NORDIC JOURNAL OF EUROPEAN LAW

Volume 8
Issue 2· 2025

LUND UNIVERSITY
HELSINGIN YLIOPISTO
UNIVERSITY OF BERGEN
SDU
UPPSALA UNIVERSITET
ISSN 2003-1785

NORDIC JOURNAL OF EUROPEAN LAW
ISSUE N 2 OF 2025

http://journals.lub.lu.se/njel

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Editorial note:

A special edition of the NJEL devoted to an increasingly special(ised) field – EEA Social Security Law

Christian Franklin*

The following special edition of the Nordic Journal of European Law is dedicated to various European Economic Area (EEA) social security law issues and developments. Whilst a great deal of academic writing has naturally been devoted to European Union law and practice in this field over the years, surprisingly little attention had been given to it in its EEA context in the first 25 years since the EEA Agreement entered into force in 1994.[1] Notwithstanding the fact that social security coordination had formed an integral part of the Agreement itself from the very beginning – initially by virtue of Regulation 1408/71, and as later replaced by Regulation 883/2004 – as an essential corollary in ensuring the three non-EU Member States of Norway, Iceland and Liechtenstein full participation in the EU's internal market.[2]

The picture has nevertheless changed rather radically over the past 5 years or so, following the earth-shattering public announcement by Norwegian authorities on 28 October 2019 that EEA rules concerning the exportation of sickness benefits had been misinterpreted and misapplied for many years, with serious consequences for the beneficiaries concerned.[3] In short, for reasons that may never fully be brought to light, the Norwegian Labour and Welfare Administration (NAV) had wrongly considered the right to export various sickness benefits as limited solely to cases where beneficiaries had transferred their *habitual residence* to another EEA state, and not when they enjoyed mere *temporary stays abroad* (holidays, weekend trips abroad and such).[4] Several thousands of beneficiaries who had spent time abroad in other EEA states whilst in receipt of the benefits in question, the majority of whom were Norwegian citizens, had therefore either had their benefits stopped and/or been required by NAV to repay often ruinous amounts to the Norwegian state. In many cases to the tune of several hundred thousand Norwegian kroner. Worse still, many were subsequently prosecuted for social security fraud under Norwegian criminal law rules. The misinterpretation affected around 86 convictions, including at least 36 cases of imprisonment.[5] For doing something which was not prohibited under EEA law or

* Professor, Director of CENTENOL and Joint Coordinator of the EEA Social Security Law project, University of Bergen.

[1] Agreement on the European Economic Area [1994] OJ L1/3.

[2] Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2; Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L166/1.

[3] A full time line of many important events both pre- and post-dating 28 October 2019 can be found on the Norwegian Government's official website (Norwegian only): <https://www.regjeringen.no/no/tema/pensjon-trygd-og-sosiale-tjenester/feilpraktisering-av-eos-sin-trygdeforordning/id2675673/>.

[4] Article 21(1) of Regulation 883/2004.

[5] Full numbers of cases affected can be found on NAV's website (Norwegian only): <https://www.nav.no/no/nav-og-samfunn/kontakt-nav/feiltolkning-av-eos-reglene/tall-pa-behandlede-saker-og-utbetalinger>.

Norwegian national law – the latter which even aimed (yet obviously had failed) to give EEA social security rules precedence – to begin with.[6]

Somewhat reassuringly, the political and judicial clean-up operations which followed the Norwegian social security scandal (sometimes somewhat misleadingly referred to as the 'NAV-scandal' in the media) proved both rigorous and comprehensive. A public inquiry was established,[7] a law commission set up to reform legislation in the field,[8] criminal cases were re-opened, many convictions expunged, with the Norwegian courts also reaching out to the EFTA Court for assistance as to the EEA legal issues that needed resolving.[9] The clean-up efforts are to a certain extent also still ongoing, with compensatory claims still making their way through the court system.

Perhaps inevitably, the scandal has also led to a significant and uncommonly welcome uptick in interest in EEA legal education and research in Norway, and the role played by academic institutions – not only in assisting with getting to grips with the many legal issues underlying the scandal itself, but also hopefully in helping to prevent anything similar from ever happening again. The contributions to this special edition are in fact a direct result of the push towards increasing both knowledge and awareness of EEA social security law and how it impacts on national law in the EEA EFTA States. They are based on presentations made at the annual EEA Social Security Law Conference 2024, an event which is usually organized by a tri-Faculty Research Project on EEA Social Security Law,[10] but which this past year was also co-hosted by the two new EEA law Centres based at the Universities of Bergen (CENTENOL) and Oslo (EURNOR).[11] The 4-year EEA Social Security Law project – which is led jointly by the Universities of Bergen, Oslo and Tromsø, and funded by the Norwegian Ministry for Labour and Social Inclusion – has proven such a success that it was recently extended for another 4-year period. CENTENOL and EURNOR for their

[6] EU readers will note two of the main peculiarities of EEA law as compared to EU law here: Firstly, since regulations are not directly applicable in the EFTA States but must also be incorporated 'as such' into national law (Art 7 EEA), Regulation 883/2004 was incorporated in full by a Norwegian statutory instrument (*Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen*, FOR-2012-06-22-585). Secondly, according to Protocol 35 of the EEA Agreement, as implemented in Norway by § 2 of the Norwegian EEA Act (*Lov av 27. november 1992 nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v.*), EEA primacy only requires that *national rules* implementing EEA obligations be afforded primacy over conflicting *national rules*. Unimplemented or wrongly implemented EEA rules therefore enjoy no primacy (or direct effect) – at least not in the dualist EFTA states of Norway and Iceland. In cases of conflict, full precedence of the statutory instrument (and hence Regulation 883/2004) over the higher-ranking National Insurance Act (*Lov av 28. februar 1997 nr. 19 om folketrygd*) was nevertheless to be ensured by the joint effects of both § 2 of the Norwegian EEA Act and the inclusion of so-called 'sector-monism' clauses in § 1-3 of the National Insurance Act and § 1(3) of the statutory instrument.

[7] NOU 2020:9 *Blindsonen – Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området*, <https://www.regjeringen.no/no/dokumenter/nou-2020-9/id2723776/?ch=1>. The full report is available in Norwegian only, but does contain a summary of its main findings in English.

[8] NOU 2021:8 *Trygd over landegrensene – Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser*, <https://www.regjeringen.no/no/dokumenter/nou-2021-8/id2860696/>.

[9] See further e.g. Halvard H. Fredriksen and Christian N.K. Franklin, 'The NAV Case in the EFTA Court and the Supreme Court of Norway', in The EFTA Court (ed), *The EFTA Court – Developing the EEA over Three Decades* (Hart 2024) 267-286.

[10] For more information about the tri-Faculty research project on EEA Social Security Law, visit <https://uit.no/project/trygd> (Norwegian only).

[11] For more information about CENTENOL and EURNOR, see <https://www.uib.no/en/centenol> and <https://www.jus.uio.no/english/research/projects/eurnor/>.

part enjoy funding for an initial 5-year period (2023-2028) from the Norwegian Research Council and were instituted largely as a direct result of the social security scandal.

The articles in this special edition do not aim to cover all of the bases of the scandal itself, but instead aim to draw the spotlight towards various legal issues in the field of EEA social security law. Ingunn Ikdahl and Christoffer C. Eriksen (both EURNOR and the University of Oslo) start by taking a closer look at some of the most important lessons to be learnt from the scandal itself, all of which they explain should be considered relevant not only to national authorities in the EEA EFTA States but also to the authorities of the EU Member States. The article which follows takes a rather different turn, venturing into the at times rather byzantine interplay between social security coordination under Regulation 883/2004 and rights of free movement and residence under the Citizenship Directive 2004/38.[12] This collaborative piece, written by myself and three CENTENOL colleagues – Margrét Einarsdottir (Reykjavik University), Jaan Paju (University of Stockholm and Visiting Professor at the University of Bergen) and Georges Baur (Liechtenstein Institute) – aims to clarify how the requirement of 'comprehensive' sickness insurance in the Citizenship Directive must be understood under EU and EEA law, before analysing and comparing how the requirement has been interpreted and applied in different ways at national level in the three EFTA States and the Nordic EU Member State of Sweden. Omar Berg Runarsson (former Research Fellow on the EEA Social Security Law project, current PhD Fellow at CENTENOL) then picks up the mantle with his contribution on the particular status of third country nationals, refugees and stateless persons under both the EU social security regulations and the Nordic Convention on Social Security. Two contributions of equal interest no doubt to both practitioners and academics alike then follow, penned by Martin Andresen (formerly of NAV) and Dag Sørlie Lund (Judge at the Norwegian National Insurance Tribunal). The first provides an overview and comparison of key rulings of the Court of Justice of the European Union and EFTA Court in the area of social security law, whilst the second describes and analyses several selected decisions of the Norwegian National Insurance Tribunal in the field. This special edition is finally rounded off with an insightful and critical article written by Margrét Einarsdottir and Ómar Berg Runarsson, looking into current Icelandic law and practice in the field of EEA social security law, and making specific calls for improvement in the light thereof.[13]

On behalf of all of the contributors and the editorial board, we hope you enjoy reading this special edition, which we also hope will be the first of many devoted more specifically to EEA social security issues. In the meantime, anyone interested in learning more is naturally welcome to attend the next annual EEA Social Security Law Conference, due to be held in Asker (just outside of Oslo, Norway) on 11-12 September 2025.[14]

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[12] Directive 2004/38/EC of the European Parliament 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

[13] A huge note of thanks is due to Research Assistant Hans Olav Mangschau Hammervold of the University of Bergen for his invaluable assistance in the editorial process of this special edition and with all of the individual contributions.

[14] <https://uit.no/tavla/artikkel/878107/eos_trygderettskonferansen_2025>.

ON THE EDGE: LESSONS ON GOOD GOVERNANCE IN THE BORDERLANDS OF EU LAW

CHRISTOFFER CONRAD ERIKSEN & INGUNN IKDAHL*

In 2019, it became publicly known that Norwegian social security legislation had been applied in violation of the right to receive services in the internal market and the EU social security coordination regulations. The misapplication had persisted since 1994 and we argue that it could have been discovered earlier if the relevant authorities had conducted analyses of the potential ripple effects of relevant case law, avoided secrecy of their legal opinions, and focused less on 'litigation risk' and 'wiggle room' in their legal assessments. This article examines what the Norwegian public administration can learn from this scandal, with the aim of also providing lessons relevant to administrative authorities in the EU member states.

1 INTRODUCTION

In 2021, the grand chamber of the Norwegian Supreme Court decided that Norwegian social security legislation had been applied in a way which violated the right to receive services in the internal market and the EU social security coordination regulations (SSC Regulations).[1] Although Norway is not a member of the EU, Norwegian authorities are obliged to respect the internal market rules, including the right to receive services and the SSC Regulations. Both are incorporated into the European Economic Area (EEA) Agreement, to which Norway is a party.

In its 2021 ruling, the Norwegian Supreme Court found that a 'stay in Norway' requirement for the entitlement to certain sickness benefits under Norwegian social security legislation constituted an unlawful restriction on the right to receive services under Article 36 EEA, which corresponds to Article 56 of the Treaty on the Functioning of the European Union (TFEU). Moreover, the Supreme Court found that the requirement was also contrary to Articles 21 and 7 of Regulation 883/2004 on the coordination of social security systems.[2]

While the ruling of the Supreme Court applied to one individual case, its interpretation of the law clarified the extent to which a wider administrative practice had been in error. As a result of the way in which the Supreme Court interpreted EU law, as incorporated into the EEA Agreement and thus Norwegian law, it was evident that the Norwegian Labour and Welfare Administration (NAV), the Public Prosecution Offices and the Norwegian courts – including the Supreme Court itself – had adopted a number of wrongful decisions.

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* Professors, Department of Public and International Law, University of Oslo. This research was partly funded by the Norwegian Research Council, project nr. 341262 – EURNOR and Institute for Democracy and Legitimacy Analysis [Institutt for Demokrati- og Legitimitetsanalyse] and is based on these authors' joint publication, 'God forvaltning i EØS-rettens grenseland – Lærdommer fra trygdeskandalen' (2024) 63(6) Lov og Rett 369, available at <https://doi.org/10.18261/lor.63.6.3>.

[1] The Norwegian Supreme Court, HR-2021-1453-S. The judgement has been translated into English and available here: <https://www.domstol.no/globalassets/upload/hret/translated-rulings/hr-2021-1453-s.pdf>.

[2] ibid.

In thousands of cases since the EEA Agreement entered into force in 1994, these bodies had denied or reduced benefits, or demanded the repayment of benefits, sometimes going so far as to convict for welfare fraud, on the basis of a legal provision which, as it now transpired, violated the right to receive services in the internal market and the SSC Regulations. According to internal investigations into NAV, at least 7,510 persons had received wrongful decisions concerning the denial or reduction of benefits, demands for the repayment of benefits already received, or both. In addition, at least 64 criminal convictions had been affected by the error. Many of these were re-opened, eventually leading to full or partial acquittals. The erroneous application of the right to receive services and the SSC Regulations in all of these cases is known as 'the social security scandal', or the 'NAV-scandal'. This article analyses what can be learnt from this scandal, with the aim of also providing lessons which may be of relevance to administrative authorities in other states where the right to receive services and the SSC Regulations apply.

While Norway is not a member of the EU, we argue that the lessons from the Norwegian social security scandal for the Norwegian public administration will also be of relevance to administrative authorities in EU Member States. The scandal is a case of misapplication of legal rules that apply both in Norway and in the EU Member States.

However, the particular legal relation between Norway and the EU raises questions of terminology. Norway and two other EFTA states have accepted to implement the rules of internal market, including the SSC Regulations, as parties to the EEA Agreement. While the EEA Agreement has certain provisions which are not identical in substance to provisions in the EU treaties, its material content is EU-law. In addition, the EEA EFTA states have also set up a surveillance authority (the EFTA Surveillance Authority, ESA) and a court (the EFTA court), to ensure that obligations under the EEA Agreement are enforced and complied with in the same way in the EEA EFTA states as in the EU. For the purposes of this article, it is not necessary to go further into the details about the differences between EU and EEA law.[3] In the following, we refer to Norway's obligations under the EEA Agreement to respect the right to free movement in the internal market and the SSC Regulations as obligations to respect EU law.[4]

As a backdrop for our analysis, a brief presentation of the context of the scandal, the subsequent inquiries and the foundational legal misapplication is required.

The social security scandal shook Norwegian society. Media abounded with stories of the severe consequences experienced by those affected: Disturbance of family life, sale of homes, psychological distress, and time in prison. The government initiated a Public Inquiry

[3] However, with regard to the right to move freely within the internal market, the Agreement on the European Economic Area EEA [1994] OJ L1/3 (hereafter the EEA Agreement), does not include a provision similar in substance to the (Consolidated Version of) the Treaty on the Functioning of the European Union [2012] OJ C326/13 (hereafter TFEU), Article 21. In effect, other internal market rules which are included in the EEA Agreement and provide citizens with the right to travel across borders, such as the prohibition against restrictions to provide services, may gain more attention in the EEA than in the EU.

[4] See along the same lines: Norwegian Public Commission, *Utenfor og innenfor — Norges avtaler med EU* (NOU 2012:2) 37 <https://www.regjeringen.no/no/dokumenter/nou-2012-2/id669368/> accessed 1 May 2025. However, when we refer to documents and literature using the term EEA law, we follow their terminology.

into the causes of the scandal,[5] and later set up a Public Commission to propose legislative changes to reduce the risk of future failures.[6] The Parliament's Standing Committee on Scrutiny and Constitutional Affairs held hearings, and the Parliament strongly criticised the executive branch.

The foundational legal misinterpretation in the case is fairly simple to explain. The Norwegian National Insurance Act (NIA) included a requirement that recipients of sickness benefits in cash remain present in Norway in order to receive the benefit.[7] This 'stay in Norway' requirement applied to all three Norwegian benefits recognised as 'sickness benefits in cash' under EU law: Sick pay,[8] work assessment allowance, and attendance allowance. Exceptions were only granted within strict limitations and after prior application. Recipients who had shorter or longer visits abroad without prior approval – whether shopping in neighbouring Sweden, meeting family in Germany, or relaxing in Spain – were considered to have violated this requirement. However, EU law establishes a general freedom to receive services abroad,[9] and specifically regulates the right to receive sickness benefits in cash when residing or staying in other Member States than the state responsible for the payment.[10] Under EU law, recipients therefore had the right to travel abroad without prior approval. As the Norwegian legal system gave these EU rules preference in cases of conflict with the NIA, the requirement of stay in Norway should not have been applied to beneficiaries who remained within the EEA area, that is the Member States of the EU in addition to the three EEA EFTA states of Norway, Iceland and Liechtenstein.

Not surprisingly, the erroneous application of EU law resulted in increased attention being paid to how EU law is implanted in Norway through the EEA Agreement. How could it be that NAV, the Ministry of Labour and Social Inclusion (hereafter, the Ministry), the government, the prosecution authorities, defence lawyers, courts, and academia for years had not detected that social security rules had been applied in violation of the EEA Agreement's obligations to respect EU law? Extensive public debate on the matter followed the scandal.

Rather than focusing on normative content,[11] or insisting on locating legal responsibility, we address the following question in this article: How should administrative authorities act to avoid misinterpreting EU law?

Several answers to this question have been suggested in the Norwegian context. In the report published by the government appointed Public Inquiry into the social security scandal,

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[5] Norwegian Public Commission, *Blindsonen. Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området* (NOU 2020:9) <https://www.regjeringen.no/no/dokumenter/nou-2020-9/id2723776/> accessed 1 May 2025.

[6] Norwegian Public Commission, *Trygd over landegrensene. Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser* (NOU 2021:8) <https://www.regjeringen.no/no/dokumenter/nou-2021-8/id2860696/> accessed 1 May 2025.

[7] *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28-19).

[8] Sick pay is sometimes referred to as 'sickness benefit' in English. We use the term 'sick pay' in order to distinguish between the national benefit ('sick pay') and the legal term in EU law ('sickness benefit'), which covers all three benefits.

[9] The EEA Agreement (n 3), Article 36.

[10] 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 (hereafter the Social Security Regulation), Article 21(1).

[11] See eg Tarjei Bekkedal, 'On an equal footing. The EFTA Court's ruling in the Norwegian Social Security scandal: Criminal proceedings against N' (2022) 59(1) Common Market Law Review 223; Tarjei Bekkedal, 'The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal' (2020) 7(3) Oslo Law Review 145.

several learning points were highlighted.[12] The Committee's report was entitled 'The blind spot', indicating that almost all parties involved were insufficiently aware of the significance of EU law.[13] From this, one might conclude that the solution to problems of misapplication might be to hire more experts in EU law, such that EU rules are removed from the blind spot and brought into the field of vision. To some extent, this aligns with the Committee's recommendations, which suggested that 'competence in EEA law' should be strengthened within the Ministry, NAV, the National Insurance Court, and the ordinary courts, and that the Ministry must 'thoroughly explain the EEA law of significance for the application of national law, in preparatory works for proposals to amend the National Insurance Act'.[14]

The Minister of Labour and Social Affairs at the time touched on the same point in a presentation detailing three measures aimed at preventing errors of the sort that triggered the social security scandal.[15] One of the three measures was 'increased EEA competence', and he noted that the Ministry had 'already advertised four positions in EEA law to strengthen this competence'.[16] A report written by a cabinet appointed working group, tasked with making suggestions to improve how the ministries worked on EU- and EEA-related matters, pointed out several learning points.[17] Amongst these, the report recommended that 'digital EEA courses' be developed and that 'EEA competence in the ministries should be strengthened' and 'given greater weight in recruitment, both at the caseworker and leadership levels'.[18]

Similarly, one of the main recommendations from the final report by a government appointed commission, which evaluated Norwegian experiences with the EEA Agreement from 2014 to 2024, was that more must be done 'to preserve and further develop EEA competence in the central administration, directorates, county municipalities, and municipalities'.[19]

However, bringing EU law into the field of vision through increased EU competence is hardly sufficient in itself to avoid misapplication of EU rules incorporated via the EEA Agreement. Both the Public Inquiry and other studies showed that EU law was not necessarily a blind spot for all relevant authorities. Between the entry into force of the EEA Agreement in 1994 and 2019 (when the scandal was revealed to the public), the relevant ministry was involved in numerous investigations, procedures, and decisions involving

[12] NOU 2020:9 (n 5).
[13] ibid 24.
[14] ibid 250. Unofficial translation by the authors, as is also the case for all other English quotes from Norwegian documents which have not been translated into English.
[15] Torbjørn Røe Isaksen, 'Den samme feilen må ikke skje på ny. Slik skal vi følge opp EØS-saken' (*Aftenposten*, 17 August 2020) <https://www.aftenposten.no/meninger/kronikk/i/wPMeLL/den-samme-feilen-maa-ikke-skje-paa-ny-slik-skal-vi-foelge-opp-eoes-saken-torbjoern-roee-isaksen> accessed 9 January 2025.
[16] ibid.
[17] Interministerial working group, 'Departementenes EØS-arbeid: Rapport fra en interdepartemental arbeidsgruppe' (2021) <https://www.regjeringen.no/contentassets/66bfc3cfe6564edfb3d0de236aa328cb/departementenes-eos-arbeid.pdf>.
[18] ibid 14.
[19] See, Norwegian Public Commission, *Norge og EØS: Utvikling og erfaringer* (NOU 2024:7) 14 <https://www.regjeringen.no/no/dokumenter/nou-2024-7/id3033576/> accessed 1 May 2025.

EU law, many of which touched upon the misinterpreted and misapplied legal rules.[20]

Another apparent obstacle to the correct application of EU law, besides the lack of relevant competence, was the fact that Norwegian legislation placed NAV at the edge of EU law. That is, the National Insurance Administration (later NAV) occupied a position where their task was to interpret and apply legal norms that, according to the law, flirted with the limits of what was legally permissible under EU law.

In this article, we look at what administrative authorities can learn about how they should act in such situations. We aim to complement the investigations conducted by the Public Inquiry, the government appointed Working Group that suggested measures to improve how the ministries work on EU and EEA related matters, and the report by the Commission evaluating the experiences with the EEA Agreement, with our own analysis of the role that NAV's control system played in making the error as extensive as it became.[21]

Little attention has so far been paid to the administration's role in interpreting and applying legislation that comes so close to the limit of what EU law allows. In this article, we use the Norwegian scandal as a point of departure to analyse what constitutes good governance in cases where domestic regulations flirt with the limits of EU law.[22]

Our examination is based on a review of all publicly available material on the administration's consideration of the implications of EU rules for the requirements of stay in the NIA. We have examined instances where traditional approaches to working with EU rules were not suited to achieving the objective of legally correct decisions. We have analysed the work carried out by the administration to ensure sufficient knowledge of applicable EU rules (including by engaging with the continuous flow of new EU case-law), and the administration's own analytical work in the field of EU law.

Our review of the available materials is presented in the form of a three-part analysis of the administration's work with EU rules, focusing on the administration's approach to monitoring and interpreting relevant EU case law, openness and transparency concerning the administration's analyses of the content of EU rules, and the use of 'wiggle room'[23] and 'litigation risk' to frame how EU law should be applied in Norway.

In Section 2, we provide a specific example in which the significance of EU law for the requirements of stay in the NIA was *not* overlooked by the administration. Rather, the

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[20] See particularly NOU 2020:9 (n 5) Chapter 14. See also the report from the internal audit of NAV, Directorate of Work and Welfare, 'Kartlegging av fakta i EØS-saken' (2019) <https://www.nav.no/_/attachment/download/a2294ca2-348b-49f4-9e15-42544aef1541:809c3790c76e4da1d66fe60c82262dee952ba99c/E%C3%98S-Saken%20Internrevisjons%20rapport.pdf> accessed 9 January 2025; Ingunn Ikdahl and Christoffer C Eriksen, 'Ingen blindsone? Departementets kjennskap til gråsonen' (2020) <https://www.jus.uio.no/om/aktuelt/retten-i-trygdeskandalen/departementetsrolledel1.html> accessed 9 January 2025.

[21] Ingunn Ikdahl and Christoffer C Eriksen, 'NAVs kontrollsystem og trygdeskandalen' (2023) 19(4) Tidsskrift for erstatningsrett, forsikringsrett og trygderett 186.

[22] The term 'good governance' may refer to different meanings, such as the principles in Council of Europe, 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration and the right to good administration' (2007) <https://rm.coe.int/16807096b9> accessed 1 May 2025, or according to the Charter of Fundamental Rights of the European Union [2016] OJ C202/389 Article 41. The recommendations we make in this article are means to achieve a core element of various concepts of good administration according to these European standards, namely that the administration should make legally correct decisions and avoid the misinterpretation of legal rules.

[23] This phenomenon is also described by other terms, such as 'room for manoeuvre' ('*handlingsrom*' in Norwegian).

administration took note of EU law and concluded that the Norwegian rules skimmed the edge of what EU law permitted while remaining just within the realm of the permissible. In Section 3, we go on to clarify what we mean by national rules that test the limits of what EU law allows, why we focus on such rules, and how this pertains to the requirements of stay in the NIA. Subsequently, in Sections 4, 5, and 6, we delve deeper into three recommendations for good administration when dealing with areas of domestic law that flirt with the limits of EU law.

2 AN ILLUSTRATION OF MISSED OPPORTUNITIES

The government's Public Inquiry found that 'the question of the relationship between the requirement of stay in the National Insurance Act and the [SSC Regulations] has been repeatedly raised by the Ministry and the Labour and Welfare Administration since the year 2000'.[24] The Ministry's involvement in cases where the welfare administration's practice was incorrect can be understood as missed opportunities to uncover and correct the erroneous practice. Each of these missed opportunities provides learning opportunities.

One such missed opportunity arose in 2010. On 7 June, the Director of Labour and Welfare sent a letter to the Ministry of Labour about a case where NAV had rejected a claim for unemployment benefits.[25] The rejection was based on the fact that the person did not meet the requirement of stay in Norway under § 4-2 NIA.[26] The National Insurance Court had overturned the decision, reasoning that it was contrary to Regulation 1408/71 to apply the requirement of stay in such a way that the recipient lost the right to the benefit when staying in another EEA country. Thus, the Director of Labour and Welfare sought clarification on whether the practice should be changed. The letter concluded with a question that went beyond the specific benefit at issue:

> If NAV changes the practice of the requirement of stay in the National Insurance Act § 4-2, it should be considered whether this has ripple effects on other benefits, primarily work assessment allowance (WAA) where the starting point [according to § 11-3 NIA] is also that the user must stay in Norway to be entitled to WAA.[27]

The National Insurance Court's decision that had prompted the Director of Labour and Welfare's question concerned a person who had worked in Norway but was residing in another EEA country; it did not involve persons residing in Norway who were on vacation or other temporary stays in other EEA countries. However, in the Ministry's handling of the Director's letter, it appears that the relevant department in the Ministry raised questions about the scope of the decision beyond the specific group of people with which the case was directly concerned. In an internal memorandum, the said department noted that they did 'not rule out the possibility that the National Insurance Court's interpretation in this instance could potentially include all EEA citizens receiving unemployment benefits (including

[24] NOU 2020:9 (n 5) 197.
[25] See, The National Insurance Court, TRR-2009-2265, available at: <https://lovdata.no/pro/#document/TRR/avgjorelse/trr-2009-226>
[26] Letter from Labour and Welfare Administration by the Director of Labour and Welfare to the Ministry of Labour and Social Inclusion, 'Dagpenger – EØS. Kjennelse fra Trygderetten' (7 June 2010) 10/5685. On file with the authors.
[27] ibid 2.

Norwegians)'.[28] On this basis, the department recommended that the Attorney General provide a legal opinion assessing 'the impact this decision could have regarding the general requirement of stay in the National Insurance Act § 4-2'.[29] The Ministry's own notes indicate that the National Insurance Court's decision was understood as potentially affecting the application of the requirement of stay to 'Norwegians who are on vacation in a European country', and others who have been 'residing in Norway'.[30] However, it seems the Ministry was only concerned with unemployment benefits; it does not appear to have considered the potential impact of the National Insurance Court's decision on the application of the requirement of stay for WAA, whether for persons residing in or outside of Norway.

The decision by the National Insurance Court was later brought before the Court of Appeal, which requested an Advisory Opinion from the EFTA Court. The case is now known as E-3/12 *Jonsson*. In March 2013, as returned to in further detail below, the EFTA Court confirmed the 2010 decision by the National Insurance Court. Following the EFTA Court's decision, Norway, represented by the Ministry of Labour, decided to withdraw the lawsuit.[31]

The letter penned by the Director of Labour and Welfare in 2010 is not mentioned in the Public Inquiry Committee's report. However, it clearly illustrates that NAV was walking the tightrope in terms of what EU law allowed, but also that both NAV and the Ministry were aware of this concern.[32] The questions in the Director's letter could have been followed up with a thorough assessment of the potential ripple effects of the National Insurance Court's decision, for WAA in particular. This opportunity to uncover and stop the misapplication well before 2019 was, however, lost.

3 NATIONAL REGULATION AT THE LIMIT OF WHAT IS LEGALLY PERMISSIBLE UNDER EU LAW

3.1 STRATEGIES FOR DESIGNING NATIONAL REGULATION WITHIN THE FRAMEWORK OF EU LAW

[28] Memorandum from the Department of Labour Market in the Ministry of Labour and Social Inclusion to the Minister by the State Secretary and the Permanent Secretary (1 July 2010), regarding the National Insurance Court's decision dated 12 March 2010.

[29] ibid. The Ministry's record of documents suggests that the Attorney General was asked to provide a legal opinion, after which the Ministry decided to bring the case to the Court of Appeal. However, we were not granted access to the assessments of the Attorney General.

[30] See respectively Memorandum (n 28) 2; Letter from the Ministry of Labour and Social Inclusion to the Labour and Welfare Administration (20 October 2010) regarding the National Insurance Court's decision dated 12 March 2010.

[31] See Borgarting Court of Appeal, 10-149956FØR-BORG/03. According to the court decision, the parties reached an out-of-court settlement regarding the legal costs after the state withdrew the case. The court then dismissed the case.

[32] Through other individual cases, the Ministry had become aware that not only were the requirements of stay in the National Insurance Act close to the limit of what was permitted by EU law, but that it was also possible that the requirements were applied in violation of EU law. In 2011, the Social Insurance Court heard a case in which a person residing in Norway was denied sick pay while staying in Spain, see Social Insurance Court, TRR-2011-1098. The insured person then took the case to the Court of Appeal. According to NOU 2020:9 (n 5), NAV reversed the decision and granted sick pay based on 'contact with the Ministry regarding the case, and assistance from the Attorney General's office in preparing the case for the Court of Appeal'. The rationale for the reversal was that the insured person was nevertheless entitled to sick pay under the rules of the four freedoms, see NOU 2020:9 (n 5) 147.

This article focuses on situations where national administrative authorities subject to EU law must interpret and apply national legislation at the edge of what EU law allows. What EU law permits is fundamentally an either/or matter. In this sense, national legislation cannot be more or less at the limit of EU law: Either legislation is within its bounds, or it is not. Nevertheless, it is both possible and appropriate to identify legislation that lies at the limit of what EU law allows. Here we explain how and why we adopt this approach in analysing the Norwegian Social Security Scandal.

When adopting national legislation in areas covered by EU law, various 'adaptation strategies' can be considered to ensure that national administrative authorities remain within the bounds of the latter. In areas covered by the rules on free movement, there are two strategic extremes: One is to design national legislation in accordance with the main obligations to remove restrictions on free movement across borders. The other is to design national legislation that may hinder the exercise of fundamental freedoms or make free movement less attractive, but which nevertheless complies with EU law insofar as it pursues an objective that is in the public interest, is appropriate for ensuring the attainment of that objective and does not go beyond what is necessary to attain that objective (the principle of proportionality).

If the national authorities know the precise content of EU law and the limits it imposes on national regulation, neither of these options poses a greater risk of violating EU rules. In some cases, the content of EU law appears clear and precise to national administrative bodies. In such instances, they may develop measures that patently restrict free movement but which can obviously be justified as proportionate measures to safeguard public interests. This may also be the case where unambiguous provisions exist in secondary EU legislation or specific legal issues have been clarified by the Court of Justice of the European Union (CJEU) or, as the case may be for the three EFTA states party to the EEA Agreement, the EFTA Court.

However, it is not always easy to know with certainty how legal questions should be answered. This is well known in legal philosophy and is exemplified by Ronald Dworkin's imaginary judge Hercules, who has superhuman intellectual capacities and unlimited time at his disposal.[33] Thorough analyses of all the relevant sources can provide a basis for identifying one, and only one, correct answer to a legal question. In practice, however, there is often uncertainty about how legal questions should be resolved until they are addressed by the highest courts.

This also applies to EU law. Even with ample time and the best EU law expertise available, it is challenging to analyse all the relevant legal questions so thoroughly that no doubt about the solution subsists.

It is in situations where the content of EU rules remains vague that the choice of adaptation strategies becomes relevant when considering the authorities' ability to ensure that practices are consistent with EU law. In some cases, designing national legislation based on the EU exception rules may pose little or no risk of violation. This is, for example, the case if freedoms and rights granted by general treaty provisions are restricted through

[33] See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986). Hercules is introduced on page 239.

secondary legislation.[34]

However, the risk of inconsistency with EU law will usually be lower if national legislation simply adheres to the rules on free movement. Where there are no indications that the rules of free movement are restricted through secondary legislation, they are safe to follow. Similarly, in instances where it is unclear whether national law falls within the bounds of justifiable exceptions to the founding treaties of the EU, it will be safer to follow the main rules than to rely on possible exceptions.

Adapting national regulations to the main rules of EU law can be compared to following a marked ski trail in safe terrain. Conversely, when national rules are based on exceptions, in many areas they will stray to the edge of what EU law allows. This can be compared to walking along the edge of a snow cornice; such trails require extra attention.[35]

3.2 THE REQUIREMENT OF STAY IN THE NATIONAL INSURANCE ACT PLACED NAV AT THE EDGE OF EU LAW

Until 2022, the wording of the NIA stipulated that eligibility for sick pay, attendance allowance, and work assessment allowance required that the insured 'stay in Norway'. The requirements of stay in the NIA are examples of national regulation designed contrary to the goal of abolishing restrictions to the free movement of persons, services, and capital.[36] It could be argued that the requirements of stay did not violate the more specific rules on the right to free movement, or that EU law allowed the administration to set limitations on the right to receive a social security benefit during absence from the country, provided such limitations were non-discriminatory.[37] For example, one could claim, as the Norwegian government indeed did, that conditions for prior authorisation of stays abroad were justified for reasons of general public interest. Amongst these reasons, the government listed integration of excluded persons from the labour market and promotion of employment, monitoring compliance, prevention of abuse, the risk that the financial balance of the social security system would be undermined, and rules that were easily managed and supervised. They argued that national legislation was suitable to attain these objectives and did not go beyond what was necessary in order to attain them.[38] However, for anyone familiar with EU law, it must have been uncertain whether such arguments would succeed. The NIA was thus designed in such a way that the trail was close to the edge.

Formally, it was clear that the provisions of the law should not be applied in violation of EU law. Firstly, the Norwegian EEA Act stipulates that the Main Part of the EEA Agreement (including a provision which is in substance identical to Article 56 TFEU on the

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[34] Secondary legislation may oblige national authorities to restrict freedoms and rights granted by general treaty provisions, see e.g. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, Article 3(1).

[35] Christoffer C Eriksen and Ingunn Ikdahl, 'Tolkningstvil og tillit' (2020) 30(2) Stat og Styring 42.

[36] See eg The EEA Agreement (n 3) preamble para 6; TFEU (n 3) Article 26(2).

[37] See Interministerial working group, 'Eksport av velferdsytelser: En gjennomgang av problemstillinger knyttet til eksport av velferdsytelser' (2014) 35 <https://vgc.no/pdf/1fc8ab.pdf> accessed 1 May 2025.

[38] This was also asserted by Norwegian authorities after 2019, see e.g. Case E-8/20 *Criminal Proceedings against N* [2021] EFTA Court judgement of 5 May 2021, para 87; The EFTA Court, 'E-8/20-19 Report for the hearing in Case E-8/20' (2020), paras 21–22. The report is available at: <https://eftacourt.int/download/8-20-report-for-the-hearing/?wpdmdl=6920> accessed 1 May 2025.

free movement of services) applies as Norwegian law, with precedence over other Norwegian legislation.[39] Secondly, § 1-3 NIA stated that the King (i.e. the government) could enter into agreements with other countries that could make exceptions to the provisions of the law. Based on this provision, a statutory instrument determined that the SSC Regulations applied as Norwegian law and should take precedence over the provisions of the NIA in case of conflict.[40] Therefore, the requirements of stay in the NIA had to yield to the extent that they conflicted with EU law.

It had long been recognised that the requirements of stay established by the NIA were, in some cases, in conflict with the SSC Regulations. Thus, the requirements could not always be applied literally.[41] However, it was left to NAV to determine the cases in which the law should yield in order to comply with EU rules. The law did not allow for the requirements of stay (or associated conditions, such as the requirement of prior authorisation for stays abroad) to be relaxed beyond what was necessary to comply with EU law. To the extent that administrative circulars and practices addressed requirements of stay (or other measures intended to ensure that recipients of benefits stayed in Norway), these had to be drafted such that EU exception rules were respected. This is where NAV erred. In applying the requirements of stay contained in the NIA, NAV circulars and practices went further than what EU law allowed.

