Brussels, 26 November 2024
Case No: 91345
Document No: 1431581

ORIGINAL

IN THE EFTA COURT

APPLICATION

submitted pursuant to Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by

THE EFTA SURVEILLANCE AUTHORITY

represented by Claire Simpson, Melpo-Menie Joséphidès,
and Sigurbjörn Bernharð Edvardsson,
Department of Legal & Executive Affairs,
acting as Agents,

AGAINST

ICELAND

Seeking a declaration that Iceland has failed to fulfil its obligations under Article 29(1) of Regulation (EC) No 216/2008 and/or Article 28 of the EEA Agreement, by maintaining in force an administrative practice which precludes the transfer of the capital value of occupational pensions accrued in Iceland to the pension scheme of the European Union institutions.

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1 INTRODUCTION AND SUMMARY OF PLEAS-IN-LAW

1. The present application was prepared with support from Ciarán Burke and Per-Arvid Sjøgård, Legal Officers of the Authority's Internal Market Directorate.

2. This application concerns Iceland's refusal, by way of a consistent administrative practice, to allow staff members of the European Union Aviation Safety Agency ("**EASA**" or "**the Agency**") to transfer the capital value of their occupational pensions accrued in Iceland to the pension scheme of the European Union institutions ("**PSEUI**"). The fact that Iceland refuses to permit such transfers is uncontested.

3. The Authority submits that:

    i. **FIRST PLEA**: such a refusal is in breach of Article 29(1) of Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency ("**the EASA Regulation**" or "**the Regulation**");[1] and/or

    ii. **SECOND PLEA**: such a refusal is in breach of Article 28 EEA, the freedom of movement of workers.

4. In respect of the First Plea, the Court's ruling in this case will *inter alia* clarify the important point of whether a prescriptive reference ("*the Staff Regulations … shall apply*") to an act which has not been incorporated into the EEA Agreement can, *in the particular circumstances of the case*, have EEA law consequences for the relevant EFTA State (here, Iceland).

5. The First and Second Pleas are made both cumulatively and alternatively. Thus, while a finding of a breach under the First Plea would, in the Authority's submission, reinforce its arguments under the Second Plea, the Authority submits that Iceland's obligations

[1] Regulation (EC) No 216 of the European Parliament and of the Council of 20 February 2008, OJ L 79, 19.3.2008, p.1, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 163/2011 of 19 December 2011: see further footnote 17 below.

under Article 28 EEA (the Second Plea) apply irrespective of whether Article 29(1) of the EASA Regulation imposes obligations on Iceland in this case (the First Plea).

2 PRE-LITIGATION PROCEDURE

6. On 24 June 2019, the Authority received a complaint ("**the Complaint**") from an Icelandic citizen ("**the Complainant**") that the Icelandic authorities had refused to transfer his occupational pension rights, which had accrued in Iceland, to the PSEUI.[2] The Complainant had been a staff member of the Icelandic Civil Aviation Authority from 2001 until 2009,[3] at which time he became employed by EASA in Köln, Germany. He submitted the pension transfer request after commencing work for EASA, and received a refusal from the Icelandic Social Insurance Administration in 2012.[4] The Complainant unsuccessfully resubmitted his request (via the European Commission Office for Administration and Payment of Individual Entitlements or "**PMO**") in 2019.[5]

7. On 27 September 2019, the Authority informed Iceland of the Complaint and requested certain information.[6] Further correspondence was exchanged between the Authority and Iceland.[7]

[2] See the Complaint form at **Annex A.1**.
[3] See an e-mail from the Icelandic Transport Authority confirming the Complainant's employment with the Icelandic Civil Aviation Administration from 2 February 2001 to 28 February 2009, and a certificate issued by the Icelandic Civil Aviation Administration confirming the commencement of the Complainant's employment in 2001: **Annex A.2** (English original and English translation, respectively) and **Annex A.2a** (Icelandic original of certificate).
[4] See the transfer refusal of the Icelandic Social Administration, dated 2 July 2012 ("**the 2012 Refusal**") at **Annex A.3** (English translation) and **Annex A.3a** (Icelandic original). See more generally the decision of 4 June 2019 of the Authority Responsible for Concluding Contracts of Employment of the European Commission ("**the 2019 Commission Decision**") (**Annex A.4**), which confirms at pp. 1 and 5 that the 2012 Refusal took place.
[5] See letter from the European Commission (PMO) (**Annex A.5**), confirming receipt of the Complainant's new application dated 28 February 2019 for transfer of his relevant Icelandic pension rights to the PSEUI, and e-mail from the European Commission (PMO) to the Complainant dated 20 October 2021 (**Annex A.6**), confirming that the PMO's reminders to the concerned Icelandic pension schemes (regarding the Complainant's pension transfer request) remain unanswered.
[6] Request for Information ("**RQI**"), **Annex A.7**.
[7] See e.g. Reply to the RQI, **Annex A.8**; Extract from letter following up to the package meeting of 28 May 2020, **Annex A.9**; Reply of 13 August 2020 to the letter following the package meeting, **Annex A.10**.

8. On 10 February 2021, the Authority sent a letter of formal notice to Iceland.[8] The letter concluded that, by maintaining in force an administrative practice which precluded the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI, Iceland had failed to fulfil its obligations under Article 29 of the EASA Regulation and/or Article 28 EEA.

9. In its reply of 23 June 2021,[9] Iceland submitted that Article 29 of the EASA Regulation did not require Iceland to allow the transfer of accrued pension rights to the PSEUI. Iceland did not contest that the EASA Regulation had been incorporated into the EEA Agreement. It also recognised that: "[t]*he text of Article 29 of the EASA Regulation, as adapted, explicitly states that the EU Staff Regulations shall "apply to the staff of the Agency"*."[10] It however observed that the EU Staff Regulations[11] had not themselves been incorporated into the EEA Agreement. Iceland considered *inter alia* that a "*simple reference within one EU act to another EU act* [was] *insufficient to create an obligation to implement or transpose the act referred to*."[12] It also submitted that there was no obstacle to the free movement of workers under Article 28 EEA. In Iceland's view, Article 28 EEA does not confer rights in relation to employment with agencies to which the EFTA States "*are not party*".[13]

10. On 15 March 2023, the Authority delivered a reasoned opinion ("**the Reasoned Opinion**") to Iceland.[14] It concluded that, by maintaining in force an administrative practice which precluded the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI, Iceland had failed to fulfil its obligations under Article 29 of the EASA Regulation and Articles 3 and 28 EEA. The Authority required Iceland to take the measures necessary to comply with the Reasoned Opinion within two months of receipt, i.e. by 15 May 2023 ("**the Compliance Date**").

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[8] "**Letter of Formal Notice**", **Annex A.11**.
[9] Reply to the Letter of Formal Notice, **Annex A.12**.
[10] *Ibid*, p.2.
[11] i.e. Council Regulation (EEC, EURATOM, ECSC) No 259/68 of 29 February 1968 laying down the Staff regulations of Officials and the Conditions of Employment of Other Servants of the European Communities ("**Council Regulation No 259/68**"), OJ L 56, 4.3.68, p.1, as amended. See further paragraph 19 below.
[12] Reply to the Letter of Formal Notice, **Annex A.12**, p.2.
[13] *Ibid*, pp.2-3.
[14] **Annex A.13**.

11. On 15 May 2023, Iceland replied to the Reasoned Opinion.[15] Iceland maintains its position that it has not breached Article 29 of the EASA Regulation or Articles 3 and 28 EEA.

12. The Authority therefore submits the present Application to the Court.[16]

3 RELEVANT LAW

3.1 EEA Law

13. Article 3 EEA provides:

> *"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement."*

14. Article 7 EEA provides:

> *"Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or made, part of their internal legal order as follows:*
>
> *(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties.* […]*"*

15. Article 28 EEA provides:

> *"1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States*

[15] Reply to the Reasoned Opinion, **Annex A.14**.
[16] EFTA Surveillance Authority decision (10 July 2024) to refer the case to the EFTA Court, **Annex A.15**.

as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) […]

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers."

16. The EASA Regulation was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 163/2011 of 19 December 2011.[17] It entered into force in the EEA on 1 March 2013.

17. Article 29 of the EASA Regulation, entitled "*Staff*", provides (emphasis added):

> *"**1. The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities** and the rules adopted jointly by the institutions of the European Communities for purposes of the application of those Staff Regulations and Conditions of Employment **shall apply to the staff of the Agency**, without prejudice to the application of Article 39 of this Regulation to the members of the Board of Appeal.*

[17] OJ L 76, 15.2.2012, p.51 ("**JCD No 163/2011**" or just "**the JCD**"). The EASA Regulation has been repealed by Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, OJ L 212, 22.8.2018, p.1 ("**Regulation (EU) 2018/1139**" or "**the New EASA Regulation**"). Regulation 2018/1139 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 114/2023 of 28 April 2023, OJ L 2294, 09.11.2023, p.1. It entered into force in the EEA on 16 July 2024, thus after the Compliance Date. Regulation 2018/1139 does not therefore form part of this Application.

