EUROPEAN COMMISSION

Brussels, 16th August 2023
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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the European Commission, represented by Bernd-Roland Killmann, Member of its Legal Service, and Nicola Yerrell, its Senior Expert, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

In Case **E-3/23,**

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the National Insurance Court of Norway, in the case of:

A

Plaintiff

against

Arbeids- og velferdsdirektoratet

Defendant

requesting an advisory opinion regarding the interpretation of Article 58 of the act referred to in Point 1 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security schemes.

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. The present request for an advisory opinion arises out of a decision made by the Norwegian Labour and Welfare Administration ("NAV") regarding the plaintiff's entitlement to invalidity benefits.

2. The plaintiff is a Norwegian national who is resident in Norway. In May 2018, he made a claim for invalidity benefits to NAV on the basis that he suffered from a serious long-term mental illness. The claim form included the information that he had been resident in Ireland from May 2006 until February 2014. By a decision dated 25th January 2019, his application was granted, and his degree of invalidity fixed at 80%. The onset of invalidity (the point at which his earning capacity was deemed to be permanently reduced by at least 50%) was set at April 2014.

3. According to information provided by the Irish social security authorities, the plaintiff had not been a member of the Irish national insurance scheme since December 2012. As a result, he did not fulfil the key requirement laid down in Section 12.2 of the Norwegian National Insurance Act of five years' prior membership of the national insurance scheme before the onset of invalidity (even calculated on the basis of the aggregation principle contained in Article 6 of Regulation (EC) No. 883/2004).

4. However, NAV went on to conclude that the exception in the third paragraph of Section 12.2 of the Act nevertheless applied, since the plaintiff was a member of the national insurance scheme at the time of the onset of invalidity, and had acquired entitlement to at least half of the full minimum invalidity benefit. He was accordingly entitled to an invalidity benefit calculated under the rules set out in the National Insurance Act.

5. The plaintiff lodged an appeal against this decision to NAV, arguing that his degree of invalidity should be set at 100% instead of 80% since his ability to work running a small computer service business was highly unpredictable, but the original finding was upheld in a decision of NAV Appeals dated 15th November 2019.

6. On 25th November 2019, the plaintiff appealed against this decision to the National Insurance Court, on the grounds that i) his degree of invalidity should be set at 100% and also that ii) he should be entitled to a supplement under Article 58 of Regulation (EC) No. 883/2004), since the total of his *pro rata* benefits was lower than the minimum benefits fixed by Section 12.13 of the National Insurance Act.

7. In the meantime, the plaintiff had also applied for invalidity benefits in Ireland. This claim was rejected by the Irish social security authorities in a decision dated 21st August 2019 on the basis that the plaintiff did not satisfy the conditions for entitlement because he was not permanently incapable of work (and noted that according to the information supplied, he was currently self-employed as a computer engineer). It followed that he would receive invalidity benefits only from Norway.

8. On 10th August 2020, NAV Appeals referred the second part of the plaintiff's case (relating to the issue of prior membership) back to NAV for a re-assessment. On 19th August 2020, NAV adopted a new decision in which the calculation of the plaintiff's invalidity benefit was amended, with the result that he received a new higher amount. As is explained at paragraph 9 of the request for an advisory opinion, the new decision found that he satisfied the conditions of the exception in point b) of the second paragraph of Section 12.2 of the National Insurance Act (rather than that in the third paragraph) through aggregation of his Norwegian and Irish periods of insurance, and was accordingly entitled to a Norwegian invalidity benefit on that basis. It followed that his benefit was to be calculated on a *pro rata* basis in accordance with Article 52(1)(b) of Regulation (EC) No. 883/2004, and the Norwegian Regulation on the calculation of invalidity benefits under the EEA Agreement.

9. The details of this calculation are set out at paragraphs 11-13 of the request for an advisory opinion. In brief, it was based on i) a theoretical amount equal to the benefit the plaintiff would have received if all periods of insurance had been completed in Norway and ii) an actual amount based on the *ratio* of the periods completed in Norway before the onset of invalidity and the combined periods completed in Norway and Ireland before that date.

