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Case No: 87974
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by Ewa Gromnicka, Ingibjörg Ólöf Vilhjálmsdóttir,
Claire Simpson and Melpo-Menie Joséphidès,

Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-5/21

Anna Bryndís Einarsdóttir

V

the Icelandic Treasury

in which the district court of Reykjavík (héraðsdómur Reykjavíkur) requests the EFTA Court to give 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 concerning the interpretation and application of Articles 6 and 21(3) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Article 29 of the EEA Agreement.

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1. INTRODUCTION / THE FACTS OF THE CASE

1. The present case seeks to answer the question whether national authorities are obliged to take into account the level of salary from a person's employment in another EEA State when calculating the amount or level of their maternity benefit.

2. The plaintiff in this case, Ms. Anna Bryndis Einarsdóttir (the "**Plaintiff**") was employed in Denmark from 1 September 2015 until she moved to Iceland on 17 September 2019, being pregnant at that time. The Plaintiff began employment in Iceland on 30 September 2019. She submitted an application for benefits from the Icelandic Maternity/Paternity Leave Fund (the "**M/P Fund**")[1] on 22 January 2020, accompanied by payslips from her Icelandic employer and a confirmation from Denmark of her domicile there since 2015 and an overview of her wage payments there since 2015.[2]

3. The Icelandic Maternity/Paternity and Parental Leave Act No 95/2000 (the "**M/P Act**")[3] establishes the conditions for entitlement to maternity/paternity benefits and the calculation methods. As set out below in Section 3, in Iceland, a parent must (under Article 13(1) of the M/P Act) have been active on the Icelandic labour market for six months prior to birth in order to have the right to benefits ("**the rights acquisition period**"). If this rights acquisition period is not completed in Iceland or is not completed in full, Article 13(12) of the M/P Act provides for employment periods in other EEA States to be taken into account in order to fill the gap, provided no more than ten days elapsed between the parent stopping work in the other EEA State and commencing work in Iceland. The Plaintiff (who worked in Iceland for over five months before the birth of her daughter) appears to have benefitted from

[1] The M/P Fund handles the administration and payment of the benefits.
[2] See the request for the advisory opinion ("**the Request**"), page 3.
[3] See the M/P Act No 95/2000 in Icelandic: https://www.althingi.is/lagas/nuna/2000095.html and the English translation: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/Act-on-maternity-paternity-leave-95-2000-with-subsequent-amendments.pdf . ESA will focus its submissions on the M/P Act from 2000, as amended, as this was the Act in force at the time the Plaintiff applied for maternity benefits and throughout her maternity leave. It has since been replaced by the new Act on Maternity Paternity Leave No 144/2020, currently in force: https://www.althingi.is/lagas/nuna/2020144.html .

the application of Article 13(12) and was thus considered *entitled* to maternity benefits under the M/P Act.

4. The calculation or *level* of maternity benefits in Iceland is based on 80% of average total salary during the twelve-month period which precedes the six months before the birth month of the child ("**the calculation reference period"** or simply "**the reference period**").[4]

5. If a parent worked on the domestic labour market during some part of the rights acquisition period but not at all during the calculation reference period, there is no provision in the M/P Act which requires the M/P Fund to take into account employment periods completed in another EEA State in the reference period (in this case Denmark). As a result, the worker is only entitled to a minimum payment under Article 13(7), which at the relevant time was set at 184.119,- ISK, per month.[5]

6. This is what happened to the Plaintiff who, on 3 March 2020, was informed that since she had not worked in Iceland during the twelve month reference period, but only in Denmark, her average total salary during that time was considered zero. Hence, she was only granted the basic minimum level of benefits.

7. The dispute in the present case therefore concerns the calculation of the *amount* of benefits, or more specifically whether the Plaintiff was entitled to have her salary earned and/or the period employed in Denmark during the reference period aggregated, for the purpose of the calculation of the amount or level of maternity benefit.

8. In the request for an advisory opinion (the "**Request**"), the national court asks the EFTA Court to clarify firstly, whether in calculating the level of maternity benefit, Articles 6 and 21(3) of Regulation (EC) No 883/2004 of the European Parliament

[4] See Article 13(2) of the M/P Act. Article 13(3) of the M/P Act sets out a monthly cap on the level of the benefit, which is currently at 600.000,- ISK per month (even if the average parent's salary was higher): see Article 3(5) of Regulation No 1218/2008 on payments from the M/P Fund. See https://island.is/reglugerdir/nr/1218-2008 .

[5] The Icelandic system contains separate provisions for maternity grant for parents receiving unemployment benefit under Article 18 and student grant under article 19. These benefits are funded directly by the State. Currently the level of these benefits is set out in Article 38(1) of the new Act on Maternity Paternity Leave No 144/2022.

and of the Council of 29 April 2004 on the coordination of social security systems ("**Regulation 883/2004"** or **"the Regulation"**)[6] oblige an EEA State to take into account reference income on the basis of aggregate wages on the labour market across the EEA; secondly, whether a national provision limiting the aggregation of persons' wages only to those obtained on a domestic market infringes the provisions of Regulation 883/2004 and principles of the EEA Agreement (e.g. Article 29 EEA).

9. As set out below, ESA considers that Articles 4, 6 and 21(2)-(3) of the Regulation should be interpreted as requiring the competent institution of an EEA State:

    - to take into account periods of employment in another EEA State when determining whether the conditions for entitlement to maternity benefit are met;
    - to take into account only average income received during periods of employment undertaken under its national legislation during the relevant calculation reference period;

    but that, where the entire calculation reference period is completed under the legislation of another EEA State, the competent institution of the EEA State where the benefits are claimed should ensure that the amount of the benefit is calculated by reference to the income of a person who has comparable experience and qualifications and who is similarly employed in that latter EEA State. In the alternative, such a result is in any event required by the provisions of Articles 28 and 29 EEA.

10. ESA's submissions leading to these conclusions are structured as follows. First, we set out the relevant law (Sections 2 and 3) and the question referred (Section 4).

