

**REPORT FOR THE HEARING**  
in Case E-4/07

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 Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland, in a case pending before it between

**Jón Gunnar Þorkelsson**

and

**Gildi-lífeyrissjóður (Gildi Pension Fund)**

concerning rules on free movement of workers within the EEA.

## **I Introduction**

1. By a letter dated 19 March 2007, registered at the EFTA Court on 26 March 2007, Héraðsdómur Reykjavíkur made a request for an Advisory Opinion in a case pending before it between Jón Gunnar Þorkelsson (hereinafter “the Plaintiff”) and Gildi-lífeyrissjóður (Gildi Pension Fund, hereinafter “the Defendant”).

## **II Facts and procedure**

2. The case before the national court concerns the issue of whether the Plaintiff is entitled to have his disability pension calculated with account taken of projected pension points, i.e. pension points that he would have been able to accrue with the Defendant, had he remained a member of that pension fund and continued working until turning 67.

3. The Plaintiff is an Icelandic mariner who, having lived and worked in Iceland, in September 1995 moved to Denmark where he still resides. He continued to work as a mariner in Denmark, and paid contributions to a Danish pension fund. On 16 September 1996, however, the Plaintiff, while at work on board a Danish fishing vessel, suffered an accident causing his invalidity. The Plaintiff has been assessed with a disability rating of 75%.

4. The Plaintiff had accrued rights to pension payments from several Icelandic pension funds at the time of the accident. Pension premiums had been paid to Lífeyrissjóður Vestfirðinga (the West Fjords Pension Fund) in 1975–87, to Lífeyrissjóður Austurlands (the Eastern Iceland Pension Fund) in 1991–95, most recently in August 1995, and to the Defendant, then Lífeyrissjóður sjómanna (the Mariners’ Pension Fund), now Gildi-lífeyrissjóður (Gildi Pension Fund), in 1969–95, most recently in September 1995.

5. For his accident, the Plaintiff was awarded a lump-sum payment of DKK 99 653.12 from his Danish pension fund. With this pension fund, it appears that the Plaintiff had not acquired rights to any other benefits for his accident. In Iceland, since 1 October 1996, the Plaintiff has received disability pensions from the pension funds named above in accordance with his accrued points and the assessment of his loss of working capacity.

6. However, on the grounds of failing to meet a condition of having paid contributions to the Defendant for at least six of the 12 months preceding the accident, the Plaintiff has not been found to have a right to have his disability pension calculated on the basis of projected points. The dispute between the parties concerns only this right to projection of entitlements.

7. On 23 February 2006, the Plaintiff brought an action before Héraðsdómur Reykjavíkur and demanded such payment from the Defendant. The Plaintiff bases his claim on the view that he is entitled to a disability pension with account taken of projected pension points with the Defendant, since the rules of the fund regarding projection and the relevant provisions of the Agreement on Relations between the Icelandic pension funds infringe provisions of the EEA Agreement on the free movement of workers, in particular Articles 28 and 29 and the rules based thereon.

### III Questions

8. The following questions were referred to the Court:

**1. Does the term ‘social insurance’<sup>1</sup> as it is to be understood under the EEA Agreement, and in particular Article 29 of the main text of the Agreement and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, cover the entitlement to disability benefit that arises in pension fund schemes such as the Icelandic one?**

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<sup>1</sup> Note: Article 29 EEA and the relevant provisions of Regulation 1408/71, in their English language versions, do not use the term ‘social insurance’ but rather ‘social security’.

**2. Whether or not the answer to Question 1 is in the affirmative, the District Court asks whether the provisions of the EEA Agreement on the free movement of workers, and in particular Articles 28 and 29, can be interpreted as meaning that a rule in the Articles of Association of Icelandic pension funds which makes a specific benefit right (the right to projection of entitlements) subject to the condition that the individual involved has paid premiums to an Icelandic pension fund that is a party to the Agreement on Relations between the Pension Funds, for at least 6 of the 12 months preceding the date of an accident, is compatible with the EEA Agreement when the reason why the individual is unable to meet this condition is that he has moved to another state within the EEA in order to pursue employment comparable to that which he pursued previously, and he has paid into a pension fund in that state?**

**3. Is Council Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident and in which they had social security entitlements at the time of their injury?**

#### **IV Legal background**

##### *National law*

9. Icelandic pension funds are established on the basis of agreements between workers' and employers' organisations, but workers are obliged by law to belong to the pension fund of their respective occupation or workers' group and to pay premiums to a pension fund. In the event of loss of working capacity, fund members are entitled to a disability benefit on the basis of the rights they have accrued through the payment of premiums to the fund. Some funds also project rights when calculating such pensions, i.e. the funds calculate a member's rights as if he had paid premiums up to the age of drawing old-age pension.

10. Under the rules of the Mariners' Pension Fund (now the Defendant), which were in force at the time of the Plaintiff's accident, a fund member who suffers a loss of working capacity of 40% or more is entitled to a disability pension from the fund, provided that he has (a) paid premiums to the fund for at least three of the preceding four calendar years and accrued not less than one point for each of the years; (b) paid premiums to the fund for at least 6 months and for at least 100 days during the preceding 12 months; and (c) suffered a reduction of income as a result of the loss of working capacity.

11. Article 15(1) of the Pension Act No 129/1997, which took effect on 1 July 1998, states that fund members are entitled to disability pensions if they suffer a loss of working capacity assessed as being 50% or greater, provided that they have paid premiums to the fund for at least two years and suffered a reduction of income as a result of the loss of working capacity. Article 15(2) states that disability pension rights are to be projected in accordance with the rules specified in further detail in the Articles of Association of the pension funds, providing that the member in question has paid into a fund for at least three of the preceding four years, including at least six months of the preceding twelve-month period.

*EEA law*

12. Article 28(1) EEA reads:

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

13. 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 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.*

14. Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter “Regulation 1408/71”) is referred to at point 1 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time of the Plaintiff’s accident.

15. Under Title I *General provisions*, Article 1 *Definitions*, item (j):

- (j) legislation means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4 (1) and (2) or those special non-contributory benefits covered by Article 4 (2a).*

*The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. However, in so far as such provisions:*

- (i) serve to put into effect compulsory insurance imposed by the laws and regulations referred to in the preceding subparagraph; or*
- (ii) set up a scheme administered by the same institution as that which administers the schemes set up by the laws and regulations referred to in the preceding subparagraph,*

*the limitation on the term may at any time be lifted by a declaration of the Member State concerned specifying the schemes of such a kind to which this Regulation applies. Such a declaration shall be notified and published in accordance with the provisions of Article 97.*

*[...]*

16. Under Title I *General provisions*, Article 1 *Definitions*, item (r):

- (r) periods of insurance means periods of contribution or period of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;*

17. Under Title I *General provisions*, Article 3 *Equality of treatment*, paragraph 1:

- 1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.*

18. Under Title I *General provisions*, Article 4 *Matters covered*, paragraph 1(b) and (e):

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

*[...]*

- (b) invalidity benefits, including those intended for the maintenance improvement of earning capacity;*

*[...]*

- (e) benefits in respect of accidents at work and occupational diseases;*

19. Under Title I *General provisions*, Article 5 *Declarations by the Member States on the scope of this Regulation*:

*The Member States shall specify the legislation and schemes referred to in Article 4 (1) and (2) [...] in declarations to be notified and published in accordance with Article 97.*

20. Point I(b) of Iceland's original Declaration pursuant to Article 5:<sup>2</sup>

(b) *Invalidity benefits:*

[...]

