

Brussels, 10 February 2021  
Case No: 84080  
Document No: 1154947  
Decision No: 005/21/COL

Ministry of Transport and Local Government  
Sölvhólgötu 7  
101 Reykjavík  
Iceland

Dear Sir or Madam,

**Subject: Letter of formal notice to Iceland concerning the transfer of occupational pensions to the pension scheme of the European Union institutions**

## 1 Introduction and correspondence

- (1) By a letter dated 27 September 2019 (Doc No 1088526), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had received a complaint against Iceland concerning the refusal to transfer pension rights accrued in Iceland to the pension scheme of the European Union institutions (“PSEUI”). The Authority also requested clarifications on the applicable, Icelandic legislation pertaining to the transfer of pension rights.
- (2) The complainant, an Icelandic citizen, worked for the Icelandic Civil Aviation Authority from 2001 until 2009 when he was engaged by the European Union Aviation Safety Agency (“EASA”) as a temporary agent. By virtue of his previous employment, the complainant had accrued *inter alia* occupational pensions in Iceland.
- (3) Shortly after taking up his position at the EASA, the complainant submitted a request for the transfer of his occupational pensions to the PSEUI.<sup>1</sup> However, the Icelandic Social Insurance Administration (*Tryggingastofnun*) replied that it was not possible to transfer pension rights acquired in Iceland to other countries. The refusal applied to both tax-financed public pensions and occupational pension funds.
- (4) Having remained under contract with the EASA, the complainant resubmitted his request for the transfer of his occupational pensions in January 2019. To date, that request has been left unanswered.
- (5) The complainant contends that by refusing to allow for the transfer of his occupational pensions, Iceland has failed to respect the obligations deriving from Article 29 of Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (“EASA Regulation”), as adapted for the purposes of the EEA Agreement.<sup>2</sup> That provision stipulates that EFTA nationals may be employed by the agency and, moreover, that the EU Staff Rules shall apply to the staff of the agency. Notably, the EU Staff Rules provide that employees are entitled to have the capital value of their national pension rights transferred to the PSEUI.

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<sup>1</sup> The request was submitted via the Paymaster Office, the internal department within the European Commission responsible for the financial entitlements of staff of the European Commission and certain other EU institutions.

<sup>2</sup> 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, included in point 66n. of Annex XIII.VI to the EEA Agreement.

- (6) On 21 November 2019, the Icelandic Government submitted its reply to the Authority's request for information (Doc No 1099196), in which it contested the merits of the complaint. Following discussions during the package meeting in May 2020, the Authority received further clarifications by way of letters dated 13 August 2020 (Doc No 1147969) and 14 September 2020 (Doc No 1152635).
- (7) Having examined the Icelandic Government's response, the Authority has reached the conclusion that by not allowing for the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI, Iceland is acting in breach of Article 29 of the EASA Regulation and/or Article 28 of the EEA Agreement.

## 2 Relevant national law<sup>3</sup>

Section 146 of the Icelandic Aviation Act No 60/1998<sup>4</sup> provides that:

*"The Icelandic Transport Authority will participate in the work of the European Aviation Safety Agency (EASA) with the aim, inter alia, of improving aviation safety, reducing pollution from aircraft and presenting the viewpoints of the Icelandic government in the work of the Agency.*

*The Minister shall, with reference to Paragraph 1, issue a government regulation effecting the incorporation of Regulations of the European Parliament and the Council relating to the establishment of the European Aviation Safety Agency, into the Icelandic legal order.*

*The Minister may issue a regulation effecting the transposition of EEA Acts concerning tasks in the field of the European Aviation Safety Agency (EASA) which have been delegated to the Agency on the basis of the Acts establishing EASA, in accordance with Paragraph 2."*

Section 3 of the Icelandic Regulation 812/2012<sup>5</sup> reads:

*"Implementation:*

*With this regulation the following EU regulations come 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:*

1. *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..."*

Section 1(4) of the Icelandic Act on Mandatory Pension Insurance and on the Activities of the Pension Funds No 129/1997 provides that:

*"All wage earners and self-employed have the right and obligation to ensure pension by participating in a pension fund from the age of 16 to 70."*

Sections 19(3) and (4) of the Icelandic Act on Mandatory Pension Insurance and on the Activities of the Pension Funds No 129/1997 read:

<sup>3</sup> Disclaimer: unofficial translations.

<sup>4</sup> 1998 nr. 60 10. júní Lög um loftferðir

<sup>5</sup> Nr. 812/2012 Reglugerð um sameiginlegar reglur um almenningsflug og stofnun Flugöryggisstofnunar Evrópu.