[6] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 *on the coordination of social security systems*, was incorporated into the EEA Agreement in point 5 of Protocol 37 (containing the list provided for in Article 101) to the Agreement by Joint Committee Decision No 76/2011 of 1 July 2011; OJ L 262, 6.10.2011, p. 33 and entered into force in the EEA EFTA States on 1 June 2012. OJ L 166, 30.4.2004, p.1 (Corrigendum, OJ L 200, 7.6.2004, p.1 and OJ L 204, 4.8.207, p.30), as amended by: Regulation 988/2009 (OJ L 284, 30.10.2009, p.43); Commission Regulation 1244/2010 (OJ L 338, 22.12.2010, p.35); Regulation 456/2012 (OJ L 149, 8.6.2012, p.4); Commission Regulation 1244/2012 (OJ L 349, 19.12.2012, p.45); Commission Regulation 1372/2013 (OJ L 346, 20.12.2013, p.27), and Commission Regulation 1368/2014 (OJ L 366, 20.12.2014, p.15).

We then (Section 5) provide an overview of relevant provisions of Regulation 883/2004 (Section 5.1), followed by an assessment of the Regulation's aggregation rules in relation to the acquisition of rights (Section 5.2) and the calculation of the level of the benefits (Section 5.3). In the alternative or in support, we observe that the same outcome can be reached by applying Article 28 and 29 EEA (Section 5.4).

2. EEA LAW

11. Article 3 of the EEA Agreement provides:

"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."

12. Article 28(1) of the EEA Agreement provides:

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

13. Article 29 of the EEA Agreement provides:

"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. Regulation 883/2004 provides in Article 2 "Persons covered":

"1.This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.[…]."

15. Article 3 of Regulation 883/2004, "Matters covered", provides:

"1. This Regulation shall apply to all legislation concerning the following branches of social security: (a) sickness benefits; (b) maternity and equivalent paternity benefits […].

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

16. Article 4 of Regulation 883/2004 provides for equality of treatment:

"Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

17. Article 5 of Regulation 883/2004 on "Equal treatment of benefits, income, facts or events" provides:

"Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:
(a) […]
(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory."

18. Article 6 of Regulation 883/2004, "Aggregation of periods", provides:

"Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:
— the acquisition, retention, duration or recovery of the right to benefits,
— the coverage by legislation,
— or
— the access to or the exemption from compulsory, optional continued or voluntary insurance,
conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies."

19. Linked with Article 6 of Regulation 883/2004 are the provisions of Articles 12 and 13 of Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (the "Implementing Regulation").[7]

[7] Implementing Regulation was incorporated into the EEA Agreement in point 5 of Protocol 37 (containing the list provided for in Article 101) to the Agreement by Joint Committee Decision No 76/2011 of 1 July 2011 OJ L 262, 6.10.2011, p. 33; and entered into force in the EEA EFTA States

20. Article 21 of Regulation 883/2004, on cash benefits, provides:

"1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.

2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.

3. 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.

4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States."

3. NATIONAL LAW

21. The Act on the European Economic Area No 2/1993 (the "**Icelandic EEA Act**")[8] implements the EEA Agreement, its protocols and annexes and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, as well as the other agreements as provided for in Article 1 of the Icelandic EEA Act.

22. Article 4 of the Icelandic EEA Act prohibits any discrimination on the grounds of nationality. *"Any discrimination on grounds of nationality is prohibited within the scope of this Convention unless otherwise provided in its individual provisions."*

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on 1 June 2012.; OJ L 284 30.10.2009, p.1, amended by: Commission Regulation 1244/2010 (OJ L 338 22.12.2010, p. 35); Regulation 465/2012 (OJ L 149 8.6.2012, p.4); Commission Regulation No 1244/2012 (OJ L 349 19.12.2012, p.45); Commission Regulation 1372/2013 (OJ L 346, 20.12.2013, p.27); Commission Regulation 1368/2014 (OJ L 366, 20.12.2014, p.15) and Commission Regulation 2017/492 (OJ L 76, 22.2.2017, p.13 - not yet incorporated into the EEA Agreement).

[8] See the Icelandic EEA Act in Icelandic *"Lög um Evrópska efnahagssvæðið"* https://www.althingi.is/lagas/nuna/1993002.html .

23. Regulation 883/2004 was implemented into the Icelandic legal system by a reference method, by Icelandic Regulation No 442/2012 on the entry into force of the European Union regulations on social security.[9]

24. The M/P Act[10] provides in Article 1(1):

"*This Act shall apply to the rights of parents working in the domestic labour market to be granted maternity/paternity leave and parental leave. It shall apply to parents who are employed by others or are self-employed.*"[11]

25. Article 4(1) of the M/P Act provides that the M/P Fund shall make payments to parents who are entitled to payments during maternity/ paternity leave under Article 13. Benefits falling under Chapter VI (that is for parents outside the labour market or in full-time education) shall be paid directly by the State Treasury.

26. Article 4(3) of the M/P Act provides that the M/P Fund shall be financed by a social security tax[12] in addition to interest on the Fund's deposits. Article 4(4) provides that the Minister shall ensure that the Fund has at all times sufficient funds to meet its obligations.

27. Article 7(2) provides:

"For the purposes of this Act, employee refers to anybody who is employed in a salaried position in the service of others amounting to at least a 25% of a full-time position each month. Notwithstanding this, the term employee, as used in Section VII, shall apply to all those who are employed in salaried positions in the service of others."

28. Article 13(1) of the M/P Act sets out the rights acquisition period:

"A parent […] acquires the right to payments from the Maternity/Paternity Leave Fund after she/he has been active on the domestic labour market for six consecutive months prior to a birth of a child […] However, in the case of a parent who begins taking maternity/paternity leave before the birth of the child […], the

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[9] See *"Reglugerð um gildistöku reglugerða Evrópusambandsins um almannatryggingar*" in Icelandic https://island.is/reglugerdir/nr/0442-2012 .

[10] See the M/P Act No 95/2000 https://www.althingi.is/lagas/nuna/2000095.html with further amendments**.**

[11] Icelandic original text: *"Lög þessi taka til réttinda foreldra á innlendum vinnumarkaði til fæðingar- og foreldraorlofs. Þau eiga við um foreldra sem eru starfsmenn eða sjálfstætt starfandi. Lög þessi taka einnig til réttinda foreldra utan vinnumarkaðar og í námi til fæðingarstyrks.".*

[12] Set out in line with the Act on Social Security Tax No 113/1990 *"Lög um tryggingagjald"* No 113/1990. See https://www.althingi.is/lagas/nuna/1990113.html .

date on which the parent begins taking maternity/paternity leave shall be taken as the base regarding that parent's entitlement."

