



E-2/18-26

REPORT FOR THE HEARING

in Case E-2/18

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 the Princely Court of Liechtenstein (Fürstliches Landgericht), in the case between

C

and

Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein

concerning the interpretation 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 13 July 2018, registered at the Court on 17 July 2018, the Princely Court of Liechtenstein (*Fürstliches Landgericht*) made a request for an advisory opinion in a case pending before it between C, as plaintiff, and Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein (“Concordia”), as defendant.

2. C, a Spanish national resident in Spain, is covered by mandatory health insurance provided by Concordia, and receives a disability pension from Liechtenstein following several years of employment there. He has incurred expenses for medical treatment in Spain, for which he seeks reimbursement directly from Concordia.

3. Referring to 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 166, p. 1, and corrigendum OJ 2004 L 200, p. 1) (“the Basic Regulation”), Concordia claims that C must present his invoices to the Spanish authorities before potentially submitting a claim to Concordia. C however argues that the Basic Regulation does not apply to his

insurance contract with Concordia. On this basis, the Princely Court has referred certain questions to the Court concerning the interpretation of the Basic Regulation.

II Legal background

EEA law

4. Article 28(1) and (2) of the Agreement on the European Economic Area (“EEA Agreement” or “EEA”) reads:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

5. Article 29 EEA reads:

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

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

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

6. Article 36(1) EEA reads:

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

7. The Basic Regulation and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) (“the Implementing Regulation”) were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33).

The two regulations were added to points 1 and 2, respectively, of Annex VI to the Agreement (Social security). The decision entered into force on 1 June 2012.

8. The preamble to the Basic Regulation includes the following recitals:

(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

...

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

(5) It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned.

...

(13) The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

...

(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.

...

(20) In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.

...

(22) The specific position of pension claimants and pensioners and the members of their families makes it necessary to have provisions governing sickness insurance adapted to this situation.

9. Article 1 of the Basic Regulation reads:

For the purposes of this Regulation:

...

(c) 'insured person', in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

...

(l) 'legislation' means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

This term excludes contractual provisions other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the European Union. Such a declaration shall be published in the Official Journal of the European Union;

...

(p) 'institution' means, in respect of each Member State, the body or authority responsible for applying all or part of the legislation;

(q) 'competent institution' means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is or would be entitled to benefits if he/she or a member or members of his/her family resided in the Member State in which the institution is situated;

...

(r) 'institution of the place of residence' ... mean[s] ... the institution which is competent to provide benefits in the place where the person concerned resides ... in accordance with the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State concerned;

(s) 'competent Member State' means the Member State in which the competent institution is situated;

...

(va) 'Benefits in kind' means:

(i) for the purposes of Title III, Chapter 1 (sickness, maternity and equivalent paternity benefits), benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the costs of medical care and products and services ancillary to that care. This includes long-term care benefits in kind;

...

10. Article 3 of the Basic Regulation reads:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

...

11. Article 9 of the Basic Regulation reads:

1. The Member States shall notify the European Commission in writing of the declarations made in accordance with point (l) of Article 1, the legislation and schemes referred to in Article 3 ... as well as substantive amendments. Such notifications shall indicate the date from which this Regulation will apply to the schemes specified by the Member States therein.

2. These notifications shall be submitted to the European Commission every year and shall be given the necessary publicity.

12. Title II of the Basic Regulation concerns the determination of the legislation applicable, and comprises Articles 11 to 16. Article 11 reads, as far as is relevant:

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

...

3. Subject to Articles 12 to 16:

...

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.

...

13. Title III of the Basic Regulation contains special provisions concerning the various categories of benefits covered by that regulation. Chapter 1 of Title III concerns sickness, maternity and equivalent paternity benefits. Section 2 of Chapter 1 applies to pensioners and members of their families, and comprises Articles 23 to 30.

14. Article 24 of the Basic Regulation reads:

1. A person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself/herself and the members of his/her family, in so far as he/she would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his/her pensions, if he/she resided in that Member State. The benefits in kind shall be provided at the expense of the institution referred to in paragraph 2 by the institution of the place of residence, as though the person concerned were entitled to a pension and benefits in kind under the legislation of that Member State.

2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined in accordance with the following rules:

(a) where the pensioner is entitled to benefits in kind under the legislation of a single Member State, the cost shall be borne by the competent institution of that Member State;

...

15. Article 25 of the Basic Regulation reads:

Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, and no pension is received from that Member State, the cost of benefits in kind provided to him/her and to members of his/her family shall be borne by the institution of one of the Member States competent in respect of his/her pensions determined in accordance with Article 24(2), to the extent that the pensioner and the members of his/her family would be entitled to such benefits if they resided in that Member State.

16. Article 35 of the Basic Regulation reads:

1. The benefits in kind provided by the institution of a Member State on behalf of the institution of another Member State under this Chapter [Chapter 1 of Title III] shall give rise to full reimbursement.

2. The reimbursements referred to in paragraph 1 shall be determined and effected in accordance with the arrangements set out in the Implementing Regulation, either on production of proof of actual expenditure, or on the basis of fixed amounts for Member States the legal or administrative structures of which are such that the use of reimbursement on the basis of actual expenditure is not appropriate.

3. Two or more Member States, and their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions coming under their jurisdiction.

17. Article 76(4) and (5) of the Basic Regulation reads:

4. The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation.

The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation.

The persons concerned must inform the institutions of the competent Member State and of the Member State of residence as soon as possible of any change in their personal or family situation which affects their right to benefits under this Regulation.

5. Failure to respect the obligation of information referred to in the third subparagraph of paragraph 4 may result in the application of proportionate measures in accordance with national law. Nevertheless, these measures shall be equivalent to those applicable to similar situations under domestic law and shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by this Regulation.

18. Article 83 of the Basic Regulation reads:

Special provisions for implementing the legislation of certain Member States are referred to in Annex XI.