Based on the Advisory Opinion of the EFTA Court, the Norwegian Supreme Court has now established that applying the NIA's requirements of stay violated the obligation to remove restrictions on the free movement of services from the time the EEA Agreement entered into force in 1994. The requirement of stay not only constituted a restriction on the right to travel to another EEA state to receive a service there.[42] The requirement also went further than necessary to achieve the purpose of preventing abuse and ensuring that recipients of benefits fulfilled the requisite conditions.[43] The same applied to the requirement that travel to other EEA countries be approved before the trip was undertaken.[44]

Furthermore, the Norwegian Supreme Court established that denying the work assessment allowance on the grounds of a stay in another EEA state violated Articles 21 and 7 of Regulation 883/2004, which had entered into force in Norwegian law on 1 June 2012.[45] Finally, it was not permitted to have a scheme where exceptions to the stay requirements required prior authorisation,[46] and could only be granted for up to four weeks a year.[47]

The decisions of the EFTA Court and the Norwegian Supreme Court demonstrate that NAV applied the wording of the NIA beyond what could be justified.[48] The legislature's choice of adaptation strategy meant that NAV could not apply the wording of the NIA in cases involving stays in other EEA states, thus placing NAV on the edge of the EU legal cornice. This increased the risk of errors, with potentially significant consequences for a large

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[39] *Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det euopeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven)* (LOV-2014-04-11-11) (hereafter the EEA Act), section 1 and 2.
[40] *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen* (FOR-2012-06-22-585) (revoked).
[41] See e.g. the circular quoted in NOU 2020:9 (n 5) 63.
[42] HR-2021-1453-S (n 1) para 168.
[43] ibid para 176.
[44] ibid paras 168 and 176.
[45] ibid para 140.
[46] ibid para 141.
[47] ibid para 135.
[48] See *N* (n 38); HR-2021-1453-S (n 1).

number of people.

When drawing lessons from the social security scandal, something essential will be lost if one disregards the fact that the NIA was designed so that NAV's practice had to navigate the very edge of what EU law allowed. When moving along snow cornices, it is necessary to check the map and terrain more frequently and carefully than when following marked trails in safe terrain. In situations where domestic law places administrative authorities at the edge of EU rules, the importance of good governance is heightened. The Norwegian social security scandal can provide lessons as to what this entails. Sections 4–6 describe three such lessons.

4 ANALYSIS OF POTENTIAL 'RIPPLE EFFECTS' FROM LEGAL DEVELOPMENTS IN THE EU AND EEA

4.1 NAV'S MONITORING OF LEGAL DEVELOPMENTS

After the social security scandal, the Public Inquiry Committee's report highlighted the need for NAV to follow legal developments in the practices of the CJEU and EFTA court more closely.[49] Similarly, in 2024, the government appointed Commission which reviewed Norwegian experience with the EEA Agreement emphasised that the 'functions of clarifying and developing the law held by both the EFTA Court and the EU Court means that Norwegian authorities should have good knowledge of decisions made by these courts'.[50] However, neither report goes into detail about how to do this in areas where Norwegian legislation runs close to the limit of what is permissible under EU law.

Efforts to monitor legal developments can take various forms. Here, we focus on the ripple effects of decisions made by the EU and EFTA courts. By ripple effects, we mean the ways in which new decisions interpreting and applying certain provisions or principles can signal developments or clarifications of the correct legal interpretation of related yet distinct provisions and principles.[51]

To examine the question of what the Norwegian state can learn from the way the authorities have monitored legal developments in the CJEU and the EFTA Court, we look here at the Norwegian authorities' response to one specific case related to the social security scandal: the *Jonsson* case.[52]

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[49] NOU 2020:9 (n 5) 119–120.

[50] See NOU 2024:7 (n 19) 94.

[51] This seems to align with what the report on improvements to how ministries work on EU- and EEA-related matters refers to as 'case law of horizontal significance'. As the report points out, a decision related to one field can also have implications in other areas: 'This can be, for example, because the case concerns cross-sectoral rules, either in the main part of the EEA Agreement or in secondary legislation, or because it raises fundamental questions'. See Interministerial working group, 'Departementenes EØS-arbeid: Rapport fra en interdepartemental arbeidsgruppe' (2021) 104 <https://www.regjeringen.no/contentassets/66bfc3cfe6564edfb3d0de236aa328cb/departementenes-eos-arbeid.pdf> accessed 1 May 2025. However, the report does not provide specific examples of what kind of analyses may be necessary to map such cases or what the consequences of failing to conduct such analyses might be.

[52] We have examined the ministries' follow-up of other cases, such as Case C-430/15 *Secretary of State for Work and Pensions v Tolley* EU:C:2017:74, where the Norwegian State was not a party to the case, but submitted a statement. This presentation is limited to the *Jonsson* case (E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep 136), because it best illustrates what the administration can do differently in following up on relevant EU case law.

4.2 THE *JONSSON* CASE

As already mentioned, in the *Jonsson* case, the EFTA Court dealt with the question of whether the requirement of stay for unemployment benefits in the NIA violated the provisions concerning unemployment benefits in Regulation 1408/71. This regulation was incorporated into the EEA Agreement and applied in Norway from the time the EEA Agreement entered into force in 1994, until Regulation 883/2004 replaced it (in an EEA context) in 2012. Because the case involved a situation where the jobseeker was residing outside of Norway, the legal issues were different from those central to the social security scandal. However, the EFTA Court's reasoning included statements about requirements of stay that extended beyond the specific case at hand.

Article 71(1)(b) of Regulation 1408/71 on unemployment benefits stipulated that, for certain groups of people, it was prohibited to require that they reside in Norway (i.e. that Norway be their place of habitual residence). The Norwegian state accepted this, but argued that the right to unemployment benefits could still be conditional on physical presence in Norway.

The EFTA Court rejected this argument. It stated that making unemployment benefits dependent on physical presence in Norway made it 'unduly difficult for an unemployed person to seek employment opportunities in another EEA State'.[53] The Court held that in 'this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement'.[54]

4.3 THE SIGNIFICANCE OF THE *JONSSON* CASE FOR THE INTERPRETATION OF REGULATION 883/2004

Read in isolation, the EFTA Court's decision only had significance for the interpretation of Regulation 1408/71 and its provisions on unemployment benefits. By the time it was delivered in 2013, Regulation 1408/71 had been repealed and replaced by Regulation 883/2004. This might suggest that the significance of the decision for later cases was limited.[55]

However, there were factors indicating that the decision in the *Jonsson* case had significance for the interpretation of provisions in the new Regulation 883/2004. When the EFTA Court concluded that Article 71(1)(b) of Regulation 1408/71 prevented Norway from requiring that individuals stay in the country to be entitled to Norwegian benefits, a new and more general interpretive question arose: Should the prohibition of residence requirements, in general, also be interpreted as prohibiting requirements of stay? As we will see, this question was essential to the interpretation of a central provision (Article 7) in the new Regulation 883/2004.

The EFTA Court did not address this question directly in the *Jonsson* case. However, parts of the reasoning were sufficiently general and principled to have some transferability.

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[53] *Jonsson* (n 52) para 72.
[54] ibid.
[55] The central provision in *Jonsson*, 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 [1971] OJ L149/2, Article 71(1)(b), was not retained in the regulation's new chapter on unemployment benefits, see further, Norwegian Legal Commission, NOU 2021:8 (n 6) 53–54.

The consideration that requirements of stay would make it 'unduly difficult for an unemployed person to seek employment opportunities in another EEA State' applies regardless of whether a person is residing in Norway or another EEA country. And the rationale that requirements of stay in 'this context [would be] more onerous than a residence requirement' also had transferability to requirements of stay for other benefits. The burden of a requirement of physical presence does not only occur in situations where a person must reside somewhere other than their place of residence to be entitled to benefits. It is also onerous because requirements of stay undermine a person's ability to seek employment or perform other activities protected by EU law in other EEA countries, regardless of where he/she resides.

Based on such an analysis, one could already assume, when the EFTA Court's decision in the *Jonsson* case was delivered in 2013, that the court's interpretation of the prohibition of residence requirements in Regulation 1408/71 was relevant for the interpretation of the prohibition of residence requirements under the new Regulation 883/2004. Thus, the *Jonsson* case could shed light on the interpretation of one of the entirely new provisions in Regulation 883/2004: The general prohibition of residence requirements in Article 7.[56] The article states that, unless specific provisions say otherwise, no national social security scheme may suspend or reduce cash benefits on the grounds that the insured person or their family members reside in another EEA country. The provision applies not only to those receiving benefits from one country's social security scheme while residing in another country (as was the situation in *Jonsson*), but also to those who have earned social security rights in the country where they reside and stand to lose those benefits if they travel to another country. In light of the EFTA Court's findings in 2013 about the burden of presence requirements, one might legitimately ask whether Article 7 should have been interpreted as meaning that the right to social security benefits was protected not only for persons residing in a country other than the country where they have social security rights, but also for persons who – for shorter or longer periods – stay in EEA countries other than that where they have social security rights, regardless of where they reside.

Other provisions of Regulation 883/2004 also gave reason to believe that Article 7 would have special significance for cash benefits in case of sickness, such as Norwegian sick pay, WAA, and attendance allowances. This is because the new Regulation not only introduced a general prohibition of residence requirements, but also repealed several of the specific rules in Regulation 1408/71 concerning the right to receive benefits in case of illness during stays in other countries. Article 21 of the new Regulation 883/2004 stated that one had the right to receive cash benefits in case of illness during stays in other countries, in accordance with the legislation applicable to the relevant social security scheme. Unemployment benefits were the exception here. Regulation 883/2004 set out several special rules for receiving unemployment benefits during stays in other countries: Presence requirements for unemployment benefits for persons residing in Norway had to be assessed against other, more specific provisions.[57] Although the *Jonsson* case concerned the

[56] Regulation 1408/71 (n 55) Article 10 also prohibited residence requirements, but this prohibition only applied to certain benefits, such as benefits for old age and benefits for survivors of work accidents, etc.
[57] See Case E-13/20 *O v Arbeids- og velferdsdirektoratet* [2021] EFTA Court judgement of 30 June 2021; Case E-15/20 *Criminal Proceedings Against P* [2021] EFTA Court judgement of 30 June 2021; The Norwegian Supreme Court, HR-2023-301-A.

interpretation of the repealed Regulation 1408/71's provisions on unemployment benefits, paradoxically, there was reason to believe that it would be relevant to the interpretation of the new Regulation's provisions on benefits in case of illness.

However, we have not found any evidence that Norwegian authorities conducted specific assessments of the right to maintain presence requirements for recipients of benefits other than unemployment benefits in the months following the *Jonsson* decision. Thus, it appears that Norwegian authorities, in responding to the case, did not reconsider their interpretation of the new Article 7. Even after the EFTA Court's decision in the *Jonsson* case, NAV maintained that as long as the beneficiary's residence was in Norway, entitlement to cash benefits in case of illness depended on presence in Norway.

4.4 THE RIPPLE EFFECTS OF THE JONSSON CASE WERE ANALYSED – EVENTUALLY

The EFTA Court's decision was delivered shortly before an escalation in Norwegian policy efforts to limit the export of social security benefits. When the Solberg government took office in the Autumn of 2013, one of its stated intentions was that it would 'consider measures that will limit and bring to a halt the export of social security benefits, but that remain within the framework of Norway's binding international agreements'.[58] To implement this, the government established an interministerial working group in March 2014 to assess 'what limitations EEA rules place on Norway's wiggle room in introducing measures that can limit the export of Norwegian welfare benefits to other EEA countries'.[59] The working group presented its assessment in Autumn 2014, in a report entitled 'Export of Welfare Benefits', but the report was not made public at this time, and the government has later refused to grant access to it.

The working group analysed the limitations imposed by EU law with regard to the requirement that social security beneficiaries (including recipients of sick pay, attendance allowance, and WAA) stay in Norway. When assessing whether such requirements of stay could be imposed, not only for unemployment benefits but also for other benefits, the working group relied upon the *Jonsson* case. Thus, the ripple effects of the case were analysed. The content of the report and how the *Jonsson* case was used will be discussed further in Section 5 below.

When the social security scandal became known to the public, the implications of the *Jonsson* case for the interpretation of Article 7 of Regulation 883/2004 were again discussed. In 2021, as the EFTA Court had established in the *Jonsson* case, both the EFTA Court and the Norwegian Supreme Court noted that a requirement that excludes the right to benefits during short stays abroad is significantly more intrusive than a residence requirement.[60] In the case concerning a person residing in Norway, who had received WAA while staying in another EEA country, the Supreme Court justified its interpretation of Article 7 by quoting the EFTA Court:

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[58] Office of the Prime Minister, 'Political platform for a government formed by the Conservative Party and the Progress Party' (2013) 6 <https://www.regjeringen.no/en/historical-archive/solbergs-government/andre-dokumenter/smk/2013/political-platform/id743014/> accessed 9 January 2025.
[59] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 7.
[60] *N* (n 38) para 139; HR-2021-1453-S (n 1) paras 130–131.

> The Court notes that, in circumstances such as those of the main proceedings, a presence requirement, which excludes entitlement to sickness benefits during short stays abroad, is in fact significantly more restrictive than a residence requirement (see *Stig Arne Jonsson*, cited above, paragraphs 69 to 74). Article 7 provides that EEA States cannot make benefits conditional on residence. It follows that an EEA State cannot condition such benefits on continuous physical presence either.[61]

The reasoning in *Jonsson* was thus understood to mean that Article 7 of Regulation 883/2004 should not be interpreted in a narrow and literal manner. Precisely because requirements of continuous stay are more intrusive than residence requirements, a provision that prohibits residence requirements in the country providing social security benefits must also be interpreted as prohibiting requirements that recipients remain physically in the country.

4.5 SUMMARY

Although the *Jonsson* case involved unemployment benefits rather than sickness benefits, the EFTA Court's reasoning still had ripple effects for the latter. The judgment provided arguments suggesting that where residence requirements are illegal, requirements of stay are also problematic. In order to understand the implications of these arguments for requirements of stay for persons residing in the country where they have social security rights, however, this would require assessments of the ripple effects of the reasoning. This was not done when *Jonsson* was decided. The case illustrates the importance of analysing such ripple effects when national rules are set at the limit of what EU law allows. If one focuses only on the specific legal questions being resolved, without looking for possible ripple effects, court decisions in individual cases will appear to have only limited significance. To reduce the permanent risk of wrongful application of rules that lie at the limit of what EU law allows, attention to new case law from the CJEU and the EFTA Court should not be limited to the specific legal questions addressed by them. Attention should instead be directed to potential ripple effects of their decisions. This is a challenging task, but one which is necessary if the goal is to avoid misapplication of rules that lie at the limit of what EU law allows.

5 SECRECY OF LEGAL OPINIONS, MEMOS, AND REPORTS

5.1 LEGAL ADVICE AND REPORTS ON EU/EEA LAW PROVIDED TO THE GOVERNMENT AND MINISTRIES

Where national regulatory schemes are at the edge of what EU law permits, governments may mitigate the risk of wrongful practices by ensuring transparency when assessing the requirements of EU law as applicable in Norway through the EEA Agreement. Transparent legal assessments are especially important when legislative techniques make it difficult to see the significance of EU law for the application of national law. In such cases, the edge may become invisible.

The Public Inquiry Committee's report on the social security scandal emphasised that

[61] HR-2021-1453-S (n 1) para 130.

publicly available preparatory works to new legislation should include assessments of the relationship between the proposed legislation and EU law. If proposed legislation raises EU legal issues, these should be mentioned in the preparatory works, even if the solution is unclear.[62] Similarly, in 2024, the Commission appointed to evaluate experiences with the EEA Agreement also advocated for a certain level of transparency, stating that it will 'be easier to defend maintaining a national regulation where any uncertainty is made known to the public'.[63]

However, the Public Inquiry Committee was silent concerning the need to make legal opinions and other assessments of EU law that do not lead to legislative proposals available to the public. Nor was this explicitly mentioned by the Commission evaluating experiences with the EEA Agreement. Legal opinions and other assessments that do not lead to legislative proposals are drafted in various situations: In work on specific legislative and budget proposals that are later postponed or shelved, in preparatory work for parliamentary reports and policy development, and in work aimed at clarifying the state of current law following questions from subordinate agencies or in connection with ongoing legal cases.

Clearly, the administration needs to be able to work on cases, including EU legal investigations, without all parts of the work being shared with the public. Public access to all documents prepared by the administration for its own work can harm internal processes. This is acknowledged by § 14 of the Norwegian Freedom of Information Act, based on the consideration that the administration needs an internal sphere where information can be kept confidential.[64] Indeed, the government argued along these lines in its refusals to grant access to the 2014 report on the export of welfare benefits, suggesting that access could

> affect how advice and assessments are prepared and communicated internally, in an unfortunate way. It could, among other things, lead to reluctance to provide candid advice and assessments from the civil service to the political leadership.[65]

As part of our investigation into the omissions that played a significant role in allowing the misapplication of EU law to continue for so long, we reviewed all legal opinions and assessments of requirements of residence or stay from 1992 to 2019 that we have had access to.[66] The material shows that the significance of EU law for Norwegian social security rules was presented to or assessed by the ministries on several occasions, including in connection with the conclusion of the EEA Agreement in 1992,[67] the expansion of the EU in 2004,[68]

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[62] NOU 2020:9 (n 5) 107–109, 249–250.
[63] NOU 2024:7 (n 19) 97.
[64] *Lov om rett til innsyn i dokument i offentleg verksemd (offentleglova)* (LOV-2006-05-19-16).
[65] The Council of State, 'Kongelig Resolusjon – 6/2021' (2021) <https://www.jus.uio.no/om/aktuelt/retten-i-trygdeskandalen/kgl-res-6-2021.pdf> accessed 1 May 2025.
[66] We have worked systematically to identify legal reports and requested access to hundreds of documents. We were granted access to several, but also denied access to some documents that may contain legal assessments, including the 2014 report and several documents prepared by the Attorney General.
[67] Ministry of Foreign Affairs, 'St.prp. nr. 100 (1991–92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS), undertegnet i Oporto 2. mai 1992' (1992) 258–264 <https://www.regjeringen.no/no/dokumenter/stprp100_1991/id627296/> accessed 1 May 2025.
[68] Two reports from interministerial committees contain considerations of the role of EU law for social security schemes, see Ministry of Local Government and Regional Development, 'EU-utvidelsen, arbeidstakere og velferdsordninger: Rapport fra tverrdepartemental arbeidsgruppe' (2003) <https://www.regjeringen.no/globalassets/upload/kilde/krd/rap/2003/0018/ddd/pdfv/184339-

and by the commission appointed by the government to assess the impact of migration on Norwegian welfare (the Brochmann Commission) in 2011.[69]

Yet amongst all the materials that we had access to, the 2014 report on the export of welfare benefits is the most thorough legal assessment of the implications of EU law for the NIA's requirement of actual stay in Norway as a condition for entitlement to sickness benefits. This report was in part a legal opinion on the implications of EU law, and in part legal advice on various proposals for domestic policy. It was commissioned in 2014 by the then newly elected conservative government as part of its comprehensive political effort to reduce the export of social security benefits. However, the legal opinions and assessments in the 2014 report were not shared with the public. Nor were they shared with NAV, the prosecution authority, parliament, lawyers or social security beneficiaries.

5.2 THE CONTENT AND MANDATE OF THE 2014 REPORT

The government-appointed working group that prepared the 2014 report consisted of 13 members from various Norwegian ministries, including six people from the Ministry of Labour and Social Affairs and two lawyers from the Attorney General's Office. The existence of the report was first made publicly known in August 2020, when it was mentioned in the Public Inquiry Committee's report. Despite several requests for access from private individuals, and the fact that the Parliament's Standing Committee on Scrutiny and Constitutional Affairs repeatedly requested access to it as a part of its investigations into the causes of the scandal, the report is still not publicly available in its entirety.[70] However, parts of the report became known to some of the victims of the misapplication of EU law in connection with a lawsuit they filed against the state claiming compensation. As part of the case preparation, on 1 November 2022 the state, represented by the Ministry of Labour and Inclusion, submitted parts of the report in a procedural document.[71] These parts of the report were then published by the Norwegian newspaper *Aftenposten* some days later.[72]

The published parts of the report show that it is extensive – about 100 pages, in addition to two appendices. The published content further indicates that the main issue was 'what wiggle room national states have in their obligation to follow EU law with regard to making changes and adaptations to limit the export of social security benefits'.[73] Chapter 3 was entitled 'General discussion on the EEA Legal Wiggle Room', while Chapter 4 discussed whether the government had the wiggle room to impose various types of requirements on

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euutvidelsen.pdf> accessed 1 May 2025; Ministry of Local Government and Regional Development, 'EØS-utvidelsen og velferdsordninger: Oppfølgingsrapport fra en tverrdepartemental arbeidsgruppe' (2004) <https://www.regjeringen.no/globalassets/upload/kilde/krd/rap/2004/0012/ddd/pdfv/199393-februar-rapporten.pdf> accessed 1 May 2025.

[69] Norwegian Public Commission, *Velferd og migrasjon – Den norske modellens fremtid* (NOU 2011:7) 112 – 160, <https://www.regjeringen.no/no/dokumenter/nou-2011-07/id642496/> accessed 1 May 2025.

[70] The report is exempted from public disclosure by the Ministry of Labour and Inclusion because it is considered an internal document under the *Offentleglova* (n 64) (the Norwegian Freedom of Information Act), s 14. Despite appealing the exemption, the Ministry's decision was upheld, see The Council of State, 'Kongelig Resolusjon – 6/2021' (n 65).

[71] After the report was partially released, a dispute arose regarding access to the entire report, see Oslo District Court (21 December 2022); Borgarting Court of Appeal (3 February 2023).

[72] See Aftenposten <https://mm.aftenposten.no/2022/11/pdf/B001_Eksport_av_trygdeytelser__2014-rapporten__med_vedlegg_-_sladdet.pdf> accessed 10 January 2025.

[73] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 19.

recipients of social security benefits, including separate subchapters on both residence requirements and requirements of stay in Norway. Chapters 5–15 discussed possible changes and adaptations of the rules for a wide range of benefits, including sick pay (9), attendance allowance (10), and WAA (11).

The mandate for the working group specifically referred to recipients of benefits who were residing in another EEA country. This has contributed to doubts about the report's relevance to the social security scandal, where actual presence – rather than residence – outside of Norway were the problem. In a hearing before the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, the head of the Public Inquiry Committee, has given the impression that this mandate meant that the report was not relevant to the social security scandal: '[T]he mandate for this report concerned payments to persons residing abroad […]. So it does not fall within the issue raised by the NAV case'.[74] In the hearing, the head of the Inquiry Committee elaborated, suggesting that the report dealt with 'topics that are outside the NAV case'. When asked if the report assessed anything outside of its mandate, he stated that '[i]t does not'.[75]

However, the published parts of the 2014 report provide a more nuanced picture. Part of the report explicitly addresses the issue raised by the social security scandal, namely the requirements of stay in Norway, which primarily affect people residing in Norway.[76] In addition, the legal sources the report is based on also suggest that it is relevant for those residing in Norway. For example, in the report, the working group draws on case law from the CJEU on the application of the SSC Regulations' provisions to persons residing in the country where they have social security rights,[77] and not just case law on persons residing in another country. The analyses of the ability to apply requirements of stay are not explicitly limited to persons residing outside Norway. The assessments appear to apply regardless of where the affected persons reside, so what the report says about requirements of stay can be read as also being relevant for persons residing in Norway.

5.3 STAY VS RESIDENCE: THE 2014 REPORT'S ANALYSIS OF ARTICLE 7 OF REGULATION 883/2004

In the aftermath of the social security scandal, it is particularly interesting that the report not only rejected the possibility of imposing *residence* requirements in Norway (cf Article 7), it also largely rejected the possibility of imposing requirements of actual *stay* in Norway as a condition for entitlement to sickness benefits. The report substantiates this position by analysing the relationship between residence requirements and requirements of stay. The

[74] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 278 S (2020–2021) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt i Stortinget 13. oktober 2020 av arbeids- og sosialministeren om Granskningsutvalgets rapport om EØS-saken, NOU 2020: 9' (2020) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2020-2021/inns-202021-278s.pdf>, Appendix 7, 'Referat fra åpen høring i kontroll- og konstitusjonskomitéen om Redegjørelse av arbeids- og sosialministeren om Granskingsutvalgets rapport om EØS-saken, NOU 2020: 9' (2020) 5 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2020-2021/inns-202021-278-vedlegg.pdf> accessed 1 May 2025.

[75] ibid 8.

[76] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 35.

[77] See eg references in the report made to Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* EU:C:2008:187 paras 21 and 27.

working group writes:

> The practice of the EU Court and the EFTA Court may indicate that a requirement of actual presence in Norway should not always be equated with a requirement of residence in Norway and that there may, in principle, be some wiggle room based on the principle of equal treatment and [EU] primary law. On the other hand, the group assumes that in most cases it is unrealistic to succeed with such an argument. This applies to both requirements of prior stay and requirements of continuing stay in the country to receive a benefit there.[78]

The working group found it 'unrealistic to succeed with' an argument that benefits can only be granted during periods when the person actually stays in Norway so that periods of stay in another country exclude rights to benefits. The reasoning is elaborated a paragraph further down. Here it states that it will generally be 'difficult to justify' a requirement of stay in Norway to be entitled to a benefit:

> If a strict requirement for continuous stay is imposed, for example, such that there is a requirement for stay throughout the period the benefit is paid, such a requirement may be considered a residence requirement that is prohibited under, among other things, Regulation Article 7.[79]

As mentioned above, the wording of Article 7 of Regulation 883/2004 prohibits social security benefits from being suspended or reduced because people reside in or move to another EEA state. In its presentation of this prohibition, the working group also refers to the EFTA Court's decision in the then relatively recent *Jonsson* case, decided in 2013. It reminds the reader that the Court had established that the requirement of actual stay in question was not a 'residence requirement that would have been directly prohibited under the [SSC Regulations], but it was a requirement that, in the EFTA Court's view, was at least as intrusive. It could not be justified under EEA law'.[80]

Although the working group's reasoning was not known to the public in 2021, the same reasoning was relied on by the EFTA Court in case E-8/20. Although case E-8/20 concerned a person residing in Norway (and thus differed from the *Jonsson* case), the EFTA Court referred to the latter as justification for interpreting Article 7 of Regulation 883/2004 as prohibiting the suspension of benefits because the recipient resides in another EEA country. One could therefore say that the EFTA Court in 2021 concurred with the 2014 working group on the significance of Article 7 for requirements of stay. This illustrates the relevance of the 2014 report's arguments and reasoning for cases concerning people residing in Norway. However, there is a difference between the 2014 report and the EFTA Court's decision: The report's conclusions were kept secret, whilst the EFTA Court's judgment in 2021 was made public.

The 2014 report also contained some comments that were explicitly aimed at the core of the social security scandal, namely the impact of requirements of stay in Norway on people who reside in Norway. The report states:

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[78] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 34.
[79] ibid.
[80] ibid.

> A special aspect of the requirement for actual stay in Norway concerns cases of absence from the country as a basis for the loss of a benefit, in practice, absence due to longer vacation stays or other stays abroad. The working group assumes that EEA law gives states relatively great freedom to set such limitations on the right to receive a social security benefit during absence from the country, provided that the regulation is designed in a non-discriminatory manner. However, the group assumes that a tightening here will primarily affect those who have membership in the social security system as residents of Norway and that it therefore will not be a good measure to reduce the export of social security benefits.[81]

The different arguments found in this paragraph are somewhat difficult to reconcile. On the one hand, states have 'relatively great freedom' to set limitations. On the other hand, limitations must be non-discriminatory. However, regardless of the lack of clarity on the specifics of legal conditions, this paragraph demonstrates awareness that national regulations, which require residents in Norway to stay in the country in order to receive social security benefits, were close to the edge.

5.4 WHAT HAPPENED TO THE 2014 REPORT?

The thorough assessments in the 2014 report were not shared openly. Unlike the interministerial reports with EU legal assessments of social security schemes from 2003 and 2004 mentioned in Section 5.1, this report was not published on the ministries' websites. There is also no information indicating that the report was shared with subordinate agencies, such as NAV, or with the National Insurance Court, the prosecution authority, or the courts.

However, several ministries were represented in the working group, and the internal documents archived on the case indicate that several ministers in the Solberg government were invited to a briefing on the report.[82] The report was part of the groundwork for the parliamentary report on Export of Norwegian Welfare Benefits.[83] In the general description of the significance of EU law, it was pointed out that the principle of exportability (Article 7) prevented the imposition of conditions that would require recipients of benefits to reside in Norway.[84] The fact that the working group had argued that requirements of continuous stay in Norway could be equated with residence requirements, however, was not mentioned. The report's specific discussion of the rules on short-term benefits (including the benefits involved in the social security scandal) similarly mentions the prohibition against stopping

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[81] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 35.

[82] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (2017) <https://www.regjeringen.no/no/dokumenter/meld.-st.-40-20162017/id2556627/> accessed 1 May 2025. According to the public service eInnsyn, case no. 2014/1600 *Eksport av velferdsytelser* include a record of a document with the title 'Memo regarding invitation to a meeting for several ministers regarding a follow-up of a report' ['Notat vedr. invitasjon til møte for div. statsråder som oppfølging av rapport'], 17 November 2014. Our request for access to this document was denied. The public service link to the document is available here: <https://www.einnsyn.no/saksmappe?id=http%3A%2F%2Fdata.einnsyn.no%2Fnoark4%2FSaksmappe--983887457--1600--2014&jid=http%3A%2F%2Fdata.einnsyn.no%2Fnoark4%2FJournalpost--983887457--2014--1600--7--2014> accessed 1 May 2025.

[83] See also statements by the Head of the Inquiry Committee, in Appendix 7 (n 74) 5.

[84] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (n 82) 15–17.

benefits due to residence abroad without commenting that this has implications for requirements of stay.[85] In contrast, requirements of stay related to several different benefits were discussed in more detail in Chapter 6 of the report, which described the recent tightening of the requirement of stay in Norway to receive attendance allowance.[86] Here, EU rules were not mentioned at all.

To provide an accurate picture of the legal situation, it would have been necessary for the parliamentary report to state that stay requirements could be considered equivalent to residence requirements, as indicated in the 2014 report. This should have been included both in the report's discussion of the prohibition under EU law of residence requirements, and in the presentation of the tightening of national requirements of stay, but it was not mentioned in either. The connection between requirements of stay and residence requirements – identified in the 2014 report – thus remained invisible to Parliament and to other readers of the parliamentary report in 2017.

The assessments made by the interministerial working group in 2014 concerning the significance of EU rules for requirements of stay turned out to be both more thorough and more accurate than the assessments made by NAV, the prosecution authorities and the courts.[87] It is therefore paradoxical that this report's analyses, carried out on behalf of the government, were not shared openly.

5.5 CONSEQUENCES OF SECRECY: THE 2014 REPORT

As many people have experienced at first hand, NAV, the National Insurance Court, the prosecution authorities, and the courts enforced a requirement of stay to receive sickness benefits both before and after 2014. Moreover, around 2014, NAV's control unit actively and systematically searched for violations of stay requirements,[88] and these violations were met with both civil repayment claims and criminal prosecution of cases referred to the prosecution authorities.

However, the fact that a working group in 2014 had assessed the requirement to be physically present in Norway to receive social security benefits against specific EU legal provisions was apparently unknown outside the ministries and government. The assessment constituted new knowledge, particularly in its analysis of the relationship to Article 7 of Regulation 883/2004 and its statements about the consequences for persons residing in Norway. Asking what impact this knowledge might have had if it been shared in 2014 would require a counterfactual history. However, statements from some of the relevant actors involved in the practice and enforcement of requirements of stay can shed light on the potential significance of their lack of knowledge of the report's assessments.

In January 2020, during the first hearing on the social security scandal, the Director of

[85] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (n 82) 7, 20.
[86] ibid 48.
[87] It appears that the report did not comment on all the issues that later became central to the EFTA Court and the Supreme Court cases on the malpractice in question. This applies to the Social Security Regulation (n 10) Article 21, the rules on freedom of service in the EEA Agreement (n 3) Article 36 and the issue of prior authorisations. However, the conclusion and premises on which the working group was based stood firm in 2014, as they do today, in 2025.
[88] Ingunn Ikdahl and Christoffer C. Eriksen, 'NAVs kontrollsystem og trygdeskandalen' (n 21) 186–230.

Public Prosecutions stated the following to the Committee on Scrutiny and Constitutional Affairs:

> Already during the press conference on October 28, last year, I noted that the prosecution authority would very much have liked to have been informed earlier about the doubt that spread within the NAV system in their reports about whether their legal application was correct […] [I] now insist that that information to us would, almost regardless of the timing, have triggered a duty to act and a duty to respond from our office – as illustrated by what we did on October 17, [2019], when we had something concrete to work with on the same day.[89]

At this point, it seems that the existence of the 2014 report was not known to the Director of Public Prosecutions or the Parliament's Committee on Scrutiny and Constitutional Affairs.

The NAV Director also pointed out that the unanimous support for their interpretation – from the legal text, lawyers, the National Insurance Court, and the Court of Appeal – contributed to NAV not following up on internal questions about EU law.[90] She stated:

> In this case, our practice had been confirmed year after year after year. That is part of this large, collective misinterpretation. There was no reason for NAV to raise it because we were in good faith about whether we were applying it correctly. So it was not until 2017, when rulings against us from the National Insurance Court began to come in, that we started looking at the topic. It simply was not an issue about which it seemed we could be wrong.[91]

It is difficult to know what would have happened if the 2014 report had been shared with all relevant actors at an early stage. However, the statements from the Director of Public Prosecutions and the NAV Director suggest that their lack of knowledge about the legal problems associated with enforcing requirements of stay while complying with Article 7 of Regulation 883/2004 was significant. If the 2014 report had been shared with the Director

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[89] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 168 S (2019–2020) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt I Stortinget 5. November 2019 av arbeids og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2019) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s.pdf>, Appendix 44, 'Referat fra åpen høring i kontroll- og konstitusjonskomitéen om Redegjørelse av arbeids- og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2020) 2 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s-vedlegg.pdf> accessed 1 May 2025.

[90] The report from the internal audit of NAV shows that questions about whether the practice conformed with EU law were raised long before 2019, Directorate of Work and Welfare, 'Kartlegging av fakta i EØS-saken" (n 20) 12, 18, 26ff, 29–31.

[91] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 168 S (2019–2020) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt i Stortinget 5. November 2019 av arbeids og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2019) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s.pdf>, Appendix 45, 'Referat fra åpen høring i kontroll- og konstitusjonskomiteen om Redegjørelse av arbeids- og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2020) 18 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s-vedlegg.pdf> accessed 1 May 2025.

of Public Prosecutions, NAV, Parliament, or other relevant actors, they would have been aware that requirements of stay raised EU legal issues for both persons residing in Norway and abroad.

The 2014 report was not just an attempt to map the significance of EU law for requirements to reside or to stay in Norway. Looking back at the legal clarifications that came in the years after 2014, it is clear that it also identified with precision trails that lead close to the cornice. If the government, the Ministry, NAV, the National Insurance Court, the prosecution authorities, and the courts had followed this map from 2014 onwards, several thousand people could have avoided unjustified suspension of benefits they had a right to, erroneous repayment claims for sometimes very large amounts, and several dozen people could have avoided conviction and imprisonment.

Clearly, public administration needs an internal sphere where information can be kept confidential, and full transparency about all internal assessments may lead to some reluctance in the administration to provide 'candid advice and assessments from the civil service to the political leadership', as the government itself has feared. At the same time, it is not obvious that these considerations should weigh heavily when it comes to extensive legal investigations of the limits of EU law. When the state's best EU lawyers systematically work to map the limits EU law sets for the application of the NIA, and then present this in a systematic and well-prepared report, there is little reason to suggest that the full report should be reserved only for the highest levels of government. The parts that focus on the interpretation of EU law provide important information for others besides the government. The rule of law presupposes that legal rules are known. This will obviously be hindered if the government withholds detailed knowledge of the content of legal rules from administrative bodies, the prosecution authority, the courts, or citizens.

6 LITIGATION RISK AND WIGGLE ROOM AS A FRAME FOR ANALYSIS

The significance of EU rules for the requirement of stay in the NIA was not part of a 'blind spot' for the authors of the 2014 report presented in the previous Section. On the contrary, its analysis shed considerable light on legal arguments and case law of relevance. In the previous section, we argued that the lack of transparency concerning this report allowed wrongful practices to continue to develop.

However, questions can also be raised about the way the 2014 report analysed EU rules. The concepts of 'litigation risk' and 'wiggle room' were central. How suitable was this 'framing' of the analysis in clarifying the issues at stake for political decision-makers? And what effects was such a focus likely to produce in the social security administration and in the authorities prosecuting alleged welfare fraud? In this Section, we look at how the report's focus on litigation risk and wiggle room created specific types of weaknesses.

As noted above, the mandate for the 2014 report specifically requested an analysis of how much wiggle room EU law permitted in imposing limitations on the export of social security benefits. The risk of exceeding the available wiggle room was linked to litigation risk. The report states: 'For example, when it is described as very high risk or it is clear that there is significant risk with a possible measure, the working group considers that a potential

lawsuit is clearly more likely to be lost than won'.[92]

This approach to legal analysis of EU law can cause at least three types of problems. The first concerns visibility: The actual consequences of mistakes are made invisible. The second is more communicative in nature: A text highlighting possible 'wiggle room' – even where wiggle room is considered unlikely or unrealistic – can leave the reader with a distorted picture of how flexible the rules are. The third type of problem concerns the potential knock-on effects on openness: A report discussing wiggle room and litigation risk can make it appear tempting to keep the analyses secret, where, on the contrary, it would be particularly helpful to share these assessments with other actors to avoid misapplication of rules that lie at the limit of what EU law allow.

Firstly, the above quote reveals a narrow understanding of litigation risk, focused on the likelihood of losing lawsuits. The narrowness of this approach is evident when compared to scientific risk analysis and risk management approaches that emphasise the importance of assessing both likelihood *and* gravity of consequences. Adopting a broader understanding of risk as a point of departure, the assessment could instead be expressed as follows: Significant risk means that the measure is assessed as highly likely to lead to people losing rights, being unjustly deprived of necessary benefits in case of illness, being subjected to illegal demands for repayment of benefits, and also being convicted and required to serve sentences in violation of the decisions made by Parliament.

However, while the 2014 report pays sustained attention to possible wiggle room under EU law, it does not address who is affected, and how, if one pushes the rules too far. Nor is there any trace of risk assessments that consider both likelihood and gravity of consequences in any of the public documents in this case. Analysis of EU law could have been framed in ways that made visible the fact that authorities were at risk of acting illegally towards people entitled to benefits in case of illness. However, this dimension seems to have been overlooked by successive governments and in discussions by the Ministry about the adaptation of social security benefits to the EU context.

The parts of the 2014 report that are now publicly available thus reveal something paradoxical: Even in a systematic and thorough analysis of 'wiggle room', what lies beyond this space – and the potential consequences of crossing the line – remain invisible.

