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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by

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and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-3/23

A.

v

***the Labour and Welfare Directorate (Arbeids- og
velferdsdirektoratet)***

in which the National Insurance Court (Trygderetten) requests the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning whether the minimum annual benefit in the event of invalidity in the second paragraph of Section 12-13 of the National Insurance Act constitutes a minimum benefit within the meaning of Article 58 of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

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1. INTRODUCTION

1. The present case seeks to answer the question of whether the minimum annual benefit pursuant to the second paragraph of Section 12-13 of the Norwegian National Insurance Act (“**NIA**”)¹ constitutes a “*minimum benefit*” within the meaning of Article 58 of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (“**Regulation 883/2004**” or “**the Regulation**”).
2. The plaintiff, (“**A**”), is a Norwegian national, born in 1966 and resident in Norway. In May 2018, A submitted a claim for invalidity benefits to the Norwegian Labour and Welfare Administration (“**NAV**”). A had resided in Ireland from May 2006 until February 2014. The claim for invalidity benefits was granted by NAV decision of 25 January 2019.
3. NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) found that A was covered by the third paragraph of Section 12-2 NIA, which gives an exception to the principal requirement under the first paragraph of Section 12-2 NIA of five years’ prior membership before the onset of invalidity, for individuals, such as A, who were members of the national insurance scheme at the time of the onset of invalidity and had acquired entitlement to at least half of the full minimum invalidity benefit. A’s invalidity benefit was calculated according to the rules in the NIA, since that gave the highest benefit, see Article 52(3) of Regulation 883/2004.
4. A lodged an appeal against NAV’s decision. In the appeal decision of 15 November 2019, NAV Appeals (*NAV Klageinstans*) upheld the original decision.
5. On 25 November 2019, the decision by NAV Appeals was appealed to the National Insurance Court (“**NIC**”). Before the NIC, A maintains, *inter alia*, that he is entitled to be paid a guarantee supplement/additional benefit pursuant to Article 58 of Regulation 883/2004, since the total of his *pro rata* benefits is lower than the minimum benefit pursuant to the second paragraph of Section 12-13 NIA.
6. By decision of 10 August 2020, NAV Appeals referred the part of the case relating to prior membership back to the NAV Employment and Benefits Office for reassessment. On 19 August 2020, the NAV Employment and Benefits Office adopted a new decision in which the calculation of the invalidity benefit was

¹ Act of 28 February 1997 No 19 on social security. In Norwegian: *Lov 28. februar 1997 nr. 19 om folketrygd*.

amended so that A received a higher invalidity benefit. It was held that A, through the aggregation of Norwegian and Irish periods of insurance, satisfied the condition in letter b of the second paragraph of Section 12-2 NIA (instead of, as held in the previous decisions, the third paragraph of Section 12-2 NIA).

7. Since A satisfied the conditions for the application of the exception in letter b of the second paragraph of Section 12-2 NIA, his Norwegian invalidity benefit was calculated on a *pro rata* basis pursuant to Article 52(1)(b) of Regulation 883/2004 and the Norwegian Regulation (*forskrift*) on calculation of invalidity benefits pursuant to the EEA Agreement (“**the Calculation Regulation**”).²
8. The way in which this calculation was done, is described in the following manner by the NIC in the Request for an advisory opinion (“**the Request**”):

“This was done, first, by calculating a theoretical amount equal to the benefit to which A would have been entitled had all periods of insurance been completed in Norway. Next, an actual amount was determined for the pro rata benefit based on the theoretical amount, on the basis of the ratio between the completed periods of insurance in Norway before the incident (the onset of invalidity) and the combined completed periods of insurance in Norway and Ireland before the incident.

*Since A had low income in the last five calendar years preceding the onset of invalidity, the theoretical amount was calculated on the basis of the minimum benefit in the second paragraph of Section 12-13 of the National Insurance Act. Furthermore, A’s total periods of insurance in Norway and Ireland, including future periods of insurance, were set to a maximum of 40 years. As stated above, the degree of invalidity was 80 per cent. Based on the basic amount, [which is the base amount for which Norwegian social security calculates benefits (*grunnbeløpet*)], as of 1 May 2022 – which is NOK 111 477 – this gave the following calculation:*

Theoretical amount: [NOK] 111 477 x 2.48 x 40/40 x 80% = [NOK] 221 170

The actual amount was calculated as follows, based on 283 months of periods of insurance in Norway before the onset of invalidity and 59 months in Ireland:

Actual amount: [NOK] 221 170 x 283/342 = [NOK] 183 015 ([NOK] 15 251 per month).

By comparison, the current minimum annual benefit for single persons is 2.48 x [NOK] 111 477 = [NOK] 276 463 based on 40 years of periods of insurance. When adjusted for 80 per cent degree of invalidity, this gives [NOK] 221 170.”³

² In Norwegian: *Forskrift 12. februar 2015 nr. 130 om beregning av uføretrygd etter EØS-avtalen.*

³ The Request, p. 3–4, paragraphs 11–14.

9. A's claim is to have the annual invalidity benefit adjusted on the basis of Article 58 of Regulation 883/2004 from NOK 183 015 (the actual amount) to NOK 221 170 (the theoretical amount).⁴ In other words, A claims to be entitled to be paid the minimum annual benefit in the second paragraph of Section 12-13 NIA, which is higher than the *pro rata* benefit, calculated on the basis of Article 52(1)(b) of Regulation 883/2004 and the Calculation Regulation.
10. As the NIC puts it, the question is therefore whether A is entitled to be paid the difference between the *pro rata* benefit and the minimum annual benefit in the second paragraph of Section 12-13 of the NIA.⁵ The answer to this question depends in particular on whether the minimum annual benefit in the second paragraph of Section 12-13 NIA constitutes a minimum benefit of Article 58 of Regulation 883/2004.
11. ESA submits that there is a minimum benefit within the meaning of Article 58 of Regulation 883/2004 where the national legislation contains provisions on a minimum annual benefit in the event of invalidity, even if the benefit is to be proportionately reduced when the person has a shorter period of insurance than the full period of insurance, which is 40 years.
12. To that effect, ESA will first provide some general comments on Chapter 12 of the National Insurance Act and the question from the National Insurance Court. Second, ESA will reference the change in the Norwegian practice and its declaration of the applicable legislation. Third, ESA will present arguments to the effect that the minimum annual benefit in the second paragraph of Section 12-13 NIA constitutes a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004. Finally, ESA will present arguments to the effect that the way in which the benefit is calculated does not change its nature as a "minimum benefit" in the context of Article 58 of the Regulation.

