ADVISIO

The Registry
EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

Oslo, 21 August 2023

WRITTEN OBSERVATIONS FROM THE APPELLANT

EFTA Court Case No. E-3/23, A v Arbeids- og velferdsdirektoratet

Parties

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Table of contents

1 Introduction

(1) The Norwegian National Insurance Court (hereinafter «the referring court») has, by application dated 16 May 2023, requested the EFTA Court (hereinafter «the Court») to deliver an advisory opinion on a question regarding a claim for a «minimum annual benefit» (*«minste årlige ytelse»*, hereinafter referred to as «minimum annual benefit»), as set forth in the Norwegian National Insurance Act (*«folketrygdloven»*, hereinafter «the NIA»).

(2) The core provision in the NIA is to be found in the second paragraph of Section 12-13, hereinafter referred to as «Section 12-13 (2)». The other provisions in the NIA will, accordingly, be referred to by the section, followed by the paragraph number, e.g. «Section 12-13 (4)».

(3) The referred question is, in short, whether the «minimum annual benefit», as set forth in the NIA Section 12-13 (2), is to be considered a «minimum benefit» within the meaning of Regulation (EC) 883/2004 (hereinafter «the Regulation»), Article 58.

(4) The appellant hereby timely submits his written observations.

(5) In the following, the appellant will make reference to Norwegian and Swedish sources of law, of which some (older) sources are only available on paper. In order to ease the Court's access to the references made, a collection of the sources of national law referred to is lodged as an annex to the present pleading. Following correspondence with the Registry, the annex is lodged in their original language. Translation to English is made by the appellant's counsel in the citements below. Prior to each citement, reference to the page number in the annex is indicated in bold types, with the letter «A» followed by the page number (e.g. «A6», which means the annex page 6). The cited parts are also highlighted in the annex. The PDF document contains bookmark entries of all its content, as well as an interactive table of contents.

2 The question referred to the Court

2.1 The wording of the question

(6) The referred question reads as follows:

> *«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?»

2.2 Preliminary observations on the question

(7) As already pointed out above, the core of the referred question is whether the «minimum annual benefit» constitutes a minimum benefit within the meaning of Article 58 of the Regulation. However, the question consists of two main elements and gives rise to a number of legal considerations.

(8) First, the question regards the meaning of the term «minimum benefit». This requires a consideration as to which kinds of benefits Article 58 is aimed at, in the sense that it addresses a certain kind of national regulations, which are distinguishable from those of social security benefits in general, and particularly from earnings-based benefits, including benefits which depend on contributions in any form.

(9) Second, the question concerns whether it is relevant to the interpretation of the term «minimum benefit» in Article 58, that national law prescribes a proportional reduction based on the conditional fact that the total insurance periods amount to less than 40 years.

(10) In the latter regard, the appellant observes that the provision in question, which is to be found in the NIA Section 12-13 (4), has no practical impact, when construed correctly, on the calculation of invalidity benefits in cases where all insurance periods are completed in EEA countries, as the total number of completed and future insurance periods then will amount to a minimum of 40 years. This is partially due to the beneficiary's right to aggregation of insurance periods when this is favourable, and partially due to the beneficiary's right to the inclusion of future insurance periods when the national rules are applied on their own, as discussed in detail below.

(11) In contrast, which is also apt to create some ambiguity as to how Section 12-13 (4) would be practised if it were applied to EEA cases, the competent institution in Norway (*«NAV»*) has a practice where reduction of all invalidity benefits in EEA cases, when carried out, is considered to be performed pursuant to Article 52 (1) (b) of the Regulation, as also carried out in the current case. The national rule set forth in Section 12-13 (4), construed as a national rule aiming to prevent overlapping, is also inapplicable whenever Article 52 (1) (b) is applied.

(12) The appellant submits that Article 52 (1) (b) is not applicable when the entitlement to a benefit falls within the scope of Article 58, cf. the ECJ judgment in case C-189/16 *Zaniewicz-Dybeck*, nor is any national provision to the same effect. This means that the application of Article 58 concerns benefits which by their very nature are to be considered different from an ordinary old-age pension or invalidity benefit based on contributions or insurance periods.

(13) Based on the direct, three-way e-mail correspondence between the parties and the referring court prior to the finalised version of the referring court's request, the above seems to be a well balanced interpretation of the referring court's initial reason to request the Court's advisory opinion on the matter at issue. However, the appellant considers it appropriate to provide the Court with some information as to the process prior to the final version of the referring court's request.

2.3 The procedure prior to the finalisation of the referring court's request

(14) The appellant finds it relevant to inform the Court that the State, prior to the referring court's final version of its request, repeatedly attempted to change the referring court's formulation of its question, to the amount that the question itself be about quite a different issue and with a somewhat biased approach. However, the referring court resisted these attempts and upheld its initial formulation, only with minor changes.

(15) The State also made several attempts to change the referring court's presentation of relevant national rules, in large part contrary to commonly accepted legal perceptions of those rules, in despite of the fact that the referring court, which has social security law as its special (and only) field, undoubtedly has an excellent understanding of them.

(16) The appellant provides the Court with this information in order to illustrate the need of establishing the view of the State on the basis of what is actually laid down in the NIA and other relevant acts, interpreted on the basis of their prepararory works, which in accordance with accepted legal method in Norway is the only means to construe their content in a proper manner, and on the basis of the international obligations which Norway has undertaken; and certainly not on the basis of what the State's counsel submits in this case, which appears to express an autonomous understanding decoupled from the aforementioned sources of national law, established Norwegian legal method and constitutional principles.

3 Observations in regard of the answer to the referred question

3.1 Introduction

(17) The appellant recognises that the Court is not to decide on mere national legal matters. However, the appellant assumes that the question submitted by the referring court requires that the Court first assesses how the national rule is to be characterised, insofar the content and purpose of the national rule is to be interpreted as such, relying on a domestically accepted legal method to construe that national rule, as the basis for characterising it under the terms used and provisions set forth in relevant EEA law.

(18) That is to say, the specific provisions in Article 58 of the Regulation, as it regards a benefit of a kind which is not provided in all EEA countries, and accordingly, noting that Article 58 has been assessed in relevant case-law to have a limited object, precisely call for such an approach, as established in, inter alia, the ECJ cases of *Torri* and *Browning* discussed below.

(19) For the latter reason, the first aspect of the referred question is that it requires an analysis of the legal characteristics of the national rule, precisely on the premises set out by the national legislator and in accordance with the legal method of domestic law. For the same reason, ECJ case-law regarding comparable or near equivalent systems in other EEA countries is highly relevant.

(20) On the other hand, case-law regarding systems with no or very few similarities to the aforementioned systems may primarily serve to illustrate certain aspects of the EEA rule in question. In instances of systems with no or very few similarities, e.g. that a rule on minimum benefits is not expressed in any national source of law, singular rules in different systems, or even the systems as such, may be deemed incommensurable in the specific matter at issue in the current case. This is, indeed, the current situation, as only some EEA countries do have minimum benefits, whereupon they are not subject to, inter alia, apportionment as set forth in Article 52 (1) (b).

(21) The appellant recalls that the purpose of the Regulation is (only) to coordinate social security systems, even in instances of such lack of similarities between systems. As pointed out in the ECJ judgment in case C-406/04 *de Cuyper*, this requires a certain level of abstraction as regards the purpose of a social security benefit, its economic funding and the legal conditions to be fulfilled in order to obtain it.

(22) However, the undertaking of comparison between systems or ECJ case-law as a basis for such comparison, can not and should not be brought to an all too abstract level, thus forcing next to incommensurable benefits to look partially similar, when it appears very clear even at first glance that they are nothing but highly different. This may be expected to be clarified upon the ascertainment of differences and similarities regarding the purpose, funding and legal conditions on which the benefit in question is provided.

(23) Moreover, and in the light of the State's assertations before the referring court, the appellant finds it appropriate and necessary to point out that a comparison to the benefits concerned in the *Torri* and *Browning* cases, may (also) be carried out by analysing the purpose of the system as such, i.e. the political and legislative approach chosen on national level as a basis for the national scheme in question.

(24) An initial approach to this diversity of systems may therefore be to characterise them as either a commonship based system, where rewarding work efforts and tax contributions, and on the other hand, preventing poverty in society as a whole and retaining social stability are equally appreciated aims, or, on the contrary, a system based (only, or at least mainly) on the principle of return of contributions.

(25) The appellant respectfully submits that the Scandinavian systems are not only of the former type, but that they are all alike on this general level, hence it inevitably has an impact on how to perceive them properly, also when analysing and comparing them in terms of singular types of social insurance benefits and their respective reasons, aims and purposes.

(26) That is not to say that other systems with multiple similarities to the Nordic welfare systems do not exist elsewhere in Europe. The purpose of the appellant's observations in this particular regard, is only that the provision on the minimum annual benefit may be construed in the context of the national system it constitutes a part of.

(27) Indeed, and as mentioned in ECJ case-law discussed below, the rule set forth in Article 58 originated from the initiative of three other European countries at an early stage of the community. Moreover, ECJ case-law and other sources of law give examples of several other national systems in Europe which do have minimum benefits expressly formulated in their national legislation, as is also the case in Norway and Sweden.

3.2 The relevance of other provisions in Chapter 5 of the Regulation

(28) As already pointed out above, the application of Article 58 of the Regulation excludes the application of Article 52 (1) (b), cf. *Zaniewicz-Dybeck.* Article 58 is also assumed to refer to a kind of benefit, i.e. a kind of characteristics attributed to a certain benefit level, exclusively set forth in (only some EEA States') national legislation, and which, thus, differs from those in concern under the preceding articles of Chapter 5 of the Regulation.

(29) This gives rise to the assumption that Article 58, when applicable, may be considered as a safety valve to adverse outcomes of the coordination rules of Chapter 5, that be applied in other instances.

(30) On the other hand, this also gives rise to the assumption that the beneficiary is entitled to a preliminary consideration of whether he fulfills the requirements for a more favourable benefit than the minimum benefit, before the consideration of a minimum benefit comes into question at all.

(31) The beneficiary submits that this is relevant to the interpretation of Article 58 following its placement and function in Chapter 5 of the Regulation.

(32) The appellant wishes to point out that the Kingdom of Norway, through Annex VI to the EEA Agreement, has submitted its listing of invalidity benefits in Annex IX to the Regulation, leading to that such benefits fall within the scope of Article 54 (2). This gives rise to some considerations.

(33) In the following, the appellant assumes that the most recent decision made in his case, is in accordance with the current administrative practice. Hence, what is carried out in his case, is to be taken as an expression of that practice.