19. Annex XI to the Basic Regulation contains an entry concerning Liechtenstein which reads:

1. Compulsory insurance under Liechtenstein sickness insurance scheme for benefits in kind (“Krankenpflegeversicherung”) and possible exemptions:

(a) The Liechtenstein legal provisions governing compulsory sickness insurance for benefits in kind shall apply to the following persons not resident in Liechtenstein:

- (i) persons subject to Liechtenstein legal provisions under Title II of the Regulation;*
- (ii) persons for whom Liechtenstein shall bear the costs of benefits according to Article 24, 25 and 26 of the Regulation;*

...

20. The preamble to the Implementing Regulation includes the following recitals:

(8) The Member States, their competent authorities and the social security institutions should have the option of agreeing among themselves on simplified procedures and administrative arrangements which they consider to be more effective and better suited to the circumstances of their respective social security systems. However, such arrangements should not affect the rights of the persons covered by Regulation (EC) No 883/2004.

...

(17) *This Regulation, and especially the provisions concerning the stay outside the competent Member State and concerning scheduled treatment, should not prevent the application of more favourable national provisions, in particular with regard to the reimbursement of costs incurred in another Member State.*

...

(22) *Informing the persons concerned of their rights and obligations is a crucial component of a relationship of trust with the competent authorities and the Member States' institutions. Information should include guidance on administrative procedures. ...*

21. Article 22(1) of the Implementing Regulation reads:

The competent authorities or institutions shall ensure that any necessary information is made available to insured persons regarding the procedures and conditions for the granting of benefits in kind where such benefits are received in the territory of a Member State other than that of the competent institution.

22. Article 24 of the Implementing Regulation reads:

1. For the purposes of the application of Article 17 of the basic Regulation, the insured person and/or members of his family shall be obliged to register with the institution of the place of residence. Their right to benefits in kind in the Member State of residence shall be certified by a document issued by the competent institution upon request of the insured person or upon request of the institution of the place of residence.

2. The document referred to in paragraph 1 shall remain valid until the competent institution informs the institution of the place of residence of its cancellation.

The institution of the place of residence shall inform the competent institution of any registration under paragraph 1 and of any change or cancellation of that registration.

3. This Article shall apply mutatis mutandis to the persons referred to in Articles 22, 24, 25 and 26 of the basic Regulation.

23. Article 62(1) of the Implementing Regulation reads:

For the purposes of applying Article 35 and Article 41 of the basic Regulation, the actual amount of the expenses for benefits in kind, as shown in the accounts of the institution that provided them, shall be reimbursed to that institution by the

competent institution, except where Article 63 of the implementing Regulation is applicable.

24. Article 63 of the Implementing Regulation reads:

1. The Member States referred to in Article 35(2) of the basic Regulation, whose legal or administrative structures are such that the use of reimbursement on the basis of actual expenditure is not appropriate, are listed in Annex 3 to the implementing Regulation.

2. In the case of the Member States listed in Annex 3 to the implementing Regulation, the amount of benefits in kind supplied to:

...

(b) pensioners and members of their family, as provided for in Article 24(1) and Articles 25 and 26 of the basic Regulation;

shall be reimbursed by the competent institutions to the institutions providing those benefits, on the basis of a fixed amount established for each calendar year. This fixed amount shall be as close as possible to actual expenditure.

25. Annex 3 to the Implementing Regulation lists the EEA States claiming reimbursement of the cost of benefits in kind on the basis of fixed amounts. That list includes Spain.

National law

26. The Basic Regulation and the Implementing Regulation are directly applicable in Liechtenstein.

27. The system of mandatory health insurance (*Obligatorische Krankenpflegeversicherung*, “OKP”) is governed by the Law of 24 November 1971 on health insurance (*Gesetz über die Krankenversicherung*, LR 832.10) (“KVG”). Persons subject to the mandatory health insurance requirement shall conclude an appropriate insurance contract with a Government-approved health insurance fund. According to the referring court, there are currently three approved health insurance funds in Liechtenstein that provide mandatory health insurance.

28. The mandatory health insurance covers in- and outpatient treatment in accordance with Article 18 KVG. As regards outpatient treatment, the OKP is available in two variants, both of which have to be offered by health insurance funds. Under “OKP Basic”, the choice of outpatient service providers is limited to those with whom the health insurance funds have concluded a service contract. Under “OKP Plus”, the insured person is free to choose

the outpatient service provider. Certain maximum tariffs apply with regard to both in- and outpatient treatment.

III Facts and procedure

29. According to the referring court, C worked in Liechtenstein from 1977 to 1999. Since 1 December 2000 he has received a disability pension under the Liechtenstein disability insurance scheme. He has taken out mandatory health insurance under Liechtenstein law with Concordia. The insurance provides for the cover prescribed by Liechtenstein law, and grants a free choice of doctor worldwide.

30. C resided in Liechtenstein until 31 May 2003. On 1 June 2003, he moved his residence to Spain. He registered there using an E121 form, which certifies entitlement to healthcare for persons not living in the country in which they are insured.

31. C suffers from mental and physical disorders of a chronic nature. For several years he has received benefits in kind in various private healthcare institutions in Spain. The institutions issued invoices for the treatment, which C forwarded to Concordia. Concordia bore these costs until 31 March 2016.

32. For the period after 31 March 2016, invoices for continued treatment in Spain were submitted to Concordia on C's behalf. However, Concordia concluded in March 2017 that, due to the chronic nature of C's disorders, there was no longer a need for hospital care after 1 April 2016.

33. On 6 September 2017, Concordia informed C's lawyers that it would cover in full the inpatient stay at the Spanish institution up to 31 March 2016, and up to 30 June 2016 as a transitional period. Concordia would pay a daily contribution to care costs amounting to CHF 37.60 for the period after that date, and reimburse the costs for certain other medical services in this period.

