REPORT FOR THE HEARING
in Case E-3/04

- revised - *

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 Gulating lagmannsrett (Gulating Court of Appeal), Norway, in a case pending before it between

Tsomakas Athanasios and Others

Supported by
Odfjell ASA

and

The Norwegian State represented by Rikstrygdeverket

concerning the interpretation of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended[1] ("Regulation 1408/71") and as referred to in Annex VI, point 1 to the EEA Agreement.

I. Introduction

1. By a reference dated 28 May 2004, registered at the Court on 4 June 2004, Gulating lagmannsrett made a Request for an Advisory Opinion in a case pending

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* Paragraph 36 has been inserted and subsequent paragraphs renumbered.

[1] The Regulation was amended and updated by Council Regulation No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 66/98 of 4 July 1998. It has subsequently been amended several times. Regulation 1408/71, as amended by Council Regulation No 1399/1999 of 29 April 1999 (OJ 1999 L 164, p.1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 9/2000 of 28 January 2000, that entered into force the subsequent day, is the version relevant to this case.

before it between Tsomakas Athanasios, Labropoulos V. Elias, Pastrikos Constantinos, Moystakas Antonios, Stiros Ilias, Papmarkos Konstantinos, Desypris Petros, Dellaportas Gerasimos, Koufogiannis Nikolas Sotirios, Markou Stavros Pantelis, Bourzikos Konstantinos, Karafillidis Grigorios, Spyratos Konstantinos, Skiadaressis Vassilis, Manasis Leonidas, Kourouklis Panagiotis, Vasilakis Georgios (the "Plaintiffs"), supported by Odfjell ASA (the "Accessory Intervener"), and the Norwegian State, represented by Rikstrygdeverket (the National Insurance Administration) (the "Defendant").

II. Facts and procedure

2. In the case before the national court there is a disagreement on the interpretation of the choice of law rules contained in Title II of Regulation 1408/71. The disagreement essentially concerns the question of whether a decision to apply Article 14b(4) of the Regulation is only to be based on form E 101 or equivalent official documentation issued by the State of residence, or whether the flag State must, in the absence of such documentation, conduct its own evaluation of whether the conditions of Article 14b(4) are fulfilled, and assess, inter alia, private documentation.

3. The Plaintiffs are Greek mariners who worked on board vessels owned by the Accessory Intervener for varying lengths of time between 1995 and 1999. All of the vessels were registered with the Norwegian International Ship Registry (NIS). According to documentation provided to the national court by the Accessory Intervener, the Plaintiffs are residing in Greece and have been employed and remunerated by Mare Maritime SA, which has its place of business in Greece.

4. On behalf of its employees, Mare Maritime SA made a claim to Sentralskattekontoret for utenlandssaker (the Central Office – Foreign Tax Affairs) on 4 September 1997 to be exempt from Norwegian social security legislation. The matter was referred to Folketrygdekontoret for utenlandssaker (the National Office for Social Insurance Abroad, the "FFU"), which is the competent institution in Norway for deciding whether Norway's or another State's social security legislation applies pursuant to Regulation 1408/71. By way of letter dated 19 February 1999, FFU notified Mare Maritime SA that the competent Greek institution needed to issue form E 101 for each mariner, confirming that the mariners in question were covered by Greek legislation. FFU also sent a request to the competent Greek institution for completed E 101 forms for the mariners. The competent Greek institution subsequently issued completed E 101 forms for most of the Greek mariners working on the subject vessels, but not for all of them, and not for any of the Plaintiffs.

5. On 11 July 2000, FFU issued a decision on social security cover for the Greek mariners. With respect to Article 14b(4) of Regulation 1408/71, and the need for documentation from the Greek authorities, FFU found that it was for the Greek social security authorities to make a factual determination, and provide confirmation that the conditions for application of Article 14b(4) were fulfilled. Such confirmation could be provided by issuing form E 101 or equivalent documentation from Greek social security authorities. It stated that in the absence of such confirmation, FFU was unable to determine if the individual mariner is actually covered by Greek social security during those periods such individual works on Norwegian vessels. On those grounds FFU confirmed exemption from social security in Norway for those Greek mariners for whom Greek authorities had issued form E 101 but denied exemption for other mariners, including all the Plaintiffs.

6. Based upon FFU's ruling, in October 2000 Sentralskattekontoret for utenlandssaker stipulated the basis for calculating social security contributions for those mariners who were not exempt from Norwegian social security law.

7. On 17 August 2000, the Accessory Intervener, on behalf of the mariners, appealed FFU's decision to Trygderetten (The National Insurance Court), arguing that Article 14b(4) of Regulation 1408/71 exhaustively determines which State's laws shall apply, and that form E 101, or equivalent documentation, cannot be demanded in addition to the conditions set forth in the Regulation. Among the documents presented to Trygderetten was a statement from a Greek government representative to the Administrative Commission on Social Security for Migrant Workers in Brussels, dated 9 May 2002. The statement was a reply to an inquiry from Norwegian authorities regarding social security cover for mariners on board the relevant vessels. The reply was made after consultations with the competent Greek institution. It stated, inter alia, that on the basis of Article 14b(4), E 101 forms were provided for all the mariners expressly mentioned and that:

> "*Yet,* **[ ]** *E 101 Forms have not been issued for Greek mariners who, in their capacity of pensioners, have been employed on board vessels flying the Norwegian flag...*"

According to the Request, the parties to the proceedings disagree on the factual and legal meaning of the above statement.

8. On 11 April 2003, Trygderetten issued its ruling on the appeal. A majority of two of three judges agreed with FFU's interpretation of Regulation 1408/71 and upheld its ruling, stating, inter alia, that no Norwegian authority would be competent to determine that the mariners in question would be covered by Greek law when this has not been confirmed by the competent Greek institution. On 7 October 2003, the Accessory Intervener challenged Trygderetten's ruling before

Gulating lagmannsrett, claiming that Trygderetten's ruling is invalid, primarily on the grounds that Trygderetten's finding of a requirement for documentation from the Greek social security authorities is contrary to Article 14b(4) of Regulation 1408/71.[2] The Defendant argues in its reply that Trygderetten's ruling was based upon a correct interpretation of EEA law, and requests a finding in the Defendant's favour. Under the proceedings Gulating lagmannsrett decided to request an Advisory Opinion from the Court.

III. Question

9. The following question was referred to the EFTA Court:

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

IV. Legal background

10. According to Chapter 2 of the National Insurance Act No 19 of 28 February 1997 (*lov om folketrygd)*, the basic principle is that only those persons who are residing in Norway are compulsory members of the Norwegian social security scheme. However, the King is, pursuant to the Act, authorised to grant exemptions from its provisions through reciprocal agreements with other states, such as the EEA Agreement. Until 1 January 2001, the choice of law rules of Regulation 1408/71 were implemented in Norwegian law through Regulation No 384 of 25 April 1997 (*forskrift av 25. april 1997 nr. 384).* According to section 1 of the Norwegian regulation, the rules of the National Insurance Act shall be derogated from insofar as is necessary in order to apply, inter alia, the choice of law rules contained in Regulation 1408/71.