2. EEA LAW

13. Regulation 883/2004 was incorporated into the EEA Agreement by Decision No 76/2011 of the EEA Joint Committee of 1 July 2011, at point 1 of Annex VI to the

⁴ Paragraph 14 of the Request.

⁵ Paragraph 2 of the Request.

Agreement (Social Security). The Joint Committee decision entered into force on 1 June 2012.⁶

14. Article 52, “**Award of benefits**”, reads:

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

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

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

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

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

2. Where appropriate, the competent institution shall apply, to the amount calculated in accordance with subparagraphs 1(a) and (b), all the rules relating to reduction, suspension or withdrawal, under the legislation it applies, within the limits provided for by Articles 53 to 55.

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

4. Where the calculation pursuant to paragraph 1(a) in one Member State invariably results in the independent benefit being equal to or higher than the pro rata benefit, calculated in accordance with paragraph 1(b), the competent institution shall waive the pro rata calculation, provided that:

(i) such a situation is set out in Part 1 of Annex VIII;

(ii) no legislation containing rules against overlapping, as referred to in Articles 54 and 55, is applicable unless the conditions laid down in Article 55(2) are fulfilled; and

⁶ OJ 2011 L 262, p.33.

(iii) Article 57 is not applicable in relation to periods completed under the legislation of another Member State in the specific circumstances of the case.

5. Notwithstanding the provisions of paragraphs 1, 2 and 3, the pro rata calculation shall not apply to schemes providing benefits in respect of which periods of time are of no relevance to the calculation, subject to such schemes being listed in part 2 of Annex VIII. In such cases, the person concerned shall be entitled to the benefit calculated in accordance with the legislation of the Member State concerned.”

15. Article 58, “**Award of a supplement**”, reads:

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

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

3. NATIONAL LAW

16. As of 25 November 2022, Regulation 883/2004 was made part of Norwegian law by Section 1-3a(1) NIA, entitled “**Implementation of the social security coordination regulation and the implementing regulation**” which provides that:

“Annex VI No. 1 to the EEA Agreement (Regulation (EC) No. 883/2004 on the coordination of social security schemes, as amended by Regulation (EC) No. 988/2009, Regulation (EU) No. 1244/2010, Regulation (EU) No. 465/2012, Regulation (EU) No. 1224/2012, Regulation (EU) No. 517/2013, regulation (EU) no. 1372/2013, regulation (EU) no. 1368/2014 and regulation (EU) 2017/492) (the social security regulation) applies as [Norwegian] law with the adaptations that follow from Annex VI, protocol 1 and the agreement in general.

Annex VI No. 2 EEA Agreement (Regulation (EC) No. 987/2009 laying down detailed rules for the implementation of Regulation (EC) No. 883/2004 on the coordination of social security schemes, as amended by Regulation (EU) No. 1244/2010, Regulation (EU) No. 465/2012, Regulation (EU) No. 1224/2012, Regulation (EU) No. 1 372/2013, Regulation (EU) No. 1368/2014 and Regulation (EU) 2017/492) (the implementing regulation) applies as [Norwegian] law with the adaptations that follow from Annex VI, Protocol 1 and the agreement in general.

The provisions given in or pursuant to this Act shall be waived to the extent necessary to comply with obligations arising from the regulations mentioned in the first and second paragraphs.”⁷

17. Section 2-1 NIA is entitled “**Persons residing in Norway**”, and provides:

“Persons who reside in Norway are compulsory members of the national insurance scheme.

Residents of Norway are those who stay in Norway, when the stay is intended to last or has lasted at least 12 months. A person who moves to Norway is considered resident from the date of entry.

It is a condition for membership that the person concerned has legal residence in Norway.

In the event of a temporary absence from Norway that is not intended to last more than 12 months, the person concerned is still considered resident here. However, this does not apply if the person concerned is to stay or has stayed abroad for more than six months per year for two or more consecutive years.”

18. Chapter 12 NIA is entitled “**Invalidity benefits**” and is part of Part IV of the NIA, entitled “**Benefits in the event of illness, etc.**”⁸ Chapter 12 NIA is also listed by Norway in its Article 9 Declaration as a benefit falling within the scope of invalidity benefits of Regulation 883/2004.

19. Section 12-1 NIA is entitled “**Purpose**”, and provides that:

“The purpose of invalidity benefits is to ensure income for persons who have had their earning capacity permanently reduced due to illness, injury or disability.”

20. Section 12-1a NIA, which was added on 25 November 2022 is entitled “**The relation to provisions concerning international social security coordination**”, and reads:

“Invalidity benefits are benefits in the event of invalidity pursuant to the Social Security Coordination Regulation. The provisions in this chapter shall be disapplied to the extent necessary in respect of relevant provisions in the Main Part of the EEA Agreement, the Social Security Coordination Regulation, the Implementing Regulation and bi- and multilateral social security agreements, see Sections 1-3 a and 1-3 b [NIA].

The Ministry may, by regulation, issue provisions supplementing or facilitating compliance with provisions on benefits in the event of invalidity in the Social Security Coordination Regulation and the Implementing Regulation.”

⁷ Until 25 November 2022, Regulation 883/2004 was implemented into Norwegian law by virtue of Regulation 22 June 2012 No 585 on the implementation of the social security regulations into the EEA Agreement (in Norwegian: *forskrift 22. juni 2012 nr. 585 om inkorporasjon av trygdeforordningene i EØS-avtalen*), which was repealed on the same day.

⁸ In Norwegian “*Uføretrygd*” and “*Ytelser ved sykdom m.m.*”, respectively.

21. Section 12-2 NIA is entitled “**Prior membership**”, and reads:

“It is a condition for entitlement to invalidity benefits that the person concerned has been a member of the national insurance scheme for the five years preceding the onset of invalidity, see Section 12-8 [NIA]. In the assessment of whether the condition is fulfilled, no account shall be taken of periods spent serving with international organisations or bodies of which the Norwegian State is a member, to which it makes financial contributions or to which it is responsible for contributing to staffing.