34. Concordia then adopted two orders, which are at issue in the national proceedings. First, C was ordered to claim reimbursement of benefits in kind received in Spain after 1 September 2017 from the competent Spanish institution. Invoices partly or fully rejected by the competent Spanish institution were to be submitted to Concordia. Concordia also reserved the right to recover benefits over-reimbursed for the period 1 July 2003 to 31 August 2017. In the second order, Concordia held that it would pay C's care costs of CHF 37.60 per day from 1 July 2016 to 30 November 2017, unless benefits in kind were already provided in Spain. Payments after that period would be dependent on a request for a commitment to cover costs.

35. In November 2017, C challenged the two orders before the Princely Court. On the basis of his insurance policy, he argues that Concordia should be ordered to pay for all

medically prescribed treatments. His contract covers the free choice of doctor and the cost of treatment in Liechtenstein and abroad, up to the amount of the statutory tariff. C argues that the Basic Regulation is not applicable. The Spanish national health system does not cover costs arising in the private insurance system. Invoicing the Spanish institution would also delay the procedure, as compared to invoicing Concordia directly.

36. Concordia argues that the action should be dismissed. It argues that, under Article 24 of the Basic Regulation, C is entitled to benefits in kind in Spain as if he were insured under Spanish legislation. His invoices for treatment must be submitted to the relevant Spanish institution which will reimburse him and then settle with Concordia. He may submit invoices to Concordia only to the extent they are not covered by the Spanish institution, and only up to the maximum of the tariffs applicable to his insurance. Since Concordia already provided benefits in excess of that limit, it argues that it is entitled to recover these over-reimbursed benefits.

37. In the proceedings before the Princely Court, C presented documents showing that he had attempted to submit various invoices for his medical treatment to the Spanish authorities. The Spanish authorities had refused to reimburse the costs, as they had been incurred in private institutions, which fall outside the national health system.

38. By a letter of 13 July 2018, the Princely Court decided to stay the proceedings and to refer the following questions to the Court:

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

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

(b) If, in accordance with point (a), it is not possible for the policyholder to rely on the insurance contract:

Is that also the case where the insurance contract is concluded within the framework of the statutory insurance requirement but the contractual insurance goes beyond the minimum required by law and has thus been concluded to some extent ‘voluntarily’?

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

- (a) Does this also apply to an insured person who has already been provided benefits under the contractual relationship for several years or is reliance by the social insurance scheme on [the Basic Regulation] contrary to the principle of good faith?**
- (b) Is a social insurance scheme entitled, relying on [the Basic Regulation], to make claims for recovery to an insured person because in the past it has provided insurance cover in excess of the level specified in the regulation, that is to say, it has provided benefits which do not have to be paid under the rules of that regulation, or it is contrary to the principle of good faith to make claims for recovery?**
- (c) Does, in the light of [the Basic Regulation], the provision of benefits by the social insurance scheme, without invoices having been submitted through the social insurance institution in the place of residence, also entitle the policyholder to the future provision of benefits, without the need to submit invoices through the social insurance institution in the place of residence?**

39. In the same letter, the referring court requested the Court to apply an accelerated procedure pursuant to Article 97a of the Rules of Procedure. By an order of the President of 11 September 2018, that request was denied.

IV Written observations

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

- C, represented by José R. Tent, Advocate, and ADVOCATUR Beck & Partner AG;
- Concordia, represented by Ivo Bühler and Andreas Dobler, Advocates;

- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the Government of Spain, represented by Miguel Sampol Pucurull, Abogado del Estado-Jefe, and Alejandro Rubio González, Abogado del Estado, Members of the Spanish Legal Service before the Court of Justice of the European Union, acting as Agents;
- the Government of the Netherlands, represented by Mielle Bulterman and Jurian Langer, head and staff member, respectively, of the European Law Division of the Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Michael Sánchez Rydelski and Carsten Zatschler, members of the Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Denis Martin and Nicola Yerrell, legal adviser and member, respectively, of its Legal Service.

V Summary of the arguments and observations submitted to the Court

C

41. With regard to Question 1, C submits that the Basic Regulation is not applicable to the case. The case concerns purely a contractual issue and not an international situation. Within the framework of freedom of contract, Concordia offered C insurance cover which includes a supplement guaranteeing C a “free choice of doctor throughout the world”. Concordia is required to adhere to these policy conditions and to pay the benefits generated by C’s treatment in Spain. Moreover, Concordia has paid benefits directly to C for years and reimbursed treatment in Spain, without requiring him to submit invoices to the institution of the place of residence. In any event, the institution of the place of residence does not cover benefits under the private insurance system.

42. For these reasons, C submits that it is arbitrary, illegitimate and an abuse of rights to invoke the Basic Regulation to circumvent the agreed conditions. According to C, the interpretation put forward by Concordia would mean that C could never exercise his right of free movement if he wanted to retain his policy terms and insurance cover.

43. If the Basic Regulation is applicable, C submits that it only provides a minimum framework for coordination of social security systems. Since the Basic Regulation does not

harmonise social security law, obligations to provide benefits under private insurance contracts cannot be affected or restricted by that regulation. In C's view, it follows from Article 24(1) and Article 24(2)(a) of the Basic Regulation that it was not the intention of the EU legislature that the institution of the place of residence should perform obligations under a private insurance contract.

44. C contends that coordination of systems is only possible where two insurance systems actually provide equivalent benefits. Since the Spanish institution only pays the benefits generated within the Spanish social insurance system, and not by a private insurance scheme outside that system, the responsibility lies with Concordia alone.

45. Regarding Question 2, C argues that his insurance goes beyond the statutory minimum benefits provided for in Liechtenstein. Because he availed himself of his free choice of doctor, he was treated by private doctors and institutions. Under no circumstances are these benefits paid by the Spanish institution of residence. It would therefore be incompatible with the system and inappropriate if an insured person in such a situation were required to submit invoices first to the institution of the place of residence. Freedom of contract and the principles of sanctity of contract and of good faith ensure that a policyholder may rely on his rights under an insurance contract. Concordia has breached these principles by attempting unilaterally to modify its obligations to the detriment of C.