11. In its review of the consequences of the choice of law issue, Gulating lagmannsrett states that in the event that the Plaintiffs are found not to be subject

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[2] Subsequently the claim was altered and the 17 mariners were named as Plaintiffs and Odfjell AS as Accessory Intervener.

to Norwegian social security legislation they will not be liable for social security payments to Norway and will not be entitled to any benefits under the Norwegian social security legislation or from any other social security programs in Norway. If the opposite conclusion is reached, the Plaintiffs must pay Norwegian social security contributions pursuant to section 23-3 of the National Insurance Act, and their employer would be required to pay social security contributions pursuant to section 23-2 of the National Insurance Act. In addition, the Plaintiffs will be fully entitled to all of the benefits enjoyed by Norwegian citizens during the relevant period.

12. Article 3 of the EEA Agreement reads:

> *"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement."*

13. Article 28(1) and (2) of the EEA Agreement read:

> *"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."*

14. Article 29 of the EEA Agreement 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:*
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> *(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;*
>
> *(b) payment of benefits to persons resident in the territories of Contracting Parties."*

15. According to Article 13(1) of Regulation 1408/71 persons to whom the Regulation applies shall be subject to the legislation of a single Member State only.

16. Article 13(2)(c) of Regulation 1408/71 reads:

> *"2. Subject to Articles 14 to 17:*
>
> *(…)*
>
> *(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of the State;"*

17. Article 14b(4) of Regulation 1408/71 reads:

> *"Article 13 (2) (c) shall apply subject to the following exceptions and circumstances:*
>
> *(…)*
>
> *4. A person employed on board a vessel flying the flag of a Member State and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another Member State shall be subject to the legislation of the latter State if he is resident in the territory of that State; the undertaking or person paying the remuneration shall be considered as the employer for the purpose of the said legislation."*

18. Articles 80 and 81 of Regulation 1408/71 establish the Administrative Commission on Social Security for Migrant Workers ("the Administrative Commission"), whose duties include dealing with all administrative questions and questions of interpretation arising from the provision of Regulation 1408/71 and the fostering and development of cooperation between Member States with a view to expediting, taking into account developments in administrative management techniques, the awarding of benefits.

19. Article 84 of Regulation 1408/71 contains rules on cooperation between competent authorities and institutions of Member States within the field of application of the Regulation. Article 84(1) requires the competent authorities of the Member States to communicate to each other information regarding, inter alia, their implementing measures. Article 84(2) states that "*the authorities and institutions of Member States shall lend their good offices and act as though implementing their own legislation.*" Article 84(3) further states that the competent authorities and institutions may, for the purpose of implementing the Regulation, communicate directly with one another and with the persons concerned or their representatives.

20. According to Article 2(1) of Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended[3] ("Regulation 574/72"), and as referred to in point 2 of Annex VI to the EEA Agreement, models of certification and other documents necessary for the application of the Regulation and of the implementing Regulation shall be drawn up by the Administrative Commission.

21. Article 11(1)(a) and (b) of Regulation 574/72 reads:

> *"The institutions designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person shall remain subject to that legislation up to a specific date:*
>
> *(a) at the request of the employed person or his employer in cases referred to in Articles 14 (1) and 14b (1) of the Regulation;*
>
> *(b) in cases where Article 17 of the Regulation applies."*

22. Form E 101, drafted by the Administrative Commission, contains the following introduction:[4]

"CERTIFICATE CONCERNING THE LEGISLATION APPLICABLE
Regulation (EEC) No 1408/71: Article 13.2.d; Article 14.1.a; (…) Article 14b.1,2 and 4; (…) Article 17"

Section 5.1. of the form contains a separate box for marking Article 14b(4).

V. Written Observations

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

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[3] The Regulation was amended and updated by Council Regulation (EC) No 118/97 (OJ 1997 L 28, p. 1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 66/98 of 4 July 1998. It has subsequently been amended several times. Regulation 574/72, as amended by Council Regulation No 1399/1999 of 29 April 1999 (OJ 1999 L 164, p. 1), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 9/2000 of 28 January 2000 that entered into force the subsequent day, is the version relevant to this case.

[4] Decision No 164 of 27 November 1998 on the model forms necessary for the application of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 (OJ 1997 L 216, p. 85), as amended by Decision No 172 of 9 December 1998 (OJ 1999 L 143, p. 13), referred to in point 3.48 of Annex VI to the EEA Agreement. It was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 11/2000 of 28 January 2000 that entered into force the subsequent day.

- the Plaintiffs and the Accessory Intervener, represented by Stephan L. Jervell, Advokat, Wiersholm, Mellbye & Bech, advokatfirma AS, Oslo, and Espen Ommedal, Advokat, Ernst & Young Tax, Bergen;

- the Defendant, represented by Ketil Bøe Moen, Assistant Advocate, Office of the Attorney General;

- The Government of the Republic of Iceland, represented by Finnur Thór Birgisson, Ministry of Foreign Affairs, acting as Agent;

- The Government of the Federal Republic of Germany, represented by Claus-Dieter Quassowski and Annette Tiemann, officials in the Federal Ministry of Finance, acting as Agents;

- the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski, Deputy Director, Legal & Executive Affairs, and Arne Torsten Anderssen, Legal & Executive Officer, acting as Agents.

- the Commission of the European Communities, represented by Nicola Yerrell and Denis Martin, Members of its Legal Service, acting as Agents;

The Plaintiffs and the Accessory Intervener

24. The Plaintiffs and the Accessory Intervener are of the opinion that the question referred to the Court must be answered in the negative. Article 14b(4) of Regulation 1408/71 provides, in their view, an independent, complete and exhaustive set of choice of law rules for determining which country's social security legislation shall apply at any given time. Accordingly, there is no room for national authorities to supplement the provision with additional conditions, particularly when doing so would result in Article 14b(4) being used to the detriment of foreign citizens residing in other EEA States.

25. In their introductory remarks the Plaintiffs and the Accessory Intervener describe, inter alia, the main issues of the case. In their view, the parties to the case agree that the situation of the Plaintiffs falls within the scope of Article 14b(4) of Regulation 1408/71, and that the Plaintiffs would initially appear to be subject to Greek legislation. As they see it, the disagreement concerns the proper interpretation of Article 14b(4) as well as the legal status of the Plaintiffs under

Greek law, i.e. whether they, as allegedly argued by the Defendant, fall completely outside the Greek social security system or whether they, as argued by themselves, merely fall outside the mandatory social security system, but as pensioners may voluntarily subscribe to a social security system in Greece.