Secondly, assessments that focus on litigation risk and wiggle room can leave a skewed picture of the borderlands of EU law. When practices that are most likely illegal are presented as interpretations of EU rules that have a chance of success in a lawsuit, the rules can appear more flexible than they actually are. Again, this can be illustrated by the 2014 report. The report is so focused on exploring every available corner of wiggle room, that a non-specialist who reads individual quotes can get the impression that the room is larger than it is. Using the frame of litigation risk and wiggle room can thus increase the likelihood of decisions that push the boundaries of EU law. When decisions are made behind closed doors, it is not surprising that mistakes happen. The social security scandal shows that such mistakes can be very serious.

The first two observations suggest that assessments of EU law that focus on litigation risk and wiggle room are not well suited to clarifying what is at stake and reducing the likelihood of future mistakes. To make clear what is at stake and thereby reduce the risk of

[92] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 29.

future mistakes, assessments should make politicians and other non-specialist readers aware of the risks involved in walking the tightrope of EU law. This would involve pointing out the consequences of violations by describing high litigation risk as what it is – namely a high risk of illegal practice – and by ensuring that the emphasis on potential wiggle room does not inflate the impression of the flexibility of EU law.[93]

The third observation is that the reliance on litigation risk in the framing of analyses can also make it tempting to keep legal assessments under wraps. This may be due to potential or upcoming lawsuits, or it may be due to concern about possible criticism given the questions being asked.

A possible connection between assessments of litigation risk and wiggle room, and a desire for secrecy, was formulated in Autumn 2020 at the hearing held by the Parliament's Standing Committee on Scrutiny and Constitutional Affairs. Here, the head of the Public Inquiry Committee stated:

> [I]n such interministerial groups, which are internal, where measures to be taken in the future are assessed, there will often be assessments related to litigation risk: If we do this, how likely is it that this will be challenged, and how likely is it that we will win? It may well be that even if the litigation risk is high, one chooses to try to challenge the boundaries of the wiggle room, and many will consider that completely legitimate, but there is no desire, reason, or wish to show such assessments in advance.[94]

But this conceals the significance such assessments can have for other actors in the legal system than those who litigate civil EU law cases on behalf of the state. Both public administrative bodies (which must assess their own practices), and the prosecution authority (which must decide whether to prosecute for violations of criminal provisions), may benefit from assessments of the wiggle room available in the administration's application of EU law in Norway.

As described in Section 3 above, the legislation related to requirements of stay meant that those in NAV who were deciding on practice, whether via circulars or in individual cases, had a challenging task. If circulars are written without knowledge of the limits of what EU law allows, there is a risk that obligations will be imposed on the recipients of benefits where there is insufficient legal basis for these obligations.

Because violations of obligations related to social security benefits can also be criminally sanctioned as fraud, individuals can end up being punished for violating obligations imposed based on a misinterpretation of EU law. Therefore, the prosecution authority also needs to be aware of any assessments carried out regarding the legal basis for enforcing the relevant obligations. Thorough investigations into EU legal boundaries can help clarify legal doubts over whether the prosecution authority should bring the issue to court.

The significance of the prosecution authority's responsibility to bring unresolved legal

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[93] Although this information may be present in other documents and presentations to politicians and beyond, such reports have a life of their own to some extent. For this reason, it is important to include such information in the reports as well.

[94] Appendix 7 (n 74) 6.

questions before the courts was addressed by the Director of Public Prosecutions during the Parliament's Committee on Scrutiny and Constitutional Affairs' hearing on the social security scandal. When asked whether the prosecuting authorities should have been informed about doubts that arose concerning the misapplication in connection with some rulings of the National Insurance Court in 2017, he replied:

> I would very much have liked to see that we were already involved from the summer of 2017 when decisions were made that raised questions about whether this could be correct. Criminal law requires [that the wording of statutes should satisfy] a certain level of clarity. It is not the case that the most likely interpretation should be assumed, and I believe – admittedly with the benefit of hindsight – that if we had received some warnings then, we would have gone heavily into this already in 2017.[95]

The Director of Public Prosecution's desire to be 'involved' is probably even greater if the government has chosen to 'challenge the boundaries of available wiggle room' by imposing obligations on private parties with full knowledge of the risk that the obligations may be considered in violation of EU law.

In the absence of transparency, the consequence can be, as in the social security scandal, that those who apply the rules challenge the boundaries of wiggle room without knowing that this is what they are doing. This applies to both the social security administration, through the rejection of benefit applications and demands for repayment; and the prosecution authority, who proceeded to prosecute, convict and punish benefit 'fraudsters'. The Director of Public Prosecution's statement illustrates how crucial it is for those handling criminal cases to have knowledge of doubt and risk. It shows that what the authors of the 2014 report deemed litigation risk, in an attempt to exploit the 'wiggle room' available within EU law, in reality, involved much more complex and serious issues.

7 CONCLUSION

The misapplication leading to the Norwegian social security scandal occurred in a situation where domestic rules walked the tightrope of what EU law allows. In this article, we have presented three distinct instances where other approaches to analysis and assessments of EU law in the public administration could have stopped the misapplication at earlier stages. The misapplication could have been halted if the administration had analysed the ripple effects of one of the EFTA Court's decisions in 2013. Wider knowledge of the 2014 report on the significance of EU law for the export of social security benefits could also have contributed to correcting application errors, and would have been particularly helpful had these assessments focused on more than just litigation risk and wiggle room. These findings show that the very late detection and correction of the illegal practice cannot be explained solely by a lack of EU legal competence within the administration. The way the administration worked with EU law also contributed to the misapplication not being stopped earlier.

Based on our discussion, we present three recommendations for good governance in

[95] Appendix 44 (n 89) 3.

the borderlands of EU law:

- The administration's analyses of case law should not be limited to the legal issues that the CJEU and EFTA Court explicitly address. Broad assessments should be conducted into the ripple effects that these courts' interpretative methods and reasoning in individual cases may have for rules other than those central to the decision.
- The government and the rest of the administration should not keep assessments of EU law secret – whether contained in legal opinions, reports, or memos – even if these assessments do not result in proposals for changes to Norwegian legislation.
- Analysis and assessment of EU law issues should not be limited to addressing the state's litigation risk and wiggle room. EU law is not a game in which the only possible downside is lost lawsuits, with binding cooperation with other states setting limits on domestic authorities' political wiggle room. A high risk of losing lawsuits also means a high risk of individuals losing their rights and being subjected to erroneous decisions or even convictions.

Following the recommendations we have outlined for good governance in cases where legislation is situated at the limit of what EU obligations allow will have both economic and political costs. However, the costs of *not* following these recommendations may be even higher. By not following these recommendations, authorities risk making mistakes that may lead to people losing their rights, being unjustly deprived of necessary subsistence benefits, being subjected to illegal demands for repayment of benefits, being convicted, and being required to serve sentences in violation of the decisions made by Parliament.

Although the social security scandal involved welfare legislation, the lessons to be learnt are not limited to this sector, nor even to EU law. In theory, any legislative provision may find itself on the edge of higher-order norms, including (but not limited to) constitutional norms. Regardless of the area in question, when navigating such borderlands there is a need to closely monitor the ripple effects of case law interpreting the higher-order norms, to share assessments of the legal boundaries openly, and for the civil service and administration to highlight what is at stake in case of misapplication, including for the individual. If the trail cleaves to the edge, there is a significant risk of errors unless the authorities follow these recommendations for good governance.

The choice of adaptation strategy when adopting national legislation in areas covered by EU law, constitutional law, or other higher-order norms is essentially a political choice. Whether national rules should cleave to what higher-order norms permit is thus a decision that lies primarily with politicians. But the choice has consequences, and the bureaucracy plays a key role in detecting, articulating and handling these. When analysis and assessments are conducted regarding the wiggle room available to the state when following obligations to obey higher-order legal norms, it is crucial that the politicians who make the final decisions are also made aware of what is required to exercise good governance in the borderlands of these norms and the human, economic, and rule-of-law costs of making mistakes. And to avoid mistakes, lawyers in the civil service should not limit their analysis of case law to the legal issues that the relevant courts explicitly address but should also conduct broad

assessments of the ripple effects that these courts' interpretative methods and reasoning in individual cases may have for rules beyond those with which the decision is explicitly concerned. Without such an approach, more scandals are likely to follow, as the risks then will increase for misapplication not merely of EU law, but also for constitutional law and every other norm of higher order. In effect, without taking the recommendations for good governance seriously, the prospects for the rule of law may diminish.

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A COMPARATIVE VIEW OF THE COMPREHENSIVE SICKNESS INSURANCE CONDITION FOR RESIDENCE IN ARTICLE 7 OF DIRECTIVE 2004/38

CHRISTIAN FRANKLIN,* JAAN PAJU,†
MARGRÉT EINARSDOTTÍR‡ & GEORGES BAUR•

The Citizenship Directive 2004/38 provides for a right of residence for more than three months and up to five years for EEA nationals and their family members in other EEA states, subject (amongst other things) to a requirement of 'comprehensive' sickness insurance during one's stay. Yet what does 'comprehensive' mean under EU and EEA law? How has this been interpreted by the CJEU and/or EFTA Court? And how is the requirement understood and applied at national level? These are the main issues discussed in the following article, which reveals a surprisingly high level of disparity in terms of interpretation and application of the requirement at national level in Norway, Iceland, Liechtenstein and Sweden.

1 INTRODUCTION

Article 7 of the Citizenship Directive provides for a right of residence for more than three months and up to five years for EU citizens and citizens of the EEA EFTA States in other EEA states, subject to certain conditions.[1] Whilst workers and self-employed persons (and their family members) need only be in possession of a valid passport or national identification card,[2] students and others must additionally be able to show that they have sufficient resources and comprehensive sickness insurance for their stay so as not to become a burden on the host state.[3] While both the Citizenship Directive itself and the EU and EFTA Courts have provided a great deal of clarification on what is meant by 'sufficient resources', the requirement of comprehensive sickness insurance has received somewhat less attention. What does 'comprehensive' mean? This article attempts firstly to clarify how comprehensive the sickness insurance may be required to be under EU/EEA law (Section 2), before taking a closer comparative look at how the condition has been interpreted and applied in the EEA EFTA states of Norway (Section 3), Iceland (Section 4) and Liechtenstein (Section 5), and

* Professor, Director of CENTENOL, Coordinator of the EEA Social Security law project, University of Bergen. Many thanks to Research Assistant Hans Olav Mangschau Hammervold for help in collecting information from various sickness insurance providers used in Section 3.
† Associate professor in EU law, senior lecturer in Constitutional law, Member of the board of CENTENOL, University of Stockholm.
‡ Professor, Reykjavik University, and member of CENTENOL.
• Head legal research of the Liechtenstein-Institut, member of the Advisory Committee of CENTENOL.
[1] Directive 2004/38/EC of the European Parliament 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 (hereafter Directive 2004/38/EC).
[2] ibid Article 7(1)(a).
[3] ibid Article 7(1)(b) and (c).

in the Nordic EU Member State of Sweden (Section 6). The article will round off with a few, short summarising remarks.

2 'COMPREHENSIVE' INSURANCE – COMPLETE OR (MERELY) EXTENSIVE COVERAGE?

The English language version of Article 7(1)(b) and (c) of the Citizenship Directive requires the sickness insurance to be 'comprehensive'. The very term 'comprehensive' is nevertheless somewhat nebulous, and capable of taking on two rather different meanings. On the one hand, it may be used to describe something which is complete or all encompassing. On the other hand, however, it might equally be used to describe something which is extensive, albeit not complete. Naturally there is a significant difference – both in terms of potential cost, and perhaps even in availability on the market – in requiring an insurance policy which covers absolutely all conceivable health related risks to one covering merely some or even a significant proportion of these. Getting to the bottom of what the term requires is therefore important from a practical perspective, for students and other non-economically active citizens looking to avail themselves of their rights of residence under EU and EEA law. Not only so as to legitimize stays for up to five years in another EEA state, but also so as to (eventually) qualify for permanent residence in the host state beyond that.[4]

So what does 'comprehensive' mean in this particular setting? Looking at the rules upon which Article 7 was historically based, one might be forgiven for automatically concluding that the term was intended to denote that the insurance coverage needs to be all encompassing in order to qualify. All of the various language versions of both the Residence and Student Directives from the 1990's, which were replaced by the Citizenship Directive, had previously conditioned residence in other EEA states on a strict requirement of sickness insurance covering 'all risks' (see Figure 1 below).[5] In its first draft, the Commission had also initially proposed that the same wording (i.e. insurance covering all risks) be kept in Article 7 of the Citizenship Directive.[6] Yet for reasons which do not seem apparent from the preparatory works at any stage of the legislative process, the Commission decided to change at least the English, German and Portuguese language versions prior to final adoption – from 'all risks', '*alle Risiken*' and '*conjunto dos riscos*', to 'comprehensive', '*umfassenden*' and '*cobertura extensa*', respectively.[7] The amendments were adopted without comment by the EU Council and EU Parliament.

Whether or not these changes in wording were simply aesthetical or had some deeper significance is nevertheless rather difficult to ascertain – at least when taken at face value. Looking at the other 21 equally authentic language versions of the provision, most of these

[4] Directive 2004/38/EC (n 1) Article 16.
[5] Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ [1990] L180/26; Article 1 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.
[6] Commission, 'Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' COM (2001) 257 final.
[7] Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty)' COM (2003) 0199 final.

seem to have retained terms either identical, or at the very least closely aligned, to those used in the 1990 directives.[8]

Figure 1: Various language versions of the requirement under the Citizenship, Residence and Students Directives.

	Citizenship Directive 2004/38	Residence Directive 90/364	Students Directive 93/96
Danish	samtlige risici	samtlige risici	samtlige risici
Swedish	heltäckande	heltäckande	samtliga risker
French	complète	l'ensemble des risques	l'ensemble des risques
Spanish	todos los riesgos	la totalidad de los riesgos	todos los riesgos
English	comprehensive	all risks	all risks
German	umfassenden	alle Risiken	sämtliche Risiken
Portuguese	cubertura extensa	todos os riscos	totalidade dos riscos
Norwegian	full dekning	alle risikoer	alle risikoer
Icelandic	fullnægjandi	alla áhættu	alla áhættu

The CJEU is of course no stranger to dealing with linguistic divergences in EU legislation. The different language versions of an EU legal text must naturally be given a uniform interpretation, and the Court has therefore established several different tests for resolving such matters.[9] Yet these tests need to be approached with a certain degree of caution. They are seldom applied in mechanical fashion, with the Court appearing to have adopted a pluralistic approach as to their use.[10] Furthermore, the application of these different tests may, but will not always lead to the same interpretative outcomes when applied. The CJEU therefore enjoys a great deal of flexibility when faced with such issues, making it very difficult to predict what the outcome will be in any given case. How the tests operate, and what the Court has usually focused on in applying these in the past, may nevertheless provide some insights into how the Court might reason its approach to resolving the linguistic divergence in Article 7 of the Citizenship Directive.

[8] Changes also appear to have been made to several other language versions, including the Bulgarian, Estonian, Lithuanian, Greek, Hungarian and Maltese language versions, although the present authors do not command these languages sufficiently to say with any degree of certainty what they entail.

[9] For more detail on these and the analyses mentioned below, see e.g. Christian N K Franklin, 'Consistency in EC External Relations Law' (PhD-series, University of Bergen 2010) 209-234.

[10] As opposed to a monistic approach; applying one singular, uniform test – as contended by e.g. Jurate Vaiciukaite and Tadas Klimas 'Interpretation of European Union Multilingual law' [2005] 3 International Journal of Baltic Law 1; Trevor C Hartley, *European Union Law in a Global Context* (Cambridge University Press 2004) 117; L Neville Brown and Tom Kennedy, *Brown & Jacobs: The Court of Justice of the European Communities* (5th edn, Sweet & Maxwell 2000) 326-329. Supporters of a pluralistic view include e.g. Niels Fenger, 'Forvaltning & Fællesskab. Om EU-rettens betydning for den almindelige forvaltningsret: Konfrontation og frugtbar sameksistens' (PhD thesis, University of Copenhagen 2004), in particular pp. 458-486; Anthony Arnull, *The European Union and its Court of Justice* (Oxford University Press 2006) 608-611; Mattias Derlén, 'A Castle in the Air – The Complexity of the Multilingual Interpretation of European Community Law' (PhD thesis, University of Umeå 2008); and Franklin, 'Consistency in EC External Relations Law' (n 9).

2.1 CJEU APPROACHES TO RESOLVING LINGUISTIC DIVERGENCES

The first stage of the Court's enquiry will usually be to see if the discrepancy can be resolved on the basis of a superficial, comparative literal analysis of all of the language versions of the provision or term in question. This method generally appears to be used in three different situations.

Firstly, where there is clear precedent determinative of the understanding of the term or provision in question, the Court will simply refer to this and wash its hands of the matter.[11] Whilst the CJEU has in fact provided certain indications as to how various aspects of Article 7 of the Citizenship Directive are to be understood, it has never dealt with the question as to the meaning of the term 'comprehensive' square on. We shall nevertheless return to relevant parts of the case law concerning both Article 7 and other parts of the Citizenship Directive further below.

Secondly, the CJEU may rely on a comparative literal analysis alone where the linguistic divergence is deemed to have been caused by a mere drafting error.[12] Given that changes were made not to one but at least three language versions during the drafting process, however, a superficial comparison of the terms used in the various language versions reveals that this was not an obvious drafting error or slip up in translation.

Thirdly, the CJEU has at times used comparative literal analyses in order to give precedence to the clear and unequivocal wording of an overwhelming majority of the language versions of a provision pointing to one particular understanding.[13] The Court's case law here is not uniform, however, as we also find examples of decisions where an overwhelming majority of language versions have been required to align with the understanding of one.[14] Simple 'majority' arguments have also been subject to a great deal of academic criticism over the years.[15] Although one might naturally contend that an overwhelming majority of language versions could (and should) at the very least give rise to a rebuttable presumption in favour of a particular interpretative outcome, it seems rather doubtful to our minds that the Court would choose to resolve the linguistic divergence in Article 7 of the Citizenship Directive in this way alone – at least not without conducting any further analyses.

Where divergences cannot be dealt with by a simple comparative literal analysis, the Court will usually proceed to resolve the issue in one of two ways: Either from seeking out the real intention of the specific provision in which the term is contained (what one might call the *Stauder*-approach),[16] or from a broader analysis of the purpose and general scheme of

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[11] See e.g. Case C-219/95 *Ferriere Nord SpA v Commission of the European Communities* EU:C:1997:375.
[12] See e.g. Case C-64/95 *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v Hauptzollamt Cottbus* EU:C:1996:388.
[13] See e.g. Case C-372/88 *Milk Marketing Board of England and Wales v Cricket St. Thomas Estate* EU:C:1990:140.
[14] See e.g. Case C-76/77 *Auditeur du travail v Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial* EU:C:1977:215.
[15] See e.g. Derlén (n 10) 85-86, and Franklin, 'Consistency in EC External Relations Law' (n 9) 212, both with further references.
[16] See e.g. Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* EU:C:1969:57; Case C-55/87 *Alexander Moksel Import und Export GmbH & Co. Handels-KG v Bundesanstalt für landwirtschaftliche Marktordnung* EU:C:1988:377; Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* EU:C:2001:616; Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* EU:C:2005:59.

the entire set of rules of which the provision in question forms part (what one could call the *Bouchereau*-approach).[17]

Given that the aim of the provision and the aim of the Directive as a whole are not symmetrically aligned, however, the interpretative outcome might well vary depending on which of the two approaches the Court were to adopt: On the one hand, the Directive generally seeks to simplify and strengthen rights of free movement and residence for all EU and EEA EFTA state citizens, and to facilitate free movement to the greatest possible extent.[18] Application of the *Bouchereau*-approach would therefore seem to lean in favour of interpreting the provision in line with the English, German and Portuguese language versions. On the other hand, Article 7(1)(b) and (c) of the Directive clearly recognise the EU/EEA EFTA states' legitimate concern that persons availing themselves of their general right to free movement (which in EU law stems from Articles 20 and 21 TFEU, and in EEA law exists as a general, unwritten principle), do not become a burden on the social assistance system of the host Member State during an initial period of residence (i.e. when staying for periods in excess of three months).[19] Application of the *Stauder*-approach could therefore be said to point towards an interpretative outcome in favour of requiring sickness insurance that indeed covers absolutely all risks.

As mentioned above, which test the CJEU might apply to resolve any linguistic divergence is difficult to ascertain in advance with any degree of certainty. The point to bear in mind here is that *both interpretative outcomes remain open to the Court*, depending on which approach the Court might decide to adopt. In our opinion, however, there are several other factors which should be taken into account, which firmly point towards a more relaxed interpretation of the term 'comprehensive' as contained in Article 7(1)(b) and (c) of the Citizenship Directive.

2.2 CJEU – TOWARDS A MORE RELAXED APPROACH?

Support for the contention that the term should not be understood as meaning 'all encompassing' or 'complete' may firstly be found in the CJEU's case law related to Article 7, where the Court has appeared to take an increasingly liberal approach. A first (albeit minor) step in this direction might arguably be drawn from *Ibrahim*, a case concerning the relationship between rights of residence under the Workers Regulation and conditions of residence under the Citizenship Directive.[20] In the end, the Workers Regulation was effectively allowed to overrule application of the Citizenship Directive in the substantive

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[17] Case C-30/77 *Régina v Pierre Bouchereau* EU:C:1977:172; Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikrinsselskabet Codan* EU:C:1998:617; Case C-420/98 *W.N. v Staatssecretaris van Financiën* EU:C:2000:209; Case C-257/00 *Nani Givane and Others v Secretary of State for the Home Department* EU:C:2003:8; Case C-280/04 *Jyske Finans A/S v Skatteministeriet* EU:C:2005:753.

[18] Preamble of Directive 2004/38/EC (n 1) recital 3; Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* EU:C:2008:449 para 59; Case C-930/19 *X v État belge* EU:C:2021:657 para 81.

[19] Preamble of Directive 2004/38/EC (n 1) recital 10.

[20] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* EU:C:2010:80; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

determination of the case.[21] Of note is nevertheless a statement made by the Advocate General in the case, who was clearly of the opinion that the sickness insurance condition in Article 7 of the Citizenship Directive was to be understood as a continuation of the conditions set out in the earlier Residence and Students Directives, given that 'the Community legislature has expressly imposed a requirement of having sickness insurance cover in respect of all risks in the host Member State'.[22] The CJEU chose not to follow the Advocate General's opinion on this point, however, making explicit use instead of the term 'comprehensive' sickness insurance in its judgment. It is worth noting that the official, authentic language of the case was also English.

A clearer step was taken a few years later in *Rendón Marín*, where – following the approach suggested by Advocate General Szpunar – the Court appeared to accept that public sickness insurance coverage in the host state would suffice to fulfil the requirement.[23] The Court nevertheless stopped short of assessing whether the requirement was in fact fulfilled in the case, leaving the matter to be determined by the referring national court.

The CJEU's decision in *Rendón Marín* paved the way for an even more significant development in *A*.[24] The case concerned an Italian national who had moved to Latvia to live with his Latvian wife and their two children. Having informed Italian authorities of his intention to move abroad, he was registered as such by them and consequently lost his right to receive care under the Italian health care system. Once registered as resident in Latvia, A applied to Latvian authorities to become a member of the Latvian compulsory public sickness insurance system, and to issue him with a European Health Insurance Card (EHIC). His application was refused. Latvian authorities claimed that since he was neither a worker nor self-employed person, as a mere EU citizen living in Latvia, he could only receive health care in return for payment. The national courts acting at first instance had held that although A was entitled to emergency medical treatment (thus in line with the CJEU's much earlier decision in *Baumbast*, which we shall return to in some detail further below), that he would only be entitled to receive other medical care financed by the Latvian state when a right of permanent residence had been acquired (i.e. usually after five years legal residence). As pointed out by the Latvian Supreme Court in referring the case to the CJEU, this left A caught between a rock and a hard place, as denied access to medical care in both Italy and Latvia.

As discussed above, if an EU citizen is not economically active, the right to reside according to the Citizenship Directive is conditional upon sufficient means and a comprehensive sickness insurance. By contrast, the right to be affiliated to the competent Member State and its social security system, including its healthcare system, under Regulation 883/2004, is not conditional. It suffices under Article 11(3)(e) of Regulation 883/2004 that an EU citizen is (merely) residing in that Member State. As the personal scope in Regulation 883/2004 makes no difference between economically active and economically inactive EU citizens residing in a Member State, this leads to a legal

[21] Similar reasoning was applied in C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* EU:C:2010:83, delivered the very same day.
[22] Opinion of AG Mazák in Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* EU:C:2009:641 para 39 and footnote 36.
[23] Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* EU:C:2016:675 para 49.
[24] Case C-535/19 *A v Latvijas Republikas Veselības ministrija* EU:C:2021:595.

paradox – since Regulation 883/2004 provides the state health care, which the Citizenship Directive intends to uphold by keeping economically inactive out.[25]

The CJEU held that the mandatory 'conflict rule' in Article 11(3)(e) of Regulation 883/2004 makes it clear that economically inactive EU citizens, such as A, in principle are covered by the social security legislation of the Member State in which they reside (i.e. in this case Latvia).[26] This was precisely so as to ensure that such individuals are not left without any social security cover whatsoever.[27] The Court held further that since A was covered by Latvian social security legislation under Article 11(3)(e) of Regulation 883/2004, that provision gave him a right to be affiliated to the Latvian public sickness insurance system. Secondly, that the right to be affiliated to national public health systems in such circumstances would persist, notwithstanding the right of host Member States to require comprehensive sickness insurance cover for stays of more than three months and up to five years under Article 7(1)(b) of the Citizenship Directive.[28] Conscious of the fact that its decision might otherwise render Article 7(1)(b) completely redundant, the Court was quick to add that host Member States were not thereby obliged to grant such affiliation entirely free of charge.[29] As long as such charges were proportionate, the Member States would be fully within their rights to require economically inactive EU citizens staying for up to five years to maintain either comprehensive private sickness insurance or to pay a contribution to the public health system in return for public health coverage, to prevent them becoming an unreasonable burden on public finances.

The Court's more relaxed approach to the comprehensive sickness insurance requirement in *A* was confirmed the following year in *VI.*[30] The referral came from a UK national court post-Brexit, in a case concerning an Irish national's right to reside in the UK and receive certain child benefits during stays there in 2006 and 2016. The CJEU held here in no uncertain terms that 'once a Union citizen is affiliated to […] a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b)'.[31] Furthermore, the Court stressed that in situations where that public sickness insurance coverage is in fact offered free of charge, the Member State cannot rely on its own failure to take advantage of the mere possibility of charging migrant EU citizens for such affiliation to their national health systems:

> […] it would be disproportionate to deny that child and the parent who is his or her primary carer a right of residence, under Article 7(1)(b) of Directive 2004/38, on the sole ground that, during that period, they were affiliated free of charge to the public sickness insurance system of that State. It cannot be considered that that

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[25] On the interaction between 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 and Directive 2004/38/EC (n 1), see Jaan Paju, 'A Bridge Too Far – On the Misunderstandings of the Nature of Social Security Benefits: A v. Latvijas Republikas Veselības Ministrija' (2022) 59(4) Common Market Law Review 1219.
[26] 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.
[27] *A* (n 24) paras 45-51.
[28] ibid paras 52-59.
[29] ibid para 59. Although if a Member State did in fact choose to provide such protection free of charge under national law, then this would naturally be considered a more favourable provision in accordance with Article 37 of Directive 2004/38/EC (n 1).
[30] Case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs* EU:C:2022:177.
[31] ibid para 69.

> affiliation free of charge constitutes, in such circumstances, an unreasonable burden on the public finances of that State.[32]

The interesting question whether reciprocal arrangements, such as those in force relating to the common travel area applicable to health insurance between the UK and Ireland, were capable of satisfying the requirement to have comprehensive sickness insurance cover within the meaning of Article 7(1)(b), was nevertheless left unanswered.

2.3 THE ADVOCATES GENERAL – PRESSURE AND COMMON VIEWS

Another indication of a more liberal understanding of the extent of sickness insurance coverage required under Article 7(1)(b) and (c) of the Citizenship Directive may be drawn from the less filtered opinions of the Advocates General in both *A* and *VI*, who argued even more forcefully and directly in favour of such an interpretation.

In *A*, Advocate General Saugmandsgaard Øe declared that a more nuanced approach to the condition ought to be adopted, akin to that followed by the Court with regards to the sufficient resources requirement under Article 7.[33] Recalling the general starting point that derogations from fundamental freedoms should be interpreted strictly,[34] he noted how the earlier Residence Directive contained not the same, but a 'similar' requirement.[35] Strongly reminiscent of the Court's rulings concerning sufficient resources, he further opined that the source of the sickness insurance coverage – i.e. whether private or public (and if public, whether provided by the host or home state) – was not important.[36] What mattered was simply that you had it. He then recalled how the Court in *Baumbast* had in any event taken account of comprehensive sickness insurance coverage in one's *home state* as a factor in finding a strict requirement of all-encompassing sickness insurance in the *host state* as a disproportionate restriction on Mr. Baumbast's general right to free movement under Articles 20 and 21 TFEU.[37] Referring further to the Court's decision in *Dano*,[38] the EU legislature's intention as regards comprehensive sickness insurance was to ensure that economically inactive migrant EU citizens would not become not simply a burden, but an *unreasonable* burden for the host Member State.[39] Again, this seemed to indicate that insurance covering a substantial amount of – but not necessarily all – risks, might well suffice. In the Advocate General's opinion, in light of the Court's case-law in *García-Nieto*, *Alimanovic* and *Dano*, A could only be deemed to constitute an unreasonable burden if he had made social

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[32] *VI* (n 30) para 70.
[33] Opinion of AG Saugmandsgaard Øe in Case C-535/19 *A v Latvijas Republikas Veselibas ministrija* EU:C:2021:114, with further reference to C-181/19 *Jobcenter Krefeld v JD* [2020] EU:C:2020:794.
[34] Opinion of AG Saugmandsgaard Øe in *A* (n 33) para 83.
[35] ibid para 90, fn 48.
[36] ibid paras 89 and 91. On the (ir)relevance of the origin of resources, see e.g. Case C-93/*18 Ermira Bajratari v Secretary of State for the Home Department* EU:C:2019:809; further Elspeth Guild, Steve Peers, and Jonathan Tomkin, *The EU Citizenship Directive – A Commentary* (2nd edn, Oxford University Press 2019) 138.
[37] Opinion of AG Saugmandsgaard Øe in *A* (n 33) para 90.
[38] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358 paras 71 and 77.
[39] Opinion of AG Saugmandsgaard Øe in *A* (n 33) para 85. Although unclear from the Advocate General's opinion, and arguably from the Court's decision in *Dano* (n 38), the CJEU itself confirmed in Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602 (a decision published the very same day as the final decision in *A*), that the same applied as far as the sufficient resources requirement was concerned – i.e. that both conditions are intended inter alia to prevent people from becoming an unreasonable burden on the social assistance system of the host Member State.

security claims related to the first three months following his arrival in Latvia, if his right of residence was based solely on the fact that he was seeking work there (i.e. on the basis of Article 14(4)(b)), or if he went to Lativa as a 'social tourist' (i.e. solely in order to obtain Latvian social assistance benefits or free health care).[40] None of these were the case in his situation. And with a nod to *Bidar* and *Förster*, the Advocate General also noted that A had formed genuine links of integration with Latvia during his time there which ought to be taken into account.[41] For the Advocate General in *A*, the key to understanding what is comprehensive enough under Article 7 of the Directive seemed therefore to lie in a proportionality assessment, i.e. whether the lack of coverage was of such an extent that it would amount to an unreasonable burden, upsetting the financial balance of the host Member State, taking account of the level of integration the individual has achieved in the host state.

Advocate General Hogan went a step further in *VI*.[42] Noting with regret that the referring national court had not asked the question or provided any further information in this respect in its referral, despite the question being debated before the national court(!), and given the UK government's failure to submit written observations in the case or to attend the oral hearing(!!), the Advocate General admitted that addressing the question of what comprehensive sickness insurance is might seem 'particularly inopportune'.[43] In what could only be described as a classic *obiter dicta*, he went on to make a few 'remarks' on the issue nonetheless. Recognising the EU legislature's attentiveness to the legitimate concern of the Member States to safeguard their public finances, he pointed out that the legislature did not go so far as to require that the insurance be provided by a private operator. He also called particular attention to the EU legislature's change in terminology from insurance covering all risks under the 1990 directives to 'comprehensive' coverage under the Citizenship Directive.[44] Given the lack of any definition in the Directive itself, the term fell to be interpreted in a uniform manner as an autonomous concept of EU law. In Advocate General Hogan's view, sickness insurance must be regarded as 'comprehensive' where the cover enjoyed by the EU citizen corresponds to that provided free of charge by the host Member State to its own nationals, or to that which a Member State requires its nationals to subscribe to.[45] From here, the Advocate General mimics to a great extent the approach adopted by his colleague Saugmandsgaard Øe in *A* – calling attention to the fact that as a derogation to the right to free movement it must be interpreted restrictively; that his suggested understanding would not unreasonably burden public finances in the Member States; and finally, that such an understanding in any event corresponded *mutatis mutandis* to what is required for the condition relating to sufficient resources (i.e. that the insurance coverage need only be sufficiently comprehensive).[46]

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[40] Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* EU:C:2016:114; Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597; and *Dano* (n 38).
[41] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* EU:C:2005:169; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.
[42] Opinion of AG Hogan in Case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs* EU:C:2021:778.
[43] ibid paras 55-60.
[44] ibid para 61.
[45] ibid para 63.
[46] ibid para 64.

As we have already seen, the Court did not deem it necessary to address the points raised by the Advocates General as to the interpretation of the term 'comprehensive', sidestepping the issue altogether in its final decisions in both cases. It is nevertheless interesting to see how both of the Advocates General appeared to be on the same page – both as regards their understanding of the term, and the need to call the Court's attention to the issue. They both certainly laid down a clear marker for future potential reference in their Opinions.

2.4 LEGALITY – ABSOLUTE INSURANCE COVERAGE IN BREACH OF TREATY RIGHTS

The third, and to our mind crucial, argument against interpreting the condition in Article 7 of the Citizenship Directive as requiring sickness insurance covering absolutely all risks, nevertheless stems from the CJEU's seminal decision in *Baumbast* more than 20 years ago.[47] This is quite simply because retention by the EU legislature of a requirement of sickness insurance covering all risks after that ruling, would obviously run the risk of being declared invalid as contrary to rights flowing directly from the legal basis of the Directive itself.

Baumbast concerned a German citizen and his family who were living in the UK. One of the questions referred to the CJEU concerned the sickness insurance condition under Article 1(1) of the Residence Directive. Mr. Baumbast did not have private health insurance but was covered by German public health insurance. As mentioned previously, all of the language versions of the Residence Directive unequivocally required sickness insurance covering 'all risks' during one's stay in the host state. UK authorities therefore claimed that since Mr. Baumbast was not covered for emergency health treatment whilst in the UK, and hence not covered for 'all risks', that he did not qualify for residence under the Residence Directive. The CJEU nevertheless held that a right of residence may exist in such situations on the basis of Article 18(1) EC (now Article 21(1) TFEU) instead. It pointed out that limitations and conditions set out in secondary measures were subject to judicial review, and could not prevent the provisions of Article 18(1) EC from conferring rights on individuals.[48] Further, that any national measures seeking to safeguard the Member States' legitimate interests in preventing foreign EU migrants from becoming an unreasonable burden on public finances must comply with limits imposed by EU law and general principles thereof – including the principle of proportionality.[49] The Court then pointed out that since Mr. Baumbast had sufficient resources for his stay, had worked and lawfully resided in the UK for several years, had not become a burden on public finances during his stay and had 'comprehensive sickness insurance in another Member State', that denying him residence on the ground that his sickness insurance did not cover emergency treatment in the UK would amount to a disproportionate interference with Mr. Baumbast's right to free movement and residence as an EU citizen under Article 18(1) EC.[50]

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[47] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493.
[48] ibid para 86.
[49] ibid para 91.
[50] ibid paras 92-93. The Court did question whether the summation of UK authorities that Mr Baumbast and his family were not covered for emergency health treatment was correct, in light of 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 [1971] OJ L149/2, Article 19(1)(a). The Court's

Up until this decision, guidance from the CJEU on the various sickness insurance conditions found in the 1990 directives had been relatively sparse.[51] The Court did not go so far in *Baumbast* as to rule Article 1(1) of the Residence Directive invalid. Indeed, it did not even frame its response as one related to (what would undeniably have amounted to a highly teleological) interpretation of that provision. Instead, it delicately sidestepped the limitation by framing the issue as one of directly effective rights under Article 18 EC, coupled with a standard testing of the national rules for their proportionality.

The result is nevertheless the same – and striking – on any reading: The requirement of insurance covering 'all risks' as unequivocally stated in the Residence Directive could no longer be taken at its word. The provision was amenable to indirect judicial review by the CJEU and could be set aside in favour of directly effective provisions of the Treaty. In the event that an EU migrant citizen had comprehensive (in the sense of extensive, yet not all-encompassing) sickness insurance coverage, the fact that the insurance did not cover all risks (here, emergency treatment in the host state) as required under Directive 90/364, would be of no consequence, as he/she could then claim a right of residence on the basis of the Treaty rules. In effect, the Court in *Baumbast* established a significant, Treaty-based exception to the strict requirement of sickness insurance covering all risks under the Residence Directive.[52]

Some might claim that this is merely an example of parallel rights existing in EU primary and secondary law.[53] To our mind, however, the Court's approach seems better described as a *soft legality challenge* to rights contained in secondary EU measures, and a good example of the pragmatically attuned dialogue between the Court and the EU legislature.[54] Rather than simply overruling the EU legislature's choice, the Court through its judgment

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assumption indeed seems correct, in light of its earlier decisions in Case C-215/90 *Chief Adjudication Officer v Anne Maria Twomey* EU:C:1992:117 and Case C-451/93 *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland* EU:C:1995:176, which made clear that the concept of 'worker' under Regulation 1408/71 was much broader than in other EU contexts, i.e. covering any person insured under the social security legislation of one or more Member States. Any outlay of benefits in kind by the UK, including for emergency treatment, could therefore presumably have been made subject to a reimbursement claim to Germany after the fact. Notwithstanding this, the Court made clear that it's decision and reasoning would have been the same regardless (see para 90, where the Court – having referred to the possibility of reimbursement – went on to state that its reasoning applied 'In any event…').