*Act on the Seamen's<sup>3</sup> Pension Fund (49/1974 with later amendments)*

[...]

21. Point I(b) in the later Declaration made by Iceland pursuant to Article 5:<sup>4</sup>

b) *Invalidity benefits:*

[...]

*The Pension Act No 129/1997 with later amendments*

[...]

*The Act on the Seamen's<sup>5</sup> Pension Fund No 45/1999 with later amendments*

[...]

22. Under Title I *General provisions*, Article 10 *Waiving of residence clauses – Effect of compulsory insurance on reimbursement of contributions*, paragraph 1:

*1. Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.*

[...]

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<sup>2</sup> OJ C 398 of 31.12.1994 p. 10.

<sup>3</sup> Note: in most of the written observations submitted to the Court, the Icelandic *sjómanna* as used in the title of this Act is translated into "Mariners".

<sup>4</sup> OJ C 135 of 2.6.2005 p. 11.

<sup>5</sup> Note: in most of the written observations submitted to the Court, the Icelandic *sjómanna* as used in the title of this Act is translated into "Mariners".

23. Under Title I *General provisions*, Article 10a *Special non-contributory benefits*, paragraph 1:

*1. Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4 (2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. [...]*

24. No such special non-contributory benefits have been listed in Annex IIa to Regulation 1408/71 as regards Iceland. Presently, this is stated under point 1 adaptation (m) of Annex VI to the EEA Agreement.<sup>6</sup>

25. Under Title II *Determination of the legislation applicable*, Article 13 *General rules*, paragraph (2)(a) and (c):

*2. Subject to Articles 14 to 17:*

*(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;*

*[...]*

*(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of the State;*

26. Under Title III *Special provisions relating to the various categories of benefits*, Chapter 2 *Invalidity*, Section 2 *Employed persons or self-employed persons subject either only to legislation under which the amount of invalidity benefit depends on the duration of periods of insurance or residence or the legislation of this type and of the type referred to in Section 1:*

Article 40 *General provisions*, paragraph 1:

*1. An employed person or a self-employed person who has been successively or alternately subject to the legislation of two or more Member States, of which at least one is not of the type referred to in Article 37 (1), shall receive benefits under the provisions of Chapter 3, which shall apply mutatis mutandis [...].*

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<sup>6</sup> Previously under adaptation (jb), as added by EEA Joint Committee Decision 7/94 of 21.03.1994, moved to adaptation (m) by way of EEA Joint Committee Decision 82/97 of 12.11.1997.

27. Under Title III *Special provisions relating to the various categories of benefits*, Chapter 3 *Old age and death (pensions)*:

Article 44 *General provisions for the award of benefits where an employed or self-employed person has been subject to the legislation of two or more Member States*, paragraph 1:

1. *The rights to benefits of an employed or self-employed person who has been subject to the legislation of two or more Member States [...] shall be determined in accordance with this Chapter.*

Article 45 *Consideration of periods of insurance or of residence completed under the legislations to which an employed person or self-employed person was subject, for the acquisition, retention or recovery of the right to benefits*, paragraphs 1 and 5:

1. *Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had completed under its own legislation.*

*[...]*

5. *Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits conditional upon the person concerned being insured at the time of the materialization of the risk, this condition shall be regarded as having been satisfied in the case of insurance under the legislation of another Member State, in accordance with the procedures provided in Annex VI for each Member State concerned.*

28. Under Title VI *Miscellaneous provisions*:

Article 86 *Claims, declarations or appeals submitted to an authority, institution or tribunal of a Member State other than the competent State*, paragraph 1:

1. *Any claim, declaration or appeal which should have been submitted, in order to comply with the legislation of one Member State, within a specified period to an authority, institution or tribunal of that State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution, or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution*



*or tribunal of the former State either directly or through the competent authorities of the Member State concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the Second State shall be considered as the date of their submission to the competent authority, institution or tribunal.*

29. As presently referred to at point 1 adaptation (t) of Annex VI to the EEA Agreement,<sup>7</sup> the following has been added to Annex VI *Special procedures for applying the legislations of certain Member States* to Regulation 1408/71 (cf. Article 89 of the Regulation), as regards Iceland:<sup>8</sup>

*Where employment or self-employment in Iceland has terminated and the contingency occurs during employment or self-employment in another State to which this Regulation applies and where the disability pension of both the social security and the supplementary pension schemes (pension funds) in Iceland no longer includes the period between the contingency and the pensionable age (future periods), periods of insurance under the legislation of another State to which this Regulation applies shall be taken into consideration for the requirement of the future periods as if they were periods of insurance in Iceland.*

30. Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the community (hereinafter “Regulation 574/72”) is referred to at point 2 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time of the Plaintiff’s accident.

31. Under Title IV *Implementation of the special provisions of the Regulation relating to the various categories of benefits*, Chapter 3 *Invalidity, old-age and death (pensions)*, the Section on *Submission and investigation of claims for benefits*:

*Article 36 Claims for old-age and survivors’ benefits (excluding orphans’ benefits) and invalidity benefits in cases not referred to in Article 35 of the implementing Regulation:*

*1. In order to receive benefits under Articles 40 to 51 of the Regulation, except in the cases referred to in Article 35 of the implementing Regulation, the person concerned shall submit a claim to the institution of the place of residence in accordance with the procedure provided for by the legislation*

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<sup>7</sup> Originally under adaptation (n), made (t) by Joint Committee Decision 82/97 of 12.11.1997.

<sup>8</sup> Originally point O, later renumbered P (by Joint Committee Decision 82/97 of 12.11.1997), now part of point ZA (by way of the EEA Enlargement Agreement, cf. OJ L 130 of 29.4.2004 p. 3).

*administered by that institution. If the employed or self-employed person has not been subject to that legislation, the institution of the place of residence shall forward the claim to the institution of the Member State to whose legislation he was last subject, indicating the date on which the claim was submitted. That date shall be regarded as the date on which the claim was submitted to the latter institution.*

*2. Where a claimant resides in the territory of a Member State to whose legislation the employed or self-employed person has not been subject, he may submit his claim to the institution of the Member State to whose legislation the employed or self-employed person was last subject.*

*3. Where a claimant resides in the territory of a State which is not a Member State, he shall submit his claim to the competent institution of that Member State to whose legislation the employed or self-employed person was last subject.*

*Should the claimant submit his claim to the institution of the Member State of which he is a national, the latter shall forward such claim to the competent institution.*

*4. A claim for benefits sent to the institution of one Member State shall automatically involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies except where, under Article 44 (2) of the Regulation, the claimant asks for postponement of any old-age benefits to which he would be entitled under the legislation of one or more Member States.*

*32. Under the following Section on Investigation of claims for benefits in respect of invalidity, old age and survivors in the cases referred to in Article 36 of the implementing Regulation:*

*Article 41 Determination of the investigating institutions:*

*1. Claims for benefit shall be investigated by the institution to which they have been sent or forwarded in accordance with the provisions of Article 36 of the implementing Regulation. This institution is hereinafter referred to as the 'investigating institution'.*