29. Article 13(2) of the M/P Act provides that payments from the M/P Fund to a parent shall be based on a percentage of her/his average total wages on the domestic labour market, based on the reference period:

"*The Maternity/Paternity Leave Fund's monthly payment to an employee […][13] during maternity/paternity leave shall amount to 80% of her/his average total wages, […] these being based on a continuous twelve-month period ending six months prior to [the birth month or the month] […]. "Wages" here shall include all forms of wage and other remuneration according to the Insurance Levy Act,[…]."*

30. Article 13(4) of the M/P Act provides for the situation where an employee has acquired the right to payments under the rights acquisition period, but has not worked on the domestic market during the earnings reference Period:

"When an employee meets the conditions of the first paragraph but has not worked on the domestic labour market during the reference period as specified [paragraph one] she/he shall acquire the right to minimum payments under the [seventh paragraph]."[14]

31. Article 13(7) of the M/P Act provides that the minimum payment to a parent holding a 50-100% job shall never be less than a minimum threshold.

32. Article 13(12) of the M/P Act provides for the situation where the employee has not been active on the domestic labour market for the full six months of the rights acquisition period:

"When a parent has worked on the domestic labour market for at least the last month of the rights acquisition period under the first paragraph, the Directorate of

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[13] See reference to Article 7(2) which states that an employee refers to anybody who is employed in a salaried position in the service of others amounting to at least 25% of a full-time position each month.

[14] The paragraph references have been updated by ESA, as the text in the official English translation contains incorrect references. The Icelandic original text states: *Þegar starfsmaður uppfyllir skilyrði 1. mgr. en hefur ekki starfað á innlendum vinnumarkaði á viðmiðunartímabili skv. 2. mgr. skal hann öðlast rétt til lágmarksgreiðslna skv. [7. mgr.] 3) í samræmi við starfshlutfall hans.* See the M/P Act in Icelandic: https://www.althingi.is/lagas/nuna/2000095.html .
See also the English translation: *When an employee meets the conditions of the first paragraph but has not worked on the domestic labour market during the reference period as specified in [the seventh paragraph], she/he shall acquire the right to minimum payments under the sixth paragraph in accordance with her/his employment ratio*.
See the M/P Act in English: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/Act-on-maternity-paternity-leave-95-2000-with-subsequent-amendments.pdf .

Labour shall, to the extent necessary, take account of his/her working periods as an employee or a self-employed individual in another Member State of the Agreement on the European Economic Area,[…], during the rights acquisition period, providing that the parent's work conferred rights on him/her under the legislation of the state in question regarding maternity/paternity leave. [If, on the other hand, the parent worked on the domestic labour market for less than the last month of the rights acquisition period under the first paragraph, then the Directorate of Labour shall assess whether the parent in question is to be regarded as having worked on the domestic labour market for the purposes of this Act with the consequence that account is to be taken, to the extent necessary, of his/her working periods as an employee or a self-employed individual in another Member State of the Agreement on the European Economic Area, […], during the rights acquisition period, providing that the parent's work conferred rights on him/her under the legislation of the state in question regarding maternity/paternity leave.] A condition for this shall be that the parent began work on the domestic labour market within ten working days of stopping work on the labour market of the other state within the EEA,[…]. The parent shall submit the required certificate of accrued employment periods and insurance periods in the other state, according to the provisions of the agreements, together with her/his application for payments from the Maternity/Paternity Leave Fund under Article 15."

4. THE QUESTION REFERRED

33. The referring court asks the following question:

"Does Article 6 of Regulation 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?"

5. LEGAL ANALYSIS

5.1 Introductory remarks

34. Before turning to the construction and interpretation of Articles 4, 6 and 21 of the Regulation, it may be useful to recall how the Regulation itself fits into the broader framework of free movement and equal treatment, provided for by the EEA Agreement.

35. Regulation 883/2004 was adopted on the basis of Article 48 TFEU (equivalent to Article 29 EEA), which obliged EEA States to introduce measures in the field of social security which are necessary to provide freedom of movement for workers.

36. Under the case law of the Court of Justice of the European Union ("**CJEU**"), neither Article 48 TFEU, nor its predecessor, produce direct effects, as it is an instrument empowering the legislature to act within the prescribed boundaries.[15] This does not however mean that Articles 48 TFEU and 29 EEA are not relevant to the present case.[16] On the contrary, as established also by the Court, because Article 48 TFEU/Article 29 EEA entrusted the legislature with the task of adopting such measures in the field of social security as necessary to provide freedom of movement for workers, the provisions of Regulation 883/2004 must be interpreted in the light of that objective.[17]

37. In the words of the European Commission's Explanatory Memorandum, put forward with the proposal for the adoption of Regulation 883/2004, the EEA social security coordination did not introduce new types of benefits, nor did it replace national rules.[18] Regulation 883/2004 is a coordination mechanism, not a harmonisation mechanism.[19] In the absence of harmonisation at EEA level, and thus to the extent that the Regulation does not govern a particular matter, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. Nevertheless, when exercising that power, the EEA States must comply with EEA law and its principles.[20] Thus, while EU/EEA primary law can offer no guarantee to an insured person that moving to another Member State will be neutral in terms of social security, it is settled case law that, where its application is less favourable, national legislation will be consistent with EU/EEA law only to the extent

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[15] See Case C-379/09 *Maurits Casteels v British Airways plc.*, EU:C:2011:131.
[16] See Case C-515/14 *Commission v Cyprus,* EU:C:2016:30, paragraphs 32-37.
[17] See amongst others: Case E-3/12 *Stig Arne Jonsson* [2013] EFTA Ct. Rep. 248, paragraph 73 and case law cited; Case E-8/20 *Criminal proceedings against N*, not yet reported, paragraph 46; Case C-406/93 *André Reichling v Institut National d'Assurance Maladie-Invalidité*, EU:C:1994:320, paragraph 21; Case C-482/93 *S. E. Klaus v Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, EU:C:1995:349, paragraph 21.
[18] Explanatory Memorandum to a Proposal for a Council Regulation on coordination of social security systems, COM(1998) 779 final, page 1 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51998PC0779&from=EN .
[19] The Regulation creates a closed system of conflict rules aimed at safeguarding the rights of beneficiaries when exercising their free movement rights and ensuring that the application of different national systems does not adversely affect persons exercising their right to freedom of movement: see the Explanatory Memorandum to a Proposal for a Council Regulation on coordination of social security systems, COM(1998) 779 final, page 3.
[20] See Case E-8/20, *Criminal proceedings against N*, not yet reported, paragraph 71 and Case E-2/18, *C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein,* not yet reported, paragraph 43.

that such legislation does not place the migrant worker at a disadvantage compared with those who pursue all their activities in the Member State.[21]

38. The system of social security coordination provided in Regulation 883/2004 is applicable to all legislation concerning, amongst other things, sickness benefits and maternity and paternity benefits. The Regulation also applies to all general and special social security schemes, whether contributory or non-contributory.

