

**Report from the EFTA Surveillance Authority on the implementation of
Council Directive 98/49/EC of 29 June 1998, in Iceland, Liechtenstein
and Norway, on safeguarding the supplementary pension rights of
employed and self-employed persons moving within the EEA**

Adopted on 13 June 2007

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1 INTRODUCTION

The implementation of the fundamental principle of freedom of movement for workers, enshrined in the Agreement on the European Economic Area (hereinafter “EEA Agreement”), implies amongst others the protection of supplementary pension rights of workers moving within the EEA.

On 29 June 1998 the Council adopted Directive 98/49/EC (hereinafter “the Directive”) *on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community*. The Directive has been taken over into Point 2a of Annex VI of the EEA Agreement by Joint Committee Decision 80/1999 from 25 June 1999. The Directive entered into force in the EEA on 1 March 2001 and had to be implemented by 25 July 2001.

According to Article 10(2) of the Directive as adopted by Protocol 1 to the EEA Agreement, the EFTA States shall communicate to the EFTA Surveillance Authority (hereinafter “the Authority”) the text of the provisions of national law which they adopt in the field covered by the Directive. Iceland, Liechtenstein and Norway adopted the measures for the implementation of the Directive and notified them accordingly to the Authority.

In accordance with Article 10(3) of the Directive, Point 5 of Protocol 1 to the EEA Agreement stipulates that where the European Commission, according to an act referred to in an annex to the EEA Agreement, is to prepare a report with regard to the EU Member States, the EFTA Surveillance Authority shall concurrently prepare a corresponding report with regard to the EFTA States.

The present report follows the structure of the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, from 26 January 2006 (hereinafter “the Commission Report”), concerning the implementation of the Directive in the EU Member States.¹

A questionnaire was sent to the Governments of Iceland, Liechtenstein and Norway and this report is based on the information supplied by the respondents. The content of the report reflects the situation in the three EFTA States by November 2005.

In **Iceland** the implementation Act notified was Act No. 129/1997 on the Mandatory Insurance of Pension Rights (*Lög um skyldutryggingu lífeyrisréttinda og starfsemi lífeyrissjóða*), later amended with Act No. 70/2004.

In **Liechtenstein** the implementation Act notified was the Act of 20 October 1987 on the Occupational Pension Scheme (*Gesetz über die betriebliche Personalvorsorge-BPVG*, LR 831.40) as last amended by Act of 25 November 2005, Law Gazette 2005 No. 276).

In **Norway** the implementation Act notified was Act No. 95/2001 on Safeguarding the Supplementary Pension Rights of Employed and Self-employed Persons moving within

¹ COM (2006) 22 final, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee on Regions on the Implementation of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, Commission of the European Communities, Brussels, 26 January 2006.

the Community (*Lov om beskyttelse av supplerende pensjonsrettigheter for arbeidstakere og selvstendig næringsdrivende som flytter innenfor EØS-området*).

2 SCOPE

2.1 Personal Scope

In **all three EFTA States** economically active persons are covered, either as employees or self-employed persons, and their family members (spouse and children). In **Norway** also the registered partner is explicitly mentioned in the implementation act. In **Liechtenstein** the competent institutions have the possibility to include unmarried partners as well.

2.2 Material scope (Table 1)

Within the meaning of the Directive, a supplementary pension scheme refers to any occupational pension scheme established in conformity with national legislation and practice or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons. In order to give an overview of possibilities of arrangements in the **three EFTA States** a table has been established in the Annex to this report.

The Directive covers furthermore any occupational pension scheme such as a group insurance contract or pay-as-you-go scheme, funded scheme or pension promise backed by book reserves. In **Norway** the vast majority of supplementary pension schemes operate on a funded basis. Only few schemes operate on the basis of setting aside book reserves. In **Iceland and Liechtenstein** supplementary pension schemes operate on a funded basis. Pension schemes operating on the basis of setting aside book reserves are not allowed in **Liechtenstein**.