46. In relation to Question 3, C argues that he continues to be entitled to the benefits under the contract with Concordia based on the principles of good faith and the protection of legitimate expectations. The Basic Regulation cannot undermine the contractually agreed "free choice of doctor throughout the world". Recovery would be contrary to the principle of good faith, and it is not consistent with the Basic Regulation if C is penalised for spending his retirement in Spain.

47. Furthermore, C argues that recovery only makes sense if a policyholder has actually received overlapping benefits. However, C has no claim to benefits vis-à-vis the institution of the place of residence. Accordingly, the claim for recovery against C on the ground that the institution of the place of residence should pay is not justified. In any event, recovery claims can only be made between the respective State institutions and not directly against an insured person.

48. C submits that the Basic Regulation does not apply at all, and that the Court does not therefore need to examine the questions any further. In the event the Court should take a different view, C proposes that the Court should answer the questions referred as follows:

[1] [The Basic Regulation] lays down a minimum framework which must be complied with. However, [the Basic Regulation] does not in any way affect or restrict the insurer's benefit obligations to be performed worldwide under the insurance contract. Responsibility for providing benefits under the insurance

contract therefore lies solely with the private insurance company, in this case Concordia Schweizerische Kranken- und Unfallversicherung AG.

[2](a) A policyholder is not required 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. The insurer cannot be made liable for payment only once the institution in his place of residence has refused to pay but, notwithstanding the above, a policyholder may in any case rely on his rights under the insurance contract.

(b) This applies even more so where the insurance contract was concluded within the framework of the statutory insurance requirement but the contractual insurance goes beyond the minimum required by law and has thus been concluded to some extent voluntarily.

[3](a) Because the insured person has already been provided benefits under the contractual relationship for several years, it is consistent with the principle of good faith that the invoices can be submitted, as before, directly to the insurer, in this case Concordia. Reliance on [the Basic Regulation] would be contrary to the principle of good faith.

(b) If benefits have been provided which should not have been paid under the rules of [the Basic Regulation], a possible claim for recovery can be made – unless it is time-barred – by an insurance institution solely against the institution in the place of residence. A direct claim for recovery against the policyholder is precluded in any case.

(c) If the invoices have been submitted directly to the insurer over a long period of time and the insurance company has always paid the benefits thus far, the policyholder is entitled to the future provision of benefits, without the need to submit invoices through the institution in the place of residence.

Concordia

49. With regard to Question 1, Concordia submits that the conflict rules laid down by the Basic Regulation are mandatory for the EEA States. Articles 24 and 25 contain specific derogating rules with regard to sickness benefits for pensioners, and form a complete system of conflict rules. Insured persons falling within the scope of the rules cannot elect to counteract their effects by withdrawing voluntarily from their application.¹

¹ Reference is made to the judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraphs 51, 52, 56, 57 and 72.

50. As regards Question 2, Concordia submits that the KVG covers both compulsory and voluntary health care insurance. Persons who are compulsorily insured can take out voluntary insurance for benefits that exceed the framework of the compulsory insurance scheme. Thus, in order to quantify voluntary benefits, it must first be established which benefits are to be provided under the compulsory health care insurance scheme.

51. In this respect, Concordia argues that, under Article 24 of the Basic Regulation, the institution of the place of residence must provide benefits in kind in accordance with its legislation and then claim payment for the benefits from the institution in the EEA State granting the pension. The extent of the benefits to be reimbursed under the compulsory health care insurance scheme is established through the submission of invoices by C to the institution of the place of residence. This is decisive to establish the Liechtenstein institution's obligations to provide benefits under the compulsory health care insurance scheme. Since voluntary health care insurance only finances obligations not already covered under the compulsory scheme, submission to the institution of the place of residence is a requirement to determine the entitlement under the voluntary insurance scheme.

52. As regards Question 3, Concordia submits that both the KVG and the Basic Regulation contain binding statutory provisions which insurers must observe. C cannot claim a continued right to treatment which is not in accordance with these provisions. Moreover, by virtue of binding provisions, Concordia reserved its right to claim recovery because it does not have the authority to waive that right. Nevertheless, an individual affected is afforded a certain protection by reason of limitation periods.

53. In Concordia's view, the implementation of binding statutory provisions cannot be seen to be contrary to the principle of good faith. On the other hand, a reimbursement of benefits not in compliance with the law is precluded and Concordia remedied this situation as soon as it was realised.

The Government of Liechtenstein

54. The Government of Liechtenstein submits that it has made the necessary declaration under Article 9 of the Basic Regulation to bring the KVG within the scope *ratione materiae* of the Basic Regulation and the Implementing Regulation. The providers of mandatory health insurance in accordance with the KVG therefore have to ensure full compliance with the mandatory requirements laid down by these regulations. They are directly applicable under Liechtenstein law.

55. As regards the first part of Question 1, the Liechtenstein Government submits that the regulations merely provide for coordination and not harmonisation of national social security systems. These coordination rules do not remove substantive differences between national systems, including the possible negative effects of crossing borders due to different levels and standards of social protection in each country. Every EEA State

remains free to decide who is to be insured under its legislation, which benefits are granted and under what conditions, how these benefits are calculated and what contributions should be paid.

56. However, the coordination rules ensure that the application of different national legislation does not adversely affect persons exercising their right to move and to stay within EEA States. The common rules and principles established have to be observed by all national authorities, social security institutions, courts and tribunals when applying national laws. Therefore, the coordination provisions are mandatory.

57. The Liechtenstein Government argues further that, since the Basic Regulation is applicable to all social insurance systems in the EEA States, it also applies to insurance systems as described in the second part of Question 1.

