REPORT FOR THE HEARING
in Case E-11/16

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in the case between

Mobil Betriebskrankenkasse

and

Tryg Forsikring

concerning the interpretation of Article 85(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

I Introduction

1. By a letter of 31 August 2016, registered at the Court on 7 September 2016, Oslo District Court (*Oslo tingrett*) made a request for an Advisory Opinion in a case pending before it between Mobil Betriebskrankenkasse ("the plaintiff") and Tryg Forsikring ("the defendant").

2. The case before the referring court concerns the settlement of recourse claims between a German insurance company and a Norwegian insurance company after a German national ("the injured person") was injured in a car accident in Norway. More precisely, the legal issue in the present case is whether the defendant is obliged to pay compensation to the plaintiff as assessed under German law, given that the latter was obliged under German law to cover the costs in question without regard to their compensability under Norwegian law.

II Legal background

EEA law

3. At the time when the car accident occurred in Norway, 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) ("Regulation No 1408/71"), as referred to at point 1 of Annex VI to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") was in force under EEA law.

4. Article 93(1) of Regulation No 1408/71 reads:

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

5. Regulation No 1408/71 was repealed by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1, as corrected by OJ 2007 L 204, p. 30, and EEA Supplement 2015 No 76, p. 40) ("the Social Security Regulation") which was incorporated into the EEA Agreement at point 1 of Annex VI by Joint Committee Decision No 76/2011 of 1 July 2011.[1] Constitutional requirements were indicated and the Social Security Regulation entered into force in the EEA on 1 June 2012.

6. Article 19 of the Social Security Regulation reads:

> *1. Unless otherwise provided for by paragraph 2, an insured person and the members of his family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in*

[1] OJ 2011 L 262, p. 33, and EEA Supplement 2011 No 54, p. 46.

accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation.

2. The Administrative Commission shall establish a list of benefits in kind which, in order to be provided during a stay in another Member State, require for practical reasons a prior agreement between the person concerned and the institution providing the care.

7. Article 85(1) of the Social Security Regulation reads:

If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, any rights of the institution responsible for providing benefits against a third party liable to provide compensation for the injury shall be governed by the following rules:

(a) where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party, such subrogation shall be recognised by each Member State;

(b) where the institution responsible for providing benefits has a direct right against the third party, each Member State shall recognise such rights.

National law

8. At the time the accident occurred in Norway, Regulation of 30 June 2006 No 731 on the incorporation of the social security regulations of the EEA Agreement[2] was in force in Norway. Article 1 of the Regulation provided that the provisions of Annex VI of the EEA Agreement, inter alia, Regulation No 1408/71, as amended, should apply as a regulation in Norway. Similarly, Article 1 of Regulation of 22 June 2012 No 585 on the incorporation of the social security regulations of the EEA Agreement,[3] provides that the Social Security Regulation, as amended, shall apply as a regulation in Norway.

9. A limitation on the right of recourse is established in Section 3-7(1) of the Norwegian Compensatory Damages Act of 13 June 1969 No 26[4] ("Compensatory Damages Act"), which provides that a social security or pension institute may not recover its payments for an injury from the liable person, unless the latter acted with intention to

---

2 *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen.* FOR-2006-06-30-731.

3 *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen*. FOR-2012-06-22-585.

4 *Lov om skadeserstatning*. LOV-1969-06-13-26.

cause the injury. In cases involving a personal injury insurance, the same applies to the insurance company's right of recourse against the liable person.

III Facts and procedure

10. The accident occurred on 6 May 2011, while the injured person was on holiday in Norway, driving his German-registered car. The driver of the other car, which was registered in Norway and covered by liability insurance taken out with the defendant, was found responsible for the injury.

11. Immediately after the accident, the injured person was taken to hospital in Kristiansand, where he received emergency treatment for a number of orthopaedic and internal injuries. He was offered surgery for an arm injury and a knee injury at the hospital, but requested to be transferred to a hospital in Germany to have the surgeries performed there. Complications arose in connection with the surgery in Germany, and his hospital stay there was therefore longer than planned.

12. According to the referring court, the parties agree that the orthopaedic and internal injuries healed in the course of the first six months after the accident. However, other serious disorders, which the injured person had also suffered from prior to the accident, developed. The parties agree that the latter disorders with related occupational disability were not a consequence of the traffic accident in Norway.