> *2. Without prejudice to Article 42, the powers conferred on the appointing authority by the Staff Regulations and the Conditions of Employment shall be exercised by the Agency in respect of its own staff.*
>
> *3. The Agency's staff shall consist of a strictly limited number of officials assigned or seconded by the Commission or Member [or EFTA]*[18] *States to carry out management duties. The remaining staff shall consist of other employees recruited by the Agency as necessary to carry out its tasks.*
>
> *[**4. By way of derogation from Article 12(2)(a) of the Conditions of employment of other servants of the European Union, nationals of the EFTA States enjoying their full rights as citizens may be engaged under contract by the Executive Director of the Agency**.]*[19]"

18. Article 30 of the EASA Regulation, entitled "*Privileges and immunities*", provides (emphasis added):

> *"The Protocol on the Privileges and Immunities of the European Communities annexed to the Treaties establishing the European Community and the European Atomic Energy Community shall apply to the Agency.*
>
> *[**The EFTA States shall apply to the Agency and to its staff the Protocol of Privileges and Immunities of the European Union**[20] **and applicable rules adopted pursuant to that Protocol**.]"*[21]

19. Council Regulation No 259/68 (EEC, Euratom, ECSC)[22] lays down, in one legal instrument, the Staff Regulations of officials ("**the Staff Regulations**") and the Conditions of Employment of other Servants ("the **Conditions of Employment**") of the European Union. Article 11(2) of Annex VIII (Pensions) to the Staff Regulations provides, and provided at the Compliance Date (emphasis added):

> *"*[…] *2. **An official who enters the service of the Union after:***
>
> ***— leaving the service of a government administration or of a national or international organization**; or*
>
> *— pursuing an activity in an employed or self-employed capacity;*
>
> ***shall be entitled,** after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations,*

[18] As adapted by point 3(a) of the Annex to JCD No 163/2011.
[19] As adapted by point 3(m) of the Annex to JCD No 163/2011.
[20] Protocol (No 7) on the privileges and immunities of the European Union ("**the Protocol on Privileges and Immunities**" or just "**the Protocol**"), OJ 2016 C 202 p. 266.
[21] As adapted by point 3(n) of the Annex to JCD No 163/2011.
[22] See footnote 11 above.

> ***to have paid to the Union the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities****.*
>
> *In such case the appointing authority of the institution in which the official serves shall, taking into account the official's basic salary, age and exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Union pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.*
>
> *Officials may make use of this arrangement once only for each Member State and pension fund concerned;* […]"

20. Article 11(2) of Annex VIII to the Staff Regulations also applies to temporary staff such as the Complainant, by virtue of Article 39(2) of the Conditions of Employment, which provides: "*Article 11(2) and (3) of Annex VIII of the Staff Regulations shall be applied by analogy to servants within the meaning of Article 2 of these Conditions of Employment*". Article 2 relates to "*temporary staff*".

3.2 National law

21. Article 1, fourth paragraph, of Act No. 129/1997 on Mandatory Pension Insurance and on the Activities of Pension Funds (*lög um skyldutryggingu lífeyrisréttinda og starfsemi lífeyrissjóða*) as amended ("**the Pensions Act**") requires all employees, and those engaged in commercial operations or self-employment, to join and contribute to a pension fund from the ages of 16 to 70.[23]

22. Article 19(1) and (2) of the Pensions Act provide *inter alia* that individuals should not lose earned pension rights because they cease to make contributions to a particular fund, nor should they lose or gain rights because they divide their contributions between more than one pension fund. The provision provides, at paragraphs three and four:

[23] The Icelandic original reads: "*Öllum launamönnum og þeim sem stunda atvinnurekstur eða sjálfstæða starfsemi er rétt og skylt að tryggja sér lífeyrisréttindi með aðild að lífeyrissjóði frá og með 16 ára til 70 ára aldurs*." The Icelandic pension system is based on three pillars. The first is a tax-financed public pension. The second is a mandatory occupational system, to which Article 1, fourth paragraph of the Pensions Act refers. The third is a voluntary personal pension scheme, whereby wage earners can save a portion of their earnings. See further Reply to the RQI (**Annex A.8**), pp.2-3.

[[3] "Contributions and, in consequence, the entitlements arising from them may be transferred between pension funds when the receipt of pension commences, for the purpose of facilitating the implementation of this Article.

[4] Pension contributions of foreign nationals emigrating from Iceland may be reimbursed, provided that this is not prohibited under an international agreement to which Iceland is party. Such reimbursement may not be limited to only part of the contributions, except on a legitimate actuarial basis."[24]

23. The EASA Regulation was implemented into Icelandic national law by Article 3 of Regulation No. 812/2012 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (*reglugerð um sameiginlegar reglur um almenningsflug og stofnun Flugöryggisstofnunar Evrópu*).[25] It provides, in relevant part:

"Implementation:

With this regulation the following EU regulations enter into force, with those changes and amendments which follow from Annex XIII of the EEA Agreement, Protocol 1 to the EEA Agreement and other, relevant provisions:

a. Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency […]*."*[26]

24. For completeness, the Authority notes that Regulation No. 812/2012 was repealed and replaced by Regulation No. 270/2024,[27] carrying the same title, which entered into

[24] Official translated version of the Pensions Act, accessible here: *Lög um skyldutryggingu lífeyrisréttinda og starfsemi lífeyrissjóða*. The original Icelandic states: "[3] *Heimilt er að flytja iðgjöld og þar með réttindi sem þeim fylgir milli lífeyrissjóða þegar að töku lífeyris kemur í því skyni að auðvelda framkvæmd þessarar greinar.* [4] *Heimilt er að endurgreiða iðgjöld til erlendra ríkisborgara þegar þeir flytjast úr landi enda sé slíkt ekki óheimilt samkvæmt milliríkjasamningi sem Ísland er aðili að. Óheimilt er að takmarka endurgreiðsluna við tiltekinn hluta iðgjaldsins nema á tryggingafræðilega réttum forsendum*."

[25] Regulation No. 812/2012 was originally adopted based, *inter alia*, on Article 146(2) of the Icelandic Aviation Act (*lög um loftferðir*) No. 60/1998. This latter act was repealed and replaced by the New Aviation Act No. 80/2022, with entry into force on 14 July 2022. Under Article 257(2) of the New Aviation Act, Regulation No. 812/2012 remained in force until it was repealed and replaced by Regulation No. 270/2024 (implementing the New EASA Regulation): see footnote 27 below.

[26] The Icelandic original reads: "*Með reglugerð þessari öðlast gildi eftirfarandi reglugerðir Evrópuþingsins og ráðsins og framkvæmdastjórnarinnar með þeim breytingum og viðbótum sem leiðir af XIII. viðauka samningsins um Evrópska efnahagssvæðið, bókun 1 um altæka aðlögun og öðrum ákvæðum hans: a) Reglugerð Evrópuþingsins og ráðsins (EB) nr. 216/2008 frá 20. febrúar 2008 um sameiginlegar reglur um almenningsflug og um stofnun Flugöryggisstofnunar Evrópu* […]"

[27] Regulation No. 270/2024 was issued by the relevant Minister under Article 20, first paragraph, of the New Aviation Act No. 80/2022.

force on 2 March 2024. Regulation No. 270/2024 contains a provision (Article 4) in similar terms to Article 3 of Regulation No. 812/2012 (cited above). It implements Regulation (EU) 2018/1139 (the New EASA Regulation), which replaced the EASA Regulation, into national law. As noted above at footnote 17, the New EASA Regulation entered into force on 16 July 2024 in the EEA, thus after the Compliance Date set by the Authority's Reasoned Opinion. Regulation No. 812/2012 is therefore the national regulation in force at the Compliance Date.

4 THE AUTHORITY'S SUBMISSIONS

4.1 FIRST PLEA: BREACH OF ARTICLE 29(1) OF THE EASA REGULATION

4.1.1 Introduction and Iceland's Administrative Practice

25. It is undisputed that the EASA Regulation was, at the Compliance Date, incorporated into the EEA Agreement. Iceland recognises that Article 29(1) of the EASA Regulation "*explicitly*"[28] provides that "[t]*he* […] *Staff Regulations … shall apply to the staff of the Agency*."