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

- a. the person concerned became disabled before turning 26 years of age and at that time was a member in the national insurance scheme, or*
- b. the person concerned, after turning 16 years, has been a member of the national insurance scheme except for a maximum of five years.*

The condition in the first paragraph shall not apply if the person concerned was a member in the national insurance scheme at the time of the onset of invalidity and the invalidity benefit in the event of a 100 per cent degree of invalidity:

- a. calculated on the basis under the first paragraph of Section 12-11 [NIA] will at least correspond to half of the high rate under the third sentence of the second paragraph of Section 12-13 [NIA], or*
- b. calculated on the basis of periods of insurance will at least correspond to half of the minimum benefit under the second paragraph of Section 12-13 [NIA].*

Future periods of insurance shall not be included, see the fifth paragraph of Section 12-12 [NIA].”

22. Section 12-3 NIA is entitled “**Continued membership**”, and provides:

“It is a condition for the right to invalidity benefits that the person concerned is still a member of the National Insurance Scheme.

A person who is not a member of the national insurance scheme still receives invalidity benefits if the person concerned has at least 20 years of social security insurance according to Section 12-12, second paragraph [NIA] (length of residence). To those who have less than 20 years of residence, invalidity benefits are provided on the basis of the basis of calculation according to Section 12-11 [NIA], but so that years before the time of invalidity when the person concerned has not had a pensionable income above the basic amount, are not counted as a period of social security when calculating the benefit.

Invalidity benefits according to Section 12-2 second and third paragraphs [NIA] on exemption from membership in the national insurance up to the time of invalidity are only retained as long as the person concerned is a member

of the national insurance. The same applies to invalidity benefits on the basis of Section 12-13, third paragraph [NIA], on disability benefits for disabled young people.

In the event of changes to the invalidity benefit according to the provisions here, the supplement to invalidity benefit for the surviving spouse (survivor's supplement) according to Section 12-18 [NIA] must be changed proportionately."

23. Section 12-4 NIA sets out the age requirements for the entitlement to invalidity benefits,⁹ Section 12-5 requires that the person concerned has undergone appropriate treatment to improve their capacity for gainful employment, Section 12-6 sets out the condition that the person in question has a permanent illness, injury or disability, whilst in accordance with Section 12-7, it is a condition that the ability to perform gainful employment is reduced by at least half. Section 12-8 defines the onset of invalidity as the time at which the capacity for gainful employment was permanently reduced by at least half, whilst Sections 12-9 and 12-10 contain detailed rules on the determination of the degree of invalidity.

24. Section 12-11 NIA is entitled "**The basis for calculating invalidity benefits**", and reads:

"Invalidity benefits are calculated on the basis of pensionable income, see Section 3-15 [NIA], in the last five calendar years preceding the date of invalidity, see Section 12-8 [NIA]. The average income in the three best income years is used as a basis.

For years when a person has received an invalidity benefit, pensionable income, and income that corresponds to the calculation basis for the invalidity benefit adjusted for the determined degree of invalidity, must be included in the basis. Total income cannot, however, exceed the highest of the calculation basis and the pensionable income. The Ministry can issue regulations on what income is to be used as a basis for years when a person has received a invalidity pension.

For years when a member has served military or compulsory military service or such voluntary service, an income of at least three times the average basic amount shall be taken as a basis. If the member had a higher income in the year before the service began, this income is used.

Years in which a member has received pension accrual on the basis of care work pursuant to Section 3-16 or Section 20-8 [NIA] shall be disregarded if this is to the benefit of the person concerned. The year before and the year after such years are then considered to follow immediately after each other.

⁹ The person concerned must be between 18 and 67 years of age.

Pensionable income above six times the average basic amount in a calendar year is not included in the basis for invalidity benefits.

The pensionable income in the individual calendar year must be adjusted in accordance with changes in the basic amount up until the time when the invalidity benefit is given effect.

The basis for the invalidity benefit is regulated in accordance with subsequent changes in the basic amount.”

25. Section 12-12 NIA is entitled “**Social security period**”, and reads:

“Social security period is a factor used when calculating invalidity benefits, see Section 12-13 fourth paragraph [NIA].

Social security period is the period from 1 January 1967 when a person has been a member of the national insurance scheme with the right to benefits according to Chapters 12, 16, 17, 19 and 20. Social security period is counted from the age of 16 up to and including the year he or she turns 66. The period before 1 January 1967 shall also be considered as social security period if the person concerned would then have fulfilled the conditions for membership as mentioned in the first sentence.

Social security period is also considered future social security period from the time of invalidity (see Section 12-8 [NIA]) up to and including the year in which the person turns 66. If less than 4/5 of the time between the age of 16 and the time of invalidity (the earning period) can be considered as social security period, the future social security period shall amount to 40 years with a deduction of 4/5 of the earning period.

When the condition of prior membership is met according to Section 12-2, second paragraph [NIA], future social security period is calculated from the time the person last became a member of the national insurance at the earliest. The period up to this point is considered the accrual period.

Future social security period is not taken into account when invalidity benefits are granted in accordance with Section 12-2, third paragraph [NIA].

If the social security period is set according to the third paragraph, second sentence, it must be set again when a new time of invalidity is determined in the event of an increased degree of invalidity according to Section 12-8, second paragraph [NIA].

When the total period of social security is at least five years, it is rounded up to the nearest whole year.”

26. Section 12-13 NIA is entitled “**Amount of the invalidity benefit**”, and provides:

“Invalidity benefits are paid at 66 percent of the base according to Section 12-11 [NIA].

The minimum annual benefit is 2.28 times the basic amount (ordinary rate) for people who live with a spouse (see Section 1-5 [NIA]) or with a cohabitant in a

cohabitation relationship that has lasted for at least 12 of the last 18 months. The minimum annual benefit is nevertheless 2.33 times the basic amount if the person concerned receives an invalidity benefit which is a converted invalidity pension. For others, the minimum annual benefit amounts to 2.48 times the basic amount (high rate).

For a member who has become invalid before the age of 26 due to a serious and permanent illness, injury or disability that is clearly documented, the minimum benefits as mentioned in the second paragraph are respectively 2.66 and 2.91 times the basic amount. This applies even if a member has been more than 50 percent professionally active after the age of 26, if it is clearly documented that the conditions in the first sentence were met before the age of 26 and the claim is made before the age of 36. The provision in the first sentence also applies when invalidity benefit is granted again after the benefit has lapsed due to an income test according to Section 12-14 [NIA]. The minimum benefit according to this subsection is paid from the month the member turns 20 at the earliest.

When the social security period according to Section 12-12 [NIA] is shorter than 40 years, the invalidity benefit is reduced accordingly.