58. With regard to Question 2(a), the Government of Liechtenstein argues that Article 24 of the Basic Regulation entails that the institution of the place of residence of the pensioner has to provide benefits in kind to the pensioner and his family, even if the pensioner is not entitled to benefits in kind under the legislation of that EEA State. The Government also highlights Articles 22 and 24 of the Implementing Regulation, which oblige the competent institution of the EEA State where the pensioner is entitled to benefits in kind (here: Liechtenstein) to inform the insured person about the procedures and conditions for the granting of benefits in kind in the territory of another EEA State, and to issue, upon request, a document certifying the right of the insured person to benefits in kind in the EEA State of residence.

59. In the view of the Liechtenstein Government, these provisions of the Basic Regulation and the Implementing Regulation clearly define the procedures concerning benefits in kind. Those procedures must be followed by the EEA States, the competent institutions and the insured persons. Consequently, a policyholder cannot rely on his rights under an insurance contract if these rights are contrary to mandatory rules and procedures laid down in those regulations.

60. Turning to Question 2(b), the Liechtenstein Government submits that OKP Plus is a variant of the mandatory health care insurance, which should not be confused with the possibility to conclude an additional private insurance contract that goes beyond the minimum statutory requirements. Within the framework of the mandatory health insurance scheme, it is not possible to be insured on a voluntary basis beyond the minimum required by law. Therefore, Question 2(b) cannot be answered.

61. As regards Question 3(a), the Liechtenstein Government submits that the obligation to submit invoices first to the institution in the place of residence also applies to an insured person who has already received benefits under a contractual relationship. It is for the referring court to decide whether and, if so, to what extent an incorrect application of the

Basic Regulation and the Implementing Regulation in the past could have an impact on the legal relationship between Concordia and C under national law.

62. With regard to Question 3(b), the Liechtenstein Government contends that, in the absence of provisions in the Basic Regulation and the Implementing Regulation concerning recovery claims vis-à-vis an insured person, a social security scheme is not entitled to make such recovery claims on the basis of the Basic Regulation. Whether such claims can be made under national law is for the referring court to decide.

63. Finally, as regards Question 3(c), the Government of Liechtenstein submits that the policyholder has no entitlement to the provision of benefits without invoices having been submitted through the institution of the place of residence. This conclusion is not affected by the fact that, for a period of time, the competent institution did provide such benefits without invoices having been submitted through the institution of the place of residence.

64. The Liechtenstein Government proposes that the Court should answer the questions referred as follows:

1. The answer to the first sub-question under Question 1 should be that the rules of [the Basic Regulation] are also mandatory if they affect and restrict benefit obligations to be performed worldwide under an insurance contract.

2. The second sub-question under Question 1 should be answered in the affirmative.

3. The answer to Question 2a) should be that a policyholder cannot rely on his rights under an insurance contract if these rights are contrary to mandatory rules and procedures laid down in [the Basic Regulation] and [the Implementing Regulation].

4. Question 2b) cannot be answered as such as an insurance contract concluded within the framework of the mandatory health care insurance cannot go beyond the minimum required by law.

5. The answer to Question 3a) should be that the obligation to submit invoices first to the institution in their State of residence also applies to an insured person who has already been provided benefits under a contractual relationship for several years.

6. The answer to Question 3b) should be that a social insurance scheme is not entitled, relying on [the Basic Regulation], to make claims for recovery to an insured person because in the past it has provided insurance cover in excess of the level specified in the regulation. Whether a social insurance scheme is entitled to make such claims under national law is for the national court to decide.

7. Question 3c) should be answered in the negative.

The Government of Spain

65. As to the content of Spanish social security law, the Spanish Government notes that a person who is lawfully a holder of a national health card (such as C), is entitled to receive services from the Spanish public national health system. Under Article 9 of Spanish Law No 16/2003, benefits under the national health system will be provided only by staff lawfully authorised to do so, using the facilities of the national health system, except in life-threatening situations where it is shown that it was not possible to use the facilities of that system.

66. Referring, inter alia, to recital 4 of the Basic Regulation, the Government of Spain submits that the purpose of that regulation is to coordinate the EEA States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively. The Basic Regulation therefore allows different social security schemes to exist.² It does not harmonise the material content of the social security benefits which it covers.³ In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted.⁴

67. The Government of Spain considers that, as a pensioner from Liechtenstein resident in Spain, C is subject to Spanish legislation pursuant to Article 11(e) of the Basic Regulation. Therefore, once the E121 form was registered by the institution of the place of residence, C was entitled to benefits in kind in Spain in accordance with the Basic Regulation. The Spanish authorities issued a national health card for C, which entitles him to receive services from the Spanish public national health system. Under Spanish law, benefits under the national health system are provided only by staff lawfully authorised to do so, using the facilities of the national health system, except in life-threatening situations where it is shown that it was not possible to use the facilities of that system. Since C's costs relate to services provided by private health centres outside the Spanish national health system, and no life-threatening situation was involved, the Spanish authorities could not reimburse the costs.

68. The Spanish Government refers to Article 24 of the Basic Regulation, according to which C is entitled to benefits in kind as if he were entitled to a pension and benefits in kind under Spanish legislation. That is also precisely how the case was treated by the Spanish authorities. Similarly, the registration of C in the Spanish social security system also meant that Spain started to bill Liechtenstein for the benefits in kind in accordance

² Reference is made to the judgments in *Brey*, C-140/12, EU:C:2013:565, paragraph 43, *Commission v United Kingdom*, C-308/14, EU:C:2016:436, paragraph 67, and *Klein Schiphorst*, C-551/16, EU:C:2018:200, paragraphs 31, 43 and 44.

³ Reference is made to Case E-4/07 *Þorkelsson and Gildi-lífeyrissjóður* [2008] EFTA Ct. Rep. 3, paragraph 38.

⁴ Reference is made to Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320, paragraph 43.

with Article 35(2) of the Basic Regulation and, in particular, Article 63 of the Implementing Regulation.