(34) Firstly, Article 54 (1) expressly excludes rules such as the NIA Section 12-13 (4), construed as a rule of reduction, from being applied to a benefit which is subject to a *pro rata* calculation pursuant to Article 52 (1) (b). Hence, it is clear that Article 52 (1) (b) may only be applied to the «minimum annual benefit» if Section 12-13 (4) is inapplicable, i.e. to the effect of a reduction, and vice versa. The appellant recalls that the competent institution (*«NAV»*) has calculated his benefit *pro rata*, with express reference to Article 52 (1) (b).

(35) Therefore, and thus addressing the possible reservation described in the referring court's question, Section 12-13 (4) is only applicable if the calculation made in A's case is wrongful.

(36) Secondly, Article 54 (2), which concerns benefits pursuant to Article 52 (1) (a), includes Norwegian invalidity benefits due to the aforementioned listing in Annex IX to the Regulation. Hence, but here only mentioned for the purpose of a tentative analysis, Section 12-13 (4) may be considered applicable to the «minimum annual benefit» at the stage of calculating the independent benefit pursuant to Article 52 (1) (a).

(37) Upon this calculation, future insurance periods, as prescribed in the NIA Section 12-12 (3) first sentence, fall within the scope of Article 54 (2) (b) (i). Therefore, upon the calculation pursuant to the NIA Section 12-13 (4), such future insurance periods are to be taken into consideration. Hence, Section 12-13 (4) will only lead to a reduction of the benefit, if the total of completed and future insurance periods in Norway amount to less than 40 years.

(38) Also in this regard, the calculation carried out in A's case is wrongful. If the future insurance periods were to be added to the numerator, aggregation of insurance periods would not be relevant to the calculation in the current case, as A has a total of completed and future insurance periods in Norway of more than the maximum of 40 years.

(39) In the actual calculation, 283 months completed in Norway and 59 months completed in Ireland have been used, amounting to a gross of 342 months. However, the future insurance periods from the onset of invalidity to retirement age equal 225 months, thus adding to a total which exeeds 480 months in Norway.

(40) Unlike the minimum benefit provided to persons who are born disabled or become disabled at an early age, which in national law is calculated pursuant to the Norwegian National Insurance Act Section 12-13 (3), the «minimum annual benefit» is not listed by Norway as a benefit which falls under the scope of Article 70 in the Regulation, cf. its Annex X, cf. Annex VI to the EEA Agreement.

(41) The appellant submits that the «minimum annual benefit» is neither a regular invalidity pension subject to *pro rata* calculation pursuant to Article 52 (1) (b), nor a non-contributory cash benefit. As a consequence of Norway's listing of invalidity benefits to Annex IX of the Regulation, thereby making future insurance periods relevant, the

application of the NIA Section 12-13 (4), if applicable, has a very limited, if any, general effect to limit the minimum benefit, when applied correctly in EEA cases.

(42) The limited scope it may have, does not amount to altering the character of the «minimum annual benefit» as a minimum guarantee. Also for this reason, it appears clear that the possible applicability of Section 12-13 (4) to the «minimum annual benefit» according to Norwegian law, does not exclude that benefit from being classified as a minimum benefit pursuant to Article 58.

3.3 Case-law regarding European systems without minimum benefits

3.3.1 Introduction

(43) The appellant is aware that the case-law in which the scope and meaning of the term «minimum benefit» pursuant to Article 58 of the Regulation initially was assessed, regards cases where the question of whether there was a minimum benefit in the case at issue, was answered in the negative.

(44) However, in those cases, i.e. the ECJ Cases 64/77 *Torri* and 22/81 *Browning*, statements were made by the ECJ which outline the required characteristics of a minimum benefit in order to qualify to the term «minimum benefit» pursuant to Article 58, i.e. its predecessor (Article 50 of Regulation No. 1408/71).

(45) In particular, it is stated that Article 58 does not regulate benefits present in all EEA countries, but instead applies to legislations which do provide a «*specific guarantee»* of a minimum level. This leads to that Article 58 only refers to, and therefore only applies to, national legislations of such a kind.

(46) As the cases concerned are about old-age pensions, the appellant wishes to point out that Norway has a basic pension which in itself does not express the minimum benefit level. The Norwegian basic pension is imbursed to all pensioners and is not intended, in itself, to guarantee a minimum level. One must therefore distinguish between basic pension and minimum pension in the Norwegian system. Hence, that distinction is also relevant when comparing the Norwegian scheme to the pension schemes concerned in the cases of *Torri* and *Browning*.

3.3.2 ECJ Case 64/77 Torri

(47) The case concerned an Italian beneficiary, *Torri*, who had accrued most of his insurance periods in Belgium.

(48) The Belgian scheme, under which Torri was covered, was an ordinary old-age pension scheme which had no rules on minimum benefits. On the other hand, such minimum benefits were provided to certain groups of old-age pensioners (frontier workers and seasonal workers) as well as for invalidity pensioners. Torri was not covered by these special arrangements.

(49) In the Advocate General's Opinion, it was first observed that the wording in Article 50 of Regulation 1408/71 (which corresponds to Article 58 of Regulation 883/2004) does not seem to have aimed at situations where there is only the theoretical amount according to Article 46 (2) [Article 52 (1) (b) of the current regulation] which could have been set as a minimum level, i.e. situations where the national legislation does not express any specific benefit level as a minimum level for old-age pensions in general.

(50) Secondly, the Advocate General pointed out that Belgium had not listed any benefit of the latter type, under Article 5 of Regulation No. 1408/71 (corresponding to Article 9 of the current Regulation). According to the Attorney General, this indicated that there was a lack of legal basis in national law for the claim Torri had made, and that the Regulation alone could not provide a basis for a calculation other than that which followed from national law.

(51) The Advocate General concluded that where national law did not prescribe a minimum benefit, Article 50 of Regulation No. 1408/71 did not apply.

(52) The ECJ essentially conferred to these views, but also made reference to the Commission's statements on the purpose of Article 50 of Regulation 1408/71. The appellant reproduces from the Commission's observations:

> *«It is clear from the statement of reasons that the intention, at least that of the Commission, was to ensure that a migrant worker who receives portions of a pension from different Member States and who resides in one of them should receive at least the minimum pension laid down by the legislation of the State in which he resides where that State does lay down a minimum pension. If the minimum pension had been intended to be the theoretical amount, the provision would have been applicable in all the Member States and not only in three of them.»*

(53) Furthermore, the Commission observed:

> *«The minimum benefit is a fixed amount, that is to say a flat-rate sum laid down by the law, payable to all pensioners whether they are covered by Regulation (EEC) No 1408/71 or not. It is therefore a national concept in contrast to the concept of the theoretical amount introduced by Regulation (EEC) No 1408/71. Sometimes the minimum benefit is made conditional on completion of a certain number of years of insurance. In the context of rules adopted on the basis of Article 51 of the EEC Treaty it would have been normal that in granting the right to that minimum benefit account should be taken of all the periods taken into consideration by the various national legal systems to which the worker was subject. That explains the wording of Article 50 of Regulation (EEC) No 1408/71 which essentially seeks to enable a worker who has not completed sufficient insurance periods in order to be entitled to the minimum benefit determined by the legislation of the State in which he resides to satisfy the conditions relating to the insurance period by aggregating all the periods of insurance or residence completed in the various Member States.*
>
> *Finally, Article 50 of Regulation (EEC) No 1408/71 is only of somewhat limited application. It only concerns three or four Member States and only seeks to guarantee, where necessary after aggregation, the minimum pension which is laid down on a flat-rate basis by the legislation of the Member State where the worker resides or where he is entitled to a part pension if the sum of the various pensions paid is less than the aforementioned minimum benefit.»*

(54) As the Belgian scheme under which Torri was covered, did not contain any provisions on a minimum benefit, in that it rather (and only) provided a regular basis for calculating the theoretical amount pursuant to Article 46 (2) of Regulation No. 1408/71, the ECJ found that there was no minimum benefit to be claimed according to this scheme. Hence, the claim of Torri was not for a minimum benefit pursuant to Article 50 of Regulation No. 1408/71.

(55) The *Torri* case was the first landmark in ECJ case-law making an outline of the meaning of the term «minimum benefit». It may be construed as a clarification of two matters; that the theoretical amount does not establish a minimum benefit in itself, and that a minimum benefit is to be provided according to (express) national legislation in order to qualify to the term «minimum benefit» of the Regulation.

(56) In regard of the former, the appellant notes that the referring court has pointed out that the full «minimum annual benefit» at issue in the current case, «seems to coincide» with the theoretical amount pursuant to Article 52, cf. section 47 of the referring court's request. That has also been subject to some observations by the State, cf. section 80 of that request, which will already be addressed here.

(57) The appellant wishes to underpin that the *Torri* judgment does not establish that such a coincidence excludes the benefit from being considered a minimum benefit in the meaning of Article 58. In this regard, it only establishes that the theoretical amount in itself does not qualify the benefit in question to the term «minimum benefit».

(58) Moreover, as already observed by the appellant in sections 61 to 63 of the referring court's request, the Norwegian minimum benefit will not always coincide with the theoretical amount. When performing a preliminary calculation of the earnings-based benefit, in order to, inter alia, assess whether the minimum benefit comes into question at all, the result will depend on the earnings of the last five years prior to the onset of invalidity, and not on the minimum benefit level. It is only in cases where the minimum benefit level is higher than the result of those earnings, that the former will coincide with the theoretical amount.

(59) This is merely a function of the circumstance that the minimum benefit level is the highest achievable benefit level for the beneficiary in question, precisely due to the fact that the «minimum annual benefit» represents a minimum level, exceding that which be calculated on the basis of his earnings. The competent institution shall, indeed, ensure that the theoretical amount is calculated at its possible maximum, as stated by the ECJ in Cases 132/96 *Stinco and Panfilo*, 793/79 *Menzies* as well as 30/04 *Koschitzky*, cf. particularly section 28 in the latter judgment.

(60) Hence, the minimum benefit level will only coincide with the theoretical amount when the requirements for the «minimum annual benefit» are fulfilled. This brings the somewhat distorted assertation of the State that the *Torri* judgment establishes that the «minimum annual benefit», for the reason of its coincidence with the theoretical amount, is not a minimum benefit pursuant to Article 58, into another circular line of reasoning, in addition to that which is already observed by the appellant in section 55 of the referring court's request.

3.3.3 ECJ Case 22/81 Browning

(61) The outset established in the case of *Torri* was developed further in the ECJ judgment in Case 22/81 *Browning*. The latter clarifies that it is not sufficient in order to establish that there is a «minimum benefit» according to Article 50 of Regulation No. 1408/71, that the calculation of the benefit is based on a fixed amount, that it is based on contributions

with fixed amounts (and not on a percentage of the worker's income etc.), and that it requires qualification through completed insurance periods – nor that these circumstances are all present.