39. Article 2(1) of Regulation 883/2004 provides that the Regulation applies to a national of an EEA State who is or has been subject to the legislation of one or more EEA States. As the Plaintiff worked in Denmark during the Icelandic reference period, where she was at the time subject to the Danish social security system, as well as in Iceland after her return, she therefore falls within the personal scope of the Regulation.

40. It is recognised in recital (4) of the Regulation that "*it is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.*" Regulation 883/2004 follows the basic principles of equality of treatment, aggregation of periods of insurance, exportability of benefits (offsetting basic principles of territoriality of social protection) and uniform criteria for determining the applicable social security legislation while respecting the principle of proportionality by preventing the overlapping of benefits.

41. The principle of equal treatment is expressed in Article 4 and recital (5) of Regulation 883/2004, ensuring that all persons to whom the Regulation applies

[21] See Case C-515/14 *Commission v Cyprus,* cited above, paragraph 40 and see more generally paragraphs 38-42; Case C-548/11 *Edgard Mulders v Rijksdienst voor Pensioenen,* EU:C:2013:249, paragraph 76. ESA observes that the CJEU has acknowledged in certain cases that the application, possibly as a result of the provisions of Regulation, of national legislation that is less favourable as regards social security benefits may in principle be compatible with the requirements of primary EU law on freedom of movement for persons. This is however not a general rule but rather an exception, depending on particular circumstances of the case. Even in such circumstances the fundamental principle of non-discrimination must at all times be respected. See Joint Cases C-393/99 and C-394/99, *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA,* EU:C:2002:182, paragraph 50-51; Case C-493/04 *L. H. Piatkowski v Inspecteur van de Belastingdienst grote ondernemingen Eindhoven.*, EU:C:2006:167, paragraph 34; C-208/07 *Petra von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse.*, EU:C:2009:455, paragraph 85 and Joined Cases C-611/10 and C-612/10 *Waldemar Hudzinski v Agentur für Arbeit Wesel — Familienkasse and Jaroslaw Wawrzyniak v Agentur für Arbeit Mönchengladbach — Familienkasse*, EU:C:2012:339, paragraphs 42 and 43.

shall enjoy the same benefits and be subject to the same obligations under the legislation of any EEA Sate as the nationals thereof, unless otherwise provided. The CJEU has given the principle of equal treatment a broad interpretation, prohibiting not only direct discrimination based on nationality but also covert forms of discrimination which, by applying other distinguishing criteria, *de facto* achieve the same result.[22]

42. The principle of aggregation of all insurance periods, irrespective of the EEA State in which they were accrued, as expressed in Article 6 of Regulation 883/2004, guarantees the beneficiaries the retention of social security rights in the process of being acquired.

43. The question of the competence of an EEA State in a given case is governed solely by the conflict rules of the Regulation, which provide a complete and uniform set of conflict rules in order to *"prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation 883/2004 are not left without social security cover because there is no legislation which is applicable to them"*.[23]

5.2 Aggregation during the Rights Acquisition Period

44. Article 29(1)(a) EEA establishes that, in order to provide freedom of movement of workers, the Contracting Parties shall secure […] "*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;"*

45. Article 6 of Regulation 883/2004 accordingly sets out the principle of aggregation of periods of insurance, employment, self-employment or residence completed under the legislation of any other EEA State as though they were periods completed under the legislation of the competent EEA State, where the legislation of the competent EEA State makes the acquisition, retention, duration or recovery of the

[22] See Cases C-41/84 *Pietro Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1 and Case C-349/87 *Elissavet Paraschi v Landesversicherungsanstalt Württemberg,* EU:C:1991:372.
[23] See Case C-308/14 *Commission v United Kingdom*, EU:C:2016:436, paragraph 64, and Case C-451/17 *„Walltopia" AD v Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite – Veliko Tarnovo*, EU:C:2018:861, paragraph 41 and the case-law cited therein; see also Case C-551/16 *Klein Schiphorst*, EU:C:2018:200, paragraph 31; also in literature: Pennings, "*European Social Security Law*", 5th ed. Intersentia 2010, p. 6.

right to benefits conditional upon the completion of such periods. The competent EEA State must take them into account to the extent necessary.

46. Article 6 is moreover, operationalised *inter alia* by Articles 12 and 13 of the Implementing Regulation. They provide that *"[…] The respective periods of insurance, employment, self-employment or residence completed under the legislation of a Member State shall be added to those completed under the legislation of any other Member State, insofar as necessary for the purposes of applying Article 6 of the basic Regulation, provided that these periods do not overlap. […]"* and provide further detailed rules for such calculations.

47. As expressed in recital (13) of Regulation 883/2004, *"the coordination rules must guarantee that persons moving within the [*EEA*][24] [...] retain the rights and the advantages acquired and in the course of being acquired."*[25] This objective, in line with recital (14), "*must be attained in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by this Regulation."*[26]

48. The principle of aggregation of benefits is the subject of Decision No H6 of the Administrative Committee for the Coordination of Social Security Systems.[27] Recital (2) of the Decision directly refers to increasing the value of the benefit as a result of aggregation: *"Article 6 of Regulation (EC) No 883/2004 provides for the principle of aggregation of periods. This principle should be applied in a uniform way which includes the aggregation of periods which, under national legislation, count only in terms of qualifying for or in terms of increasing the benefit."*

49. Recital (5) to Decision No H6 recalls that *"it is necessary to recognise the principle that Member States retain jurisdiction to determine their national conditions for*

[24] Changed by ESA.
[25] See recital 13 of Regulation 883/2004.
[26] See recital 14 of Regulation 883/2004.
[27] Administrative Commission for the Coordination of Social Security Systems *Decision No H6 of 16 December 2010 concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation 883/2004 on the coordination of social security systems*; OJ C 45 of 12.2.2011, p.5.

granting social security benefits — provided that these conditions are applied in a non-discriminatory way […]".[28]

50. It is quite clear from the Request that the Icelandic Government ensured the application of the principle of aggregation for the purpose of establishing the Plaintiff's *entitlement* to the benefits.[29]

51. The question however remains whether Article 6 of Regulation 883/2004 (on its own, or in conjunction with other provisions) obliges the EEA States to aggregate periods of employment abroad for the purpose of *calculating the amount* of benefit.[30]

5.3 Aggregation and the Calculation of the Level of the Benefit

52. Taking into account the facts of the case pending before the Court, ESA submits that the answer to the question whether EEA States are obliged to aggregate periods of employment abroad for the purpose of calculating the amount of benefit can be found in the combined application of Articles 4, 6 and 21 of Regulation 883/2004, interpreted in light of Articles 28 and 29 EEA. Two broad points are relevant here.