The protection of the Directive refers to pension rights under both voluntary and compulsory supplementary pension schemes, with the exception of schemes covered by EEC Regulation No. 1408/71 (hereinafter “Regulation 1408/71”). In all **three EFTA States** voluntary schemes are explicitly included in the scope of application. To this day, there are no supplementary pension schemes in the three EFTA States which are covered by Regulation 1408/71 via a declaration under Article 1(j) of Regulation 1408/71.

The Directive applies to retirement pensions, but it also covers invalidity and survivors’ benefits, where children and spouses are being possible survivors. This provision has been incorporated in the **three EFTA States** concerned.

3 DEFINITIONS

Article 3 of the Directive contains the following definitions: a) supplementary pension, b) supplementary pension scheme, c) pension rights, d) vested pension rights, e) posted worker and f) contribution.

Iceland has not implemented the definitions explicitly in the Act, but the comments to Act No 70/2004, which are of importance when interpreting the Act, contain definitions of the concepts referred to in Article 3 of the Directive.

Lichtenstein has not implemented the definitions of Article 3 of the Directive into its national law, but they can be deduced from implementing legislation.

In the case of **Norway**, the definitions of Article 3 are not implemented as such, but an exhaustive list of supplementary pensions schemes in Norway can be found in Section 2 of the Act. With regard to the definition of the term “posted worker”, there exists a direct reference in Section 4 of the Act to Regulation 1408/71.

4 MEASURES FOR SAFEGUARDING PENSION RIGHTS OF WORKERS MOVING WITHIN THE COMMUNITY

4.1 Equality of treatment as regards preservation of rights (Table 2)

Article 4 of the Directive stipulates that EEA States shall ensure the preservation of vested pension rights for members of a supplementary pension scheme, when contributions are no longer being made to that scheme as a consequence of the moving of a member from one EEA State to another, to the same extent as the EEA States ensure the preservation of vested pension rights for members which no longer contribute but who remain within the same EEA State.

In **all three EFTA States** national legislation ensures the principle of equality of treatment.

In **Norway** specific regulations have been adopted to ensure that members of a supplementary pension scheme who cease making contributions to the scheme are treated equally regardless to whether they remain in Norway or move to another EEA State.

In **Iceland** and **Liechtenstein** similar specific regulations are not to be found, but according to national legislation there is no distinction made between workers remaining in the state and workers who move to another EEA State.

4.2 Guarantee of cross-border payments (Table 3)

Article 5 of the Directive aims to ensure that EEA States will take the necessary measures to guarantee that in all EEA States benefits under supplementary pension schemes are paid to members of such schemes or to others holding entitlement under them, net of any taxes and transaction charges which may be applicable. This provision is not intended to prevent the taxation of benefits in the EEA State in which the supplementary pension scheme is established or transaction charges.

In **Iceland** the implementing legislation does not address taxes and transaction costs. Thus, general taxation rules would apply in accordance with the taxation legislation.

In **Liechtenstein** cross border payments are governed by the regulations of Institutions Managing a Supplementary Pension Scheme. The Financial Market Authority in its function as surveillance authority guarantees that these regulations are in conformity with the BPVG.

In **Norway** a special provision has been implemented in the national legislation on the subject. It provides that all entitled persons shall have the right to receive their pension payment, with deduction of transaction costs, in any other EEA Member State. As there is no withholding tax on pensions in Norway, it has been considered unnecessary to include a provision concerning tax deductions.

4.3 Cross-border membership of posted workers (Table 4)

Article 6 concerns the posted workers within the meaning of Article 3(e) which refers to Title II of Regulation 1408/71. Posted workers expect to return to their EEA State of origin without a break in the building-up of their pension rights. Consequently, they and their employers often prefer to continue making contributions to the supplementary pension scheme in the EEA State of origin. The aim of Article 6 is to enable this to take place and to align the rights of a worker under a supplementary pension scheme with the rights which workers have in relation to statutory social security schemes under Regulation 1408/71.

a) Adopted Measures to permit the payment of contributions by and on behalf of posted workers, Article 6 (1)

In **Norway** and **Liechtenstein** explicit provisions have been adopted to ensure the rights of workers who are posted in another EEA State. For Norway, the worker has these rights as long as he is comprised by Norwegian legislation on social security in accordance to Title II of Regulation 1408/71.