(62) According to the national legislation of the United Kingdom at the time, a basic pension was provided if given criteria were met. The basic pension was, from the outset, a fixed amount, which could be obtained by completing a minimum insurance period and making a minimum number of contributions with a fixed amount per week. The system was based on the number of weeks of contributions being counted and held up to the minimum requirements. If the claimant's contribution history fell below a given threshold, no basic pension was paid at all. An amendment was later introduced for an intermediate category below the relevant threshold and an even lower threshold, but a sum of contributions that was lower than the latter threshold still resulted in the applicant not receiving a pension at all.

(63) The appellant reproduces from the Advocate General's opinion:

> *«In the first question posed by the Divisional Court of the Queen's Bench Division, the pension is not stated to be conditional simply upon the completion of a period of insurance. Entitlement to benefit at a flat rate is conditional on the yearly average of weekly flat-rate contributions paid or credited, during the period between entry into insurance and attaining pensionable age, being not less than 50; if that condition is not satisfied then a reduced pension, which varies according to the yearly average, is payable, so long as the yearly average does not fall below 13.*
>
> *Accordingly, in my opinion, no minimum benefit within the meaning of Article 50 has been fixed by the legislation to which the Court has been referred, because entitlement depends upon, and differs according to, the yearly average of contributions. lf the average does not attain at least 13 the person concerned will get nothing at all.»*

(64) Before the ECJ, Browning, who represented the views of the national authorities of the United Kingdom, observed that there was no minimum benefit according to the UK scheme. The appellant reproduces from the ECJ's reference to the observations submitted by Browning:

> *«There was no provision in the British legislation for minimum pension. The level of flat-rate benefit was entirely dependent upon the relation between the number of contributions paid and the length of insurance; in particular, there was no provision for any minimum benefit based on length of residence, time in insurance, or any given number of contributions.»*

(65) The appellant respectfully submits that the Norwegian minimum benefit is precisely of the latter type, which was, in contrast, not prescribed according to national rules in the United Kingdom at the time. The Norwegian minimum benefit is precisely expressed as a «minimum annual benefit» in Norwegian law, and it is precisely dependent on time in insurance, which can precisely be fulfilled by an identical length of residence or work periods in Norway.

(66) The Insurance Officer (Browning) also asserted that establishing a minimum benefit in the case of the UK legislation would mean equating the minimum benefit with the theoretical amount under Article 46 (2) a), which there was no basis for, cf. *Torri*.

(67) The key point here, if the appellant has understood the statements of The Insurance Officer about the UK pension scheme correctly, is that the application of Article 46 (2) (a) to the UK system would result in having to simulate, upon the *pro rata* calculation, when calculating the theoretical amount, that the applicant had paid contributions to the United Kingdom for a period corresponding to his insurance periods in other countries, in addition to the actual contributions. This as the contribution payment in the United Kingdom was apparently synonymous with accruing insurance periods.

(68) However, the appellant submits that a distinction must be made between rules which require insurance periods to be completed in order to qualify for the benefit, and the operation of insurance periods when calculating the benefit. It is characteristic to minimum benefits pursuant to the Regulation, that they are based on minimum requirements regarding completed insurance periods. The circumstance that the benefit is then subject to a calculation, that is to say an apportionment, due to a lack of (i.e. less than any possible maximum of) completed insurance periods in the competent state, does not preclude the benefit from being considered a minimum benefit within the meaning of the Regulation, cf. the Swedish case discussed below.

(69) In the Norwegian scheme, as soon as the beneficiary qualifies to invalidity benefits at all, i.e. fulfills any of the alternative requirements in the NIA Section 12-2, by simply residing in Norway or accruing insurance periods within the EEA area of a minimum of one year, the beneficiary has, implicitly, completed the insurance periods required by Norwegian law to be entitled to the minimum benefit as well (albeit, often, only to this benefit, if only the minimum requirements are fulfilled).

(70) Clearly, the Norwegian minimum requirements are very modest, and they do not require any form of preceding work, income or financial contributions.

(71) Also for the latter reason, the Norwegian scheme is highly distinguishable to that of the United Kingdom which applied in the *Browning* case.

(72) Futhermore, the applicant observes that even the earnings-based pensions in Norway are calculated within an interval between a minimum threshold and a maximum amount, and that the system in the United Kingdom thus had more in common with an earnings-based system from the very outset, than a system which offers an economic minimum standard.

(73) For an earnings-based old-age pension in Norway, the lower threshold is expressed by pension points being accrued for each income year, where the income exceeds the basic amount (G), cf. NIA Section 3-13, first paragraph. That is to say, a total income less than G in a given calendar year will not accrue pension points. Income above the level of seven times the basic amount (G) will not be taken into account when calculating the pension, cf. NIA Section 3-12, third paragraph. If the earnings-based old-age pension is lower than the minimum pension, the minimum pension is provided instead.

(74) For invalidity benefits, an earnings-based benefit is not imbursed at all if the earnings in the average of the three best of the last five years before the time of disability is lower than the minimum benefit divided by 0.66. Furthermore, income above six times the basic amount (G) is not taken into account when the benefit is calculated, cf. the NIA Section 12-11 (5). The earnings-based benefit equals 66 percent of the relevant earnings, cf. the NIA Section 12-13 (1).

3.3.4 Summary

(75) The appellant submits that the ECJ cases of *Torri* and *Browning* concerned national legislation which was highly different from that in question in the current case. Both ECJ cases concerned regular old-age pensions, and not benefits which were intended to serve as a provision for a minimum benefit level.

(76) The two judgments have, in sum, clarified that in order to establish that there is a minimum benefit pursuant to Article 58, the relevant national legislation must indicate a purpose of ensuring a minimum standard of living, and this must have been expressed as a specific guarantee. Characteristics to such a guarantee, in order to examine its

purpose, were assumed to be that the benefit was to be imbursed with a fixed amount, that (only) minimum requirements as regards completed insurance periods were to be met in order for the beneficiary to be eligible for such a benefit, and that it did not depend on financial contributions, the latter assumingly being a crucial issue.

(77) The appellant submits that the Norwegian «minimum annual benefit» precisely has the purpose indicated above, and that it also has all the characteristics of a minimum benefit as outlined in the two judgments.

3.4 Legal characteristics of the Norwegian minimum benefit

3.4.1 Introduction

(78) The appellant submits that the referring court's question calls for an assessment of the legal characteristics to the ««minimum annual benefit», and in particular its purpose, economic funding and the conditions to be fullfilled in order to obtain it.

(79) In regard of the economic funding, only earnings-based benefits in Norway refer to contributions. But even those benefits are, in practice, funded through allocations in the national budget, which in turn are connected to a fund (the Norwegian Government Pension Fund) regulated in the Government Pension Fund Act (*«Lov om Statens pensjonsfond»*). This fund is essentially based on the state's petroleum income as well as revenue from the petroleum sector (therefore often referred to as «the Oil Fund», *«Oljefondet»*), in combiation with yield from the fund's investments made abroad, cf. Section 4 (1) of the Government Pension Fund Act.

(80) Hence, the funding of the Norwegian Social Security Scheme as such, has to an increasingly lesser extent been made dependent on other revenue or contributions from personal taxpayers.

(81) On the contrary, the calculation of benefits is only remotely connected to contributions, as the rates (both for earnings-based benefits and those calculated by a fixed amount) are not set on the basis of previous payments made by the beneficiary. For instance, the social security tax (*«trygdeavgift»*) is expressly regulated as a tax, pursuant to the NIA Section 23-3 (1), it its adjusted upon the fiscal decisions made by the Storting when processing the national budget pursuant to the NIA Section 23-3 (6), and is not linked to any benefit calculation rules in the NIA.

(82) Hence, the Norwegian Social Security Scheme as such is of a rights-based nature, as it has also been a guiding principle that its benefits are desired to be universal. Accordingly, their funding is organised so that there be no direct link between the right to a benefit and its funding.

(83) The purpose of the Norwegian «minimum annual benefit» comes into light when studying a long-standing history of legislation and policies applied to it.

(84) In the following, Norwegian legislation and its history (as a means to illustrate the intended purpose of the Norwegian minimum benefits) will be dealt with in point 3.4.2.

(85) As the Court will identify in point 3.4.3., the competent institution in Norway previously imbursed a guaranteed supplement («garantitillegg») solely on the basis of Article 58 read in conjunction with the provisions for a minimum benefit in the NIA. However, this practice was discontinued. As the Court also will identify, the change of practice regarding the guaranteed supplement took place from 1 September 2014, i.e. prior to the date from which the current rules on invalidity benefits entered into force. However, the latter rules were part of an act which was already passed, as of 16 December 2011, that is to say prior to the introduction of the new practice regarding the guaranteed supplement. Hence, the change of practice does not amount to a change of the intended purpose of the national legislation itself. Instead, it represents a different approach as to how the «minimum annual benefit» is interpreted by the competent institution, in the context of Article 58.

(86) The appellant wishes to underpin that the Norwegian «minimum annual benefit» is only subject to increase or reduction according to three factors. First, there are two fixed rates, i.e. the choice of rate depends on the beneficiary's civil status. Second, the benefit is subject to reduction if the beneficiary has a total of insurance periods less than 40 years. Third, the benefit is also reduced if the beneficiary is considered to have been deprived of less than 100 percent of his work ability, which is the case regarding A.

(87) On the latter, a short clarification it may be useful. The appellant does not submit that A is entitled to 100 percent of the «minimum annual benefit» by its rate indicated in the NIA Section 12-13 (2), as long as he is considered to have retained some of his earning capacity. He is currently considered to have lost 80 percent of his ability to provide for himself, hence he asserts that he is entitled to 80 percent of the minimum benefit. The remaining 20 percent of his subsistence is to be covered by his remaining 20 percent of

earning capacity. The issue that he disputes the existence of the latter, is of no relevance to the question referred to the Court.

3.4.2 Purpose and historical background

3.4.2.1 The Special Supplement Act (1969) and subsequent amendments

(88) The first Norwegian National Insurance Act was passed in 1966. The 1966 Act was later replaced by the 1997 National Insurance Act, which, subject to several subsequent amendments, is the current national act regarding most social security benefits in Norway.

(89) The national pension scheme was from the outset in 1966 modeled with a basic pension («grunnpensjon»), which amounted to one basic amount («grunnbeløp», often expressed with the abbreviation «G», which mostly has been adjusted annually). The basic pension was based on residency and did not depend on previous income. On the contrary, the additional pension («tilleggspensjon») was earnings-based.

(90) As the appellant will get back to, the invalidity pension and old-age pension respectively, were subject to the same provisions as to how they were accrued and calculated, as well as the provisions on insurance periods. This continued to be the case all until the old-age pension reform in 2011 and the connected invalidity pension reform which entered into force in 2015, cf. points 3.4.2.2 and 3.4.2.3 below.

