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EFTA SURVEILLANCE AUTHORITY

Ministry of Education and Research
Kirkegata 18
P. box 8119 Dep
0032 Oslo

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning support for studies abroad for EEA nationals and their family members

1 Introduction

1. By a letter dated 17 June 2015 (Doc. No 757521), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case concerning support for studies abroad under the new rules for study financing in Norway.
2. Following the infringement proceedings against Norway in Case No 69199, on 17 March 2015 (your ref. 11/2195, Doc. No 750659), the Norwegian Government informed the Authority about the adoption, on 18 February 2015, of the Study Financing Regulation for the academic year of 2015-2016 remedying the breach put forward in the letter of formal notice of 6 November 2013 (Doc. No 675338) and the reasoned opinion of 2 July 2014 (Doc. No 702285).
3. In particular, the combination of the "*two out of five years*" residence rule and the Norwegian language proficiency requirement, which was considered by the Authority as being too exclusive and going beyond what was necessary in order to attain the objective pursued by Norway, has been replaced by several criteria.
4. The new rules provide for more possibilities for EEA nationals and their family members to receive support for studies abroad, compared with the old rules. However, as set out below, the Authority holds the opinion that the new rules are still too exclusive and go beyond what is necessary in order to attain the objective relied on by Norway.

2 Correspondence

5. A request for information to the Norwegian Government was sent on 17 June 2015 (Doc. No 757521). The Norwegian Government replied by letter of 17 August 2015 (ref. 11/2195, Doc. No 769530).
6. The case was discussed at the package meetings on 12 and 13 November 2015[1] and on 27 and 28 October 2016[2].

[1] See the follow-up letter to the package meeting, Doc. No 776934.
[2] See the follow-up letter to the package meeting, Doc. No 824382.

3 Relevant national law

General rules on financial support to students

7. The Study Financing Act of 3 June 2005 No 37[3] ("the Study Financing Act") provides the legal basis for financial support, in the form of grants or loans, to students by the Norwegian State Educational Loan Fund.

8. According to Section 1 of the Study Financing Act the purpose of the educational grant scheme is to advance equal opportunities in the field of education regardless of geography, age, gender, disability, economic and social situation, and to ensure that competence is made available to society and the labour market. According to Section 3, the Act applies to Norwegian nationals and EEA nationals, including EEA nationals who have employment in Norway ("EEA workers") and EEA nationals who have special links with Norway. The Act also applies to other groups of foreign nationals who have links with Norway on the basis of their work or family ties.

9. The Regulation on financial support from the Norwegian State Educational Loan Fund ("the Study Financing Regulation")[4] (a new regulation is adopted each year) lays down the following rules.

10. Section 2-1 of the Study Financing Regulation states, as a general rule, that study financing is normally provided for Norwegian nationals. Section 2-2 of the Regulation provides that family members of EEA nationals, residing in Norway on a basis other than studies, shall have the right to study financing on the same conditions as Norwegian nationals. According to Section 2-3 EEA workers are entitled to study support on the same conditions as Norwegian nationals. If an EEA worker stops working and starts studying, he is eligible for study support only if the studies have a connection with work. The requirement for a connection with work is not applicable only if he has become involuntarily unemployed due to general changes in the labour market. Section 2-3 of the Regulation defines who is to be considered as a family member of an EEA worker. Section 2-4 adds that EEA nationals, and their family members, who have been granted the right of permanent residence in Norway (see Sections 115 and 116 of the Immigration Act[5]), shall be treated on equal footing with Norwegian nationals.

Rules on financial support for studies abroad

11. With regard to studies pursued abroad, Section 2-6 of the Study Financing Regulation states that special requirements shall apply with regard to nationality and links with Norway, as further laid down in Chapter 6 (studies in another Nordic country) and Chapter 31 (studies outside the Nordic countries).

12. Section 6-2 establishes that a person applying for study financing in another Nordic country must fulfill the conditions of affiliation with Norway, as set out in Section 31-5.