*“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,*

*Pension contributions of foreign, nationals emigrating from Iceland may be reimbursed, provided that this is not prohibited pursuant to international agreements to which Iceland is a party. Reimbursement may not be limited to a specific portion of the contributions except on proper actuarial premises.”*

### **3 Relevant EEA law**

(8) Article 3 EEA reads:

*“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.”*

(9) Article 7 EEA reads:

*“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;”*

(10) Article 28 EEA provides that:

- “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 as regards employment, remuneration and other conditions of work and employment.”*

(11) The EASA Regulation provides in Article 29 on “staff” that:

- “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*
- 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 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."*

(12) Point 3(a) of the annex to Decision of the EEA Joint Committee No 163/2011 ("the JCD") incorporating the EASA Regulation into the EEA Agreement, includes an adaptation text to Article 29:

*"(a). Unless otherwise stipulated below, and notwithstanding the provisions of Protocol 1 to the Agreement, the term "Member State(s)" contained in the Regulation shall be understood to include, in addition to its meaning in the Regulation, the EFTA States. Paragraph 11 of Protocol 1 shall apply.*

(13) Point 3(m) of the annex to Decision of the EEA Joint Committee No 163/2011 incorporating the EASA Regulation into the EEA Agreement, provides the following adaptation to Article 29:

*"(m). The following paragraph shall be added to Article 29:*

*"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."*

(14) Article 11(2) of Annex VIII to Regulation No 31 (EEC), 11(EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ("the EU Staff Regulations") states the following on the transfer of pension rights:

*"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, 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 a 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 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 only once for each Member State and pension fund concerned;*"

## **4 The Authority's assessment**

### **4.1 Overview of the Icelandic pension system<sup>6</sup>**

The Icelandic pension system is based on three pillars. The first pillar is a tax-financed public pension. The second pillar consists of mandatory occupational pension schemes, funded by contributions from both employers and employees. The third pillar comprises voluntary, personal pensions savings schemes.

The public pension (pillar I) established by Act No 100/2007 is financed directly by general taxes, without contributions. Its primary objective is to provide mutual insurance, income equalisation and a social safety net for pension recipients. It includes pensions, health insurance and disability insurance. Individuals covered by the public pension scheme receive a basic pension from the age of 67 as well as a means-tested supplementary benefit after retirement.

The mandatory occupational pension schemes system (pillar II) is classified into two main categories, of which the first covers defined benefit funds for general government employees where the value of pension pay-outs is guaranteed by the government. The second category comprises defined contribution funds for non-general government employees where pension payments are dependent on the valuation of invested funds. There are no individual accounts, although an individual's accrued rights can be calculated. The investment risk is borne collectively by the members of the fund. The occupational private pension fund system (second category) is built on the premise that schemes are collective and that generations saved up and contribute to a fund that provides rights upon retirement.

Pursuant to voluntary, personal pensions savings schemes (pillar III), wage earners can save a portion of their wages by depositing them into a special account whereby the employer contributes reciprocally. These individual pension savings are most commonly defined contribution accounts and cannot be redeemed until the individual has reached the age of 60 years.

### **4.2 Article 19(4) of the Icelandic Act on Mandatory Pension Insurance**

Article 19(4) of the Icelandic Act on Mandatory Pension Insurance and on the Activities of the Pension Funds No 129/1997 ("the Act") provides that "*[p]ension contributions of foreign nationals emigrating from Iceland may be reimbursed, provided that this is not prohibited pursuant to international agreements to which Iceland is a party.*"

During the course of its correspondence with the Authority, the Icelandic Government has argued that Article 19(4) of the Act cannot be applied to EEA nationals moving from Iceland to another EEA State. In this context, the Icelandic Government has highlighted that pension rights accrued by EEA nationals in Iceland under the first and second pillar of the national pension system are protected under the relevant rules of Regulation 883/2004 on the coordination of social security systems. Furthermore, in its letter dated 21 November 2019, Iceland points out that due to the nature and general scheme of the

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<sup>6</sup> The overview is based on information provided by the Icelandic Government in its letter dated 21 November 2019 (Doc No 1099196).

national pension funds system, the funds would need to assess the actuarial assumption of a pension (estimate of the accrued capital value of the pension to date) before any reimbursements of contributions could be approved.

In this respect, the Authority recalls that the Icelandic Government has recognised that the capital value of an individual's accrued rights under the second pillar (occupational pensions) can be calculated. Further, the rights and obligations contained in Article 29 of the EASA Regulation, including its reference to the EU Staff Rules and the ensuing right to have one's national pension rights transferred to the PSEUI, constitute *lex specialis* in relation to the general coordination rules provided by Regulation 883/2004.