(91) From the latter time this common set of provisions was replaced by the current legislation, set forth in the provisions referred to in the request from the referring court. However, most or all of the content of the previous provisions on minimum benefits is not only kept, but developed even further in the recent years. i.e. particularly on old-age pensions, where the legislator has avoided legal issues of property deprival and so ensured that already obtained possessions are not infringed. This is also the background for the middle-rate of 2,33 G set forth in Section 12-13 (2), which no longer is of relevance to new applications.

(92) However, the 1966 Act was also amended several times, in some cases by legislation given in separate acts, later to be included in the 1966 Act. An example of this, is the Special Supplement Act («særtilleggsloven») passed in 1969, which entered into force in 1970. The «særtillegg» will hereinafter be referred to as «special supplement».

(93) The outset for the reasoning behind the special supplement, is to be found in the initial preparatory works for the Special Supplementary Act of 1969, Ot.prp.nr.51 (1968-1969). The appellant reproduces from this document (Chapter II) **(A73)**:

> *«The discussion which has taken place and the proposals which have been made in the case are based on the premise that any special arrangement should only cover those who, due to their age, have not been able to earn a additional* [i.e. earnings-based] *pension, or have only been able to earn a very small additional* [i.e. earnings-based] *pension. Anyone who, according to their age, has had the opportunity to earn an additional* [i.e. earnings-based] *pension, but who, e.g. due to low work income have nevertheless not earned any such pension, should therefore not be covered by the special scheme.*
>
> *Such an arrangement would primarily cover persons born before 1 January 1898. The special arrangement would in that case only be a transitional arrangement.*
>
> *It is clear, however, that there are groups other than the elderly who, for various reasons, are not going to to earn an additional* (i.e. earnings-based] *pension. This primarily applies to those who were born disabled or who become disabled during youth or education. There will also be a number of people who, for one reason or another, do not achieve sufficient income to accrue pension points, or whose efforts in working life are so short that they do not qualify for additional* [i.e. earnings-based] *pension.»*

(94) The appellant submits that the purpose of the special supplement indicated here, prior to the very beginning of its existence, was clearly stated. It was to ensure a degree of economic equality for those who were not sufficiently covered, that is, whose subsistence was not sufficiently ensured by the basic pension and earnings-based pension as a whole.

(95) A thorough presentation of the legislative history behind the rules on special supplement can be found in NOU 1990:20, which is the legislative review (i.e. the initial preparatory work) of the National Insurance Act of 1997. NOU 1990:20 contains quotes from the continuation of the above cited part of the 1969 preparatory works, of which the appellant reproduces the following (NOU 1990:20, p. 165) **(A66)**:

> *«If a scheme only for those born before 1 January 1898 is implemented, even after the national insurance is fully developed, there will be older people who have not managed to earn any additional [i.e. earnings-based] pension. In that case, these will be brought in a less favourable position than the corresponding elderly from the transition period. This will be particularly hard on people who, due to invalidity at an early age, have had no opportunity to earn an additional [i.e. earnings-based] pension. One refers to what the Social Committee has stated about this matter in Ordinance No. VIII (1965–1966) and which is quoted above.*

The Ministry agrees with the views expressed by the Social Committee. One finds it not reasonable to leave the invalidity and survivor pensioners outside of a scheme with a special supplement to the basic pensions.»

(96) Furthermore, the authors of NOU 1990:20 reproduced from Ot.prp.nr.71 (1971-1972) **(A67)**:

> «Married couples who are both entitled to a basic pension in the national insurance today receive two full special supplements. Some expenses are, however, in many cases as large for a single pensioner as for a married couple. On this background, the Ministry agrees that this can be a basis for reducing the special supplement somewhat for married couples compared to singles.»

(97) The appellant notes that this indicates that the special supplement was modeled in accordance with its purpose, in that the rates were decided with reference to living expenses for couples and single persons respectively.

(98) The appellant points out that the reasoning behind the special supplement here, in the preparatory works, which was initially expressed upon the passing of its provisions and then, 20 years later, in the form of reproduction and endorsement of those considerations, clearly appears to be based on the idea of levelling out some of the differences that be the outcome of a scheme which primarily constitutes an earnings-based pension system. That is to say, the objective ever since the special supplement was introduced in 1969, was to ensure a minimum level for those who were unable to accrue a pension which would, for any practical purpose, provide for a reasonable living standard.

(99) A pioneer in Norwegian social security jurisprudence, the late professor Asbjørn Kjønstad, wrote in an article as of 2012 (published in the journal «Jussens Venner» No. 2/2012) the following about the history of the special supplement (point 1.2.) **(A76)**:

> *«From 1970, a scheme was introduced with special supplements for people who had not earned a supplementary pension, or only a low such pension. This supplement was initially 7.5% of G, but was later gradually increased to 100% of G for singles. The special supplement was introduced as a guaranteed minimum supplementary pension, but has gradually changed its character to become a supplement to the basic pension to ensure a reasonably high minimum pension level. Thus, the minimum pension (basic pension plus special supplement) as a single person has increased from 100% of G in 1967 to 200% of G in 2010.»*

Kjønstad also wrote (point 6.4.4.) **(A76)**:

> *«The minimum pension forms the minimum standard of the National Insurance Scheme – that which according to the law is considered possible to live from in Norwegian society.»*

(100) Another pioneer in Norwegian social security jurisprudence, former judge of the National Insurance Court, Runar Narvland, writes in the legal commentary to the NIA (published on Gyldendal Rettsdata, note 103) **(A78)**:

> *«The purpose of the special supplement is to ensure a minimum level for those who have not earned the right to an additional [i.e. earnings-based] pension or have low additional pension earnings.»*

(101) To the same effect, although even more expressingly, the author of the legal commentary to the Special Supplement Act, Per Knudsen, former president of the National Insurance Court, also published on Gyldendal Rettsdata, wrote (in the general note) **(A80)**:

> *«The purpose of the Act is to provide a supplement to the basic pension to those who have not accrued an additional* [i.e. earnings-based] *pension from the National Insurance Scheme or have a accrued a low amount. The Special Supplement, together with the basic pension and any providers' supplement, forms the minimum pension of the National Insurance Scheme. Thus, the Special Supplement serves to guarantee a certain minimum level, regardless of previous income.»*

(102) Hence, Norwegian sources of jurisprudence may give an ontake or general impression of how the special supplement consistently has been perceived since its origin.

(103) The term *«minstepensjon»*, which may well be translated to «minimum pension», was established informally (in political and legal use of language) in the first years after the Special Supplement Act entered into force in 1970. However, it was subsequently adopted as a legislative term referring to the same elements of the Norwegian pension scheme. The appellant will get back to this issue below.

(104) The appellant submits that the purpose of the special supplement (as the central element of the minimum pension) from the outset was to ensure a reasonable benefit level compared to pensioners who had earned (more than) the minimum pension level.

(105) The Special Supplement Act was amended in 1981, i.e. the rates were adjusted. The core preparatory work to this amendment is the government's proposition to the first

chamber of the Norwegian parliament («Odelstinget»), Ot.prp.nr.84 (1980-81). This proposition generally presented an argument related to comparing the development of the minimum pension with the development of the pension level for pensioners who have earned an additional pension. This may be deemed of interest in itself, as it precisely indicates that the purpose of the minimum pension was retained and brought further.

(106) The proposition was then processed by the Social Committee of the Norwegian Parliament, as part of the ordinary process prior to the legislative decision. The outcome of this is to be found in Innst.O.nr. 97 (the Committee's recommendation), of 1980-1981. The Committee was divided in its views on some issues which are less relevant to the current case, but jointly supported and strengthened the main purpose and idea behind the special supplement.

(107) The appellant reproduces from the majority's remarks to the proposal **(A72)**:

> *«With the proposed increase of the basic amount in the national insurance to NOK. 19,100 from 1 May this year, the assumption of a better income development in 1981 for the minimum pensioners than for the average wage earner will be met.*
>
> *The majority also finds reason in this context to recall that a supplementary pension scheme has now been introduced for those born disabled and for those who become disabled at a young age.»*

(108) The appellant also reproduces from the minority's remarks to the proposal **(A72)**:

> *«These members find that the proposed regulation is not satisfactory this time either, regarding an increase [of the special supplement] and cannot see that it gives the minimum pensioners the expected improvement that these members consider necessary. These members will point out the strong increase of prices that has taken place and in particular emphasise the fact that housing expenses often make up a larger proportion of minimum pensioners' overall expenses than is otherwise common. Furthermore, the prices for public transport and medicines have risen. These conditions particularly affect the elderly with a minimum pension and an unfavorable living situation. More than other groups, the disabled and elderly minimum pensioners depend on public transport. In order to more rapidly bring the minimum pensioners up to an acceptable level, these members propose an increase of the special supplement of 2 percentage points above the Government's proposal.»*

(109) The appellant submits that these quotes from the Social Committee's remarks support that the legislator's perception of the special supplement was not only that it constituted

a minimum pension, but that this minimum pension level was intended to provide for a reasonable living standard.

(110) By Act of 20 May 1983 No. 26, the Storting decided that the the special supplement rates were no longer to be regulated in the Special Supplement Act itself. Instead, a provision was adopted that the adjustment be determined by the Storting, in connection with its annual decision on the national budget. Therefore, there are no subsequent preparatory works for the Special Supplement Act which describe the overall considerations of the special supplement.

(111) However, an express right to a minimum pension was enshrined in the 1997 National Insurance Act, with reference to its components, and therefore in particular the basis pension and the special supplement. The preparatory works for the 1997 National Insurance Act contain several considerations on the special supplement and its function in the pension scheme. In the special motives of Section 3-1 (i.e. the first Section of the chapter in which the provisions on pension calculation were to be found), cf. Ot.prp.nr.29 (1995-1996) p. 40, the Ministry of Health and Social Affairs remarks the following **(A58)**:

> *«Sections 3-2 and 3-3 have provisions on basic pension and special supplement. These two benefits together form the minimum pension of the National Insurance Scheme, cf. Section 3-4.»*

(112) The provision in the first paragraph of Section 3-3 in the 1997 National Insurance Act read as follows **(A47)**:

> *«Special supplement is provided to pensioners who are not entitled to additional* [i.e. earnings-based] *pension or have an additional* [i.e. earnings-based] *pension less than the special supplement rate. The special supplement is waived to the extent additional* [i.e. earnings-based] *pension is provided.»*

(113) The other provisions in Section 3-3 stated that the entitlement to the special supplement required that the beneficiary also was entitled to the basic pension (second paragraph), that the special benefit was to be reduced if the beneficiary had a total of completed and future insurance periods less than 40 years (third paragraph), that the (two) rates were to be decided by the Storting (fourth paragraph), that the lower rate was to be provided when the beneficiary lives with a spouse who is also a pensioner and receives an additional pension higher than two times the high rate of special supplement, yet not to result in a lower total benefit for both spouses of less than two times the high rate of the

special supplement (fifth paragraph), and finally that a pensioner who is entitled to a supplement based on status as a provider for a spouse of more than 60 years of age, is entitled to a special supplement of two times the high rate (sixth paragraph).