If the degree of invalidity according to Section 12-10 [NIA] is lower than 100 percent, the invalidity benefit is set at a proportional share of the amount according to the first to fourth paragraphs.”

27. The Calculation Regulation has detailed rules on the calculation of invalidity benefits from the national insurance scheme pursuant to Article 52(1)(b) of Regulation 883/2004, in accordance with its Section 1, which is entitled “**Scope**”, and provides that:

“This regulation contains provisions on the calculation of invalidity benefits from the national insurance scheme according to Regulation (EC) No. 883/2004 Article 52 No. 1 b for persons covered by the EEA Agreement Annex VI No. 1 and 2 (European Parliament and Council Regulation (EC) No. 883/2004 on the coordination of social security schemes and European Parliament and Council Regulation (EC) No. 987/2009 on rules for the implementation of Regulation (EC) No. 883/2004 – etc.). The provisions apply correspondingly in cases where similar rules are applied pursuant to a social security agreement Norway has with another country.”

28. Section 3 is entitled “**Minimum annual benefit**”, and provides that:

“Invalidity benefits are paid at 66 percent of the base according to Section 2 [of the Regulation]. The minimum annual benefit follows from Section 12-13 of the National Insurance Act.

The invalidity benefit shall be reduced in accordance with Section 4 and Section 5 [of the Regulation].”

29. Section 4 is entitled “**Theoretical amount**”, and provides that:

“The theoretical amount for invalidity benefit in case of total invalidity corresponds to 66 percent of the basis for invalidity benefit, see Section 2 [of the Regulation], multiplied by a fraction where theoretical social security period is the numerator and 40 is the denominator.

If the person concerned is entitled to a minimum annual benefit according to the National Insurance Act Section 12-13 second and third paragraphs, the theoretical amount for invalidity benefit in case of total invalidity corresponds to the minimum annual benefit multiplied by a fraction where theoretical social security period is the numerator and 40 is the denominator.

By theoretical social security period is meant social security period determined according to the National Insurance Act Section 12-12, but still such that membership time in another EEA country is equated with social security period according to the National Insurance Act Section 12-12 second paragraph.”

30. Section 5 is entitled “**Actual amount**” and provides that:

“The actual amount for the invalidity benefit is determined by multiplying the theoretical amount according to Section 4 [of the Regulation] by a fraction where the Norwegian social security period prior to the date of disability determined in the number of months is the numerator and the sum of the Norwegian social security period and membership period in another EEA country prior to the date of disability determined in the number of months is the denominator.

The social security period is limited to periods of time that can be considered as social security period according to the National Insurance Act Section 12-12, second paragraph. The social security period cannot amount to more than 480 months in numerator or denominator.

If the degree of disability is lower than 100 percent, the invalidity benefit is set at a proportionate share of the amount according to the first paragraph.”

4. THE QUESTION REFERRED

31. The NIC seeks an advisory opinion from the EFTA Court on the following question:

“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?”

5. LEGAL ANALYSIS

5.1 General remarks on Chapter 12 of the National Insurance Act and the question from the National Insurance Court

32. The present Request raises questions concerning the Norwegian rules governing the right to invalidity benefits, which are laid down in Chapter 12 of the NIA.
33. The stated purpose of the invalidity benefit, in accordance with Section 12-1 NIA, is to ensure income for persons who have had their earning capacity permanently reduced due to illness, injury or disability.
34. Section 12-1a NIA sets out the interrelation between Chapter 12 NIA and Regulation 883/2004, indicating that invalidity benefits pursuant to Chapter 12 NIA are to be considered as benefits in the event of invalidity pursuant to Regulation 883/2004.
35. Sections 12-2 to 12-7 NIA set out the conditions for the entitlement to invalidity benefits, and contains conditions on, *inter alia*, membership in the Norwegian national insurance scheme, age, and reduction of the ability to perform income-generating work. All the requirements set out in Sections 12-2 to 12-7 NIA must be met for the beneficiary to be entitled to invalidity benefits. The other provisions of Chapter 12 NIA set out, *inter alia*, rules governing the calculation and amount of the invalidity benefit.
36. In accordance with the first paragraph of Section 12-2 NIA, which sets out the prior membership requirement, the person concerned must, as a starting point, have been a member of the national insurance scheme “*for the five years preceding the onset of invalidity*”. The second and third paragraphs of Section 12-2 contain certain exceptions to this rule.
37. Of particular relevance in the present case is the exception in letter b of the second paragraph of Section 12-2 NIA, which provides that the requirement of five years of prior membership does not apply to person who, in essence, has been a member of the national insurance scheme *except for a maximum of five years* after turning 16 years of age. Application of the exception in letter b also requires that the person had been a member of the national insurance scheme for at least one year immediately before submitting a claim for invalidity benefits. NAV in its decision found that in the present case, A falls into that category of beneficiaries after it aggregated his periods of insurance under Norwegian and Irish social security

schemes and concluded that his absence from membership in the Norwegian social security scheme did not last more than five years.¹⁰

38. In addition to satisfying the prior membership requirements, the person concerned must also, according to the first paragraph of Section 12-3 NIA, be a current member of the insurance scheme at the time when the benefit is sought.¹¹ All persons residing in Norway, such as A, are compulsory members of the national insurance scheme, in accordance with the first paragraph of Section 2-1 NIA.
39. The main rule for the calculation of the invalidity benefit is laid down in the first paragraph of Section 12-11 NIA, which states that the calculation of invalidity benefits shall be based on the income in the five calendar years preceding the onset of invalidity, with the average income in the three best income years being used. Periods of insurance are also a factor used in the calculation of invalidity benefits, and Section 12-12 NIA stipulates how those periods are calculated, including future periods from the onset of invalidity.
40. The provision at the core of the issue in the present case is Section 12-13 NIA, which is entitled “Amount of the invalidity benefit” and lays down further rules governing the calculation of the invalidity benefit. Of particular interest in the present case is the second paragraph of the provision, which lays down rules on the minimum annual benefit.¹²
41. In accordance with the first paragraph of Section 12-13 NIA, the amount of invalidity benefit provided to the person concerned is paid at a rate of 66 percent of the basis under Section 12-11 NIA. However, where the person concerned has had a low income in the five years preceding the onset of invalidity resulting in a low benefit, such as A, the second paragraph of Section 12-13 of the NIA guarantees a minimum benefit for the calculation of which two different quotients are used depending on whether the person is residing with a spouse or is single (respectively 2.28 times the basic amount – so called ordinary rate or 2.48 times the basic amount – high rate).
42. By its question, the NIC seeks to ascertain whether the minimum annual benefit in the second paragraph of Section 12-13 NIA constitutes a minimum benefit within the meaning of Article 58 of Regulation 883/2004.