26. Under Article 11(2) of Annex VIII to the Staff Regulations ("**Article 11(2)**"), Agency staff who are EEA nationals, such as the Complainant, are entitled to have transferred to the PSEUI the capital value of their occupational pensions accrued in Iceland:

> "*An official who enters the service of the Union* [e.g. EASA] *after:*
>
> *–* ***leaving the service of a government administration or of a national or international organization****; or*
>
> *– pursuing an activity in an employed or self-employed capacity;*
>
> ***shall be entitled,*** *after establishment but before becoming eligible for payment of a retirement pension* […] ***to have paid to the Union the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities****.* […]"[29]

[28] Reply to the Letter of Formal Notice, **Annex A.12**, p.2.
[29] Emphasis added.

27. The wording of these provisions is clear. Indeed, the prescriptive formulation in Article 29(1) leaves little room for doubt, at least if the words are given their plain, natural meaning ("*the Staff Regulations … shall apply*"). Iceland does not and will not however ensure that the treatment foreseen in Article 11(2) applies to EEA nationals employed by EASA. Throughout the pre-litigation procedure, Iceland has consistently maintained that it does not and is not required to transfer the capital value of occupational pensions accrued in Iceland to the PSEUI.[30] Iceland has drawn the Authority's attention to Article 19(4) of the Icelandic Pensions Act, which provides for the *reimbursement* of pension contributions of *foreign* nationals on emigration. It is unclear to the Authority whether Iceland considers that – in principle – such a provision might meet the requirements of Article 11(2), at least for non-Icelandic EEA nationals. Iceland has however confirmed that such a rule does not apply to Icelandic nationals and that, in order not to discriminate against its own nationals, it will not apply such a rule to other EEA nationals, either.[31] Thus, it is undisputed that Iceland will not grant or otherwise secure the rights provided for under Article 11(2) in respect of EFTA State or other EEA nationals.

28. *Concretely*, Iceland's position has manifested itself by way of a consistent administrative practice in relation to the Complainant[32] and other Icelandic nationals working (or seeking to work) for EASA.[33] As explained in a letter from EASA to the Authority:

> "*The persistent refusal of the Icelandic authorities to adhere to the EEA rules not only compromises the entitlements of our Icelandic staff members, including Mr Steinþórsson* [the Complainant]*, but also contravenes established legal*

[30] See e.g. Reply to the Letter of Formal Notice, **Annex A.12**, Reply to the Reasoned Opinion, **Annex A.14**, Reply to the follow-up letter to the package meeting, **Annex A.10**, p.2.
[31] See Reply to the follow-up letter to the package meeting, **Annex A.10**, p.2 and Reply to the RQI, **Annex A.8**, pp.2-3.
[32] See the documents referred to at footnotes 4 and 5 above.
[33] In addition to the documents specifically related to the Complainant, see also: an email of 4 February 2019 from the Icelandic authorities to EASA at **Annex A.16** (English translation) and **Annex A.16a** (Icelandic original), refusing such a transfer in relation to an Icelandic colleague of the Complainant; the Complaint form (**Annex A.1**), p.2, in which the Complainant refers to two other Icelandic colleagues who would (otherwise) be entitled to make transfers to the PSEUI; the Reply to the follow-up letter to the package meeting, **Annex A.10**, p.1, para. 2, confirming that the Icelandic Ministry's response is not specific to the Complainant, and is "*based on general information about the implementation* [sic] *applicable rules in similar cases*"; and the letter of 16 April 2024 from the Executive Director of EASA to the President of the EFTA Surveillance Authority ("**the EASA Letter**"), **Annex A.17**.

> *frameworks governing cross-border employment within the European Economic Area.* […]
>
> *The denial of the transfer of pension rights places our Icelandic staff at a distinct disadvantage vis-à-vis their EU counterparts, thereby infringing upon their vested legal entitlements.*
>
> *In addition to the negative impact on actual individual cases, such refusal is likely to deter potential candidates of Icelandic nationality from accepting EASA offers of employment*, *thereby having an impact on EASA recruitment of Icelandic staff members*. *Prior to offering a contract of employment, our Agency must now inform the Icelandic candidates of the practice of their national authorities regarding pension rights*."[34]

29. This practice of the Icelandic authorities has, to date, related to *Icelandic* nationals. Iceland has however confirmed that the same practice (no transfer of pension rights) would apply to other EEA nationals moving from Iceland to work for EASA.[35] This confirmation evidences that Iceland's refusal practice applies to *all* EEA nationals leaving Iceland to work for EASA. The Authority submits that this, and the practice described and evidenced in paragraphs 27 and 28 above, together evidence a consistent and general administrative practice within the meaning of the case-law.[36]

30. The Authority accordingly submits that, by maintaining in force an administrative practice which fails to ensure that EEA nationals may transfer to the PSEUI the capital value of the occupational pensions they have accrued in Iceland, Iceland is in breach of Article 29(1) of the EASA Regulation. The breach is also supported by an interpretation of Iceland's obligations under Article 3 EEA.

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[34] EASA Letter, **Annex A.17**, pp. 1-2.

[35] See the documents cited at footnote 31 above and **Annex A.10**, p.1, para, 2.

[36] That is, the practice must be "*to some degree, of a consistent and general nature*": see e.g. Case E-6/12 *EFTA Surveillance Authority* v *Norway*, para. 58 and the case-law cited. See also paras 60-63 thereof, where the Court took into consideration statements made by the State about its practice as evidence of the nature and extent of the administrative practice. It is settled case-law of the CJEU that any official document issued by the authorities of the EEA State concerned may be considered a valid source of information for the purposes of initiating infringement proceedings against that State, see e.g. judgment of 11 December 2014 in *Commission* v *Greece*, Case C-677/13, EU:C:2014:2433, para. 66, and case-law cited. For other examples of the CJEU relying on statements from a State as evidence of that State's consistent practice, see e.g. judgments of 26 April 2005 in *Commission* v *Ireland*, C-494/01, EU:C:2005:250, para. 74, and of 5 March 2009 in *Commission* v *Spain*, C-88/07, EU:C:2009:123, para. 61.

31. Iceland has, in correspondence, raised a number of arguments why no such breach exists:

    i. First, Iceland argues that Article 29 of the EASA Regulation does not place obligations on States, but rather on EASA as an employer. In other words, it argues that the *scope* of Article 29 is limited, and does not apply to States;

    ii. Second, Iceland argues that even if the Staff Regulations are capable of placing obligations on States, no such obligations apply to Iceland. This is because the Staff Regulations are not themselves incorporated into the EEA Agreement. In other words, Iceland claims that any reference to the Staff Regulations in Article 29 of the EASA Regulation is ineffective – that such references have no *binding effect*.

32. These arguments are addressed in turn.

4.1.2 The Scope of the Obligations imposed under Article 29 of the Regulation: Article 29(1) may require States to take action

33. By its first argument, Iceland contends that the wording of Article 29 of the EASA Regulation does not place obligations on the EFTA States, but rather on the Agency itself. It refers *inter alia* to the fact that the adaptation text added at Article 29(4) refers only to the *ability* of nationals of EFTA States to be employed by EASA, and does not place any specific obligations on the EFTA States.[37]

34. The Authority acknowledges that the text of Article 29(1), "[t]*he* […] *Staff Regulations … shall apply to the staff of the Agency*," does not identify which actor must apply the Staff Regulations (albeit that the obligation to apply the Staff Regulations to Agency staff is itself clear, beyond any doubt). In line with settled case-law, the Authority has therefore considered the legislative context and purpose pursued by the provision and the act of which it forms part, and the preference which must be given to the

[37] See e.g. Reply to the Letter of Formal Notice, **Annex A.12**, p.2 and Reply to the RQI, **Annex A.8**, p.2.

interpretation which ensures the provision retains its effectiveness.[38] The Authority submits that consideration of all these factors points to an interpretation of Article 29(1) which is capable of placing obligations on EFTA (and EU) States, not just the Agency itself, and which may therefore require Iceland to act in the present case.[39]

35. **First**, by requiring the *Staff Regulations* to be applied to Agency staff, Article 29(1) of the EASA Regulation makes the Staff Regulations part of the critical *legislative context*. The Staff Regulations thus 'operationalise' Article 29(1). Indeed, without the Staff Regulations (or Conditions of Employment), Article 29(1) is ineffective. The Staff Regulations must therefore logically be consulted in order to determine which party or person must act. It is plain from the text of the relevant provision of the Staff Regulations, in this case, Article 11(2), that staff have a right to the transfer of the relevant capital value of acquired pension rights to the PSEUI. Where such pension rights derive from an occupational pension fund of a State, the relevant State (or State body) must actually transfer that capital value to the PSEUI, in order for the staff member to enjoy their rights – that is, in order for the rights *to be effective*. Thus, where such rights are acquired in Icelandic occupational pensions, *Iceland* must permit or facilitate the relevant transfer of the capital value accrued to the PSEUI.