(114) The appellant submits that the provisions of Section 3-3, second through sixth paragraph, all reflect that the benefit as such was modeled from the purpose in regard of the beneficiaries' needs for subsistence, precisely reflecting its provision for a minimum standard of living. Furthermore, these provisions are apt to illustrate that the conditions to be met in order to achieve a higher minimum benefit, were connected to the private situation of the beneficiary, thus also reflecting that the minimum pension was not, by its nature, related to accrual of insurance.

(115) The appellant also submits that the current provisions on «minimum annual benefit» is in full based on the provisions in Section 3-3. Moreover, the purpose of the «minimum annual benefit» is kept to this day. Therefore, it is not surprising that all the provisions which currently apply to the «minimum annual benefit» are highly similar to those set forth in Section 3-3.

(116) The first paragraph of Section 3-3 sets forth that the special supplement is only provided to the extent that additional (i.e. earnings-based) pension is not. That is to say, the minimum pension is only to be paid out if the pensioner does not obtain an earnings-based benefit higher or equal to the minimum pension level. Therefore, a pensioner with some, but low earnings-based pension, will typically receive basic pension, earnings-based pension and special supplement, the latter in order to make the total amount equal the minimum pension.

(117) Accordingly, Section 3 of the Special Supplement Act, which was repealed when the 1997 National Insurance Act entered into force, read as follows **(A45)**:

> *«Special supplement is waived to the extent that additional* [i.e. earnings-based] *pension and* [i.e. and/or] *waiting allowance for additional pension from the National Insurance Scheme is provided.»*

(118) Hence, the special supplement as set forth in Section 3-3 represented a legislative continuation of a benefit that had been organised in the same way and had the same purpose ever since it was introduced in 1969.

(119) The appellant points out that the National Insurance Scheme has had rules on minimum pension ever since the entry into force of the first announced version of the National

Insurance Act of 1997. However, the 1966 Act also referred to a minimum pension level in Section 1-3 and, more indirectly, in Section 7-8A. In Section 1-3 of the 1966 Act, the following definition was given, subsequent to an amendment which entered into force on 1 January 1993 **(A41)**:

> *«Minimum pension means full basic pension and full special supplement according to the rates for single pensioners.»*

(120) As of today, it is only old-age pensions for the cohorts before 1964 for which the provisions in the NIA Section 3-3 are relevant, cf. current provisions in the NIA Section 19-15, cf. Section 19-5. The appellant will get back to the current rules on guaranteed pension and minimum pension for old-age pensioners below, as they may be read in parallel due to their common history with the «minimum annual benefit» pursuant to Section 12-13 (2).

3.4.2.2 Old-Age Pension Reform (2011) and its preparatory works

(121) As mentioned above, the calculation provisions which applied to invalidity pension before 2015, also applied to old-age pensions. These two benefit types were decoupled in 2015, following the Old-Age Pension Reform («pensjonsreformen») which entered into force on 1 January 2011. Therefore, the Invalidity Benefits Reform must be understood against this broader background.

(122) The appellant assumes that the Court may find it relevant to consider the referring court's question in the light of not only the national provisions on invalidity benefits, but also the national rules regarding minimum pensions for old-age pensioners, with which it shares its legislative history. Thus, the parallel development of minimum benefit rules under the Norwegian old-age pension scheme after 2011 may add to the context in which the invalidity benefits scheme is to be construed. Furthermore, this appears relevant in the light of Article 46 (1) of Regulation No. 883/2004.

(123) Hence, the topic in the following is whether the minimum pension for old-age pensioners has the same purpose as the «minimum annual benefit» of invalidity benefits after the 2015 reform. The legislative history, as far as the special supplement is concerned, is shared with the invalidity pension, which has been dealt with above. Until the entry into force of the pension reform for old-age pensions on 1 January 2011, it is therefore clear that the same applies fully to old-age pensions as to invalidity pensions.

(124) It remains to look more closely at today's benefits. It must then first be noted that the pension reform created a distinction between the cohorts, so that pensioners born before 1954 can only have their old-age pension calculated according to chapter 19, cf. Chapter 3 - also called the «old scheme». No changes as to how earnings-based pension is accrued or calculated were introduced for this group. For the cohorts from 1964 onwards, the pension calculation only takes place according to Chapter 20. For the cohorts 1954-1963, there is a gradual phase-in so that the pension is calculated with 1/10 more of the new scheme for each cohort.

(125) The terminology «minimum pension» («minstepensjon») is retained in the rules in Chapter 19, with the expression «minimum pension level» («minste pensjonsnivå») set forth in Section 19-8, which then refers to the older cohorts. For the new scheme, Chapter 20 operates with the term «guaranteed pension» («garantipensjon»), cf. Sections 20-9 to 20-11. The relevant paragraphs will be cited below.

(126) The preparatory works to Section 19-8 are to be found in Ot.prp.nr.37 (2008-2009), from which the appellant reproduces (p. 176) **(A57)**:

> *«The Section provides rules on the minimum pension level for pension earned according to the current rules. Rules on minimum pension level and pension supplement will replace the minimum pension scheme, which consists of basic pension and special supplement. Both the basic pension and the special supplement are given at different rates depending, inter alia, on marital status, cohabitation and the spouse's/cohabitant's income and pension situation. The different rates for the minimum pension level are maintained as they are today.»*

(127) The legislative considerations are described in more detail in the same proposition, Section 7.4.1, from which the appellant reproduces (p. 105) **(A54)**:

> *«The Norwegian Social Security's pension system provides both a basic insurance regardless of previous income and a standard insurance which is in a certain relation to the income as an employee. The basic insurance is provided in the form of a minimum pension which consists of a basic pension and a special supplement. The minimum pension is the minimum pension benefit according to the National Insurance Act for a pensioner who has full social security period (40 years) and receives ungraded benefits.»*

(128) The applicant respectfully points out the connection between the seventh paragraph of Section 19-8 and Section 19-9 on pension supplements. The seventh paragraph of Section 19-8 reads as follows **(A26)**:

«If the total sum of the basic pension and additional [i.e. earnings-based] pension is lower than the pension level the person is entitled to in accordance with this provision, the difference shall be paid as a pension supplement, see Section 19-9.»

(129) Section 19-9 of the Norwegian Social Security Act, first paragraph, reads as follows **(A26)**:

«In case of low earnings of additional pension, a pension supplement is to be paid, which is calculated on the basis of the basic pension, see Section 19-5, and minimum pension level, see Section 19-8.»

(130) Thus, a mechanism has been included in the current NIA which in practice serves the same function as the special supplement did under the pension rules before 1 January 2011.

(131) A new feature to the pension reform was that the minimum pension level is not adjusted as a function of the National Insurance Scheme's basic amount (G). Earnings-based pensions are no longer adjusted in this way either. The rules for this are to be found in the NIA Section 19-14. It follows from the provision's second paragraph that pensions during payment are adjusted in accordance with wage growth, upon which 0.75 percentage points of the current annual growth rate is then deducted.

(132) The minimum pension level, on the other hand, is adjusted according to the third paragraph. From the outset, the minimum level was adjusted in two steps, first by wage growth and then adjusted for the life expectancy adjustment for 67-year-olds in the regulation year, provided that this does not result in a lower benefit level than the outcome of a calculation according to the second paragraph of Section 19-14. This may be considered to mirror the legislative intention of not only a minimum guarantee, but equity to beneficiaries who receive an earnings-based pension only. However, the provision was simplified in 2022 and currently only sets forth that the means of adjustment be the same as the provision which applies for earnings-based pensions.

(133) Hence, it seems relatively clear that the minimum pension level under Chapter 19, particularly with regard to the provisions on annual adjustments, aims to ensure a reasonable minimum level, in the same way as the previous minimum pension.

(134) As regards the guaranteed pension, according to Chapter 20 (relevant for cohorts from 1954 onwards, and fully applicable for cohorts from 1964 onwards), the current NIA Section 20-3 sets forth the following **(A32)**:

> *«Retirement pension according to this chapter consists of income pension calculated on the basis of an accumulated pension portfolio. A guaranteed pension* [«garantipensjon»] *is provided to persons who have built up little or no pension savings.»*

(135) Hence, the «guaranteed pension» covers the same function in the Norwegian pension system, which was previously covered by the special supplement. As mentioned above, the oldest cohorts are covered by the rules on the «minimum pension» level in Chapter 19. The background for the use of different terms is presumably the need to indicate that the two forms of minimum level old-age benefits arise from a «new» and an «old» pension scheme, which at this particular point do not have any different objectives, as they neither give rise to different benefit levels to the different cohorts respectively.

(136) The rates for «guaranteed pension» are set forth in the NIA Section 20-9. In the main proposition, the preparatory work for this provision is to be found in Ot.prp.nr.37 (2008-2009), from which the appellant reproduces from pinit 4.3. (p. 44) **(A52)**:

> *«In connection with the processing of St.meld.nr.5 (2006–2007), the Storting agreed with the Government's proposal for the design of a new old-age pension in the national insurance. The model means that one earns income pension from the first kroner up to a specified ceiling. Everyone shall be guaranteed a minimum benefit in old age in the form of a guaranteed pension. The guaranteed pension shall be at the same level as the current minimum pension and differentiated according to civil status. Furthermore, it was decided that it* [the guaranteed pension] *shall be reduced by 80 per cent of earned income pension, so that everyone who has earned pension rights will receive a pension that exceeds the guaranteed pension level. Persons who have not earned pension rights will receive a guaranteed pension exclusively. These may have the guaranteed pension paid out from the age of 67.*
>
> *[...]*
>
> *Against this background, the Ministry proposes that everyone shall be guaranteed a minimum benefit in old age in the form of a guaranteed pension. The guaranteed pension is designed on the basis of the current rules for minimum pension, but so that it is gradually reduced towards earned income pension.»*

(137) The appellant submits that the wording of these considerations in the preparatory works not only suggests that the legislator's intention has been to ensure a minimum living standard with the guaranteed pension, but that this also applies to all other Norwegian minimum benefits discussed above, as the legislative history leaves no trace of any other purpose to be attained.

3.4.2.3 Invalidity Benefits Reform (2015) and its preparatory works

(138) Until 1 January 2015 (when the Invalidity Benefits Reform [«uførereformen»] entered into force), the permanent invalidity benefit under the National Insurance Act of 1997 was called invalidity pension (*«uførepensjon»*) and was essentially calculated according to the same model as the old-age pension, although with certain calculation rules in favour of members with low earnings. These are of less interest to the current case, as they only concerned beneficiaries who qualified for an earnings-based pension.