[51] See e.g. Case C-424/98 *Commission of the European Communities v Italian Republic* EU:C:2000:287, which dealt with how beneficiaries were to demonstrate that they were in fact insured, making clear that limiting the means of proof or requiring provision of specific documents issued or certified by the authority of a Member State would be in breach of Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26 and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28.

[52] As similarly put by Dougan and Spaventa, 'secondary legislation is reinterpreted (or even effectively rewritten) according to the demands of primary law', effectively 'lowering the thresholds provided for in the Residency Directives'. Michael Dougan and Eleanor Spaventa, 'Educating Rudy and the (non-)English Patient: A double-bill on residency rights under Article 18 EC' (2003) 28(5) European Law Review 699, 705-706.

[53] Mads Andenæs and Tarjei Bekkedal, 'The reach of jobseekers rights to free movement: On the complementary relationship between primary and secondary law' (2022) 9 Oslo Law Review 4.

[54] Timmermans similarly alludes to the EU legislature's limited discretion in setting out limitations and conditions, as not giving it 'a *blanc seing*, an unrestricted authority […] to lay down such limitations and conditions on the exercise by the Union citizen of his free movement right. […] the Court exercises some control, albeit with a light touch […]'. Christiaan Timmermans, 'Martínez Sala and Baumbast revisited' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 354.

sends a clear signal that secondary law is outdated in light of Treaty-based developments and needs to be brought up to speed.[55] Given that the Residence Directive predated the introduction of EU citizenship by the Maastricht Treaty, the Court understandably faced a rather prickly conundrum in *Baumbast* of fitting rules (i.e. the Residence Directive) created in a significantly different legal landscape, into one that was moving progressively into new and uncharted territory (i.e. in the light of EU citizenship). The situation facing the EU legislature by the time the Citizenship Directive was being formed had nevertheless plainly changed: Adopting a retained requirement of sickness insurance covering all risks would be at odds with the conditions that could be attached to a right of residence based directly in one of its legal bases, i.e. today's Article 21(1) TFEU. Not only would this render the requirement in the Directive redundant; it would also pave the way for a potential challenge as to the very legality of Article 7 as plainly at odds with one of its legal bases.[56] The EU legislature must naturally regulate in accordance with the legal bases of the legislation in question.[57] And the Court has made no secret of the limited discretion enjoyed by the Member States in the application of the conditions for residence set out in the Citizenship Directive.[58] The timing of the changes made to the English, German and Portuguese language versions of Article 7 of the Citizenship Directive also seem rather telling: The initial legislative proposal was issued by the Commission in 2001, with the amended proposal introduced on 15 April 2003; with the Court's decision in *Baumbast* delivered on 17 September 2002, neatly inserted right between the two.

If faced with the question directly, it therefore seems more reasonable to our minds to assume that the Court would favour an interpretation of the provision in line with the English, German and Portuguese language versions, rather than having to declare it invalid altogether. Such a solution would clearly be in line with the approach for resolving linguistic divergences set out in *Bouchereau* and would give full effect to the Treaty-based right of residence as established in *Baumbast*. In our view, the Member States may therefore require that individuals have sickness insurance coverage, but may not automatically deny residence where an insurance policy does not cover absolutely all risks. What is deemed sufficiently

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[55] The approach will no doubt be immediately familiar to anyone versed in EU/EEA social security law, where the Court on several occasions has adopted the same approach as regards certain rights found in the social security regulations – establishing Treaty based exceptions through its case-law, to the detriment of rights or obligations contained in secondary measures. Soft legality challenges are nevertheless more commonplace and readily understandable in areas such as social security policy, where the EU enjoys mere coordinated competence. Although the ordinary legislative procedure is used in this field, each Member State still retains the power to effectively veto any amendment proposals they might disagree with by having the matter referred back to the Council (Article 48 in the Treaty on the Functioning of the European Union (TFEU)). As a result, each new social security regulation takes years – sometimes decades – to agree on.

[56] As claimed more generally by Shaw, '[…] rules in the relevant secondary legislation (such as the 2004 Citizens' Rights Directive) must also be interpreted in such a way that the restrictions they impose do not impede the fundamental nature of the right of residence under Article 18 [EC]'. Jo Shaw, 'A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 361.

[57] See e.g. Case C-930/19 *X v État belge* EU:C:2021:657 para 78: 'As is apparent from the very wording of Articles 20 and 21 TFEU, the right of Union citizens and their family members to move and reside freely within the territory of the Member States is not unconditional but subject to the limits and conditions laid down by the FEU Treaty and by the measures adopted to give it effect […]. Therefore, the EU legislature, *in accordance with those articles* of the FEU Treaty, has regulated those limits and conditions by means of Directive 2004/38'.

[58] See e.g. ibid paras 84-85.

comprehensive insurance coverage under the Citizenship Directive may perhaps vary from one case to another, but all-encompassing insurance may not be required as a general rule.

2.5 THE EEA DIMENSION

As to the question of whether the same understanding of the term 'comprehensive' in Article 7 of the Citizenship Directive must be said to apply as a matter of EEA law, the answer must surely be a resounding 'yes'. When the Citizenship Directive was incorporated into the Agreement by EEA Joint Committee decision 158/2007, no substantive adjustments were made to the text of the provision.[59] According therefore to the basic tenet of the principle of homogeneity, where provisions under EU and EEA law are identical in substance, a strong presumption must be said to exist that these are to be interpreted in the same way – and with deference naturally to their meaning under EU law.[60] This presumption may only seemingly be rebutted where substantial differences between the EU and EEA legal constructs exist, arguments to which the EFTA Court (and CJEU) will usually not be easily persuaded to accept.[61]

Given that the changes to certain language versions of Article 7 of the Citizenship Directive appear to have been inspired by the CJEU's decision in *Baumbast*, one might perhaps be tempted to claim that the lack of provisions in the Main Part of the EEA Agreement reflecting the EU Treaty rules on EU Citizenship (i.e. Articles 20 and 21 TFEU) present just such a weighty argument against homogenous interpretation. Added to this is a Joint Declaration by the Contracting Parties attached to the Joint Committee's decision incorporating the Citizenship Directive into the EEA Agreement, further emphasizing that neither the concept of EU citizenship nor immigration policy matters form part of EEA law.[62] In line with the apparent majority of EU language versions of the provision, the Norwegian language version of Article 7 also clearly appears to require sickness insurance covering all risks.[63]

Any suggestion that a homogenous interpretation of Article 7 of the Directive should be ruled out for these reasons would nevertheless prove futile in our view. Firstly, because the interpretation of the term 'comprehensive' in its EU setting as suggested above is drawn from the very wording and textual context of the provision itself, not directly from an interpretation of the provision conducted in light of the EU Treaty rules on citizenship.

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[59] Decision of the EEA Joint Committee No. 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement [2008] OJ L124/20.
[60] See e.g. Agreement on the European Economic Area EEA [1994] OJ L1/3 (hereafter the EEA Agreement), Articles 1 and 6, and e.g. recitals 4 and 5 of the EEA Agreement's Preamble.
[61] See e.g. Case E-2/06 *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Ct. Rep. 164, para 57, where arguments based on statements made by the Contracting Parties during the negotiations to the EEA Agreement, and subsequent unilateral reservations made by the Norwegian government following its adoption, were deemed irrelevant by the EFTA Court. See also e.g. Case T-115/94 *Opel Austria GmbH v Council of the European Union* EU:T:1997:3 where the Court of First Instance rejected pleas by both the Council and the Commission for diverging interpretations of Article 10 EEA and (what is now) Article 30 TFEU.
[62] Joint Declaration by the Contracting Parties to Decision No. 158/2007 incorporating Directive 2004/38/EC into the EEA Agreement, attached to Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement [2008] OJ L124/20.
[63] Interestingly, the Icelandic version appears to more in line with the English, German and Portuguese versions – requiring sickness insurance which is merely adequate (*'fullnægjandi'*).

The EEA Joint Committee's decision to adopt the Directive without substantive amendments to Article 7 can be said to have had the effect of 'EEA cleansing' the provision, ridding it from any trace of its (potentially) EU citizenship-inspired past. Secondly, as explained in detail elsewhere, the declaration's practical import in the context of interpreting the Directive has been reduced in most situations to that of a politically (not legally) binding document by the EFTA Court.[64] Thirdly, because although the Norwegian and Icelandic language versions of the provision are equally authentic as a matter of *EEA law*, they naturally bear no weight in the interpretation of the provision as a matter of *EU law* to begin with.[65] And it is obviously upon the understanding of the term under EU law that the duty of homogenous interpretation rests. Finally, even if the EU citizenship rules of the TFEU *had* played directly into our suggested interpretation of the term 'comprehensive', the EFTA Court's establishment of an EEA general principle of free movement might potentially be used as an interpretative tool to 'soften the edges' of the term to the same effect.[66] All things said, in our view it appears highly unlikely therefore that an indigenous EEA interpretation of the term 'comprehensive', diverging from our suggested understanding of the term in its EU setting, would be made.

2.6 ANYTHING TO BE DRAWN FROM THE EFTA CONVENTION?

The EFTA Convention contains the provisions on free movement that have been put in place between the four EFTA states Iceland, Liechtenstein, Norway and Switzerland.[67] These are – mostly – derived from EU law and aim at creating a similar area of free movement as in the EEA. As Iceland, Liechtenstein and Norway (EEA EFTA states) are members of the EEA and have their relations thus based on EEA law, the respective provisions of the EFTA Convention are essentially needed to grant citizens of the three EEA EFTA states equal treatment vis-à-vis Switzerland as Union citizens do based on the Agreement between the EU and Switzerland on the Free Movement of Persons (AFMP).[68] With regard to the scope

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[64] See e.g. Christian N K Franklin, 'Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law' (2017) 19 Cambridge Yearbook of European Legal Studies 165; and Christian N K Franklin & Halvard Haukeland Fredriksen, 'Differentiated Citizenship in the European Economic Area' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy – Navigating Challenges and Crises* (Edward Elgar 2022) 297.

[65] Had substantive adjustments to the provision been made by the EEA Joint Committee, then the situation would obviously be different – in such cases, the EFTA language versions would presumably carry substantial weight in the interpretative process.

[66] Case E-4/19 *Campbell v The Norwegian Government* [2020] EFTA Court judgement of 13 May 2025 para 48; as confirmed in e.g. Case E-2/20 *The Norwegian Government v L* [2021] EFTA Court judgement of 21 April 2021 para 24. For more on the development of this general principle of EEA law, see e.g. Christian N K Franklin, 'Free Movement Rights in Norway' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law, and Regional Cooperation* (Hart 2023) 175; further Christian N K Franklin, 'EU-borgerskap og EØS' [2024] <https://www.regjeringen.no/contentassets/15ef86ab491f4856b8d431f5fa32de98/no/sved/ekstern2.pdf> accessed 20 March 2025 (Special Report to Norwegian Public Enquiry 2024:7 *Norway and the EEA: Development and experiences*, only available in Norwegian).

[67] Convention Establishing the European Free Trade Association (adopted 4 January 1960, entered into force 3 May 1960). The updated EFTA Convention, the Vaduz Convention (adopted 21 June 2001, entered into force 1 June 2002, in parallel with the EU-Swiss bilateral agreements: <https://www.efta.int/sites/default/files/uploads/2024-04/Vaduz_Convention_Agreement_Updated_1_November_2021.pdf> accessed 20 March 2025.

[68] 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 [2002] OJ L114/6.

of application, however, there is an important difference: In contrast to the EEA Agreement, the Citizenship Directive was not incorporated into the AFMP.

In the EFTA Convention, free movement of persons is regulated in Articles 20-22. There is a subdivision in movement of persons (Article 20), coordination of social security systems (Article 21) and mutual recognition of professional qualifications (Article 22), following the logic of Articles 28-30 EEA. The basic provisions of the Convention are supplemented by Annex K and Appendices 1-3. Article 23(1)(b) of Appendix 1 (Rules regarding residence), states that persons not pursuing an economic activity must prove 'to the competent national authorities that he possesses for himself and the members of his family […] all-risks sickness insurance cover'. There is also a footnote regarding that provision, stating that '[i]n Switzerland, sickness insurance for persons who do not elect to make it their domicile must include accident and maternity cover'. That provision, including the footnote, is a copy of Article 24(1)(b) of the AFMP.

With regard to the wording, the EFTA Convention follows the wording of the (now repealed) Students Directive, namely 'all risks' in English and '*sämtliche Risiken*' in German.[69]

Beyond the EEA, there is thus, firstly, an extension of the same terms to Switzerland. Secondly, regarding whether this means complete or (merely) extensive coverage,[70] the footnote mentioned before might give a certain indication. This footnote requires, albeit for persons who do not elect to make Switzerland their domicile, that accident and maternity cover must be included. This is to be read as a minimum requirement, a point we shall return to in Section 5.

3 NORWEGIAN LAW AND PRACTICE

§112 of the Norwegian Immigration Act (NIA) implements Article 7 of the Citizenship Directive into Norwegian law.[71] Apparently based on a translation of the Danish language version of the Directive, it is plainly stated here that persons seeking residence for more than three months and up to five years on the basis of private means, and students, must have sickness insurance covering all risks during their stay.[72] The Norwegian Immigration Regulation (NIR), which serves to further implement the requirements of the NIA under national law on the basis of delegated authority, provides no further details or explanations as to how the condition is to be understood.[73] Which is somewhat surprising, given that a great deal is explained here as to what the related requirement of sufficient resources means.[74] The text of the NIA cannot be read in isolation, however, but must – as a matter of Norwegian legal method, common to all of the Nordic states – also be understood in light

[69] See also Figure 1.
[70] See Section 2.
[71] *Lov om utlendingers adgang til riket og deres opphold her (utledningsloven)* (LOV-2008-05-15-35). Available in English here: <https://lovdata.no/dokument/NLE/lov/2008-05-15-35?q=Immigration%20Act> accessed 20 March 2025.
[72] ibid s.112 (1)(c) and (d).
[73] Forskrift om utlendningers adgang til riket og deres opphold her (utlendningsforskriften) (FOR-2009-10-15-1286) s.19-7, which fills out *Lov om om utlendingers adgang til riket og deres opphold her* (n 71) s.110 concerning the understanding of 'family members', simply reiterates what could be read from the statute: That in order for family members of EEA nationals to have derived rights of residence, they must also be covered by a sickness insurance policy covering all risks.
[74] See *Forskrift om utlendningers adgang til riket og deres opphold her* (n 73) s.19-13.

of its preparatory legislative works.[75] These provide a slightly more nuanced picture of what the legislature had in mind when drafting §112 back in 2008.

3.1 LEGISLATION – THE PREPARATORY WORKS

As far as persons residing on the basis of personal means under §112(1)(c) are concerned, the preparatory works make clear that the general starting point is that sickness insurance must cover absolutely all risks during one's stay in Norway.[76] The idea of the legislature seemingly being to carry over the strict requirements of the former Residence and Students Directives into the amendments necessitated by EEA incorporation of the Citizenship Directive.[77] Certain statements made in other parts of the preparatory works nevertheless indicate that sickness insurance is required, yet without specifying that it must cover all risks.[78] Whether the statutory provision could therefore be taken completely at its word seems unclear. The drafters also seemed wary of this, calling attention in their specific observations to §112 to the possibility of further elaboration being provided by the Ministry of Labour and Social Inclusion at a later date in the NIR.[79] Whilst usual to delegate legislative authority on such matters, it is difficult to escape the impression on reading the preparatory works as a whole that the legislature did not seem entirely certain how comprehensive a sickness insurance could be required under the Citizenship Directive.

This impression is further strengthened when we compare the drafters' approach to the sickness insurance required for students looking to reside in Norway on the basis of §112(1)(d). Whilst the wording of the condition is exactly the same as that of §112(1)(c), in the preparatory works, the drafters expressly recognized that it would have a different meaning. Accepting a point raised by the Norwegian Directorate for Immigration (UDI) during the public consultation round, the Ministry conceded that possession of a valid European Health Insurance Card (EHIC) should suffice for students to meet the sickness insurance requirement.[80] Interestingly, UDI had pointed out that a requirement of sickness insurance covering all risks could give rise to problems in practice, since the sickness insurance policies available on the market rarely provided for as full coverage as the Ministry

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[75] Arbeids- og inkluderingsdepartementet, 'Ot.prp.nr.72 (2007–2008) Om lov om endringar i utlendingslovgivinga (reglar for EØS- og EFTA-borgarar o.a.' [2008] <https://www.regjeringen.no/contentassets/eb8794026feb4741a5c5d577b08dc299/nn-no/pdfs/otp200720080072000dddpdfs.pdf> accessed 20 March 2025 (available in Norwegian only).

[76] See e.g. the specific comments made to s.112(1)(c) in Ot.prp.nr.72 (2007–2008) (n 75) 63; further on pp. 10 and 35, concerning the continuation of derived rights of residence for TCN family members in the event of the EEA sponsor's death, divorce or termination of partnership.

[77] Ot.prp.nr.72 (2007–2008) (n 75) 32, point 7.5.6.

[78] See e.g. comments in Ot.prp.nr.72 (2007–2008) (n 75) relating to the pre-existing requirements under the *Lov om om utlendingers adgang til riket og deres opphold her* (n 71) from before 2009 on pp. 18 and 19, and on p. 20 (referring merely to 'sufficient sickness insurance'!), which nevertheless seem somewhat misleading; further on p. 32, related to the requirement contained in Article 7 of Directive 2004/38/EC (n 1) itself.

[79] Ot.prp.nr.72 (2007–2008) (n 75) 33.

[80] ibid. UDI is tasked with both facilitating and controlling lawful immigration to Norway, working in tandem with Norwegian police authorities. UDI processes asylum and family reunification applications, issues visitor's visas and all manner of residence permits and travel documents, and makes decisions on deportation and denials of entry of foreign nationals. Whilst UDI's portfolio files primarily under the Ministry of Justice and Public Security, the Ministry of Labour and Social inclusion may instruct it in matters related to Chapter 13 of the *Lov om om utlendingers adgang til riket og deres opphold her* (n 71) concerning EEA immigration issues. UDI's decisions may be appealed to the Immigration Appeals Board (UNE) – a special tribunal, whose decisions in immigration and citizenship cases are binding on UDI.

presumably intended.[81] UDI therefore suggested that it should be considered sufficient to require an EHIC, or 'another sickness insurance that provides the same coverage as the EHIC'. Whilst the Ministry agreed to UDI's suggestion of accepting EHIC as far as students were concerned, no similar concession was made regarding persons residing on the basis of personal means.

Acceptance of EHICs in the case of students is interesting, since such cards do not cover all conceivable risks. EHICs cover 'necessary treatment' (whatever that might mean), expressly excluding expenses incurred in the event that the beneficiary must travel back to his/her home state due to illness or accident. They do not cover private healthcare costs, ongoing care and many forms of dental medical treatment, either.[82] The fact that EHIC was considered more readily acceptable in the case of students is to a certain extent understandable, since the cards are only designed to cover temporary stays in a host EEA state. Students following a specific programme or on exchange will presumably (or at least initially) only be residing in Norway for a specific and limited amount of time.[83] The same may not necessarily be said of all foreign EEA nationals looking to reside in Norway for more than three months on the basis of private means. And notwithstanding the fact that a temporary stay according to the CJEU may last many years,[84] the cover provided by EHIC will presumably not be valid in situations where the EEA national is deemed to have moved his/her habitual residence to another EEA state. As we have seen in Section 2 above, according to Article 11 of Regulation 883/2004, the state of residence (i.e. Norway) becomes the competent state in such situations. Not only might this explain the possible reluctance of the Norwegian authorities in accepting EHICs for persons residing on the basis of personal means, but such cards may simply not be valid in all situations either.

To complicate matters slightly further, even if an EHIC may in certain situations suffice to meet the sickness insurance requirements of §112, not all persons holding such cards may be able rely on them in Norway. Whilst Regulation 1231/2010 extends EU social security coordination rules to third country nationals (TCN) legally resident in the EU and in a cross-border situation within the EU, this Regulation is not part of EEA law.[85] Meaning that TCN family members of EU citizens who have a valid EHIC cannot rely on this as coverage in Norway (or any other EEA EFTA state).[86] Consequently, this also means that TCN family members of Norwegian citizens are not entitled to EHICs to cover temporary stays in other EEA states, either.

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[81] Ot.prp.nr.72 (2007–2008) (n 75) 33.

[82] Which may also explain why Norwegian authorities advise those aiming to stay in Norway on the basis of an EHIC to also take out private sickness insurance, see e.g. <https://www.helsenorge.no/en/health-rights-tourist-abroad/the-european-health-insurance-card/> accessed 20 March 2025.

[83] Matters may naturally be more problematic in situations where students initially travel to Norway study but then decide to stay on for a longer period without studying. In such cases, the EHIC may no longer be considered valid.

[84] See e.g. Case C-255/13 *I v Health Service Executive* EU:C:2014:1291 paras 50-53.

[85] For more on the status of TCNs under Regulation (EC) No 883/2004 (n 26) and the Nordic Convention on Social Security (adopted on 12 June 2012, entered into force 1 May 2014), see Ómar Berg Rúnarsson's contribution to this special edition of the NJEL ('The Status of Third-Country Nationals, Refugees and Stateless Persons Under the EU Social Security Regulations and the Nordic Convention on Social Security').

[86] For TCN family members of Nordic citizens, this is not a problem, as they will be covered by the rules of the Nordic Social Security Convention of 2012 – see Rúnarsson (n 85).

3.2 INSTRUCTIONS AND CIRCULARS

The lack of clarity in the Norwegian legislation implementing Article 7 of the Directive seems to have carried over to a certain extent into subsequent instructions issued by the Ministry to UDI on how the requirement is to be understood and applied, and further into the many circulars published by UDI for use by their own case handlers. On the one hand, initial efforts appear to have been made by UDI to rectify certain inconsistencies through administrative practice. According to a former circular (now repealed) on how case handlers were to approach the requirements of §112, EHICs were clearly to be accepted not only for students but also for persons residing in Norway on the basis of private means.[87] Another UDI circular, still currently in force, similarly states that for the purposes of family reunification with EEA nationals in Norway, 'other family members' (i.e. persons not falling under the definition in Article 2(2) of the Citizenship Directive – such as foster children, siblings, and persons moving to Norway to marry an EEA sponsor) may also rely on EHIC in lieu of private sickness insurance.[88] On the other hand, however, another UDI circular currently in force, specifically implementing recent instructions from the Ministry concerning non-derived rights of residence for EEA nationals, clearly states that only pensioners and students may rely on EHICs in lieu of private sickness insurance.[89] All other EEA nationals looking to reside in Norway on the basis of personal means, and their family members (as understood under Article 2(2) of the Citizenship Directive), are required to have private sickness insurance covering all risks. The fact that a different understanding still persists as far as 'other family members' are concerned is rather surprising, yet still the inconsistency appears to remain in place.

The latest Ministry instruction and UDI circular deserve closer scrutiny here, as attempting to bring the interpretation and application of §112 up to speed with some of the decisions of the CJEU mentioned in Section 2 above. According to the instruction and circular, the sickness insurance requirement under § 112(1)(c) and (d) will now be considered fulfilled upon acquisition of membership in the Norwegian national insurance scheme, which under the NIA is considered to be attained after staying for 12 months in the country.[90] All EEA nationals (excluding pensioners and students) and their family members residing in Norway on the basis of personal means, must therefore have a private sickness insurance covering all risks for the first 12 months from when they arrive in the country. What will be deemed to constitute sickness insurance covering all risks is also said here to be a specific assessment, presumably in each case. The general rule is nevertheless stated as being that the

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[87] *Rundskriv fra Utlendingsdirektoratet* (UDIRS-2011-37) points 3.4.1 and 3.5.1 (last updated 3 June 2020) <https://lovdata.no/pro/#document/RUDIO/rundskriv/udirs-2011-37?searchResultContext=1804&rowNumber=1&totalHits=12> accessed 20 March 2025.

[88] *Retningslinje fra Utlendingsdirektoratet I Familieinnvandring med EØS*-borger (RUDI-2010-25) points 2.2 and 3.2.5 C (last updated 7 October 2022) <https://lovdata.no/pro/#document/RUDI/rundskriv/rudi-2010-25/KAPITTEL_1 X 2025> accessed 20 March 2025.

[89] See *Rundskriv fra Arbeids- og inkluderingsdepartementet* (AI-2023-1); and *Retningslinje fra Utlendningsdirektoratet I Opphold på selvstendig grunnlag for EØS-borgere* (RUDI-2011-37) points 3.4.1 and 3.5.1 (last updated 10 October 2024) <https://lovdata.no/pro/#document/RDEP/avgjorelse/ai-2023-1?searchResultContext=1795&rowNumber=1&totalHits=2> and <https://lovdata.no/pro/#document/RUDI/rundskriv/rudi-2011-37?searchResultContext=1876&rowNumber=1&totalHits=16> accessed 20 March 2025.

[90] *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28-19) s.2.

insurance must cover absolutely all risks, but that a proportionality assessment must be carried out in each case.

The latest instruction and circular give rise to several issues, firstly concerning the specific period of time one is required to have sickness insurance, and from what point in time the condition kicks in. According to both, EEA nationals and their family members must be in possession of such insurance *from when they arrive in Norway*. Taken literally (which most immigration case handlers understandably are most likely to do), this would be directly at odds with Article 6 of the Citizenship Directive, according to which no conditions may be placed on the right to reside for up to three months in another EEA state except possession of a valid passport or national identification card. In order not to transgress this right, sickness insurance could only be required after the initial three-month period of residence.[91] Persons who have moved their habitual residence to Norway from the first day of arrival could still naturally be required to maintain sickness insurance for 12 months under national law – or potentially even longer – but not until the initial three-month period has passed. It would seem contrary to the spirit of the Directive if a host state could simply conclude that up to three initial months of a person's stay should be discounted (or worse, deemed illegal) for not having taken out private sickness insurance from the day they arrived in Norway. This could also naturally have consequences with a view to fulfilling the requirements of permanent residence under Articles 16 or 18 of the Directive in the longer term. In the event that the Ministry intended otherwise through its instruction, this is not made sufficiently clear.

The second issue concerns what kind of insurance will be deemed as covering all risks. Earlier circulars provided little by way of clarity. UDIRS-2011-37 (now repealed) for example stated that 'all risks' had to be understood as meaning those that are 'covered by Norwegian law'; and further that 'the sickness insurance must cover all expenses related to illness, including treatment by a doctor and any hospitalization'.[92] Yet without further reference or explanation, exactly what risks are or ever have in fact been 'covered by Norwegian law' is seemingly impossible to understand, and there does not (at least to this writer's knowledge) appear to be any such definition in existence. Compared to this earlier circular, and as mentioned above, the latest instruction from the Ministry certainly indicates a slightly moderated stance, by opening up for individual assessments. Yet whether it has made anything clearer is difficult to judge in the abstract. On paper, the idea that each situation be judged separately and with proportionality in mind certainly opens for a discretionary approach, and one in which exceptions can be made to fit individual circumstances. This could potentially open up for an understanding more in tune with what we believe to be the correct interpretation of the comprehensive sickness insurance requirement. Yet individual assessments seem rather clearly to be the exception, and not the general rule. Without further explanations or examples as to what will be deemed (dis-)proportionate, it seems likely to

[91] Analogously to registration requirements for mobile EEA nationals and their family members under Article 8(2) and 9(2) of Directive 2004/38/EC (n 1), which may not kick in until after the initial three month period of residence has lapsed, precisely so as to ensure that staying in a country for the first three months is free of additional administrative formalities beyond those expressly stated in Article 6. See further Guild, Peers and Tomkin (n 36) 152.

[92] RUDI-2010-25 (n 88) points 2.2.1, 2.2.2, 2.2.3, 2.2.4 and 3.2.5 (still in force), provides a slightly different understanding, according to which '[a]ll risks in this regard means coverage for expenses related to repatriation for medical reasons, necessary medical treatment and hospital treatment'.

assume that case handlers will continue to revert to the requirement of insurance covering all risks as the general rule and starting point in all cases. In practical terms, and without clearer instruction, if one does not have private sickness insurance covering absolutely all risks, then it will be left to the individual to make a case for being exempted from it. It is not difficult to imagine how this might prove challenging to do in practice.

Sickness insurance policies covering absolutely all risks are in any event expensive, and cost more depending on age, pre-existing health conditions and many other factors.[93] Ironically, whilst one can obtain world health insurance from many international companies, no Norwegian companies appear to offer readily available policies (and most not even specifically tailored options) to cover such risks for EEA citizens and/or their family members moving to Norway.[94] One might therefore question whether a requirement of private insurance covering all risks could be considered proportionate in any situation, as unreasonably expensive,[95] and excessively difficult to get hold of in the first place. UDI's initial suggestion in response to the public hearing in 2008, that private insurance might be considered sufficient where it covers the same as risks as EHIC, would seem even more sensible, practicable and attractive in this light. Alternatively, the Norwegian state might consider making a legislative change allowing it to charge for membership of the health part of the national insurance scheme after the initial three-month stay has come to an end. Not only would this presumably cost significantly less whilst also providing the exact same coverage as Norwegians enjoy, but the various registration requirements for EEA nationals (and their family members) moving to Norway might also facilitate practical implementation of such an arrangement.[96]

Thirdly and finally, requiring sickness insurance for 12 months from arrival as the basis for membership in the Norwegian national insurance scheme would also appear to be incompatible with the requirements of Regulation 883/2004. At least if the intention is to bar access to such membership from being attained within a shorter period of time, which it clearly appears to do. The instruction starts off in this regard by stating that the sickness insurance requirement will be met in Norway for an EEA citizen and his/her family

[93] A basic online search for worldwide health insurance from different international companies reveals prices in the range from NOK 35.000-110.000 per annum.

[94] In December 2024 and through January 2025, Research Assistant Hans Olav Mangschau Hammervold from the University of Bergen conducted an informal survey with 22 Norwegian insurance companies, to find out if they offered a sickness insurance policy to EEA citizens, and/or their family members (regardless of nationality), which covered all conceivable health risks for a 12 month stay in Norway, and how much this might cost. 18 of the companies responded, with several of these also willing to answer follow up questions specifying different scenarios (particularly concerning the age of the potential policy holder). None of the 18 Norwegian insurance companies had an insurance policy to offer such individuals or were willing to put a price on what such a policy might cost. The results of this informal survey are not published but may be obtained for verification purposes upon request from the author of this section of the article (christian.franklin@uib.no).

[95] Had EEA citizens and their family members residing in Norway on the basis of personal means been required to make contributions directly to the Norwegian national insurance scheme instead, this would presumably have been much cheaper than taking out private insurance. Taking as a base the amount required to qualify as having 'sufficient resources' under s.112 in Directive 2004/38/EC (n 1) (which is in fact variable, depending on your age, but amounts to roughly NOK 240.000 on average), and assuming that the contribution of this would not be higher than 9,1% (which is what voluntary membership costs for persons not in work and not paying tax to Norway), the amount would come to just under NOK 22.000 per annum.

[96] §117 NIA, which transposes Article 8(1) of the Citizenship Directive, requires foreign EEA nationals and their family members resident for more than three months (presumably excluding job seekers, who have a right to stay for at least six months) to register with Norwegian authorities.

members if they can be considered members of the Norwegian national insurance scheme. Further, that until such individuals have become members of the national insurance scheme, an individual sickness insurance policy will meet the requirement in §112(1)(c) NIA. So far, so good – entirely correct and in line with the CJEU decisions in *A* and *VI*.[97] Yet the instruction then goes on to state that:

> It follows from Section 2-1, first paragraph of the National Insurance Act that 'persons who are resident in Norway are compulsory members of the national insurance'. Furthermore, it follows from Section 2-1, second paragraph of the National Insurance Act that 'a person residing in Norway is considered to be resident in Norway when the stay is intended to last or has lasted at least 12 months.' It is also a condition for membership that the stay in Norway is legal, cf. Section 2-1, third paragraph of the National Insurance Act.
> In order to meet the requirement that the stay is 'intended to last […] at least 12 months', the person concerned must have permission to reside in Norway for at least 12 consecutive months upon arrival. In order for an EEA citizen and any family members to be granted such a stay, the conditions in Section 112 of the Immigration Act must be met. In order to meet the requirement in Section 112 […] the EEA citizen and any family members must therefore be covered by their own health insurance for the first 12 months from arrival.

Making access to membership contingent upon 12 months private sickness insurance coverage for all risks from the day one arrives in Norway may nevertheless serve to undermine one of the cardinal rules of EEA social security coordination, namely that no one be left without coverage by a competent state. The CJEU's decision in *A* described in Section 2 above makes this clear. According to Article 11 of Regulation 883/2004, the country of residence is the competent state as far as sickness benefits are concerned. And residence is not dependent on proving an intention to stay in the country one moves to, but rather on the so-called 'centre of interests' test developed by the CJEU and now codified in Article 11 of Regulation 987/2009.[98] This requires consideration of a much broader range of factors, including but not limited to the intended length of the stay itself.[99] For the purposes of Regulation 883/2004, residence – and the automatic right to membership in national insurance schemes this gives rise to, which may be required at a cost – may therefore be achieved earlier than the 12 month period mandated by the Ministry, i.e. as soon as habitual residence is deemed to have been moved. Potentially even from the very first day one moves to Norway. The Norwegian Labour and Welfare Administration (NAV) for its part operates with a very clear understanding that 'residence' in §2-1 NIA must be understood in the same

[97] Section 2.2 above.
[98] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 on the coordination of social security systems [2009] OJ L284/1.
[99] According to Article 11(1), the factors to be considered are the duration and continuity of presence on the territory of the Member States concerned, and the person's situation – including family status and family ties, the exercise of any non-remunerated activity, the person's housing situation, and the Member State in which he/she is deemed to reside for taxation purposes. Indeed, Article 11(2) also indicates that where the individual intends to reside only comes into play as a secondary or supplementary factor in the assessment in the event of disagreement between the institutions concerned.

sense as under Regulation 883/2004, and has instructed its case handlers accordingly.[100] Leading to a rather bizarre situation whereby UDI are instructed to follow a completely different understanding of the requirements for membership in the Norwegian national insurance scheme than the body directly responsible for granting such admittance in the first place.

The fact that the Ministry has generously chosen to only require 12 months insurance coverage (they would have been well within their rights to demand coverage for up to five years) cannot in any event offset or mitigate potential breaches of the Regulation. As we have seen in Section 2 above, the conditions and limitations of the Directive are clearly tempered by the requirements of Regulation 883/2004; not the other way around. The Citizenship Directive also clearly allows EEA states to maintain national rules which are more favourable to the individual.[101] Why Norwegian authorities have chosen a more favourable approach may seem puzzling but is perhaps best understood as a somewhat misplaced attempt to fit the requirements of the Directive to the Norwegian national insurance system's universal rules on membership.

In sum, there appear to be relatively significant shortcomings in the legislation implementing the sickness insurance requirement into Norwegian law, that have not been adequately remedied by subsequent administrative practice. The most recent Ministry instruction and UDI circular appear to be at odds not only with different requirements of the Citizenship Directive, but also Regulation 883/2004. Viewed as a whole, the lack of clarity in Norwegian law and practice seems fundamentally out of tune with general EEA implementation requirements.[102] Little wonder therefore that the EFTA Surveillance Authority (ESA) has started sending letters to the Norwegian authorities to push for changes to be made.[103]

4 ICELANDIC LAW AND PRACTICE

Economically inactive EEA citizens must register their legal residence at Registers Iceland if their stay in Iceland exceeds three months.[104] In recent years, the number of applications

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[100] See *Rundskriv til ftrl kap 2: Medlemskap* (R02-00) point 2.1 (last updated 20 December 2024) <https://lovdata.no/pro/#document/NAV/rundskriv/r02-00?searchResultContext=2375&rowNumber=1&totalHits=37> accessed 20 March 2025.

[101] Directive 2004/38/EC (n 1) Article 37 and recital 29 of its preamble.

[102] The point naturally being to enable individuals to know their rights and obligations. See e.g. Case C-214/98 *Commission of the European Communities v Hellenic Republic* EU:C:2000:624 para. 27; Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] EFTA Ct. Rep. 534; and Case E-15/20 *Criminal Proceedings Against P* [2021] EFTA Court judgement of 30 June 2021.

[103] EFTA Surveillance Authority Case No. 85597, where both a request (dated 20 April 2021) and a supplementary request (dated 14 February 2023) for information concerning Norway's application of the requirement of having comprehensive sickness insurance cover under Directive 2004/38/EC (n 1) have been made. Available at: <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/EC_Redacted.pdf> and <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Supplementary%20request%20for%20information%20-%20Norway%27s%20application%20of%20the%20requirement%20of%20comprehensive%20sickness%20insurance.pdf> accessed 20 March 2025.

[104] Cf. the Foreign Nationals Act No. 80/2016, s.89(1). See also Article 8 of Directive 2004/38/EC (n 1), and further reading in: Eftir Bjarnveigu Eiríksdóttir, 'Execution of registration of EEA workers in Iceland on the basis of Article 89 of the Foreigners Act No. 80/2016 in light of the obligations of the EEA Agreement' (*Úlfljótur*, 28 November 2017) <https://ulfljotur.com/2017/11/28/framkvaemd-skraningar-ees-launthega-

from economically inactive EEA nationals (others than students) seeking residence registration in Iceland has increased. In 2018, there were only 51 applications. In 2019, the number increased to a total of 342. And in the following year, the applications doubled to 674. They have remained at a high level ever since, with for example 660 in 2023.[105] As seen above in Section 2, Member States are allowed to require economically inactive EEA citizens to have sufficient resources not to become a burden on the social assistance system of the host Member State and to have 'comprehensive' sickness insurance. This Section attempts to clarify how the latter condition has been interpreted and applied in Iceland.

4.1 'COMPREHENSIVE' – ADEQUATE, OR COVERING ALL RISKS?

In the Icelandic translated version, Article 7 of the Citizenship Directive requires students and other economically inactive EEA citizens to have '*fullnægjandi sjúkratryggingu*', which means 'adequate sickness insurance'. This translation might seem to be even more lenient than the English, German and Portuguese language versions of the Article. What matters here, however, is how this provision was implemented into Icelandic law. Before discussing the current implementation provision, its predecessor will be examined.