10. As a result of this *pro rata* calculation, the plaintiff's invalidity benefit was fixed at 183.015 NOK per year. By way of contrast, the current minimum annual benefit for a single person (adjusted, as in the plaintiff's case, for an 80% degree of invalidity) would be 221.170 NOK. (In other words, 2.48 x 111.477 NOK (the basic amount used for calculating social security benefits in Norway) based on a 40 year period of insurance, see paragraph 14 of the request).

11. In the proceedings before the National Insurance Court, the plaintiff accordingly argued that his annual invalidity benefit should be fixed at this higher rate, with reference to Article 58 of Regulation (EC) No. 883/2004. In his view, the "minimum annual benefit" referred to in the second paragraph of Section 12.13 of the National Insurance Act clearly constitutes a "minimum benefit" for the purposes of Article 58 of Regulation (EC) No. 883/2004 since it is designed to guarantee a recipient of invalidity benefits a minimum financial standard. He should therefore be entitled to that higher rate, regardless of where in the EEA his periods of insurance were completed.

12. By way of contrast, the NAV maintained that the "minimum annual benefit" referred to in the second paragraph of Section 12.13 of the National Insurance Act does not constitute an express guarantee of a minimum benefit, but rather forms part of the usual social security rules, with benefits based on acquisition via periods of insurance. As such, it cannot be "transformed" into a minimum benefit within the meaning of Article 58 of Regulation (EC) No. 883/2004.

13. In light of these arguments, the National Insurance Court decided that it was necessary to refer the matter to the EFTA Court for an advisory opinion on the proper interpretation of EEA law.

II. THE QUESTION

14. The question referred to the EFTA Court by the Norwegian National Insurance Court is the following:

> *"Is there a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004 where the national legislation contains provisions on a minimum annual benefit in the event of invalidity, but at the same time provides that that benefit is to be proportionally reduced when the person has a shorter period of insurance than the full period of insurance, which is 40 years?"*

III. THE APPLICABLE LAW

Norwegian Law

15. The rules governing the right to invalidity benefits are laid down in Chapter 12 of the Norwegian National Insurance Act ("the Act"). As is noted in its Section 12.1, the purpose of invalidity benefits *"is to ensure income for persons who have had their earning capacity permanently reduced due to illness, injury or disability"*.

According to the first paragraph of Section 12.2 of the Act, the basic condition for entitlement to invalidity benefits is that the person concerned has been a member of the national insurance scheme *"for the five years preceding the onset of invalidity"*. The second and third paragraphs contain certain exceptions to this rule. Of particular relevance to the present proceedings, point b) of the second paragraph provides that:

"The condition of five years of prior membership in the first paragraph shall not apply to a person who has been a member in the insurance scheme for at least one year immediately before he or she submits a claim for invalidity benefits, if …

(b) the person concerned, after turning 16 years, has been a member in the national insurance scheme except for a maximum of five years". (Commission's underlining).

As is explained in the request for an advisory opinion (see especially paragraphs 9 and 19), the plaintiff was found to fall within this exception: by aggregating his periods of membership of both the Norwegian and Irish social security schemes, he had not been without membership of a national insurance scheme for more than five years.

According to the first paragraph of Section 12.3 of the Act, entitlement to invalidity benefits is restricted to persons who are "still a member of the national insurance scheme". (The Commission understands this to include all persons, such as the plaintiff, who are resident in Norway – see paragraph 20 of the request for an advisory opinion).

Section 12.4 goes on to provide that invalidity benefits are only available to persons aged between 18 and 67 (on the grounds that invalidity benefits are intended to compensate for lost or reduced earning capacity and are only relevant for persons of working age), whilst Section 12.7 requires earning capacity to be "*permanently reduced by at least half"*. Section 12.8 defines the onset of invalidity as the time when this permanent reduction in earning capacity occurred, and Sections 12.9 and 12.10 lay down detailed rules for the determination of the degree of invalidity.