(139) When the reform entered into force, the invalidity pension was discontinued, and a new benefit for permanent invalidity, called invalidity benefit (*«uføretrygd»*), was introduced.

(140) When invalidity benefit was introduced, the rules on the benefit level were placed in Chapter 12 of the Act, and the pension components regulated in Chapter 3 became irrelevant for the new benefit.

(141) However, the «minimum pension» was, by its content and purpose, retained and continued in the rules on ««minimum annual benefit». It is expressly stated in the preparatory works that this is a continuation of the minimum pension. The appellant reproduces from the preparatory works, i.e. Prop.130 L (2010-2011) p. 206 **(A50)**:

> *«The second paragraph provides rules on the minimum annual benefit, which replaces the minimum pension in the current invalidity pension. The minimum benefit ensures a higher invalidity benefit for people who have a low calculation basis: If 66 percent of the calculation basis is lower than the minimum benefit, the benefit level is set at the minimum benefit.»*

(142) Below this Section, the Ministry refers to Section 7.4. in the proposition, from which the appellant reproduces (p. 98, under the headline «Continued higher minimum benefit for single disabled persons») **(A49,** first and third highlighted section**)**:

> *«The reason for the minimum pension in the current invalidity scheme being higher for single persons than for married/cohabiting couples is that a single person has higher living costs than two people living together per person. A single person thus needs a higher basic insurance to achieve the same standard of living. A slightly higher minimum benefit for singles than for married/cohabiting couples will compensate for parts of the difference in living costs. Furthermore, if the minimum benefit in the new invalidity benefits scheme is to be set equal to an average of the benefits for single and married/cohabiting persons, as the Invalidity Pension Committee proposed, single persons will receive a lower minimum benefit after tax than in the current invalidity benefits scheme. Reduced benefits for this group will, in the ministry's view, have negative equity effects.*
>
> *[…]*

> *Against this background, the Ministry proposes that the minimum benefit in the invalidity benefits scheme should continue to be differentiated according to civil status, even if the earnings-dependent invalidity benefit does not depend on civil status. When the minimum benefit is increased to compensate for changed taxation, the minimum benefit becomes 2.28 G for married/cohabiting persons and 2.48 G for single persons. The conversion is based on current tax rules and a calculation technical assumption of the average basic amount [G] for 2011.»*

(143) The appellant submits that these considerations in the preparatory works for the current national rules on «minimum annual benefit» are consistent with the abovementioned motives and considerations to the previous provisions, i.e. it illustrates that the purpose of the Norwegian minimum benefit is unchanged.

(144) The legislator also considered (l.c.) **(A49,** second highlighted section**)**:

> *«Sweden decoupled the invalidity benefit from the pension system in 2004, and it is now calculated according to a similar income replacement model that is proposed for new invalidity benefits from the National Insurance Scheme. There, too, a solution was chosen where the minimum invalidity benefit is graded according to marital status, while benefits above the minimum benefit are not.»*

(145) The appellant submits that the latter strengthens the assumption that Norway has not only modeled its social security scheme very similar to the Swedish scheme, but that the legislator intendedly has done so. Moreover, the legislator has paid attention to it upon law amendments. This has been done by performing comparison to Swedish legislation in order to seek support for new elements to the model of scheme, which is a historically well established concept in Norwegian legislation.

(146) Furthermore, as the Swedish minimum benefit is calculated as a supplement to earnings-based benefits, carried out on the basis of fixed rates depending on the beneficiary's age, it is appropriate to bear in mind that the Norwegian «minimum annual benefit» is set at one out of two possible fixed rates, depending on the beneficiary's civil status. This clearly indicates that the qualification requirements for this benefit are set on the basis of an assumed level of living costs, which precisely will vary depending on the beneficiary's civil status. This element of needs-testing in the modeling of the rates as such, further underpins the purpose of the Norwegian benefit, i.e. to represent a specific guarantee for a minimum living standard.

3.4.3 Previous Norwegian supplement benefit («garantitillegg»)

(147) The appellant wishes to point out that a supplement as set forth in Article 58 was, indeed, imbursed according to a previous practice of the competent institution in Norway. This supplement, named «garantitillegg» (guaranteed supplement), was imbursed solely on the basis of the provisions in Article 50 of Regulation No. 1408/71 and subsequently Article 58 of the current regulation. Both old-age pensioners and invalidity pensioners received this supplement when applicable.

(148) The Norwegian practice was then discontinued after a consideration made by the Ministry of Labour and Social Affairs in 2013, presumably not on the Ministry's professionals' own initiative. The new practice, where the supplement was no longer imbursed, entered into force from 1 September 2014.

(149) The reasoning behind the discontinuation of the previous practice was, essentially, that the Ministry assumed that Norway did not have any benefits to be characterised as a minimum benefit pursuant to Article 58. The main reference was made to the case of *Browning,* yet also to *Torri*.

(150) However, as the appellant wishes to point out, the Ministry failed to identify that the applicable national legislation in the *Browning* and *Torri* cases did not contain any use of such terms as «minimum», and did not have a purpose of ensuring any minimum standard of living, whereas the opposite was apparent from the wording of the Norwegian rules throughout their entire history of existence, as well as their preparatory works in which the purpose of those rules was expressed.

(151) The Ministry also failed to identify that the Norwegian legislation on minumum benefits was to the effect that the minimum level precisely represented a stand-alone guarantee to take effect whenever the earnings of the beneficiary were insufficient.

(152) The appellant respectfully submits that the change of practice seemingly originated from a politically desired search for measures to limit the economic consequences to the social security scheme of migration in general, not only amounting to the consequences of migration within the EEA area, but with an approach chosen by the then-incumbent government due to its concern about immigration from certain non-EEA countries.

(153) The appellant notes that the change of practice was introduced in the same period of time as the government reinforced its focus on a non-contributory social assistance benefit outside the scope of the regulation, i.e. the supplementary benefit to persons

with a short time of residence in Norway, typically migrants from Asian and African countries, which was regulated in a separate act and not considered a social security benefit pursuant to the NIA. This is listed by Norway as a non-contributory cash benefit pursuant to Article 70, cf. Annex X of the Regulation, cf. Annex VI to the EEA Agreement. Beneficiaries of this benefit did not accrue pension points from the reception of it and were not considered to enjoy any constitutional protection of property rights regarding this benefit, in contrast to the constitutional (and, to some extent, ECHR P1-1) protection of pension rights and, accordingly, the accruance of them from benefits regulated in the NIA as well as from other earnings by taxable income.

(154) In establishing the new practice, within the latter context, the government seemingly aimed to formalise that any supplement not expressly set forth in the NIA was voluntary for the State and did not enjoy any protection on a higher legal level. To pass the barrier of EEA law, the government had to establish that the Norwegian *«garantitillegg»* was not mandatory according to Article 58. Hence, it was necessary to reinterpret what the Norwegian minimum benefits were about, even if this required an interpretation contrary to their entire history.

3.4.4 Summary

(155) The appellant submits that the Norwegian minimum benefits in general, including the «minimum annual benefit» at issue in the present case, are and have always been intended to ensure an economic minimum standard of living. This is apparent from the wording of the current as well as now repealed provisions in the NIA, any preparatory works, statements made in the Norwegian Parliament and any other official source of law prior to 2013 that one may desire to examine.

(156) As mentioned above, the current provisions were already passed, only not entered into force, at the time changes to the Norwegian practice were introduced. The chronological overlap is merely coincidental, as the agenda in 2013 and further was to reinforce the focus on a different benefit which fell outside the scope of the Regulation, cf. its Annex X, and not to make changes to the minimum benefit as such.

(157) The changes made to Norwegian practice from 1 September 2014, had no basis in the NIA or any of the aforementioned sources, but were carried out solely by the Ministry and the competent institution,. Therefore, national legislation was not changed, it did

not obtain an entirely different purpose or historical background, and it can not be construed on the basis of the reinterpretation made by the Ministry.

(158) Hence, and according to any acceptable legal method to be applied, national law must be established on the basis of national legal acts and regulations, to which there have been no amendments regarding minimum benefits subsequent to the passing of the pension reforms in 2011. The change of administrative practice does not constitute any change to national legislation.

3.5 The Swedish minimum benefits

3.5.1 Introduction

(159) The ECJ Case 189/16 *Zaniewicz-Dybeck* concerned a tax-financed old-age pension benefit, which was imbursed solely on the basis of completed insurance periods in Sweden, which were accrued by residence in Sweden. The benefit was imbursed as a supplement to earnings-based pensions, and only to the extent that the latter pensions amounted to a lower imbursement than the guaranteed pension ("garantipension").

(160) In the calculation, the Swedish authorities nevertheless made a reduction, according to a *pro rata* principle. In that context, the earned pension was converted into an annually earned economic value. A theoretical calculation was then made of what this annually earned value would have been, if all insurance periods had been completed in Sweden, which could be a maximum of 40 years.

(161) This was then, in turn, compared to the actual number of years of earnings in Sweden. The procedure aimed to adapt the practice of the Swedish guaranteed pension to Article 46 of Regulation No. 1408/71, cf. also Article 47 (1) (d).

(162) The Advocate General observed the following in his Opinion, point 46:

> «That methodology is incorrect because, in my view, whether a person is entitled to the Swedish guaranteed pension must be assessed in accordance with Swedish legislation and with Article 50 of Regulation No 1408/71, without applying the apportionment methology provided for in Paragraph 25 of Chapter 67 of the SFB and the instructions».

(163) The appellant observes that the latter provision in Swedish law has a content that is identical to the Norwegian rule in NIA Section 12-13 (4), in that it only prescribes that the benefit is reduced by the ratio between the number of years of the actual insurance

period and the number 40. That provision of Swedish law is included in the annex to the present pleading, cf. A88.

(164) The appellant notes that, prior to the ECJ judgment, the Swedish authorities regarded the guaranteed pension as an exportable benefit. After the ECJ judgment in the case of *Zaniewicz-Dybeck*, the Swedish authorities have worked to adapt to the circumstance that the supplement pursuant to the current Article 58 is not (required to be) exportable, and the main focus of the Swedish authorities seems to have been on safeguarding the interests of those who have migrated within the EEA area after having obtained a guaranteed pension from Sweden.

3.5.2 The judgment in the ECJ Case 189/16 Zaniewicz-Dybeck

(165) The legal outset was taken from the preceding ECJ judgments in the *Torri* and *Browning* cases, according to which Article 50 of Regulation No. 1408/71 requires a specific guarantee of a minimum benefit level, which, in order to be considered a minimum benefit pursuant to that provision, is required to have the purpose of ensuring a minimum standard of living.