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[3] *Lov om utdanningsstøtte*. LOV-2005-06-03-37.

[4] The current Study Financing Regulation: *Forskrift om tildeling av utdanningsstøtte for undervisningsåret 2017–2018*. FOR-2017-03-10-309.

[5] Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act) (*Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven).* LOV-2008-05-15-35.

13. Section 31-1 of the Regulation states, as a main rule, that access to study financing for studies abroad shall be accorded to Norwegian nationals. However, according to Section 31-3, this right applies also to EEA nationals, and their family members, who have the right of permanent residence in Norway.

14. Section 31-2 first paragraph extends the right to study financing for studies abroad to EEA workers. Section 31-2 second paragraph adds that family members of EEA workers shall in this regard have the right to study financing on the same basis as Norwegian nationals.

15. Section 31-5 lists the criteria to be fulfilled in order to be eligible for financial support for studies abroad. The criteria apply irrespective of the nationality of the applicant.

16. In particular, under Section 31-5 first paragraph the applicant is eligible for support if he fulfils one of the criteria listed below:

    - the applicant has lived in Norway for a consecutive period of two of the last five years prior to the education abroad;
    - the applicant has attended school or studied in Norway for a total period of three years;
    - the applicant has children, partner or parents who live in Norway while the applicant is studying abroad. The family member must be another individual in addition to the EEA worker from which the right to student support is derived. The applicant must either live together with the family member in Norway before the education starts, or must have lived with the family member for at least two years in Norway or abroad. The applicant must be proficient in the Norwegian language equivalent to level B1 under the Common European Framework of Reference for Languages;
    - *if the applicant is a frontier worker*: the applicant has worked in Norway for at least five years, and is proficient in the Norwegian language equivalent to level B1 under the Common European Framework of Reference for Languages;
    - *if the applicant is a family member of a frontier worker*: the worker has worked in Norway for at least five years, the applicant has lived in another Nordic country during this period, and the applicant is proficient in the Norwegian language equivalent to level B1 under the Common European Framework of Reference for Languages.

17. If none of these criteria are fulfilled, under Section 31-5 second paragraph, the applicant may be eligible for support if he has a connection to Norway which is considered to be equivalent to the situations covered by the objective criteria above. Knowledge of the Norwegian language is emphasised in the assessment.

4 Relevant EEA law

18. Article 28(1) of the EEA Agreement provides that freedom of movement for workers shall be secured among EC Member States and EEA EFTA States. This shall, pursuant to Article 28(2) of the EEA Agreement, entail the abolition of any discrimination based on nationality between workers of EC Member States and EEA EFTA States as regards employment, remuneration and other conditions of work and employment.

19. As regards free movement of workers, more specific rules are set out in Regulation No 492/2011 on the freedom of movement for workers within the Union[6] ("Regulation No 492/2011"). Under Article 7(2) of Regulation No 492/2011, a worker who is a national of an EEA State is to enjoy, in the territory of another EEA State, the same social and tax advantages as national workers.

20. Article 24(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[7] ("Directive No 2004/38") establishes the general rule on equal treatment of EEA nationals and their family members residing in the territory of the EEA State concerned with the nationals of the host EEA State. However, Article 24(2) of Directive 2004/38 specifies that the host EEA State is not obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, consisting of student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

5 The Authority's assessment

5.1 The scope of EEA law

21. As was mentioned above, under Article 7(2) of Regulation No 492/2011, a worker who is a national of an EEA State is to enjoy, in the territory of another EEA State, the same social and tax advantages as national workers.

22. The provision in Article 7(2) of Regulation No 492/2011 equally benefits both migrant workers resident in a host EEA State and frontier workers employed in that EEA State while residing in another EEA State[8].

23. According to settled case-law, assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes a social advantage for the purposes of Article 7(2) of Regulation No 492/2011[9]. In addition, the provision in Article 24(2) of Directive 2004/38 expressly confirms that workers, self-employed persons, persons who retain such status and members of their families shall enjoy equal treatment with nationals of the EEA State concerned regarding grant of maintenance aid for studies prior to acquisition of the right of permanent residence.