The relevance of Article 6

53. First, it is true that Article 6 of Regulation 883/2004 does not contain a reference to "*calculation of the benefit*", but, in line with general principles of interpretation,

[28] See Decision No H6, cited above.
[29] See paragraph 3 of these WOBs.
[30] The Request, p.10, records the Icelandic State's reference to the fact that ESA conducted infringement proceedings against Iceland concerning the requirement of one month of employment on the domestic market in order to be granted access to maternity benefits. The Icelandic State claims that ESA "*in its opinion, made no criticism concerning the calculation of payments from the Maternity/Paternity Leave Fund, even though it was specifically discussing the provisions of the Act that applied to this entitlement. The defendant considers that, in view of this, it follows a contrario that the arrangements regarding calculation of these payments were not considered by ESA as infringing the EEA Agreement*."
The infringement case to which Iceland refers concerned only the issue of entitlement to benefits, periods of work which gave rise to the entitlement and the application of the aggregation principle in this context (see ESA's related letter of formal notice, Decision No: 247/09/COL). The case did not concern the rules on establishing the level or the amount of the benefit or the calculations methods. That however, contrary to what the Icelandic government seems to be suggesting in the Request, does not mean that ESA concluded that they do not infringe the EEA Agreement. Simply put, these issues did not form part of the investigation.

Article 6 of the Regulation must be interpreted in view of Article 29 EEA (see paragraphs 36- 36 above) and not *vice versa*. This means that Article 6 remains relevant in the context of calculating benefits, or at the very least that any calculation method must not be such as to hollow-out or render ineffective the aggregation principle which was used to acquire the rights to the benefit in the first place.

54. This is because the principle of aggregation in Article 6 of Regulation 883/2004 constitutes a direct expression of Article 29(1)(a) EEA (and in turn of Article 28 EEA). While Article 6 references aggregation for the purpose of acquisition, retention, duration or recovery of the "*rights to the benefits*", and Article 29(1)(a) of the EEA Agreement also talks about aggregation of all periods under the laws of several countries also for *calculating* the amount of benefit, ESA submits that Article 6 of the Regulation must be interpreted in light of Articles 29 and 28 EEA and their purpose of ensuring free movement of workers. The position which appears to have been adopted by the Icelandic Government,[31] that secondary legislation can somehow narrow the scope of the EEA Agreement is simply incorrect. If the secondary legislation does not give sufficient guidelines or sufficiently regulate the matter, the interpretation should always bear in mind the main principles set out in the EEA Agreement. More precisely, in this case, the principle of free movement of workers.

The relevance of Article 21

55. Second, while the exact rules on calculation of cash benefits are set out in Article 21 of Regulation 883/2004, as alluded to above, that provision must be read in the light of Article 6 and applied by the EEA States in a manner so as to not deprive Article 6 of Regulation 883/2004 of any real effect. It also follows from the principle

[31] See the Request, pages 10 -12. The Icelandic Government considers that since Article 6 of the Regulation contains no reference to the calculation of the benefit and since Article 21 is intended *"[…] for the further elucidation of Article 29 EEA*", this means that Article 29 EEA itself must in turn be interpreted narrowly. The Icelandic Government appears also to be of the opinion that the words *"[…] and of calculating the amount of benefit […]*" in point (a) of Article 29 EEA apply only to instances when *"[…] account is to be taken of periods that are needed for the calculation of certain fixed payment sums that are not proportions of average income*.". In ESA's view, such an interpretation is not in line with the basic principles of interpretation of EEA law.

of sincere cooperation expressed in Article 3 EEA that the EEA States concerned are under an obligation to apply Regulation 883/2004 correctly.[32]

56. In relation to Article 21 itself, ESA first observes that Article 21(1) of Regulation 883/2004 guarantees that if the Plaintiff had been granted benefits under the Danish social security system, she would have been able to export them to Iceland. But this is not the case we are dealing with here.

57. The issue is whether the calculation of the Plaintiff's maternity benefits under Icelandic law complies with the requirements of Articles 21(2-4) and 6 of Regulation 883/2004 and if so, how.

58. Article 21(2)-(4) of Regulation 883/2004 provides rules for the methods of calculation of benefits. If the EEA Member State's legislation stipulates that calculation of the benefit shall be based on average income or on an average contribution basis (paragraph 2), then the competent institution shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation. If, on the other hand, the EEA State's legislation stipulates that the calculation of benefit shall be based on standard income (paragraph 3), then the competent institution shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.

59. Additionally, paragraph 4 of Article 21 provides that these rules apply *mutatis mutandis* to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.

60. ESA submits that Article 21(2)-(4) of Regulation 883/2004 establishes comprehensive compulsory rules that EEA States are obliged to apply. This is first and foremost confirmed by the use of "*shall determine*" in paragraph 2 and "*shall*

[32] See Case E-1/21 *ISTM International Shipping & Trucking Management GmbH*, not yet reported, paragraph 36 and the case law cited therein.

take into account" in paragraph 3. Therefore, depending on whether the calculation of the level of benefit under the national social security system of an EEA State is based on average income/ contributions or standard income/ contributions, the State must use the relevant paragraph in Article 21 for calculating the level of the benefit for a person who has exercised the free movement of workers' rights. If the system fits into the situation described in paragraph 4, the State is bound to apply the options described in paragraph 2 and 3 *mutatis mutandis.*

61. Given the text of Article 21(1), it might be questioned whether the provisions of Article 21(2)-(4) are applicable only in the situations covered by Article 21(1), that is, where benefits are exported from one EEA State to another. However, that Article 21(2-4) were intended to apply independently of Article 21(1) is confirmed by a systemic analysis of the predecessor to Article 21(2)-(3), which was Article 23 of Regulation 1408/71.[33] Article 23 was merged with Article 21 of Regulation 883/2004 in its paragraphs 2 and 3, supplemented by paragraph 1 which constitutes a particular expression of Article 7 of Regulation 883/2004 on the waiving of residence rules.[34]

62. The conclusion that Article 21(2)-(3) rules apply independently is also supported by the *Bergström* case[35], which was decided under Regulation 1408/71, and in which the CJEU applied the Article 23 rules on calculation of the benefit to a situation which would not fall under the export rules of Article 21(1).