36. **Second**, the multiple adaptations made by JCD No 163/2011 make clear that not only the effect, but also the *intention*, when incorporating the EASA Regulation into the EEA Agreement was, *inter alia*, to place obligations on the EFTA States. Point 3(a) of the Annex to the JCD provides that the term 'Member State(s)' shall be understood as also meaning the EFTA States. In this way, obligations are expressly placed on Iceland under, for example, Article 10 (oversight and enforcement) and Article 11 (recognition of certificates) of the EASA Regulation, in the same way that such obligations apply to the EU Member States. The fact that Article 29(1) does not expressly identify *any* actor on which an obligation is placed does not mean that Iceland or the other EEA States (or even EASA itself) suddenly have no obligations at all under that provision. Rather,

[38] Judgment of 25 January 2024, Case E-2/23 *A Ltd* v *Finanzmarktaufsicht* ("***A Ltd***"), para. 43 and the case-law cited.

[39] See further Section 4.1.3 below. The Authority uses the terms "*capable of*" and "*may*", because whether an obligation applies to a State (rather than the Agency) will depend on which particular provision of the Staff Regulations is relevant.

it means that the Staff Regulations must be consulted to identify where the responsibility lies.

37. The CJEU has considered the relevant provision of the Staff Regulations in the present case, namely Article 11(2), and it is settled case-law that Article 11(2) is capable of placing obligations on EU Member States. This is so, despite the fact that there is no express reference to EU Member States in Article 11(2), either. As the CJEU held in **Case 137/80 Commission v Belgium**, the Staff Regulations, even in the absence of any express reference to a State, place obligations on an EU Member State *insofar as their cooperation is necessary to give effect to those regulations*.[40]

38. In that case, similarly to the argument of Iceland in respect of Article 29(1), Belgium argued that the scope of Article 11(2) of the Staff Regulations was limited to the legal relations between the European Community employer and its servants, and did not require Belgium (or any other State) to ensure the relevant capital transfer could take place.[41] Belgium referred to the fact that Article 11(2) did not expressly require States to act. This argument about the scope of Article 11(2) was rejected by the CJEU. It held that the Staff Regulations did place obligations on EU Member States (in other words, Member States fell within the *scope* of the regulations) in so far as their cooperation was necessary in order to give effect to those regulations.[42] The right/entitlement under Article 11(2) was intended to ensure that EU officials could retain their national rights and have them taken into account under the EU scheme. If Member States were entitled to refuse to lay down rules for the transfer of pension rights, this would deprive EU staff of the very right granted to them under Article 11(2).[43]

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[40] Judgment of 20 October 1981, *Commission* v *Belgium* ("***Commission* v *Belgium***"), Case 137/80, C:1981:237. See also judgment of 16 December 2004, *Gregorio My* v *ONP* ("***Gregorio My***"), C-293/03, C:2004:821, paras. 44-49.

[41] See pp. 2400-2401 of the original case report, [1981] ECR 2393.

[42] Case 137/80 *Commission* v *Belgium*, para. 8.

[43] *Ibid*, paras. 11-13. See also judgment of the CJEU of 22 December 2022, *WP* v *INS* ("***WP***"), C-404/21, EU:C:2022:1023, para. 38, confirming, by reference to *Commission* v *Belgium*, that the Staff Regulations are binding on Member States in so far as their cooperation is necessary to give effect to those regulations. In other words, Member States fell within the *scope* of the Staff Regulations where action on their part was needed to make the provision in question effective.

39. The question of whether Article 11(2) of the Staff Regulations requires action on the part of States has thus been settled in the case-law of the CJEU. That States must take action is also underpinned by their obligations under Articles 4(3) TEU and/or 3 EEA to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.[44]

40. This is precisely the case here. Article 29(1) of the Regulation and the related Article 11(2) of the Staff Regulations require action on Iceland's part to be effective. Iceland's argument that the absence of an express reference in Article 29(1) to EFTA States (and, by implication, to EU Member States) is determinative in this case is unsupported by case-law. It would also logically lead to the undesirable situation in which, because no State actor is expressly identified, Article 29(1) of the EASA Regulation is wholly or partly ineffective.[45]

41. **Third**, Iceland has observed that Article 30 of the EASA Regulation was expressly adapted to require the EFTA States to "*apply to the Agency and to its staff the Protocol of Privileges and Immunities of the European Union and applicable rules adopted pursuant to that Protocol*".[46] It argues that, because Article 29 was not so adapted, this demonstrates that Article 29 was not intended to place obligations on EFTA States. This argument does not however help Iceland's case.

42. Article 30 clearly places (by Iceland's own admission[47]) an obligation on Iceland to apply ("*[t]he EFTA States shall apply*") to the Agency's staff "*the applicable rules*

[44] See e.g. judgment of 15 July 2015 in Case E-2/15 *EFTA Surveillance Authority* v *Iceland*, para. 18 and the case-law cited, and judgment of 30 April 1998 in Case E-7/97, *ESA* v *Norway*, para. 16. See also, in relation to Article 5 of the EEC Treaty (Article 4(3) TEU), Case 137/80 *Commission* v *Belgium*, para. 9: "*Consequently, where a provision of the Staff Regulations requires national measures for its application, the Member States are bound under Article 5 of the EEC Treaty to adopt all appropriate measures, whether they be general or particular*".

[45] See Case 137/80 *Commission* v *Belgium*, paras. 10-13, where the CJEU rejected on this basis such an interpretation in relation to Article 11(2) of the Staff Regulations. See also E-2/23 *A Ltd*, para. 43 and the case-law cited (preference must be given to the interpretation which ensures a provision's effectiveness). See further judgment of 10 December 2010 in Case E-2/10, *Kolbeinsson*, para. 46

[46] See e.g. Reply to the RQI, **Annex A.8**, p.2: "*A different approach is taken in the adaptation text to Article 30 of Regulation (EC) 216/2008, where the adaptation text expressly places the obligation upon the EFTA States to apply to the Agency and its staff the Protocol of Privileges and Immunities of the EU and applicable rules adopted pursuant to that Protocol*."

[47] *Ibid*.

adopted pursuant to [the] *Protocol*". The Protocol provides a legal basis for the adoption of measures relating to staff employed by the EU. The Staff Regulations were indeed adopted pursuant to the Protocol, more precisely pursuant to Article 7 and Articles 12 to 16 of the Protocol, together with Article 24 of the Treaty of Brussels.[48] Thus, by way of an express provision in JCD No 163/2011, Iceland has accepted the obligation to apply (and be bound by, to the extent relevant) the Staff Regulations, as they constitute applicable rules adopted pursuant to the Protocol. The Staff Regulations must therefore be applied by Iceland, where (as here) relevant.

43. **Fourth**, Recital 4 of the Preamble to JCD No 163/2011 records the *purpose* behind incorporating the EASA Regulation, thus together with the relevant adaptations, into the EEA Agreement:

> "*Regulation (EC) No 216/2008 should therefore be incorporated into the Agreement* ***in order to allow for the full participation of the EFTA States in the European Aviation Safety Agency***."[49]

44. This, in the Authority's submission, shows the intention fully to involve the EFTA States (and by extension their nationals) in the work of EASA.[50] This is also reflected in Point 3(m) of the Annex to the JCD, which, by adding a new Article 29(4) to the Regulation, *ensured* that EFTA State nationals could be employed by EASA. If the intention had been to limit the extent to which the Staff Regulations would then apply to such nationals, an adaptation could have been made to Article 29(1). However, this did not take place. Instead, the adapted text of Article 29(4), read in the context of Article 29(1),

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[48] See the Preamble to the Staff Regulations, which records the legal basis for their adoption. See in particular Article 14 of the Protocol on Privileges and Immunities, while the Treaty of Brussels (Treaty establishing a Single Council and a Single Commission of the European Communities) may be found at OJ 152 13.7.1967, pp.2-17 (see in particular Article 24).

[49] Emphasis added. Recitals may help explain the purpose and intent behind an instrument, which may subsequently help determine the scope of a legal act, see e.g. judgment of the Grand Chamber of the CJEU of 3 September 2024 in *Illumina, Grail* v *Commission*, Joined Cases C-611/22 P and C-625/22 P, EU:C:2024:677, paras. 187-203, and judgments of the EFTA Court of 11 December 2012 in Case E-2/12, *HOB Vín*, para. 60, and of 28 January 2013 in Case E-16/11, *Icesave*, where the EFTA Court considered the recitals of Directive 94/19/EC when construing the relevant provisions of that directive.