*2. The investigating institution shall forthwith notify claims for benefits to all the institutions concerned on a special form, so that the claims may be investigated simultaneously and without delay by all these institutions.*

*Article 48 Notification to the claimant of the decisions of the institutions, paragraph 1:*

*1. The final decision taken by each of the institutions concerned shall be notified to the investigating institution. Each of these decisions must specify the grounds and time-limits for appeal provided for by the legislation in question. When all these decisions have been received, the investigation*

*institution shall communicate them to the claimant in his own language by means of a summarized statement to which the aforesaid decisions shall be appended. Periods allowed for appeals shall commence only on the date of receipt of the summarized statement by the claimant.*

## **V Written observations**

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

- the Plaintiff, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the Defendant, represented by Hörður Felix Harðarson, Supreme Court Attorney, acting as Agent, assisted by Tryggvi Þórhallsson, District Court Attorney;
- the Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Arne Torsten Andersen, Senior Officer, and Lorna Young, Officer, Department of Legal & Executive Affairs, acting as Agents, assisted by Ólafur Jóhannes Einarsson, Officer, Internal Market Affairs Directorate;
- the Commission of the European Communities, represented by Viktor Kreuschitz, its Legal Adviser, and Nicola Yerrell, a member of its Legal Service, acting as Agents.

### *The Plaintiff*

The first question

34. The Plaintiff holds that the Icelandic pension fund system falls under the concept of ‘social security’ in Article 29 of the EEA Agreement and Regulation 1408/71. In this regard, it is emphasised that Icelandic law provides for the obligation of all employees and self-employed persons working in Iceland to pay premiums to an Icelandic pension fund. Reference is made to Article 4(1) of Regulation 1408/71 stating that the Regulation applies to legislation concerning *inter alia* disability benefits and benefits for accidents at work. Moreover, the Plaintiff quotes Article 5 of the Regulation, obliging the EEA States to “specify the legislation and schemes referred to in Article 4 (1) and (2)”. With reference to that obligation, it is pointed out that Act no 49/1974 on the Mariners’ Pension Fund with later amendments was accordingly specified under the heading “Invalidity benefits” in Iceland’s Declaration pursuant to this Article. The Plaintiff notes that he paid premiums to the Mariners’ Pension Fund which, after a merger in 2005, became Gildi Pension Fund, the Defendant in the case at hand.

35. Furthermore, with regard to the material scope of Regulation 1408/71, the Plaintiff underlines that the Court of Justice of the European Communities

(hereinafter “the ECJ”) has given a wide interpretation to the categories of social benefits to which the Regulation applies. Allegedly, it follows from the case law of the ECJ that it is of no significance in this context whether a compensatory system is defined as a “social security system” under the domestic legislation of each Member State or not.<sup>9</sup> What has been considered decisive in the assessment of whether a system constitutes a “social security system” under Regulation 1408/71 is whether its rules include provisions giving benefit recipients “a particular legally-defined position” not involving individual and discretionary assessment of the recipient’s needs and personal circumstances.<sup>10</sup> Therefore, social assistance in the EEA States does not come under the concept of social security, as legislation in that area generally involves a subjective evaluation of the conditions for entitlement to the benefits.

36. The Plaintiff suggests answering the first question as follows:

*The term “social security” as it is to be understood under the EEA Agreement, and in particular Article 29 of the main part of the Agreement, and Council Regulation (EEC) No 1408/71 of 14 June 1971 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 covering [sic] the entitlement to disability benefit that arises in pension fund schemes such as the Icelandic one.*

The second question

37. On the translation into English of the original Icelandic request to the EFTA Court, the Plaintiff alleges that the words “is unable to” in the fourth last line of the second question should rather read “does not”. However, argues the Plaintiff, this incorrect translation does not make any difference as to the subject matter of the case since almost no migrant workers who move within the EEA continue to pay premiums to the Icelandic pension funds. At the same time, the Plaintiff also argues that since the rule in force is that workers must work in Iceland and be members of Icelandic trade unions in order to be able to pay into Icelandic pension funds, he was not under any circumstances able to continue paying premiums to Icelandic pension funds.

38. The Plaintiff is of the opinion that he is entitled to additional pension rights, as the premiums paid to the Danish pension fund for the last 12 months preceding the accident should be taken into account when his rights are assessed. This submission is supported, in particular, by reference to Articles 45(1) and 44(1) cf. Article 40(1) of Regulation 1408/71.

39. The Plaintiff further argues that Article 10(1) of Regulation 1408/71 applies in his case. In his opinion, that Article reflects a fundamental principle embodied

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<sup>9</sup> The Plaintiff refers to e.g. Case C-78/91 *Hughes* [1992] ECR I-4839.

<sup>10</sup> The Plaintiff refers to e.g. Case 79/76 *Fossi v Bundesknappschaft* [1977] ECR 667.

in the Regulation, namely the “exportability” of rights, meaning that rights which have been acquired at the time of a person’s moving to another EEA State remain in force. In such cases, benefits must be paid from the State of origin, i.e. from the State where the benefits were acquired, irrespective of where in the EEA the individual in question is resident.<sup>11</sup>

40. In support of the foregoing, the Plaintiff holds that Iceland’s entry in adaptation (t) under point 1 of Annex VI to the EEA Agreement removes any doubt regarding his rights vis-à-vis the Defendant.

41. Furthermore, the Plaintiff argues that even if no specific provision of Regulation 1408/71 would be applicable in the pending case, the relevant conditions for projected entitlements constitute an obstacle to the free movements of workers within the EEA, contrary to Article 28 EEA.

42. The Plaintiff suggests answering the second question in the negative.

The third question

43. In the Plaintiff’s view, it follows from Article 10(1) of Regulation 1408/71 that long term benefits, such as the additional disability benefits at stake in the present case, must be paid to a migrant by his EEA State of origin, irrespective of where in the EEA that person resides when the long term benefits are paid out. The ECJ has clarified that the aim of Article 10(1) of Regulation 1408/71 is to guarantee the party concerned the right to have the benefit of such payments, even after taking up residence in another EEA State.<sup>12</sup>

44. The Plaintiff suggests answering the third question as follows:

*Council Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, is not to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident and in which they had social security entitlements at the time of their injury.*

*The Defendant*

General

45. In the Defendant’s view, the main issue in the case is whether schemes for disability benefits established by the Icelandic pension funds come under ‘social security’ within the meaning of Article 29 EEA. The Defendant maintains that while addressing the broad implications of the main issue, the nature of the

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<sup>11</sup> The Plaintiff refers to Case 51/73 *Sociale Verzekeringsbank v Smieja* [1973] ECR 1213, Case 92/81 *Carraciolo* [1982] ECR 2213 and Case 139/82 *Piscitello* [1983] ECR 1427.

<sup>12</sup> The Plaintiff refers to Case 51/73 *Sociale Verzekeringsbank v Smieja* [1973] ECR 1213.

specific benefit right in question must be considered as the fundamental premise, as well as the distinct legal attributes of the Icelandic occupational pension funds.