26. The Plaintiffs and the Accessory Intervener also describe the legal framework of the case. As regards Regulation 1408/71 they state that the Regulation contains an exhaustive set of choice of law rules, which entail that an individual shall only be subject to one set of laws and that an EEA State cannot maintain domestic laws that exclude individuals to whom the law should apply pursuant to the Regulation.[5] Moreover, they maintain that as the purpose of Regulation 1408/71 is to coordinate the social security legislation of different States through choice of law rules and not to harmonize them, it does not affect an individual State's ability to decide for itself the details of its own social security system. The Plaintiffs and the Accessory Intervener then quote the judgment of the Court of Justice of the European Communities in Case C-18/95 *Terhoeve*[6], which stated, inter alia, that Member States must comply with Community law when exercising their power to determine the conditions governing the right or duty to be insured with a social security scheme. Thus, in their view, an individual EEA State is not free to establish additional requirements when applying Article 14b(4).

27. In the opinion of the Plaintiffs and the Accessory Intervener, the general issue is to what extent an EEA State can establish supplemental conditions when applying EEA law. They stress that free movement of workers and other fundamental rights must be respected and that States have to seek solutions that best preserve these fundamental rights and duties when interpreting secondary legislation. Furthermore, they argue that the main purpose behind Regulation 1408/71 is to promote free movement of workers, and thus a State's freedom to supplement the conditions thereof in a manner which restricts the free movement of workers is limited.

28. The Plaintiffs and the Accessory Intervener submit that the Defendant's application of Article 14b(4) of Regulation 1408/71 results in a restriction of the Plaintiffs' right to free movement as workers since they would be forced to make mandatory social security contributions to Norway. They argue in this regard that it is clear that Article 28 EEA not only prohibits discrimination, but also precludes restrictions on the free movement of workers.[7] The Plaintiffs and the Accessory

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5 In this regard the Plaintiffs and the Accessory Intervener refer, as an example, to Case C-196/90 *Fonds voor Arbeidsongevallen* v *Madeleine De Paep* [1991] ECR I-4815, para 18.

6 Case C-18/95 *F.C. Terhoeve* v *Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [1999] ECR I-345, para 34.

7 The Plaintiffs refer to Case C-415/93 *Union royale belge des sociétés de football association ASBL* v *Bosman, Royal club liégeois SA* v *Bosman and Others and Union des associations*

Intervener submit that a mandatory Norwegian social security tax would potentially hinder Greek mariners from applying for, or obtaining, work through Greek management companies on board Norwegian registered ships. They assert that such a mandatory tax will potentially cause Norwegian shipowners to prefer mariners from other EEA States who are exempt from paying social security taxes in Norway, or perhaps citizens from outside the EEA. Furthermore, they state that it follows from Article 14b(4) of Regulation 1408/71 that the Plaintiffs are subject to Greek social security legislation. Regardless of the substance of this legislation, a requirement to pay social security tax to Norway while subject to Greek social security legislation would be an obstacle to their freedom of movement as workers. The fact that Greek social security legislation does not provide for mandatory participation in all circumstances cannot justify subjecting the Plaintiffs to Norwegian social security legislation.

29. The Plaintiffs and the Accessory Intervener are also of the opinion that the Defendant's application of Article 14b(4) of Regulation 1408/71 is de facto indirectly discriminatory on the basis of nationality[8] and conflicts with the fundamental principles of Regulation 1408/71. In this regard they argue that the Defendant applies the same rule in different circumstances by requiring the Plaintiffs to pay social security tax in Norway. In particular, the Defendant's position subjects the Plaintiffs to two legal regimes, both Norwegian and Greek, and subjects them to unjustifiable double taxation. In the view of the Plaintiffs and the Accessory Intervener it must be assumed that citizens of other EEA States are more likely to be subject to double social security coverage than Norwegian citizens.[9]

30. The Plaintiffs and the Accessory Intervener then submit that a requirement to produce an E 101 form or its equivalent does not follow from the choice of law provision of Article 14b(4) of Regulation 1408/71 and reiterate that the situation of the Plaintiffs falls within the scope of the provision. They support this submission by referring to the wording of Article 14b(4), which states that if the conditions of the provision are fulfilled the worker "shall" be subject to the legislation of the State of residence. Therefore, the Greek authorities are obliged to allow the Plaintiffs to avail themselves of Greece's social security legislation. Likewise, Norway has a duty to accept that the Plaintiffs are not subject to Norwegian social security legislation. Any other conclusion would, in their view,

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européennes de football (UEFA) v *Bosman* [1995] ECR I-4921; Case C-176/96 *Lethonen and Castors Canada Dry Namur-Braine ASBL* v *Fédération royale belge des sociétés de basket-ball ASBL* [2000] ECR I-2681; Case C-18/95 *Terhoeve*, paras 36 and 39.

8 With respect to indirect discrimination, the Plaintiffs refer to Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493, para 17.

9 The Plaintiffs and the Accessory Intervener refer in this regard to Case C-175/88 *Biehl* v *Administration des contributions du Grand-duché de Luxembourg* [1990] ECR I-1779, para 14.

jeopardise the policy of avoiding double jurisdiction, double membership, and double social security taxation. In this regard the Plaintiffs and the Accessory Intervener stress that the formal choice of law rules that regulate which State's laws shall apply and the internal substantive laws on social security cover must not be confused.[10] In this case it is only the choice of law rules that matter. Whether the Plaintiffs are perhaps not covered by the mandatory social security scheme in Greece or whether they have chosen to participate in a voluntary scheme is therefore, in the opinion of the Plaintiffs and the Accessory Intervener, irrelevant.[11]

31. The Plaintiff and the Accessory Intervener also submit that Article 11 of Regulation 574/72 demonstrates the absence of authority for requiring an E 101 form or its equivalent. That Article is, in their view, framed specifically in order to limit the requirement that a certificate is issued to the situations governed by certain provisions of Article 14 et seq. of Regulation 1408/71. They argue that the distinctions between the different provisions of Regulation 1408/71 would be without meaning in the event Article 11 of Regulation 574/72 applied to all provisions of Article 14 et seq. of Regulation 1408/71. The specificity of Regulation 574/72 is, in the view of the Plaintiffs and the Accessory Intervener, further emphasised by the specific provision of Article 11a of Regulation 574/72 relating to Articles 14a(1) and 14b(2) of Regulation 1408/71. In their view, it is not correct to interpret Article 11 of Regulation 574/72 and Article 14b(4) of Regulation 1408/71 broadly as the Defendant does. The Plaintiffs and the Accessory Intervener further point out that Regulation 574/72 regulates a particular situation which is different from those regulated by Article 14b(4) of Regulation 1408/71.

32. Furthermore, the Plaintiffs and the Accessory Intervener contest that the presence of a check box on form E 101 for Article 14b(4) has any legal significance. In their view, it does not imply that use of the form is compulsory. In that regard, they refer, inter alia, to the instructions to form E 101, where reference is made to the same provisions of Article 14 of Regulation 1408/71 as in Article 11 of Regulation 574/72. Also, they note that form E 101 does not inquire about social security cover, but rather which law applies, and if the EEA citizen is subject to the competent EEA State's legislation.

