
[5] Case E-2/18 *C v. Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein* [2019] EFTA Court judgment of 14 May 2019.

in the county of Finnmark, but resident in the neighbouring state of Finland, did not receive the regional supplement. The scheme was abolished in 2014.

ESA brought an action before the EFTA Court, asking for a declaration that Norway had failed to fulfil its obligations under Article 73 of Regulation 1408/71, alternatively under Article 7(2) of Regulation 1612/68, by not granting the Finnmark Supplement to a person who resides with family in another EEA state whilst working in Finnmark.

6.1[b] Findings of the EFTA Court

The EFTA Court held that the Finnmark Supplement was a family benefit within the meaning of Article 1(u)(i) of Regulation 1408/71. A condition of residence in the state in which the worker works could not be imposed under Article 73 of Regulation 1408/71. However, the Court said that it was not necessary to interpret this provision so that the family had to be regarded as residing at the actual place of employment of the worker and thereby be entitled automatically to regional benefits. There was 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 was 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 (i.e. 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 was deemed suitable to achieve the goal and there were no less restrictive means to achieve the same objective. Consequently, this national measure might indirectly discriminate against migrant workers but could be regarded as objectively justified.

According to Article 42(2) of Regulation 1612/68, since the measure fell under Regulation 1408/71, Article 7(2) of Regulation 1612/68 was not applicable.

On these grounds, the EFTA Court dismissed the application.

6.1[c] Analysis

This ruling of the EFTA Court concerning regional social security benefits is quite important. In the same way that the CJEU ruled on benefits which have to be understood as sickness benefits (especially in the *Hosse*-case),[6] the EFTA Court is also 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 social security regulations simply because they are regional. The CJEU has decided that such benefits, if they fall within the material scope of the Regulations, have to be exported if the potential recipients reside outside the competent state. Differently from the case dealt with by the EFTA Court, in

[6] Case C-286/03 *Silvia Hosse v Land Salzburg* EU:C:2006:125, concerning Austrian regional long-term care benefits. Later confirmed by C-206/10 *European Commission v Federal Republic of Germany* EU:C: 2011:283, concerning regional benefits for blind, deaf and disabled persons.

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 state (Article 19).

Subsequently to the ruling of the EFTA Court, the CJEU had to decide on another regional benefit – the Flemish long-term care allowance. The special situation with regard to this benefit was that it was only granted to a person residing in the region of Flanders, and the other Belgian regions did not grant comparable benefits. This case is therefore comparable to case E-3/05 decided by the EFTA Court. Although the CJEU decided that the benefit fell within the material scope of Regulation 1408/71,[7] it did not continue with an examination based on the rules of this Regulation (as it did in the *Hosse*-case), but on the basis of the prohibition of discrimination under the Treaty Establishing the European Community (now TFEU). The CJEU found in this case that EU law could not be applied to a person who resides outside the regions in which this benefit was granted if that person had never made use of their right to free movement, but that EU law would apply to all persons who have made use of their free movement rights.[8] Therefore, every person resident outside Belgium, and working anywhere where the Flemish long-term care allowance was granted, was affected, but so was anyone who had previously made use of the right to free movement and now residing in 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 such a case 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 EEA state (Article 73 of Regulation 1408/73).[9] 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 be any justification for the Finnmark supplement in the eyes of the CJEU, either. Of course, there might be other general, public interest reasons involved. It is not necessary to protect the regions concerned in Belgium against depopulation.[10] 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 social security regulations are also taken into consideration.

Taking into account the different situations and the fact that the CJEU seems to have adopted a strict attitude towards regional benefits, EU Member States cannot assume that the CJEU would accept a denial of any regional social security benefits for migrant workers residing outside this region but working therein. As mentioned previously, it should also be borne in mind 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.

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[7] Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* EU:C:2008:178 para 23.

[8] ibid paras 37 and 48.

[9] Concerning the obligation to grant family benefits without any restriction for family members resident in another Member State see most recently also CJEU Case C-328/20 *European Commission v Republic of Austria* EU:C: 2022:468.

[10] The county of Finnmark covers an area of 48 600 square kilometres with a population of 75 000 persons (Source: Statistics Norway, 'Population'). Belgium, in comparison has an area of 30 700 square kilometres and a population of 11,8 million (Source: *Store Norske leksikon*, 'Land i Europa'). Population figures are from 2024.

6.2 EXAMPLE 2: CASE-2/18 *CONCORDIA*

6.2[a] Factual Situation and Procedures

The plaintiff (C) was a Spanish national who had resided in Spain since 2003. He was receiving a disability pension from and had health insurance in Liechtenstein, having worked and resided there. Liechtenstein has outsourced the delivery of health insurance to private insurance companies in Switzerland. In this case, the plaintiff had insurance that provided for the mandatory cover prescribed by Liechtenstein law as well as certain additional benefits, including the free choice of doctor worldwide under the so 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 said 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 decision before the national court, which referred certain questions on the understanding and application of EEA law to the EFTA Court.

6.2[b] 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 social security 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 national social security system:

> 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'?

The referring court also asked a third question, a 'what/if'-question. In light of the answers to questions 1 and 2, it was not necessary to answer question 3.