¹⁰ Paragraph 9 of the Request.

¹¹ Section 12-3, second paragraph, sets out an exception to the current membership requirement, but that exception is not relevant for the purposes of the present case.

¹² Paragraph 31 of the Request.

43. Further, the NIC is querying what is the significance of the fact that the Norwegian legislation concerning a minimum annual benefit in the second paragraph of Section 12-13 NIA is expressed in specific amounts that are to be proportionally reduced in the event of a period of insurance shorter than 40 years, in line with the fourth paragraph of Section 12-13 NIA. The NIC draws attention to the fact that this reduction is the only variable factor that affects the amount of the benefit.¹³
44. In ESA's understanding, the Norwegian Government is currently of the view that the minimum annual benefit pursuant to the second paragraph of Section 12-13 NIA does not constitute a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004 for two reasons. First, that the objective of the national benefit in question must be to ensure the recipient a minimum income, and secondly, that it must do so by providing an express guarantee that secures a minimum income exceeding the amount the person in question can claim solely on the basis of their periods of insurance and contributions.¹⁴ These contentions are addressed in Sections 5.3 and 5.4 below, respectively.
45. Before addressing the main question in the pending case, ESA will offer its observations on the change of practice of the Norwegian government who initially considered a number of minimum benefits, including the invalidity benefit, as falling within the scope of Article 58 of the Regulation.¹⁵

5.2 The change in the Norwegian administrative practice

46. Article 9 of the Regulation imposes on the EEA States a duty to declare on a yearly basis laws and schemes relating to social security benefits which fall within the scope *ratione materiae* of that Regulation including, *inter alia*, any minimum benefits referred to in Article 58. The declarations indicate the date from which the Regulation applies to them. In accordance with CJEU case law, laws that have been mentioned in a declaration made under Article 9 of the Regulation fall within its scope.¹⁶

¹³ Paragraph 48 of the Request.

¹⁴ Paragraph 69 of the Request.

¹⁵ See, e.g., paragraphs 34 and 35 of the Request.

¹⁶ Judgment of 25 June 1997 in Case C-131/96 *Mora Romero*, EU:C:1997:317, paragraph 25; Judgment of 20 October 2011 in Case C-225/10 *Pérez García and Others*, EU:C:2011:678, paragraph 36.

47. Chapter 12 NIA has been declared by Norway as an invalidity benefit in its yearly declarations as generally included in the scope of legislation covered by Regulation 1408/77, and subsequently Regulation 883/2004, including in its most recent declaration for the year 2022.¹⁷
48. ESA notes that at least until 2010, Norway declared Sections 3-4 and 3-2 to 3-3 of the NIA (which covered minimum pensions and invalidity pension), as covered by Article 58.¹⁸ However, in 2013, the relevant administrative practice with regard to pensions (including invalidity pensions) changed, as Norway considered that the benefits in question do not constitute minimum benefits anymore. The new practice was reflected both in the administrative circular and confirmed in the case law of the national courts (see further paragraphs 50-51 of these WOBs).¹⁹
49. Norway to this day lists no benefits as falling within the scope of Article 58 of the Regulation, which is also the position of the Norwegian Government in the present case. ESA for the sake of completeness notes that since 2015, due to a legal reform of the NIA, invalidity *pensions* have been replaced by invalidity *benefits* in Chapter 12 NIA.²⁰ The Norwegian practice with regard to minimum benefits under Article 58 has remained unchanged since 2013.
50. Chapter 3.8 of NAV's Circular R-45-00 references this 2013 change of practice with regard to the application of Article 58 in Norway:

“3.8 Guarantee supplement when the total pension is lower than the minimum pension in the country where the pensioner resides.

The provision is in Article 58 of Regulation 883/2004. It shall no longer be used by Norway.

NAV has previously applied this provision so that a guaranteed supplement to pensions from the national insurance has been given to people who live in Norway and have pensions from Norway and other EEA countries. The guarantee consisted of ensuring a total benefit corresponding to a minimum

¹⁷ Norwegian Article 9 Declaration for the year 2022:

<https://ec.europa.eu/social/main.jsp?catId=868&intPagelId=2296&langId=en>.

¹⁸ See point 2 of the Norwegian Declaration published in the EEA Supplement to the Official Journal 2003/EØS/27/01 of 29 May 2003.

¹⁹ See paragraph 34 of the Request.

²⁰ The pension system was reformed in 2011. The relevant changes concerning invalidity benefits came into force in 2015, see Regulation 20 June 2014 No 797 concerning the entry into force of Act 16 December 2011 No 59 on amendments to the National Insurance Act (new invalidity benefit and old-age pension for the disabled (in Norwegian: *forskrift 20. juni 2014 nr. 797 om ikraftsetting av lov 16. desember 2011 nr. 59 om endringer i folketrygdloven (ny uføretrygd og alderspensjon til uføre)*).

pension from the national insurance or minimum pension level for old-age pension at age 67, calculated according to total social security period in EEA countries that paid a pension. [...]

The Ministry of Labor and Social Affairs reassessed the question of whether Norway should provide guarantee supplements and came to the conclusion that Norway should not provide such supplements. A guarantee supplement from Norway will therefore no longer be provided. The decisions on guarantee supplements are considered to be invalid decisions [...] and all ongoing guarantee supplements must lapse by 1 September 2014. [...]

51. As referenced in paragraph 35 of the Request, this change of practice has been upheld by both the NIC and Hålogaland Court of Appeal (“**the Court of Appeal**”). The Court of Appeal stated in its judgment of 27 March 2017:

“[...] The question of whether A is entitled to a guarantee supplement in the invalidity pension depends on an interpretation of the aforementioned articles. Based on the evidence presented, the Court of Appeal assumes that, until August 2013, the administration’s understanding of art 50 and art 58 was that a social security recipient with full period of insurance, based on the sum of periods of insurance in various EU/EEA countries, was entitled to a guarantee supplement up to that amount which corresponded to the minimum pension [...].