33. Lastly, the Plaintiffs and the Accessory Intervener address the purpose of the choice of law provisions contained in Title II of Regulation 1408/71 and state

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[10] With respect to the consequences of the absence of harmonisation between social security schemes, the Plaintiffs and the Accessory Intervener refer to Case C-18/95 *Terhoeve*, para 34.

[11] In this regard the Plaintiffs and the Accessory Intervener refer to the judgment in Case C-121/92 *Staatssecretaris van Financiën* v *Zinnecker* [1993] ECR I-5023, paras 4 and 18 and the Opinion of Advocate General Jacobs in the case, para 38.

that it is twofold: to avoid that migrant workers are subject to neither social security legislation of their originating State nor their host State, and to avoid subjecting them to both. In this regard, they refer, inter alia, to the judgment of the Court of Justice of the European Communities in *De Paep*.[12] In the view of the Plaintiffs and the Accessory Intervener, this judgment does not support the Defendant's position that a form E 101 must be issued to document that a worker is covered by a mandatory social security scheme in his State of residence. In this regard they first point out that in the judgment, the focus is on choice of law and not on the substantive content of national social security schemes. Second, by requiring a form E 101, the Defendant overlooks the policy of avoiding double participation/taxation. Furthermore, the Plaintiffs and the Accessory Intervener assert that the Defendant places too much emphasis on the Regulation's objective. They note that the legal significance of form E 101 was not addressed in *De Paep* and thus the judgment is of limited value for resolving the issue in the current matter. Nor can the Plaintiffs and the Accessory Intervener see how the judgments in *Barry Banks*[13] and *Fitzwilliam*[14] provide a solution to the present matter, as both of these judgments concern factual situations different from the present case.

34. The Plaintiffs and the Accessory Intervener suggest to answer the question as follows:

> "*It is not compatible with the choice of law rules contained in Title II of Regulation (EEC) No 1408/71, that the flag State proceeds from the premise that the State of residence must have issued a form E 101 or a statement containing information equivalent to that found in form E 101, for the legislation of the State of residence to apply in accordance with Article 14b(4), and in the absence of such documentation, the legislation of the flag State shall not apply in accordance with Article 13(2)(c).*"

The Defendant

35. The Defendant maintains that the question referred to the Court must be answered in the affirmative and argues that this can be inferred from the choice of law rules in Title II of Regulation 1408/71. These rules must in the view of the Defendant be read in the light of, in particular, the objectives of Regulation 1408/71 and of form E 101 itself, including its formulation, legal basis, purpose and its binding effect. Furthermore, a requirement for form E 101 or equivalent

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12 Case C-196/90, para 18.

13 Case C-178/97 *Barry Banks and Others* v *Theatre royal de la Monnaie* [2000] ECR I-2005.

14 Case C-202/97 *Fitzwilliam Executive Search* v *Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883.

information will, in the Defendant's view, contribute to more efficiently effecting the principle of free movement of workers, cf. Article 28 EEA.

36. The documentation provided by the Accessory Intervener, indicating that the criteria set out in Article 14b(4) of Regulation (EEC) No 1408/71 may be fulfilled, has not been examined by the Norwegian social security authorities. According to the Defendant, this is due to the Defendant's understanding of the legal issue in the case at hand; namely that neither the Norwegian social security authorities nor Norwegian courts are competent to overrule the mariners' State of residence (i.e. Greece) as regards the question of whether the social security law of the State of residence is applicable according to Article 14b(4) of Regulation (EEC) No 1408/71. In this connection, the Defendant refers to the request dated 9 March 1999 whereby the Norwegian authorities asked the competent Greek institution to certify the application of Greek legislation pursuant to Article 14b(4) for a considerable number of Greek mariners. Subsequently, the Greek authorities issued completed E 101 forms for most of the mariners, but not for any of the Plaintiffs.

37. In its assessment of the question referred to the Court, the Defendant first provides an introduction to the choice of law rules in Regulation 1408/71. In the introduction, the Defendant points out that neither Article 42 EC (corresponding to Article 29 EEA) nor Regulation 1408/71 provide for a harmonisation of the national legislation on social security within the EU. Therefore, these provisions do not affect the freedom of the EEA States to determine the conditions for affiliation with their own social security systems, provided there is no discrimination against nationals of other EEA States; cf. Article 3(1) of Regulation 1408/71.[15] The Defendant also refers to the purpose of Regulation 1408/71: to provide for a co-ordination of the social security systems of the Member States by way of regulating which State's law is applicable and thereby ensure that the social security legislation of one – but only one – Member State shall apply in its entirety, both as regards benefits and obligations.[16] In this regard, the Defendant refers to Articles 3(1) and 13(1) of Regulation 1408/71 and the case law of the Court of Justice of the European Communities, according to which, the aim of the choice of law rules encompasses two main objectives: ensuring that persons covered by the Regulation are not left without any social security cover because there is no legislation which is applicable to them (negative conflict of law); and,

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15 The Defendant refers to Case C-297/92 *Istituto Nazionale della Previdenza Sociale* v *Corradina Baglieri*, [1993] ECR I-5211, para 13.

16 Case C-71/93 *Guido Van Poucke* v *Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen and Algemene Sociale Kas voor Zelfstandigen*, [1994] ECR I-1101, para 22; Case C-202/97 *Fitzwilliam*, para 20.

preventing the simultaneous application of more than one national legislative system (positive conflict of law).[17]

38. As regards the answer to the question referred to the Court, the Defendant first argues that the application of the correct choice of law pursuant to Regulation 1408/71 does in itself presuppose a principle of home State control, i.e., in this case, the State of residence. In this regard, the Defendant points out that in order to determine whether the conditions for an exception from the general rule in Article 13(2)(c) are fulfilled, comprehensive knowledge of the factual and legal situation in the worker's or economic operator's home State is required.

39. Secondly, the Defendant argues that the two objectives of Regulation 1408/71: to avoid negative and positive conflict of law, as described above, strongly support the conclusion that it is the authorities of the State of residence that are competent to decide whether the conditions of Article 14b(4) have been fulfilled. The Defendant submits that a requirement for form E 101 facilitates both of these objectives. Those mariners, for whom form E 101 is issued, are subject to the legislation of the State of residence, whereas the mariners for whom the State of residence does not issue form E 101, are subject to the legislation of the flag State. If, on the other hand, it were up to the Norwegian authorities to determine whether the conditions for social security cover in Greece are fulfilled, there is in the Defendant's view a significant risk that the mariners will be without social security cover. Furthermore, the risk of double cover would generally increase if both the State of residence and the flag State are competent to make the same evaluation. The view of the Plaintiffs and the Accessory Intervener would thus result in legal uncertainty. In this regard the Defendant refers to the judgments of the Court of Justice of the European Communities in *Fitzwilliam*[18] and *Barry Banks*.[19] In the view of the Defendant, there is no conflict between the two objectives in the case at hand. Generally speaking, however, to ensure that there is social security cover could be regarded as the more fundamental of the two objectives.