As regards the *calculation* of invalidity benefits, Section 12.11 of the Act states that this shall be based on income during the five calendar years preceding the onset of invalidity, with the average income during the three best income years being used. However, as is noted at paragraph 12 of the request for an advisory

opinion, it appears that in cases where the claimant has a low income during the relevant five year period (as for the plaintiff), a theoretical income is calculated on the basis of the minimum benefit referred to in the second paragraph of Section 12.13.

Section 12.12 states that periods of insurance are a factor used in the calculation of invalidity benefits, and makes detailed provision for calculating those periods, which may (in a case such as the plaintiff's) include future periods from the onset of invalidity to the year in which a claimant attains the age of 66. (A more detailed discussion of this aspect of the national rules can be found at paragraph 28 of the request for an advisory opinion).

The key provision for the purposes of the present proceedings is Section 12.13 of the Act. This is entitled "Amount of invalidity benefits", and reads as follows:

> *"Invalidity benefits shall be paid at a rate of 66 per cent of the basis under section 12.11 .*
>
> *The minimum annual benefit is 2.28 times the basic amount (ordinary rate) for persons who reside together with a spouse (see Section 1-5) or with a cohabitant in a cohabitation relationship that has existed for at least 12 of the last 18 months. The minimum annual benefit is nevertheless 2.33 times the basic amount if the person concerned receives an invalidity benefit which is a recalculated invalidity pension.* ***For others, the minimum annual benefit amounts is 2.48 times the basic amount*** *(high rate).* (Commission's emphasis).
>
> *For a member who became disabled before the age of 26 due to a serious and permanent illness, injury or disability which is clearly documented, the minimum benefits as referred to in the second paragraph are 2.66 and 2.91 times the basic amount, respectively. This applies even though a member has been more than 50 per cent occupationally active after the age of 26, if it is clearly documented that the conditions in the first*

sentence were met before the age of 26 and the claim is made before the age of 36. The provision in the first sentence also applies when invalidity benefits are granted again after the benefit is lost due to income testing under Section 12.14 . The minimum benefit under the present paragraph shall be paid at the earliest from the month in which the member turns 20.

When the period of insurance under Section 12.12 is under 40 years, the invalidity benefit shall be reduced accordingly.

If the degree of invalidity under Section 12.10 is lower than 100 per cent, the invalidity benefit shall be fixed as a proportionate share of the amount under the first to fourth paragraphs".

Finally, for the sake of completeness, the Commission notes that Section 12-1 a of the Act states that invalidity benefits "are a benefit in the event of invalidity under the social security regulation". More specifically, *"Provisions in this chapter shall be disapplied to the extent necessary in respect of relevant provisions in the Main Part of the EEA Agreement, the social security regulation, the implementing regulation and bi- and multilateral social security agreements…".*

EEA and Union Law

16. Article 28 of the EEA Agreement lays down the general principle that freedom of movement for workers shall be secured among EU Member States and EFTA States. As regards more specifically the field of social security, Article 29 sets out the principle of the coordination of social security schemes, as follows:

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

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

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

Annex VI to the EEA Agreement (as amended by Joint Committee Decision No 76/2011 of 1st July 2011[1]) refers in its Point 1 to Regulation (EC) No 883/2004 on the coordination of social security systems ("Regulation 883/2004").

Regulation 883/2004

As is explained in its title and first recital, Regulation 883/2004 contains a series of provisions designed to coordinate national social security systems in order to facilitate the free movement of persons. Its personal scope is defined in Article 2, and covers nationals of an EEA State who are or have been subject to the legislation of one or more EEA States. Its material scope is defined in Article 3, and expressly includes legislation concerning invalidity benefits (Article 3(1)(c)). As for Articles 4-6, these lay down a series of key principles including equality of treatment (Article 4) and the aggregation of periods (Article 6).

Article 6 states that:

"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*

[1] OJ L 262, 6.10.2011 at page 33, entry into force 1st June 2012.

- *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."

Chapter 4 of Title III goes on to set out more detailed rules for invalidity benefits. According to Article 44, the legislation applying to invalidity benefits is defined as either "type A legislation", namely "*legislation under which the amount of invalidity benefits is independent of the duration of the periods of insurance or residence and which is expressly included by the competent Member State in Annex VI"*, or "type B legislation" (any other legislation).