[50] This intention can also be seen in other adaptations made by the JCD. For example, at point 66n of Annex XIII to the EEA Agreement: adaptation (o) ensures that important documents are also produced in Icelandic and Norwegian, on a par with the official languages of the EU, while adaptation (t) provides for the right to communicate with EASA in Icelandic and Norwegian, and adaptation (r) provides that EFTA State nationals shall be eligible as members of the EASA Boards of Appeal.

suggests that the intention was that the relevant parts of the Staff Regulations and Conditions of Employment *should* apply in full to EFTA State nationals. Article 29(4) provides (emphasis added):

> "***By way of <u>derogation</u> from Article 12(2)(a) of the Conditions of employment of other servants of the European Union**, nationals of the EFTA States enjoying their full rights as citizens may be engaged under contract by the Executive Director of the Agency*."

45. Article 12(2)(a) of the Conditions of Employment provides the rule that (save in exceptional cases), temporary staff must be nationals of the EU Member States. The derogation from this provision ensures that EFTA State nationals are included. But the fact that a "*derogation*" to the Conditions is made in Article 29(4) of the Regulation must also logically imply that these Conditions (in the absence of any other derogation or limitation) <u>otherwise apply in full</u>, in line with Article 29(1). Article 29(1) provides that "[t]*he Staff Regulations of Officials of the European Communities, the Conditions of Employment of other Servants of the European Communities* […] *shall apply to the staff of the Agency* […]." By including a derogation (in Article 29(4)) *only* in relation to one of the Conditions, this strongly suggests that the Staff Regulations and Conditions of Employment (which form part of the one same legal act)[51] are otherwise intended to apply in full.

46. **<u>Finally</u>**, the Authority observes that the *objectives* of the EASA Regulation aim at achieving a *uniform* level of application and implementation across Europe, in respect of civil aviation safety.[52] Full participation of the EFTA States in the Agency, as foreseen in Recital 4 of the Preamble to the JCD, contributes to achieving such uniformity <u>across the EEA</u>. By refusing to transfer pension rights acquired in Iceland to the PSEUI (and thereby disincentivising people who have worked in Iceland from applying to EASA), Iceland undermines the Agency's ability to choose qualified staff

[51] As explained at paragraph 19 above, the Staff Regulations and Conditions of Employment are together laid down in the Annex to the same act, Council Regulation Council Regulation No 259/68 (EEC, Euratom, ECSC).

[52] The Regulation's "*principal objective*" is "*to establish and maintain a high **uniform level** of civil aviation safety in Europe*" (Article 2(1), emphasis added), through the means of, *inter alia*, "***uniform implementation** of all necessary acts by the **national aviation authorities and the Agency** within their respective areas of responsibility*" (Article 2(3)(d), emphasis added).

from Iceland compared with other EEA States.[53] Such an approach is inconsistent with the stated aim of achieving uniformity across the EEA.

47. For the above reasons, the Authority submits that Article 29(1) must be interpreted in a manner that is capable of placing obligations on EFTA (and EU) States, not just on the Agency itself, and which may therefore require Iceland to act in the present case.[54]

4.1.3 The Binding Nature of the Obligations imposed under Article 29 of the Regulation in this Case

48. By its second argument, Iceland contends that, because the Staff Regulations are not themselves incorporated into the EEA Agreement, any reference to them in Article 29 of the EASA Regulation is ineffective. In such circumstances, Iceland argues that no obligations by reference to the Staff Regulations can be placed upon it. Iceland refers in particular to Article 7 EEA, and to the fact that the Staff Regulations are not referred to or contained in the Annexes to the EEA Agreement.[55]

49. The Authority does not dispute that the Staff Regulations are not incorporated as such into the EEA Agreement. However, the Authority submits that the reference to the Staff Regulations in Article 29 of the EASA Regulation is not without legal effect.

50. **First**, the Authority recalls that the EASA Regulation *is* a regulation which, within the meaning of Article 7 EEA, is referred to in the Annexes to the EEA Agreement (Annex III, points 66a, 66r, 68a and 66n) and the related JCD No 136/2011. It is undisputed that the EASA Regulation is incorporated into the EEA Agreement and is in force.

[53] As the CJEU has held, the objective of Article 11(2) of the Staff Regulations is to facilitate movement from national employment to, in this case, the Agency in Germany, thus ensuring that the Agency has the best possible chance of being able to choose qualified staff who already possess suitable experience: Case 137/80 *Commission* v *Belgium*, para. 11 and C-293/03 *Gregorio My*, para. 44. Iceland's refusal practice however impinges on EASA's ability to recruit staff who have worked in Iceland: see the extract from the EASA Letter (**Annex A.17**) quoted in paragraph 27 above.

[54] See further Section 4.1.3 below. The Authority uses the terms "*capable of*" and "*may*", because whether an obligation applies to a State (rather than the Agency) will depend on which particular provision of the Staff Regulations is relevant.

[55] See e.g. Reply to the Letter of Formal Notice, **Annex A.12**, p. 1.

Iceland was accordingly obliged, under Article 7 EEA, to make the EASA Regulation part of its legal order.

51. Iceland incorporated the EASA Regulation, including Article 29 thereof, into its national legal order by Article 3 of Regulation No. 812/2012, which provided that the EASA Regulation would come into force with the changes which followed from Annex XIII (thus the adaptations following from the JCD) and Protocol 1 to the EEA Agreement, and "*other, relevant provisions*."[56]

52. Under Article 3 EEA and settled case-law, EFTA States must ensure the full application of the relevant provisions of EEA law (here the Regulation) not only in fact but also in law. They must abstain from the application of rules which are liable to jeopardise the achievement of the objectives pursued by the Regulation and deprive it of its effectiveness.[57]

53. As considered under Section 4.1.2 above, Article 29(1) of the Regulation, as incorporated, clearly requires the Staff Regulations to be applied to Agency staff where relevant. This will entail an obligation on EEA States to act *insofar as their cooperation is necessary to give effect to the relevant regulations*.[58] Contrary to Iceland's view however, this does not mean that a general obligation is thereby placed on Iceland to implement or transpose the Staff Regulations as a whole.[59] Rather, Iceland's obligation (and therefore the subject-matter of the breach) is to give full effect to Article 29(1) of the Regulation. Effectiveness of this provision requires: (i) having recourse to certain parts of the Staff Regulations, which effectively 'clothe' the bare bones of Article 29(1); and (ii) giving those parts effect.

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[56] See paragraph 23 and the related footnotes 25 and 26 above.
[57] See e.g. judgment of 2 October 2015 in Case E-3/15 *Municipality of Vaduz*, para. 33 and judgment of 27 July 2013 in Case E-15/12 *Wahl* v *Iceland*, paras. 51-54. These cases relate to the national implementation of directives, but the Authority submits that the principles set out therein must also apply, *a fortiori*, to the implementation of regulations.
[58] See Case 137/80 *Commission* v *Belgium*, para. 8, considered further at paragraphs 37-38 above.
[59] See Reply to the Letter of Formal Notice, **Annex A.12**, p.2. Iceland, in an e-mail dated 16 June 2021 to the Authority (Internal Market Affairs Directorate) (**Annex A.18**), has referred to a statement apparently made by the European Commission's Legal Service that an act cannot be made part of the EEA Agreement by mere reference to it in another legal act which has been so incorporated. This is not however the point at issue in the present case.

54. On this point and **second**, the Authority recalls that it is not unprecedented for EEA law to refer to normative standards or rules which are not *themselves* part of EEA law, but which nevertheless influence or affect the way in which EEA law applies. For example, Article 28(3)(b) of Directive 2004/38/EC[60] refers to "*the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989*." It thereby requires EEA States (including Iceland) to take this "*best interests*" standard into account when taking expulsion decisions, even though this standard is not itself incorporated 'as such' into the EEA Agreement: see **Case E-2/20 Norwegian Government v L**, where the Court confirmed that the relevant assessment should be made *inter alia* in the light of the best interests of the child.[61]

55. **Third**, the adaptation text to Article 29 and to Article 30 of the EASA Regulation strongly suggests that the intention was to place obligations on the EFTA States to give effect to the relevant provisions of the Staff Regulations, in order to make Article 29(1) of the Regulation effective: see paragraphs 36 and 41-45 above. The opposite interpretation, namely that EFTA States are under no obligation to respect or give effect to individual rights conferred by the Staff Regulations, cannot credibly be inferred from the adaptation text. It also cannot be reconciled with the principle of effectiveness of rights granted to individuals under the EEA Agreement,[62] pursuant also to the principle of sincere cooperation in Article 3 EEA.