63. ESA therefore submits that the assessment or calculation of the level of the benefits falls under Article 21 of Regulation 883/2004. However, while Article 21(2-4) covers the calculation of the benefit, EEA States cannot make use of it in such a way as to

[33] See Council Regulation 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*. Part of the EEA Agreement at the time of signing in 1992. Entered into force 1 of January 1994.

[34] Article 7 of Regulation 883/2004 on waiving of residence rules provides: "*Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.".*

[35] See Case C-257/10 *Försäkringskassan v Elisabeth Bergström,* EU:C:2011:839.

undermine the principle and effectiveness of aggregation (Article 6 of the Regulation), thereby depriving EEA workers of their rights.

64. ESA observes that the Icelandic legislation provides that where a parent has been employed in the reference period, calculation of the level of benefits shall be based on the average of total salaries during the reference period. This indicates that Article 21(2) should apply to the calculation method used in the case at hand. However, in the Request the referring court asks about Article 21(3). Rather than speculating, ESA would just like to draw the attention of the referring court to the difference between the two sub-paragraphs of Article 21, as (2) refers to average income/ contributions while (3) refers to standard income/ contributions. The assessment as to which paragraph shall apply is for the referring court to determine.

65. The Icelandic Government applies similar logic and repeats similar arguments as with regard to Article 6 of Regulation, that the provisions of Article 21 of Regulation 883/2004 are intended for further elucidation of Article 29 of EEA and that Article 29 must be interpreted with this in mind - "*it follows directly from Article 21 of the Regulation that the EEA State which makes the payments, and whose legislation then applies, is to base the benefits solely on the income that the person in question has earned in that EEA State.*"[36] Furthermore, "*When Article 29 […] is interpreted in conformity with Article 21 of Regulation (EC) No 883/2004, it cannot be seen that this provision allows for the interpretation that foreign income is to be taken into account in the calculation of payments […]*"[37] ESA maintains its position as expressed in paragraph 54 of these observations that such reasoning is plainly wrong as it leads to undermining of the principles of free movement.

66. The Plaintiff in the pending case refers to *Öberg*[38] and *Bergström*[39] to support her view that national authorities are obliged to take account of wages earned during periods spent working in other EEA States when calculating payments related to a person's wages during a specific period. The Icelandic Government raised that these cases should be distinguished from the present case as the CJEU only

[36] See the Request, page 11 and paragraph 54 of these WOBs.
[37] See the Request, bottom of page 12 and top of page 13 and paragraph 54 of these WOBs.
[38] See Case C-185/04 *Ulf Öberg v. Försäkringskassan.* EU:C:2006:107.
[39] See Case C-257/10 *Bergström,* cited above.

obliged the national authorities to take into account periods of employment and not to take into account the income acquired outside of the country when calculating the payments.

67. In principle, EEA States are free to establish rules on calculation of the level of maternity benefit in line with Article 21(2)-(3). However, when EEA States are establishing a reference period completely outside of the scope of the rights acquisition period, they must still comply with Article 21, as properly interpreted in the light of the principles of free movement of workers and non-discrimination. Otherwise, the result is going to be an indirect discrimination against workers who relied on their free movement rights.[40]

68. ESA submits that the fact that the CJEU in *Öberg* and *Bergström* did not take into account income acquired in an EEA State outside the competent State, but took into account periods of employment in such a State, confirms that the principle of aggregation is applicable in those circumstances. More precisely, the aggregation principle was applied to require the national authorities to take into account the employment outside of the competent EEA State during the reference period, with the result that the benefit had to be based on the income of a hypothetical person with the same professional qualification and experience within the competent EEA State.

69. In other words, the CJEU in *Bergström* found that, when calculating the level of benefits, the national authorities must take the periods completed under the legislation of a different EEA State into account, and considered how that is to be carried out in light of Article 21 of Regulation 883/2004. The CJEU applied Article 21 in conjunction with the general principle of equal treatment in Article 4 of the Regulation and the aggregation of all relevant employment periods completed in other EEA States.

70. At face value, the Plaintiff is subject to the same rules as nationals of Iceland. It could be argued that the rules are applicable in the same manner – in terms of entitlement and in terms of calculation. However, it is clear, applying the CJEU

[40] See Case C-34/98 *Communities v French Republic*, EU:C:2000:84, paragraph 42.

reasoning in Case C-651/16 *DW*[41]*,* that the Icelandic rules result in indirect discrimination – the application of the same rules produces different results in the case of migrant workers. In fact, they make it almost impossible for migrant workers to be entitled to more than minimum benefits since they would be required to work in Iceland for 18 months prior to the birth month to be entitled to have their income taken into account in establishing the level of the benefit. As such, a migrant worker exercising the right to free movement is being placed in a detrimental position compared with a domestic worker, a situation which breaches the principle of Article 4 of Regulation 883/2004.

71. In the pending case the Plaintiff did not complete any period in Iceland under the Icelandic reference period (18-6 months prior to the birth month), as she was resident and employed in Denmark at the time. The relevant reference period therefore fully occurred in Denmark. As stated earlier, the Plaintiff worked for over five months *after* the reference period in Iceland, but that does not alter the fact that according to Article 13(2) of the M/P Act, any worker must *effectively* work for 18 months in Iceland to enjoy full benefits. Because the national law provisions prevent the Plaintiff from enjoying a calculation of average income of workers in a similar position as hers, she was subjected to a standard minimum wage income, contrary to the requirements of Art. 21(2)-(3) of Regulation 883/2004, read in conjunction with Article 4 and 6 the Regulation, which entail that a period or periods completed in other EEA States shall be taken into account when applying the general average income rule of the M/P Act.