69. The Spanish Government submits that the system for the reimbursement of costs established by the Basic Regulation would not be respected if Question 2(a) were answered in the affirmative. This would imply that the authorities of Spain and other similar EEA States would have to deny applications for reimbursement made by a large number of persons because reimbursement is not possible under their national health systems. The Spanish system provides health services through its own means, and is not a system of reimbursement of costs.

70. In sum, the Spanish Government contends that the Basic Regulation does not apply to the private conflict between C and Concordia. That regulation only coordinates social security systems and does not resolve the extent of a specific insurance policy.

71. The Government of Spain proposes that the Court should answer the questions referred as follows:

1) [The Basic Regulation] does not apply to the situation described by the referring Court.

2) In any case [the Basic Regulation] does not oblige the institution of the State of residence to refuse each request for the reimbursement of costs when the legal or administrative structures of that institution are such that the use of reimbursement on the basis of actual expenditure is not appropriate.

The Government of the Netherlands

72. The Government of the Netherlands submits that, if Spanish social security law does not cover treatment in private institutions, such treatment will fall outside the scope of Article 24 of the Basic Regulation. In that case, there would be no costs eligible for settlement with the institution of the place of residence. Ultimately, Liechtenstein law determines whether the costs incurred should be reimbursed directly under the OKP Plus insurance.

73. In the event that the health costs are indeed covered by the Spanish social insurance system, the compensatory mechanism established by Article 35 of the Basic Regulation is neither compulsory in all situations nor exhaustive. In particular, Article 35(3) allows two or more EEA States to provide for other methods of reimbursement. Further support for this can be found in recital 17 of the Implementing Regulation, and in Article 9(5) of 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 (OJ 2011 L 88, p. 45).

74. The Government of the Netherlands submits that its interpretation would also be conducive to the functioning of the Basic Regulation, as it would avoid unnecessary administrative burdens for insured persons and the institutions involved. In situations in which the national health insurance scheme also provides for direct reimbursement of health care costs in other EEA States, such as in the present case, the insured persons can choose between having these costs reimbursed through the institution of the place of residence or through their private insurance. In both cases, the competent EEA State pays the costs for insured persons residing in another EEA State, which is the intended result of the Basic Regulation's coordination rules.

75. The Government of the Netherlands is not aware of any case law from the Court of Justice of the European Union ("ECJ") or the Court contradicting this interpretation of the nature of the compensatory mechanism. As regards the judgment in *van Delft and Others* (cited above), the ECJ held the Basic Regulation's coordination mechanism to be mandatory, but it did not address the nature of the compensatory mechanism.

76. In conclusion, the Government of the Netherlands contends that an insured person such as C is not obliged first to settle his health costs with the institution of the place of residence before claiming costs from his insurer, if the national scheme of the competent EEA State confers an entitlement to direct reimbursement of health care costs incurred in another EEA State.

ESA

77. Relying on recital 4 of the Basic Regulation, ESA emphasises that the regulation only entails coordination of social security systems, and not harmonisation. Coordination merely aims to secure access to social security in the new State of residence, and to prevent the loss of acquired social security rights in the former. Coordination allows for maintaining differences between the national social security schemes, while also aiming to ensure that any remaining differences do not create obstacles to free movement.

78. The Basic Regulation mainly seeks to determine which institution is to be competent for bearing the costs in a particular cross-border situation. The coordination rules determine which State's system a citizen is subject to, and prevent a person from being left without protection, or having double coverage in a cross-border situation. The rules are mandatory for both individuals and institutions. While it is for national systems to regulate who is to be insured under national provisions, and which benefits are granted, the EEA rules on social security coordination provide conclusive criteria for determining the system to which a person moving from one State to another is subject.

79. With regard to Question 1, ESA notes that the Basic Regulation and the Implementing Regulation apply to Liechtenstein by virtue of Joint Committee Decision No 76/2011. Moreover, Liechtenstein has notified a declaration to ESA pursuant to Article 9 of the Basic Regulation. The declaration refers, inter alia, to the KVG, which therefore falls

within the scope of the Basic Regulation.⁵ In addition, ESA refers to the entry concerning Liechtenstein's sickness insurance for benefits in kind in Annex XI to the Basic Regulation. It follows therefore that the Basic Regulation applies to the Liechtenstein health insurance system. The Basic Regulation's concept of "legislation" is in any event a broad one, and must be taken to encompass all the national measures applicable in the matter.⁶

80. ESA notes that the Basic Regulation applies, according to its Article 3(1)(a), to the legislation of the branch of social security concerning sickness benefits. ESA considers that C's sickness benefits under the private insurance contract can be regarded as social security benefits for the purposes of the Basic Regulation because they are granted without any individual and discretionary assessment of personal needs on the basis of a legally defined position, and because they are based on one of the risks expressly mentioned in Article 3(1) of the Basic Regulation.⁷ Consequently, C's insurance with Concordia falls within the ambit of the Basic Regulation.

81. As regards Question 2, ESA submits that, under Article 24(1) of the Basic Regulation, C is entitled to benefits in kind in Spain in accordance with Spanish legislation. These benefits are provided at the expense of the institution in Liechtenstein by the institution of the place of residence. ESA submits that only an institution which is competent to provide benefits in kind under the Spanish system qualifies as an institution of the place of residence, as defined in Article 1(r) of the Basic Regulation. Consequently, private institutions which are not covered by the Spanish system fall outside the ambit of Article 24 of the Basic Regulation.

82. ESA contends that this reading is confirmed by Article 35(1) of the Basic Regulation. Full reimbursement between institutions in accordance with that provision would involve the Spanish institution providing the treatment passing on the costs to the competent Liechtenstein institution, without an invoice ever being presented to C. However, since the competent Spanish authorities did not incur any costs in relation to C's treatment, there was no reimbursement between the institutions of any costs that would be attributable to C's treatment. Assuming that C only received benefits in kind from private institutions not covered by the Spanish system, reimbursement of the costs incurred would not be subject to Articles 24 and 35 of the Basic Regulation. That appears to be the reason why invoices have been presented by C directly to Concordia.