56. Iceland has argued that the adaptation text in Article 29(4) of the Regulation was intended simply to ensure the "*employability*" of EFTA State nationals and not to fully ensure their equal treatment with EU nationals under the Staff Regulations (thus under

[60] Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 (OJ L 124, 8 May 2008, p. 20, and EEA Supplement 2008 No 26, p. 17).
[61] See para. 50 of the judgment of 21 April 2021, Case E-2/20 *Norwegian Government* v *L*, and similarly the judgment of the Grand Chamber of the CJEU of 8 May 2018 in *K.A. and Others*, Case C-82/16, EU:C:2018:308, para. 93. See also Judgment of the Grand Chamber of the CJEU of 12 July 2013 in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (the 'asset freezing cases'), EU:C:2013:518. There, the standards within the Charter of the United Nations, which Charter is referred to generally in Article 3 TEU, were considered relevant to determining the EU's scope of action. Again, a simple reference in the text to an extraneous norm did not entail that this norm became part of EU law. However, the standards set out by that norm did circumscribe the EU's freedom of action and served as an interpretative canon for how the EU rules in question could be applied, *praeter legem*.
[62] In line with the Court's settled case-law, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures a provision retains its effectiveness: Case E-2/23 *A Ltd*, para. 43 and the case-law cited.

Article 29(1)).[63] However, this fails to recognise that Article 29(1) and (4) form part of a single provision and must be read together. As submitted at paragraphs 43-45 above, the fact that a '*derogation'* to just one part of the Conditions of Employment is provided for in Article 29(4), indicates rather that those Conditions and the Staff Regulations were otherwise intended to apply to EFTA State nationals under Article 29(1), where relevant. Iceland's interpretation instead leads to a situation where EFTA States would enjoy the right for their own nationals to be employed by the Agency, without the corresponding obligation to respect all the conditions of their employment.

57. Such an interpretation would result in an unequal arrangement, with a lack of reciprocity between the EU Member States on the one hand, and the EFTA States on the other, in two ways. *First*, Icelandic nationals would benefit from the right to have the actuarial value of their pension rights accumulated in an *EU* Member State transferred upon taking up employment at the Agency, without the reciprocal right of EEA nationals (including Icelandic nationals) to receive the same benefit in relation to rights accumulated in Iceland. *Second*, the EU and its Member States would have granted the right of full participation in the Agency to the EFTA States and Iceland, including the right of their/Icelandic nationals to be employed by the Agency, without a reciprocal obligation for Iceland to give effect (as the EU Member States must) to the relevant Staff Regulations.

58. Such an interpretation would thus permit the EFTA States to unilaterally dictate, to a certain extent, the terms of employment of those working for EASA who are EFTA or EU nationals and have previously worked (and accumulated pension rights) in an EFTA State. This runs contrary to the objective of establishing a dynamic and homogeneous European Economic area, which can only be achieved if both EFTA and EU citizens enjoy, relying upon EEA law, the same results in both the EU and EFTA pillars of the EEA.[64]

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[63] See Reply to the Letter of Formal Notice, **Annex A.12**, p.2, para. 3.

[64] See e.g. judgment of 21 December 2012, Case E-14/11, *Schenker North AB and Others* v *EFTA Surveillance Authority*, para. 118 and the case-law cited. See also judgment of the CJEU of 2 April 2020 in *I.N.,* Case C-897/19, EU:C:2020:262. There, the CJEU took note (para. 4 of the judgment) of the aim of Article 1(1) of the EEA Agreement of creating a homogeneous EEA. It went on to find that where

59. Such undesirable outcomes are avoided by an interpretation of Article 29(1) whereby the Staff Regulations *do* apply to EFTA State nationals, where relevant. This construction is further supported by the second paragraph of Article 30 of the Regulation. As submitted at paragraphs 41-42 above, this second paragraph, added by the JCD, provides that the *EFTA States* must apply to Agency staff the applicable rules adopted pursuant to the Protocol on Privileges and Immunities. Crucially, such applicable rules include the Staff Regulations referred to in Article 29(1), the provision at issue in the present case.

60. **Finally**, the Authority observes that Iceland's reasoning is inconsistent with regard to references to rules contained in unincorporated legal acts, namely the Protocol on Privileges and Immunities on the one hand and the Staff Regulations and Conditions of Employment on the other. Iceland does not contest that it may derive obligations from the Protocol on Privileges and Immunities in relation to EASA staff.[65] Yet Iceland contests that it may derive obligations from the Staff Regulations and Conditions of Employment. The Authority observes however that while both the Protocol and the Conditions of Employment are referred to in the same JCD No 163/2011, neither is incorporated as such in the EEA Agreement. Iceland has given no clear rationale for treating them differently.

4.1.4 Conclusion

61. For the above reasons, Iceland's argument, that the reference to the Staff Regulations in Article 29(1) of the EASA Regulation has no legal effect in relation to Iceland in this case, must be rejected. The Authority accordingly concludes that, by maintaining in force an administrative practice which fails to ensure that EEA nationals may transfer to the PSEUI the capital value of the occupational pensions they have accrued in Iceland, Iceland has failed to fulfil its obligations under Article 29(1) of the EASA Regulation.

EFTA State nationals were in an objectively comparable situation to EU citizens, the same treatment should apply (namely the application by analogy of its ruling in *Petruhhin*, C-182/15, EU:C:2016:630, para. 56): see in particular paras. 56-58 and 75 of the judgment.

[65] Reply to the RQI, **Annex A.8**, p.2.

4.2 SECOND PLEA: BREACH OF ARTICLE 28 EEA

4.2.1 Iceland's Practice restricts the Free Movement of Workers

62. Article 28 EEA provides that freedom of movement for workers must be secured among EU Member States and EFTA States. It is settled case-law that this entails the right for EEA nationals to leave their home State to go to another EEA State to work, without being placed at a disadvantage.[66] Measures liable to hinder or make less attractive the exercise of fundamental freedoms are an encroachment on those freedoms, which require justification, even where such measures apply without discrimination on grounds of nationality.[67]

63. In the present case, Iceland has confirmed[68] that it will not allow the transfer of the capital value of occupational pensions accrued in Iceland, by Icelandic and other EEA nationals, to the PSEUI, in circumstances where such nationals will be employed by EASA, an EU agency established in Köln, Germany.

64. The Authority submits that such a practice renders it less attractive for the EEA national in question to leave employment in Iceland for that in another EEA State.[69] This is because inclusion of the capital value of their occupational pensions in that of the PSEUI presents a number of potential advantages for the EEA national, such as greater pension disbursal, an increased lump sum and periodic payments, or a reduced tax burden on accrued contributions.[70]

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[66] See e.g. judgments of the CJEU of 15 December 1995 in *Bosman*, Case C-415/93, EU:C:1995:463, paras. 94-96; 11 September 2007 in *Commission v Germany*, Case C-318/05, EU:C:2007:495, paras. 114-115; 12 July 2012 in *Commission v Spain*, Case C-269/09, EU:C:2012:439, paras. 52-54; and 13 July 2016 in *Pöpperl*, Case C-187/15, EU:C:2016:550, paras. 23-24.

[67] See e.g. judgments of 19 April 2016 in Case E-14/15 *Holship Norge AS* v *Norsk Transportarbeiderforbund*, para. 115 and the case-law cited, of 26 January 1999 in *Terhoeve*, C-18/95, EU:C:1999:22, para. 39, and of 27 January 2000 in *Graf*, Case C-190/98, EU:C:2000:49, para. 18.

[68] See the administrative practice described at paragraphs 27-29 above.

[69] EASA has indeed confirmed that, "[i]*n addition to the negative impact on actual individual cases, such refusal is likely to deter potential candidates of Icelandic nationality from accepting EASA offers of employment*, *thereby having an impact on EASA recruitment of Icelandic staff members*. *Prior to offering a contract of employment, our Agency must now inform the Icelandic candidates of the practice of their national authorities regarding pension rights*." See the EASA Letter (**Annex A.17**), pp.1-2.

[70] The existence of such potential advantages has not been contested by Iceland.

65. Iceland's failure to permit such a capital transfer therefore constitutes a restriction on the free movement of workers. Under settled case-law, Iceland must demonstrate that the restrictive measure is suitable, proportionate and justified by overriding reasons in the public interest.[71] Iceland has however failed to provide any such justification.[72]

66. Instead, Iceland makes essentially two arguments why Article 28 EEA does not confer relevant rights in the present case. These arguments are addressed in turn.

4.2.2 Iceland's Arguments are Unfounded

67. **First**, Iceland argues that Article 28(1) EEA does not confer rights in relation to organisations or institutions to which the EFTA States are not party. It observes that while the JCD incorporating the EASA Regulation gave the EFTA States participation rights in EASA, and while they for all practical purposes are to be regarded members, EASA remains an EU agency.[73] It claims that, because the Staff Regulations are not incorporated into the EEA Agreement, there is no obligation for it to provide for the transfers of capital value at issue in the present case.[74] The Authority submits that these arguments must be rejected.

68. *Firstly*, as set out in Sections 4.1.2 and 4.1.3 above, the relevant point is that the EASA Regulation is incorporated into the EEA Agreement. By its Article 29(1), the EASA Regulation imposes certain obligations on Iceland, by reference to the relevant provisions of the Staff Regulations – in this case, Article 11(2).