40. Thirdly, the Defendant submits that where form E 101 has been issued, the evaluation made is, according the case law of the Court of Justice of the European Communities,[20] binding on other States. In the view of the Defendant, the same consideration applies where the State of residence chooses not to issue form E 101. The essential point is that it is exclusively the State of residence that is

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17 Case C-196/90 *De Paep*, para 18.

18 Case C-202/97 *Fitzwilliam* , para 54.

19 Case C-178/97 *Barry Banks*, para 41.

20 Case C-178/97 *Barry Banks*, para 40; Case C-202/97 *Fitzwilliam*, para 53.

competent to decide whether each individual is covered by that State's social security legislation in accordance with Regulation 1408/71.

41. The Defendant finds support for this position in the actual formulation of form E 101, which does not include any block or field to be filled out in the event that the State competent to issue form E 101 finds the conditions for an exemption are not fulfilled. The Defendant also points out that the use of form E 101 clearly facilitates the objectives of Regulation 1408/71, and in particular the avoidance of simultaneous application of more than one national legislative system. Furthermore, the Defendant argues that the use of form E 101 also facilitates the free movement of workers. The risk of not being covered by any social security system might discourage mariners from making use of their right to free movement, contrary to the principle of Article 28 EEA. Additionally, the interpretation of EEA law submitted by the Defendant would be best in line with the principle of co-operation in Article 84 of Regulation 1408/71 and Article 3 EEA. Conversely, the solution proposed by the Plaintiffs and the Accessory Intervener implies that Norwegian authorities have to overrule the evaluation made by the competent Greek institution as regards the applicability of Article 14b(4) of Regulation 1408/71 to the Plaintiffs.

42. Moreover, with respect to the binding effect of form E 101, the Defendant submits that the absence of an express reference to Article 14b(4) in Article 11 of Regulation 574/72 cannot be decisive. In this regard the Defendant points to the reference in form E 101 to Article 14b(4) of Regulation 1408/71, and the separate box in section 5.1. of the form to be checked off if the State of residence finds the conditions in Article 14b(4) are fulfilled. Furthermore, the legal basis for form E 101 is not Article 11 of Regulation 574/72, but rather Article 81 of Regulation 1408/71 and Article 2 of Regulation 574/72. Finally, the Administrative Commission has acknowledged the need for documentation by way of form E 101 for an exception according to Article 14b(4) to apply.

43. On this background, the Defendant submits that the Administrative Commission has de facto determined what constitutes necessary documentation in order for the Member States to apply this provision, but has not imposed a new condition in addition to those that can be derived from Regulation 1408/71 and Regulation 574/72.

44. Fourthly, the Defendant asserts that neither the social security authorities nor the national courts in Norway are competent to overrule the competent Greek institutions in this matter. A decision by a Norwegian court on this question will, as the Defendant sees it, not be binding on the competent Greek institutions. In the opinion of the Defendant, this view is in line with the general principle that the

effects of EEA and Community law in a particular State must be determined by the competent institutions and judiciary system of that State.[21]

45. The Defendant suggests to answer the question as follows:

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

The Icelandic Government

46. The Icelandic Government first addresses the question of whether Norwegian authorities are imposing an additional requirement that does not follow from the provisions of Title II of Regulation 1408/71 by requiring that the Plaintiffs present form E 101 or other equivalent documentation to substantiate that they are covered by Greek social security legislation. In the view of the Icelandic Government, they are not. In support of that position, the Icelandic Government refers to the content and purpose of form E 101 and states that the form is a certificate stating that a person that falls under the scope of the Regulation is covered by the social security legislation of the EEA State that issues the form in accordance with the choice of law rules of Title II of Regulation 1408/71. In addition the Icelandic Government points out that the form refers explicitly to Article 14b(4) of Regulation 1408/71. In the view of the Icelandic Government, form E 101 simply serves the purpose of facilitating the administrative co-operation and sharing of information between the competent authorities of the EEA States that is necessary to ensure the proper application of Title II of Regulation 1408/71. The competent institutions have legitimate and compelling reasons for requesting conclusive information: so that they can make sure both that no-one engaged in paid employment in their territory is excluded from social security cover, and that no-one is subjected to social security schemes in two or more EEA States. In the view of the Icelandic Government, form E 101 is the simplest and the quickest way of providing the necessary information to attain this objective.

47. Regarding the implications of the fact that Article 11 of Regulation 574/72 does not refer to Article 14b(4) of Regulation 1408/71, the Icelandic Government

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[21] The Defendant refers in this regard to the Opinion of the Advocate General Jacobs in Case C-202/97 *Fitzwilliam*, para 60.

refers again to the purpose of the form. Furthermore, it argues that even though the use of form E 101 would not be considered mandatory when applying Article 14b(4) of Regulation 1408/71, authorities in the flag State would still need some kind of confirmation from the State of residence that the relevant workers are in fact covered by the social security legislation of the latter State before excluding them from their social security legislation. Otherwise, there is, in the opinion of the Icelandic Government, a real risk that the objective of Regulation 1408/71 would be undermined.[22] Moreover, the flag State risks interfering with matters that are solely for another State to decide if it were to independently evaluate whether a worker should be covered by the social security legislation of another State pursuant to Article 14b(4). In this regard, the Government of Iceland refers to the judgment of the Court of Justice of the European Communities in *Fitzwilliam.*[23]

48. Based on those arguments the Icelandic Government suggests that the question is answered as follows:

> "*It is compatible with the choice of law rules contained in Title II of Regulation (EEC) No 1408/71, that the flag State proceeds from the premise that the State of residence must have issued a form E101 or a statement containing information equivalent to that found in form E101, for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c).*"

The Government of the Federal Republic of Germany

49. The Government of Germany is of the opinion that the question referred to the Court should be answered in the affirmative. With respect to the legal consequences of form E 101, the Government of Germany quotes the Opinion of Advocate General Lenz in Case C-425/93 *Andresen*[24], and asserts that if statements made by the competent institutions in one EEA State could be called into question by another EEA State's institution, then there would be no purpose in having to provide formalised proof by way of a binding declaration as to which legal system was applicable. In addition, one of the fundamental principles of Regulation 1408/71, i.e. the application of only a single EEA State's legal system, would be jeopardised if the competent institution of the second State could decide that a legal system other than the one specified in the form is applicable. That

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22 With respect to the objectives of the Regulation, reference is made to Case C-196/90 *De Paep*, para 18.

23 Case C-202/97, paras 49 and 55.

24 Case C-425/93 *Calle Grenzshop Andresen* v *Allgemeina Ortskrankenkasse für den Kreis Schleswig-Flensburg*, [1995] ECR I-269, para 60 of the Opinion.

would lead to double coverage inconsistent with Article 13(1) of Regulation 1408/71 and thus also the objectives of EC Treaty provisions on the free movement of workers.