83. Further, according to ESA, it is in any event clear from case law that Article 24 of the Basic Regulation does not prevent the competent institution from providing to pensioners falling under the scope of its national legislation benefits which are more

⁵ Reference is made to the judgments in *Mora Romero*, C-131/96, EU:C:1997:317, paragraph 25, and *Perez Garcia and Others*, C-225/10, EU:C:2011:678, paragraph 36.

⁶ Reference is made to the judgment in *Bozzone*, 87/76, EU:C:1977:60, paragraph 10.

⁷ Reference is made to the judgments in *Hoeckx*, 249/83, EU:C:1985:139, paragraph 11, *Acciardi*, C-66/92, EU:C:1993:341, paragraph 14, *Molenaar*, C-160/96, EU:C:1998:84, paragraph 20, *Hosse*, C-286/03, EU:C:2006:125, paragraph 37, and *Habelt*, C-396/05, EU:C:2007:810, paragraph 63.

favourable than those which it would be bound to provide for them under the EEA rules with regard to the scope of the benefits and the reimbursement of costs.⁸ Reference is also made to recital 17 of the Implementing Regulation.

84. In view of the above, ESA submits that the rules governing the reimbursement between institutions do not apply to a case such as the one at hand. However, application of those rules would in any event ultimately lead to the costs being borne by the Liechtenstein and not the Spanish institution. Article 35 of the Basic Regulation and Articles 62 to 69 of the Implementing Regulation determine only reimbursement between institutions and do not establish rights for the insured person.⁹ These rules exhaustively describe the reimbursement procedures establishing as a general rule reimbursement between social security institutions. ESA sees no legal grounds on which Concordia could demand that C first makes a reimbursement claim of all health benefits in kind received in his place of residence from the competent Spanish institution before submitting it to Concordia.

85. ESA does not share the premise on which Question 3 is based, and therefore makes only summary observations. ESA submits that the principle of protection of legitimate expectations, which derives in particular from the principles of legal certainty and good faith, is among the fundamental principles of EEA law.¹⁰ It entails that legislation must be certain and its application foreseeable by those who are subject to it. It must be observed also by EEA States when acting within the ambit of EEA law.¹¹ Legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences.¹² It should follow from that principle that the position of the beneficiary under the social coordination rules cannot be open to challenge indefinitely.¹³

86. ESA notes that Article 22(1) of the Implementing Regulation imposes an information obligation on the competent institutions vis-à-vis the insured person. Moreover, Article 76(4) of the Basic Regulation imposes a duty of mutual information and cooperation between institutions and persons covered by that regulation to ensure its correct implementation. ESA assumes that both C and Concordia acted in good faith when they established the practice that C could submit his invoices directly to Concordia for reimbursement. This past practice in good faith cannot lead to a situation in which Concordia would be entitled to recovery claims based purely on the incorrect procedural

⁸ Reference is made to the judgment in *Jordens-Vosters*, 69/79, EU:C:1980:7, paragraph 12.

⁹ Reference is made to the judgment in *Acereda Herrera*, C-466/04, EU:C:2006:405, paragraphs 36 to 39.

¹⁰ Reference is made, inter alia, to the judgment in *ISD Polska and Others v Commission*, C-369/09 P, EU:C:2011:175, paragraph 122, and Case E-7/12 *DB Schenker v ESA* [2013] EFTA Ct. Rep. 359, paragraph 117.

¹¹ Reference is made, inter alia, to the judgment in *Elmeka NE*, C-181/04 to C-183/04, EU:C:2006:563, paragraph 31.

¹² Reference is made to the judgment in *Ireland v Commission*, 325/85, EU:C:1987:546, paragraph 18.

¹³ Reference is made to the judgment in *Fatorie*, C-424/12, EU:C:2014:50, paragraph 46.

application of the Basic Regulation, which, in ESA's view, is in any event not the case here.

87. Finally, ESA notes that the applicability of the Basic Regulation does not mean that Article 36 EEA on the freedom to provide services cannot apply at the same time.¹⁴ Medical services provided for consideration fall within the scope of Article 36 EEA, including situations where care is provided in a hospital environment, and regardless of whether the costs are subsequently reimbursed through a social security system.¹⁵ The schemes of the EEA States must therefore, without restriction, reimburse care costs incurred by their insured persons in another EEA State as if they were incurred on national territory. Conditions of access to healthcare or reimbursement that exist on national territory are applicable to care received in another EEA State as long as they are not discriminatory by their nature or application.¹⁶ A restriction may be permitted only if it is justified, proportionate and offers adequate procedural guarantees.

88. According to ESA, the Court has held that Norwegian administrative procedures for the reimbursement of costs for treatment abroad, which did not apply if the patient had received such services in Norway, constituted a restriction on the free movement of services.¹⁷ Similarly, ESA submits that a situation in which a resident of the competent State benefits from health insurance which provides him with a free choice of doctor and entitles him to submit his invoices directly to the insurance company, while the same treatment is not afforded to other beneficiaries simply by virtue of their residence in another EEA State, would at first sight appear discriminatory and contrary to Article 36 EEA. This would be for the referring court to decide.

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

1. [The Basic Regulation] must be interpreted as being applicable to social security insurance systems relying on mandatory private insurance such as the one applicable in Liechtenstein, including an option permitting a free choice of treatment providers, without however extending the cover to insured events or treatments not provided for under the legislation governing the mandatory system. [The Basic Regulation] must be interpreted as laying down mandatory minimum requirements which must be complied with by national social security institutions. They must be interpreted as not affecting the extent of cover provided by national institutions.

2. Article 24 of [the Basic Regulation] must be interpreted as entitling a beneficiary such as the one in the case pending before the referring court to benefits in kind under the legislation of the State of residence from the institution of the place of

¹⁴ Reference is made, inter alia, to the judgment in *Commission v Spain*, C-211/08, EU:C:2010:340, paragraph 45.