According to Section 36 of the Foreigners Act No. 96/2002, students and other economically inactive EEA-citizens had the right of residence in Iceland for a period of longer than three months if they had 'secure subsistence' (students) or 'received sufficient regular fixed payments or had adequate own funds' (other economically inactive EEA-citizen). Both groups had to be covered by sickness insurance that covered 'all risks during their stay in Iceland'.[106] These provisions were initially established to implement the Residence and Student Directives, and as previously mentioned, these Directives required sickness insurances that 'covered all risks'. This provision was not amended following the incorporation of the Citizenship Directive into the EEA Agreement.

It was not until the ESA sent a letter to the Ministry of the Interior, in spring 2011, regarding Iceland's implementation of the Citizenship Directive, that changes were made. One of the comments highlighted the incomplete implementation of Article 7(1)(b) of the Citizenship Directive, as the criterion to 'not become a burden on the social assistance system' was missing from Icelandic law. Consequently, the law was amended to address this issue. At the same time, the national provision was amended to change the requirement for economically inactive EEA citizens (other than students), from having sickness insurance that covered 'all risks' to requiring 'adequate sickness insurance', thereby aligning it with the wording of the Icelandic version of Article 7(1)(b) of the Citizenship Directive.

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her-a-landi-a-grundvelli-89-gr-utlendingalaga-nr-80-2016-i-ljosi-skuldbindinga-samningsins-um-evropska-efnahagssvaedid/> accessed 20 March 2025. See also the Act on Legal Domicile and Residence No. 80/2018, s.14(4). Legal residence is defined as where an individual lives on a regular basis in Iceland, cf. Article 2(1) of the Act on Legal Domicile and Residence No. 80/2018. See further reading in Ciarán Burke and Ólafur Ísberg Hannesson, 'Free Movements Rights in Iceland' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law, and Regional Cooperation* (Hart 2023) 202-205.

[105] The Registers Iceland (Þjóðskrá) sent the author of this Section of the article this statistical information via email on 15 February 2024. For verification purposes, more information on this, or other aspects of the field research conducted under this section, may be obtained upon request from the author of the present section (margreteinars@ru.is).

[106] In Icelandic, the requirement read: 'ábyrgist alla áhættu'. Available at: <https://www.althingi.is/lagas/145b/2002096.html> accessed 20 March 2025.

However, it was not long until national law was changed again. The new, comprehensive Foreign Nationals Act No. 80/2016 came into effect on January 1, 2017,[107] repealing the Foreigners Act No. 96/2002. According to Section 84(1)(c) of the Act, an economically inactive EEA or EFTA citizen has the right of residence in Iceland for a period longer than three months if he meets the following requirement:

> has sufficient resources for him and his family members not to become a burden on the social assistance system of the host Member State during their period of residence and falls under sickness insurance which covers all risks while his stay in the country lasts.[108]

According to Section 84(1)(d) of the Act, students are also required to have sickness insurance covering 'all risks'. Section 84(1)(c) and (d) are the current implementation provisions of Article 7(1)(b) and (c) of the Citizenship Directive, and they appear to be stricter in this regard, since the Directive only requires 'adequate sickness insurance' in the Icelandic version. No explanation is to be found in the legislative bill as to why the criteria of sickness insurance was changed, or why it is stricter than the Directive it is set to implement. This strict implementation raises questions about whether the legal requirement for sickness insurance covering 'all risks' creates a barrier for economically inactive individuals seeking to move to Iceland, which might be incompatible with the Citizenship Directive. To answer this, a comprehensive assessment of how this requirement is applied in practice is essential.

4.2 TO 'COVER ALL RISKS' DOES NOT, IN PRACTICE, MEAN TO COVER ALL RISKS

As previously stated, to be registered by Registers Iceland, an economically inactive person must have sufficient resources for him and his family members not to become a burden on the social assistance system of the host Member State and have sickness insurance which 'covers all risks'.[109] It is clear what requirements Registers Iceland follows when deciding whether applicants meet the condition of 'sufficient means'. Individuals with private means of support must be able to prove that they can support themselves in Iceland for at least three months, and to do so they must demonstrate that they have at least 719.685 ISK (approx. 5000 EUR) to support them financially while staying in Iceland.[110] This rigid approach has faced criticism and is unlikely to be compatible with the Citizenship Directive.[111]

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[107] The Foreign Nationals Act No. 80/2016 (n 104), hereafter the Foreigners Act.
[108] Section 84(1)(c) of the Foreigners Act.
[109] Section 84(1)(c) and (d) of the Foreigners Act, cf. s.89(1).
[110] This figure is to be found on the webpage of Registers Iceland, see <https://www.skra.is/english/people/change-of-address/moving-to-iceland/i-am-an-eea-efta-citizen/staying-more-than-6-months/minimum-subsistence/> accessed 20 March 2025. This figure also applies to students.
[111] According to Article 8(4) of Directive 2004/38/EC (n 1) 'Member States may not lay down a fixed amount which they regard as "sufficient resources" but they must take into account the personal situation of the person concerned […]'. See further reading in Burke and Ísberg Hannesson (n 104) 206-209 and Eiríksdóttir, 'Execution of registration of EEA workers in Iceland' (n 104).

However, it is not clear what criteria Registers Iceland follows when deciding whether sickness insurance submitted by applicants for residence registration is to be considered to meet the requirements of Article 84(1)(c) and (d) of the Foreigners Act, i.e. covering 'all risks'. To clarify this, it was necessary to review Registers Iceland's decisions on this matter.[112]

The decisions of Registers Iceland from 2023 regarding residence registration based on Article 84(1)(c) reveal that EHIC is considered sufficient to meet the requirement of the Article. The same applies for residence registration for students, cf. Section 84(1)(d).[113] Thus, in the majority of cases, applicants for residence registration had no other sickness insurance than the EHIC.[114] This means that EHIC is considered by Icelandic authorities to cover 'all risks'. This is surprising, as EHIC is only intended for EEA citizens while traveling for short stays or holidays, and not when they relocate their domicile to other countries within the EEA.[115] Furthermore, EHIC can only be used in Iceland if the person is insured in another EEA state.[116] It is doubtful that economically inactive persons applying for residence registration will, in all cases, remain insured in their home countries after transferring their legal residence to Iceland. This implies that EHIC cards issued by their previous home state might become invalid.

The decisions further reveal that in nearly 1/4 of the cases, the applicants had purchased health insurance from Icelandic insurance companies. According to the terms of all of them, the insurances were meant to provide protection comparable to the Icelandic national sickness insurance, as outlined in the Social Security Act No. 100/2007.[117] This includes medical and pharmaceutical expenses. However, upon a thorough examination of the insurance policy terms, it becomes evident that various factors covered for insured individuals in Iceland are excluded from the insurance, such as costs related to pregnancy and childbirth, and diseases stemming from alcohol consumption, addiction, or substance abuse.[118] Despite the above, Registers Iceland considers the insurances to meet the requirements of Article 84(1)(c) and (d) of the Foreigners Act.

In only 13% of cases, applicants had obtained special sickness insurance from an insurance company in their home state before departing. In all these instances, Registers Iceland accepted that the insurance satisfied the requirements of Article 84(1)(c) without reviewing the terms of each individual policy. Finally, in only two cases out of 118 was

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[112] On 14 February 2024, Registers Iceland welcomed the author of the present section to its office to examine its decisions from year 2023, based on s.84(1)(c) of the Foreigners Act. 118 out of 660 decisions, selected randomly, were examined.

[113] In an e-mail dated 16 December 2024, the registration unit of Register Iceland confirmed that the criteria to 'cover all risks' is applied in the same way for both students and other economically inactive persons, cf. s.84(1)(c) and (d) of the Foreigners Act and Article 7(1)(c) and (d) of Directive 2004/38/EC (n 1).

[114] In this sample (118 decisions out of 660 from 2023), applicants had an EHIC in 60% of the cases.

[115] See: <https://employment-social-affairs.ec.europa.eu/policies-and-activities/moving-working-europe/eu-social-security-coordination/european-health-insurance-card_en> accessed 20 March 2025.

[116] Burke and Ísberg Hannesson (n 104) 217.

[117] See for example Sjóvá, which is one of the largest insurance companies in Iceland, and most of the applicants for registration in Iceland that had sickness insurance (other than the European Health Insurance Card) purchased their health insurance from Sjóvá. See: <https://www.sjova.is/en/insurance/individuals/life-and-health/medical-cost-insurance> accessed 20 March 2025. The same applies for sickness insurance at TM, which is another big insurance company in Iceland, see: <https://www.tm.is/fjolskyldan/sjukrakostnadartrygging> accessed 20 March 2025.

[118] Sjóvá Medical Cost Insurance No 378, see: <https://www.sjova.is/sharepoint-files/Skilmalar/SKI-0131/ski-0131_skilmali_en.pdf> accessed 20 March 2025, and TM Medical Cost Insurance No 370, see: <https://papi.tm.is/skilmalar/370?lang=ens> accessed 20 March 2025.

registration rejected due to insufficient sickness insurance, as no information regarding sickness insurance was provided in the applications.

This study reveals that Registers Iceland is quite lenient regarding the type of sickness insurance that meets the requirement of covering 'all risks'. It certainly does not require applicants to have insurance that covers all risks, nor can its requirements be considered equivalent to the 'comprehensive' health sickness insurance outlined in Article 7(1)(b) and (c) of the Citizenship Directive. This execution of the law does not appear to create a barrier for economically inactive individuals seeking to move to Iceland and is most certainly compatible with Article 7(1)(b) and (c) of the Citizenship Directive.

4.3 A LENIENT APPROACH – BUT WHO BEARS THE COST?

This approach by Registers Iceland aligns with one of the fundamental objectives of the EEA Agreement, which is to facilitate the free movement of persons. However, this lenient approach could also have negative consequences for individuals who fall ill during the first six months of residence in Iceland.

Section 10(1) of the Health Insurance Act No. 112/2008 requires legal residence in Iceland for at least six months before being insured under the Icelandic sickness insurance system. This applies to both Icelandic and foreign nationals, regardless of their economic status. If a person living in Iceland needs healthcare before completing six months of legal residence and is not covered by sickness insurance, the medical costs will generally fall upon the individual.

However, according to Section 1 of Regulation No. 3/2024 on exemptions from the waiting period for sickness insurance, the Health Insurance Institution is authorized to grant individuals, regardless of their nationality, exemptions from this six-month requirement in certain specified cases. This applies for example if a person needs 'necessary services due to sudden illness' or is 'a kidney patient requiring regular dialysis treatment or a patient requiring oxygen', during the waiting period for sickness insurance. In all other cases, i.e. when the exemptions listed out in Regulation No. 3/2024 do not apply, individuals who have been legally resident in Iceland for less than six months must bear the costs themselves.

The previously mentioned case *A* indicates that requiring non-economically active citizens to pay for their health service is in accordance with EEA law.[119] As thoroughly argued in the judgement, medical care financed by the State, which is granted without any individual and discretionary assessment of personal needs to persons falling within the categories of recipients defined by national legislation, constitutes 'sickness benefits' within the meaning of Article 3(1) of Regulation 883/2004. It follows that a Member State cannot, under its national legislation, refuse to affiliate to its public sickness insurance scheme an EU citizen who, under Article 11(3) of Regulation 883/2004, comes under the legislation of that Member State.[120]

However, the CJEU also confirmed that access to that system does not have to be free of charge, preventing economically inactive Union citizens from becoming an unreasonable burden on the public finances of the host Member State.[121] It is therefore safe to conclude

[119] *A* (n 24).
[120] ibid paras 38 and 50.
[121] ibid para 58.

that the Icelandic state is entitled to demand reimbursement from economically inactive EEA citizens for healthcare costs if their own sickness insurance does not cover the expenses.

4.4 THE ICELANDIC STATE PROVIDES BROADER RIGHTS THAN REQUIRED BY EEA LAW

It follows from Article 7(1)(b) and (c) of the Citizenship Directive, that host Member States may require students and economically inactive Union citizens, throughout the period of residence of more than three months and less than five years in the host Member State, to have comprehensive sickness insurance cover for themselves and their family members so as not to become an unreasonable burden on the public finances of that Member State.[122] It is only after having resided legally for a continuous period of five years in the host Member State and received permanent residence in accordance with Article 16(1) of the Citizenship Directive, that economically inactive EEA citizens have the right of access to the health care system, with the same conditions as citizens from the host state.[123]

However, as already mentioned, it is after only six months of legal residence in Iceland that all individuals, including students and other economically inactive EEA citizens, are entitled to health insurance under the Icelandic Health Insurance System. This means that the Icelandic state provides broader rights in this regard than it is required to do under EEA law.[124] Given the increased number of economically inactive EEA citizens moving to Iceland in recent years, this is an issue that the Icelandic state may want to reconsider.

5 LICHTENSTEIN LAW AND PRACTICE

The equivalent of the provisions on compulsory health insurance according to Article 7(1)(b) and (c) of the Citizenship Directive in Liechtenstein law can be found in Sections 17(1)(c) (students), 18(2)(b) (tourists and service recipients staying between three and six months), and 22(1)(c) (persons without economic activity) of the Free Movement of Persons Act (*Personenfreizügigkeitsgesetz*; FMPA). The wording in all these provisions is '*umfassend*' (comprehensive) and '*sämtliche Risiken*' (all risks), thus combining the terms of the Citizenship Directive and the Students Directive.

In Liechtenstein, there is no jurisprudence about the interpretation of these terms. As in other countries, decisions by administrative bodies, tribunals or courts did focus on the question whether persons falling under the scope of the FMPA 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system'.[125] Except for persons with or without economic activity (excluding e.g. students), it is the Foreigners- and Passport Office that oversees respective authorisations. The former two categories are, however, in the government's competence.[126]

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[122] *A* (n 24) para 55.
[123] See Directive 2004/38/EC (n 1) Article 24 and recitals 17-18 of the preamble, and *A* (n 24).
[124] See further reading in Paju, 'A Bridge Too Far' (n 25).
[125] See Directive 2004/38/EC (n 1) Article 7(1)(a) and Act of 20 November 2009 on the right of EEA and Swiss citizens to free movement and residence (hereafter FMPA), Articles 17(1)(b), 18(2)(a) and 22(1)(b).
[126] FMPA Article 58.

5.1 SOCIAL SECURITY SYSTEM

Getting to the bottom of what could be meant by those terms, it is obvious to check whether there is anything to be found in the health insurance legislation. In Liechtenstein, health insurance is one of five elements of the social security system, which covers:

a) old-age (state pension),[127] survivors' and disability insurance;
b) protection against the consequences of illness and accidents;
c) compensation for loss of earnings for those in service and in the event of maternity;
d) unemployment insurance;
e) family allowances.

The benefits of the individual branches of social security are essentially financed by contributions from earned income. These contributions, known as non-wage labour costs, are made up of the employee's share, which is deducted from the gross salary, and the employer's share, which is added to the gross salary. Different calculation rates apply depending on age and the risk categorisation of the company. The insured person pays their health insurance premium in full. However, the government contributes to the financing of social insurance, or it either finances it in full (supplementary benefits) or helps economically weak people to pay their premiums, mostly by premium reductions in health insurance.

The Liechtenstein social insurance system is closely based on the Swiss system. There are only a few differences, such as the various contribution rates and the maximum insured salary limits. An important difference, however, is the daily allowance insurance ('*Taggeldversicherung*').[128] Except for these differences, this allows for using Swiss jurisprudence and other interpretative documents to respond to the essential question of this contribution.

5.2 HEALTH INSURANCE IN PARTICULAR

Any person who is resident in Liechtenstein is required to obtain health insurance – or to be insured by their legal representative or employer in certain areas – within three months after taking up residence or being born in Liechtenstein. Health insurance is offered by private companies, which, however, need a specific license and are closely supervised by the state. Compulsory health insurance is essentially the same for all and covers the same services whatever insurance company is chosen. Insurance cover is provided in the event of:

- Illness: This is understood to mean an impairment of physical or mental health that is not the result of an accident and that requires examination or medical treatment or results in an inability to work.
- Maternity: This includes pregnancy care and delivery, as well as the subsequent recovery period for the mother.

[127] In Liechtenstein, the pension system is based on two pillars: First, there is a state pension which guarantees a minimum pension up to a certain maximum amount; second there is an employment-related pension depending on the wages and contributions made during employment.
[128] See Section 5.3 below.

– Accidents: Persons who are not covered by compulsory insurance against the consequences of accidents – normally provided by an employer or e.g. an educational institution – are entitled to benefits from their health insurance in the event of an accident.[129]

The insurance essentially covers outpatient treatment by a doctor or chiropractor, including prescribed medication and aids, psychotherapy, physiotherapy, nutritional counselling, midwives, patient transport, laboratory services and diagnostics. Furthermore, contributions are paid towards a stay in a nursing home and medical rehabilitation.

Basic insurance covers the costs of treatment and a stay in the general ward of a hospital. In Liechtenstein there is a daily benefits insurance for sickness and for accidents. The two situations are regulated separately in Liechtenstein and Switzerland, differently from e.g. Austria. Contrary to Switzerland, however, the daily benefits insurance is compulsory in Liechtenstein.

In case of a disability to work of at least 50%, as certified by a doctor, the insured person is entitled to a daily benefit of 80% of his/her previous (state) pension-liable salary, including regular additional payments, from the second day after the insured person falls ill. In the event of partial incapacity to work of at least 50%, the daily allowance is reduced accordingly. The daily allowance will be paid out for a minimum of 720 days within a period of 900 consecutive days in the event of one or more illnesses. For insured persons who have reached the standard retirement age, the maximum period for which the allowance can be claimed is 180 days, but only up to the insured person's 70th birthday.

Just for the sake of completeness, it needs to be mentioned that there is, of course, also complementary insurance. Beyond the mandatory benefits provided by basic health insurance, there is the option to obtain supplementary health insurance that also covers specific benefits, such as glasses, medicines not covered by basic health insurance, alternative medical treatments, certain dental treatment but also treatment in single bedrooms, a choice of surgeons, privileged treatment etc.

5.3 ANALYSIS

From a Liechtenstein point of view, it seems fairly clear that the terms 'comprehensive'/'all risks' do not mean 'complete' but rather (merely) extensive coverage. Since the Liechtenstein health insurance law provides for compulsory basic insurance for all, this must also be taken as a basis for the health insurance obligation of EU/EFTA foreigners. The benefits to be covered by the basic insurance are the same for everyone: They include illnesses, maternity and (if not covered by the employer or otherwise) accidents. Further possible treatments, more luxurious and preferential treatments, as well as everything not necessarily covered by the basic insurance, can be covered by supplementary insurance. However, the latter cannot fall under the insurance obligation under Article 7(1)(b) and (c) of the Citizenship Directive. This is supported by the fact that it would contradict the prohibition of discrimination on grounds of nationality if EU/EFTA foreigners were subject to a more comprehensive

[129] According to Liechtenstein and Swiss practice, an accident is a sudden and unintentional physical harm caused by an extraordinary external event that impairs physical or mental health.

insurance obligation in Liechtenstein than nationals.[130] An interpretation based in part on Swiss sources leads to the same conclusion. The ominous footnote in Article 23(1)(b) of Appendix 1 to Annex K of the EFTA Convention, set out in Section 2.6 above, also supports this view. Since this describes the minimum health insurance cover, which more or less corresponds to the Liechtenstein basic insurance, it can be assumed that no further cover can be required. Consequently, the basic insurance under Liechtenstein health insurance law probably corresponds quite closely to the current CJEU case law under *Baumbast*.

6 SWEDISH LAW AND PRACTICE

For economically inactive EU/EEA citizens in Sweden, the right to reside and the interlinked right to equal treatment as regards social benefits is a rather complex affair. We see partly the influence of EU law and the restrictive Citizenship Directive, partly a Swedish welfare state in full swing with an all-encompassing access to social benefits based on unconditional national criteria for residence. Mostly, we see a situation where the requirement of a comprehensive sickness insurance plays a peripheral role, if any.

6.1 THE VARIOUS UNDERSTANDINGS OF 'COMPREHENSIVE SICKNESS INSURANCE'

The assessment of the right to reside according to the Swedish Aliens Act (*Utlänningslagen* (2005:716)) is first and foremost handled by two state agencies: the Migration Board (*Migrationsverket*), and the Tax Agency (*Skatteverket*). The assessment by the Tax Agency guides the regional councils as regards the right to health care and is dependent upon a right to stay. However, in addition, the guidance provided by the National Board of Health and Welfare (*Socialstyrelsen*) has a significant impact on the local councils in their respective assessments on the right of residence.[131] More importantly, the Swedish Social Security Agency (*Försäkringskassan*) assesses residence according to the rules in the Social Security Code as well as applying the rules on determining the competent state under Regulation 883/2004.

In two guidance notes on the chapter in the Aliens Act that implements the Citizenship Directive, *the Migration Agency* defines comprehensive sickness insurance as an insurance that covers the costs of necessary medical care and emergency treatment in Sweden.[132] According to the guidance notes, this can be provided either by the former Member State's public healthcare system,[133] or by private health insurance. For EU/EEA citizens who are not

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[130] The EEA Agreement (n 60) Article 4.

[131] See Robert Påhlsson, *Riksskatteverkets rekommendationer. Allmänna råd och andra uttalanden på skatteområdet* (Iustus 1995).

[132] Migrationsverket, 'Rättslig kommentar angående konsekvenserna av EU-domstolens dom C-165/16, Lounes - RK/003/2021' (2021) <https://lifos.migrationsverket.se/dokument?documentSummaryId=45294> accessed 20 March 2025, and Migrationsverket, 'Kommentar angående Migrationsöverdomstolens dom den 18 september 2015 i mål UM 3604-14' (2015) <https://lifos.migrationsverket.se/dokument?documentAttachmentId=42872> accessed 20 March 2025.

[133] A situation that is unlikely to occur according to the rules determining the applicable legislation under Regulation (EC) No 883/2004 (n 25). Article 11(3)(e) states that the Member State of residence is the competent state. Hence, the former EEA state's social insurance cover will in most cases cease to exist when

employed or studying (for example pensioners or self-sufficient individuals with their own financial means), they must demonstrate that they have insurance that covers both long-term and short-term healthcare needs.

If the EU/EEA citizen cannot prove that he or she and the family members are covered by the social security system in their Member State of origin, the Swedish Migration Board will require proof of a comprehensive private health insurance.[134]

According to the guidance notes, the requirements as to what private health insurance must cover in order to be considered comprehensive follow the CJEU's findings in *Baumbast*:[135] The sickness insurance requirement must be proportionate to the individual's right to free movement. In addition, the Migration Board takes into consideration that private insurance can have different levels of coverage. For private health insurance to be considered comprehensive, it must be broadly equivalent to Swedish public health insurance, which is to be decided on a case-by-case basis. Thereby not placing an unreasonable burden on Swedish public finances in the event of illness.[136]

The Swedish Tax Agency plays an important role as regards access to the welfare state systems through registry in the population registration system. When EU citizens move to Sweden, according to the Law on Public Registry, they must register with the Tax Agency.[137] The Law on Public Registry refers to the Aliens Act: The EU/EEA citizen needs to meet the criteria for residence rights under the Aliens Act. However, the Tax Authority makes its own assessment and is not bound by the Migration Board's understanding.[138] When conducting such an assessment, it is worth noting that the Tax Authority does not consider the situation where a person has sufficient means but no private health insurance. The focus is merely on sufficient resources. Hence, a comprehensive sickness insurance is not required to gain entry in the population registry. This understanding of the law has direct consequences for the regions that rely on the population registry when providing health care.

The Regions make no independent assessment, as they rely on the population registry: According to Section 3 of the Health and Medical Services Act, when a person is registered in the population register, they become entitled to healthcare.[139] The fact that the Tax

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an economically inactive EU/EEA citizen moves to another EEA state. This means that any EHIC issued by the former EEA state is void.

[134] The Migration Supreme Court has held that a sickness insurance must not be indefinite in time; a one-year coverage period is sufficient, cf. MIG 2015:15 *SI v. Migrationsverket* [2015] UM3604-1. Available at: <https://lagen.nu/dom/mig/2015:15> accessed 20 March 2025.

[135] *Baumbast* (n 47).

[136] The Migration Supreme Court held in *SI* (n 134) that while the insurance policy contained certain limitations (such as excluding coverage for specific types of mental health conditions), it was sufficiently comprehensive to make it disproportionate to demand a more inclusive policy. In a decision by the Migration Court of Appeal in Sundsvall, the fact that the private insurance did not cover health care for giving birth for a 60-year old woman, was not decisive when finding that a private insurance was comprehensive, cf. *Kammarrätten i Sundsvalls dom* 2015-07-15, målnr. 3214-14.

[137] *Folkbokföringslag* (1991:481) (hereafter The Law on Public Registry), s.4 <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/folkbokforingslag-1991481_sfs-1991-481/> accessed 20 March 2025.

[138] See position statement from Skatteverket, 'Folkbokföring av EES-medborgare och deras familjemedlemmar' (Datum: 2013-05-06, Dnr: 131 297826-13/111) (2013) <https://www4.skatteverket.se/rattsligvagledning/edition/2025.1/323636.html> accessed 20 March 2025.

[139] *Hälso- och sjukvårdslagen* (1982:763) (hereafter the Health and Medical Services Act) <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/halso-och-sjukvardslag-1982763_sfs-1982-763/> accessed 20 March 2025.

Authority makes no independent assessment whether an economically inactive EU/EEA citizen has a comprehensive sickness insurance leads to the access to the health care provided by the regions.

The National Board of Health and Welfare issues national guidelines that are not binding. However, these can be considered as soft law, as most local councils follow the guidelines. According to the Guideline on the Right to Social Assistance for Union Citizens,[140] the Board holds that the requirement of comprehensive sickness insurance implies the requirement of access to health care for the person and his/her family members. EU/EEA citizens can normally fulfil the requirement of comprehensive sickness insurance, i.e. access to health care, by presenting a valid EHIC or any other form that proves that the person is covered by another EEA country's social security system.[141] Alternatively, an EU/EEA citizen who does not have access to publicly funded health insurance can prove that he/she has equivalent private comprehensive health insurance.

The Local Councils are independent agencies but mostly follow the guidance note issued by *the National Board of Health and Welfare*. However, depending on political decisions in the councils, the understanding of sufficient means and comprehensive healthcare insurance could potentially differ and deviate from what is required under EU-law.

The Swedish Social Insurance Agency makes an assessment on residency solely on the basis of Sections 2 and 3, Chapter 5, of the Social Security Code, not the Aliens Act.[142] The Social Security Code states that EU/EEA citizens who come to Sweden and can be expected to stay here for longer than one year shall be considered to be resident in this country. Hence, there is no requirement of sufficient means or a comprehensive sickness insurance.[143] In addition, when applying Regulation 883/2004, Sweden can be designated the competent state according to Article 11(3)(e) that points out the state of residence if a person is not economically active.

6.2 ANALYSIS

Summing up, at first glance, the right to residence for economically inactive union citizens might be understood as solely an issue for the Migration Board. However, a right to residence for an EU/EEA citizen gets the Swedish welfare state going: The right to social security benefits, health care and social aid. Issues for the state agencies, but also for regional as well as local agencies. In some cases, those agencies do take into account the Migration Board's

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[140] Socialstyrelsen, 'Vägledning för socialtjänsten i arbetet med EU/EES-medborgare' (2020) <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/vagledning/2020-6-6815.pdf> accessed 20 March 2025.

[141] Cf. the Migration Board´s assessment: A situation that is unlikely to occur according to the rules determining the applicable legislation under Regulation (EC) No 883/2004 (n 25). Pursuant to Article 11(3)(e) the former Member State's coverage will cease to exist when an economically inactive EU/EEA citizen moves to another EEA state. This means that any EHIC issued by the former Member State is void.

[142] *Socialförsäkringsbalken* (2010:110) (hereafter the Social Security Code) <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/socialforsakringsbalk-2010110_sfs-2010-110/> accessed 20 March 2025.

[143] Cf. Försäkringskassan, 'Övergripande bestämmelser i SFB, unionsrätten och internationella avtal (Vägledning 2017:1) Version 17' (2017) <https://www.forsakringskassan.se/download/18.7fc616c01814e179a9f6e3/1734699186858/overgripande-bestammelser-i-sfb-unionsratten-och-internationella-avtal-vagledning-2017-1.pdf> accessed 20 March 2025.

assessment, in other cases the agencies themselves assess the right to reside applying national laws independent of a residence test under the Aliens Act. Hence, an economically inactive EU/EEA citizen may very well end up not having the right to reside according to the Migration Board, whilst, in parallel, according to the Social Security Agency the person has a right to social security benefits, including health care, based on residency as defined by the Social Security Code as well as by Regulation 883/2004. Furthermore, regardless of the fact that the Social Security Agency has held an economically inactive EU/EEA citizen eligible for social security benefits, the Tax Authority, being responsible for the population registry, might nevertheless deny registration in the Population registry, according to the Law on the Population Registry (that takes into account the Aliens Act when assessing a right to reside). Such a conclusion will affect the right to health care as the regions to a large extent rely on the population registry when providing health care.

The understanding of what is to be considered as comprehensive health insurance (as well as what is to be understood as sufficient means) is central in assessing the right of residence for EU/EEA citizens and their family members. The preparatory works of the Aliens Act shed no light as to what this term means.[144] They simply refer to a requirement of having a comprehensive sickness insurance. Hence, what is to be understood as a comprehensive sickness insurance is left for the agencies to assess. As seen above, this poses a challenge, as the right of residence according to the Aliens Act is independently assessed by numerous agencies on state, regional as well as local level. Furthermore, as in the case of the Social Security Agency, additional relevant national law as well as Regulation 883/2004 might define residence more generously.

In addition, while the understanding of what comprehensive health insurance entails plays a significant role for the Migration Board, the Tax Authority takes no notice of a sickness insurance in its assessment of whether an economically inactive EU/EEA citizen has a right to reside or not when deciding on an entry in the population registry, an entry which is the requirement for inclusion in the national health care system run by the regions. Similarly, the National Board of Health and Welfare opens up for social aid provided by the local councils as an (in fact void) EHIC is considered sufficient when assessing the right to reside in a social aid context. Finally, the Social Security Agency takes no account of the Aliens Act in its assessment of the right to reside in a social security setting.

The Swedish legal landscape is contradictory and complex. The reason behind the complexity is twofold. Firstly, migrating EU/EEA citizens are moving targets with potentially ever-changing rights to reside. Secondly, given the fact that a right to reside is a snapshot and there is no hierarchy between the independent agencies on either a vertical or horizontal level, the assessments of the various agencies will differ – to the detriment of both the rights of EU/EEA citizens who might face incorrect decisions, as well as of Sweden – as the overall approach is fragmented.[145]

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[144] Regeringen, 'Proposition 2005/06:77 Genomförande av EG-direktiven om unionsmedborgares rörlighet inom EU och om varaktigt bosatta tredjelandsmedborgares ställning' (2006) <https://data.riksdagen.se/fil/D6ABF701-CDAA-44D4-8913-3AD6B0CADBBD> accessed 20 March 2025.

[145] The Tax Authority spells out the independency very clearly in a former guidance note on the Aliens Act, see position statement from Skatteverket, 'Folkbokföring av EES-medborgare och deras familjemedlemmar' (n 138): 'The Migration Agency's assessment of right of residence cannot form the basis for the Tax Agency's assessment of the same issue'.

There have been proposals to improve 'horizontal coordination' between agencies. However, the legal framework for agency independence is enshrined in the Swedish Constitution, the Instrument of Government, particularly Chapter 12, which outlines the division of responsibilities between government and agencies.[146] Whilst the legislature sets the overall policy directions, agencies are responsible for implementing these policies, and they continue to do so with considerable independence.[147]

Nevertheless, given the ruling by the CJEU in *VI*, we see an end to this Swedish scattered picture as regards the understanding of comprehensive sickness insurance. The ruling points in the direction that welfare systems that have an all-encompassing health care must take active legal action in order to claim additional fees in safeguarding its health care system, as Regulation 883/2004 calls for equal treatment for those being covered by a Member State's social security system. Swedish law does not open for reimbursement of such fees. Thus, there is no room to manoeuvre for independent assessments by the various agencies as there cannot be a claim for a comprehensive sickness insurance where Sweden has been determined as the competent state for an economically inactive Union Citizen.

7 CONCLUSION

Summing up the findings of this article, the sickness insurance conditions for residence in other EEA states would appear less strict today than when they were introduced into the Residence and Student Directives more than 30 years ago. Both legislative and judicial EU and EEA developments would appear to have played their part in fuelling this change. Under Article 7 of the Citizenship Directive, whilst EEA states may naturally require that individuals have some sickness insurance coverage, they may not automatically deny residence where an insurance policy does not cover absolutely all risks, or where provided under public insurance schemes. What is deemed sufficiently comprehensive sickness insurance coverage may perhaps vary to a certain extent from one case to another, but all-encompassing insurance may not be required as a general rule under EU or EEA law.

Looking at how the requirement has been understood and implemented in Norway, Iceland, Liechtenstein and Sweden, it is interesting to note how widely different approaches have been adopted. Whilst Norwegian rules and practice (still) seem too strict, Iceland appears to have adopted a more lenient approach than strictly necessary. Somewhere in the middle we find Liechtenstein, which given its rather unique system of private health insurance allows it to cater fairly unproblematically to the demands of EU/EEA law. Whilst Sweden, notwithstanding the public administrative coordination challenges (which also appear to be an issue in Norway), seems to have hit the right balance on the whole as to how the condition should be interpreted and applied. In order to avoid unnecessary disparity in

[146] The Swedish administrative system has its origins in the early 17th century under the reforms of Chancellor Axel Oxenstierna. Over the centuries, the Swedish system of independent agencies has evolved, but the core principle of autonomy remains intact, see Erik Thomson, 'Axel Oxenstierna and Swedish Diplomacy in the Seventeenth Century' in Paul M Dover (ed), *Secretaries and Statecraft in the Early Modern World* (Edinburg University Press 2017), p. 115. See also Thomas Bull, 'Oxenstierna och omvärlden' in Thomas Bull et al (eds), 'Arvet från Oxenstierna –reflektioner kring den svenska förvaltningsmodellen och EU' (2012:2op, SIEPS 2012) 7-19.

[147] Cf. Joakim Nergelius, 'Om Oxenstiernas ständiga aktualitet' in Thomas Bull et al (eds), 'Arvet från Oxenstierna –reflektioner kring den svenska förvaltningsmodellen och EU' (2012:2op, SIEPS 2012) 77-92.

terms of interpretation and application of the sickness insurance requirement at national level throughout the EEA, further and definitive clarification by the CJEU and/or EFTA Court would nevertheless seem timely.

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THE STATUS OF THIRD-COUNTRY NATIONALS, REFUGEES AND STATELESS PERSONS UNDER THE EU SOCIAL SECURITY REGULATIONS AND THE NORDIC CONVENTION ON SOCIAL SECURITY

ÓMAR BERG RÚNARSSON*

In the Nordic countries, the following instruments regulate the coordination of social security cases: Regulation 883/2004 on the coordination of social security systems, the Nordic Convention on Social Security of 2012, and Regulation 1231/2010 which extends the application of Regulation 883/2004 to third-country nationals (TCNs). This article clarifies how the personal scope of these instruments intersect with one another regarding the status of TCNs, refugees and stateless persons. Since the Nordic countries are composed of both EU Member States and EEA/EFTA States, the applicable legal framework may vary depending on the countries involved. In particular because Denmark, Iceland and Norway are not bound by Regulation 1231/2010. To some extent, the Nordic Convention bridges the gap since it extends the scope of Regulation 883/2004 to TCNs. The effects of the Nordic Convention are nevertheless limited to intra-Nordic cases. Therefore, in a scenario involving e.g. Norway and Germany, a TCN would not be able to benefit automatically from the EU/EEA coordination system. On the other hand, since refugees and stateless persons are covered by Regulation 883/2004 they would be able to rely on the coordination system in the same set of circumstances, i.e. between Norway and Germany.

1 INTRODUCTION

In the Nordic countries, there are primarily two instruments in force which regulate the coordination of social security cases. These are Regulation 883/2004 on the coordination of social security systems,[1] and the Nordic Convention on Social Security of 2012 ('Nordic Convention').[2] Another piece of the puzzle is Regulation 1231/2010, which extends the application of Regulation 883/2004 to third-country nationals ('TCNs').[3] The aim of this article is to clarify how the personal scope of these instruments intersect with each other,[4]

* PhD Research Fellow at CENTENOL, University of Bergen, and part-time lecturer at Reykjavik University. The present article was researched and written whilst working as a Researcher on the EEA Social Security Project funded by the Norwegian Ministry of Labour and Social Inclusion. The author would like to thank the reviewer for providing helpful feedback on the draft article.

[1] 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.

[2] Nordic Convention on Social Security (adopted on 12 June 2012, entered into force 1 May 2014).

[3] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 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 [2010] OJ L344/1.

[4] Clarifying the personal scope of application is an important task because only if the person concerned is covered will the Regulation apply (provided also that the relevant conditions concerning the material scope are fulfilled). See further in Bernhard Spiegel, 'Article 2' in Maximilian Fuchs and Rob Cornelissen (eds), *EU*

specifically regarding the status of TCNs, refugees and stateless persons.[5] As we shall see, these categories of persons, who are not EEA nationals, may be protected by the EU/EEA social security coordination system if they fall under the scope of the relevant instruments. Coordinating social security cases with regard to these categories of persons may nevertheless pose certain challenges in the Nordic countries. This is partly because the Nordic countries are composed of the three EU Member States Denmark, Finland and Sweden, and two EEA/EFTA States (Iceland and Norway). Depending on the exact countries involved in a given cross-border situation, the applicable legal framework may vary. The fact that the relevant instruments may also *overlap* adds an additional layer of complexity, such as which instrument is applicable, to whom, and whether the outcome matters (the Nordic Convention for instance provides for certain more favourable rights as compared to Regulation 883/2004).