13. The defendant accepted liability under Section 8 of Act of 3 February 1961 relating to liability for damage caused by motor vehicles[5] for the ailments and losses sustained by the injured person as a consequence of the traffic accident. Damages were assessed in accordance with the provisions of the Compensatory Damages Act and Norwegian tort law. According to the referring court, the parties agree that the defendant has paid full compensation for the injured person's losses that warranted compensation, including his expenses and loss of income as a result of the traffic accident.

14. The injured person was covered by mandatory German health insurance provided by the plaintiff. The plaintiff made a number of payments under this insurance scheme and subsequently filed recourse claims against the defendant. The defendant accepted several of the recourse claims, but rejected others on the basis that the remaining expenses did not warrant compensation to the directly injured person under Norwegian law. More precisely, three of the plaintiff's claims are disputed. The first disputed claim concerns expenses for hospital treatment in Norway. The injured person was not liable to pay these expenses due to the European Health Insurance Card scheme. The claim rejected under this item amounts to EUR 11 310. Nonetheless, the plaintiff is obliged to pay these expenses pursuant to German law. The second disputed claim concerns expenses for the hospital stay in

[5] *Lov om ansvar for skade som motorvogner gjer (bilansvarslova).* LOV-1961-02-03.

Germany, and related ambulance expenses. According to the defendant, by reason of the duty to mitigate losses, the insured person should have accepted the offer to have surgery performed at the hospital in Norway. The claim rejected under this item amounts to EUR 55 210.45. The third disputed claim concerns expenses for treatment not deemed compensable under Norwegian law, including lymph drainage and general massage. The claim rejected under this item amounts to EUR 5 873.16.

15. The plaintiff instigated proceedings in respect of the disputed claims before the referring court, which referred the following questions to the Court:

> **Question 1, concerning the interpretation of Article 85(1)(a) of the Social Security Regulation:**
>
> **When an institution in the injured party's home country that is responsible for providing benefits, under that country's legislation "is subrogated to" the injured party's right against a "third party", other EEA States must recognise the institution's subrogation to the claim. Does this mean**
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution and that the existence and scope of the claim depends on the home country's legislation,**
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution and that the existence and scope of the claim depends on the legislation in the country where the injury occurred, *or***
>
> – **that other EEA States must recognise that the claim has passed from the injured party to the institution, but that the Social Security Regulation has no bearing on the choice of law as regards the existence and scope of the claim?**
>
> **Question 2, concerning the interpretation of Article 85(1)(b) of the Social Security Regulation:**
>
> **Where the institution responsible for providing benefits has a direct right against the third party, other EEA States shall recognise such rights. Does this mean**
>
> – **that other EEA States must recognise the right in full, including that its existence and scope depends on the home country's legislation, *or***

– **that other EEA States must recognise the right, subject to those limitations that follow from the rules of law in the country where the injury occurred?**

IV Written observations

16. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the plaintiff, represented by Patrick Lundevall-Unger, advocate;

– the defendant, represented by Terje Marthinsen, advocate;

– the German Government, represented by Thomas Henze and Kathleen Stranz, acting as Agents;

– the Norwegian Government, represented by Marius Emberland, advocate at the Attorney General of Civil Affairs, and Kine Sverdrup Borge, Higher Executive Officer at the Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler and Maria Moustakali, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Denis Martin, Legal Adviser, and Jonathan Tomkin, member of its Legal Service, acting as Agents.

V Summary of the arguments submitted

The plaintiff

17. As regards the costs incurred in Germany, i.e. the second disputed claim, the plaintiff indicates its agreement with the defendant that the law of the country where the injury occurred sets the limits within which an "institution", within the meaning of Article 85(1) of the Social Security Regulation, can claim coverage from the liability insurer. However, consideration must also be given to the law of the home country of the institution. This means that consideration must be given to two regulatory frameworks.

18. If no limitations on recourse exist under the law of the country where the injury occurred, the substantive law of the injured person's home country and the limitations laid down therein must be examined. Where limitations exist, they must be accepted. However,

where no limitations exist and the home country institution is obliged to cover various treatments, this entails a right of recourse in the country where the injury occurred.