6.2[c] Findings of the EFTA Court

The EFTA Court held that since the various insurances under Liechtenstein legislation had been notified under Article 9 of Regulation 883/2004, they fell within the material scope of that Regulation. This included the OKP Plus insurance with Concordia. It did not matter that a national social security system offered 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 Member State which pays the pension if he/she can prove that there is no entitlement in the Member State of residence. A person can also directly claim reimbursement from the Member State which pays the pension if the reimbursement has been denied in the Member State of residence. The competent institution is required to inform the person concerned of all the choices and possibilities this person has. As the specific benefits at issue in the case were not provided by the Spanish health care system covered by the social security regulations, the bill for the costs of these benefits could be presented directly to the competent institution.

6.2[d] Analysis

This case has interesting aspects for those Member States schemes which include elements of a private insurance because they cover for example 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 social security regulations – can oblige the insured person to follow the path of these regulations (which is registration in the Member State of residence, receiving benefits under the same conditions as other residents of that Member State 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 Regulations.[11] First, Article 24 of Regulation 883/2004 is not a provision which applies to specific benefits but concerns a person's overall situation. The application of this provision

[11] 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 Member States.

depends on whether the individual is entitled to (any) benefits in kind under the legislation of the Member State of residence. Very often, this provision is applied to persons who do not receive a pension from their Member State of residence.[12]

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 state of residence is incorrect. 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 social security 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 for them upfront. Usually this should not happen if the benefits were provided within the national health insurance system of the state 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 provides for the granting of benefits in kind in the state, where the competent institution is situated and does not deal with the situation of benefits in kind granted in the state of residence, which had to be paid to the service provider.

It is of interest that only the provisions on the benefits granted in a state other than the competent state during a (temporary) stay contain specific provisions on direct reimbursement by the competent institution when the treatment had to be paid for in the state one was staying in (Article 25(4) et seq. and Article 26(6) et seq. of Regulation 987/2009). In the case of residence outside the state 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.[13]

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 EEA state.[14] 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.

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 EU Member States which does not request reimbursement for every single benefit provided for by the competent institution. Instead, Spanish authorities request lump-sum reimbursement for every pensioner registered with an E 121 (or S1) form.[15] Therefore, as the plaintiff is registered with the Spanish institution as the place of residence, it must be assumed that

[12] The additional exemption from national health systems, which would open entitlement to benefits in kind for any resident, is provided for in Article 25 of Regulation 883/2004 (n 1).
[13] See Case C-158/96 *Raymond Kohll v Union des caisses de maladie* EU:C: 1998:171, and especially Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* EU:C:2001:400.
[14] Case C-208/07 *Petra von Chamier-Gliszczinski v Deutsche Angestellten-Krankenkasse* EU:C:2009:455.
[15] Article 63(1) and Annex 3 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 [2001] OJ L284/1.

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 to be incorrect). 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 in any event must 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 country 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 make a decisive difference. 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: '[…] 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'.[16]

7 ASSESSMENT OF THE ROLE OF THE TWO COURTS

To better assess the role of the EFTA Court and its 19 rulings on the social security regulations, it is necessary to compare it to the role of the CJEU in this field. CJEU statistics can provide information,[17] and it is possible to compare the number of rulings in the field of social security for migrant workers for the years 2018 to 2022.

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

Of course, it would not be appropriate to estimate the general importance of rulings on social security based on these figures alone, as these five years might not be representative and there might be different factors exerting an influence over five years.

[16] See para 42 of the judgment.
[17] Available here: <https://curia.europa.eu/jcms/jcms/Jo2_7032/de/> accessed 30 March 2025.

The rulings of the EFTA Court on the social security regulations delivered to date concern Norway in eleven 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 EEA EFTA States (7 million inhabitants compared to about 450 million in the EU Member States), 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 EFTA States than in the EU Member States.

Another aspect should also be mentioned: the attitude towards involving the CJEU varies between EU Member States or groups thereof. While national courts in for example Austria, Belgium, Germany and the Netherlands frequently send questions to the CJEU asking for preliminary rulings, this is not the case in courts in other Member States such as the Nordic EU countries of Denmark, Finland or Sweden. Of course, this depends amongst other things on the national legislation and the application of the Regulations by national administrations, but also the attitude of national courts, especially on their understanding of '*acte claire*'.

It could be interesting to see whether a similar pattern can also be detected in the EEA EFTA States. Could it be that the referral of only very few cases 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. However, the practice of Norway does not support this argument. Eleven cases on the social security regulations is a high number compared even to some other EU Member States outside the Nordic region. Two of the rulings were infringement procedures, but this still leaves nine in which the EFTA Court has been asked for an Advisory Opinion by a Norwegian court.

It could be argued that the number of Norwegian cases reflects the importance and the perception of EEA law in the field of social security in Norway. It is – probably – also a result of increased focus on EEA law since 2019, in the wake of the so-called 'NAV scandal', when doubts first 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 stays abroad in other EEA states, was in line with EEA rules.[18]

What is also interesting is the role each of the two courts attributes to the other in these cases. The EFTA Court refers frequently and widely to the rulings of the CJEU. 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.

The present account, and the full report on which it is based,[19] could be seen as an incentive to continue and deepen the analysis of the rulings of the EFTA Court and the comparison of them with the rulings of the CJEU. 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.

[18] This argument is supported by the fact that six requests for advisory opinions on social security coordination were submitted by Norwegian courts from 2020 to 2024, compared to a total of three in the 25 years from 1994 to 2019.

[19] The full report can be downloaded from the EU websites, see: <https://op.europa.eu/en/publication-detail/-/publication/c41a0c19-d646-11ee-b9d9-01aa75ed71a1/language-en> accessed 30 March 2025.

There 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.