In the present case, the Norwegian rules on invalidity benefits thus fall within the category of "type B legislation". In accordance with Article 46(1), it follows that "*a person who has been successively or alternately subject to the legislation of two or more Member States, of which at least one is not a type A legislation, shall be entitled to benefits under Chapter 5, which shall apply mutatis mutandis….*".

Chapter 5 is entitled "Old-age and survivors' pensions". Article 52 governs the calculation of benefits, as follows:

"1. The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

(b) by calculating a theoretical amount and subsequently an actual amount (pro rata benefit), as follows:

(i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

(ii) the competent institution shall then establish the actual amount of the pro rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.

2. ....

3. The person concerned shall be entitled to receive from the competent institution of each Member State the higher of the amounts calculated in accordance with subparagraphs 1(a) and (b)". .....

Of particular relevance to the present proceedings, Article 58 makes provision for the award of a supplement, as follows:

"1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit ***which is less than the minimum benefit fixed by that legislation*** *for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this chapter.*

2. The competent institution of that Member State shall pay him/her throughout the period of his/her residence in its territory a ***supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit****".* (Commission's emphasis).

IV. OBSERVATIONS

17. The central issue arising in the present proceedings is whether an invalidity benefit with the characteristics of the Norwegian minimum annual benefit can be considered a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004.

18. By way of preliminary comment, the Commission notes that the plaintiff's claim before the National Insurance Court is based on his request for a supplement to his invalidity benefit. As is set out at paragraph 14 of the request for an advisory opinion, this is calculated as the difference between the *pro rata* invalidity benefit already awarded to him, and the (theoretical) minimum annual benefit referred to in the second paragraph of Section 12.13 of the Act (calculated as 2.48 times the basic amount under Norwegian social security rules).

19. Since the plaintiff has not *in fact* been awarded a minimum annual invalidity benefit under the second paragraph of Section 12.13 of the Act, the secondary issue of how such an amount would be calculated *if he were found to be entitled thereto* (and in particular the relevance, if any, of the fourth paragraph of Section 12.13 and possible reductions for periods of insurance under 40 years/completed in another EEA State) does not yet appear to have arisen.

20. At this stage of the proceedings, the Commission would accordingly propose to focus its comments primarily on the **nature** of the minimum annual benefit referred to in the second paragraph of Section 12.13 of the Act.

21. It is well-established that there is a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004 if the legislation of the State of residence "*includes a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and*

their contributions" (see paragraph 15 of the judgment in Case 22/81, Browning[2] and paragraph 45 of the judgment in Case C-189/16, Zaniewicz-Dybeck[3]).

22. In other words, one of the key functions of the "minimum benefit" is to *increase* the amount otherwise payable to a beneficiary of social security benefits in order to reach a certain minimum income. This is further illustrated by the plain wording of Article 58(2) of Regulation 883/2004, which expressly requires the competent institution to pay "***a supplement*** *equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit*".

23. As is set out above, Section 12.13 of the Act provides for two different calculations of invalidity benefits: either the "normal" calculation in paragraph 1, or the "minimum annual benefit" in paragraph 2. Put simply, it appears that the calculation set out in paragraph 2 is thus triggered when the "normal" calculation (based on income and periods of insurance) does not meet the level of the "minimum annual benefit". In this sense, it clearly provides for a "top up" or supplement to invalidity benefits where the "normal" calculation gives a level considered to be too low.

24. This seems to be confirmed on the website of NAV[4]. The section on disability benefit (in this English translation, the Commission understands the term "disability" to be used interchangeably with "invalidity") states under "How much will you receive?" that the benefit is "*66% of the average of your pensionable income in the best 3 of the last 5 years before you became ill. Income from previous years will be adjusted up to current value".* "Other circumstances of significance" include the length of time of membership of the National Insurance Scheme, unpaid care work and whether the benefit is due to an occupational injury. The next heading is entitled "The right to a **minimum payment**", and states that "*If you have low or no income, you have in any case the right to a basic rate of disability benefit,*

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2 Judgment of 17th December 1981, ECLI:EU:C:1981:316.