By letter of 25 June 2013 from the Ministry of Labor to the Directorate of Labor and Welfare, the ministry stated that after a new assessment of the regulations relating to guarantee supplements, it had come to the conclusion that the administration’s previous interpretation was not correct, and that no guarantee supplements should be awarded in new cases. [...]

From the preambles to regulations 1408/71 and 883/2004 it appears that the rules are of a coordinating nature and given to ensure that workers who move within the community retain the rights they have acquired, without the rules leading to unjustified double benefits, and that the persons concerned within the community are treated equally according to the national legislation of the various countries. [...]

*The Court of Appeal agrees with the State that the National Insurance Act does not authorize a guaranteed minimum amount regardless of the earning period [...]. That Norway in a declaration from 2003, pursuant to regulation 1408/71 art. 5, has stated that these provisions represent such a minimum benefit as referred to in art. 50, is probably due to the administration's erroneous interpretation of the article, and no significance is attached to what can in reality be derived from the provisions of the National Insurance Act. [...]*²¹

52. ESA recalls that the determination made by the State in the declaration does not predetermine the nature of the benefit and its classification in light of the Regulation. Thus, even if a legal provision is not mentioned in the declaration within the meaning of Article 9, it does not necessarily mean that it does not fall within the scope of the Regulation.

53. As noted by the EFTA Court with regard to the question of whether a benefit is covered by an Article of the Regulation, the Court stated that it is not bound by “*mere expectations of the EEA States as to the exact content of the obligations they enter into.*”²² The Court has also stated that “*the fact that the Norwegian Government since the entry into force of the EEA Agreement, has considered the benefit outside the scope of the Regulation and its predecessor is of no significance for the classification.*”²³

54. In light of those considerations, ESA submits that the failure by the Norwegian Government to declare the minimum annual invalidity benefit as a benefit falling within the scope of Article 58 of the Regulation does not predetermine the nature of the benefit. ESA submits that the same reasoning as applied by the Court in its judgment in case E-2/22 applies with regard to the declarations concerning Article 58 of the Regulation. Therefore, the scope of the benefit is affirmed by the Court even if the respective EEA Member State did not submit a declaration in compliance with Article 9 or if that declaration did not include the benefit in the list.²⁴

²¹ Court of Appeal Judgment of 27 March 2017, LH-2016-120882. ESA notes that the judgment of the Court of Appeal concerned the rules on invalidity pensions in force before the entry into force of the current provisions on invalidity benefits.

²² Judgment of 14 December 2007 in Case E-5/06 *EFTA Surveillance Authority v The Principality of Liechtenstein*, paragraph 63.

²³ Judgment of 29 July 2022 in Case E-2/22 *A v Arbeids- og velferdsdirektoratet*, paragraph 41.

²⁴ See also: Judgment of 15 July 1964 in Case C-100/63 *J.G. van der Veen, widow of J. Kalsbeek v Bestuur der Sociale Verzekeringsbank and nine other cases*, EU:C:1964:65; Judgment of 2

5.3 The invalidity benefit in the second paragraph of Section 12-13 NIA constitutes a “minimum benefit” within the meaning of Article 58 of Regulation 883/2004

55. Regulation 883/2004 does not set up a common scheme of social security but allows different national schemes to exist, and its sole objective is to ensure the coordination of those schemes. Thus, according to settled case law, the EEA EFTA States retain the power to organise their own social security schemes. In the absence of harmonisation at EEA level, it is for the legislation of each EEA EFTA State to determine, in particular, the conditions for entitlement to benefits.
56. In exercising those powers, EEA EFTA States must nonetheless comply with EEA law and, in particular, with the provisions of the EEA concerning free movement and right to move and reside within the territory of the EEA EFTA States.²⁵
57. Regulation 883/2004 does not require the EEA EFTA States to provide for a minimum benefit in its national legislation, but it is established case law that, to the extent the national law does include minimum benefits of the type in question,²⁶ the Regulation applies to such benefits.²⁷
58. Article 58 of the Regulation in its paragraph 1 provides that a beneficiary “*may not, in the EEA EFTA State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment [...]*”.
59. In line with the second paragraph of Article 58 the EEA EFTA State is, as long as the person concerned resides on its territory, obliged to pay a supplement which is equal to the difference between the total benefits due under Chapter 5 of the Regulation and the amount of minimum benefit pursuant to national law. From the outset the CJEU has held that “*Article 58 provides that where the legislation of the*

December 1964 in Case C-24/64 *A.M. Dingemans v Bestuur der Sociale Verzekeringsbank*, EU:C:1964:86; Judgment of 31 March 1977 in Case C-79/76 *Carlo Fossi v Bundesknappschaft*, EU:C:1977:59; Judgment of 4 November 1997 in Case C-20/96 *Kelvin Albert Snares v Adjudication Officer*, EU:C:1997:518; Judgment of 11 June 1998 in Case C-297/96 *Vera A. Partridge v Adjudication Officer*, EU:C:1998:280.

²⁵ See judgment of 5 May 2021 in Case E-8/20, *Criminal proceedings against N*, paragraph 71 and judgment of 14 May 2019 in Case E-2/18, *C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein*, paragraph 43 and judgment of 21 February 2013 in Case C-282/11 *Salgado González*, EU:C:2013:86, paragraphs 35 to 37.

²⁶ Judgment of 30 November 1977 in Case C-64/77 *Torri*, EU:C:1977:197, paragraph 7 (“**Torri**”).

²⁷ Judgment of 17 December 1981 in Case C- 22/81 *Browning*, EU:C:1981:316, paragraph 10 (“**Browning**”).