69. *Secondly*, Iceland's claim, that Article 28 EEA does not apply because EASA is an EU agency, misses the point and is unsupported by case-law. It is settled case-law of the

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[71] See e.g. judgments of 5 May 2021, Case E-8/20 *Criminal Proceedings against N* ("***N***"), paras. 91-95, and of 16 May 2017, E-8/16 *Netfonds*, para. 117. See also judgment of 5 June 2018 in *Coman and others*, Case C-673/16, EU:C:2018:385, para. 41 and case-law cited.

[72] The Authority recalls that the burden of proving that restrictions on fundamental freedoms may be justified rests upon the State, which must adduce an analysis of the appropriateness and proportionality of the measures adopted and *specific evidence supporting its arguments*: see e.g. Case E-9/11 *EFTA Surveillance Authority* v *Norway*, paras. 88-89, Case E-8/20 *N*, para. 125, and Case E-2/12 *HOB-Vín ehf*., para. 82.

[73] Reply to the Letter of Formal Notice, **Annex A.12**, pp. 2-3.

[74] *Ibid*.

CJEU that the free movement of workers under Article 45 TFEU applies to EU nationals irrespective of whether they move Member State to work for an EU institution or agency,[75] or for example to work for an international organisation governed by international law.[76] Thus, *where an individual moves to an EEA State to work*, Article 28 EEA will apply,[77] irrespective of the type of entity or organisation, and irrespective of whether or not the State in question is a party to or member of that particular body.

70. Accordingly, Iceland's argument that it is not party to EASA – with the result that Article 28 EEA does not apply – must be rejected. The Authority recalls further that EASA is a creation of EU law, established and governed by the EASA Regulation. The EASA Regulation is in turn incorporated into the EEA Agreement. As Iceland itself recognises, "*according to Joint Committee Decision No 163/2011 incorporating Regulation (EC) No 216/2008* [the EASA Regulation] *into the EEA Agreement, the EEA EFTA States have participation rights in the EASA and for all practical purposes are regarded to be members*."[78] Iceland's argument essentially amounts to the claim that, although the EASA Regulation, *inter alia* establishing EASA, has been incorporated into the EEA Agreement, Article 28 of that same EEA Agreement does not apply to those seeking to work there (in Germany). Such an argument has no legal basis and must be rejected.

71. **Second**, Iceland argues, by reference to the cases of **C-233/12 Gardella** and **C-404/21 WP**, that the terms of employment in EU agencies are derived *exclusively* from agency acts and associated instruments, and that Article 28 EEA is not engaged and

[75] See e.g. judgment of 22 December 2022, *WP* v *INS* ("***WP***"), C-404/21, EU:C:2022:1023, para.24 (where an individual who had previously worked in Italy commenced work with the European Central Bank) .

[76] As the CJEU has held, a person "*does not lose his status as worker for the purposes of Article 48(1) of the Treaty because he holds employment with an international organisation*": see judgment of 15 March 1989, *Echternach and Moritz* ("***Echternach and Moritz***"), Joined Cases 389/87 and 390/87, EU:C:1989:130, para. 11 (which case related to the European Space Agency, an international organisation governed by international law and located in the Netherlands). See also judgment of 4 July 2013, *Gardella* v *INPS* ("***Gardella***"), C-233/12, EU:C:2013:449, paras. 25-27 and the case-law cited. In that particular case, Mr Gardella worked for the European Patent Office, an international body established by the Munich Convention (European Patent Convention) of 5 October 1973 and having its head office in Munich.

[77] Assuming that the other conditions for the application of Article 28 EEA are met, such as employment.

[78] Reply to the Letter of Formal Notice, **Annex A.12**, p. 2.

consequently has not been breached.[79] The Authority submits that this argument is not well-founded, as follows.

72. *Firstly*, as set out at paragraphs 69-70 above, a case such as the present one does come within the scope of Article 28 EEA, which is therefore engaged. The fact that some other, employment-specific acts or norms might *also* apply, cannot displace the basic application of Article 28 EEA. The same argument as that made by Iceland was considered and rejected by the CJEU in the seminal case of **Echternach and Moritz**, **Joined Cases 389/87 and 390/87**. That case concerned a German national working in the Netherlands for the European Space Agency, an international organisation governed by a special statute under international law. The Netherlands argued that the legal relationship of the German national with the host country was governed *solely* by that special statute (namely a protocol on privileges and immunities), and therefore that Article 48 of the EEC Treaty did not apply. The CJEU rejected this argument, ruling that such a national did not lose his status as a worker within the meaning of Article 48 of the EEC Treaty, even though the special statute (also) applied. This had the consequence that he and his family could benefit from relevant rights and privileges under EEC law.[80]

73. *Secondly*, the cases of **C-233/12 Gardella** and **C-404/21 WP** concern different material facts from the present case. The reasons why the CJEU did not grant relief to the worker in those cases do not apply here.

74. In **C-233/12 Gardella**, the relevant employer was the European Patent Office ("**EPO**"), an international organisation based in Munich. While the free movement provisions of Article 45 TFEU *did* apply,[81] the CJEU observed that no additional facilitating EU law

[79] Slides of the Icelandic Government for a meeting with the Authority of 17 January 2023, **Annex A.19**, p.4.
[80] In that particular case, the rights deriving from Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community: see Joined Cases 389/87 and 390/87, *Echternach and Moritz*, paras. 9-12.
[81] C-233/12 *Gardella*, paras. 25-27.

measures, such as the Staff Regulations, applied to the EPO.[82] It noted further that the EPO's rules on pensions required the body managing the EPO's pension scheme to give its permission before any transfer of the capital value of pension rights could take place.[83] In these circumstances ("*thus*"), the CJEU considered that Mr Gardella's situation fell to be assessed by comparison with workers moving within the Union to work for an employer who was not an EU institution or international organisation, and with self-employed citizens.[84] In such cases, the relevant provisions of EU law (the TFEU and Regulation Nos 1408/71 and 883/2004) did not provide for the transfer of the capital value representing previously-acquired pension rights. Rather, they were based on the principle of aggregation of periods. Accordingly, in the circumstances of the case, Article 45 TFEU *alone* could not oblige a Member State to provide for such capital transfers or to conclude an international agreement to that effect.[85] Rather, the principle of aggregation of pension periods was to be applied.[86]

75. In the present case however, EASA is a creation of EU law, established and governed by the EASA Regulation, which is in turn incorporated into the EEA Agreement. EASA *must*, under Article 29(2) of the Regulation, apply the Staff Regulations to its own staff, including EFTA State nationals.[87] Accordingly, and contrary to the situation in **Gardella**, the employer (EASA) *must* apply an EEA law measure which further facilitates the free movement of workers: in this case, permitting the transfer of the capital value of previously acquired pension rights to the PSEUI.[88] Even if Article 29 of the Regulation does not oblige *Iceland* to apply the relevant provisions of the Staff Regulations (*quod non*), it is clear that EASA must do so. By failing to permit the capital

[82] *Ibid*, paras. 28-29, and see also paras. 14-15 and 48 (no agreement existed between the Member State and the EPO which provided for the possibility of a transfer of the capital value of the relevant pension rights).
[83] *Ibid*, para. 30.
[84] *Ibid*, paras. 27-32.
[85] *Ibid*, paras. 33-36.
[86] *Ibid*, paras. 45-49.
[87] The Authority therefore submits that, similarly to the case of *Forcheri*, the legal position of staff of EASA in the EEA States in which they are employed comes within the scope of the EEA Agreement on a dual basis: by reason of their post with EASA, and because they must enjoy all the benefits flowing from EEA law for nationals of the EEA States in relation to freedom of movement: see the judgment of 13 July 1983, *Forcheri* v *Belgium*, Case 152/82 EU:C:1983:205, para. 9, which paragraph is also referred to in the Opinion of Advocate General Darmon in Joined Cases 389/87 and 390/87 *Echternach and Moritz* (EU:C:1989:35) at paras. 37-38.
[88] As the CJEU held in Case 137/80 *Commission* v *Belgium*, para. 11, the intention of Article 11(2) of Annex VIII to the Staff Regulations is to facilitate the free movement of workers.

value of transfers to which EASA staff members would otherwise be entitled under Article 29, Iceland unlawfully hinders their rights of free movement under Article 28 EEA. Independently therefore of whether the Authority is correct in respect of its First Plea (breach of Article 29(1) of the Regulation), the Authority submits that, where EEA law measures exist to facilitate free movement (here Article 29(1) of the Regulation and Article 11(2) of the Staff Regulations), and where such measures apply to the employer (EASA),[89] Iceland's failure to apply or give effect to such measures constitutes a breach of Article 28 EEA (the Second Plea).