¹⁵ Reference is made to the judgment in *Watts*, C-372/04, EU:C:2006:325, paragraphs 86 and 89.

¹⁶ Reference is made to the judgments in *Decker*, C-120/95, EU:C:1998:167 and *Kohll*, C-158/96, EU:C:1998:171.

¹⁷ Reference is made to *Rindal and Slinning*, cited above, paragraphs 44 and 54.

residence as defined in Article 1(r) of that Regulation. Article 24 of [the Basic Regulation] must be interpreted as not applying to a situation such as the one in the case at hand where benefits in kind are, instead of that institution, provided by another entity not covered by [the Basic Regulation].

3. In the latter situation, beneficiaries such as the one in the case at hand are entitled to cover and reimbursement of costs incurred from the competent institution in accordance with the legislation of their State of origin as well as the terms and conditions of the insurance contract concerned. Reimbursement procedures in that case cannot involve onerous administrative procedures going beyond what would have been required in the State of origin to verify that expenses have been validly incurred.

4. Article 36 EEA must be interpreted as precluding an entity designated by national legislation as the competent institution for the purposes of [the Basic Regulation] from limiting without justification the extent to which benefits in kind provided outside of the scope of that Regulation are reimbursed on the sole account of the beneficiary having moved his or her place of residence to another EEA State.

The Commission

90. As regards Question 1, the Commission submits that the Basic Regulation and the Implementing Regulation have the primary purpose, as expressed in recitals 4 and 13 of the Basic Regulation, of setting up a comprehensive coordination system in order to ensure that persons moving within the EEA retain the rights and the advantages acquired and in the course of being acquired. As regards sickness benefits, recitals 20 and 22 of the Basic Regulation emphasise that persons residing in an EEA State other than the competent State should be afforded protection, while recognising that the specific situation of pensioners requires particular rules.

91. In the Commission's view, the provisions of the Basic Regulation form a complete system of mandatory conflict rules, from which it is not possible to "opt out".¹⁸ That binding nature is unaffected by the fact that a national social security system may permit individuals subject to compulsory healthcare insurance to choose between different State-approved providers.

92. Turning to Question 2, the Commission submits that C's receipt of sickness benefits in kind in Spain is governed by either Article 24 or Article 25 of the Basic Regulation, depending on whether or not he is entitled to benefits in kind under Spanish legislation. In the Commission's view, the wording of Article 24 is sufficiently broad to cover not only

¹⁸ Reference is made to the judgments in *van Delft and Others*, cited above, paragraphs 51 and 52, and *Walltopia*, C-451/17, EU:C:2018:861, paragraph 48, and to Cases E-13/15 *Bautista* [2015] EFTA Ct. Rep. 720, and E-24/15 *Waller* [2016] EFTA Ct. Rep. 527.

situations where the pensioner is not entitled to any benefits in kind, but also situations where the pensioner is not entitled to specific benefits in kind, as in the present case. In both cases, the key point is that the pensioner should not lose entitlement to the benefits in kind he would otherwise have enjoyed if still resident in the competent State.¹⁹

93. The Commission notes that it is for the national court to decide whether Article 24 or Article 25 of the Basic Regulation applies to the facts of the case. The Commission nevertheless submits that, following the rejection by the Spanish authorities of C's claim for reimbursement of private healthcare costs, C would be entitled under Article 24(1) to the further benefits in kind which he would have received if resident in Liechtenstein, including the costs of healthcare treatment with non-approved service providers.

94. With regard to Question 3, the Commission submits that a pre-condition for the application of Article 24(1) of the Basic Regulation is that the pensioner has been refused reimbursement of the costs for the relevant healthcare benefits by the Spanish institution of the place of residence before requesting and receiving such benefits from the competent institution in Liechtenstein. However, if an initial refusal has been made concerning a specific type of benefit in kind by the EEA State of residence, this refusal should be deemed to be "on-going" unless and until there is a relevant change of circumstances. In this case, the pensioner should be able to send subsequent invoices relating to the same benefits in kind directly to the competent institution in Liechtenstein. This would be consistent with the cooperation principles in Article 76 of the Basic Regulation. The Commission also refers to the information obligation imposed on the competent institution by virtue of Article 22(1) of the Implementing Regulation.

95. The Commission observes that Concordia was aware that C had transferred his residence to Spain, and that it reimbursed him the healthcare costs until 2016 without any concern being raised as to the correct procedure. In such a situation, Article 22(1) of the Implementing Regulation precludes Concordia from seeking to rely on any such procedural irregularity to claim back the costs of benefits in kind already reimbursed. Since it appears that C would in any event be entitled to such reimbursement if the correct procedure had been followed, the Commission considers any question of recovery to be purely hypothetical. Finally, in the event of overpayment, for example an incorrect maximum tariff being applied, any right to reimbursement for the competent institution would be governed by national law on recovery and limitation periods etc.

¹⁹ Reference is made to the judgment in *Aldewereld*, C-60/93, EU:C:1994:271, paragraph 26.

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

1. [The Basic Regulation] lays down a set of mandatory rules for the coordination of social security systems, which are binding on both social security institutions and individuals falling within its personal scope.

2. In a situation where a pensioner resides in a Member State other than the State competent for payment of the pension, entitlement to benefits in kind in the Member State of residence is governed by the provisions of either Article 24 or Article 25 of [the Basic Regulation].

Article 24(1) of [the Basic Regulation] should be interpreted as entitling a pensioner to receive benefits in kind at the expense of the institution competent for payment of the pension, as if he/she were resident in that State if entitlement to those benefits has been refused by the institution of the Member State of residence.

3. Article 22(1) of [the Implementing Regulation] should be interpreted as precluding a competent institution, which has provided benefits over a period of time without informing the beneficiary of the correct procedure to be followed under [the Basic Regulation] from relying upon any such irregularity in order to make a claim for recovery of benefits.

Per Christiansen
Judge-Rapporteur