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[6] Act referred to at point 2 of Annex V to the EEA Agreement (*Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union*), as adapted to the EEA Agreement by Protocol 1 thereto.

[7] Act referred to at point 1 of Annex V to the EEA Agreement (*Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*), as adapted to the EEA Agreement by Protocol 1 thereto.

[8] Judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 33 and the case-law cited therein; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 37; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 39 and the case-law cited therein.

[9] Judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 34 and the case-law cited therein; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 38; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 40.

24. Furthermore, study financing granted by an EEA State to the children of workers constitutes, for the migrant worker, a social advantage for the purposes of Article 7(2) of Regulation No 492/2011, where the worker continues to support the child[10].

25. The members of a migrant worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation No 492/2011. Since the grant of funding for studies to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may himself rely on that provision in order to obtain that funding if, under national law, such funding is granted directly to the student[11].

26. It is settled case-law that the equal treatment rule laid down both in Article 28 EEA and in Article 7(2) of Regulation No 492/2011 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result[12]. In particular, conditions which may be more easily fulfilled by national workers than EEA workers are prohibited[13].

5.2 The requirements applied to EEA workers and their family members

27. As mentioned above, as from the academic year 2015-2016, Norway replaced the combination of the "*two out of five years*" residence rule and the Norwegian language proficiency requirement assessed by the Authority in Case 69199 by several criteria.

28. It is therefore necessary to examine whether those criteria comply with EEA law.

5.2.1 The requirement of prior residence for a consecutive period of two of the last five years

29. Section 31-5 first paragraph first indent of the Study Financing Regulation establishes that the applicant is eligible for study support abroad if he has lived in Norway for a consecutive period of two of the last five years.

30. The requirement of prior residence for a consecutive period of two of the last five years was already partially assessed by the Authority in its letter of formal notice of 6 November 2013 (Doc. No 675338) and its reasoned opinion of 2 July 2014 (Doc. No 702285) in Case 69199. There, the Authority concluded that the prior residence

[10] Judgments of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraphs 12 and 13; 21 June 1988, *Lair*, 39/86, EU:C:1988:322, paragraph 24; and 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 35 and the case-law cited therein.

[11] Judgments of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraphs 12 and 13; 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89, paragraph 26; 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 48; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 40; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 40.

[12] Judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 37 and the case-law cited therein; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 41; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 41.

[13] See, to that effect, Case E-3/05 *EFTA Surveillance Authority* v *Norway* [2005] EFTA Ct. Rep. page 102, paragraph 55 on Regulation (EEC) No 1408/71; judgments of 12 September 1996, *Commission* v *Belgium*, C-278/94, EU:C:1996:321, paragraphs 27 and 28; 27 November 1997, *Meints*, C-57/96, EU:C:1997:564, paragraph 44; and 10 September 2009, *Commission* v *Germany*, C-269/07, EU:C:2009:527, paragraph 53.

requirement creates an inequality in treatment as regards access to export of study financing, contrary to Article 28 EEA and Article 7(2) of Regulation No 492/2011[14].

31. In particular, as confirmed also by the Court of Justice of the European Union ("the Court of Justice") in its judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09[15], and 20 June 2013, *Giersch and Others*, C-20/12[16], both examining prior residence requirements for the grant of financial support to studies, such a distinction based on residence is liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are, in the majority of cases, foreign nationals.

32. In that context, it is immaterial whether, in some circumstances, the contested measure affects, as well as nationals of other EEA States, nationals of the EEA State in question who are unable to meet such a criterion. In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing all the nationals of the EEA State in question at an advantage or of placing at a disadvantage only nationals of other EEA States, but not nationals of the State in question[17].

33. The requirement of prior residence for a consecutive period of two of the last five years, such as laid down in Section 31-5 first paragraph first indent of the Study Financing Regulation, therefore constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified. In order to be justified, it must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective.