*State of residence makes provision for a minimum benefit, the benefit payable by that State will be increased by a supplement equal to the difference between the total benefits payable by the various Member States to whose legislation the worker was subject and that minimum benefit.*²⁸

60. The CJEU held that there is a “minimum benefit” within the meaning of Article 50 of Regulation No 1408/71 (and now Article 58 of Regulation 883/2004) where the legislation of the EEA EFTA State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess of the amount of benefit which they may claim solely on the basis of their periods of insurance and their contributions.²⁹
61. In its case law the CJEU has also noted that Article 58 covers cases “*where the periods of employment of the worker under the legislation of the states to which he was subject were relatively short with the result that the total amount of the benefits payable by those states does not provide a reasonable standard of living.*”³⁰
62. To ESA’s understanding, the Norwegian Government interprets the quote above as requiring that in order for the national benefit to be considered a “*minimum benefit*” within the meaning of Article 58 of the Regulation the purpose of the national legislation in question must be to provide a reasonable standard of living.
63. ESA submits that there is nothing in the wording of Article 58 of the Regulation itself that supports such conclusion. Article 58 only requires that a “minimum” benefit is fixed by the national legislation in question. It is guaranteeing a minimum “as high as those stipulated under the [national] law”, thus without implying any need to demonstrate that the benefit at issue seeks to ensure a certain, qualified standard of living.³¹
64. When referring to a “*reasonable standard of living*” in *Torri*, *Browning* and *Zaniewicz-Dybeck*,³² the CJEU merely sought to clarify the objective of Article 58 by referring to situations where the total amount of benefits payable to the person concerned is considered to be too low to cover the person’s needs. The objective of Article 58 is, as set out above, to ensure recipients of invalidity benefits a

²⁸ See *Torri*, paragraph 6 and judgment of 7 December 2017 in Case C-189/16, *Zaniewicz-Dybeck*, EU:C:2017:946, paragraph 58 (“**Zaniewicz-Dybeck**”).

²⁹ See *Browning*, paragraph 15. See also *Zaniewicz-Dybeck*, paragraph 45.

³⁰ *Torri*, paragraph 5, emphasis by ESA; *Browning*, paragraph 12; and *Zaniewicz-Dybeck*, paragraph 57.

³¹ Compare in the literature: Fuchs/ Cornelissen “*EU Social Security Law. A commentary on EU Regulations 883/2004 and 987/2009*”, 2015, p. 367.

³² *Torri*, paragraph 5, *Browning*, paragraph 12, *Zaniewicz-Dybeck*, paragraph 57.

minimum income which is in excess of the amount which they would normally be entitled to, when the national legislation includes such a specific guarantee.³³ Such guarantees would typically be triggered when the payable amounts are low, or in other words, do not provide for a reasonable standard of living. Article 58, and the case law can however not be interpreted as the Norwegian Government submits, as limiting the scope of application of Article 58 by requiring that the minimum benefit in question must provide a reasonable standard of living.

65. In any case, ESA observes that the stated purpose of the minimum annual benefit in the second paragraph of Section 12-13 NIA, as evidenced by the NIA itself and its preparatory works, can be viewed as designed *exactly* to provide a reasonable standard of living for the recipients of the minimum annual benefit.

66. As set out in Section 12-1 NIA, the purpose of invalidity benefits is to ensure income for persons who have had their earning capacity permanently reduced due to illness, injury or disability. ESA maintains that the Norwegian legislation in question contains an express guarantee that has as its objective to ensure the recipients of invalidity benefits a minimum income for the reasons explained below.

67. The provision concerning the calculation of the invalidity benefit in the Norwegian legislation in Section 12-11 NIA is clear that the basis for the calculation of the invalidity benefit is the pension-generating income during the five last calendar years preceding the onset of invalidity. At the same time, the second paragraph of Section 12-13 establishes a minimum annual benefit which is calculated based on a quotient of the basic amount set in the legislation. This minimum benefit is calculated completely independently of the pension generating income. As a result, the beneficiary will be entitled to a minimum benefit set out in in the second paragraph of Section 12-13 when this amount will exceed the amount the beneficiary can claim solely on the basis of their income in line with Section 12-11, or if he or she had no pensionable income at all.³⁴

68. It is stressed in the Preparatory works that “[t]he national insurance invalidity benefit must, among other things, ensure a minimum income to live on if the earning capacity is reduced due to disability. Chapter 7 therefore proposes a minimum annual benefit for new invalidity benefits. The minimum benefit results in an increased benefit for people who have had little or no previous income. It is

³³ *Browning*, paragraph 11.

³⁴ Compare paragraph 15 of *Browning*.

*proposed that married/cohabiting couples should receive a minimum benefit at the ordinary rate (2.28 G), and that single persons should receive a minimum benefit at the high rate (2.48 G)."*³⁵

69. Furthermore, paragraph 31 of the Request refers to sections of the preparatory works which clearly state that "[t]he benefits in the national insurance scheme shall both ensure everyone a minimum income (basic insurance) and ensure that one can maintain an appropriate standard of living (standard insurance). The basic security is ensured through the minimum benefits/minimum pension."³⁶

70. The preparatory works also recall that "in the specific motives [...] it is emphasised that the minimum benefit shall ensure a higher invalidity benefit for persons who have a low basis of calculation under Section 12-11".³⁷

71. ESA maintains that from the overall structure of the system of the Norwegian invalidity benefits it is clear that the minimum annual invalidity benefit as defined in the second paragraph of Section 12-13 is to be construed as a guaranteed minimum income in excess of the amount to which they would normally be entitled, and therefore constitutes a minimum benefit pursuant to Article 58.³⁸

5.4 The way in which the benefit is calculated pursuant to national law does not change its nature as a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004

72. In the second part of its question, the NIC asks whether the minimum annual benefit in the second paragraph of Section 12-13 NIA can be a "minimum benefit" within the meaning of Article 58 of Regulation 883/2004 when the national legislation

³⁵ See Prop. 130 L (2010-2011) *Amendments to the National Insurance Act (new invalidity benefit and old-age pension for disabled)*, page 171, point 12.2.2, "Minimum benefit". In Norwegian: "Folketrygdens uføretrygd skal blant annet sikre en minste inntekt å leve av hvis inntektsevnen er redusert på grunn av uførhet. I kapittel 7 foreslås det derfor en minste årlige ytelse for ny uføretrygd. Minsteytelsen medfører økt ytelse til personer som har hatt lav eller ingen tidligere inntekt. Det foreslås at gifte/samboende skal få en minsteytelse etter ordinær sats (2,28 G), og at enslige skal få en minsteytelse etter høy sats (2,48 G)."

³⁶ Prop. 130 L (2010-2011), page 96, point 7.4.1 "Introduction". In Norwegian: "Folketrygdens ytelser skal både sikre alle en minsteinntekt (grunnsikring) og sikre at en kan opprettholde tilvendt levestandard (standardsikring). Grunnsikringen ivaretas gjennom minsteytelsene/minstepensjonen."

³⁷ Prop 130 L (2010-2011), page 206. In Norwegian: "Minsteytelsen sikrer en høyere uføretrygd for personer som har et lavt beregningsgrunnlag" see also paragraph 31 of the Request.