In **Iceland** the implementation Act permits contributions to supplementary pension schemes by and on behalf of posted workers, who come to work in Iceland. It is though not specifically stated that workers with Icelandic domicile are entitled to continuation of payment during his posting in another EEA State.

b) Exemption from contributions, Article 6 (2)

According to the second paragraph of Article 6, when contributions continue to be made by or on behalf of a worker to a supplementary pension scheme in his or her EEA State of origin, the host EEA State shall recognise this as equivalent to membership of a supplementary pension scheme in that State, and the host EEA State is thus not able to compel membership of a compulsory scheme established in its territory.

This provision is explicitly mentioned in the implementing Acts of **all three EFTA States** (see Table 4).

4.4 Information provided to scheme members (Table 5)

According to Article 7 of the Directive EEA States shall take measures to ensure that employers, trustees or others responsible for the management of supplementary pension schemes provide adequate information to scheme members, when they move to another EEA State, concerning their pension rights and the choices which are available to the scheme members under the scheme. That information shall at least correspond to

information given to scheme members in respect of whom contributions cease to be made but who remain within the same EEA State.

In **Iceland** and **Norway** explicit rules on the subject have been implemented. In **Liechtenstein** there are no similar explicit rules on the subject, but it is stated that information shall be given when the scheme member intends to leave the scheme. There is no distinction made between those members who leave the scheme but stay in Liechtenstein and to those who do not.

5 CONCLUSION AND DEVELOPMENT

In all three EFTA States judicial protection concerning supplementary pension rights is in force.

As far as the scope of the Directive is concerned, clear indications can be found in the national legislation of all three EFTA States for persons or schemes covered by Directive 98/49. Differences in legislation can, however, be noticed with regard to allowed investment practices. Furthermore, there are no supplementary pension schemes which are covered by Regulation 1408/71 via a declaration under Article 1(j) of Regulation 1408/71.

The definitions stated in Article 3 of Directive 98/49 have not been implemented literally in the legislation of any of the three States. They can, nevertheless, either be found via references or simply be deduced from implementing legislation.

According to the legislation in Iceland, Liechtenstein and Norway, no discrimination exists in domestic and cross border cases. This applies not only for the preservation of rights but also for the guarantee of cross-border payments.

New provisions with special regard to posted workers have been introduced in Norway and Liechtenstein concerning the payment of contributions by and on behalf of posted and workers and also the exemption from paying contributions in case when payments are made by or on behalf of a worker in his or her state of origin.

Last but not least, also the provisions of information exchange have been adapted in order to guarantee sufficient information to the members of schemes about possibilities and consequences of leaving a supplementary pension scheme.

The provisions of Directive 98/49 seem therefore to have been sufficiently implemented by Iceland, Liechtenstein and Norway.

ANNEX TO SUPPLEMENTARY PENSION REPORT

Table 1: Material Scope

| Country | Non-exhaustive list of supplementary pension schemes covered by Directive 98/49/EC | Non-exhaustive list of supplementary pension scheme covered by Regulation 1408/71/EEC |
|----------------------|---|---|
| <i>Iceland</i> | There are currently no supplementary pension schemes within the meaning of Articles 1 and 3b of the Directive in place. | All schemes subject to Article 8(3) of Act No. 129/1997 (Declaration under Article 5 of Regulation 1408/71) |
| <i>Liechtenstein</i> | The voluntary supplementary pension scheme under the BPVG (Articles 2 and 3 BPVG). | - |
| <i>Norway</i> | Funded occupational pension schemes can be established with a life insurance company, pension fund, bank or securities fund management company. There are specific binding regulations if the employer wants to obtain a tax deduction (entered into force 1 January 2001). There exist collective pension schemes based on agreement where pensions are directly paid by the employer. | - |