To illustrate the point: A TCN who is resident in Iceland wants to export her Icelandic unemployment benefits to Norway whilst looking for a job. However, Regulation 1231/2010, which is based on Article 79(2)(b) of the Treaty on the Functioning of the European Union ('TFEU'), is only applicable to Finland and Sweden. Denmark has an 'opt-out' in accordance with Protocol No 22.[6] Regulation 1231/2010 also falls outside the material scope of the Agreement on the European Economic Area ('EEA Agreement'), and is therefore not applicable to Iceland or Norway.[7] Still, by virtue of Articles 3 and 4 of the Nordic Convention, the application of Regulation 883/2004 is *extended* to TCNs in intra-Nordic cases. Thus, the TCN could export her Icelandic unemployment benefits to Norway, but the Icelandic Social Insurance Administration could arguably refuse to export the benefits to the EU Member State of Germany. To complicate things further, it follows from Denmark's reservation in Article 3(3) of the Nordic Convention that even in intra-Nordic cases complex issues may arise. Denmark's reservation provides that the entitlement to certain types of benefits (such as unemployment benefits) is limited to 'Nordic nationals'. Although Denmark's reservation is unsurprising given that Denmark opted out of Regulation 1231/2010 concerning TCNs, it is questionable whether limiting certain benefits to 'Nordic nationals' is compatible with Regulation 883/2004 which clearly covers refugees and stateless persons.

The present article is structured as follows: Section 2 starts by explaining the *relationship* and the *hierarchy* between the Nordic Convention and Regulation 883/2004. Since the two instruments may overlap and apply to the same territory or persons, clarifying their relations is crucial. Next, Section 3 looks at the personal scope of Regulation 883/2004 and the Nordic Convention, together also with Regulation 1231/2010. This Section aims to clarify who is covered, on what legal basis and why. Thereafter, Section 4 focuses on the conditions which

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Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009 (C.H. Beck, Hart, Nomos 2015) 72.

[5] According to Article 1(g) and (h) of Regulation 883/2004 the terms 'refugee' and 'stateless person' are given the same meaning as in Article 1 of the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), and Article 1 of the Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960).

[6] See Articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed to the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 and to the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/13, according to which Denmark is not taking part in the adoption of Regulation 1231/2010 and is not bound by it or subject to its application.

[7] Agreement on the European Economic Area [1994] OJ L1/3.

TCNs, refugees or stateless persons must fulfil to come under the personal scope of the relevant instruments, in particular concerning residence requirements and the existence of a cross-border element. Section 5 goes on to provide two examples of certain challenges which may arise between Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention. Finally, Section 6 offers some conclusions.

2 THE INTERACTION BETWEEN REGULATION 883/2004 AND THE NORDIC CONVENTION

Nordic cooperation in social security matters can be traced back to 1954 when the Nordic countries Denmark, Finland, Iceland, Norway and Sweden concluded the Agreement concerning a common Nordic labour market.[8] Under that Convention, Nordic citizens were permitted to take up residence and work in any of the Nordic countries without being obliged to obtain a residence or work permit.[9] To facilitate that agreement, the Nordic countries concluded the Nordic Convention on Social Security on 15 September 1955 in Copenhagen.[10] Since then the Nordic Convention has been renewed several times, i.e. in 1981, 1992 and 2003.[11] The version currently in force was adopted on 12 June 2012 in Bergen, Norway.

The Nordic Convention is an international treaty, and as a common starting point, all the Nordic countries take a dualistic approach concerning the relationship between international law and domestic law.[12] Thus, international agreements such as the Nordic Convention must, in principle, be incorporated into the domestic legal orders of the Nordic countries to be applicable before national courts.[13] In the Nordic EU Member States of Denmark, Finland and Sweden, Regulation 883/2004 and implementing Regulation 987/2009 are *directly applicable* pursuant to Article 288 TFEU.[14] The provisions of Regulation 883/2004 may also have *direct effect* if they are unconditional and sufficiently clear and precise.[15] Since the principles of direct applicability and direct effect are not part of EEA law, it follows from Article 7 EEA that Regulations 883/2004 and 987/2009 must be incorporated into the respective legal systems of the two dualistic EEA/EFTA States

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[8] Adam Trier, 'The Nordic Social Security Convention' (1982) 121 International Labour Review 259, 259-260.
[9] ibid.
[10] ibid.
[11] For further reading on the background to these agreements and the interplay with EU/EEA law, see Norwegian Legal Commission, *Trygd over landegrensene: Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser* (NOU 2021:8) 221-223. <https://www.regjeringen.no/contentassets/4fbaf542bdfb4718aeddb50df235cb9c/nou-2021-8-trygdoverlandegrensene.pdf> accessed 15 September 2024.
[12] Henrik Wenander, 'The Vision and Legal Reality of Regional Integration in the Nordic States' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 16-17.
[13] ibid. In Sweden, for example, the Nordic Convention is part of Swedish law on the basis of *Lag om nordisk konvention om social trygghet* (2013:134), in Iceland the Convention is given status as law with *Lög um lögfestingu Norðurlandasamnings um almannatryggingar nr. 119/2013*, and in Norway the Convention applies as Norwegian law on the basis of *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28-19) s 1-3 b.
[14] Regulation 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 [2009] OJ L284/1.
[15] Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (7th edn, Oxford University Press 2020) 233-234.

Norway and Iceland (Liechtenstein follows a monist approach).[16]

The Nordic Convention recognises that the EU/EEA social security regulations are the primary coordination instruments, and that the role of the Convention is merely supplemental. This follows, *inter alia*, from the preamble to the Convention which stipulates that the Convention 'shall complement the European Union regulations'. Since the Nordic Convention functions as a complementary instrument to Regulation 883/2004, it is somewhat difficult to picture a clear scenario where provisions of the two instruments might collide. Confusion may occur nonetheless,[17] for example regarding which instrument is applicable due to overlap within their geographical or personal scope of application. Article 8 of Regulation 883/2004 therefore specifies the relationship between the Regulation and other coordination instruments. Article 8(1) reads as follows:

> This Regulation shall replace any social security convention applicable between Member States falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time. For these provisions to remain applicable, they shall be included in Annex II. If, on objective grounds, it is not possible to extend some of these provisions to all persons to whom the Regulation applies this shall be specified.

Pursuant to Article 8(1), Regulation 883/2004 *replaces* social security conventions applicable between the Member States within its personal and substantial scope of application.[18] The Court of Justice of the European Union ('CJEU') has stated that the 'principle of replacement' in Article 8(1) is 'mandatory in nature and does not, in principle, allow of exceptions'.[19] Yet derogations are possible, if two conditions are fulfilled. First, the international convention must be more favourable to the beneficiaries, or it must arise from specific historical circumstances, in which case its effect must be limited in time. Second, the relevant provisions must be included in Annex II to Regulation 883/2004.

In respect of the EU Member States Denmark, Finland and Sweden, Annex II of Regulation 883/2004 refers to Article 7 of the Nordic Convention on Social Security of 2003

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[16] Regulation 883/2004 (n 1) and Regulation 987/2009 (n 14), have been made part of Norwegian law by the *Lov om folketrygd* (n 13) s 1-3 a, and in Iceland the social security regulations have been made part of the Icelandic legal order with an implementing regulation, i.e. *Reglugerð um gildistöku reglugerða Evrópusambandsins um almannatryggingar nr. 442/2012*.

[17] See also Ciarán Burke and Ólafur Ísberg Hannesson, 'Free movement Rights in Iceland' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 215-216.

[18] Heinz-Dietrich Steinmeyer, 'Article 8' in Maximilian Fuchs and Rob Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (C.H. Beck, Hart, Nomos 2015) 133.

[19] See for example Joined Cases C-401/13 and C-432/13 *Vasiliki Balazs v Casa Județeană de Pensii Cluj and Casa Județeană de Pensii Cluj v Attila Balazs* EU:C:2015:26 para. 40, which concerns Articles 6 and 7(2)(c) of 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 [1971] OJ L149/2, the predecessor to Regulation 883/2004 (n 1). As stated by the CJEU in Case C-646/*13 Casa Județeană de Pensii Brăila v E.S Balazs* EU:C:2015:276 paras. 23-24, Article 8(1) of Regulation 883/2004 replaced Articles 6 and 7(2)(c) of Regulation 1408/71 and since those provisions are substantially similar their interpretation can be transposed to Regulation 883/2004.

(which is however no longer in force) concerning reimbursement of extra travel expenses because of sickness during a stay in another Nordic country.[20] Moreover, based on Articles 8(1) and/or 9(2) of implementing Regulation 987/2009, Article 15 of the Nordic Convention on Social Security of 2003 (concerning the reciprocal waiver on the refunding of costs for certain benefits in kind) is included in Annex 1 to that Regulation. As regards the two EEA/EFTA States Iceland and Norway, Annex VI (Social Security) to the EEA Agreement stipulates that Article 7 of the Nordic Convention on Social Security of 2003 shall be added to Annex II of Regulation 883/2004.[21] Similarly, in relation to Iceland and Norway, Annex VI to the EEA Agreement also adapts Annex 1 of implementing Regulation 987/2009 for the purposes of including Article 15 of the Nordic Convention of Social Security of 2003.

The current Nordic Convention of 2012 is included in Finland's notification to the Commission on the basis of Article 9(1) of Regulation 883/2004.[22] According to Article 9(1), the EU Member States shall notify the Commission of any conventions entered into as referred to in Article 8(2). The latter provision stipulates that '[t]wo or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and in keeping with the spirit thereof'. As noted by Steinmeyer, the aim of this provision is to ensure that the Member States cannot overturn the system of the Regulation through intergovernmental agreements.[23] The provision only allows the Member States to create further-reaching rights, which are essential in relations between two or more Member States due to special situations.[24] The preamble to the Nordic Convention clearly specifies that it is 'based on the principles of Regulation (EC) 883/2004 and in line with the basic idea thereof'. On the face of it, the Nordic Convention clearly seems to fulfil the requirement in Article 8(2) of Regulation 883/2004, by providing certain more favourable rights as compared to those found in the Regulation.[25]

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[20] See the current consolidated version of Regulation 883/2004 of 31 July 2019 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0883-20190731> accessed 10 November 2024.

[21] Regulation 883/2004 (n 1) and the implementing Regulation 987/2009 (n 14) are incorporated into the EEA Agreement and referred to at points 1 and 2 of Annex VI to the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social security) and Protocol 37 to the EEA Agreement [2011] OJ L262/33. Joint Committee Decision No 76/2011 entered into force on 1 June 2012.

[22] It appears that Finland is the only Nordic EU Member State which notified the Commission of the Nordic Convention on Social Security of 2012. The declarations to the Commission pursuant to Article 9 of Regulation 883/2004 are available on the following website: <https://employment-social-affairs.ec.europa.eu/policies-and-activities/moving-working-europe/eu-social-security-coordination/specialised-information/official-documents/declarations-made-member-states-accordance-article-9-regulation-ec-no-8832004_en?prefLang=fr> accessed 12 November 2024. Similarly, it appears that Iceland and Norway did not notify the EFTA Surveillance Authority ('ESA') of the Nordic Convention on Social Security of 2012. The declarations of Iceland and Norway are available here: <https://employment-social-affairs.ec.europa.eu/policies-and-activities/moving-working-europe/eu-social-security-coordination/specialised-information/official-documents/declarations-made-eea-efta-states-and-united-kingdom-accordance-article-9-regulation-ec-no-8832004_en> accessed 12 November 2024.

[23] Steinmeyer (n 18) 134.

[24] ibid.

[25] The present article does not analyse whether the more favourable provisions of the Nordic Convention could constitute some sort of discrimination. For further reading see for example Steinmeyer (n 18) 134-139, and Catherine Jacqueson, 'Free Movement Rights in Denmark' in Katarina Hyltén-Cavallius and Jaan

3 THE PERSONAL SCOPE OF THE SOCIAL SECURITY REGULATIONS AND THE NORDIC CONVENTION

The following Section analyses the personal scope of the relevant instruments, i.e. Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention on Social Security. In the context of Regulations 883/2004 and 1231/2010, emphasis is placed on explaining the relevant legal basis for the inclusion of certain categories of persons. Clarifying the relevant legal basis is particularly helpful for two reasons. First, it explains who is covered and for what reasons. For instance, why are refugees and stateless persons included in the personal scope of Regulation 883/2004 whereas TCNs are generally dealt with in a separate instrument (i.e. Regulation 1231/2010)? In the context of EEA law especially, it appears that Regulation 883/2004 is the only piece of secondary legislation which *explicitly* refers to and covers refugees and stateless persons. Normally, these categories of persons are not covered by EEA law, at least not directly. Second, it helps to explain the complex situation in the Nordic countries, which consist of both EU Member States and EEA/EFTA States. The relevant legal basis partly explains why certain measures are ultimately not incorporated into the EEA Agreement. As will be seen, however, the fusion in the Nordic Convention makes these differences between EU and EEA law less of a problem.

3.1 REGULATION 883/2004

Article 2 of Regulation 883/2004 provides the following:

> This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.
>
> It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

The following categories of persons are thereby included in the personal scope of Regulation 883/2004: EU nationals, stateless persons and refugees who are *residing* in a Member State, and the members of their families and survivors.[26] The Regulation has also been extended to the EEA/EFTA States.[27] Therefore, the Regulation also covers EEA/EFTA nationals. For the present analysis, it is important to note that both the *inclusion* of refugees and stateless persons in the personal scope of the Regulation, and its *extension* to

Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 99-100.

[26] As noted by Cornelissen, in limited circumstances TCNs can fall under the scope of the Regulation, i.e. as family members or survivors. See further Rob Cornelissen, 'Regulation 1231/2010 on the inclusion of third-country nationals in EU social security coordination: Reach, limits and challenges' (2018) 20(2) European Journal of Social Security 86, 87-88.

[27] Regulation 883/2004 has also been extended to Switzerland. See the 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 [2002] OJ L114/6.

EEA/EFTA nationals, rests on a *common legal basis*, i.e. Article 48 TFEU.[28] This follows from the judgments of the CJEU in *Khalil*,[29] and *UK v Council* (concerning extension to the EEA/EFTA States).[30]

In *Khalil*, the German referring court asked the CJEU whether Article 51 EEC (now Article 48 TFEU) provided sufficient legal basis to include stateless persons and refugees in the personal scope of Regulation 1408/71 (the predecessor to Regulation 883/2004), even though they did not enjoy independent/free-standing free movement rights within the Community. The CJEU answered the question in the affirmative by considering the *historical context* of the inclusion of stateless persons and refugees in the personal scope of the Regulation. The Court pointed out that *before* the Community was founded in 1957, the Member States had already undertaken international obligations such as the 1951 Refugee Convention and the 1954 Convention on the Status of Stateless Persons, to allow refugees and stateless persons to benefit from national social security laws and regulations.[31] The Court then went on to say that:[32]

> The Council cannot be criticised for having, in the exercise of the powers which have been conferred on it under Article 51 of the EEC Treaty, also included stateless persons and refugees resident on the territory of the Member States in order to take into account the abovementioned international obligations of those States.
>
> As the Advocate General pointed out in paragraph 59 of his Opinion, coordination excluding stateless persons and refugees would have meant that the Member States, in order to ensure compliance with their international obligations, had to establish a second coordination regime designed solely for that very restricted category of persons.

The CJEU therefore held that Article 48 TFEU provided a sufficient legal basis to include stateless persons and refugees in the personal scope of Regulation 1408/71, but with the caveat that this only applied to a *'very restricted category of persons'*.

Article 48 TFEU also played an important role in *UK v Council*, an action for annulment brought by the United Kingdom against the decision of the EU Council to extend Regulation 883/2004 to the EEA/EFTA States.[33] The UK argued here that the decision had

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[28] Article 29 EEA corresponds in most parts to Article 48 TFEU and provides for the coordination of social security schemes to facilitate the freedom of movement of workers and self-employed persons within the EEA. For further reading on Article 29 EEA, see Karin Fløistad, 'Article 29' in Finn Arnesen et al (eds), *Agreement on the European Economic Area – A Commentary* (C.H. Beck, Hart, Nomos, Universitetsforlaget 2018) 385-391.

[29] Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervett Khalil* (C-95/99), *Issa Chaaban* (C-96/99) and *Hassan Osseili* (C-97/99) *v Bundesanstalt für Arbeit and Mohamad Nasser* (C-98/99) v *Landeshauptstadt Stuttgart and Meriem Addou* (C-180/99) v *Land Nordrhein-Westfalen* EU:C:2001:532.

[30] Case C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* EU:C:2013:589. For further reading on that case see e.g. Pauline Melin, *The External Dimension of EU Social Security Coordination: Towards a Common EU Approach* (Brill 2019) 71-73, or Fløistad (n 28) 386-388. On *Khalil* see further reading in Cornelissen (n 26) 88-89.

[31] *Khalil* (n 29) paras 43-53.

[32] ibid paras 57-58.

[33] 2011/407/EU: Council Decision on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ L182/12.

been adopted on an incorrect legal basis (i.e. Article 48 TFEU). Since Regulation 883/2004 (unlike its predecessor, Regulation 1408/71) would give rights to non-economically active TCNs (i.e. EEA/EFTA nationals), the UK argued that it ought to have been adopted on the basis of Article 79(2)(b) TFEU instead.[34] The CJEU nevertheless dismissed the claim, accepting that Article 48 TFEU constituted the correct legal basis. One of the main reasons was because of *reciprocity*,[35] however, an element which was not present in *Khalil*. The Court emphasised that the extension of the social security coordination regime to the EEA/EFTA States benefitted both EU nationals in the EEA/EFTA States and *vice versa*.[36]

3.2 REGULATION 1231/2010

Under the current EU social security coordination regime, the situation of TCNs is regulated by Regulation 1231/2010, which extends the application of Regulation 883/2004 and implementing Regulation 987/2009.[37] The substantive legal basis for the adoption of Regulation 1231/2010 is Article 79(2)(b) TFEU which allows the adoption of measures concerning non-derived free movement and residence rights of TCNs in the Member States. Article 79 TFEU forms part of Title V (Area of Freedom, Security and Justice), in Chapter 2 entitled 'Policies on border checks, asylum and immigration'. Article 79(1) TFEU provides that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of TCNs residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

It follows from Article 1 of Regulation 1231/2010 that TCNs must fulfil two conditions in order to rely on Regulations 883/2004 and 987/2009: They must be legally resident in the territory of a Member State, and in a situation which is not confined in all respects within a single Member State (discussed further below in Section 4). Regulation 1231/2010 is applicable to all EU Member States except Denmark, which has an 'opt-out'.[38] Similarly, since Regulation 1231/2010 is based on Article 79(2)(b) TFEU, it is not applicable to the three EEA/EFTA States of Iceland, Norway and Liechtenstein. In fact, of all the Nordic countries, only Finland and Sweden are bound by Regulation 1231/2010. However, as we shall see directly below, since the Nordic Convention also applies to TCNs, the limited applicability of Regulation 1231/2010 to the Nordic countries is less troublesome.

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[34] For further reading on the extension of Regulation 883/2004 to all nationals of a Member State regardless of economic activity, see Frans Pennings, *European Social Security Law* (7th edn, Intersentia 2022) 38.

[35] The reciprocity element is erog. mentioned by Fløistad (n 28) 388. The reciprocity element was also recalled in a recent CJEU judgment, in Case C-329/23 *Sozialversicherungsanstalt der Selbständigen v Dr. W M and Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz* EU:C:2024:802 para 38.

[36] *UK v Council* (n 30) para 55. A similar action was brought against the Council's decision to extend the personal scope of Regulation 883/2004 to Swiss nationals, with similar findings of the CJEU. See the judgment of the CJEU in Case C-656/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* EU:C:2014:97.

[37] On the lengthy process of adopting Regulation 895/2003 (the previous measure to Regulation 1231/2010) see Melin (n 30) 30-32.

[38] Protocol (No 22) on the position of Denmark (n 6).

3.3 THE NORDIC CONVENTION ON SOCIAL SECURITY

The current Nordic Convention of 2012 is applicable to the 'Nordic countries'. According to Article 1(1), this means Denmark, Sweden, Norway, Finland and Iceland.[39] Moreover, the Convention also covers Greenland, the Faroe Islands and the Åland Islands, provided that these territories have agreed that the Convention shall apply to them.[40] As regards the personal scope of application, Article 3(1) of the Convention simply refers to the personal scope of Regulation 883/2004, i.e. Article 2. Thus, all persons covered by Regulation 883/2004 are also covered by the Convention, so long as they are or have been subject to the laws of a Nordic country (which normally is based on residence). Moreover, based on Article 3(2) of the Convention, it also applies to TCNs who are or have been subject to the laws of a Nordic country, together with their relatives or survivors. Thus, the personal scope of the Nordic Convention is considerably *broader* than that which follows from Regulation 883/2004 alone.

Next, Article 4 of the Convention provides that the application of the EU social security regulations is *extended to all persons* who are covered by the Convention and are *resident* in a Nordic country. This means that nationality is in fact irrelevant for the purposes of determining whether the Convention is applicable.[41] What matters is that the person concerned is resident in a Nordic country. The extension of the personal scope of the EU social security regulations via the Nordic Convention appears to be mostly relevant for TCNs and their family members or survivors, since Nordic nationals are already covered by virtue of Article 2(1) of Regulation 883/2004 in intra-Nordic cases.[42] However, Article 4 of the Nordic Convention of 2003 played a role in the *Jonsson* case, which concerned a Nordic (Swedish) national who worked for a Norwegian company on the Norwegian archipelago of Svalbard.[43] That territory is exempted from the scope of application of the EEA Agreement pursuant to Protocol 40 EEA. Normally, Regulation 883/2004 would not therefore be

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[39] Article 6 of the Convention also provides that for the purposes of applying Title II of Regulation 883/2004, work related to research and exploitation of natural resources on *the continental shelf* should also be considered work performed in that country. In Case C-347/10 *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* EU:C:2012:17, the CJEU dealt with issues related to the applicability of Regulation 883/2004 to the continental shelf. See an analysis of that judgment in Pennings (n 34) 33-34. For further reading on the geographical scope of EEA law see Halvard Haukeland Fredriksen, 'The Geographical Reach of EEA Law after Scanteam' in Tryggvi Gunnarsson et al (eds), *Afmælisrit: Páll Hreinsson sextugur 20. febrúar 2023* (Fons Juris 2023) 263-280.

[40] In relation to Greenland and the Faroe Islands see Jeppe Kofod, 'BKI nr 15 af 23/08/2019 Bekendtgørelse om udvidelse til Færøerne og Grønland af nordisk konvention af 12. juni 2012 om social sikring med tilhørende administrativ aftale' (Udenrigsministeriet, 23 August 2019) <https://www.retsinformation.dk/eli/ltc/2019/15> accessed 15 November 2024, where it is stated that the Nordic Convention on Social Security of 2012 is extended to the Faroe Islands and Greenland with effect from 1 May 2015.

[41] Burke and Ísberg Hannesson, 'Free movement Rights in Iceland' (n 17) 215.

[42] The extension is also relevant for persons in Greenland and the Faroe Islands, areas which for other purposes are normally not part of the geographical scope of EU/EEA cooperation. See also Christian N K Franklin, 'Free Movement Rights in Norway' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States – EU Law, EEA Law and Regional Cooperation* (Hart 2023) 190.

[43] Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136. Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides that: *'When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement'.*

applicable to Svalbard. In *Jonsson*, however, the EFTA Court cited Protocol 40 EEA before going on to state that:[44]

> [T]he EEA Agreement is not applicable on Svalbard. However, Article 4 of the Nordic Convention on Social Security of 18 August 2003 ('the Convention') contains a specific clause pursuant to which Regulation No 1408/71 shall apply to persons covered by the Convention who reside in a Nordic country. As the defendant was a member of the Norwegian National Insurance Scheme during his employment on Svalbard, he was covered by the Convention. He was also resident in a Nordic country. Accordingly, by virtue of the Convention, the Regulation thus applies to the circumstances of the present case.

By virtue of Article 4 of the Nordic Convention, the predecessor to Regulation 883/2004 was therefore deemed applicable to a defendant who was a member of the Norwegian National Insurance Scheme during his employment on Svalbard and resident in Sweden. The *Jonsson* case thus demonstrates a situation where, by virtue of the Convention, the geographical scope of Regulation 883/2004 is extended to a territory which for other purposes is normally not covered by EEA law, thus also bringing it within the jurisdiction of the EFTA Court. To date, the EFTA Court has not dealt with a case concerning a TCN who by virtue of the Convention comes within the personal scope of Regulation 883/2004.

The material scope of the Nordic Convention mirrors the scope of Regulation 883/2004, as stipulated in Article 2 of the Convention. The material scope of the Regulation is defined in Article 3 and covers e.g. sickness benefits, invalidity benefits, old-age benefits, unemployment benefits, survivors' benefits and maternity and equivalent paternity benefits. Additionally, the Convention also provides for certain more favourable rights which *supplement* the Regulation.[45] This includes Article 7, concerning the reimbursement of the costs of a return journey to the country of residence on account of sickness occurring during a stay in another Nordic state; the so-called 'five year rule' in Article 10, which provides for an exception to the rules in Article 61(2) of Regulation 883/2004 concerning requirements for periods of insurance of employment; and Article 15, which provides for exceptions to Articles 35, 41 and 65 of the Regulation, by introducing a waiver of reimbursement between the Nordic countries in relation to certain benefits in kind, e.g. concerning work accidents, maternity, or unemployment benefits.

4 REQUIREMENTS OF (LEGAL) RESIDENCE AND A CROSS-BORDER ELEMENT

To fall under the personal scope of Regulation 883/2004, Regulation 1231/2010, or the Nordic Convention, TCNs, refugees and stateless persons must fulfil certain requirements related to residence and the existence of a cross-border element. The residence requirements are nevertheless phrased in somewhat different terms in each of these instruments, and their exact meaning may vary slightly. Moreover, depending on whether these categories of persons are covered by EU or EEA law, the possibilities to fulfil the cross-border

[44] *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* (n 43) para 18, in part II of the judgment on legal background.
[45] Franklin, 'Free Movement Rights in Norway' (n 42) 191.

requirement may differ. The first part of this section explains the residence requirements, followed by a discussion on the requirement of a cross-border element.

4.1 RESIDENCE REQUIREMENTS

In the context of Regulation 1231/2010, Article 1 stipulates that TCNs must be legally resident in the territory of a Member State and in a situation which is not confined in all respects within a single Member State.[46] In *Balandin*, the CJEU clarified the meaning of the first condition, i.e. 'legally resident in a Member State' for the purposes of Regulation 1231/2010.[47] As stated *inter alia* by the Court, the notion of 'legal residence' here is not the same as the concept of 'residence' in Article 1(j) of Regulation 883/2004 (i.e. the place where a person habitually resides).[48] The latter concept is intended to determine the Member State to which the persons concerned are most closely connected and thus to whose legislation they are therefore subject.[49]

As further stated by the Court, the concept of 'legal residence' within the meaning of Regulation 1231/2010 reflects the EU legislature's decision to extend the personal scope of the social security regulations to TCNs, subject to the prior condition that they must remain lawfully on the territory of the relevant Member State.[50] As noted by Melin, the first condition therefore demonstrates that the social security situation of a TCN will be dependent upon his/her immigration status.[51] She further notes that the requirement of legal residency can for example be fulfilled on the basis of EU instruments such as the Blue Card Directive 2009/50,[52] the Long-Term Residence Directive 2003/109,[53] or the Researcher Directive 2016/801,[54] or by virtue of international or domestic immigration rules.[55]

As regards refugees and stateless persons, it follows from Article 2(1) of Regulation 883/2004 that they must be *resident* in an EEA State.[56] This 'additional condition' was recently highlighted by the EFTA Court in its judgment in *Maitz*, which concerned an Austrian national working as a lawyer in Liechtenstein and residing in Switzerland. The EFTA Court stated the following, with reference to the previous CJEU judgment in *Chuck*:[57]

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[46] For further reading on these two conditions see Cornelissen (n 26) 91-93.
[47] Case C-477/*17 Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others* EU:C:2019:60. See also the subsequent order of the CJEU in Case C-523/20 *Koppány 2007 Kft. v Vas Megyei Kormányhivatal* EU:C:2021:160.
[48] *Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others* (n 47) para 34.
[49] ibid para 36.
[50] ibid para 38.
[51] Melin (n 30) 33-34.
[52] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment [2009] OJ L155/17.
[53] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.
[54] Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or education projects and au pairing (recast) [2016] OJ L132/21.
[55] Melin (n 30) 33-34.
[56] See also Pennings (n 34) 38.
[57] Case E-5/22 *Christian Maitz v AHV-IV-FAK* [2023] EFTA Court judgment of 24 January 2023, para 37. In its judgment in Case C-331/06 *K. D. Chuck v Raad van Bestuur van de Sociale Verzekeringsbank* EU:C:2008:188 para 30, the CJEU stated the following: 'Article 2 of that regulation requires only, for its application, the fulfilment of two conditions: the worker must be a national of one of the Member States (or be a stateless

> Article 2(1) of Regulation 883/2004 provides that the regulation is applicable to nationals of EEA States, stateless persons and refugees residing in an EEA State who are or have been subject to the legislation of one or more EEA States, and to members of their families and their survivors. The European Court of Justice has held in relation to the equivalent provision of Regulation 883/2004's predecessor, 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 1971 L 149, p. 2), that Article 2 prescribes an additional condition vis-à-vis stateless persons and refugees, namely, that they must be resident in an EEA State, whereas in respect of nationals of EEA States, this condition does not apply (compare the judgment in *Chuck*, C-331/06, EU:C:2008:188, paragraph 30). This entails that the provisions of Regulation 883/2004 may apply to EEA nationals, regardless of whether or not they are resident in an EEA State.

It is not entirely clear whether the additional condition of residence in Regulation 883/2004 means that refugees and stateless persons must be residing *legally* in the territory of a Member State, a condition which is explicitly stipulated in relation to TCNs pursuant to Article 1 of Regulation 1231/2010. Based on a reading of *Balandin*, however, it seems clear that the condition of residence in the context of Article 2(1) of Regulation 883/2004, which is only applicable to stateless persons and refugees, serves a different purpose than the concept of 'residence' in Article 1(j). Moreover, the 1951 Refugee Convention and the 1954 Convention on the Status of Stateless Persons (which are referred to in Article 1(g) and (h) of Regulation 883/2004) both provide in their Articles 24 that the Contracting Parties shall accord to refugees and stateless persons *lawfully staying* in their territory the same treatment as is accorded to their nationals with respect to *inter alia* social security. This seems to imply that refugees and stateless persons must, according to Article 2(1) of Regulation 883/2004, be legally resident in an EEA State, i.e. on the basis of domestic immigration law and/or the relevant secondary legislation in EU law. For instance, if the person concerned has received international protection and subsequently a residence permit in a Member State according to the Qualification Directive 2011/95.[58]

Finally, it follows from Article 4 of the Nordic Convention that the application of Regulation 883/2004 is extended to all persons who are *resident* in a Nordic country. The concept of residence is defined in Article 5 of the Convention, which provides that a person shall be considered to be resident in a Nordic country *in accordance with the laws of the country concerned*. Thus, residence is determined with reference to the relevant national law (e.g. in Norway, the Immigration Act of 15 May 2008).[59] Article 5 also stipulates that in the case of a conflict about which legislation is to be applied, the person concerned is considered

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person or refugee residing within the territory of one of the Member States) and be or have been subject to the legislation of one or several Member States'.

[58] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9. This Directive is not part of EEA law.

[59] *Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)* (LOV-2008-05-15-35).

to be resident in the Nordic country where he or she is registered in the national register, unless there are any particular indications to the contrary.

4.2 CROSS-BORDER ELEMENT

The requirement of a cross-border element underpins the application of all the relevant instruments, i.e. Regulation 883/2004, Regulation 1231/2010 and the Nordic Convention.[60] Within a clearly defined national situation, there is never a need for coordination of two States' social security systems.[61] The cross-border requirement applies to anyone who wants to avail themselves of the relevant instruments, i.e. EU nationals, TCNs, refugees, stateless persons, etc. In relation to Regulation 883/2004, the CJEU has on several occasions stressed the importance of a cross-border element being present.[62] For instance in *Khalil*, the Court stated that workers who were stateless persons and refugees residing in the territory of one of the Member States and their family members, could not rely on rights conferred by the former Social Security Regulation 1408/71 where they were in a situation which was 'confined in all respects within that one Member State'.[63] In general, the cross-border element is not interpreted strictly, and it is enough if the facts of the case are not limited to a single state, for example where the person is a national of another EEA State, or when parents stay in a different EEA state than their children.[64] Accordingly, moving beyond borders is not required as such.

In the context of EEA law, it could in fact be more of a challenge for TCNs, stateless persons and refugees to exercise free movement rights. This is because immigration policy and residence rights for TCNs fall outside the scope of the EEA Agreement.[65] As a result, neither the Schengen *acquis* nor the Common European Asylum System are part of EEA law.[66] The situation is therefore somewhat different than in EU law, where refugees, stateless persons and TCNs may enjoy certain, albeit sometimes limited, free movement

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[60] Unlike Regulation 883/2004 or the Nordic Convention, the cross-border requirement is *explicitly* referred to in Article 1 of Regulation 1231/2010 concerning TCNs. However, Spiegel (n 4) 73-74, notes that although the cross-border requirement is not explicitly referred to in Regulation 883/2004, it could be deducted from the wording 'who are or have been subject to the legislation of one or more Member States' in Article 2(1) and (2). The same could also be said about the Nordic Convention, which in its preamble refers to e.g. 'persons who move between the Nordic countries'.

[61] Jaan Paju, *The European Union and Social Security Law* (Hart 2017) 22.

[62] See further Spiegel (n 4) 74-76.

[63] *Khalil* (n 29), para. 72.

[64] Spiegel (n 4) 75, and Pennings (n 34) 29. On the consequences of Regulation 1231/2010 not being applicable to Switzerland, see Case C-247/09 *Alketa Xhymshiti v Bundesagentur für Arbeit - Familienkasse Lörrach* EU:C:2010:698, where the Court held that the condition of a cross-border element was not fulfilled since the situation concerned a non-member country (Switzerland) and a single Member State (Germany). For further reading, see Cornelissen (n 26) 94-95.

[65] As also stipulated in the specific Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement [2007] OJ L124/23. For further reading on the incorporation and status of Directive 2004/38 in EEA law, see Christian N K Franklin, 'Square Pegs and Round Holes: The Free Movement of Persons Under EEA Law' (2017) 19 Cambridge Yearbook of European Legal Studies 165, 165-186. See also Ciarán Burke and Ólafur Ísberg Hannesson, 'Citizenship by the back door?' (2015) 52 Common Market Law Review 1111, 1111-1134. See also Christian N K Franklin and Halvard Haukeland Fredriksen, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 Common Market Law Review 629, 638-640.

[66] Franklin, 'Free Movement Rights in Norway' (n 42) 181-182.

and/or residence rights based on the relevant applicable secondary legislation, such as the Long-Term Residence Directive (which is not part of EEA law). Under EEA law, in particular Directive 2004/38,[67] TCNs, refugees and stateless persons who are family members of EEA nationals may however enjoy *derived* free movement and residence rights.[68]

5 SOME PROBLEMS AND CHALLENGES

According to the picture which has emerged so far, the Nordic Convention, Regulation 883/2004 and Regulation 1231/2010 may all play a role in social security coordination cases involving the Nordic countries and other EEA States. The interaction between those instruments may however cause some challenges, resulting in questions such as who is covered, on what basis and in which area. These kinds of challenges are referred to in the report of the Norwegian Legal Commission (NOU:2021:8 – *Trygd over landegrensene*), which also provides a few examples on certain complex scenarios, e.g. concerning the inclusion of Greenland or Svalbard in the Nordic Convention, and whether TCNs who are insured and resident in a Nordic country can export certain social security benefits to other EEA States.[69] In addition to those examples, the following two scenarios are presented.

5.1 SCENARIO 1: THE STATUS OF REFUGEES/STATELESS PERSONS VIS-À-VIS TCNS

Upon applying for international protection, the Norwegian immigration authorities grant person A with refugee status in accordance with the 1951 Refugee Convention. A, who is resident and employed in Norway and thus a member of the national insurance scheme, subsequently becomes ill and is entitled to sickness benefits. Since refugees fall under the personal scope of Article 2(1) of Regulation 883/2004, A would be entitled to export her sickness benefits to all the EU Member States, the EEA/EFTA States and Switzerland. In contrast, if A would be a TCN without refugee status, she would not be covered by Regulation 883/2004, and Regulation 1231/2010 would not be applicable since Norway is not bound by it. Thus, the possibility to export the benefits for example to the EU Member State of Germany seems precluded. However, by virtue of Regulation 883/2004 *via* the Nordic Convention, she could export her Norwegian sickness benefits to another Nordic country, e.g. Iceland.

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[67] Directive 2004/38/EC of the European Parliament 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EE [2004] OJ L158/77, incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 (n 65).

[68] See for example the recent judgment of the EFTA Court in Case E-6/23 *MH v Påtalemyndigheten* [2024] EFTA Court judgement of 2 July 2024, paras 36-37. Also, as noted by Franklin, 'Free Movement Rights in Norway' (n 42) 181-182, certain free-standing rights for TCNs may flow from Directive 2004/38.

[69] Norwegian Legal Commission, *Trygd over landegrensene: Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelse* (n 11) 225.

5.2 SCENARIO 2: DENMARK'S LIMITATION OF CERTAIN BENEFITS TO NORDIC NATIONALS

Even in intra-Nordic cases complex issues can emerge. This is especially because of Denmark's reservation to the application of the Nordic Convention to TCNs. Article 3(3) of the Convention states that only 'Nordic nationals' are entitled to family benefits, unemployment benefits and basic pension in Denmark. Article 3(3) is further detailed in Annex 3 of the Administrative Agreement to the Convention, which explains that these limitations apply to 'persons who are not nationals of European Economic Area (EEA) countries or Switzerland (nationals of third countries), given that nationals of EEA countries and Switzerland enjoy rights under the Regulation'. The background to Denmark's limitation in Article 3(3) is that Denmark is not bound by Regulation 1231/2010. It seems, however, that Article 3(3) of the Convention excludes by definition not only TCNs but arguably also refugees and stateless persons who are not nationals of an EEA State or Switzerland. In any event, because refugees and stateless persons are clearly covered by the personal scope of Regulation 883/2004, which moreover is directly applicable in Denmark, these categories of persons should be able to fully rely on the Regulation concerning unemployment benefits, basic pension and family benefits.