(166) However, in the proceedings before the ECJ, the Swedish government had already admitted that the purpose of the national rule was precisely to that effect, hence the ECJ found it clear that the «garantipension» did fulfill the requirements for a «minimum benefit» pursuant to Article 50 of Regulation No. 1408/71.

(167) The question at issue was, following the near to given conclusion on the latter, whether the Swedish minimum benefit was to be made subject to reduction according to Article 46 (2) of Regulation No. 1408/71, arising from, inter alia, the national provisions which modeled the minimum benefit to be imbursed as a supplement to earnings-based benefits from Sweden and other countries.

(168) The Swedish view was, as regards the context of community law, that in particular the reasoning in the ECJ judgment in Case 143/97 *Conti* gave rise to an assumption that the national provisions modeling the supplement to be increased and reduced according to earnings-based benefits, also meant that they were to be considered provisions for reduction of a benefit, thus bringing those provisions under the scope of the apportionment rules of Regulation No. 1408/71, in particular Article 46 (2). Hence, the

amounts received from other EEA schemes were not taken into consideration. Instead, a calculation based on the *pro rata* principle was performed.

(169) The ECJ confered to the Opinion of the Advocate General, point 47, in which the Advocate General took the position that since the Regulation does not require all Member States to provide minimum old-age benefits, and since nor all Members States do provide such benefits, there would be no obvious reason to apply the coordination rules, i.e. apportionment pursuant to Article 46 (2) of Regulation No. 1408/71, to minimum benefits.

(170) Thus, the ECJ stated the following (section 47):

> *«As the Advocate General observed in point 47 of his Opinion, since Regulation No 1408/71 does not require Member States to provide minimum benefits and not all national legislation therefore necessarily makes provision for that kind of benefit, Article 46(2) of that regulation cannot impose specific detailed rules for the calculation of such a benefit.»*

(171) Accordingly, the ECJ ruled in point 1 of its conclusion, that a *pro rata* calculation is not to be applied to a minimum benefit pursuant to Article 58. However, the appellant notes that there is seemingly a misspelling in this conclusion, as it, contrary to the reasoning of the judgment, is worded «not inappropriate to apply», whereas it seems clear that the ECJ meant either «it is inappropriate» or «it is not appropriate». However, the appellant has read the versions in the German, French, Danish and Swedish languages, which are to the correct meaning.

3.5.3 The relevance of the Zaniewicz-Dybeck case to Norwegian minimum benefits

(172) The appellant submits that in the current Norwegian case, the consequence of the latter statement by the ECJ must be, also with reference to the aforementioned case of *Conti*, that any provision, that be of community law or national law, which authorises a reduction made solely on the basis of that the relevant insurance periods amount to less than a prescribed maximum of e.g. 40 years, such as the NIA Section 12-13 (4), may not be applied to minimum benefits pursuant to Article 58.

(173) On the other hand, the *Zaniewicz-Dybeck* case illustrates that such national provisions, even if intended by the national legislator to be applied also to minimum benefits, do not exclude the benefit in question from being considered a minimum benefit pursuant to Article 58.

(174) However, and as stated by the ECJ in its consideration of the second question referred to it, such rules of apportionment are to be applied when calculating earnings-based benefits, and, accordingly, as the Swedish minimum benefit is calculated by means of a supplement to the latter type of benefits, the actual amount imbursed in the form of such benefits may be taken into consideration upon the calculation of the minimum benefit, subject to Article 58 as well as national legislation.

(175) The appellant wishes to point out that this understanding does not give rise to any practical challenges within the frame of the Norwegian scheme, if the Court is to answer the referred question in the affirmative.

(176) First, as clearly stated by the ECJ in point 1 of its conclusion, the minimum benefit as such is to be calculated according to (currently) Article 58. This means that the Norwegian authorities may solely rely on Article 58, when calculating the supplement to be imbursed. It does not need a provision in national legislation which prescribes a reduction based on the imbursement of relevant benefits from other EEA countries, as Article 58 only requires the «difference» to be paid as a supplement, in cases where the total amount received from all EEA schemes, i.e. as a result of the other benefits in question having been apportioned in accordance with the preceding provisions in Chapter 5 of the Regulation, does not suffice to reach the national minimum level. As regards Sweden, the current practice is that the application of the *pro rata* calculation on the minimum benefit has been discontinued and replaced by a reduction on the basis of actual amounts imbursed from all EEA schemes as a whole.

(177) Second, if the Norwegian legislator so desires, it is free to amend the Norwegian rules in such a way that invalidity benefits and pensions imbursed from other countries, are to be taken into account when calculating the Norwegian minimum benefit. As the minimum benefit may not be reduced solely on the basis of insufficient insurance periods under the «40 years rule», it may still be regulated by national legislation in such a way that any theoretical risk of overlap or double compensation is addressed, within the provisions set forth in Article 58.

(178) Moreover, the Norwegian legislator is even free to discontinue the minimum benefit as such, as the Regulation does not require the State to provide such benefits. However, as long as the current national legislation on minimum benefits continues to be in force, it must be construed and practised in accordance with Article 58.

3.5.4 The Swedish scheme, in comparison to the Norwegian scheme

(179) The Swedish rules on invalidity benefits are laid down in Part C of the Social Security Act («socialförsäkringsbalken», hereinafter referred to as «SFB»), which contains Chapters 23 to 47. The short-term benefit upon sickness is «sjukpenning» (Chapters 24 to 28a), to be imbursed for up to one year (364 days). Following this period, i.e. upon prolonged disease, the beneficiary may receive a second and third form of temporary benefits, «rehabiliteringspenning» and «rehabiliteringsersättning» pursuant to Chapters 29 to 31a, to be imbursed for as long as a rehabilitation program is carried out.

(180) The appellant submits that this system generally is in parallel to the Norwegian system, and that its provisions are mainly identical or to the same effect. In the Norwegian scheme, the first year is covered by *«sykepenger»*, followed by *«arbeidsavklaringspenger»* with a similar purpose and conditions set forth in the national legislations respectively, as the *«rehabiliteringspenning»* and *«rehabiliteringsersättning»* in Sweden. The benefit *«arbeidsavklaringspenger»* also covers what the Swedish system would cover as *«aktivitetsersättning»* for more prolonged need of work-related activity to be attempted (although, only one year at a time, which is also similar to how work-related attempts under the provision of *«arbeidsavklaringspenger»* are carried out under the Norwegian scheme).

(181) Upon disease considered to, either for a prolonged period or permanently, deprive the beneficiary of all or some of the person's work ability, i.e. a minimum loss of 25 per cent of the work ability and then graduated by intervals of 25 per cent (i.e. 25, 50, 75 and 100), the person may be entitled to invalidity benefits. The provisions regarding these benefits are laid down in Chapters 32 to 37. Upon permanent loss of work ability, the Swedish invalidity benefit is called *«sjukersättning»*.

(182) According to SFB Chapter 33, Paragraph 3, the invalidity benefits may be provided in the form of an earnings-based benefit pursuant to Chapter 34, or a guaranteed-level benefit («garantiersättning», in Swedish abbreviated «GSA», hereinafter referred to as «GSA») pursuant to Chapter 35. This chapter is included in the annex to the present pleading, cf. A83 – A87.

(183) According to SFB Chapter 35, Paragraph 2, the beneficiary is entitled to GSA if the person is considered to be disabled according to the (medical and work-related) provisions laid down in Chapter 33, and does either lack the right to an earnings-based invalidity benefit

pursuant to Chapter 34 or has an earnings-based invalidity benefit level which is lower than the guaranteed level (*«garantinivå»*). Furthermore, the entitlement to the guaranteed benefit level requires that the beneficiary has completed a minimum of three years of insurance periods in Sweden.

(184) According to SFB Chapter 35, Paragraph 19, the guaranteed benefit level for persons under 30 years of age is set at a range between 2,48 and 2,73 basic amounts (*«prisbasbelopp»*) depending on the beneficiary's exact age (divided into six age intervals). According to SFB Chapter 35, Paragraph 18, the benefit level for persons over 30 years of age is 2,78 basic amounts.

(185) The appellant submits that these provisions have their apparent similarities to the Norwegian «minimum annual benefit» , in that the Swedish scheme provides a fixed amount depending on age, whereas the Norwegian scheme provides a fixed amount depending on civil status.

(186) Furthermore, the Swedish minimum amount is reduced pursuant to Paragraph 20 of Chapter 35, if the beneficiary has Swedish insurance periods less than 40 years. In this calculation, not only completed insurance periods, but also future insurance periods which extend up to retirement age, are included, by virtue of Chapter 35 Paragraph 5. Both these rules are similar, that is to say identical, to the Norwegian rules on the same matters.

(187) Moreover, a «4/5 rule» similar to the provisions set forth in the NIA Section 12-12 (3), cf. point 25 of the referring court's request, also applies, pursuant to SFB Chapter 35 Paragraphs 12 and 13. This leads to a reduction of the future insurance periods if less than 80 percent of the completed insurance periods were completed in Sweden.

(188) The appellant submits that this reflects similar systems in Norway and Sweden, also in the latter regard. For all practical purposes, Norway and Sweden have rules to the same effect in so to speak every aspect of invalidity benefits.

(189) The only significant difference between the two systems, is that the Swedish benefit is imbursed as a supplement in instances of low earnings-based benefits. In the Norwegian scheme, the minimum benefit replaces the earnings-based invalidity benefit if the latter is lower than the minimum level, i.e. the minimum benefit as such is paid out as a full replacement. There is no adjustment made to the rate as such, and, on the other hand, the low earnings-based pension is not imbursed at all. This means that the Norwegian

scheme does not distinguish between low earnings-based benefits and instances where the beneficiary has accrued none. However, this may seem more of a technical property than a material difference between the two national schemes.

(190) Subsequent to the EJC judgment in Case 189/16, the Swedish government carried out a thorough examination of the laws in force, thus addressing all Swedish social security benefits regarding old-age retirement, survivors' pensions and invalidity benefits which contained elements of minimum, basis or guaranteed benefit levels. The result of this work is found in reports published as part of the official SOU series, commonly used for the purpose of delivering preparatory works for law amendments as well as new acts. The equivalent Norwegian publication is the NOU series.

(191) One of these documents, SOU 2019:53 bearing the title «Grundpension», amounting to 481 pages, contains a broadly scoped analysis of the Swedish basic and minimum benefits as well as a comparison to systems in other EEA countries.