5.2.2 The requirement of schooling or studies in Norway for a total period of three years

34. Under Section 31-5 first paragraph second indent of the Study Financing Regulation, the applicant is eligible for study support abroad if he has attended school or studied in Norway for a total period of three years.

35. The Authority notes that the considerations presented above regarding the requirement of prior residence for a consecutive period of two of the last five years apply equally to the requirement of schooling or studies in Norway for a total period of three years.

36. In particular, this requirement is liable to operate mainly to the detriment of nationals of other EEA States, as Norwegian nationals will be more likely to meet this criteria, compared to foreign nationals. Further, as explained above, it is immaterial whether, in some circumstances, the requirement affects, as well as nationals of other EEA States, nationals of Norway who are unable to meet such a criterion.

37. In addition, the requirement of schooling or studies in Norway for a total period of three years could be seen as a disguised requirement of prior residence and / or of the proficiency in the Norwegian language, as in the majority of cases a person attending school or studying in Norway will also reside in Norway and the schooling or studies in Norway are normally conducted in the Norwegian language.

38. Therefore, the requirement of schooling or studies in Norway for a total period of three years, such as laid down in Section 31-5 first paragraph second indent of the

[14] See paragraphs 48-53 of the letter of formal notice of 6 November 2013 and paragraphs 54-59 of the reasoned opinion of 2 July 2014.
[15] Judgment of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 38.
[16] Judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 44.
[17] Judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 45 and the case-law cited therein.

Study Financing Regulation, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified under the conditions set out in paragraph 33 of this letter.

5.2.3 The combination of the requirement of having a family member residing in Norway and the Norwegian language proficiency requirement

39. Section 31-5 first paragraph third indent of the Study Financing Regulation provides that the applicant is eligible for study support abroad if he has a family member (a child, the partner or a parent) residing in Norway while the applicant is studying abroad. The family member at issue must be in addition to the EEA worker from which the right to study support derives. The applicant must either live together with the family member in Norway before the education starts or must have lived with the family member for at least two years in Norway or abroad. The applicant must, moreover, be proficient in the Norwegian language.

40. With regard to the requirement of having a family member residing in Norway, the Authority notes that the residence requirements with respect to study financing abroad have been already discussed above (paragraphs 29-33 of this letter). It does not matter in this respect whether the residence requirement is imposed on the applicant himself or on his family member. In effect, it is clear that Norwegian nationals will more readily be able to comply with this condition than EEA nationals.

41. With regard to the language proficiency requirement, in the context of granting financial support for studies abroad, which in absolute majority of cases will not be pursued in the Norwegian language, this requirement serves only as a ground for exclusion from the financial support of certain students, again mainly to the detriment of nationals of other EEA States and their family members.

42. Accordingly, the combination of the requirement of having a family member residing in Norway and the Norwegian language proficiency requirement, such as laid down in Section 31-5 first paragraph third indent of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality, which is permissible only if it objectively justified under the conditions set out in paragraph 33 of this letter.

5.2.4 The requirements applicable to frontier workers

43. Under Section 31-5 first paragraph fourth indent of the Study Financing Regulation, if the applicant is a frontier worker, he is eligible for study support abroad if he has worked in Norway for at least five years and is proficient in the Norwegian language.

44. This national provision therefore makes the grant of financial support for studies abroad in the case of workers from other EEA States not residing in Norway conditional on, *inter alia*, their having been employed in Norway for at least five years. Even if it applies equally to Norwegian nationals and to nationals of other EEA States, such a condition of a minimum period of work is not laid down in respect of workers who reside in the territory of Norway. It is clear, moreover, that this condition is liable to operate mainly to the detriment of nationals of other EEA States, as frontier workers are, in the majority of cases, foreign nationals.

45. Such a distinction based on residence is liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are in the majority of cases foreign nationals[18].