50. In the opinion of the Government of Germany, form E 101 merely constitutes presumptive evidence of a legal situation, which can be refuted by providing other evidence. If this is done, the person named on the form would be forced to leave the social security system of the EEA State issuing the form, so that s/he can be admitted to the social security system of the competent State.[25] In the view of the Government of Germany, the presumptive effect of form E 101 was confirmed in the judgments of the Court of Justice of the European Communities in *Barry Banks*[26] and *Fitzwilliam.*[27] As long as form E 101 is not withdrawn or declared invalid, the State of employment must take it into account. If that State doubts its basis or the facts contained therein, the issuing State will have to reconsider whether the conditions for issuing the form were fulfilled, and if necessary withdraw it. In the event of a disagreement, the matter can be referred to the Administrative Commission. In the opinion of the Government of Germany, the Court of Justice of the European Communities, in *Barry Banks* and *Fitzwilliam*, rightly emphasised the importance of legal certainty and of the principle that workers must be subject to only a single system of social security.

51. The Government of Germany argues that this must, therefore, also apply *mutatis mutandis* to cases in which the competent institution of the State of residence does not issue such a form. In such cases, according to the principle *lex loci laboris* laid down in Article 13(2)(c) of Regulation 1408/71, the legislation of the flag State applies as long as the competent institution of that State has no guarantee whatsoever that the competent institution of the State of residence will actually subject the concerned workers to its own social security legislation during their detachment. In the event that the competent institution of the flag State nevertheless believes that the social security legislation of the State of residence should apply, that institution is expected to contact the competent institution of the State of residence, and if necessary, request that form E 101 be issued. In the event that the competent institution in the State of residence subsequently issues the form, it may have retroactive effect[28] and social security contributions previously paid in the flag State may have to be reimbursed. In the view of the Government of Germany, this ensures no negative conflict regarding jurisdiction and that

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25 In this regard, the Government of Germany refers to Case C-425/93 *Andresen*, para 64.

26 Case C-178/97, paras 38-43.

27 Case C-202/97, paras 53-57.

28 In this regard, the Government of Germany refers to Case C-178/97 *Barry Banks*.

workers employed in a State other than that of residence are not without social security cover during the time they are working in such other State.

52. Finally, the Government of Germany asserts that the judgment of the Court of Justice of the European Communities in *De Paep*[29] is not relevant to the case at hand. In support of that assertion, the Government of Germany points out that the judgment considered neither the matter of the legal consequences of form E 101 nor the refusal to issue the form, but only the validity of national legislation in light of the conflict of law rules of Regulation 1408/71.

53. The Government of Germany suggests that the question referred to the Court should be answered as follows:

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

The EFTA Surveillance Authority

54. The EFTA Surveillance Authority is of the opinion that, disregarding private documentation in the absence of any official documentation does not conform to an effective application of the conflict rules of Title II of Regulation 1408/71, and thus does not facilitate free movement of persons within the European Economic Area. However, it is for the relevant national authorities and courts to determine what constitutes sufficient private documentation and to evaluate it.

55. In its assessment of the question referred to the Court, the EFTA Surveillance Authority describes the nature and scope of the conflict rules in Title II of Regulation 1408/71. The EFTA Surveillance Authority recalls the aim of the conflict rule laid down in Article 13(1) of the Regulation, and states that, according to settled case law of the Court of Justice of the European Communities, the provisions of Title II of Regulation 1408/71 constitute a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the European Economic Area are subject to the social security scheme of only one

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[29] Case C-196/90.

EEA State[30], and to ensure that persons are not left without social security cover because there is no legislation applicable to them.[31] Consequently, EEA States are bound by the determination of the applicable law under the conflict rules in Title II of Regulation 1408/71.[32] It is, however, for the legislator of each State to lay down the conditions creating the right or the duty to become affiliated with a social security scheme.[33]

56. In assessing the question of whether form E 101 is the only means of proof, or in the negative, what other proof the Defendant could legitimately request before deciding not to apply Norwegian social security law, the EFTA Surveillance Authority first turns to the issue of how the conflict rules should be applied. In that regard, the EFTA Surveillance Authority refers to the functions of the Administrative Committee, established under Article 80 and 81 of Regulation 1408/71 and to Title III of Regulation 574/72.[34] The EFTA Surveillance Authority also describes the content and the purpose of form E 101 and states, inter alia, that form E 101 documents the legal appraisal of specific facts.[35] It is up to the competent institution of the EEA State whose legislation is applicable under the conflict rules to issue form E 101, and hence no EEA State can issue form E 101 on behalf of another EEA State. The principle of sincere cooperation laid down in Article 10 EC (corresponding to Article 3 EEA), requires the institution that issues form E 101 to carry out a proper assessment of the facts relevant for the application of the conflict rules, and consequently, to guarantee the correctness of the information contained in an E 101 form.[36] The EFTA Surveillance Authority

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30 Reference is inter alia made to Case 60/85 *M.E.S. Luijten* v *Raad van Arbeid* [1986] ECR 2365, paras 12 and 14; Case C-2/89 *Bestuur van de Sociale Verzekeringsbank* v *M. G. J. Kits van Heijningen* [1990] ECR I-1755, para 12; Case C-202/97 *Fitzwilliam*, para 20; Case C-347/98 *Commission* v *Belgium* [2001] ECR I-3327, para 27.

31 Case C-196/90 *Madeleine De Paep*, para 18; Case C-275/96 *Anne Kuusijärvi* v *Riksförsäkringsverket*, [1998] ECR I-3419, para 28; Case C-347/98 *Commission* v *Belgium* [2001] ECR I-3327.

32 In relation to this, the EFTA Surveillance Authority refers to Case 276/81 *Board of the Sociale Verzekeringsbank* v *Heirs or assigns of Kuijpers* [1982] ECR 3027, para 14; Case 275/81 *Koks* v *Raad van Arbeid* [1982] ECR 3013, para 10; Case 302/84 *Ten Holder* v *Direction de la Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821; Case 60/85 *Luijten*, para 14; Case C-2/89 *Kits van Heijningen*, para 20; Case C-196/90 *De Paep*, para 18.

33 In this regard, the EFTA Surveillance Authority refers to Case C-2/89 *Kits van Heijningen*, para 19; Case 275/81 *Koks*; Case C-202/97 *Fitzwilliam*, para 50.

34 As regards the content and aim of the provisions of Title III of Regulation 574/72, the EFTA Surveillance Authority refers to the Opinion of Advocate General Lenz in Case C-425/93 *Andresen*, para 57; Case 93/81 *Institut national d´assurance maladie-invalidité* v *Knoeller* [1982] ECR 951, para 10; the Opinion of Advocate General Colomer in Case C-178/97 *Barry Banks*, para 84; Case C-202/97 *Fitzwilliam*, para 50.