3 Judgment of 7th December 2017, ECLI:EU:C:2017:946.

4 See https://www.nav.no/uforetrygd/en (updated 5th July 2023).

if this gives you a higher payment than what you have accrued*"* (Commission's emphasis).

25. In the Commission's view, it follows that the minimum annual benefit derived from the second paragraph of Section 12.13 of the Act corresponds to a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004. As was described at paragraph 11 of the judgment in Case 22/81 Browning, a "minimum benefit" in this context is precisely designed to guarantee benefit recipients a minimum income "*in excess of the amount to which they would normally be entitled on the basis of the periods of insurance completed by them and the contributions which they have paid*".

26. The Commission would add that there is nothing to require a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004 to be set as a fixed amount, rather than a variable amount taking into account individual factors such as the level of invalidity, or whether the claimant lives with a spouse or cohabitant. Indeed, as is reflected in the terms of paragraph 2 of Section 12.13 itself, a higher multiplication factor may be appropriate in order to provide a higher minimum benefit in cases where a claimant lives alone and cannot therefore rely on additional income.

27. The Norwegian social security authorities also suggest that the minimum annual invalidity benefit cannot fall within the definition of a "minimum benefit" because its calculation is based on periods of insurance, and therefore potentially has "40 different levels" (see especially paragraph 72 of the request for an advisory opinion). In this regard, the Commission would simply reiterate that there is nothing to preclude an "individually calculated" benefit from falling within the concept of a "minimum benefit". This is clearly illustrated by the judgment in Case C-189/16, Zaniewicz-Dybeck: the guaranteed pension under the Swedish social security system at issue was based on individual insurance periods but was nevertheless found to be a "minimum benefit" (see especially paragraphs 14 and 46 of the judgment).

28. The secondary question which arises is the correct basis for the *calculation* of the minimum benefit (and corresponding supplement) by the EEA State of residence in cases falling under Regulation 883/2004.

29. In light of its comments at paragraphs 18-20 above, the Commission would simply underline that in accordance with Article 58 of Regulation 883/2004, a recipient of invalidity benefits may not be provided with a benefit "*which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to* ***all the periods taken into account*** *for the payment in accordance with this chapter".* On the Commission's reading, the reference to "all the periods taken into account" clearly indicates that this requires a calculation based on all the periods completed in any EEA State, i.e. the aggregated periods, not just those completed in the EEA State of residence. Any other interpretation would be incompatible with the express wording of this provision.

30. Such a conclusion is further reinforced by paragraph 52 of the judgment in Case C-189/16, Zaniewicz-Dybeck, where the Court of Justice held that the minimum benefit must be calculated *"in accordance with Article [58] of the regulation, in conjunction with the provisions of national law, without, however, applying national provisions, such as those in the main proceedings,* ***providing for a pro rata calculation****"* (Commission's emphasis). In other words, the national social security body must take into account all periods of insurance or residence on an aggregated, not *pro rata* basis.

31. This approach also underlies paragraphs 57-59 of the judgment, which acknowledge not only that periods completed in the State responsible for paying the supplement may be short, but also that it may deduct the "total benefits payable" by other EEA States. At the same time, no mention is made of a deduction in relation to the **periods of insurance or residence** completed in those States (cf. also paragraph 59 of the Advocate General's Opinion).

32. Finally, the Commission notes that such a result is entirely in line with the objectives of Article 29 of the EEA Agreement and ensuring that the right to free

movement can be effectively exercised (see by way of analogy paragraphs 30-33 of the judgment in E-5/21, Einarsdottir[5]).

V. CONCLUSION

33. For the reasons discussed above, the Commission considers that the question from the National Insurance Court should be answered in the following sense:

"A benefit such as the Norwegian minimum annual invalidity benefit at issue in the main proceedings constitutes a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004."

Bernd-Roland KILLMANN Nicola YERRELL

Agents of the Commission

5 Judgment of 29th July 2022.