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Ministry of Foreign Affairs
of the Czech Republic

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Prague, 28 February 2022

WRITTEN OBSERVATIONS

submitted in accordance with Article 20 of the Statute and Article 97
of the Rules of Procedure of the EFTA Court on behalf of

THE CZECH REPUBLIC

represented by Mr. Martin Smolek and Mr. Jiří Vláčil

acting as agents in

Case E-5/21

Anna Bryndís Einarsdóttir v. The Icelandic Treasury

in which the Icelandic *Reykjavik District Court* requests an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by an application lodged at the EFTA Court on 13 December 2021.

The Czech Republic submits the following written observations:

1 THE FACTS OF THE CASE

1 As far as the facts of the case are concerned, the Czech Republic refers fully to the request for an advisory opinion.

2 THE RELEVANT PROVISIONS OF NATIONAL AND EEA LAW

2 As far as the relevant provisions of the law of the Republic of Iceland and of the EEA law are concerned, the Czech Republic refers fully to the request for an advisory opinion.

3 THE QUESTION REFERRED

3 The referring court requests the EFTA Court to provide an advisory opinion on the following question:

Does Article 6 of Regulation (EC) No 883/2004, on the coordination of social security systems (cf. also Article 21(3) of the Regulation), oblige an EEA State, when calculating payments in connection with maternity/paternity leave, to calculate reference income on the basis of a person's aggregate wages on the labour market across the entire European Economic Area? Does it infringe the aforementioned provision and the principles of the EEA Agreement (see, for example, Article 29 EEA) if only a person's aggregate wages on the domestic labour market are taken into account?

4 THE OPINION OF THE CZECH REPUBLIC

4 By its question the referring court asks, in essence, whether Art. 6[1] in conjunction with Art. 21 of Regulation No. 883/2004 obliges the competent institution to calculate the payments in connection with a maternity or paternity leave based on wages acquired throughout the entire European Economic Area (further as "EEA") instead of wages acquired only on the domestic labour market.

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[1] Art. 6 of Regulation (EC) No. 883/2004, on the coordination of social security systems (further as "Regulation No. 883/2004") regulates the aggregation of periods regarding <u>the acquisition of the right to benefits</u>, not the equal treatment of income in respect of calculating the amount of the benefit (which is laid down in Art. 5 of the said Regulation). It follows from the request for an advisory opinion (see page 7, part III first paragraph and page 14 second paragraph) that there is no dispute in the present case as to the fact that <u>the plaintiff did acquire the right to the payment</u> in connection with her maternity leave due to the fact, that her labour period acquired in Denmark was taken into the account by the competent institution. Therefore Art. 6 of Regulation No. 883/2004 shall not be relevant when providing this opinion. The dispute in the present case continues exclusively as to <u>whether the plaintiff's wages acquired in Denmark should be taken into the account in order to calculate the actual amount of the payment</u> in connection with the maternity leave.

5 The Czech Republic is convinced that it is in full conformity with Regulation No. 883/2004 to calculate the payments in connection with a maternity leave only based on wages acquired on the domestic labour market. However, it should be pointed out that in the present case, the competent institution should take into account the wages acquired on the domestic labour market even though they were not acquired during the relevant reference period.

6 **Firstly**, the present question falls within the scope of Art. 21(3) in conjunction with Art. 21(4) of Regulation No. 883/2004. Art. 21(4) of Regulation No. 883/2004 provides that Art. 21(3) shall apply *mutatis mutandis* to cases where the legislation lays down a specific reference period, which corresponds either wholly or partly to the periods, which the person concerned completed under the legislation of one or more other Member States. Such is the case in the present matter[2] and the rule stated in Art. 21(3) of the Regulation shall thus apply.

7 Art. 21(3) clearly states that only the income for periods completed under the legislation of the Member State of the competent institution, i.e. completed in Iceland in the present case, should be taken into account when calculating cash benefits.[3]

8 **Secondly**, there is no derogation in Regulation No. 883/2004 from the rule laid down in Art. 21(3) of the said Regulation.

9 Further, the application of the rule stated in Art. 21(3) of Regulation No. 883/2004 cannot be questioned by bringing up Art. 5 of the said Regulation. This provision lays down a general rule of equal treatment of income. The wording of this provision starting with "*[unless] otherwise provided for by this Regulation*" suggests that there may be exceptions from this general rule. And Art. 21(3) of the Regulation constitutes such an exception anticipated by Art. 5 of the Regulation and as such is *lex specialis* with reference to Art. 5 of the Regulation.

10 **Thirdly**, the plaintiff did not acquire any wages in Iceland during the special reference period based on national law. However, the plaintiff did acquire wages in Iceland after the special reference period (and before the baby was born) and she also did acquire

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[2] See the request for an advisory opinion, page 14, last paragraph.

[3] See the wording of Art. 21(3) of the Regulation: "*The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.*"

wages in other EEA Member State during the special reference period.[4] In such a situation, not taking into account the income acquired on the domestic labour market, i.e. in Iceland, and therefore granting a cash benefit in the minimum amount is in direct contradiction with Regulation No. 883/2004.

11 The objective of Regulation No. 883/2004, laid down in recitals 4, 5 and 45, is to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively and to prevent a situation in which a worker who, having exercised his right of free movement, has worked in more than one Member State is treated, without objective justification, less favourably than a worker who has completed his entire career in only one Member State.[5] The provisions of Regulation No. 883/2004, including Art. 21 of this Regulation, have to be read in accordance with this objective.

12 Based on the facts of the case, it is evident that not taking into account the plaintiff's income acquired in Iceland outside of the scope of the reference period puts the plaintiff in a less favourable position as opposed to workers who have not exercised their right of free movement and who spent their entire working career in the domestic labour market.[6] The Icelandic legislation in question therefore directly undermines the objectives pursued by Regulation No. 883/2004 and, further, it must be considered as liable to hinder the free movement of persons, which is a right guaranteed by Art. 28(1) of the EEA Agreement.[7]

13 Therefore, in order for Regulation No. 883/2004 and its Art. 21(3) and 21(4) to be effective, the monthly payments of the cash benefit in connection with the maternity leave of the plaintiff have to be calculated by the competent institution based on the income acquired under the legislation of the Member State of the competent institution, that is under the Icelandic legislation, even if such an income was acquired out of the scope of the reference period.[8]

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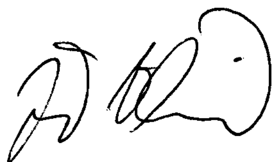
[4] See the request for an advisory opinion, part I, first paragraph, and part III, second paragraph.
[5] See judgement *Bundesagentur für Arbeit*, C-29/19, EU:C:2020:36, p. 33.
[6] See ibid., p. 37.
[7] See ibid., p. 42.
[8] See judgement *Bergström*, C-257/10, EU:C:2011:839, p. 52 and 53, and judgement *Bundesagentur für Arbeit*, C-29/19, p. 43.

5 THE PROPOSED ADVISORY OPINION

Art. 21(3) in conjunction with Art. 21(4) of Regulation No. 883/2004 does not oblige an EEA State, to calculate payments in connection with maternity or paternity leave based on wages acquired throughout the entire EEA.

However, in the present case, the competent institution should take into account the wages acquired on the domestic labour market even though they were not acquired during the relevant reference period.



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