(192) The authors of the report recommended in point 5.6.2. that the GSA be considered a minimum benefit within the scope of Article 58 of the Regulation. The appellant reproduces from the committee's reasoning (p. 164) **(A101)**:

> *«Both benefits provide a basic protection which is issued as a supplement in cases where the beneficiary is not entitled to earnings-based benefits or is entitled to only a low earnings-related benefit. The level of the [GSA] is higher than the base level of the guarantee pension for those born in 1938 or later but was* [by political decision] *determined based on essentially the same purpose – to ensure that everyone who is affected of illness or disability, is provided with a reasonable standard of living, which basically covers all normal consumption needs, except for housing costs.»*

(193) The authors recommended in point 5.6.3. of the report that the GSA, following the ECJ judgment in Case 189/16, is to be treated in the same way as the guaranteed pension at issue in the settled ECJ case. The reasoning for this reads as follows (p. 166) **(A103)**:

> *«In the same way as for guaranteed pension, the judgment* [in ECJ Case 189/16] *means that invalidity benefit and activity benefit in form of «garantiersättning»* [GSA] *is no longer to be calculated taking into account the general coordination provisions in the regulation (Article 52 etc.). The calculation of the* [GSA] *must therefore no longer be done according to the pro rata temporis method. Instead, the benefit must be calculated in accordance with national legal provisions but with consideration of Article 58 of the Regulation.»*

(194) The Swedish government, which conferred to this recommendation, subsequently submitted its listing of the GSA as an invalidity benefit and, as such, a minimum benefit pursuant to Article 58 of the Regulation. This was done following a decision made by the Swedish government on June 2, 2022. The source of this information is the document referred to in the section below. The appellant has unsuccessfully attempted to locate this information in the annexes to the Regulation, hence it is assumingly not updated yet. However, the reference made is to a decision which appears from the case list of the Swedish government of 2 June 2022. That case list is included in the annex to this pleading, cf. A113.

(195) The issue of coordination of the GSA was subsequently considered by the Swedish competent institution, i.e. the Social Security Authority in Sweden, («*Försäkringskassan*»), which on 9 September 2022 delivered its legal opinion («*rättsligt ställningstagande*») on the matter. In this document, which is included in the annex to the present pleading (cf. A104-A112), direct reference to the ECJ judgment in the case of *Zaniewicz-Dybeck* was made, that is to say it was referred to as the very reason for delivering the legal opinion in question.

(196) That Swedish authority found that, also upon coordination with benefits from other EEA countries, the GSA is to be considered a minimum benefit pursuant to Article 58 of the Regulation. This practice was to apply in cases from January 2018 and further.

3.5.5 Summary

(197) The appellant observes that the Swedish scheme for invalidity benefits has a minimum benefit, which is similar to the old-age guaranteed benefit at issue in the *Zaniewicz-Dybeck* case, and which, indeed, is treated by the competent institution in Sweden as a minimum benefit within the scope of Article 58, following the ECJ judgment in the aforementioned case as well as further considerations made in SOU 2019:53, the Swedish government's decision in accordance to that report, and the subsequent legal opinion of the competent institution in Sweden.

(198) Furthermore, the appellant observes that the Norwegian «minimum annual benefit» is organised, regulated and reasoned in a near to identical manner, in national legislation interpreted in conjunction with its entire history, as the Swedish minimum benefit in cases of invalidity.

3.6 Observations on the State's submissions before the referring court

(199) The appellant recognises that the purpose of the Regulation is not to harmonise the different social insurance schemes in the EEA area. However, providing A with a supplement according to Article 58 does not result in such harmonisation. Article 58 is, in itself, further away from harmonisation than other provisions in Chapter 5 of the Regulation, as it only refers to national systems which do have a minimum benefit.

(200) Second, the appellant notes the State's assertation that Norwegian legislation does not contain an express guarantee for a minimum benefit level. The appellant wishes to point out that this assertation is not only refuted in the above observations, it also represents an opinion which is not shared by the national legislator, and which therefore should not be submitted by the State either.

(201) Third, the appellant notes that the State, cf. section 72 of the referring court's request, suggests that there are 40 different levels to the «minimum annual benefit». In this regard, the appellant submits that a *pro rata* calculation pursuant to Article 52 (1) (b), which indeed has also been performed in the case of A, is carried out on the basis of months. This would also be the applied method on the event of an equicalent calculation according to the NIA Section 12-13 (4), as invalidity benefits are attributed to months, according to the NIA Section 22-12.

(202) The minimum requirement for entitlement to an invalidity benefit at all, is an insurance period of one completed year. Hence, as 40 years equals 480 months, the numerator of the fraction can be anything from 12 to 480 months, i.e. 469 different values, not 40. The denominator can be any of the possible values from 24 to 480. Thus, the theoretically possible combinations of numerator and denominator is 469 * 457 = 214.333 different «levels», according to that way of reasoning of the State's counsel, not 40.

(203) Hence, the scheme as such does not contain a rule on any thresholds or «belts», as was the situation in the case of *Browning*. The NIA Section 12-13 (4) only sets forth that an apportionment be performed if the total of completed and future insurance periods amounts to less than 40 years. As it would have no meaning to speak of Article 52 (1) (b) as a provision for different benefit levels, this has no meaning in regard of the NIA Section 12-13 (4) either.

(204) Fourth, the appellant notes that the State's observations in sections 73 and 76 of the referring court's request, amounts to a misconception of the national rules. The «minimum annual benefit» is indeed not a component of any imbursement under the Norwegian scheme, but rather a benefit to be imbursed subject to an exception from the main rule in the NIA Section 12-13 (1), which is prescribed in Section 12-13 (2). That is to say, the benefit to be imbursed is either one of the earnings-based and the minimum benefit, but never both at the same time.

(205) Furthermore, and by way of illustration to this, Section § 12-13 (3) provides a second exception from the main rule, i.e. the non-contributory benefit for persons with serious diseases which have lead to an onset of invalidity at an early age (under 26 years old), which is listed by Norway as pursuant to Article 70 and Annex X to the Regulation, cf. Annex VI to the EEA Agreement.

(206) Thus, the composition of Section 12-13 and its first three paragraphs must be construed as a main rule to which two exceptions apply, which is also precisely reflected in the practical way in which the calculation is made. First, the earnings-based benefit is assessed, then the right to minimum benefit is assessed, if relevant pursuant to the preceding assessment, and finally, in both instances, the right to early-age invalidity benefit is examined as a checkpoint. This is also a practical way for the competent institution to process the case, as the latter requires more in-depth considerations of the time and cause of the invalidity as such. In contrast, the earnings-based calculation pursuant to the main rule, is performed on the basis of already registered data, not requiring any discretionary assessments.

(207) Fifth, in regard of the State's observations referred to in section 76 *in fine* of the referring court's request, national legislation makes insurance periods relevant to the earnings-based and the minimum benefits alike. That is to say, the circumstance that the minimum benefit, according to national provisions, is also subject to reduction on the basis of insurance periods, both in the *Browning* and *Zaniewicz-Dybeck* cases, is not a distinguishing mark to any of the two types of benefits. The State's reasoning in this regard does not compare the two categories, it merely states that one category (that of *Browning*) included the relevance of insurance periods, which is not disputed in the current case. As this characteristic is something that both categories have in common, it is not decisive for whether there is a minimum benefit or not.

(208) Sixth, in section 77 of the referring court's request, the State asserts that the «minimum annual benefit» is not reduced on the basis of insurance periods from other EEA states. As the case of A clearly provides an example of, the State's assertation is incorrect. The imbursement has been made subject to a *pro rata* calculation pursuant to Article 52 (1) (b) and is thereby reduced.

(209) This is not a different matter – it is the only calculation of the minimum benefit which has actually been performed, as the benefit as such is calculated on the basis of a fixed rate. The State has seemingly confused this with the requirements for entitlement to invalidity benefits as such, i.e. the minimum of one year of insurance periods prior to the onset of invalidity, including that this requirement may be fulfilled by aggregation of insurance periods.

(210) Furthermore, the insurance periods according to the «40 years rule» are not to be considered a starting point for the calculation, as the minimum level is not accrued in this way. On the contrary, the calculation on the basis of insurance periods is secondary to the entitlement to the minimum benefit as such. The Norwegian «minimum annual benefit» is not accrued in any other way than fulfilling the minimum requirements, i.e. a minimum of one completed year of insurance.

(211) Seventh, in regard of the State's assertations in section 78 of the referring court's request, the appellant wishes to simply point out that the Norwegian provisions for a «minimum annual benefit» are, indeed, in the form of an exception to the main rule in the NIA Section 12-13 (1), as observed above.

(212) Hence, it precisely constitutes a form of benefit which is in excess to the earnings-based benefit, in that it is only of relevance when the latter is to be imbursed with a lower amount than the minimum level, and thus is entirely replaced by the minimum benefit. As a provision to that effect may well be in place when it is imbursed as a supplement to the earnings-based benefit, as in *Zaniewicz-Dybeck*, it must be considered, *a fortiori*, to be in place where the latter is completely replaced.

(213) Eighth, in regard of the State's assertations in section 79 of the referring court's request, the appellant wishes to clarify that A does not submit that the «minimum annual benefit» is «part of the usual rules», implying that it is subject to apportionment pursuant to Article 52, and simultaneously an express guarantee.

(214) The appellant submits that the Norwegian «minimum annual benefit» is only of the latter type. However, as discussed above, the assessment of an entitlement to the «minimum annual benefit» is secondary to the earnings-based calculation, in that the latter must be assessed first, in order to consider whether the minimum benefit comes into question at all.

(215) Ninth, and finally, in regard of the State's assertations in section 81 of the referring court's request, it is not disputed in this case that insurance periods in Norway may be completed in either way of residence or employment.

(216) However, this does not mean that the entitlement to the minimum benefit is accrued, by means of employment. It only means that the minimum requirements, following that insurance periods can be completed in two different ways, may be fulfilled without any reference to residence in Norway.

(217) In conjunction with the latter, Article 58 does not lay down any obligation for Norway to imburse anything but the earnings-based benefit to a beneficiary who resides in another EEA country. Hence, the State's observation that the minimum requirements for the minimum benefit may (also) be fulfilled through employment, seems to be of little relevance to the referred question at issue.

4 Conclusion

(218) Based on the foregoing, the appellant submits that the question posed by the referring court should be answered as follows:

A benefit such as the «minimum annual benefit» at issue in the current case constitutes a minimum benefit within the meaning of Article 58 of Regulation (EC) No 883/2004 on the coordination of social security systems, and is neither subject to «pro rata» calculation as set forth in Article 52, nor to any apportionment pursuant to national legislation, providing for a «pro rata» calculation.

In relation to a benefit such as the «minimum annual benefit», it is not relevant in the context of the assessment under the referred question, that national rules set forth that the benefit may be reduced when the person has a shorter period of insurance than the full period of insurance, which is 40 years.

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Oslo, 21 August 2023

Advokatfirmaet Advisio AS

Olav Lægreid
advokat

Annex: Collection of legal sources, as indicated in the introduction.