19. If on the other hand, limitations exist under the law of the country where the injury occurred, they must be accepted, also where no such limitations exist under the substantive law of the injured person's home country. Thus, under such circumstances no right of recourse exists.

20. Citing case law of Norwegian courts, the plaintiff submits that, contrary to the defendant's contentions, Norwegian law includes no limitation on the plaintiff's rights to subrogation in this regard, as foreign institutions are not subject to Section 3-7 of the Compensatory Damages Act. Therefore, the plaintiff is free to make a recourse claim. In the plaintiff's view, this is in accordance with Article 85(1) of the Social Security Regulation and a reflection of the Regulation's objective.

21. The claim that the injured person had against the defendant has passed to the plaintiff, which in turn has a right of recourse and can claim compensation for the payments that it is obliged to make to the injured person under German law.

22. As regards expenses for treatment of the injured person in Norway, i.e. the first disputed claim, the plaintiff contends that although the injured person was not personally responsible for covering any expenses for the treatment he received in Norway, the Norwegian health service recovered the money for the treatment from the plaintiff. The plaintiff submits that it is therefore not correct to claim that the injured person does not have to pay the expenses incurred under such circumstances. It is simply that the injured person does not pay for this himself. However, it is the plaintiff which must cover the cost.

23. The plaintiff maintains that no limitations exist that prevent it from exercising a right of recourse in the present case. Nor can any limitations exist, because Norway is bound by Regulation No 1408/71 as well as Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1972 L 74, p. 1). Thus, the expenses for the treatment of the injured person incurred in an EEA State, for which the treatment institution is claiming reimbursement, must also be subject to the right of recourse.

24. As regards the submission by the defendant regarding the injured person's obligation to mitigate losses, the plaintiff contends that the submission cannot succeed for two reasons. First, the plaintiff would not have saved any expenses had the injured person not been transferred, at his own request, to Germany. The plaintiff is obliged to pay for all treatment administered in Norway. Second, the injured person is not obliged to receive treatment in the place with the most favourable costs. Under German law, injured persons may choose their own doctor.

25. Finally, as regards the defendant's reference to the judgment in *Kordel and Others*,[6] the plaintiff maintains that the judgment is only concerned with the actual scope of the claim that is transferred. The actual wording of the claim is for national law to determine, i.e. the law of the social institution. It is this very wording of the claim, the plaintiff continues, that must be recognised abroad under EEA law.

26. The plaintiff does not propose any specific answers to the questions referred.

The defendant

27. As a preliminary remark, the defendant notes that tort law is not harmonised in the EEA. However, insurance law is harmonised to a great extent. The defendant considers the case to concern the former area of law and not the latter.

28. The defendant submits that the law of the country where the injury occurred sets the limits within which an "institution", within the meaning of Article 85(1) of the Social Security Regulation, can claim coverage from the liability insurer.

29. As regards the first question, the defendant maintains that the parties are agreed that, under Norwegian law, there is no factual or legal causal link between the harmful event and the remaining losses. In other words, had the injured person covered the expenses in question himself, and then claimed reimbursement from the defendant, he would have been unsuccessful. Therefore, the real issue in the case is whether, as a consequence of EEA law, the plaintiff is placed in a better position in relation to the party that caused the injury than the directly injured person would have enjoyed under the law of the country where the injury occurred.

30. The defendant contends that the words "resulting from" in Article 85(1) of the Social Security Regulation should be interpreted to mean that there is a requirement also under EEA law for a factual and legal causal link between the injury sustained and the subrogated claim. The wording indicates that this causality requirement constitutes an independent barrier that must be overcome for a right of recourse to be warranted under Article 85(1) of the Regulation. In the defendant's view, there is no causal link warranting compensation under Norwegian law in the present case.

31. Addressing the second disputed claim concerning the hospital treatment in Germany and the related transport expenses, the defendant contends that if the injured person had accepted the offer of surgery in Norway, the expenses for surgical treatment and his hospital stay would have been covered by the European Health Insurance Card scheme. The defendant maintains that the accident was not a necessary condition for the treatment and transport expenses in Germany, since the injured person was under an obligation to

---

[6] Reference is made to the judgment in *Kordel and Others*, C-397/96, EU:C:1999:432.

mitigate his losses. Therefore, the requirement for a factual and legal causal link is not met with regard to this claim.