The first question

46. The Defendant makes a fundamental distinction between, on the one hand, acquired (or accrued) rights to benefits and, on the other hand, the right to projection of entitlements. Allegedly, Regulation 1408/71 is based on a premise identical to the one found in Icelandic law, under which the right to disability benefits based on projection is said not to constitute an acquired right in a legal sense. Basically, a member in an Icelandic pension fund is entitled to specific benefits in the event of disability, in proportion to the member's contributions to the fund. Through his contributions, the member comes into possession of a stake (a partial interest) in the fund, and the fund thus has a joint character. Under Icelandic law, the Defendant alleges, statutory protection is extended to acquired rights and to each member's stake in the fund but not to the right to projection of entitlements. According to the Defendant, there can be no notion of rights being acquired without the payment of contributions, as that would undermine each member's stake in the fund and breach the statutory protection of acquired rights [under Icelandic law].

47. Rather, the Defendant holds that Article 10a of Regulation 1408/71 may be applicable to benefits based on projection. It is contended that the projection constitutes special non-contributory benefits that may be limited to persons residing in the State granting the benefit.

48. As for Regulation 1408/71 applying first and foremost to acquired rights in a legal sense, the Defendant draws attention to the preamble, where emphasis is put on "rights and the advantages acquired and in the course of being acquired".

49. The Defendant also underlines that according to Article 15(2) of the Pension Act, the projection of entitlement to disability pension shall be determined in accordance with rules specified in further detail in the Articles of Association for each fund. In this context, the Defendant remarks that the ECJ has answered the question on the interpretation of the word "acquired" with direct reference to "schemes under national law".<sup>13</sup>

50. Moreover, the Defendant points to Article 1(j) of Regulation 1408/71 excluding provisions of existing or future industrial agreements from the scope of the term 'legislation'. This limitation encompasses collective bargaining agreements between labour unions and employers.<sup>14</sup>

51. The dominant feature of the establishment and operation of Icelandic pension funds is said to be precisely such collective bargaining agreements. The

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<sup>13</sup> The Defendant refers to Case 51/73 *Sociale Verzekeringsbank v Smieja* [1973] ECR 1213.

<sup>14</sup> The Defendant refers to Case C-57/90 *Commission v France* [1992] ECR I-75.

Defendant also maintains that the decision to grant additional disability benefits based on projection was the subject of such an agreement (cf. Article 5 of Act No 94/1994).

52. On this background, the Defendant contends that Iceland's Declarations [pursuant to Article 5 of Regulation 1408/71] were made without the knowledge and consent of the Icelandic pension funds, in particular the Mariners' Pension Fund, and that these Declarations thus cannot be considered as Declarations lifting the limitation on the term 'legislation' under Article 1(j) of Regulation 1408/71.

53. The Defendant also contends that such a Declaration in the sense of Article 1(j) cannot be said to have been made by virtue of point O (now point ZA) added to Annex VI to Regulation 1408/71 in respect of Iceland [presently referred to as point 1 adaptation (t) of Annex VI to the EEA Agreement] as that point contains no reference to the agreements between the workers' and employers' organisations inherent in the Articles of Association for each pension fund.

54. To the Defendant, the administering of acquired rights to disability benefits from Icelandic pension funds seems fully compatible with the principles of Regulation 1408/71, and the Defendant maintains that, to this extent, these schemes for acquired rights converge with 'social security' within the meaning of Article 29 EEA.

55. As concerns the right to disability benefits based on projection, however, the Defendant pleads that such a right neither comes under the term 'social security' in Article 29 EEA nor is subject to the principles laid down in Regulation 1408/71.

The second question

56. The Defendant's arguments tied to Article 1(j) of Regulation 1408/71, as set out above, are advanced also with respect to the second question. The Defendant adds that the agreement between the Icelandic pension funds is an undertaking of independent legal entities separate from the public sphere and thus cannot be considered as 'legislation' or 'law' under Article 29 EEA or Regulation 1408/71.

57. However, the Defendant argues that the answer to the second question, insofar as it concerns free movement of workers, must take fully into account the relevant facts of the pending case, without prejudice to whether the Icelandic Pension Funds are covered by the term 'social security'.

58. In this context, and as opposed to the Plaintiff, the Defendant contends that nothing prevented the Plaintiff from continuing to pay contributions to the Defendant after having taken up work on a foreign [i.e. not Icelandic] vessel.

59. Furthermore, the Defendant contends that answering the second question in the negative may give rise to "reverse discrimination" as workers moving

domestically may be put in a less favourable position than workers moving to another EEA State. This is so because only 29 pension funds are parties to the agreement between the Icelandic pension funds whereas 11 are not. A worker in Iceland leaving one of the 29 funds and joining one of the 11 will thus lose his rights to disability benefits based on projection. A worker leaving one of the 29 funds and joining a pension fund in another EEA State, on the other hand, will retain his rights. According to the Defendant, such reverse discrimination is prevented by the principle in Article 3 of Regulation 1408/71 and thus answering the second question in the negative would not be justified.

#### The third question

60. The Defendant argues that under the single State rule in Regulation 1408/71, an individual can only rely on the social security system of one EEA State, namely the State where he works (*lex laboris*). According to the Defendant, the principle of aggregation ensures that the EEA State of employment [*in casu* Denmark] must take account of periods of insurance completed in other EEA States when calculating whether the claimant has satisfied the necessary qualifying periods of work, residence or contributions for entitlement to benefits.

61. Moreover, the Defendant argues that the State of employment [*in casu* Denmark] is the competent State for administering the social security benefits. In any case, the Defendant also alleges that the Defendant is not a competent institution for the Icelandic social security system under Regulations 1408/71 and 574/72.<sup>15</sup>

62. Furthermore, the Defendant contends that the exportability principle is fully upheld by the Icelandic pension funds, as the Plaintiff has received all payments he was entitled to on the basis of his acquired [as opposed to projected] rights to disability benefits.

#### *The Republic of Iceland*

##### The first question

63. Referring in particular to its Declarations pursuant to Article 5 of Regulation 1408/71, the Republic of Iceland states that, since the negotiations on the EEA Agreement, its position has been that on account of the compulsory nature of the Icelandic pension fund scheme, the pension funds would fall within the scope of Regulation 1408/71.

64. The Republic of Iceland maintains that the answer to the first question should be as follows:

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<sup>15</sup> The Defendant refers to Case 92/81 *Carraciolo* [1982] ECR 2213 and Case C-481/93 *Moscato* [1995] ECR 3525.



*The term “social insurance” is to be understood, under the EEA Agreement and Council Regulation (EC) 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, to cover the entitlement to disability benefit that arises in pension fund schemes such as the Icelandic one.*

## The second question

65. As regards the wording of the question, the Republic of Iceland emphasises that the Articles of Association of Icelandic pension funds should not be confused with the Agreement on Relations between the funds. The Articles of Association of the Defendant do not make the right to benefits subject to the condition that the individual has paid premiums to an Icelandic pension fund party to the agreement, but rather emphasise the payments to that specific fund. The Agreement on Relations, on the other hand, is a contract between a number of Icelandic pension funds that facilitates co-operation between them and *inter alia* results in transferral of rights when certain conditions are fulfilled.