72. ESA submits that, in line with *Bergström*, it is clear that the application of Article 6 of Regulation 883/2004 to the rights acquisition period does not release EEA States from the obligation to correctly apply the other provisions of the Regulation, (like Article 21 and Article 4) in establishing the level of the benefit in question. Article 21 covers the calculation of the benefit, but EEA States cannot make such use of it as to undermine the principle of aggregation and it cannot be used as a loophole to allow EEA States to apply different treatment to workers making use of their rights compared to purely domestic workers.

[41] See Case C-651/16 *DW v Valsts sociālās apdrošināšanas aģentūra*, EU:C:2018:162.

73. ESA therefore submits that, as the Plaintiff did not have any income in Iceland during the reference period that could be demonstrative of her average income based on her qualifications, the national court should estimate hypothetically what her income would have been according to average income of similar professionals, holding similar qualifications. Taking into account that the Plaintiff received income in Iceland for over five months prior to birth (directly after the reference period established by the M/P Act, during the rights acquisition period) it should be straightforward for the national authorities to establish the average income of a hypothetical person with the same professional qualifications and experience as the Plaintiff during the reference period.

74. Furthermore, ESA would like to note that also in the cases concerning maternity benefit considered by the CJEU, where the Regulation was not applicable and the CJEU considered them on the basis of Articles 45 and 48 TFEU, the CJEU held that it would be contrary to the principle of freedom of movement of workers, for periods of employment in other EEA States to be equated only to periods of unemployment by the competent institution for the purposes of calculating a maternity benefit.[42] It would indeed be strange if beneficiaries relying on Article 28 EEA or 45 TFEU itself would be placed in a better position than the beneficiaries falling within the scope of the secondary legislation, namely Regulation 883/2004 which was adopted with the view of ensuring that the rights of beneficiaries are protected.[43] This therefore in itself indicates that the most appropriate construction of Article 21 is one which correctly takes into account the principle of aggregation in calculating maternity benefit and which therefore avoids such different outcomes.

75. ESA submits that this conclusion must be upheld even taking into account that some of those cases concerned situations where the value of the benefit was *per diem* or a fixed sum dependent on the completion of a sufficient period to be able to grant the benefit (also known as a situation where the amount of the benefit is a

[42] See especially judgments in: Case C-185/04 *Öberg*, cited above, paragraph 16; Case C-137/04 *Amy Rockler* v. *Försäkringskassan*, EU:C:2006:106, paragraph 19, and Case C-651/16 *DW*, cited above, paragraph 26.

[43] See paragraph 2 on page 1 of the General Comments to the Proposal for a Council Regulation (EC) on coordination of social security systems. See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51998PC0779&from=EN .

function of completed periods of insurance).[44] The CJEU made it clear in its assessment in the *DW* case, that what mattered was that the application of national rules on calculation of the benefit (wrongly) placed the beneficiary in a group which was paid at a lower rate.[45] This same consideration is applicable in the pending case.

76. ESA therefore submits that Articles 4, 6 and 21(2) of the Regulation should be interpreted as requiring the competent institution of an EEA State to take into account periods of employment in another EEA State when determining whether the conditions for entitlement to maternity benefit are met; and to take into account only average income received during periods of employment undertaken under its national legislation during the relevant calculation reference period; but that, where the entire calculation reference period is completed under the legislation of another EEA State, the competent institution of the EEA State where the benefits are claimed should ensure that the amount of the benefit is calculated by reference to the income of a person who has comparable experience and qualifications and who is similarly employed in that EEA State. In the alternative, such a result is in any event required by the provisions of Articles 28 and 29 EEA.

5.4 EEA Agreement

77. In the alternative, should the Court not agree with ESA's submissions on the applicability of Article 21, 6 and 4 of the Regulation to the present case, either because the Court considers:

(i) that the rules on calculation of the benefit under Article 21(2)-(4) only apply where the situation falls within the scope of Article 21(1) of Regulation 883/2004; or

(ii) that Article 21 should be construed as leaving EEA States free to establish rules on the calculation of the benefit (subject to compliance with EEA law), so that the application of Article 6 is limited to aggregating periods relevant only for establishing the entitlement to the benefit,

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[44] See for example on invalidity benefit Case C-481/93 *R. Moscato v Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, EU:C:1995:348, paragraph 31 and cash sickness benefit Case C-482/93 *S. E. Klaus*, cited above, paragraph 30.
[45] Case C-651/16 *DW*, cited above, paragraph 26.

ESA submits that, in any case Articles 28 and 29 EEA must be interpreted as precluding legislation of an EEA State such that as at issue in the main proceedings that, for the purposes of determining the average wage/ contribution basis when calculating the amount of maternity benefit excludes wages/ contributions in another EEA State, has the effect of substantially reducing the amount of maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that EEA State alone.

78. ESA notes that the existing EEA secondary legislation on coordination of social security benefits is in line with the aim of the free movement of persons. At the same time, national regulations relating to social security still fall under the matters covered when it comes to applying the EEA Agreement as a whole, including free movement of goods and the freedom to provide services.[46]

79. Should the Court decide that the matter at hand, i.e. the national rules for calculation of cash benefit, fall outside the scope of Regulation 882/2004 (*quod non*), ESA submits that this would not have the effect of removing that measure from the scope of the main part of the EEA Agreement or another legal act incorporated in the EEA Agreement.[47]

80. In that regard, ESA submits that, although EEA States retain the power to organise their social security schemes, by determining, *inter alia*, the conditions on which social security benefits are granted, they must nonetheless, when exercising that power, observe EEA law and, in particular, the provisions of the EEA Agreement on freedom of movement for workers.[48]

81. This was recognised by the CJEU which also held that interpretation of Regulation 883/2004 must be understood without prejudice to the solution which flows from the

[46] Explanatory Memorandum to a Proposal for a Council Regulation on coordination of social security systems, COM(1998) 779 final, page 4.
[47] See Case E-8/20 *Criminal Proceedings against N,* cited above, paragraph 68 and Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, EU:C:2010:581, paragraph 38 and case law cited therein.
[48] See, to that effect, Joined Cases E-11/07 and E-1/08 *Rindal and Slinning*, [2008] EFTA Ct. Rep. 320, paragraph 43; Case C-212/06 *Government of the French Community and Walloon Government*, EU:C:2008:178, paragraph 43; Case C-515/14 *Commission v Cyprus*, cited above, paragraph 38; Case C-466/15 *Jean-Michel Adrien and Others v Premier ministre and Others*, EU:C:2016:749, paragraph 22.

potential applicability of provisions of the main part of the EEA Agreement.[49] It follows that the non-applicability, as the case may be, of Article 21 to a situation such as that at issue in the main proceedings does not of itself prevent the person concerned from claiming, pursuant to the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement, the recalculation of the maternity benefit taking into account the aggregation principle.[50] The CJEU has already confirmed the application of Article 45 TFEU to the calculation of maternity benefits for persons not covered by Regulation 883/2004 in a number of cases[51].