32. Addressing the third disputed claim regarding costs for treatment that is not compensable under Norwegian law, the defendant maintains that it is not disputed that those costs do not warrant compensation under Norwegian tort law.

33. The defendant submits that the plaintiff's recourse claim cannot exceed the limits set by Norwegian tort law.[7] Where tort law in the country where the injury occurred provides for a ceiling that must be observed by the injured person, this ceiling must also be observed by the party enjoying a right of recourse.[8]

34. According to the defendant, the directly injured person will receive the sum total of all payments to which, under the law of the country where the injury occurred, he is entitled from the person responsible for the injury, and such additional benefits to which he is entitled under the insurance contract with the institution. However, where the institution's obligation to make further payments to the directly injured person follows from the insurance terms and conditions or the law of the country to which the institution belongs, the institution will not be able to recover the amount from the person responsible for the injury.

35. In addition, the defendant notes that the principle that the law of the country where the injury occurred must apply has a strong foundation in the EEA States and is also enshrined in Article 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L 199, p. 40) ("Rome II Regulation"), although the defendant adds that this Regulation does not form part of EEA law.

36. The defendant submits that the judgment in *Kordel and Others*, cited above, entails that a right of recourse in relation to pensions and other social security benefits cannot as such be refused under the law of the country where the injury occurred. It is reasonable and in accordance with the purpose behind the Social Security Regulation that the existence of the benefit is determined by the legislation of the home country of the person seeking recourse. However, the basis and scope of the claim must be governed by the law of the country where the injury occurred, which can thus entail a limitation of the right of recourse, also in respect of social security benefits, for example where the insurer liable has already paid the directly injured person the maximum amount of compensation provided for under its legislation.

---

[7] Reference is made, by analogy, to the judgment in *Kordel and Others*, cited above, paragraph 2 of the operative part.

[8] Reference is made to the Opinion of Advocate General Lenz in *DAK*, C-428/92, EU:C:1994:136, point 31.

37. The defendant concludes that the plaintiff's right of recourse in relation to the expenses addressed by the referring court's first question must be decided on the basis of the law of the country where the injury occurred.

38. Turning to the second question, the defendant submits that the injured person was not personally responsible for covering the expenses for his medical treatment in Norway. The plaintiff is obliged to compensate the Norwegian State for the treatment provided as a consequence of the European Health Insurance Card scheme, but the Norwegian health service had no compensation or recourse right against the defendant. As the expenses at issue are not benefits the injured person received in Germany as a consequence of the accident, the item falls outside the scope of the Regulation, as Article 85(1) only applies when a person receives benefits under the legislation of one EEA State in respect of an injury resulting from events occurring in another EEA State.

39. Therefore, the defendant submits that it must be Norwegian tort law that sets the limits for the plaintiff's direct claim. The defendant maintains that the parties are agreed that under Norwegian law the plaintiff does not enjoy any direct claim against the defendant for the expenses in question.

40. The defendant does not propose any specific answers to the questions referred.

The German Government

41. The German Government submits that Article 85(1)(a) of the Social Security Regulation entails that other EEA States must recognise that the claim in question has passed from the injured person to the competent institution, if and to the extent that this is provided for in the social law provisions that apply where the institution in question is based. At the same time, the Social Security Regulation has no bearing on whether and to what extent any liability claims can be made under civil law. Tort statutes and social security statutes must be considered separately from one another.

42. Whenever there is a difference between the applicable tort law, on the one hand, and social security provisions, on the other, the German Government maintains that whether and to what extent damages can be claimed under civil law depends on the civil law provisions that are found to apply by the court before which the case is brought and having regard to the relevant conflict-of-laws rules.

43. The coordinating rules set out in the Social Security Regulation do not apply in this case, as they do not specify which tort law should apply.[9] The nature and scope of the injured person's rights that are subrogated to the institution are defined solely by social security law.

---

[9] Reference is made to the judgment in *DAK*, C-428/92, EU:C:1994:222, paragraph 21.

44. Article 11 of the Social Security Regulation sets out the conflict-of-laws rules to be used to decide which social law applies when determining the social security benefits to which an injured person is entitled. Article 85(1)(a) of the Social Security Regulation does not set out any requirements concerning the substance of claims made under civil law. It merely specifies that the EEA States concerned must recognise such cession of right.