66. At the outset, the Republic of Iceland emphasises that Regulation 1408/71 provides for coordination and not harmonisation of social security legislation within the EEA. The Regulation is thus not intended to give individuals special rights that go beyond their rights under the national legislation concerned. The aim of the regulation is to coordinate the practice between EEA States in order to prevent citizens from losing their acquired rights when moving within the EEA.<sup>16</sup>

67. The Republic of Iceland contends that the right to projection of disability benefits cannot be considered “acquired rights” within the meaning of Article 29 EEA and Regulation 1408/71.<sup>17</sup> At the time of the accident, the Plaintiff had stopped paying into Icelandic pension funds and started paying into the Danish system. At the time of his moving to Denmark, the Plaintiff had acquired rights based on the points accrued through his payment of premiums in Iceland. These rights were not in any way reduced, modified, suspended, withdrawn or confiscated (cf. Article 10 of Regulation 1408/71). The Plaintiff’s right to projection, however, depended on his ongoing payments to the pension funds, a requirement which he did not fulfil. In that respect, the Republic of Iceland stresses that it cannot be regarded as contrary to the EEA Agreement that there may be better social rights in one State than another, as it is settled case-law that the EEA Agreement does not detract from the power of the EEA States to organise their social security systems.

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<sup>16</sup> The Republic of Iceland refers to Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, at paragraph 51; Case E-3/04 *Tsomakas* [2004] EFTA Ct. Rep. 95, at paragraph 27; and Case E-3/05 *EFTA Surveillance Authority v Norway* [2006] EFTA Ct. Rep. 101, at paragraph 46.

<sup>17</sup> Note: the phrase “acquired rights” does not appear in Article 29 EEA or Regulation 1408/71.

68. Furthermore, the Republic of Iceland emphasises that the rules on projection – as laid down in the Regulation of the Defendant (now the Articles of Association), adopted with reference to the Act on the Mariners' Pension Fund No 94/1994 – apply in an equal manner to everyone working in Iceland, foreigners as well as Icelanders. Various reasons may give rise to a situation where any such person does not have the right to projection, *inter alia* a break from work lasting more than six months. The Republic of Iceland also questions why a person leaving an Icelandic pension fund and moving to another EEA State, taking up work and paying premiums to a pension fund there should be put in a better position than a person leaving the same Icelandic pension fund and also moving to another EEA State but not finding work there and thus not paying premiums to any pension fund for six months. (It is pointed out that a person is entitled to go to another EEA State and to stay for up to six months searching and applying for jobs.<sup>18</sup>) From the Icelandic pension fund's point of view, the two persons are in the same situation, having stopped paying premiums.

69. Moreover, the Republic of Iceland submits that contrary to what the Plaintiff has maintained in the case, he was able to apply for permission to continue paying his premiums to the Defendant. This should not, however, be a decisive factor in the present case, since the relevant rules on social security do not provide a right to continue paying premiums in one EEA State after moving to another. On the contrary, as Regulation 1408/71 aims to simplify procedures, a worker is thus as a main rule only subject to the laws of one EEA State. The same allegedly follows *a contrario* from Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, as this Directive, which applies to pension schemes other than those falling under Regulation 1408/71, obligates EEA States to adjust their regulations in order to enable contributions to continue to be made to a supplementary pension scheme established in one EEA State, by or on behalf of a worker posted in another EEA State.

70. The Republic of Iceland draws attention to the interplay between the public social security system and the independent pension funds in Iceland, which aims at preventing citizens from being compensated several times over for the same loss. This is said to be of relevance also with regard to the foundation and objectives of Regulation 1408/71. It could thus be argued that if the Plaintiff would receive payments in line with his projected entitlements from the pension funds in Iceland, he should receive less from the public social security systems concerned.

71. As concerns the Agreement on Relations between pension funds, the Republic of Iceland emphasises the nature of this agreement as a contract between independent pension funds, free from interference by the Government. No foreign pension fund has become a party to the agreement, but there is

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<sup>18</sup> The Republic of Iceland refers to Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745.

nothing to prevent this from happening if such an intention is shared amongst the parties and other foreign funds. It is further underlined that not all Icelandic pension funds are parties to the agreement. Thus, not all workers enjoy the benefits from this co-operation. It is submitted that if the Plaintiff's arguments were accepted, a situation could arise where a person moving to another EEA State and paying premiums to a pension fund there would be put in a better position than a person moving within Iceland and starting to pay premiums to a another pension fund which is not a party to the Agreement on Relations. This kind of discrimination can neither be endorsed nor be in line with the objectives of Regulation 1408/71.

72. Moreover, the Republic of Iceland contends that the agreement concerned is not covered by Regulation 1408/71 as it falls under the term 'industrial agreements' and thus under the exception to the scope of the Regulation, laid down in its Article 1(j). The ECJ has in a limited way addressed the meaning of the term 'industrial agreement'.<sup>19</sup> Its point of departure has been whether the agreement concerned follows directly from the application of the social security legislation in issue. The Republic of Iceland emphasises in this regard that the Agreement on Relations has no connection to the Icelandic social security legislation. Moreover, the agreement was not made in order to further implement any public rules or policy; the initiative came exclusively from the pension funds themselves in order to facilitate their work and co-operation.

73. In the light of the above, the Republic of Iceland suggests answering the second question as follows:

*The provisions of the EEA Agreement on the free movement of workers are to be interpreted as meaning that a rule in the Articles of Association of Icelandic pension funds, which makes a specific benefit right (the right to projection of entitlements) subject to the condition that the individual involved has paid premiums to that fund for at least 6 of the 12 months preceding the date of an accident, is compatible with the EEA Agreement.*

The third question

74. The Republic of Iceland emphasises that the aim of Regulation 1408/71 is coordination of national social security legislation of the EEA States in order to further facilitate the free movement of workers within the EEA, and that to this end the Regulation provides that the legislation of a single EEA State shall apply to persons subject to the Regulation. Reference is made to the general rules regarding the applicable law in Title II of Regulation 1408/71, more specifically to Article 13(2)(a) and (c) of the Regulation. It is submitted that it follows from these Articles that the applicable law in the case at hand would be that of Denmark. Further reference is made to Article 36(1) and (4) of Regulation

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<sup>19</sup> The Republic of Iceland refers to Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, at paragraph 22.

574/72, from which it follows that for the Plaintiff to receive benefits pursuant to Article 40(1) of Regulation 1408/71, which applies in the case at hand, he shall submit his claim to the institution of his place of residence.

75. The Republic of Iceland argues that when the abovementioned rules of Regulation 1408/71 and Regulation 574/72 are brought into the context of the case at hand, it can be concluded, by mere interpretation of the provisions of Regulation 1408/71 in accordance with the ordinary meaning to be given to its terms in its context and in the light of its object and purpose, that the legislation applicable was that of Denmark and that claims for compensation are to be presented there to the competent institution in conformity with the requirements set forth by the law administered by that institution.

76. In the light of these observations, the Republic of Iceland suggests the following answer to the third question:

*Council Regulation (EC) No. 1408/71 is to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident and in which they had social security entitlements at the time of their injury.*

#### *The EFTA Surveillance Authority*

##### The first question

77. Firstly, the EFTA Surveillance Authority (hereinafter “ESA”) notes that Regulation 1408/71 has its basis, its framework and its limits in Articles 28 and 29 EEA which are aimed at securing freedom of movement for workers.<sup>20</sup> The term ‘social security’ is not defined in the main Agreement or in Regulation 1408/71, but must be assumed to carry the same meaning in both contexts.