Table 2: Equal preservation

| Country | Adopted measures to ensure equal preservation | Reference in the national provision |
|----------------------|---|---|
| <i>Iceland</i> | No specific legislation has been introduced. National law ensures the equality of treatment as regards preservation of pension rights stipulated in Article 4 of the Directive. Act No 129/1997 stipulates how the vested rights are preserved. | Article 3 of Act No 70/2004, along with the general provisions of Act No 129/1997 |
| <i>Liechtenstein</i> | No specific legislation has been introduced. Regardless whether the insured person is moving cross border or within the country, the 'Freizügigkeitsleistung' (vested rights), which becomes due under the rules of the supplementary pension scheme, has to be preserved continuously for the pension of the moving worker. | Articles 11+12 BPVG |
| <i>Norway</i> | Specific legislation has been adopted to ensure that members of a supplementary pension scheme who cease making contributions to the scheme are treated equally regardless to whether they remain in Norway or move to another EEA State. | Section 5 of the Act of 14 December 2001 |

Table 3: Cross-border payments

| Country | Adopted measures to guarantee cross border payments | Reference in the national provision |
|----------------------|--|---|
| <i>Iceland</i> | The implementing legislation does not address taxes and transaction charges. General taxation rules would apply in accordance with the general taxation legislation. | Article 3 of Act No 70/2004, along with the general provisions of Act No 129/1997 |
| <i>Liechtenstein</i> | The cross border payments are governed by the regulations of the institutions managing the scheme. The Financial Market Authority in its function as surveillance authority guarantees that these regulations are in conformity with the BPVG. | Article 3 (3) BPVG |
| <i>Norway</i> | Specific legislation provides that all entitled persons shall have the right to receive their pension payment, with deduction of transaction costs, in any other EEA Member State. | Section 3 of the Act of 14 December 2001 |

Table 4: Cross-border membership of posted workers

| Country | Adopted measures to permit contributions by and behalf of posted workers, Article 6 (1) Exemption from contributions, Article 6 (2) | Reference in the national provision |
|----------------------|--|--|
| <i>Iceland</i> | The payments of contributions to supplementary pension schemes by and on behalf of posted workers are guaranteed under the same conditions as under Title II of Regulation (EEC) No 1408/71. Both, employees and employers are exempted from any obligation to make contributions to a supplementary pension scheme in Iceland, if they make contributions to such a scheme in another EEA State. | Article 3 of Act No 70/2004 |
| <i>Liechtenstein</i> | During the period of posting in another country the workers have the possibility to continue with their contributions to the voluntary supplementary pension scheme established on behalf of the worker. They have the same rights as the other insured workers. There is no obligation to make contributions in case (i) the posted worker is not permanently working in Liechtenstein and (ii) it is guaranteed that the worker is sufficiently insured abroad. | Article 7(3) BPVG Article 3 (3) lit. f BPVG |
| <i>Norway</i> | A person working in another EEA State and being comprised by a supplementary pension scheme in Norway, shall continue to be fully entitled to the rights under the supplementary pension scheme if the person is comprised by Norwegian legislation on social security in accordance to Annex No 1 to the EEA Agreement. | Section 4 of the Act of 14 December 2001 |

Table 5: Information provided to scheme members

| Country | Adopted measures to ensure adequate information | Reference in the national provision |
|----------------------|---|--|
| <i>Iceland</i> | Specific legislation was adopted | Article 3(2) of Act No 70/2004 |
| <i>Liechtenstein</i> | <p>Specific legislation was adopted</p> <p>In case the insured person terminates the scheme, the responsible institution has to inform the person about the use of the ‘<i>Freizügigkeitsleistung</i>’ (vested rights) according to Article 12 BPVG as well as other entitled persons about their pension rights.</p> <p>The responsible institution informs the insured persons annually about its activities, its financial statement and assets. Furthermore, at least every three years the institution has to inform in writing each insured person about his or her pension rights.</p> | Article 20 BPVG |
| <i>Norway</i> | Specific legislation was adopted. | Section 6 of the Act of 14 December 2001 |