76. In short, while Article 28 EEA applied in **Gardella** and also applies in the present case, the difference is that in the present case the Staff Regulations also apply, and must, on any view, be applied by EASA. This has the effect of *further facilitating* the free movement of workers under Article 28 EEA.[90] Once such facilitating measures exist, denying their application necessarily impinges upon the full extent of the rights of free movement the worker would otherwise have enjoyed. In Gardella on the other hand, no such additional facilitating measures applied: no arrangement existed to permit the transfer of the capital value of the pension rights. In such a context, the worker could only rely on the 'basic' EU law free movement rights which (at the time) entailed only aggregation of periods and not capital transfers. It was in this specific context that, logically, the CJEU found that the absence of such a capital transfer facility was not required by, and therefore not in breach of, Article 48 TFEU.

77. In **C-404/21 WP**, again, just as in **Gardella**: (i) the Staff Regulations did not apply to the employing entity (here the European Central Bank ("**ECB**"))[91]; and (ii) some sort of agreement or arrangements between the ECB and the Member States would therefore

[89] The Authority observes that Iceland (and the other EFTA States) *chose*, via the JCD and the incorporation of the EASA Regulation into the EEA Agreement, to make EASA subject to such free movement requirements.
[90] Indeed, the CJEU has held that the intention of Article 11(2) of Annex VIII to the Staff Regulations is precisely to facilitate the free movement of workers: see Case 137/80 *Commission* v *Belgium*, para. 11 and C-293/03 *Gregorio My*, para. 44.
[91] While the ECB is an EU institution, it has its own legal personality, separate from the European Union, and the Staff Regulations do not apply to it: see C-404/21 *WP*, paras. 32-34.

have been required in order to permit the transfers of capital value.[92] Again therefore, **WP** can be distinguished from the present case, where it is undisputed that the Staff Regulations apply to EASA, the employing entity, which must apply such regulations to its staff. The relevant rules are therefore in place: all that remains is for Iceland to permit the transfer. Indeed, there is no doubt that, under Article 29(1) of the Regulation (and Article 11(2) of the Staff Regulations), an *EU citizen* moving from an EU Member State to work for EASA would be able to transfer the capital value of his/her pension scheme to the PSEUI.

78. The Authority therefore submits, *thirdly*, that the principle of homogeneity also supports the conclusion that EEA or EFTA State nationals moving to work for EASA must similarly be permitted to transfer the capital value of occupational pensions accrued in Iceland to the PSEUI. As the Court has held:

> "[…] *Homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and EC law are to be construed in the same way*. […]" [93]

The Authority submits, in line with its submissions in Section 4.1 above, that there are no relevant differences in the scope or purpose of the EASA provisions as incorporated into the EEA Agreement, compared with those in the EU legal order. Accordingly, and in order to promote the effective functioning of the EEA internal market, the provisions should be construed and applied in a way which promotes homogeneity with their operation in the EU.

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[92] C-404/21 *WP*, paras. 35-43. Indeed, the CJEU observed that, under the ECB conditions of employment, the ECB was required to *negotiate and enter into* agreements or arrangements to facilitate the relevant pension transfers with the relevant Member State. In the absence however of an such agreement or arrangement, the Member State was not *required* to provide for such a transfer (albeit that, once the ECB *had* opened such negotiations, the Member State was required to participate actively and in good faith with a view to entering into such an agreement).

[93] Judgment of 8 July 2008 in Joined Cases E-9/07 and 10/07 *L'Oréal Norge AS*, para. 27. See also judgment of 26 June 2007 in Case E-2/06 *ESA* v *Norway,* para. 59 and judgment of 26 July 2016 in Case E-28/15 *Jabbi*, para. 60.

79. *Finally*, the Authority recalls that, under the principle of loyal cooperation (Article 3 EEA), States must take all appropriate measures to ensure fulfilment of the obligations arising under the EEA Agreement, and must abstain from measures that could jeopardise the attainment of its objectives.[94] This means that where, as here, the EFTA States have agreed to extend the scope of the EEA Agreement via amendments to its annexes (the EASA Regulation), such an extension may limit, as in this case, an EFTA State's discretion to set rules, including in the area of free movement.[95] Thus, in the present case, to the extent that Iceland has agreed to participate in EASA, it is no longer free to restrict the rights of EEA nationals as if no such participation had taken place. This means that Iceland has committed to give effect to Article 29(1) of the EASA Regulation, and to the relevant Staff Regulations referred to therein, and to refrain from compromising the free movement objectives reflected in those Regulations[96] and in the EEA Agreement itself.[97]

80. Accordingly:

    i. where, via Article 29(1) of the EASA Regulation, a measure to facilitate the free movement of workers applies (Article 11(2) of Annex VIII to the Staff Regulations); and

    ii. where EASA is ready to apply, as it must, that facilitating measure to the Complainant and other EEA nationals,[98]

    Iceland's practice[99] of refusing the relevant capital transfers under Article 29(1) and Article 11(2) jeopardises the free movement objectives of those provisions (and those of the EEA Agreement) and fails to ensure their effectiveness.

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[94] See, e.g. judgment of 4 July 2023 in Case E-11/22 *RS,* paras. 41, 44 and Case 137/80 *Commission* v *Belgium*, para. 9.

[95] See judgment of 1 February 2006 in Case E-17/15, *Ferskar kjötvörur ehf*., paras. 48-49.

[96] See Case 137/80 *Commission* v *Belgium*, para. 11 and C-293/03 *Gregorio My*, para. 44, where the CJEU held that the intention of Article 11(2) of Annex VIII to the Staff Regulations was to facilitate the free movement of workers.

[97] See e.g. Recital 8 to the EEA Agreement, which underlines the important role played by individuals in the EEA through the exercise of the rights conferred on them by the EEA Agreement and through the judicial defence of those rights.

[98] See e.g. the EASA Letter, **Annex A.17**.

[99] The practice as described in Section 4.1.1 above.

81. The Authority's position on this point finds support in the case of **C-293/03 Gregorio My**.[100] There, the CJEU held that the duty of genuine cooperation and the obligation to facilitate the achievement of the Union's tasks (Article 10 EC), read together with the Staff Regulations, precluded national legislation which failed to take into account, for the purposes of entitlement to a national early retirement pension scheme, periods of employment under the European Community pension scheme. The CJEU's reasoning was that such legislation was likely to discourage employment with an EU institution, and that such consequences could not be accepted in light of the duties and obligations laid down in Article 10 EC.[101]

82. It is noteworthy that the CJEU invoked and relied upon the duty of sincere cooperation in circumstances where the provisions governing the free movement of workers did not apply (because Mr My's situation was purely internal to Belgium), nor did a particular provision of the Staff Regulations expressly regulate the matter.[102] Nevertheless, the CJEU took into account the objective of the Staff Regulations as a whole (facilitating and encouraging employment with the Community administration), to find that Article 10 EC obliged Belgium to facilitate the achievement of such employment by permitting 'Community employment periods' to be taken into account under its national pension scheme. The CJEU's approach underscores the importance and strength of States' duty of sincere cooperation, to ensure fulfilment of obligations arising out of relevant EU or EEA law.

83. The Authority submits that similar reasoning applies here, *a fortiori* in a situation where the free movement provisions and specific provisions of the Staff Regulations (Article 11(2)[103]) do apply. By restricting rights of EEA nationals to take up employment with EASA (an agency within the scope of the EEA Agreement), Iceland discourages both the exercise of free movement rights and employment with that agency. This runs contrary to Iceland's obligations under Article 3 EEA to abstain from any measure

[100] Cited in footnote 40 above.
[101] C-293/03 *Gregorio My*, paras. 45-48.
[102] The CJEU did however make reference to and build upon its case-law in relation to Article 11(2) of Annex VIII to the Staff Regulations (Case 137/80 *Commission* v *Belgium*): see C-293/03 *Gregorio My*, paras. 44-48.
[103] Engaged via Article 29 of the EASA Regulation.

which could jeopardise the attainment of the free movement objectives of the EEA Agreement and to facilitate cooperation within the framework of the Agreement.

4.2.3 Conclusion

84. In light of the above, the Authority submits that, by engaging in an administrative practice which precludes the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI, Iceland has failed to fulfil its obligations under Article 28 EEA.

5 CONCLUSION

Accordingly, the Authority requests the Court to:

1. Declare that, by maintaining in force an administrative practice which precludes the transfer of the capital value of occupational pensions accrued in Iceland to the pension scheme of the European Union institutions, Iceland has failed to fulfil its obligations under Article 29(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and/or Article 28 of the EEA Agreement.

2. Order Iceland to pay the costs of these proceedings.

Claire Simpson Melpo-Menie Joséphidès

Sigurbjörn Bernharð Edvardsson

Agents of the EFTA Surveillance Authority

SCHEDULE OF ANNEXES

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