78. ESA then assesses whether the disability pension in the case at hand is covered by Regulation 1408/71 as far as the nature of the benefit is concerned. ESA refers in this regard to the ECJ, which, when faced with questions relating to the scope of the term ‘social security’, has tended to base itself on the branches of social security benefits covered by the Regulation, as exhaustively listed in its Article 4(1).<sup>21</sup> Article 4(1)(b) of the Regulation refers to invalidity benefits. Moreover, Article 15 of the Pension Act and Article 11 of the Mariners’ Pension Fund Regulation, applicable at the time of the Plaintiff’s accident, both provide for entitlement to disability benefits for fund members on certain terms. Thus, ESA concludes that as far as the nature of the benefit is concerned, the disability benefit in the present case is covered by the Regulation.

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<sup>20</sup> ESA refers to Case 100/63 *van der Veen* [1964] ECR English special edition 565 and Case 24/75 *Petroni* [1975] ECR 1149, at paragraph 11.

<sup>21</sup> ESA refers to Case 249/83 *Hoeckx* [1985] ECR 973, at paragraphs 12–14, Case 122/84 *Scrivner* [1985] ECR 1027, at paragraphs 19–21 and Case C-78/91 *Hughes* [1992] ECR I-4839, at paragraph 15.

79. Subsequently, ESA deals with the question whether a pension scheme such as the Icelandic one in the case at hand falls within the term ‘legislation’ referred to in Article 4(1) and defined in Article 1(j) of Regulation 1408/71. Particular reference is made to the ECJ’s broad interpretation of the term.<sup>22</sup>

80. A distinction is made between the rules governing the current scheme and the rules governing the scheme in force at the time of the accident. As regards the rules governing the current scheme, ESA submits that the Pension Act satisfies the definition laid down in Article 1(j) of the Regulation. Article 2 of the Act sets out the minimum contributions payable to the pension funds. Chapter III of the Act lays down the general rules regarding pension rights in pension funds, including a detailed description of the content of such rights and entitlement thereto. In particular, Article 15 governs the right to a disability pension, including the right to have this benefit calculated on the basis of projected pension points.

81. It is further stated that the applicability of Regulation 1408/71 to Icelandic pension funds such as the one in the case at hand was confirmed by Iceland’s Declaration pursuant to Article 5 of the Regulation, specifying the Pension Act under heading 1(b) ‘Invalidity benefits’. In this regard, ESA quotes case law of the ECJ, where it is stated that “the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation no 1408/71”.<sup>23</sup> Equally, Article 29 EEA must apply to disability benefits granted from an Icelandic pension fund on the basis of the Pension Act.

82. As regards whether the scheme in force at the time of the Plaintiff’s accident falls under the term ‘legislation’, ESA points out that, whereas the Act No 49/1974 on the Mariners’ Pension Fund was listed under point 1(b) ‘Invalidity benefits’ in Iceland’s original Declaration, the legislation applicable at the time of the Plaintiff’s accident, i.e. Act No 94/1994, which replaced Act No 49/1974, never appeared on the list. The reason for this was, however, that Iceland did not update its original Declaration until after the 1994 Act had in turn been replaced by Act No 45/1999. ESA argues, in this regard, that Iceland’s failure to keep its Declaration updated cannot have the effect of withdrawing the legislation at issue from the scope of the Regulation.

83. With regard to Act No 94/1994, ESA points out that the substantive rules governing pension rights were to be found not in the Act itself, but in the Mariners’ Pension Fund Regulation. However, that Regulation was based on the

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<sup>22</sup> ESA refers to Case 87/76 *Bozzone* [1977] ECR 687, at paragraph 10, Case 300/84 *van Roosmalen* [1986] ECR 3097, at paragraph 28 and Joined Cases 82/86 and 103/86 *Laborero and Sabato* [1987] ECR 3401, at paragraph 23.

<sup>23</sup> ESA refers to Case 35/77 *Beerens* [1977] ECR 2249, at paragraph 9, Case 237/78 *Toia* [1979] ECR 2645, at paragraph 8, Case C-251/89 *Athanasopoulos* [1991] ECR I-2797, at paragraph 28 and Case C-131/96 *Mora Romero* [1997] ECR I-3659, at paragraph 25.

Act, it laid down generally formulated rules, it was subject to ministerial approval and it gave rise to rights on the basis of a legally defined position. ESA thus maintains that both the Act and the said Regulation should be regarded as falling under the term ‘legislation’ in Article 1(j) of Regulation 1408/71.

84. Reference is made to Article 5 of Act No 94/1994, according to which the Regulation was to be drafted by the Board of the Pension Fund and then approved *inter alia* by the Minister of Finance. It is emphasised that although not responsible for the drafting of the Regulation itself, the Icelandic Government had the duty to ensure its legality. Moreover, ESA recalls that the classification as ‘legislation’ under national law is not decisive for the purpose of the definition in Article 1(j) of Regulation 1408/71. A notion of Community law must be given an autonomous and uniform interpretation throughout the Community and must be construed by taking account of the context and purpose of the national provision in question.<sup>24</sup> It is also recalled that the ECJ has held the definition in Article 1(j) to include “administrative action” by the Member States.<sup>25</sup>

85. Lastly, ESA addresses the Defendant’s allegations that any right of the Plaintiff’s to projection of pension points follows from the Agreement on Relations between the pension funds, which, according to the Defendant, is not legislation within the meaning of Regulation 1408/71. ESA’s understanding is that this agreement does regulate the question of which fund pays how much to each individual, but does not have a bearing on the existence or extent of a right. Therefore, the content and classification of the agreement cannot change the conclusion that a disability benefit exists and is based on ‘legislation’ within the meaning of Article 1(j) of Regulation 1408/71.

86. Thus, ESA proposes that the first question be answered as follows:

*The term ‘social insurance’ as it is to be understood under Article 29 EEA and Regulation 1408/71 covers the entitlement to invalidity benefit granted as a result of membership in a pension fund scheme such as the Icelandic one under examination in the case at hand.*

The second question

87. At the outset, ESA stresses that the question does not relate to the entitlement to a disability benefit as such. The question relates only to the Plaintiff’s right to have his disability pension calculated on the basis of a projection of future points. In this respect, the question does not concern whether actual pension points accrued in another EEA State have to be added to the pension points accrued in Iceland when calculating the pension. Rather, the question is whether, for the purposes of satisfying a condition which requires a

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<sup>24</sup> ESA refers to Case 327/82 *Ekro* [1984] ECR 107, at paragraph 11 and Case C-287/98 *Linster* [2000] ECR I-6917, at paragraph 43.

<sup>25</sup> ESA refers to Case 300/84 *van Roosmalen* [1986] ECR 3097, at paragraph 28.

previous insurance record with the disbursing fund during a specified reference period, EEA law requires that insurance periods in another EEA State be assimilated as qualifying insurance periods, where satisfying the condition results in a more advantageous method of pension calculation.