35 In this regard, the EFTA Surveillance Authority refers to the Opinion of Advocate General Lenz in Case C-425/93 *Andresen*, para 59.

36 Case C-202/97 *Fitzwilliam*, paras 51 and 56; Case C-178/97 *Barry Banks*, paras 38 and 43.

also states that form E 101 binds the authorities of another EEA State, in so far as it establishes a presumption that the person concerned is affiliated with a social security system[37], but it does not affect States' freedom to organise their own social security schemes or the way in which they regulate the conditions for affiliation to the various social security schemes.[38] The EFTA Surveillance Authority argues that the issuing of form E 101 means not only that the person it concerns will be exempt from the duty to pay contributions in the second State but also that the issuing State assumes responsibility for the social security cover of this person.[39] Consequently, as long as the issuing State does not exclude the compulsorily insured person from its social security system by withdrawing or declaring the form E 101 invalid, the person concerned cannot be subject to the scheme in force in another EEA State, since that would make him subject to two systems of social insurance and would run counter to the purpose of Article 13(1) of Regulation 1408/71.[40] Considering the above, it is the view of the EFTA Surveillance Authority that the certification procedure under Regulation 574/72 was established to make the conflict rules operational between EEA States and to provide the respective authorities with sufficient proof that particular national legislation applies in a given case. In the view of the EFTA Surveillance Authority, it should normally be when the application of the legislation of an EEA State is confirmed (certified) by the competent institutions of that State that another EEA State can rightfully refrain from applying its own legislation. Applying the above assessment to the case at hand, the EFTA Surveillance Authority submits that the failure of the Greek authorities to issue the E 101 forms establishes the presumption that the Plaintiffs are not subject to Greek social security law.

57. The EFTA Surveillance Authority then turns to the question of whether any certification requirement applies for cases covered by Article 14b(4) of Regulation 1407/81. In this regard, the EFTA Surveillance Authority firstly points out that no reference is made in Title III of Regulation 574/72 to Article 14b(4) and hence no certification requirement follows therefrom. Secondly, the EFTA Surveillance Authority points out that national authorities are not bound by the decision of the Administrative Commission to use form E 101 in relation to cases falling under

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37 In relation to this, the EFTA Surveillance Authority refers to Opinion of Advocate General Lenz in Case C-425/93 *Andresen*, paras 61 and 62; Case C-202/97 *Fitzwilliam*, paras 53 and 59; Case C-178/97 *Barry Banks*, paras 40 and 46.

38 Case C-202/97 *Fitzwilliam*, para 50.

39 In this context, the EFTA Surveillance Authority refers to Opinion of Advocate General Colomer in Case C-178/97 *Barry Banks*, para 84.

40 In this context, the EFTA Surveillance Authority refers to Opinion of Advocate General Lenz in Case C-425/93 *Andresen*, para 65; Case C-202/97 *Fitzwilliam*, para 55; Opinion of Advocate General Colomer in Case C-178/97 *Barry Banks*, para 42.

Article 14b(4) as the Administrative Commission is not empowered by the Council to adopt acts having the force of law.[41] The fact that the decision of the Administrative Commission has been incorporated into the EEA Agreement by way of an EEA Joint Committee Decision that has the force of law, does not in the opinion of the EFTA Surveillance Authority lead to a different result. Firstly, because it cannot be established that it was the intention of the EEA Joint Committee to change the legal nature of the decision of the Administrative Commission. Secondly, a different result would run counter to the homogeneous application of Community and EEA law. In light of the above the EFTA Surveillance Authority concludes that the Defendant cannot require form E 101 as the only possible proof.

58. Next, the EFTA Surveillance Authority assesses the need for effective application of the conflict rules of Regulation 1408/71 with respect to Articles 28 and 29 EEA.[42] The EFTA Surveillance Authority states that simultaneous application of more than one social security system to migrant workers would discourage the movement of workers and thus run counter to the aim of Articles 28 and 29 EEA and the basic principle of Regulation 1408/71. Furthermore, legal uncertainties with regard to the question of which national law is applicable would have the same effect.

59. The EFTA Surveillance Authority submits that any uncertainties as to which national law applies should primarily be resolved between the competent authorities and institutions of the relevant EEA States.[43] They are obliged, pursuant to Article 3 of the EEA Agreement together with Article 84 of Regulation 1408/71, to cooperate in good faith to give full effect to the EEA provisions on social security and ensure the fulfilment of the objectives of Articles 28 and 29 EEA.[44] If, following consultation between the relevant States, agreement can not be reached, the matter could be raised before the EEA Joint

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41 In this regard, the EFTA Surveillance Authority refers to Case 98/80 *Romano* v *Institut national d'assurance maladie-invalidité* [1981] ECR 1241, para 20.

42 With respect to the relationship between Regulation 1408/71 and Article 28 and 29 EEA, the EFTA Surveillance Authority refers to Case 93/81, *Knoeller*, para 9.

43 In this respect, the EFTA Surveillance Authority refers to the Opinion of Advocate General Jacobs in Case C-202/97 *Fitzwilliam*, para 54.

44 The EFTA Surveillance Authority refers, in this regard, to the Opinion of Advocate General Jacobs in Case C-202/97 *Fitzwilliam*, para 56. As regards more generally the obligations of EEA States the EFTA Surveillance Authority refers, inter alia, to Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403; Case 42/82 *Commission* v *France* [1983] ECR 1013; Case 235/87 *Matteucci* v *Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* [1988] ECR 5589; Case C-251/89 *Athanasopoulos and others* v *Bundesanstalt für Arbeit* [1991] ECR I-2797; Case C-186/91 *Commission* v *Belgium* [1993] ECR I-851; Case C-94/98 *The Queen, ex parte Rhône-Poulenc and May & Baker* v *The Licensing Authority* [1999] ECR I-8789.

Committee, which assumed the rights and duties conferred upon the Administrative Commission.[45] In the view of the EFTA Surveillance Authority, it should not be for the Defendant, but for the competent institution in Greece, to assess and verify, in accordance with the principle of sincere cooperation laid down in Article 10 EC (corresponding to Article 3 EEA)[46], whether the conditions of Article 14b(4) of Regulation 1408/71 were fulfilled for the Plaintiffs. Nor should it be up to the Plaintiffs to prove to the Norwegian Authorities that Greek law applies. This division of tasks is, in the opinion of the EFTA Surveillance Authority, supported by the fact that the conditions of Article 14b(4) for applying Greek legislation require an investigation into the situation of individual mariners in Greece, which Greek authorities are in the best position to undertake. The EFTA Surveillance Authority asserts that such a responsibility inherently carries an obligation to inform the parties and competent institutions in the EEA States involved in a particular case about the outcome of such an investigation.[47] In the opinion of the EFTA Surveillance Authority, the inactivity of the Greek authorities cannot lead to a situation whereby the effective application of the conflict rules is undermined. It should not be to the disadvantage of the free movement of workers if the cooperation between EEA States malfunctions. Under such circumstances, the Plaintiffs must be given the opportunity to submit proof, which the flag State should consider, in order to apply the correct conflict rules to the Plaintiffs. However, it should be for the relevant authorities of the flag State to determine whether sufficient private documentation has been produced for Article 14b(4) to apply, before deciding not to apply the social security law of the flag State.[48]

60. The EFTA Surveillance Authority suggests that the question should be answered as follows:

> *"It is not in conformity with an effective application of the conflict rules contained in Title II of Regulation 1408/71 that the flag State proceed from the premise that the State of residence must have issued a form E 101 or a statement containing information equivalent to that found in form E 101, in order that the legislation of the State of residence apply in accordance with Article 14b(4), and that in the absence of any such official documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c), if sufficient private documentation has been submitted, proving that the circumstances in Article*

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45 In this regard, reference is made to Case C-202/97 *Fitzwilliam*, para 57; Case C-178/97 *Barry Banks*, para 44.