Further the Authority observes that case-law of the European Court of Justice ("the CJEU") demonstrates that transfers of national pension rights to the PSEUI do take place in practice, without the CJEU ever having considered if Regulation 883/2004 should in any way prevent this.<sup>7</sup>

Moreover, the Authority recalls that the issue raised in the context of the present complaint case concerns the *transfer* of accrued pension rights to another pension scheme located within the EEA, not the *reimbursement* directly to the individual concerned which seems to be the situation covered under Article 19(4) of the Act.

### 4.3 Breach of Article 29 of the EASA Regulation

The question is whether Article 29 of the EASA Regulation, as incorporated into the EEA Agreement, confers upon EFTA nationals working for the EASA the right to have their occupational pensions transferred to the PSEUI.

The Authority recalls, first, that pursuant to Article 29 of the EASA Regulation as amended for the purposes of the EEA Agreement, EFTA nationals may be employed by the agency. Secondly, Article 29(1) provides that the EU Staff Rules shall apply to the staff of the agency. Importantly, Article 11(2) of Annex VIII to the EU Staff Rules stipulates that officials shall be entitled to have paid to the PSEUI the capital value of pension rights acquired at national level.

#### 4.3.1 *The objections of the Icelandic Government*

To the Authority's understanding, the Icelandic Government essentially contends that because the EU Staff Rules are not incorporated into the EEA Agreement, EFTA nationals working for the EASA are precluded from enforcing the right set forth therein to have their national pensions transferred to the PSEUI. Iceland emphasises, moreover, that the EU Staff Rules are laid down in a legislative act which is binding upon the EU Member States only.

In further support for its position, the Icelandic Government recalls that the relevant adaptation text in the JCD merely entails a right for EFTA nationals to be employed by the EASA, without making any reference to the EFTA States. By consequence, Article 29 of the EASA Regulation would only serve EFTA nationals as a legal basis for invoking the EU Staff Rules towards the EASA, not towards the EFTA States. This in contrast to the approach taken by virtue of the adaptation text to Article 30 of the EASA Regulation, whereby the EFTA States are explicitly obliged 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.

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<sup>7</sup> Case C-132/18 *Tuerck* and Case C-166/12 *Časta*.

Finally, the Icelandic Government argues that an interpretation of Article 29 of the EASA Regulation, as adapted for the purposes of the EEA Agreement, to the effect that EFTA nationals can invoke the right to have their national pension rights transferred to the PSEUI, lacks support in Article 7 of the EEA Agreement and the adaptation text itself.

#### 4.3.2 *The Authority's assessment*

At the outset, it is appropriate to recall that unless the act itself offers specific definitions, the starting point for determining the meaning and scope of a provision of EEA law must be determined considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part<sup>8</sup>.

The Authority observes, first, that the wording of Article 29 of the EASA Regulation, as incorporated into the EEA Agreement, stipulates *with absolute clarity* that EFTA nationals have the right to be employed by the EASA and that the EU Staff Rules “shall apply to the staff of the Agency”.

Secondly, the Authority notes that a majority of the adaptations contained in the JCD were specifically added with the objective of ensuring the full participation of the EFTA States in the EASA. That particular purpose is indeed emphasised in recital 4 of the preamble to the JCD. The specific adaptation text to the effect that also EFTA nationals have the right to be employed by the EASA, forms part of that overall objective.

In that respect, although the wording of Article 29 of the EASA Regulation as adapted for the purposes of the EEA Agreement leaves no scope for alternative interpretations, the Authority recalls that preference must be given to the interpretation which ensures that provisions of EEA law retain their effectiveness. The Authority submits that any interpretation which would amount to disapplying the possibility for EFTA nationals to rely on the EU Staff Rules as foreseen by Article 29(1), would obstruct the full effectiveness of those persons right to be employed by the EASA on the same footing as EU nationals.

It follows from the considerations above that, although the Authority acknowledges that the EU Staff Rules, as such, have not been incorporated into the EEA Agreement, this does not mean that they are wholly excluded from the scope of EEA law. To the extent that secondary legislation, which has been made part of EEA law, requires an instrument of EU law, such as the EU Staff Rules to be observed, that instrument applies fully in the context of, and as specified by, that piece of legislation. This is the case irrespective of whether the EFTA States are themselves signatories to the instrument referred to.