45. Thus, in the present case, it is not the Social Security Regulation that establishes the conflict-of-laws rule to be used in determining the scope of the claims subrogated. Instead, the referring court must base its conclusion on the conflict-of-laws rules set out in private international law and applicable under national law.

46. As regards the second question, the German Government maintains that, again in the context of Article 85(1)(b) of the Social Security Regulation, a distinction must be made between the applicable tort statutes and the applicable social security statutes. Article 85(1)(b) of the Regulation must therefore be interpreted as meaning that other EEA States must recognise that the institution can make claims against the party that has caused the injury, if and to the extent that this is provided for in the social law provisions that apply where the institution in question is based.

47. As far as the type and scope of the claims are concerned, the German Government submits that to the extent that these claims are made on the basis of provisions of social law only and irrespective of any claims made under civil law, they are to be determined in line with the legal provisions to which the institution responsible for providing the benefits is bound. However, the Social Security Regulation does not have any bearing on whether or to what extent any liability claims can be made under civil law.

48. The German Government proposes that the Court should answer the questions referred as follows:

1. *Article 85(1)(a) of Regulation No 883/2004 is to be interpreted to mean that other EEA States must recognise that the claim has passed from the injured party to the competent institution, if and to the extent that this is provided for in the social law provisions that apply in the location at which the institution is based. At the same time, Regulation No 883/2004 has no bearing on the question as to whether and to what extent claims can be made under civil tort law.*

2. *Article 85(1)(b) of Regulation No 883/2004 is to be interpreted to mean that other EEA States must recognise that the institution can make claims against the party that has caused the injury, if and to the extent that this is provided for in the social law provisions that apply in the location at which the institution is based. At the same time, Regulation No 883/2004 has no bearing on the question as to whether and to what extent claims can be made under civil liability law.*

The Norwegian Government

49. The Norwegian Government submits that the questions referred should be examined jointly as they are closely interconnected. The Norwegian Government argues that the interpretation of the Social Security Regulation should be in accordance with the well-established case law of the Court of Justice of the European Union ("the ECJ"), which has distinguished between the question of the law applicable to subrogated or direct rights, on the one hand, and the question of the law applicable to the exercise of the subrogated or direct right, on the other. The existence of subrogated or direct rights is determined by the legislation applicable to the institution providing benefits, whereas the substance of the right is determined by the legislation in whose territory the injury occurred.[10]

50. Thus, Article 85(1) of the Social Security Regulation provides that the right of subrogation or direct right is to be determined by the legislation administered by the institution providing the benefit. It also follows that if that legislation grants such a right, it must be recognised in the other EEA States. The exercise of that right, however, is determined by the legislation of the State in whose territory the injury occurred. This is so because Article 85(1) "is intended only to ensure that any right of action which an institution responsible for benefits may enjoy by virtue of the legislation it administers is recognised by the other Member States". The provision "does not purport to alter the applicable rules for determining whether and to what extent non-contractual liability on the part of the third party who caused the injury is to be incurred".[11]

51. The Norwegian Government does not propose any particular answers to the questions referred.

ESA

52. ESA submits that the language of Article 85(1) of the Social Security Regulation is clear in specifying that the possibility and scope of the subrogation of an institution to the rights of the injured person is governed by the law of the EEA State of the competent institution. This argument is supported by the case law of the ECJ.[12] This means that if the legislation of an EEA State provides in a purely internal situation that a social security institution is subrogated to any entitlement to compensation the injured person has against the person liable or confers on that institution direct rights against the person liable, such subrogation or direct rights apply also in cross-border situations.

---

[10] Reference is made, by analogy, inter alia, to the judgments in *L'Etoile-Syndicat général*, 78/72, EU:C:1973:51; *Tiel-Utrecht Schadeverzekering*, 313/82, EU:C:1984:107; *DAK*, cited above; and *Kordel and Others*, cited above.

[11] Reference is made to the judgment in *Kordel and Others*, cited above, paragraph 15.

[12] Reference is made to the judgments in *Kordel and Others*, cited above, paragraph 21; and *DAK*, cited above, paragraph 17.