46 Case C-202/97 *Fitzwilliam*, para 51; Case C-178/97 *Barry Banks*, para 38.

47 Concerning obligations between States to inform each other, reference is made to Case 42/82 *Commission* v *France*.

48 With regard to the acceptance of documents submitted, the EFTA Surveillance Authority refers to Case C-336/94 *Dafeki* v *Landesversicherungsanstalt Württemberg* [1997] ECR I-6761, paras 18 and 19.

14b(4) are fulfilled. It is for the relevant national authorities and courts to determine what constitutes sufficient private documentation and whether this has been submitted and proves that the circumstances are fulfilled for national social security law to apply in accordance with Article 14b(4) of Regulation 1408/71."

The Commission of the European Communities

61. The Commission states that Regulation 1408/71 plays a fundamental role in ensuring that workers who exercise their right to free movement are not disadvantaged as regards their social security cover or access to benefits.[49] In this regard the Commission quotes the judgment of the Court of Justice of the European Communities in *De Paep*[50] where it was held that the provisions of Title II of Regulation 1408/71 constitute a complete and uniform system of conflict rules,[51] the aim of which is to prevent both positive and negative conflict of law. Thus, once the conditions set out in Article 14b(4) of the Regulation are fulfilled, it is the legislation of the State of residence of the mariner and his employer which applies and not the legislation of the flag State in accordance with Article 13(2)(c) of the Regulation. This is not a matter of choice for the relevant authorities, but follows necessarily from the system set up by the Regulation itself.

62. In the Commission's view, it is clear that the rule laid down by Article 14b(4) of Regulation 1408/71 cannot be subordinated to a formal requirement for a form E 101 or equivalent document. In this regard, the Commission reiterates that the conflict rules established by Regulation 1408/71 were intended to provide a complete and uniform system of choice of law provisions, on the one hand preventing complications of positive conflict of laws, and on the other facilitating freedom of movement. Form E 101 was designed for effectively applying this system and further promoting freedom of movement.[52] In this sense, it forms part of the cooperation envisaged between social security institutions in the context of Regulation 1408/71. However, it is not itself a constitutive part of the determination of the legislation applicable in a given case, but simply states that the person concerned remains subject to the legislation of that EEA State throughout a given period. This is illustrated by the fact that the certificate may even be issued with retroactive effect.[53] It follows logically that it cannot be a legal precondition for the application of Article 14b(4). Any other conclusion would be

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49 As an example, the Commission refers to the judgment in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1, para 20.

50 Case C-196/90, para 18.

51 With respect to this point the Commission also refers to Case 60/85 *Luijten*, paras 12-14.

52 In relation to this, the Commission refers to Case C-202/97 *Fitzwilliam*, para 48.

53 The Commission refers, in this regard, to Case C-178/97 *Barry Banks*, para 53.

likely to bring about the very result the conflict rules were intended to avoid. The principle that only one social security system should apply would be undermined, as would the predictability of the system to be applied and consequently legal certainty.[54] This would in turn risk acting as an obstacle to the fundamental principle of free movement.

63. As regards how Article 14b(4) of Regulation 1408/71 can be applied in the absence of a form E 101, the Commission states that the Norwegian authorities clearly need at least a minimum level of documentation in order to know that the basic conditions of Article 14b(4) are satisfied. In the opinion of the Commission, Article 84 of Regulation 1408/71 clearly requires the competent institutions in the relevant EEA States to cooperate in order to ensure that the Regulation is applied correctly and the rights it confers are fully respected.[55] The Commission argues that this is further confirmed by the terms of the new Article 84a, which was inserted into Regulation 1408/71 by Regulation 631/04.[56] In particular the Commission refers to paragraph 3 of Article 84a, which reads:

> "*In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent State or of the State of residence of the person involved shall contact the institution(s) of the Member State(s) concerned. (…)*"

As part of this duty of cooperation, the competent institution of the place of residence should therefore provide the competent institution of the flag State with the necessary information to enable it to be satisfied that Article 14b(4) of Regulation 1408/71 applies. If, however, the State of residence does not fulfil its duties in this regard, it is, in the opinion of the Commission, not open to the competent institution of the flag State simply to decide to apply the general rule of Article 13(2)(c) of Regulation 1408/71 instead. Such an approach would in the view of the Commission undermine the entire system of conflict rules and risk prejudicing the individuals concerned, contrary to the overriding objective of promoting free movement. In these circumstances, it seems to the Commission that it can be derived from the wording of Article 84(3) of Regulation 1408/71 that the competent authority of the flag State may properly assess any other evidence made available to it, such as private documentation put forward directly by the persons involved. If such evidence cannot be accepted, then the proper course

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54 The Commission refers, in this regard, to Case C-178/97 *Barry Banks*, para 41; Case C-202/97 *Fitzwilliam*, para 54.

55 In relation to this, the Commission refers to Case C-326/00 *Idryma Koinonikon Asfaliseon* v *Ioannidis* [2003] ECR I-1703, para 51.

56 OJ 2004 L 100, p. 1, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 101/2004 of 9 July 2004 that entered into force the subsequent day.

according to the case law of the Court of Justice of the European Communities,[57] now codified in Article 84a(3) of Regulation 1408/71, would be, in the view of the Commission, to refer the matter to the EEA Joint Committee (which replaces the Administrative Commission in the EEA context).

64. The Commission of the European Communities suggests to answer the question as follows:

> *"The choice of law rules contained in Title II of Regulation (EEC) No 1408/71 together with the duty of cooperation set down in its Article 84 preclude the flag State from proceeding from the premise that the State of residence must have issued a Form E101 or a statement containing equivalent information for the legislation of the State of residence to apply in accordance with Article 14b(4), and that in the absence of such documentation, the legislation of the flag State shall apply in accordance with Article 13(2)(c)."*

Thorgeir Örlygsson
Judge Rapporteur

[57] Reference is made to Case C-202/97 *Fitzwilliam*, paras 57-58.