6 CONCLUDING REMARKS

In any area of law where overlapping sets of rules apply, complex legal issues may naturally follow. This is especially the case when it comes to coordinating social security cases in the Nordic countries which are composed of both EU Member States and EEA/EFTA States, and where three different legal instruments may all have a role to play. The Nordic Convention has been in place since 15 September 1955, thus soon celebrating 70 years of existence. Today, the role of the Convention is merely supplemental in relation to the EU social security regulations, which function as the primary coordination instruments. However, the Convention still has an important role to play. In addition to providing for certain more favourable rights, the Convention also extends the application of Regulation 883/2004 to TCNs who are resident in a Nordic country. The inapplicability of Regulation 1231/2010 in intra-Nordic situations (i.e. to Denmark, Iceland and Norway) is therefore less problematic. The Convention has also played in favour of Nordic nationals, as follows from the judgment of the EFTA Court in *Jonsson*. In that case, it was precisely because of the Nordic Convention that a Swedish national who was working in Svalbard (and resident in Sweden) fell within the scope of protection of EEA law (Regulation 1408/71) and therefore also the jurisdiction of the EFTA Court.

The direct inclusion of refugees and stateless persons in the personal scope of Regulation 883/2004 is admittedly rather peculiar in the context of EEA law, an area of law which for most purposes does not cover matters related to immigration or residence rights for TCNs, unlike EU law. In fact, that is precisely the reason why Regulation 1231/2010 has not been incorporated into the EEA Agreement. However, the CJEU judgment in *Khalil* explains why refugees and stateless persons were included specifically in the personal scope of Regulation 883/2004, i.e. because of certain international commitments which the EU Member States had undertaken before the Community was founded in 1957, such

as the 1951 Refugee Convention. In its recent judgment in *Maitz*, the EFTA Court explicitly referred to the inclusion of refugees and stateless persons in the personal scope of Regulation 883/2004 without questioning the lawfulness of that inclusion, which might perhaps be taken to suggest implicit endorsement.[70] In any case, it is difficult to see why the inclusion of refugees and stateless persons in Regulation 883/2004 (the aim of which is merely coordination rather than harmonisation) could create problems in EEA law. In the end, these categories of persons must satisfy the requirements of being resident in an EEA state and in a cross-border situation, similarly to TCNs under Regulation 1231/2010.

Despite the fact that refugees, stateless persons and TCNs have in common that they are not EEA nationals, their status is not entirely the same under the EU/EEA social security regulations. Since refugees and stateless persons are covered by Regulation 883/2004, they may benefit from the EU/EEA coordination system in all the EU Member States and the EEA/EFTA States.[71] In contrast, the possibility for TCNs to rely on Regulation 883/2004 via Regulation 1231/2010 seems excluded when it comes to Denmark, Iceland or Norway. Of course, in such scenarios the Nordic Convention might kick in and bring the TCN concerned within the scope of application of Regulation 883/2004 in an intra-Nordic scenario. Denmark, however, reserved certain rights to 'Nordic nationals' under Article 3(3) of the Nordic Convention, as further stipulated in Annex 3 to the Administrative Agreement. In the absence of Denmark's participation in Regulation 1231/2010, the reservation in Article 3(3) concerning TCNs is logical – although similar reservations were not made by Iceland or Norway, which are not bound by Regulation 1231/2010, either. The problem with Denmark's reservation is, however, that it appears to be too broad, since it could effectively exclude refugees and stateless persons who are not Nordic nationals to the entitlement of certain rights and benefits under Regulation 883/2004. However, altering the scope of an EU regulation, which is directly applicable in Denmark, is not permitted. Thus, refugees and stateless persons should be able to rely on Regulation 883/2004, for instance if they want to export Icelandic unemployment benefits to Denmark while searching for a job.

[70] Of course, the *Maitz* case (n 57) did not concern issues related to the status of refugees and stateless persons. See, however, for comparison, Opinion of AG Jacobs in Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil* EU:C:2000:657 paras 40-44.

[71] For reasons of simplification Switzerland is not mentioned here.

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

MARTIN ANDRESEN*

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

* Norwegian Directorate for Labor and Welfare (NAV).

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.

EEA LAW IN THE NORWEGIAN NATIONAL INSURANCE COURT – A SELECTION FROM RECENT CASE LAW

DAG SØRLIE LUND*

The National Insurance Court of Norway (NIC) occupies a unique position within the Norwegian legal system, as a specialized court for social security and pension disputes. This article examines how the NIC adjudicates cases involving EEA law, focusing on selected cases from 2023 and 2024. It explores the NIC's engagement with the jurisprudence of the Court of Justice of the European Union (CJEU), the EFTA Court, and the Norwegian Supreme Court. At stake is not merely the resolution of individual disputes but the broader question of how national courts function as decentralized enforcers of EEA law. The analysis underscores the NIC's evolving role in ensuring legal certainty, fostering judicial dialogue, and upholding the rule of law. In doing so, it sheds light on the intersection of national and European legal orders, illustrating how a specialized court contributes to the integrity of the EEA legal framework.

1 INTRODUCTION

Before presenting a selection of EEA-related rulings from the National Insurance Court (NIC), it is useful to provide a brief introduction of this institution,[1] and some context regarding its application of EEA law. Despite its English name, the NIC is not formally a 'court' as defined by Article 87 of the Constitution of the Kingdom of Norway.[2] A more accurate translation would arguably be 'the National Insurance Tribunal'. A proposal to include the National Insurance Court among the ordinary courts of justice, is currently being reviewed, cf. Official Norwegian Reports (NOU) 2023: 11.

The NIC is an independent judicial agency under the Ministry of Labour and Social Inclusion, established by law in 1967.[3] It was established primarily to promote the rule of law in social security and pension cases and adjudicates disputes related to such issues. It handles appeals concerning rights and duties under various Norwegian statutes, including the National Insurance Act (NIA), the Family Allowance Act, and the War Pensions Act, as well as public occupational pension schemes. The NIC replaces the district court in the judicial hierarchy, and its rulings are reviewed by the ordinary Courts of Appeal in the appellant's jurisdiction. Unlike the ordinary district courts that only have regional jurisdiction, the NIC has a national jurisdiction, receiving appeals from all parts of Norway. The permanent

* Judge, National Insurance Court of Norway. LL.M Universitat Pompeu Fabra, LL.M University of Oslo.

[1] I have not been able to find presentations of the NIC in any academic journals in English. There is, however, a brief description in English of the NIC on its official website, see: <https://trygderetten.no/en/about-national-insurance-court> accessed 5 March 2025.

[2] 'The ordinary courts of justice are the Supreme Court, the courts of appeal and the district courts. They hear and make decisions in civil cases and criminal cases'.

[3] *Lov om anke til Trygderetten (trygderettsloven)* (LOV-1966-12-16-9) s.9.

members of the NIC are appointed by the King in Council, and are fully independent.[4] These members, commonly referred to as 'social security judges', possess expertise in law, medicine, or vocational rehabilitation. The NIC also employs deputy judges and temporary acting judges.[5]

In 2023, the NIC achieved a record high case resolution rate, the highest since 2004.[6] It received 3108 new appeals, primarily from the Norwegian Labour and Welfare Administration (NAV) Appeals Management Unit (*Nav klageinstans*), which accounted for about 92% of the total appeals.[7] The NIC resolved a total of 5 149 appeals.[8] A search in the Norwegian *Lovdata* database found 197 cases that involved EEA law for 2023 alone. Considering the average in the ordinary courts of 26 cases per year that raised substantial EEA law related questions, this is a very high number, making the NIC something of a national champion in settling EEA related cases.[9]

The NIC has applied EEA law ever since the entry into force of the EEA Agreement. However, the NIC was criticised by the Expert Commission mandated to investigate the so-called Norwegian social security scandal (or NAV scandal), essentially for failing to realize the consequences of EEA law for social security rights.[10] As pointed out by Bekkedal, however, this is not the only possible account of the matter.[11] He notes that the NIC had issued 'at least nine decisions that Norwegian law or practice was not compliant with Regulation 883/2004'.[12] Moreover, as noted by Ikdahl and Eriksen, the NIC had concluded

[4] All the permanent members of the NIC have to be appointed according to the procedure in Article 21 of the Constitution of the Kingdom of Norway: 'The King shall choose and appoint, after consultation with his Council of State, all senior civil and military officials. These officials shall have a duty of obedience and allegiance to the Constitution and the King. […]'. Judges in the ordinary courts were up until recently also appointed by the procedure in Article 21, but now have a slightly different procedure laid down in Article 90, adopted in 2024: 'Judges are appointed by the King on the recommendation of an independent council. Specific provisions concerning the appointment of judges shall be laid down by law'.

[5] In 2023, the NIC had a total of 45 judges, 14 deputy judges and 2 temporary acting judges, cf. the National Insurance Court, 'Annual report for 2023' (2023) 9 <https://trygderetten.no/sites/default/files/2024-06/%C3%85rsrapport%202023_Trygderetten_0.pdf?v=845> accessed 5 March 2025.

[6] ibid 4.

[7] ibid 15.

[8] ibid 17.

[9] See Halvard Haukeland Fredriksen, 'EU/EØS-rett i norske domstoler' (2011) 22 <https://bora.uib.no/bora-xmlui/bitstream/handle/1956/8056/E%C3%98S-rett%20i%20norske%20domstoler.pdf?sequence=1&isAllowed=y> accessed 5 March 2025.

[10] Cf. Norwegian Official Report, *Blindsonen: Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området* (NOU 2020: 9) 26: 'Whilst NAV bears primary responsibility for the misapplication, the Ministry of Labour and Social Affairs, the National Insurance Court, the Norwegian Prosecuting Authority, lawyers, courts and academia carry a considerable responsibility as well. A common denominator is that none of them has devoted sufficient attention to the consequences of EEA law, particularly after the incorporation of the new social security regulation into the EEA Agreement'. The NIC was also mentioned in a Reasoned Opinion from 2022 in which the EFTA Surveillance Authority *inter alia* examined the practice of the NIC, which disclose[d] that the NIC '[did] not correctly apply Article 20 of Regulation 883/2004,118 nor [did] it apply Article 36 EEA in inpatient treatment cases' (para 106). The matter is pending before the EFTA Court as Case E-9/23 *EFTA Surveillance Authority* v *The Kingdom of Norway*. The Reasoned Opinion is available here: <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Supplementary%20Reasoned%20opinion%20-%20Own-initiative%20case%20concerning%20access%20to%20in-patient%20treatment%20in%20other%20EEA%20States%20.pdf> accessed 5 March 2025.

[11] Tarjei Bekkedal, 'The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal' (2020) 7(3) Oslo Law Review 145, 151.

[12] ibid. One early example is TRR-2016-2497, where the NIC pointed out that Article 21 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social

that the 'stay-in-Norway' requirement for unemployment benefits in the NIA was in breach of EEA law as early as 2010.[13] This demonstrates the central role of the NIC in upholding the EEA social security rights in Norway. As recently emphasized by president of the EFTA Court, Páll Hreinsson, '[t]he contribution of national judges should be recognised, as their awareness and dedication to their role as EEA law judges is instrumental in ensuring the effectiveness of the Agreement'.[14]

Notwithstanding the fairness of the critique from the Expert Committee, the social security scandal has certainly raised the awareness of EEA law within the NIC. And I believe its dedication is firmly demonstrated by the following selection of cases.

2 TRR-2022-1588 | COVID-STRANDED IN SPAIN

The first case concerns the entitlement to unemployment benefits for an individual who was stranded in Spain due to COVID-19 travel restrictions. The claimant, the managing director of a Norwegian company, was in Spain in March 2020 to set up a subsidiary. While in Spain, several COVID-19 measures were introduced both nationally and regionally, making it impossible for him to return to Norway. Due to the economic shutdown in Norway, the claimant decided to lay off the entire staff, including himself. His application for unemployment benefits was denied by NAV due to a requirement under § 4-2 of the NIA of being physically present in Norway in order to qualify for unemployment benefits.[15] The question before the NIC was whether this requirement to stay in Norway was compatible with EEA law in the exceptional circumstances of the COVID-19 pandemic that made it impossible to return to Norway.

The Norwegian Supreme Court had previously held that the 'stay-in-Norway' requirement was compatible with EEA law.[16] The Supreme Court relied on two Advisory Opinions from the EFTA Court, concluding that EEA states are allowed to require those receiving unemployment benefits to stay in Norway in situations other than those specifically stated in Articles 64-65a of Regulation 883/2004 on the coordination of social security systems,[17] and that the EEA Agreement's general rules on free movement are not applicable.[18]

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security systems [2004] OJ L166/1, provides the insured person a right to reside or stay in other EEA States whist receiving a cash benefit from the competent state.

[13] Christoffer Conrad Eriksen and Ingunn Ikdahl, 'God forvaltning i EØS-rettens grenseland – Lærdommer fra trygdeskandalen' (2024) 63(6) Lov og Rett 369, 373, with reference to TRR-2009-2265.

[14] Páll Hreinsson, 'The EFTA Court – Past, Present, Future' (2023) 62(2) Lov og Rett 77, 78.

[15] *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28) s.4-2 , headed 'Stay in Norway', reads as follows: 'In order to be entitled to unemployment benefits, the member must stay in Norway. The Ministry may issue regulations providing for exemptions from the requirement to stay in Norway'.

[16] See HR-2023-301-A. The judgment has not been translated into Norwegian, but an English summary can be found here: <https://www.domstol.no/en/supremecourt/rulings/2023/supreme-court-criminal-cases/HR-2023-301-A/> accessed 5 March 2025.

[17] Regulation 883/2004 (n 12).

[18] Case E-13/20 *O v Arbeids- og velferdsdirektoratet* [2021] EFTA Court judgement of 30 June 2021, and Case E-15/20 *Criminal Proceedings Against P* [2021] EFTA Court judgement of 30 June 2021. These advisory opinions have been criticized for not being in line with the case law from the CJEU, see e.g. Mads Andenæs, 'Two Opinions on free movement and unemployment benefits in the EFTA Court: A Bit of a Dog's Breakfast' (*EU Law Live*, 9 July 2021) EU Law Live <https://eulawlive.com/op-ed-two-opinions-on-free-movement-and-unemployment-benefits-in-the-efta-court-a-bit-of-a-dogs-breakfast-by-mads-andenaes/> accessed 5 March 2025, and Mads Andenæs and Tarjei Bekkedal, 'The reach of jobseeker rights to free

The NIC noted that the Supreme Court in HR-2023-301-A found the 'stay-in-Norway' requirement in § 4-2 NIA compatible with EEA law under normal circumstances, but acknowledged that free movement rules could apply in situations falling outside Regulation 883/2004.

Referring to these provisos in the Supreme Court's ruling, the NIC distinguished the case from the one decided by the Supreme Court, citing the extraordinary circumstances of the COVID-19 pandemic. These circumstances were outside the normal situations referred to by the Supreme Court. The NIC emphasized that the appellant was involuntarily stranded in Spain due to a national lockdown and had no means of returning to Norway. The NIC also referred to guidelines from the Administrative Commission during COVID-19, which suggested flexibility in applying residency and stay requirements due to travel restrictions.[19]

The NIC found that the 'stay-in-Norway' requirement constituted a disproportionate restriction on the appellant's right to free movement under the EEA Agreement and reversed the decision. The appellant was thus granted unemployment benefits for the period he had been stranded in Spain.

3 TRR-2023-2125 | COVID-STRANDED DUE TO ENTRY RESTRICTIONS

The second case concerns the validity of a decision by NAV to recover unemployment benefits granted to an appellant who was staying in another EEA state for medical treatment. The applicant initially received sickness benefits, which were later replaced by unemployment benefits. Once NAV discovered that the appellant was not staying in Norway, as required by § 4-2 NIA, his payments were stopped. NAV then sought recovery of the benefits he had received while staying in the other EEA state.

The NIC partially reversed NAV's decision, finding that the 'stay-in-Norway' requirement could not be enforced during periods in which strict entry restrictions were in place in Norway. The NIC relied on the ruling in TRR-2022-1588, and held that the same applied with respect to the appellant who stayed involuntarily in another EEA state due to the *entry restrictions* imposed by Norway. This distinguished the case from the normal situations referred to by the Norwegian Supreme Court in HR-2023-301-A. The NIC found that the 'stay-in-Norway' requirement constituted a disproportionate restriction on the appellant's right to receive services in other EEA states, cf. Article 36 of the EEA Agreement.

In its application of the proportionality test, the NIC analysed the various entry restrictions in place during the period in question, and ruled that for the periods in which the most restrictive measures were in place, the appellant had no practical way to enter Norway. Consequently, NAV could not recover the unemployment benefits the appellant had received during these periods. However, the NIC also found that an amendment to the entry restrictions had made it possible to enter Norway. Therefore, unemployment benefits received after these amendments entered into force could be recovered.

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movement: On the complementary relationship between primary and secondary law' (2022) 9(1) Oslo Law Review 4.

[19] Guidance note on Covid-19 pandemic (AC 074/20REV3). Included as Annex I to the Administrative Commission for the Coordination of Social Security Systems Decision No H14 of 21 June 2023, available at: Decision - 2024/594 - EN - EUR-Lex (accessed 5 March 2025).

4 TRR-2022-1437 | UNEMPLOYMENT BENEFITS TO A LAID-OFF WORKER RESIDING IN ANOTHER EEA STATE

The third case concerns an appeal against the denial of unemployment benefits due to the appellant's failure to meet the requirement of being a genuine job seeker whilst residing in another EEA State.

In order to be eligible for unemployment benefits, a claimant must be considered a genuine job-seeker, as defined by § 4-5 NIA. This provision defines a genuine job seeker as someone who is capable of work, willing to actively seek work, willing and able to accept any job full-time or part-time, anywhere in Norway, and to participate in work training programs.

The appellant had not accepted all these conditions unconditionally, mainly due to the fact that he resided in another EEA State, and also his particular situation as laid off from his Norwegian employer while residing in another EEA State. The NIC found that NAV had not sufficiently considered the specific circumstances of the appellant's layoff in its assessment of his eligibility for unemployment benefits. The NIC emphasized that the appellant was covered by Article 65(1) of Regulation 883/2004, which should have been taken into account.[20] The NIC recalled that for situations regulated by Article 65(1), the 'stay-in-Norway' requirement cannot be applied.[21]

The NIC further noted that applying the genuine job seeker requirement for someone regulated by Article 65(1) too strictly would undermine the effectiveness of that provision. This requirement had to be seen in light of the other criteria for unemployment benefits, particularly the objective of returning the unemployed to the labour market in Norway as soon as possible. The NIC held that this cannot apply equally to workers covered by Article 65 of Regulation 883/2004. According to the NIC, this also explained why the 'stay-in-Norway' requirement does not apply in these situations. This was particularly so for laid-off workers, which empirical studies had shown are not prioritized by NAV and, in practice, do not get job offers or get invited to work training by NAV.[22]

5 TRR-2022-3184 | UNEMPLOYMENT BENEFITS TO A FREELANCER RESIDING IN ANOTHER EEA STATE

The fourth case concerns an appeal against the denial of unemployment benefits to a freelance translator who was residing in another EEA state and providing translation services to Norwegian courts and hospitals.

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[20] Regulation 883/2004 (n 12) Article 65(1) reads as follows: 'A person who is partially or intermittently unemployed and who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself available to his employer or to the employment services in the competent Member State. He shall receive benefits in accordance with the legislation of the competent Member State as if he were residing in that Member State. These benefits shall be provided by the institution of the competent Member State'.

[21] The NIC referred to the ruling by the Norwegian Supreme Court in HR-2023-301-A, paras 80-83.

[22] Ragnhild Haugli Bråten et al, ' Virkninger av endringer i permitteringsregelverket' (2018) Report 1/2018 31 <https://www.frisch.uio.no/publikasjoner/pdf/rapp18_01.pdf> accessed 5 March 2025, and Kåre Hansen and Henrik Kvadsheim, 'Permitteringsordningen – en gjøkunge i NAV-systemet?' (2008) International Research Institute of Stavanger 39 <https://norceresearch.brage.unit.no/norceresearch-xmlui/bitstream/handle/11250/2632870/IRIS%202008-005.pdf?sequence=1&isAllowed=y> accessed 5 March 2025.

The appellant had applied for unemployment benefits after experiencing a reduction in her freelance work due to the COVID-19 pandemic. Her claim was rejected since she was not considered 'partially or intermittently unemployed', as required by Article 65(1) of Regulation 883/2004. Rather NAV deemed her as 'wholly unemployed', meaning the EEA state of residence was the competent state, cf. Article 65(2).[23]

The NIC fully reversed NAV's decision, granting the appellant unemployment benefits. The NIC found that NAV had erred in law with respect to its assessment of freelancers' connection to an employment relationship and in finding the appellant wholly unemployed. It was noted that freelance work is included in the basis for unemployment benefits if the income is reported in the State Register of Employers and Employees.[24] The NIC also emphasized that an administrative practice making it harder for freelancers residing in other EEA countries to receive unemployment benefits compared to those residing in Norway would violate the principle of equal treatment under Article 4 of the Regulation.[25]

Finally, it was noted that for someone to be considered 'wholly unemployed', case law from the CJEU requires that 'the worker concerned has completely stopped working',[26] and 'no longer has any link with the competent Member State'.[27] Since the appellant had merely experienced a *reduction* in her freelance work, but continued to get new translation assignments via telephone and video link throughout the period in question, the NIC considered her as 'partially unemployed' and her situation thus regulated by Article 65(1) of Regulation 883/2004, not 65(2).

NAV had relied on a decision by the Administrative Commission for the Coordination of Social Security Systems in its rejection of the appellant's application.[28] The NIC therefore found it appropriate to recall the EFTA Court's finding in *Maitz*:[29]

> Although an Administrative Commission decision may provide aid to social security institutions responsible for applying EEA law, such decisions are not of such a

[23] Regulation 883/2004 (n 12) Article 65(2) reads as follows: 'A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person. An unemployed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject'.

[24] For a description of the State Register of Employers and Employees, reference is made to: <https://www.skatteetaten.no/en/business-and-organisation/employer/the-a-melding/about-the-a-ordning/the_State_Register_of_Employers_and_Employees/> accessed 5 March 2025.

[25] Regulation 883/2004 (n 12) Article 4 reads as follows: 'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof'.

[26] Case C-444/98 *R. J. de Laat* v *Bestuur van het Landelijk instituut sociale verzekeringen* EU:C:2001:165 para 36.

[27] Case C-655/13 *H.J. Mertens* v *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* EU:C:2015:62 para 26.

[28] Decision No U3 of 12 June 2009 concerning the scope of the concept of 'partial unemployment' applicable to the unemployed persons referred to in Article 65(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council [2009] OJ C106/45.

[29] Case E-5/22 *Christian Maitz* v *AHV-IV-FAK* [2023] EFTA Court judgement of 24 January 2023, para 57. Reference was also made to an LL.M thesis by Per Silnes Tandberg, 'Én nøkkel, mange dører. En analyse av trygdeforordningens enstatsprinsipp og lovvalgsreglene som gjelder for EØS-arbeidstakere' (2024).

> nature so as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the relevant EEA rules in a particular field (compare the judgment in *Knoch*, C-102/91, EU:C:1992:303, paragraph 52 and case law cited).

6 TRR-2024-1496 | SICKNESS BENEFITS TO A CIVIL SERVANT WITH ACTIVITY IN TWO EEA STATES

The fifth case concerns a nurse residing in Sweden and working both in Norway and the country of residence. The nurse applied for sickness benefits in Norway after contracting COVID-19 while working in Norway, which made him severely ill. The application was denied with reference to the nurse's status as a 'civil servant' in Sweden, according to Article 13(4) of Regulation 883/2004.

This status meant that Sweden was the competent state according to Article 13(4) of Regulation 883/2004:

> A person who is employed as a civil servant by one Member State and who pursues an activity as an employed person and/or as a self-employed person in one or more other Member States shall be subject to the legislation of the Member State to which the administration employing him is subject.

Since he was no longer working in Sweden at the time due to being severely ill from COVID-19, he was only eligible for sickness benefits there for a short period of time. The appellant was therefore effectively left without sickness benefits from either country.

The NIC reversed the decision and instructed NAV to initiate contact with Swedish social security authorities in order to endeavour to conclude a so-called Article 16 Agreement.[30] NAV's administrative circular on the EEA Agreement's provisions on social security mentions that Article 16 agreements may be considered where the result following from the application of the main rules for determining the applicable legislation are unintended and unfortunate, and in breach of the right to free movement.[31] The result of determining Sweden as the competent state was considered a severe restriction on the appellant's right to free movement. The NIC held that Article 16 is not excluded in such situations.[32] The only condition for using Article 16 is that such an agreement is 'in the interest of certain persons or categories of persons'.[33] The NIC also held that it was immaterial that the worker had not himself requested an Article 16 agreement.

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[30] Regulation 883/2004 (n 12) Article 16 allows for exemptions to the rules for determining the applicable legislation in Articles 11 to 13. Article 16(1) reads as follows: 'Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons'.

[31] NAV, Hovednr.45- 'Rundskriv til EØS-avtalens bestemmelser om trygd ' (R45-00 2025), chapter 2.18. Available at: <https://lovdata.no/nav/rundskriv/r45-00> accessed 5 March 2025.

[32] cf. Case C-101/83 *Raad van Arbeid* v *P.B. Brüsse* EU:C:1984:187.

[33] The CJEU rejected a narrow reading of Article 16, stating in para 25: '[…] that provision makes no reference to the reasons or circumstances which might lead the Member States to derogate from Articles 13 to 16. It follows that, in that respect, the Member States enjoy a wide discretion to which the only limitation is regard for the interests of the worker'.

7 TRR-2022-2987 | ADAPTATION TEXT AND THE PRINCIPLE OF LEGALITY

The sixth case concerns an appeal against the determination of the effective date for when the appellant was to be considered disabled regarding her entitlement to disability benefits.[34] The appellant had moved to Norway from another EEA State, where she had completed several periods of insurance. NAV initially set the date of disablement to 1 October 2015.

However, she had applied for disability benefits as early as 26 October 2011. According to settled administrative practice within NAV, periods of insurance from other EEA States were not aggregated when applying § 12-2(3) NIA, which regulates the entitlement to disability benefits. This practice was based on an adaptation text to Regulation 1408/71, included in Annex VI to the EEA Agreement, that was applicable up until 1 June 2012.[35] The relevant parts of the adaptation text reads as follows:

> The provisions of the Regulation shall, for the purposes of the present Agreement, be read with the following adaptations:
> [...]
> 3. In so far as Norwegian survivors' or disability pension is payable under the Regulation, calculated in accordance with Article 46(2) and by applying Article 45, the provisions of Articles 8-1 section 3, 10-1 section 3 and 10-11 section 3 of the National Insurance Act by which a pension may be granted by making an exception from the general requirement of having been insured under the National Insurance Act during the last 12 months up to the contingency, shall not apply.

The NIC reversed the decision and granted the appellant disability benefits from the earlier date. It held that NAV had erred in law by not aggregating the periods of insurance from the other EEA State. The NIC noted that the adaptation text only refers to the revoked NIA of 1966, and not the NIA of 1997, which is currently in force.

The NIC further noted that the adaptation text makes an exemption from one of the main principles of coordination of social security schemes (the aggregation of insurance periods), and thus limits the rights that migrating workers have according to the Regulation. The NIC considered that an exemption from a main principle of coordination required a clear legal basis. This meant that the adaptation text could not be interpreted as also applying to the NIA of 1997. An exemption for provisions of the NIA of 1997 would have required a decision by the EEA Joint Committee, as per Article 98 of the EEA Agreement.[36] The NIC

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[34] The case was supposed to be reviewed by Gulating Court of Appeal on 18 August 2025, cf. case 24-189404FØR-GULA/AVD2, but the lawsuit from the government has been withdrawn. NAV has, however, expressed disagreement with the NIC in point 12.4.2 of Circular R45-00, and that it will continue its settled administrative practice from the years 1994 to 2012 despite the result in this case.

[35] Adaptation text (t) litra ZC, subparagraph 3 in the former Annex VI to the EEA Agreement. For more on adaptation texts in general, see fact sheet from the EFTA Secretariat, 'Adaptations to EU acts in the EEA Agreement', available here:
<https://www.efta.int/sites/default/files/publications/Fact%20Sheets/EEA_EFTA_Adaptations.pdf> accessed 5 March 2025.

[36] Article 98 of the EEA agreement reads as follows: 'The Annexes to this Agreement and Protocols 1 to 7, 9 to 11, 19 to 27, 30 to 32, 37, 39, 41 and 47, as appropriate, may be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103', available here:

noted that the adaptation text had in fact been updated to include references to other provisions of the NIA of 1997.[37]

8 TRR-2022-3684 | ADAPTION TEXT, NORDIC CONVENTION ON SOCIAL SECURITY, AND THE CENTRE OF INTEREST TEST

The seventh case concerns a Norwegian citizen who had been residing and registered as residing in Sweden, where she studied naprapathy, an education not offered in Norway. She had been supported by loans and grants from the Norwegian State Educational Loan Fund. She worked part-time in Sweden and returned to Norway for summer jobs in 2010, 2011, and 2012. The appellant became permanently disabled in December 2014 and applied for a disability benefit. NAV initially granted her a 100% disability pension, calculated based on limited periods of membership in the Norwegian national insurance scheme. Essentially, she was considered a member of the Swedish social security scheme except for the periods she had worked in Norway during the summers.

The NIC overturned the decision and sent the case back to NAV for a new assessment. The facts of the case meant that the matter was regulated according to Regulation 1408/71. The NIC found that the appellant should be considered as a worker 'attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States', according to Article 14(1)(c)(i).[38] For such workers, the applicable legislation is that of the territory where the worker 'resides', which in turn depends on where the worker's centre of interest is.[39]

NAV had argued that an adaptation text to Regulation 1408/71 made an exemption from the rules for determining the applicable legislation in the Regulation. The text reads as follows:

> Persons who are insured in Norway and covered by this regulation, and who receive loans or grants from the Norwegian State Educational Loan Fund and begin studying in another state where this regulation applies, are covered by the Norwegian National Insurance Scheme. With regard to studies in Denmark, Finland, Iceland, and Sweden, the student must also be registered in the Norwegian Population Register. The student's insurance coverage is independent of the duration of the studies. A student who takes up work in another state where this regulation applies loses their insurance coverage.[40]

<https://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> accessed 5 March 2025.

[37] See inter alia subparagraph 4 in point 1 of adaptation text (t) point ZC, which was updated by Decision of the EEA Joint Committee No 8/2000 of 4 February 2000 amending Annex VI (Social security) to the EEA Agreement [2000] OJ L103/16, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22000D0008&qid=1740614417116> accessed 5 March 2025.

[38] This provision corresponds to Regulation 883/2004 (n 12) Article 13(1)(a).

[39] 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 [2009] OJ L284/1, Article 11.

[40] Unofficial translation by the author. The text in Norwegian reads as follows: 'Personer som er trygdet i Norge og omfattet av denne forordning, og som mottar lån eller stipend fra Statens lånekasse for utdanning

The NIC rejected the argument that the adaptation text intended to deviate from the general rules for determining the applicable legislation and read it as an imprecise formulation of the *lex loci laboris* principle, which did not regulate a situation where a student worked in two EEA States. The NIC further relied on its own case law where registration in the population register in other Nordic countries does not necessarily result in the loss of membership in the Norwegian social security scheme.[41]

The NIC also rejected the argument that the Nordic Convention on Social Security,[42] which has a different definition of 'residence' than Regulation 883/2004, could result in the loss of rights under the Regulation. Article 1(6) of the Nordic Convention on Social Security defines 'residence' as '[…] residing in a Nordic country according to the country's population registration unless special reasons indicate otherwise'.[43]

The NIC considered that the appellant's centre of interest was Norway during the entire period in question. She was only residing in Sweden to study for a profession that was not offered in Norway. Her family also resided in Norway. The NIC noted that the appellant's part-time work in Sweden did not constitute a significant portion of her employment, and her primary income sources were loans and grants from Norway and her summer jobs in Norway. The requirement of being registered as residing in Sweden was a formality necessary to take her exams there and could not be decisive for the assessment of where she had her centre of interest. Furthermore, she stayed on in Sweden after her graduation to get her authorization as a naprapath, which is not possible in Norway.[44] Finally, the NIC also found that she intended to return to Norway after getting her authorization.

9 TRR-2021-1525 | MINIMUM BENEFIT

The eighth and last case concerns an appeal regarding the calculation of a disability benefit and the entitlement to a guarantee supplement under Article 58 of Regulation 883/2004.

The appellant was a Norwegian citizen who had insurance periods both from Norway and Ireland. He was granted a disability benefit in Norway in 2019 based on an 80% disability for work. He was denied a similar benefit from Ireland. The disability pension from Norway was calculated pro rata as stipulated by Article 52(1)(b) of Regulation 883/2004, which resulted in a lower amount than the minimum annual benefit specified in § 12-13 second paragraph NIA.

The appellant appealed, arguing that the benefit should be calculated based on him being 100% disabled for work, and that he should be awarded a guarantee supplement under Article 58 of Regulation 883/2004. The NIC had requested an Advisory Opinion from the EFTA Court concerning how the minimum annual benefit was to be considered with respect

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og begynner å studere i en annen stat der denne forordning får anvendelse, er dekket av den norske folketrygden. Med hensyn til studier i Danmark, Finland, Island og Sverige må studenten også være oppført i det norske folkeregisteret. Studentens trygdedekning er uavhengig av studienes varighet. En student som tar arbeid i en annen stat der denne forordning får anvendelse, mister sin trygdedekning'.

[41] TRR-2022-2240.

[42] Nordic Convention on Social Security (adopted on 12 June 2012, entered into force 1 May 2014).

[43] Unofficial translation by the author. In Norwegian the wording reads as follows: '[…] bosatt i et nordisk land i henhold til landets folkeregistrering dersom ikke særlige grunner tilsier noe annet'.

[44] Naprapath is a protected title in Sweden, see: <https://naprapathogskolan.se/the-scandinavian-college-of-naprapathic-manual-medicine#preferenser> accessed 5 March 2025.

to Article 58.[45] The EFTA Court clarified that the minimum annual benefit was indeed a minimum benefit, even if it was reduced proportionally for shorter insurance periods.[46]

The NIC fully reversed NAV's decision, granting the appellant a guarantee supplement to ensure the disability pension meets the minimum annual benefit level. The NIC emphasized that the purpose of the minimum annual benefit is to ensure a minimum income level for recipients, aligning with the objectives of Article 58. Consequently, Article 58 guaranteed the appellant what he would have received as a minimum annual benefit if all his insurance periods had been spent in Norway, which was more than the maximum of 40 years. The NIC thus concluded that the appellant had a right to a full minimum annual benefit, and that insurance periods from Ireland also had to be aggregated when considering his right to the minimum benefit from Norway. The fact that Ireland had rejected his application for an Irish disability benefit was without relevance to this assessment. The NIC also concluded that the appellant's disability for work should be set at 100%, based on medical evidence and the appellant's limited income-earning capacity.

The NIC also concluded that a change in NAV's administrative practice that had taken place in 2013, in which NAV granted the minimum annual benefit as a minimum benefit, had been in breach of EEA law. The previous administrative practice had, however, also been in breach of EEA law, as account had been taken only of periods of insurance from other EEA States that had granted a pension or disability benefit.

10 CONCLUSION

The above sample of EEA related cases from 2023 and 2024 shows the wide range of EEA questions that end up before the NIC. They also demonstrate the NIC's commitment to upholding the rule of law and EEA law more generally. In doing so, the NIC engages with case law from the CJEU, the EFTA Court and the Norwegian Supreme Court, and have dealt with a number of novel issues that did not have a clear-cut solution in existing case law. This is only natural considering the number of rulings the NIC decides in a year. Although the NIC has applied EEA law since the very beginning of the EEA, the first request for an Advisory Opinion was not sent to the EFTA Court until 9 September 2020.[47] Since then, however, the NIC has requested Advisory Opinions in a total of four cases, fully embracing its central role in the EEA legal system.[48] As noted by Fredriksen: '[…] once a tribunal has become aware of the relevance of EEA law to its decision making, and discovered the benefits of leaving hard questions of EEA law to the EFTA Court, it might turn into a habit'.[49]

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[45] See the National Insurance Court, 'Request for an Advisory Opinion in Appeal Case No 21/1525' (2023) <https://eftacourt.int/download/3-23-request-ao/?wpdmdl=8660> accessed 5 March 2025.
[46] Case E-3/23 *A* v *Arbeids- og velferdsdirektoratet* [2024] EFTA Court judgement of 18 April 2024.
[47] In what later became Case E-13/20 *O* v *Arbeids- og velferdsdirektoratet* (n 18).
[48] The other three are as follows: Case E-2/22 *A v Arbeids- og velferdsdirektoratet* [2022] EFTA Court judgement of 29 July 2022, Case E-3/23 A v *Arbeids- og velferdsdirektoratet* (n 46), and Case E-15/23 *K* v *Nasjonalt klageorgan for helsetjenesten (National Office for Health Service Appeals)* [2024] EFTA Court judgement of 5 December 2024.
[49] Halvard Haukeland Fredriksen, 'To refer or not to refer – Norwegian courts' engagement with the EFTA Court 2019-2023 ' (*EFTA-Studies.org*, 12 March 2024) <https://www.efta-studies.org/post/to-refer-or-not-to-refer-norwegian-courts-engagement-with-the-efta-court-2019-2023> accessed 5 March 2025.

This bodes well for the future of EEA law in the NIC. For as noted by Durant in his summary of Aristotle's psychology:

> […] we are what we repeatedly do. Excellence, then, is not an act, but a habit.[50]

[50] Will Durant, *The Story of Philosophy. The Lives and Opinions of the Greater Philosophers* (Special edition, Time Incorporated 1962) 74.