46. As regards the language proficiency requirement and as noted in paragraph 41 of this letter, in the context of granting financial support for studies abroad, which in absolute majority of cases will not be pursued in the Norwegian language, this requirement serves only as a ground for exclusion from the financial support of certain students, again mainly to the detriment of nationals of other EEA States and their family members.

47. Accordingly, the combination of the requirement of having been employed in Norway for at least five years and the Norwegian language proficiency requirement applied with respect to frontier workers, such as laid down in Section 31-5 first paragraph fourth indent of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality, which is permissible only if it objectively justified under the conditions set out in paragraph 33 of this letter.

5.2.5 The requirements applicable to family members of frontier workers

48. Section 31-5 first paragraph fifth indent of the Study Financing Regulation provides that, if the applicant is a family member of a frontier worker, he is eligible for study support abroad if the frontier worker has worked in Norway for at least five years, the applicant has lived in another Nordic country during this period and is proficient in the Norwegian language.

49. The same arguments as discussed above in paragraphs 43-47 of this letter apply to requirements in Section 31-5 first paragraph fifth indent of the Study Financing Regulation.

50. In particular, the national provision at issue makes the grant of financial support for studies abroad in the case of students not residing in Norway conditional on, *inter alia*, their being the family members of workers who have been employed in Norway for at least five years. Even if it applies equally to Norwegian nationals and to nationals of other EEA States, such a condition of a minimum period of work is not laid down in respect of students who reside in the territory of Norway.

51. In addition, the national provision requires that the applicant has lived in another Nordic country during the minimum period of the frontier worker's work in Norway.

52. The Authority notes that this is another residence requirement, despite the fact that it is not residence in Norway, but rather in another Nordic country that is required from applicants.

53. Such distinctions, based on residence, are liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are in the majority of cases foreign nationals, and / or to the detriment of nationals of EEA States other than Nordic.

54. Finally, as regards the language proficiency requirement, in the context of granting financial support for studies abroad, which in absolute majority of cases will not be pursued in the Norwegian language, this requirement serves only as a ground for exclusion from the financial support of certain students, again mainly to the detriment of nationals of other EEA States and their family members.

[18] Judgment of 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 43 and the case-law cited therein.

55. Therefore, the combination of the requirement of the worker who is the parent of the applicant having been employed in Norway for at least five years, of having lived in another Nordic country during the minimum period of the frontier worker's work and the Norwegian language proficiency requirement applied with respect to family members of frontier workers, such as laid down in Section 31-5 first paragraph fifth indent of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality, which is permissible only if it objectively justified under the conditions set out in paragraph 33 of this letter.

5.3 Possible justification

5.3.1 The existence of a reason of public interest

56. An indirectly discriminatory provision of national law can only be permissible if such a provision is justified by objective considerations independent of the nationality of the workers concerned. Yet, even if it were objectively justified, it would still have to be of such a nature as to ensure the achievement of the aim pursued and not go beyond what is necessary for that purpose[19].

57. In its letter of 17 August 2015, the Norwegian Government stated that one of the central aims of the Norwegian system for student support, as established by the Study Financing Act, is to contribute to supplying Norwegian society and the labour market with competent workers. This is the aim sought by the provisions discussed above, including those concerning frontier workers and their family members. According to the Norwegian Government, it is legitimate to seek to ensure that the recipients of support will make use of their education on the Norwegian employment market.

58. This objective is identical to the one that was relied on by the Norwegian Government in order to justify the legislation applicable until the academic year 2015-2016, which was examined by the Authority in Case 69199.

59. As in Case 69199[20], the Authority agrees with the Norwegian Government that the objective of encouraging student mobility and providing society and the labour market with competent workers is in the public interest. Accordingly, the justification relating to encouraging student mobility and providing society and the labour market with competent workers, as relied upon by the Norwegian Government, constitutes an overriding reason relating to the public interest capable of justifying a restriction of the free movement of workers[21].