88. ESA then clarifies that as the Icelandic pension scheme builds on a system of accumulation of pension points through periods of insurance, resulting in a higher pension the longer a person has been insured and the more pension points he has acquired, the case at hand falls to be assessed under Article 40 of Regulation 1408/71, specifying that the rules under Chapter 3 of Title III (Articles 44 to 51a) shall apply *mutatis mutandis*. Reference is also made to Article 1(r) of Regulation 1408/71, further defining ‘periods of insurance’.

89. ESA recalls that the ECJ has consistently held that the Member States remain competent to define the conditions for granting social security benefits, provided that the conditions do not give rise to overt or disguised discrimination between Community workers.<sup>26</sup> The principle of equal treatment requires that, for the purposes of recognising the right of migrant workers to social security or other benefits, each EEA State should take into account certain facts arising in the other EEA States, in order to equate these facts with those which arise in their own territory.<sup>27</sup>

90. According to ESA, the Icelandic condition of previous periods of contributions when disability risk materialises is basically a requirement that there exist a close link in time between the accident and the contributions made to the disbursing pension fund. The insured person remains qualified for projection of pension points for six months after leaving the Icelandic pension system. Reference is made to Article 45(5) of Regulation 1408/71 which requires that where the legislation of an EEA State makes the acquisition of the right to benefits conditional upon the person concerned “being insured at the time of the materialization of the risk,” this condition shall be regarded as having been satisfied in the case of insurance under the legislation of another EEA State.

91. ESA submits that, in an Icelandic context, “being insured at the time of the materialization of the risk” for the purpose of being entitled to a projection of pension points, must mean being insured in a qualifying manner, i.e. during a completed period of six months out of the 12 preceding the accident. Therefore, where national legislation requires that the insured person has been affiliated with the pension system during a reference period connected in time to the accident, Article 45(5) provides that an affiliation with a pension system in

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<sup>26</sup> ESA refers to Case C-306/03 *Alonso* [2005] ECR I-705, at paragraph 27, and to the case law cited there.

<sup>27</sup> ESA refers to the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-373/02 *Öztürk* [2004] ECR I-3605, at paragraph 41 *et seq.* including, in particular, paragraph 53. Further reference is made to the case law cited under sub-headings (e) to (h) in the Opinion, in particular, Case C-349/87 *Paraschi* [1991] ECR I-4501, at paragraph 27 and Case C-290/00 *Duchon* [2002] ECR I-3567, at paragraph 46.

another EEA state during that reference period will satisfy the condition. As regards the Icelandic condition, this means that an insured person has the right to a calculation based on projected points as long as he has paid premiums in an EEA State during six of the 12 months preceding the accident.

92. ESA further supports its position by referring to the adaptation presently contained in point 1(t) of Annex VI to the EEA Agreement, as regards Iceland. In ESA's view, this is intended to cover precisely the situation in the case at hand.

93. In conclusion, ESA holds that the provisions of Regulation 1408/71 preclude national rules such as the ones in the case at hand, which make a right to projection of entitlements subject to the condition that the individual involved has paid contributions to an Icelandic pension fund for at least six of the 12 months preceding an accident without enabling him to meet this condition by having paid contributions into a pension fund in another EEA State.

94. ESA adds that another result would run counter to the principle of free movement for workers underlying the provisions of Regulation 1408/71, and that the answer to the second question suggested by ESA would follow equally if Articles 28 and 29 EEA were applied directly, since the Regulation simply lays down detailed rules implementing the principles set out in those provisions.

95. Thus, ESA proposes that the second question be answered as follows:

*The provisions of the EEA Agreement on the free movement of workers, in particular Articles 28 and 29 and Regulation 1408/71, in particular Article 45(5) thereof, preclude national rules, such as those in the case at hand, which makes a right to projection of entitlements subject to the condition that the individual involved has paid contributions to an Icelandic pension fund for at least 6 of the 12 months preceding the date of an accident without enabling the individual to meet this condition by having paid contributions into a pension fund in another EEA State.*

The third question

96. As regards the third question, ESA refers to Regulation 574/72 and Article 36(1) thereof, from which it follows that in order to receive benefits under Article 40(1) of Regulation 1408/71, the person concerned shall submit a claim to the institution of their place of residence. To the extent it is not clear whether the Plaintiff in the case at hand ever satisfied the conditions for entitlement to a pension under the laws of Denmark, ESA finds it useful to note, in addition, that Article 36(1) goes on to provide for that very situation. Thus, the Danish authorities, if the Plaintiff never was subject to Danish social security legislation, would have been obliged to forward the claim to the institution of the EEA State to whose legislation the Plaintiff was last subject, in this case Iceland.



97. Moreover, ESA points out that it follows from Article 36(3) of Regulation 574/72 that where a claimant submits his claim to the institution of the EEA State of which he is national, the latter shall forward the claim to the competent institution. ESA therefore submits that, in the present case, it is not necessary to rule on which legislation applied to the Plaintiff. It is sufficient to note that, whatever the applicable national legislation, the EEA law provides for the processing of his claim and the forwarding thereof to the relevant competent institution.

98. In any event, due account should be taken of Article 86(1) of Regulation 1408/71 which states that claims submitted to an authority or institution in one EEA State shall thereby be deemed to be submitted to the competent authority of another EEA State. In that respect, ESA refers to the ECJ having held, as regards the predecessor of Article 86 of Regulation 1408/71 (Article 83 of Regulation 4/58<sup>28</sup>), that the purpose of that provision includes to “prevent persons concerned from being deprived of their rights on purely formal grounds.”<sup>29</sup> ESA therefore submits that failure to present a claim to the *correct* authorities cannot affect the worker’s right to a benefit to which he is entitled.

99. Referring to Articles 36(4) and 41 of Regulation 574/72, ESA adds that the submission of a claim shall automatically involve the concurrent award of benefits under the legislation of all of the EEA States under whose legislation the claimant would be entitled to benefits. Referring also to Article 48 of Regulation 574/72, ESA then suggests that whichever institution the Plaintiff’s claim should have been and has been submitted to, any challenge to the calculation made by Icelandic authorities in accordance with Article 41 of Regulation 574/72 is challengeable in the Icelandic courts.

100. Thus, ESA proposes that the third question be answered as follows:

*Regulation 1408/71 of 14 June 1971 is to be interpreted as meaning that workers are to present their compensation claims in the state in which they were resident at the time of their injury. Should the worker present his claim in another EEA State than the State of residence, the authorities of the receiving State shall forward the claim to the competent State. Failure to present the claim to the correct authorities shall not affect the worker’s right to a benefit.*

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<sup>28</sup> Règlement no 4 fixant les modalités d’application et complétant les dispositions du règlement no 3 concernant la sécurité sociale des travailleurs migrants (OJ 30 of 16.12.1958 p. 597).

<sup>29</sup> ESA refers to Case 92/81 *Carraciolo* [1982] ECR 2213, at paragraph 7.

*The Commission of the European Communities*

The first question

101. The Commission of the European Communities (hereinafter “the Commission”) notes that the first question is essentially a question of whether a disability pension granted under a scheme such as the Icelandic Mariners’ Pension Fund falls within the material scope of Regulation 1408/71; and that it has been suggested that such a pension is not a ‘social security benefit’ and, in particular, does not arise from ‘legislation’.