82. Taking into account the settled case law of the CJEU and the Court, the provisions of EU/EEA law on freedom of movement of workers '*are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place them at a disadvantage when they wish to pursue an activity in the territory of an EEA State other than their EEA State of origin*'.[52] Thus, Article 28 EEA precludes any national measure, of the host EEA State or of the EEA State of origin, which can hinder or render less attractive the exercise by EEA nationals of the fundamental freedom guaranteed by that Article, even if it applies without regard to the nationality of the workers concerned.[53]

83. In the particular circumstances of the pending case, the application of the Icelandic rules on the calculation of the level of the benefit not only creates a disadvantage for the Plaintiff, but also limits the amount of benefit available to her in Iceland simply because she worked in another EEA State. At the same time, because of her move back to Iceland, she cannot benefit from the maternity benefit in Denmark where she contributed to the social security system during the time of her employment.

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[49] Compare Case C-208/07 *von Chamier-Gliszczynski*, cited above, paragraph 66.
[50] See Case E-8/20 *Criminal proceedings against N*, cited above, paragraph 68 - retention of a sickness benefit in cash during short-term stays in another EEA State.
[51] See Cases: C-185/04 *Öberg*, C-137/04 *Amy Rockler* and C-651/16 *DW*, all cited above.
[52] See Cases: E-3/12 *Stig Arne Jonsson,* cited above, paragraph 73 and case law cited therein; E-8/20 *Criminal proceedings against N,* cited above, paragraph 46*;* C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* EU:C:1992:296, paragraph 16; C-385/00 *F.W.L. de Groot v Staatssecretaris van Financiën*, EU:C:2002:750, paragraph 77; C- 232/01 *Criminal proceedings against Hans van Lent*, EU:C:2003:535, paragraph 15 and C-185/04 *Öberg*, cited above.
[53] See Case C-566/15 *Konrad Erzberger v TUI AG,* EU:C:2017:562, paragraph 33 and the case-law cited therein; Case C-385/00 *De Groot*, cited above, paragraph 78, Case C- 232/01 *Van Lent*, cited above, paragraph 16, Case C-209/01 *Theodor Schilling and Angelica Fleck-Schilling v Finanzamt Nürnberg-Süd*, EU:C:2003:610, paragraph 25.

The Plaintiff is therefore treated less favourably than a worker who never left Iceland.

84. ESA submits that it is important to note that on paper the Icelandic legislation only requires payment of State social insurance contributions during the rights acquisition period. However, setting the reference period before the rights acquisition period in reality turns this reference period into a rights acquisition period, defeating the very purpose of the aggregation principle. A situation like this has in fact already been addressed by the CJEU in *DW*, and although that case was ultimately decided on the basis of the Treaty, since the Regulation was not applicable, the CJEU´s analysis stands also in the present case. The CJEU held that: "*It is important, in that regard, to note that although the applicable national legislation does not, as such, require payment of State social insurance contributions during the reference period as a condition for a maternity benefit to be granted, the fact remains that the application of the rules for calculating the benefit at issue produce a similar result, since the amount of the benefit granted to a worker […] is substantially less than that to which she could have been entitled had she worked in the territory of the Member State concerned and contributed to its social security system*." [54]

85. The Plaintiff in the pending case has complied with the rights acquisition period of contributing to the social security system of her home State. Because she was not paying social security contributions in Iceland during the twelve month reference period, due to the fact that she was paying those contributions in Denmark (her then state of residence and employment) she received in Iceland a minimum amount of maternity benefit set out by law, equating her position with a person receiving minimum level of benefit.[55]

86. ESA therefore submits that should the pending case be decided on the basis of Article 28 and Article 29 EEA the outcome cannot be any different than in the *DW*[56] case, which the CJEU decided on the basis of Article 45 TFEU. The fact that the

[54] See Case C-651/16 *DW*, cited above. Compare for similar considerations paragraph 25.
[55] See Case C-651/16 *DW*, cited above, paragraph 24.
[56] See Case C-651/16 *DW*, cited above and Case C-137/04 *Amy Rockler,* cited above, paragraphs 19 and 27.

DW case concerned a member of EU staff does not detract from this conclusion as it is hard to distinguish their situation from any other person making use of their free movement rights who at the same time does not fall under the scope of Regulation 883/2004.

87. ESA therefore submits that Articles 28 and 29 EEA must be interpreted as precluding legislation of an EEA State such as that at issue in the main proceedings that, for the purposes of determining the average wage/ contribution basis when calculating the amount of maternity benefit excludes wages/ contributions in another EEA State, has the effect of substantially reducing the amount of maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that EEA State alone.

5. CONCLUSION

Accordingly, ESA respectfully submits that the Court should answer the question referred as follows:

**(*1) Articles 6 and 21 of Regulation 883/2004 should be interpreted as requiring the competent institution of an EEA State to take into account periods of employment in another EEA State when determining whether the conditions for entitlement to maternity benefit are met and to take into account only average income received during periods of employment undertaken under its national legislation during the relevant calculation reference period;*

(2) In order for Article 6 and 21 of Regulation 883/2004 to be effective and to satisfy the equal treatment requirement of Article 4 of the Regulation, where the reference period for calculation of the benefit is in its entirety completed under the legislation of another EEA State, the competent institution of the EEA State should ensure that the amount of the benefit is calculated by reference to the income of a person who has comparable experience and qualifications and who is similarly employed in the EEA State in which the benefit is claimed.

In the alternative:

(1) Articles 28 and 29 EEA must be interpreted as precluding legislation of an EEA State such as that at issue in the main proceedings that, for the purposes of determining the average wage/ contribution basis when calculating the amount of maternity benefit excludes wages/ contributions in another EEA State, has the effect of substantially reducing the amount of maternity benefit granted to that person in comparison with the amount to which she would have been entitled had she been gainfully employed in that EEA State alone.

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