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ICELANDIC LAW AND PRACTICE IN THE FIELD OF EEA SOCIAL SECURITY LAW: A CALL FOR IMPROVEMENT

MARGRÉT EINARSDÓTTIR* & ÓMAR BERG RÚNARSSON†

So far, only two cases in the field of EEA social security law have been referred by Icelandic courts to the EFTA Court. However, this area of law has been more extensively addressed by the Icelandic Welfare Appeals Committee and the Althingi Ombudsman. Analysing these cases reveals that there are several and to some extent systematic problems in Iceland in this field. In particular, the legislature appears to struggle with the important principle of aggregation. This is evident in both the judgments of the EFTA Court in this field, i.e. E-4/07 Þorkelsson and E-5/21 Einarsdóttir. Furthermore, in the wake of the Welfare Appeals Committee's decision, in the re-opening of Case No. 115/2020, Althingi appears to have deliberately chosen to violate the provisions of Social Security Regulation 883/2004. This was achieved by classifying the rehabilitation pension as social assistance, thereby excluding it from the Regulation's scope. Finally, the article highlights the administration's improper practices, as outlined in the Althingi Ombudsman's Opinion in Case 8955/2016. In this case, the administration was compelled to re-open approximately 1,400 cases for further review due to its prior unlawful practice of reducing invalidity benefits based on periods spent abroad.

1 INTRODUCTION

So far, only two cases in the field of EEA social security law have been referred by Icelandic courts to the EFTA Court for an Advisory Opinion. However, this area of law has been more extensively addressed by the Icelandic Welfare Appeals Committee and the Althingi Ombudsman. As will be discussed further below, these cases indicate that Icelandic legislation and legal practice are not entirely in line with the obligations stemming from the EEA Agreement in this field. In particular, the legislature appears to struggle with the important principle of aggregating all periods under the laws of the EU Member States and the EEA/EFTA States to establish and maintain entitlement to benefits, as well as to calculate the amount of such benefits. As will be further discussed in Section 3, this is reflected in the beforementioned two cases. Numerous rulings related to EEA social security law have also been issued by the Welfare Appeals Committee. This article will not address all these rulings. Instead, Section 4 will focus exclusively on the Committee's rulings related to *rehabilitation pensions*, where notable developments are currently unfolding. Thereafter, Section 5 focuses on the Opinion of the

* Professor, Reykjavik University, and member of CENTENOL. The authors would like to thank the reviewer for providing helpful comments on the draft article.
† PhD Research Fellow at CENTENOL, University of Bergen, and part-time lecturer at Reykjavik University. The contribution to the present article was made whilst working as a Researcher on the EEA Social Security Project funded by the Norwegian Ministry of Labour and Social Inclusion.

Althingi Ombudsman in Case 8955/2016, where the Ombudsman concluded that the practice of the Icelandic administration in reducing the payment rate of the complainant's invalidity pension in proportion to periods spent abroad was incompatible with EEA law. Interestingly, the Ombudsman instructed the administration not only to re-open the complainant's case upon request thereof, but also other previous cases where similar mistakes were made. Ultimately, this resulted in approximately 1,400 cases to be reopened in Iceland for further scrutiny. Finally, Section 6 offers our concluding remarks.

2 GENERAL OVERVIEW

The coordination of social security in the European Economic Area ('EEA') is based on Article 29 of the EEA Agreement (equivalent to Article 48 of the Treaty on the Functioning of the European Union). These obligations are further detailed in the Social Security Regulation 883/2004,[1] which has been incorporated into the EEA Agreement,[2] and subsequently implemented into the Icelandic legal system, i.e. with Regulation on the Entry into Force of European Union Regulations on Social Security No. 442/2012.[3]

When discussing the relationship between EEA law and Icelandic social security law, it is somewhat important to consider some specificities in Icelandic legislation and practice. For instance, it appears that most cases in Iceland which concern EEA social security law are solved at the administrative level, i.e. by the Social Insurance Administration, or by the Welfare Appeals Committee on appeal. Of course, this does not mean that no cases within the field of EEA social security law are brought before the courts in Iceland. Recently, for example, the District Court of Reykjavik dealt with two cases concerning issues related to Regulation 883/2004, medical treatment abroad and travel restrictions imposed under the COVID-19 pandemic.[4] In one of these judgments, the District Court even cited the EFTA Court's ruling in Case E-8/20 *NAV*.[5] Overall, however, it seems that only a fraction of these cases are brought before Icelandic courts. In comparison, there is no specialised national insurance court in Iceland, like for example the Norwegian National Insurance Court *(Trygderetten)*.

The fact that Icelandic courts to date have not dealt with many cases concerning EEA

[1] 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.

[2] The Social Security Regulation was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ L262/33, which entered into force on 1 June 2012 and is referred to at point 1 of Annex VI to the Agreement.

[3] For further reading on the relevant legal framework in Iceland concerning EEA social security law see e.g. Ciarán Burke and Ólafur Ísberg Hannesson, 'Free Movement Rights in Iceland' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law and Regional Cooperation* (Hart 2023) 210-212.

[4] Judgment of 17 December 2022 in Case E-1852/2021 *A v the Social Insurance Administration and the Icelandic State* and judgment of 26 November 2021 in Case E-7988/2020 *A v the Icelandic State*.

[5] Case E-8/20 *Criminal Proceedings against N* [2021] EFTA Court Judgment of 5 May 2021. For further reading on the NAV-case, see e.g. Christian NK Franklin, 'Free Movement Rights in Norway' in Katarina Hyltén-Cavallius and Jaan Paju (eds), *Free Movement of Persons in the Nordic States: EU Law, EEA Law and Regional Cooperation* (Hart 2023) 188-189.

social security law explains why, over a period of more than 30 years, they only referred two cases to the EFTA Court in this field, i.e. in the cases of *Þorkelsson* (E-4/07) and most recently *Einarsdóttir* (E-5/21).[6] In comparison, Norwegian courts have (at the time of writing) referred about ten cases to the EFTA Court in the field of social security (or patients' rights), and Liechtenstein courts have referred five.[7] This modest number of two Icelandic references to the EFTA Court could perhaps also be explained by the fact that under Icelandic legislation there remains some uncertainty whether administrative bodies such as the Welfare Appeals Committee may refer questions to the EFTA Court, although they would arguably constitute a 'court or a tribunal' within the meaning of Article 34 of the Surveillance and Court Agreement ('SCA').[8] And as a matter of fact, the Committee has never referred a question to the EFTA Court. It has, however, cited several judgments of the Court of Justice of the European Union ('CJEU') and the EFTA Court.[9]

The Althingi Ombudsman has also played a role in the field of EEA social security law in Iceland. Although the opinions of the Ombudsman are not legally binding, they are normally followed by the relevant authorities in Iceland. Already in 1996, very shortly after the EEA Agreement entered into force (1 January 1994), the Ombudsman started to receive its first complaint cases on EEA social security law, e.g. Case 1724/1996 (Regulation 1408/71,[10]

[6] Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* [2008] EFTA Ct. Rep. 3, and Case E-5/21 *Anna Bryndís Einarsdóttir v the Icelandic Treasury* [2021] EFTA Court Judgment of 29 July 2022.

[7] Norwegian courts: Case E-3/04 *Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State* [2004] EFTA Ct. Rep. 95; Joined Cases E-11/07 and E-1/08 *Olga Rindal and Therese Slinning v Staten v/Dispensasjons- og klagenemda for bidrag til behandling I utlandet* [2008] EFTA Ct. Rep. 320; Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136; Case E-11/16 *Mobil Betriebskrankenkasse v Tryg Forsikring* [2017] EFTA Ct. Rep. 384; Case E-8/20 *Criminal Proceedings against N* (n 5); Case E-13/20 *O v Arbeids- og velferdsdirektoratet* [2021] EFTA Court Judgment of 30 June 2021; Case E-15/20 *Criminal Proceedings against P* [2021] EFTA Court Judgment of 30 June 2021; Case E-2/22 *A v Arbeids- og velferdsdirektoratet* [2022] EFTA Court Judgment of 29 July 2022; Case E-3/23 *A v Arbeids- og velferdsdirektoratet* [2024] EFTA Court Judgment of 18 April 2024; and Case E-15/23 *K v Nasjonalt klageorgan for helsetjenesten* [2024] EFTA Court Judgment of 5 December 2024. Liechtenstein courts: Case E-13/15 *Abuelo Insua Juan Bautista v Liechtensteinische Invalidenvericherung* [2015] EFTA Ct. Rep. 720; Case E-24/15 *Walter Waller v Liechtensteinische Invalidenvericherung* [2016] EFTA Ct. Rep. 527; Case E-2/18 *Concordia Schweizerische Kranke- und Unfallversicherung AG, Landesvertretung Liechtenstein* [2019] EFTA Court Judgment of 14 May 2019; Case E-1/21 *ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK* [2021] EFTA Court Judgment of 14 December 2021; and Case E-5/22 *Christian Maitz v AHV-IV-FAK* [2023] EFTA Court Judgment of 24 January 2023.

[8] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [2016] OJ L344/3, signed in Oporto on 2 May 1992. For further reading, see e.g. Kjartan Bjarni Björgvinsson, 'Samvinna EFTA-dómstólsins og íslenskra dómstóla' (2015) 68 Úlfljótur 73, 73-108.

[9] See e.g. the ruling of the Welfare Appeals Committee No 115/2020 of 19 May 2021 *A v the Social Insurance Administration,* where references are made to the following judgments of the EFTA Court and the CJEU: Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6), Case E-8/20 *Criminal Proceedings against N* (n 5), Case C-135/19 *Pensionsversicherungsanstalt v CW* EU:C:2020:177, Case 14/72 *Helmut Heinze v Landesversicherungsanstalt Rheinprovinz* EU:C:1972:98, and Case C-769/18 *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle v SJ and Ministre chargé de la Sécurité sociale* EU:C:2020:203. Moreover, in its ruling No 20/2019 of 16 October 2019 *A v the Social Insurance Administration*, the Committee referred to the judgment of the CJEU in Case C-107/00 *Caterina Insalaca v Office national des pensions* (ONP) EU:C:2002:147.

[10] 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 [1971] OJ L149/2.

unemployment benefits) and Case 2037/1997 (Regulation 1408/71, maternity benefits).[11] Most recently, the Ombudsman has issued opinions in Case 10077/2019 (Regulation 883/2004, benefits of the same kind) and Case 12104/2023 (Regulation 883/2004, Directive 2011/24,[12] Article 36 EEA, and medical treatment abroad).[13] In its opinions concerning EEA social security law (or patients' rights), the Ombudsman has cited several judgments of the CJEU.[14]

3 ICELANDIC CASES IN THE FIELD OF EEA SOCIAL SECURITY LAW THAT HAVE BEEN REFERRED TO THE EFTA COURT

3.1 CASE E-4/07 *ÞORKELSSON*

The first Icelandic case referred to the EFTA Court in the field of EEA social security law was Case E-4/07 *Þorkelsson*.[15] Mr. Þorkelsson was an Icelandic mariner who had lived and worked in Iceland for approximately 20 years when he decided to move to Denmark in September 1995. There he also worked as a mariner, and paid contributions to a Danish pension fund. In September 1996, he suffered a serious accident while at work, causing his invalidity. Þorkelsson had accrued rights to pension payments from several Icelandic pension funds at the time of the accident and he received invalidity pensions from them in accordance with his accrued points. However, on the grounds of failing to meet a condition of having paid contributions to the Icelandic funds for at least 6 of the 12 months preceding the accident, he was not found to have a right to have his invalidity pension calculated on the basis of projected points, i.e. pension points that he would have been able to accrue with Gildi Pension Fund, had he remained a member of that pension fund and continued working until reaching the age of retirement.

Þorkelsson brought an action before the District Court of Reykjavík, and the case was referred to the EFTA Court. The EFTA Court was asked to provide an Advisory Opinion on whether it is compatible with the EEA Agreement to make the right to the specific benefit subject to the condition that the individual involved has paid premiums to an Icelandic pension fund at least 6 of the 12 months preceding the date of an accident, when the reason why the individual is unable to meet this condition is that he has moved to another EEA state in order

[11] Opinions of the Althingi Ombudsman of 24 June 1997 in Case 1724/1996 and of 6 December 2000 in Case 2037/1997.
[12] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 153/2014 of 9 July 2014 amending Annex X (Services in general) to the EEA Agreement [2015/88] [2015] OJ L15/78 and is referred to at point 2 of Annex X (Services in general) to the EEA Agreement.
[13] Opinions of the Althingi Ombudsman of 30 April 2021 in Case 10077/2019 and of 13 May 2021 in Case 12104/2023.
[14] See e.g. the opinions in Case 2037/1997 (n 11), Case 10077/2019 (n 13) and Case 12104/2023 (n 13), where references are made to the following CJEU judgments: Case C-275/96 *Anne Kuusijärvi v Riksförsäkringsverket* EU:C:1998:279, Case 143/79 *Margaret Walsh v National Insurance Officer* EU:C:1980:134, Case C-777/18 *WO v Vas Megyei Kormányhivatal* EU:C:2020:745, and Case C-453/14 *Vorarlberger Gebietskrankenkasse and Alfred Knauer v Landeshauptmann von Vorarlberg and Rudolf Mathis* EU:C:2016:37.
[15] Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6).

to pursue comparable employment.[16]

In its answer, the EFTA Court referred to the aggregation principle in Article 10 of Regulation 1408/71 (now Article 6 of Regulation 883/2004). The Court also referred to the adaptation in Annex VI to the EEA Agreement which states the same principle. Based on this, the answer of the EFTA Court was that it was not compatible with Regulation 1408/71 to subject the entitlement to invalidity benefits based on projected rights to the condition that a member of a pension fund must have paid contributions 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.

Despite this, Gildi Pension fund was acquitted before the Supreme Court of Iceland.[17] This was done on the basis of the 'Agreement on Relations between the Icelandic Pension Funds' and had nothing to do with EEA law. Furthermore, Icelandic law was not amended after the judgment of the EFTA Court. Thus, Article 15(2) of Act No. 129/1997 on Mandatory Pension Rights Insurance and the Operation of Pension Funds still requires payment into the pension fund for at least three of the four previous years, including at least six months in the last twelve-month period, in order to get projected rights. This legal situation does not seem to be in accordance with EEA law and represents a clear obstacle for employees in Iceland moving to other countries within the EEA.

3.2 CASE E-5/21 *EINARSDÓTTIR*

The EFTA Court's judgment in Case E-5/21 *Einarsdóttir* reveals that the Icelandic Parental Leave Act No. 95/2000 is not in accordance with EEA law.[18] The facts of the case are the following. Ms Einarsdóttir pursued postgraduate studies in medicine in Denmark from 2015-2019. She was employed there on a full-time basis until 2019, when she moved back home to Iceland and started working for the National University Hospital. She was pregnant at the time, so she applied for a maternity leave from the Icelandic Treasury.

When deciding her monthly payments, her income in Denmark was not taken into consideration. The basis for this decision was that according to the Parental Leave Act, the calculation of such a benefit was to be based only on income earned on the domestic labour market. By a decision of the Icelandic Leave Fund, she therefore only received the basic minimum payments. She brought a case before the District Court of Reykjavík, which referred

[16] The EFTA Court was also asked whether invalidity pension based on projected rights fall under Regulation 1408/71. The answer of the Court confirmed that 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. See also Ingvar Sverrisson, 'Overlapping of benefits under Regulation (EC) No 883/2004 on the Coordination of Social Security Systems' (2021) 71 Tímarit lögfræðinga 478, 490, where it is stated that according to the declaration of the Icelandic authorities to the EFTA Surveillance Authority (ESA), cf. Article 9 of the Social Security Regulation, the rights to old-age pension and disability pension that are accrued in the Icelandic pension fund system fall under the scope of the Regulation.

[17] Judgment of the Supreme Court of Iceland of 26 November 2009 in Case No 95/2009 *Guðmundur Vikar Þorkelsson v. Gildi pension fund* (Jón Gunnar Þorkelsson changed his name to Guðmundur Vikar Þorkelsson).

[18] Case E-5/21 *Anna Bryndís Einarsdóttir v the Icelandic Treasury* (n 6).

the following questions to the EFTA Court:

> Does Article 6 of Regulation (EC) No 883/2004, (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?

Based on Article 21(2) and (3) of Regulation 883/2004, as interpreted in light of Article 29 EEA, the answer given by the EFTA Court was that Ms Einarsdóttir should have received the same payment in her maternity leave from the Icelandic Treasury as a doctor with comparable experience and qualifications who had been working in Iceland for the whole reference period.[19] The Parental Leave Act is therefore not compatible with EEA law.[20]

Ms Einarsdóttir nevertheless lost her case before the Supreme Court of Iceland, because the Parental Leave Act clearly requires that a person needs to have been working on the *Icelandic labour market* for his/her salary to be considered when deciding the payment. Due to unsatisfactory implementation of Protocol 35 to the EEA Agreement into the Icelandic legal system, implemented EEA law does not take precedence over other Icelandic law.[21] As the Supreme Court of Iceland considered it impossible to interpret the relevant provision of the Parental Leave Act in accordance with Regulation 883/2004, the Icelandic state was acquitted. Despite the beforementioned judgment of the EFTA Court, revealing that the Parental Leave Act is not in accordance with the Social Security Regulation, the law has not yet been amended. However, on 27 February 2025, the Ministry of Social Affairs and Labour submitted a draft bill for consultation with the aim of meeting Iceland's obligations under the EEA Agreement on the matter. It remains to be seen whether the draft will be passed into law by Althingi.

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[19] Articles 6 and 21(2) and (3) of the Social Security Regulation do however 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. See Case E-5/21 *Einarsdóttir* (n 6) para 36.

[20] For further reading on this case see Védís Eva Guðmundsdóttir, 'Restrictions by Icelandic law on the free movement of future parents in the EEA with regard to calculation on parental leave payments' (2022) 72(2) Tímarit lögfræðinga 277, 277-314.

[21] See the following Icelandic Supreme Court's judgments: *A v the Icelandic State,* judgment of 28 February 2024 in Case No 24/2023, *Criminal proceedings against X,* judgment of 5 May 2015 in Case No 291/2015, *Criminal proceedings against X and Others,* judgment of 15 July 2014 in Case No 429/2014, *Commerzbank AG v Kaupthing,* judgment of 28 October 2013 in Case No 552/2013, and *Landesbank Baden-Württemberg against Glitni*, judgment of 10 May 2013 in Case No 306/2013. See also the judgment of the Court of Appeal in *Icelandic State and the Central Bank of Iceland against Coldrock Investments*, judgment of 9 January 2019 Case No 830/2018*,* and further reading in Ólafur Jóhannes Einarsson, 'Protocol 35 and the Status of the EEA Agreement in Icelandic Law' (2007) 57 Tímarit lögfræðinga 371, 371-411; Margrét Einarsdóttir og Stefán Már Stefánsson, 'Application of implemented EEA rules in the light of Protocol 35' in Þorgeir Örlygsson et al (eds), *Hæstiréttur í hundrað ár: ritgerðir* (Hið íslenska bókmenntafélag 2020) 341-357; Gunnar Þór Pétursson, 'Forgangur EES-reglna. Hvað er að frétta af bókun 35?' in Svala Ísfeld Ólafsdóttir et al (eds), *Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum* (Hið íslenska bókmenntafélag 2017) 201-223; Margrét Einarsdóttir, 'Obligations and Remedies of the Courts to Ensure Legal Protection on the Basis of the EEA Agreement' in Benedikt Bogason et al (eds), *Afmælisrit: Markús Sigurbjörnsson sjötugur 25. september 2024* (Fons Juris 2024) 441-471.

4 DECISIONS FROM THE WELFARE APPEALS COMMITTEE REGARDING REHABILITATION PENSION

The Welfare Appeals Committee rules on appeals lodged in connection with administrative decisions regarding for example rehabilitation pension, child allowance and care allowances from the Social Insurance Administration. Many cases in the field of EEA social security law are brought before the Welfare Appeals Committee, with only a small number proceeding to the national courts. This underscores the importance of the Committee's correct understanding and application of EEA law in this area. This article will not cover all the rulings of the Committee in this field, but rather focus on rehabilitation pensions, where an interesting development is taking place.

4.1 CASE NO. 115/2020 (AND ITS RE-OPENING)

In Case No. 115/2020 *A v. Social Insurance Administration* from July 8 2020, the Social Insurance Administration had denied the appellant (A) a rehabilitation pension. A appealed the decision to the Welfare Appeals Committee. According to Article 7(1) of the Social Assistance Act, rehabilitation pensions may be made out for up to 36 months when it cannot be determined whether the individual's inability to work will be permanent following illness or injury. A was denied on the grounds that the residency requirement in Iceland was not met, as she had lived in Iceland for less than three years before applying for the rehabilitation pension. It was revealed in the case that she lived in Sweden during the reference period.

Regarding the reference period for entitlement to payments in the Social Assistance Act, reference was made to Article 18 of the Social Security Act No. 100/2007. According to that provision, as it was when the events of the case took place, an individual must have resided in Iceland for at least three years preceding submission of the application, or for six months if their working capacity was unimpaired when they took up residence here. Since A did not meet these conditions, the Welfare Appeals Committee upheld the decision of the Social Insurance Administration. A subsequently filed a complaint with the Althingi Ombudsman. In a detailed letter to the Welfare Appeals Committee, the Ombudsman explained how Icelandic legislation should be interpreted in accordance with principle of aggregation set out in Article 6 of Regulation 883/2004. In light of the Ombudsman's letter, Case No. 115/2020 was re-opened, and a new ruling was issued on May 19 2021.

In its new ruling, the Welfare Appeals Committee considered that residence in other EEA States might be taken into account when assessing whether the residency requirement of Article 18 of the Social Security Act was met. To justify this, reference was made to Article 6 of Regulation 883/2004. The decision further states that the condition for this is that the benefits in question fall within the scope of the Regulation.

According to Article 3(1)(a) of Regulation 883/2004, it applies, amongst other things, to sickness benefits. However, the Regulation does not apply to social assistance, as per Article 3(5). Provisions for rehabilitation pension are found in the Social Assistance Act. It thus appears that the Icelandic legislature views the rehabilitation pension as social assistance rather than social

security, i.e. sickness benefits. However, the decision of the Welfare Appeals Committee goes on to explain that both the CJEU and the EFTA Court have emphasized that whether benefits fall under the material scope of Regulation 883/2004, or its predecessor Regulation 1408/71, fundamentally depends on the substantive nature of the benefits, particularly their purpose and the conditions under which they are granted, rather than on whether the benefits are classified as social security benefits under national law.[22]

The decision further states that a fundamental characteristic of sickness benefits under Article 3(1)(a) of Regulation 883/2004 is that they are paid due to temporary absence from the labor market caused by illness.[23] Additionally, it can be inferred from preliminary rulings of the CJEU and Advisory Opinions of the EFTA Court that sickness benefits are not limited to those linked to health insurance, but also include pension insurance benefits.[24] In light of the above, the Welfare Appeals Committee concluded that rehabilitation pension falls under the concept of sickness benefits within the meaning of Regulation 883/2004. According to Article 18 of the Social Security Act and Article 6 of Regulation 883/2004, the Social Insurance Administration was thus required to consider A's residence in Sweden when evaluating whether she met the residency requirements. As a result, the Social Insurance Administration's rejection of A's application for a rehabilitation pension was overturned.

It may be added that, according to the CJEU, a benefit falls under the concept of social security benefits if it is granted automatically to persons who meet certain objective criteria relating in particular to the size of their family, income and capital resources, without any individual and discretionary assessment of personal needs. Social assistance on the other hand comprises benefits which are needs-based and means-tested, and financed through general taxation.[25] In our view, rehabilitation pension under Article 7(1) of the Social Assistance Act falls without a doubt under the concept of sickness benefit.

4.2 CASE NO. 567/2023 – FOLLOWING LEGISLATIVE CHANGES

The ruling in Case No. 115/2020 was important, and it is clear that following the crucial letter from the Althingi Ombudsman, the Welfare Appeals Committee finally understood the core issue – that under Article 6 of Regulation 883/2004, residence in other EEA States should be treated as equivalent to residency in Iceland. Subsequent rulings of the Welfare Appeals Committee aligned with this understanding, making it obligatory to consider residence in other EEA States when assessing the qualifying insurance periods for rehabilitation pension payments.

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[22] Case C-769/18 *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle v SJ and Ministre chargé de la Sécurité sociale* (n 9) para 26; Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* (n 6) para 36.

[23] Case C-135/19 *Pensionsversicherungsanstalt v CW* (n 9) para 32, and Case E-8/20 *Criminal Proceeding against N* (n 5) para 54.

[24] Case C-14/72 *Helmut Heinze v Landesversicherungsanstalt Rheinprovinz* (n 9) and Case E-8/20 *Criminal Proceeding against N* (n 5).

[25] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2016:436 para 60; Case C-535/19 *A v Latvijas Republikas Veselibas ministrija* EU:C:2021:595 paras 29 and 30; Case C-411/20 *S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit* EU:C:2022:602 para 35. See also Sandra Mantu and Paul Minderhoud, 'Struggles over social rights: Restricting access to social assistance for EU citizens' (2023) 25 The European Journal of Social Security 3, 6.

However, following this ruling Althingi appears to have deliberately decided to violate the provisions of Regulation 883/2004 by defining rehabilitation pension as social assistance, thereby excluding it from the material scope of the Regulation. This becomes very clear when reading the explanatory notes with the amendment to the Social Security Act, which state as follows:

> It is also deemed necessary to respond to the recent ruling of the Welfare Appeals Committee in case No. 115/2020 and its underlying reasoning by continuing to stipulate that rehabilitation pension is provided for in the Social Assistance Act. This will confirm the legislature's intent that the provisions of reciprocal international agreements will not apply to rehabilitation pension under the Social Assistance Act.[26]

As already explained, social assistance comprises benefits which are needs-based and means-tested,[27] and financed through general taxation.[28] In our view, rehabilitation pension under Article 7(1) of the Social Assistance Act does not fall under this concept.

The first case involving the payment of rehabilitation pension after the beforementioned legal amendment was Case No. 567/2023 *A v. Social Insurance Administration* from 10 April 2024. The appellant (A) argued that the Social Insurance Administration's decision not to consider her residence in Sweden when assessing whether she met the residency requirements of Article 7(1) of the Social Assistance Act violated Articles 28 and 29 of the EEA Agreement. In its ruling, the Welfare Appeals Committee noted that EEA States are required to take into account insurance or residency periods that an applicant has completed in other member states when determining if they meet the requirement period in the state where the rights are being claimed. However, this only applies if the payments in question fall within the scope of Regulation 883/2004.

The ruling further states that the Welfare Appeals Committee had concluded, in its revised decision in Case No. 115/2020 from May 19 2021, that the rehabilitation pension under the Social Assistance Act fell under the definition of sickness benefits as per Article 3(1)(a) of Regulation 883/2004. However, with the beforementioned legislative amendment to the Social Security Act, it was made explicitly clear that rehabilitation pension is classified as social assistance. The Welfare Appeals Committee fundamentally disagrees with the legislature on this matter, and is of the opinion that, according to judgments from the CJEU and the EFTA Court, rehabilitation pension indeed qualifies as sickness benefits under the Regulation. Despite this, the Committee is forced to rule in accordance with Icelandic law. As seen in the following reasoning in the decision, they are not happy about it:

> Given the legislature's beforementioned position, where it responded to the Welfare Appeals Committee's decision in case No. 115/2020, the committee is bound by it and cannot disregard clear and unequivocal legal instructions, even if they may conflict with Iceland's obligations under the EEA Agreement, cf. the Supreme Court ruling in case

[26] Unofficial translation by the authors.
[27] Means-tested refers to a process used to determine eligibility for a particular benefit or service based on an individual's or household's financial situation.
[28] Cf, Mantu and Minderhoud (n 25) 6.

> No. 24/2023. The Welfare Appeals Committee must, therefore, interpret the 12-month residency requirement in Iceland in the third sentence of Article 7(1) of the Social Assistance Act according to its plain meaning.[29]

As a result, the Social Insurance Administration's decision to deny A's application for a rehabilitation pension was upheld, as she had not been living in Iceland for the relevant period. In our view, this constitutes a clear violation of Regulation 883/2004, and it is particularly concerning that Althingi appears to be acting with deliberate intent.

5 THE ALTHINGI OMBUDSMAN'S OPINION 8955/2016

5.1 THE BACKGROUND TO THE DISPUTE

The Ombudsman has dealt with several cases concerning EEA social security law, and the opinion in Case 8955/2016 is especially noteworthy. The background to the case is that in 2005 the complainant, at the age of 16, moved from Iceland to Denmark with her family, where she later became ill and unable to work. Apparently, she did not fulfil the relevant conditions to receive Danish invalidity benefits. She moved back to Iceland in 2010, and upon contacting the Social Insurance Administration was informed that according to the Icelandic Social Security Act, she was not yet entitled to invalidity pension because she had not been resident in Iceland for the three preceding years. She therefore waited until 2013 before submitting her application for invalidity benefits, which was granted with a degree of full invalidity. The payment rate of her invalidity pension was nevertheless based on residence rate between Iceland and Denmark, from the age of 16 until the approval of the first invalidity assessment. As the applicant had spent approximately 5 years in Denmark and 1 year in Iceland during that period, her total residence rate was determined to be 21,79%. The administration then allocated her projected residence time in Iceland until the age of 67, according to the same proportion. As a result, she was only entitled to receive 21,79% of full invalidity pension until the age of 67.

Before the Ombudsman, the complainant argued amongst other things that the ruling of the Welfare Appeals Committee was unlawful since it lacked legal basis and was incompatible with EEA law. In contrast, the Welfare Appeals Committee submitted that the ruling was correct, as it was based on the relevant provisions of the Icelandic Social Security Act, i.e. Article 18 in conjunction with Article 17. At the material time, Article 18(1) of the Act stipulated that entitlement to an invalidity pension was subject to the condition that the applicant had lived in Iceland and was between the age of 18-67. Moreover, it seemingly followed from Article 18(4) of the Social Security Act that to determine periods of residence in the context of invalidity benefits, account should be taken of the rules concerning old-age pension in Article 17(1). The latter provision stipulated the following: 'Those who have reached the age of 67 and have lived in Iceland are entitled to an old-age pension […]. Full rights are acquired by living in Iceland for at least 40 calendar years from the age of 16 to 67. In case of a shorter period, entitlement to

[29] Unofficial translation by the authors.

old-age pension is calculated in proportion to the period of residence'.[30]

In its correspondence with the Ombudsman, the Welfare Appeals Committee acknowledged that the abovementioned provisions of the Icelandic Social Security Act were not entirely clear on how to calculate projected residence rates in the context of invalidity benefits where applicants have normally not yet reached the age of 67. And therefore, that the calculation is not based on actual or real residence in the past (unlike the situation with applicants for old-age pension who have reached retirement age). However, the Committee also submitted that the contested calculation was based on Article 52(1) of Regulation 883/2004, which provides instructions on how the competent institution shall calculate the amount of the benefits that would be due. First, by calculating the so-called independent benefit, i.e. where the conditions for entitlement to benefits have been satisfied exclusively under national law. Second, by calculating the pro-rata benefit, i.e. the theoretical amount and subsequently the actual amount.

5.2 THE REASONING AND CONCLUSION OF THE OMBUDSMAN

As regards Article 18 of the Social Security Act, the Ombudsman noted that that provision did not provide clear instructions on how to calculate the payment rate of invalidity benefits, by considering the proportion of residence in Iceland and abroad until the age of 67. In fact, the Ombudsman suggested that a different reading of the provision could also mean that until the age of 67, all of the relevant years should be counted as if they had been spent in Iceland. The Ombudsman then scrutinised the provisions of Regulation 883/2004 and noted the following: First, that the calculation of the pro-rata benefit in Article 52(1)(b) was only applicable to periods completed *before the risk had materialised*. The provision could therefore only cover periods which had already lapsed in time, and there were no instructions to be found on how to calculate projected residence rates.

Next, the Ombudsman held that since the complainant had not fulfilled the relevant conditions to receive invalidity benefits in Denmark, periods spent abroad should not be considered when performing the calculation in Article 52 of the Regulation, cf. Article 50(2). In any event, pursuant to Article 52(3), the complainant should have been entitled to receive the higher amount between the independent benefit or the pro-rata benefit. Finally, citing the judgment of the CJEU in *Petroni*,[31] the Ombudsman stated that the rule on aggregation and apportionment should not be applied if the effects were to diminish the benefits which the person concerned could claim by virtue of the laws of a single EEA State, i.e. solely on the basis of the insurance periods completed under those laws. Consequently, the Ombudsman concluded that the ruling of the Welfare Appeals Committee lacked sufficient legal basis.

Considering the above, the Ombudsman recommended that the Welfare Appeals Committee should re-open the complainant's case upon request thereof (which the Committee did in its ruling No. 44/2015 of 27 March 2019). Moreover, the Ombudsman also recommended that the administration should re-open other previous cases where similar mistakes were

[30] Unofficial translation by the authors.
[31] Case 24/75 *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS), Bruxelles* EU:C:1975:129.

made – subject, however, to the relevant rules that might limit how far back in time cases could be changed. Up to April 2022, the Social Insurance Administration had re-opened approximately 1,400 cases, subject to a four-year time limit. Furthermore, following a recommendation from the Ombudsman, the relevant provisions in the Social Security Act were subsequently amended by the Althingi in 2023, i.e. with the Act No. 18/2023 on Amendments to the Social Security Act and the Act on Social Assistance.

6 CONCLUDING REMARKS

It follows from the above analysis that there are several and to some extent systematic problems in Iceland in the field of EEA social security law. In particular, the legislature appears to struggle with the important principle of aggregation. This is evident in both of the judgments of the EFTA Court in this field, i.e. E-4/07 *Þorkelsson* and E-5/21 *Einarsdóttir*. Furthermore, in the wake of the Welfare Appeals Committee's decision in the re-opening of Case No. 115/2020 – where residence in other EEA States was considered when assessing compliance with the residency requirement under Article 18 of the Social Security Act – Althingi appears to have deliberately chosen to violate the provisions of Regulation 883/2004. This was achieved by classifying the rehabilitation pension as social assistance, thereby excluding it from the Regulation's scope.

The only way to rectify the above-mentioned violations of EEA law is for the Althingi to amend provisions of national law (i.e., the Parental Leave Act, Act No. 129/1997 on Mandatory Pension Rights Insurance and the Social Assistance Act) to align with Iceland's commitments under EEA social security law. The EFTA Surveillance Authority plays a key role in exerting pressure to ensure this is done by initiating infringement proceedings against the Icelandic state for the aforementioned breaches under Article 31 SCA. The Authority has paid close attention to the case of *Einarsdóttir*, and on 11 December 2024 sent a letter of formal notice concerning Iceland's breach of Article 21(2) and (3) of Regulation 883/2004, as interpreted in light of Article 29 EEA by the EFTA Court in Case E-5/21 *Einarsdóttir*.[32] Interestingly, a few days before the submission of the present article, the Ministry of Social Affairs and Labour submitted a draft bill for consultation with the aim of rectifying this situation.

It is also worth mentioning, that individuals who have suffered damages due to such violations of EEA law may file compensation claims against the Icelandic state.[33] Ms Einarsdóttir has already initiated such a case, although no ruling has been issued at the time of writing. It may, however, prove more complex to rectify the harm caused to individuals by the administration's incorrect practices over several years, as described in the Opinion of the Althingi Ombudsman in Case 8955/2016. The administration had to re-open about 1,400 cases for further scrutiny because of its previous unlawful practice of reducing invalidity benefits due to periods spent abroad. As noted in the 2020 report by the Icelandic National Audit Office

[32] EFTA Surveillance Authority (ESA), 'Letter of formal notice to Iceland concerning the basis for calculation of a maternity benefit' Case No. 90271, Doc No 1485935.
[33] See joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428, and Case E-9/97 *Erla María Sveinbjörnsdóttir v. Iceland* [1998] EFTA Ct. Rep. 95.

(Ríkisendurskoðun), the unlawful practice of the administration appears to have started at least in 2009.[34] Yet since the decision to correct previous unlawful reductions was subject to a four-year time limit,[35] a significant number of potentially affected individuals were seemingly excluded. The four-year time limit corresponds however to the main rule concerning the limitation period of claims according to the Icelandic Limitation Act No. 150/2007. It follows that even though these individuals would be entitled to damages based on the principle of state liability, pursuing the claims might prove difficult due to the four-year limitation period. On the face of it, however, a time limit of four years appears to be reasonable and in compliance with the EEA principles of effectiveness and equivalence.[36]

Moreover, it is to a certain degree worrying how few cases in the field of EEA social security law have been brought before Icelandic courts, which in turn explains the low number of Icelandic references to the EFTA Court in this field. Given that there appears to be no shortage of cases before either the Social Insurance Administration or the Welfare Appeals Committee, more guidance from the EFTA Court on these complex issues would probably be welcomed. In this context, the Ombudsman has perhaps stepped in so to speak and filled the gap, with important opinions in cases such as 8955/2016. It should also be noted that at the time of writing, a legislative bill which aims to provide administrative bodies in Iceland with a clear authorisation to seek Advisory Opinions of the EFTA Court is pending before Althingi.[37] Provided that the legislative bill is passed, and the conditions in Article 34 SCA deemed to be fulfilled, the Welfare Appeals Committee could submit questions to the EFTA Court. This could provide the Committee with important guidance on the correct interpretation of EEA social security law. It is also crucial that the EFTA Surveillance Authority take decisive action and pressure the Icelandic government to rectify its violations of individual rights in this sensitive area, including the threat of initiating infringement proceedings if no other measures prove effective.

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[34] Ríkisendurskoðun, 'Tryggingastofnun ríkisins og staða almannatrygginga' (2020) 47 <https://www.rikisend.is/reskjol/files/Skyrslur/2020-Tryggingastofnun.pdf> accessed 7 January 2025.

[35] ibid 49.

[36] See to some extent the judgment of the EFTA Court in Case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS* [2018] EFTA Ct. Rep. 292, para 112. In a similar domestic action, the Icelandic Supreme Court held in its judgment of 14 October 2024 in Case No 10/2014 *Social Insurance Administration v A and ÖBÍ,* that the four years' time limit was applicable to claims based on the unlawful practice of the administration to reduce supplementary pension due to periods spent abroad, although the practice had existed over a longer period.

[37] At the time of writing, see the legislative proposal on 'amendments to the Administration Act No 37/1993 (advisory opinions of the EFTA Court)' [2024] Doc 235, Case 234, Legislative assembly 155 <https://www.althingi.is/thingstorf/thingmalalistar-eftir-thingum/ferill/155/234/?ltg=155&mnr=234> accessed 15 November 2024.

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