³⁸ See also *Browning*, paragraphs 11 and 15 and *Zaniewicz-Dybeck*, paragraph 45.

provides that the benefit is to be proportionally reduced depending on the beneficiary's period of insurance.³⁹

73. ESA submits that the fact that the period of insurance could impact the calculation of the minimum annual benefit under the second paragraph of Section 12-13 NIA, cannot change the nature of that benefit as a minimum benefit under Article 58 of Regulation 883/2004.

74. The Norwegian Government accepts that the Regulation refers to “[...] schemes which provide a supplement to benefits determined according to the usual rules on social security period and income-based pensions when these benefits do not reach a set minimum level.” However, they also conclude that the Norwegian National Insurance Act has no such rules⁴⁰ and that the second paragraph of Section 12-13 does not constitute a minimum benefit, but simply an ordinary rule on determining entitlement to benefit applied on the basis of period of insurance and paid contributions.⁴¹ This reasoning is also reflected in the Court of Appeal judgment⁴² which stated:

*“It is clear from paragraphs 10-15 of Browning that Article 50 only provides a basis for a guarantee supplement **where national legislation contains an expressly guaranteed minimum amount for payment**, in cases where the calculation of benefit based on earning time and income does not enable a reasonable standard of living in the country of residence.”*

*[...] The prerequisite for awarding a guarantee supplement is therefore that national legislation provides **instructions for the payment of a guaranteed minimum amount**, in cases where ordinary pension calculation does not provide a benefit that enables a reasonable standard of living. The purpose seems to correspond to the Norwegian scheme of social benefits.*

The Court of Appeal agrees with the State that the National Insurance Act does not authorize a guaranteed minimum amount regardless of the earning period [...].”

³⁹ See also in that context Prop. 130 L (2010-2011), page 105 “[...] it could be perceived as unreasonable if someone who has little connection to Norway were to receive an equally high invalidity benefit as someone who has resided in Norway their whole life [...]” in Norwegian “[...] vil det kunne oppfattes som urimelig om en person som har liten tilknytning til Norge skal få like høy uføretrygd som en som har bodd i Norge hele livet. [...]”

⁴⁰ Chapter 3.8 of NAV's Circular R-45-00, as quoted by the NIC in paragraph 34 of the Request.

⁴¹ See paragraphs 71 and 76 of the Request.

⁴² Referred to in paragraph 35 of the Request. Emphasis by ESA.

75. ESA contests these conclusions, as there is nothing in the judgments in *Torri* and *Browning* suggesting that in order to be classified as a minimum benefit, the benefit in question has to be set as “***an expressly guaranteed minimum amount for payment.***”
76. The Norwegian Government also states that the rules on the minimum annual benefit in the second paragraph of Section 12-13 differ from the Swedish rules in *Zaniewicz-Dybeck* since the Norwegian benefit is not acquired solely through periods of residence, but also through periods of employment and it is not financed solely through tax, but through a combination of contributions from the members, employers and the State.⁴³ However, ESA notes that the minimum annual benefit in the second paragraph of Section 12-13 is acquired through periods of insurance (which in case of person with no income is dependent just on residence) and is granted to persons who do not have any income-based benefit.⁴⁴
77. Section 12-13 NIA provides in its first paragraph a general rule that the invalidity benefits shall be paid at a rate of 66 percent of the basis under Section 12-11 NIA, that is on the basis of pension-generating income during the five last calendar years preceding the onset of invalidity. Section 12-13 NIA in its second paragraph then establishes the minimum annual benefit in the event of invalidity expressed in specific amounts. The benefit is proportionally reduced in the event of a period of insurance shorter than 40 years. That period of insurance is the only variable factor that affects the calculation of the minimum annual benefit.⁴⁵
78. The fact that the benefit is individually calculated depending on the period of insurance does not mean that it loses its characteristic of being a minimum benefit or change the conclusion that when the calculation based on income and periods of insurance under Section 12-11 and the first paragraph of Section 12-13 NIA is lower than the “minimum annual benefit” under the second paragraph of Section 12-13 NIA the beneficiary is entitled to the “minimum annual benefit”.
79. ESA therefore submits that the fact that the period of insurance could impact the calculation of the minimum annual benefit under the second paragraph of Section

⁴³ See paragraph 81 of the Request.

⁴⁴ In paragraph 14 of *Zaniewicz-Dybeck* it is stated that: “*the guaranteed pension constitutes the basic form of cover under the Swedish state retirement pension system. It depends on the insurance period and may be granted to persons who do not have any income-based retirement pension or whose pension does not exceed a certain amount.*”

⁴⁵ Paragraph 48 of the Request.

12-13 NIA, cannot change the nature of that benefit as a minimum benefit under Article 58 of Regulation 883/2004.

80. With regard to the calculation itself, this is for the national court to determine, but ESA would like to point out that the CJEU did note that the supplement on the basis of Article 58 will be equal to the difference between the total benefits payable by the various EEA EFTA States to whose legislation the worker was subject and that minimum benefit.⁴⁶
81. ESA furthermore notes that the CJEU also ruled that for the purpose of calculating whether a person is entitled to a minimum benefit, Article 58 specifically provides that the actual amount of retirement pensions received by the person concerned from another EEA EFTA States is to be taken into account.⁴⁷ Finally, in accordance with further findings in *Zaniewicz-Dybeck* a benefit that is considered to be a minimum benefit within the meaning of Article 58 of Regulation 883/2004 must be calculated “*without (...) applying national provisions, such as those in the main proceedings, providing for a pro rata calculation.*”⁴⁸

CONCLUSION

Accordingly, for the reasons set out above, the Authority respectfully requests the Court to rule that:

There is a minimum benefit within the meaning of Article 58 of Regulation 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 proportionately reduced when the person has a shorter period of insurance than the full period of insurance, which is 40 years.

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⁴⁶ Paragraph 58-59 of *Zaniewicz-Dybeck* and paragraph 58-59 of the Advocate General Opinion in the same case.

⁴⁷ Paragraph 59 of *Zaniewicz-Dybeck*, see also the wording of Article 58 “*equal to all the periods taken into account for the payment.*”

⁴⁸ See paragraph 52 of *Zaniewicz-Dybeck*: “[...] when the competent institution of a Member State calculates a minimum benefit, such as the guaranteed pension at issue in the main proceedings [...] such a benefit must be calculated in accordance with Article 50 of the regulation, in conjunction with the provisions of national law, without, however, applying national provisions, such as those in the main proceedings, providing for a pro rata calculation.”. See also paragraph 54 of the same judgment.