53. The law of the EEA State to which the institution belongs determines not only whether that institution is subrogated to the rights of the injured person, but also the nature and extent of the claims to which the institution responsible for benefits is subrogated.[13]

54. However, the enforcement of such subrogation rights in the EEA State where the injury occurred is governed by the law of that State. Thus, the law of that State governs the rights that the injured person has against the person who caused the accident. Consequently, the exercise of the subrogated rights of the institution cannot exceed the rights that the injured person has against the person who caused the injury. According to the judgment in *DAK*, Article 85(1)(a) of the Regulation, like Article 93(1) of Regulation No 1408/71 before it, only ensures that any right of action that an institution responsible for benefits may enjoy, by virtue of the legislation which it administers, is recognised by the other EEA States.

55. Furthermore, it is settled case law of the ECJ that the substantive content of the subrogated rights of an institution and the requirements that must be satisfied to enable an action in damages to be brought before the courts of the EEA State where the accident occurred are to be determined in accordance with the legislation of that State, including any applicable private international law provisions.[14] Article 85(1) of the Social Security Regulation cannot have the effect of creating additional rights for the recipient of the benefits against third parties.[15]

56. In ESA's view, the same principles apply as regards any direct rights that the responsible institution has against the party liable to pay compensation for causing the accident. Similarly, the enforcement of such rights in the State where the accident occurred will be governed by the law of that State.

57. However, ESA submits that the aforementioned principles cannot be construed or applied such that the very notion of subrogated or direct rights of the responsible institution is nullified. The rationale behind subrogation rights is to avoid two identical claims for compensation, running in parallel against the person liable. The national legislation of the State in which the accident occurred cannot be construed such as to result in the annulment of any right of compensation for the mere reason that the injured person is insured.

58. In that regard, ESA submits that it would be tantamount to a negation of the very notion of insurance or subrogation to uphold the defendant's refusal to pay compensation

---

[13] Reference is made to the judgments in *Kordel and Others*, cited above, paragraph 22; and *DAK*, cited above, paragraph 18.

[14] Reference is made to the judgments in *Kordel and Others*, cited above, paragraph 27; *DAK*, cited above, paragraph 21; and *L'Etoile-Syndicat général*, cited above, paragraphs 5 and 6.

[15] Reference is made to the judgment in *Kordel and Others*, cited above, paragraph 17.

for hospital treatment in Norway. In ESA's view, the defendant's interpretation in that regard is erroneous and cannot be accepted.

59. Consequently, ESA contends that Article 85(1) of the Social Security Regulation precludes an interpretation of national law to the effect that the plaintiff does not acquire any right to compensation for the expenses relating to the injured person's hospital treatment in Norway.

60. As regards expenses for the hospital stay in Germany, ESA expresses its inability to understand the defendant's allegation concerning the injured person's failure to mitigate losses. ESA submits that Article 85(1) of the Social Security Regulation precludes an interpretation to the effect that the plaintiff does not acquire any right to compensation for the expenses relating to the injured person's hospital treatment in Germany.

61. As regards expenses for treatment that is not deemed compensable under Norwegian law, ESA reiterates that the scope of the subrogated rights of the institution to compensation cannot exceed what the injured person would be entitled to under the law of the EEA State where the accident occurred. The purpose of Article 85(1) of the Social Security Regulation is not to modify the rules of non-contractual liability under the law of the latter EEA State. The third party's liability remains subject to the substantive rules which are normally applied by the national court.

62. Consequently, ESA contends that, in the present case, it is for the national court to assess whether or not certain types of treatment are deemed compensable under Norwegian law, and whether that is the case in relation to the third disputed claim.

63. ESA proposes that the Court should answer the questions referred as follows:

1. *Under Article 85(1)(a) of the Social Security Regulation, when an institution in the injured party's home country that is responsible for providing benefits, under that country's legislation is subrogated to the injured party's right against a third party, other EEA States must recognise the institution's subrogation to the claim provided that the exercise of the right of subrogation does not exceed the rights that the victim would have against the person who caused the accident pursuant to the law of the EEA State where the accident occurred, including any applicable private international law rules. The application or interpretation of that law however must not deprive Article 85(1)(a) of the Social Security Regulation of its practical effect.*

2. *Under Article 85(1)(b) of the Social Security Regulation, where the institution responsible for providing benefits has a direct right against the third party, other EEA States shall recognise such rights, provided that the exercise of those rights do not exceed the rights that the victim would have against the person who caused the accident pursuant to the law of the EEA State where the injury*

occurred, including any applicable private international law rules. The application or interpretation of that law however must not deprive Article 85(1)(b) of the Social Security Regulation of its practical effect.