102. Regarding the first issue, i.e. whether the disability pension constitutes a social security benefit, the Commission recalls that the ECJ has emphasised that the question of whether a particular benefit falls within the scope of Regulation 1408/71 is based on its essential characteristics and not on the formal criterion of whether it is classified as a social security benefit under national law. Instead, the ECJ has held that a benefit is to be regarded as a social security benefit if it is granted to recipients without any individual and discretionary assessment of personal needs, on the basis of a legally defined position, and if it concerns one of the risks expressly listed in Article 4(1) of Regulation 1408/71.<sup>30</sup> In the Commission’s view, these conditions are met in the present case, as the disability pension is granted on the basis of established rules and directed towards the risk of invalidity as set out in Article 4(1)(b) of the Regulation.

103. On the second issue, the Commission remarks that the notion of ‘legislation’ for the purpose of defining the material scope of Regulation 1408/71 is broad. As stated in the definition contained in Article 1(j), ‘legislation’ may include not only legislation in the classical sense of statutes, regulations or comparable provisions, but also “all other implementing measures” relating to a branch of social security covered by Article 4(1) of the Regulation. The ECJ has emphasised that the definition of ‘legislation’ is “remarkable for its breadth, including as it does all provisions laid down by law, regulation and administrative action by the Member States”.<sup>31</sup>

104. The fact that the rules governing the Mariners’ Pension Fund appear to have been based on a legal act, contends the Commission, suggests that the disability pension has a *statutory* basis and thus falls under the notion of ‘legislation’ for the purposes of Article 4(1) of Regulation 1408/71 on that basis alone.

105. However, the Commission finds the status of the relevant Icelandic legislation to be unclear from the information provided in the request for an Advisory Opinion, and notes that the Defendant argues that the Icelandic Pension Funds were established on the basis of collective agreements between workers’

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<sup>30</sup> The Commission refers to Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.

<sup>31</sup> The Commission refers to Case 87/76 *Bozzone* [1977] ECR 687, in particular at paragraph 11.

and employers' organisations. Industrial agreements are expressly excluded from the definition of 'legislation' contained in Article 1(j) of Regulation 1408/71, but this exclusion may be lifted by means of a Declaration. In more general terms, Article 5 of the Regulation also envisages that the legislation and schemes falling within the scope of Article 4(1) shall be specified in a Declaration.

106. In this context, the Commission points to the Declaration made by Iceland pursuant to Article 5 of Regulation 1408/71, listing the Mariners' Pension Fund under the heading of invalidity benefits covered by Regulation 1408/71. The Commission then stresses, with reference to case-law of the ECJ, that where a State has specified a scheme in its Declaration under Article 5, that *must* be accepted as proof that the benefits granted under that scheme are social security benefits within the meaning of Regulation 1408/71.<sup>32</sup>

107. Based on the above, the Commission suggests that the first question be answered as follows:

*A disability pension granted under a scheme such as the Icelandic Mariners' Pension fund constitutes a social security benefit within the meaning of Article 4(1) of Regulation 1408/71.*

The second question

108. The Commission underlines that, according to Article 29 EEA, the coordination of national social security schemes is considered to be a key element in ensuring free movement of workers within the EEA and preventing adverse treatment in cases where a worker has been subject to more than one social security legislation. The Commission highlights as particularly important in this regard the principles of aggregation and exportability (items (a) and (b) of Article 29) which essentially underpin the more detailed system of rules laid down in Regulation 1408/71. In the case of a disability benefit such as the one at issue in the present proceedings, the relevant rules are found in Chapter 3 of Title III of Regulation 1408/71.

109. The first question arising is whether the right to the *projection* of the Icelandic disability pension falls within the scope of Article 45 or rather Article 46 of the Regulation. On the basis of the information provided in the request for an Advisory Opinion, it seems to the Commission that it should properly be classified as a specific *additional* benefit entitlement – it is not simply a question of the *calculation* of the amount of the basic disability pension (which would fall under Article 46) but rather a question of the acquisition of a right to a separate supplementary disability pension on the basis of “projected” future points. The Commission would therefore conclude that entitlement to this benefit is governed by the provisions of Article 45 of Regulation 1408/71.

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<sup>32</sup> The Commission refers to Case 35/77 *Beerens* [1977] ECR 2249 and Case C-251/89 *Athanasopoulos* [1991] ECR I-2797.

110. The secondary question which follows on from this is whether the requirement for contributions to have been made to the Icelandic pension fund for at least six of the 12 months preceding the accident should be examined in light of Article 45(1) or Article 45(5) of Regulation 1408/71. In the Commission's view, Article 45(1) applies in situations where a certain period of insurance or residence is required for a right to disability benefits to be acquired and this threshold cannot be reached *without* including periods completed in another EEA State. In those circumstances, Article 45(1) will operate so as to require those other periods to be included in the calculation to enable the "door to be opened" and access to the benefit granted.

111. However, contends the Commission, in a case such as the present one, the relevant rule does not simply impose a minimum insurance period. Instead, it requires six months of contributions to have been made during the 12 months preceding the accident, i.e. during a period set by reference to the materialisation of the risk. This should accordingly be equated with the situation described in Article 45(5) of Regulation 1408/71, with the result that this condition "shall be regarded as having been satisfied in the case of insurance under the legislation of another Member State, in accordance with the procedures provided in Annex VI for each Member State concerned".

112. The Commission finds the conclusion further reinforced by the terms of Iceland's entry in Annex VI to Regulation 1408/71, which make specific provision for the case of access to projected disability benefits.

113. As the sole reason for why the Plaintiff did not fulfil the six month requirement was that he had exercised his right to free movement and taken up work in Denmark, in the Commission's opinion, it follows necessarily from the operation of Article 45(5) of Regulation 1408/71 that the Defendant is obliged to take into consideration his periods of insurance under that Danish pension scheme in treating his claim for additional projected disability pension.

114. Based on the above, the Commission suggests that the second question be answered as follows:

*Articles 28 and 29 of the EEA Agreement together with Article 45 of Regulation 1408/71 should be interpreted as requiring periods of insurance completed under the legislation of another State to be taken into consideration for the purposes of a claim for the right to projection of entitlements of such a disability pension.*

The third question

115. As regards the third question, the Commission points out that there are special rules for the submission and investigation of claims for invalidity benefits in Chapter 3 of Title IV of Regulation 574/42. According to Article 36(1) of that Regulation, a claim should be submitted in the first instance to the institution of

the place of residence. Since the Plaintiff was resident in Denmark at the time of the accident, and continues to reside there, his claim should therefore have been presented to the Danish pension fund.

116. The Commission emphasises, however, that the primary purpose of Article 36 of Regulation 574/42 is to facilitate the handling of claims in cross-border situations. As apparent from the terms of Article 36(4) of the Regulation, a claim submitted will “automatically involve the concurrent award of benefits under the legislation of all the Member States in question”. Article 41 of the Regulation similarly envisages that although claims should first be investigated by the institution which receives the initial claim under Article 36, all other institutions must be notified so that they can simultaneously carry out their own investigation of the claim. In this way, the Icelandic pension fund would in any event be required to examine the Plaintiff’s entitlement to the additional projected disability pension.

117. The Commission suggests that the third question be answered as follows:

*In accordance with Article 36 of Regulation 574/72, such a claim should be submitted in the first instance to the competent institution of the State of residence.*

Henrik Bull  
Judge-Rapporteur