Indeed, the subject of this letter of formal notice is the infringement not of Article 11(2) of Annex VIII to the EU Staff Rules, but of Article 29 of the EASA Regulation. According to the terms under which the EASA Regulation was incorporated into the EEA Agreement by the relevant JCD, Iceland is obliged to respect the rights and obligations provided for by the EU Staff Rules insofar as this is required to fulfil the requirements of the EASA Regulation. The Authority recalls that the EFTA States are obliged under Article 3 EEA to take all appropriate measures to ensure fulfilment of the obligations arising from the EEA Agreement and they must abstain from any measures that could jeopardise the attainment on its objectives.<sup>9</sup>

Indeed, upon the incorporation of an act into the EEA Agreement, specific adaptations might be necessary *inter alia* where that act covers policy areas that fall outside the scope of the Agreement or where a provision, such as in the case at hand, makes a

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<sup>8</sup> Case C-201/13 *Deckmyn*, para 19 with further references.

<sup>9</sup> Case E-17/15, *Ferskar kjötvörur ehf. v the Icelandic State*

reference to a non-incorporated act (the EU Staff Rules). The Authority observes that no such adaptation, as regards the reference to the EU Staff Rules, was made in this case.

The Authority notes that, having included the specific adaptation to the effect that EFTA nationals may be employed by the EASA on the same footing as EU nationals, the contracting parties had an even greater incentive to make it clear that the reference to the EU Staff Rules in Article 29(1) should not apply, had that been their intention.

The Authority further submits that only the interpretation suggested above would appear to respect the principle of reciprocity, referred to *inter alia* in recital 4 to the EEA Agreement. That principle requires that EFTA nationals may invoke the rights conferred by the EEA Agreement within the EU.

In light of the above considerations, the Authority concludes that the refusal to allow for the transfer of occupational pensions accrued in Iceland to the PSEUI, does not comply with Article 29 of the EASA Regulation.

#### 4.4 Breach of Article 28 EEA

The Authority recalls, first, that Article 28 EEA provides for the freedom of movement for workers in the EEA, which entails the right to leave the home State and go to another EEA State without being placed at a disadvantage.<sup>10</sup>

A restriction on that right may be permissible only if it pursues a legitimate objective justified by overriding reasons in the public interest and, moreover, if it is suitable for attaining that objective and does not go beyond what is necessary in order to attain it.<sup>11</sup>

The question is, first, whether the refusal to allow for the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI constitutes a restriction on the freedom of movement for workers. Importantly, the CJEU has made clear that:

*“[p]rovisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.”<sup>12</sup>*

Being included in the PSEUI may present numerous advantages for the staff of the EU institutions, such as higher final pensions payments, lower taxes on accrued pension contributions and relatively high survivor's pension payments. By refusing the transfer of occupational pensions accrued in Iceland to the PSEUI, the individuals concerned are placed at a clear disadvantage compared to their colleagues from other EEA States. As such, it presents an obstacle for those individuals to make full use of their right to freedom of movement.

In the Authority's view, the refusal to allow for the transfer of national pension rights to the PSEUI is therefore liable to hinder or make less attractive the exercise of free movement as guaranteed by the EEA Agreement, even if there is no discrimination on grounds of nationality.<sup>13</sup>

With reference to the above, the Authority submits that the contested measure, whereby the capital value of occupational pensions accrued in Iceland may not be transferred to the PSEUI, constitutes a restriction on the freedom of movement for workers.

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<sup>10</sup> Case C-415/93 *Bosman*, paras. 94-96 ; Case C-318/05 *Commission v Germany*, paras 114-115; Case C-269/09 *Commission v Spain*, paras. 52-54; and Case C-187/15 *Pöpperl*, paras. 23-24.

<sup>11</sup> Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 114.

<sup>12</sup> Case C-18/95 *Terhoeve*, para 39.

<sup>13</sup> Case E-14/15 *Holship Norge AS vs Norsk Transportarbeiderforbund*, paragraph. 115.



Any restriction must pursue a legitimate objective justified by overriding reasons in the public interest. It is for the EEA State imposing those restrictions to demonstrate that this is the case. The Authority notes that aims of a purely economic or administrative nature cannot justify a restriction on free movement.<sup>14</sup>

The Icelandic Government has failed to demonstrate that the contested restriction is justified.

In light of the above, the Authority submits that the refusal to allow for the transfer of the capital value of occupational pensions accrued in Iceland to the PSEUI, amounts to an unjustified restriction on the free movement of workers in breach of Article 28 EEA.

## 5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force 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 obligation arising from Article 29 of Regulation 216/2008 as adapted to the EEA Agreement by Protocol 1 thereto and/or Article 28 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*

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<sup>14</sup> Case E-8/17 *Kristoffersen*, cited above, paragraph 115; and Case C-212/08 *Zeturf*, EU:C:2011:437, paragraph 48.