The Commission

64. According to the Commission, it follows from the case law of the ECJ on the interpretation of Article 93(1) of Regulation No 1408/71, which was substantially identical to Article 85(1) of the Social Security Regulation, that, pursuant to Article 85(1)(a), the subrogation rights conferred on the institution responsible for providing benefits, and the right of action that such a status entails, must be recognised by other EEA States. Nevertheless, the scope of the rights that may be claimed by the subrogated party may be limited to the rights that the injured person would have had against the responsible party in the EEA State where the injury was sustained.[16]

65. However, in the Commission's view, the application of the national law of the EEA State in which the accident occurred to the assessment of specific claims submitted by an institution responsible for providing benefits cannot be such as to undermine or nullify the very substance of the obligation to recognise subrogation rights as provided for in Article 85(1) of the Social Security Regulation.

66. The Commission maintains that there are grounds for considering that the defendant's proposed interpretation of national law in relation to certain contested items would fundamentally undermine the recognition of subrogation rights, contrary to Article 85(1) of the Social Security Regulation.

67. As regards the first claim disputed in the case, the Commission maintains that according to Article 19 of the Social Security Regulation the State administering the emergency care, in this case Norway, provided care at the cost of Germany, as the State where the competent institution is based. The Commission submits that the existence of national legislation denying recognition to the subrogation right of an institution responsible for providing a benefit, on the ground that the individual was insured with that institution, would essentially nullify the right of subrogation provided for in Article 85 of the Social Security Regulation.

68. The Commission acknowledges the argument according to which, under Norwegian law, free treatment received by the Norwegian health services constitutes a third party loss that is not recoverable under national tort law. However, the Commission maintains that the situation where an individual's treatment is funded by the Norwegian healthcare system is not the same as that where the treatment is merely administered by that system, but

[16] Reference is made to the judgments in *DAK*, cited above, paragraph 18; and *Kordel and Others*, cited above, paragraph 15.

funded by the competent authority of another EEA State. Accordingly, it submits that while Norwegian domestic law may limit the subrogation rights of its public health service, it does not follow that it can also limit the subrogation rights conferred directly on other institutions responsible for providing a benefit under the Regulation.[17]

69. As regards the second disputed claim, concerning the costs of the subsequent treatment in Germany, the Commission reiterates that expenses incurred by a responsible institution within the meaning of Article 85 of the Social Security Regulation must be recoverable pursuant to the right of subrogation provided for in that Article. Moreover, it is not evident that the costs to the insurer of the responsible party would have been lower had the subsequent operation taken place in Norway.

70. As a general principle, the Commission submits that national rules preventing an institution responsible for providing benefits from obtaining a right of subrogation, on the ground that the insured person complied with the rules attaching to his national cover, are fundamentally inconsistent with the spirit and purpose of the Social Security Regulation and the right of subrogation provided for in Article 85(1) thereof.

71. As regards the third claim, concerning the cost of treatments deemed not compensable under Norwegian law, the Commission submits that insofar as the injured person could not have recovered such costs against the responsible party under Norwegian law, such costs are equally not recoverable through subrogation by the institution responsible for providing the benefit.

72. The Commission proposes that the Court should answer the questions referred as follows:

> *Where an institution responsible for providing a benefit exercises subrogation rights in accordance with Article 85(1)(a) of Regulation (EC) No 883/2004 against the insurers of a party who, in the territory of another Member State, caused an injury which gave rise to the payment by that institution of social security benefits, the extent of the rights to which that institution is subrogated, are to be determined in accordance with the law of the Member State to which the institution belongs. Nevertheless, the rights that may be claimed by the subrogated party cannot exceed the rights that the victim would have had against the responsible party under the national law of the State in which the accident occurred.*
>
> *The application of national law in the Member State in which the accident occurred, to specific claims submitted by an institution responsible for providing benefits cannot be such as to undermine or nullify the very substance of the obligation to*

[17] Reference is made, by analogy, to the judgment in *Axa Belgium*, C-494/14, EU:C:2015:692.

recognise subrogation rights provided for in Article 85(1) of Regulation (EC) No 883/2004.

Páll Hreinsson
Judge-Rapporteur