5.3.2 The appropriateness of the measures applied

60. As regards the need to ensure the existence of a link between the person applying for the study financing and the Norwegian society, the Court of Justice has recognized Member States' power, subject to the respect of certain conditions, to require nationals of other Member States to show a certain degree of integration in their

[19] See, *inter alia*, judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 81; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 46; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 44.

[20] See paragraphs 61-63 of the letter of formal notice of 6 November 2013 and paragraphs 68-70 of the reasoned opinion of 2 July 2014 in Case 69199.

[21] See for comparison, judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraphs 71 and 72; and 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraphs 53-56.

societies in order to receive social advantages, such as financial support for education[22].

61. However, a distinction should be drawn between migrant and frontier workers and the members of their families, on the one hand, and EEA nationals who apply for assistance without being economically active, on the other hand, as provided for in Article 24 of Directive 2004/38.

62. As regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages[23].

63. In other words, in case of migrant workers and frontier workers the link of integration is already established simply by the fact of their participation in the employment market of Norway and payment of taxes in that state by virtue of their employment[24]. Accordingly, it cannot be argued that migrant and frontier workers do not have a sufficient link with Norwegian society.

64. As to the need to ensure the return to Norway of persons studying abroad, admittedly, the imposition of various requirements based on residence, as well as the requirements concerning the minimum periods of schooling or work and the language proficiency requirements, could make it reasonably more likely that the persons will return to work in the country.

65. The possible appropriateness of the requirements may moreover be supported by the case-law of the Court of Justice, which in the other contexts has allowed certain grounds of justification concerning legislation which distinguishes between residents and non-residents carrying out a professional activity in the State concerned, depending on the extent of their integration in the society of that Member State or their attachment to that State[25].

66. The Court has also accepted that a frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State[26].

67. Similar considerations may be applied to the language requirements. A person proficient in the Norwegian language may be regarded more likely to seek employment in Norway after finishing his studies abroad and be employed there, compared to persons who do not speak Norwegian.

68. Accordingly, the criteria in Section 31-5 first paragraph of the Study Financing Regulation may be regarded as appropriate for attaining the objective of encouraging

[22] See judgments of 15 March 205, *Bidar*, C-209/03, EU:C:2005:169, paragraph 57; and 18 November 2008, *Förster*, C-158/07, EU:C:2008:630, paragraph 49.
[23] Judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 65; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 63; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 49.
[24] See judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 66; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 63; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 50.
[25] See, to that effect, judgments of 18 July 2007, *Hartmann*, C-212/05, EU:C:2007:437, paragraphs 35 and 36; 18 July 2007, *Geven*, C-213/05, EU:C:2007:438, paragraph 26; and 11 September 2007, *Hendrix*, C-287/05, EU:C:2007:494, paragraphs 54 and 55.
[26] Judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 65.

student mobility and providing society and the labour market with competent workers[27].

5.3.3 The proportionality of the measures applied

69. The EFTA Court has held that the reasons which may be invoked by an EEA State in order to justify any derogations from EEA law principles "*[…] must be accompanied by an appropriate analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated*"[28].

70. Accordingly, the onus is on Norway not only to establish that the national measures at issue are proportionate to the objective pursued, but also to indicate the evidence capable of substantiating that conclusion.

71. As such, Norway would have needed at least to show why it opted for the requirements such as the ones in Section 31-5 of the Study Financing Regulation, to the exclusion of all other elements representative of the degree of attachment.

72. In that regard, it must be examined whether only the requirements chosen by Norway are capable of ensuring, with reasonable probability, that the recipients of the financial support for studies will return to settle in Norway and make themselves available to the Norwegian labour market, or whether other criteria exist which would also ensure that probability in a less restrictive fashion with regard to free movement of persons.

73. As mentioned above, the Court of Justice has already examined the proportionality of residence requirements regarding the grant of financial assistance to studies, in particular, in its judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, and 20 June 2013, *Giersch and Others*, C-20/12. The rules at issue were the "*three out of six years*" rule, applied by the Netherlands, and a general condition to be resident in Luxembourg, applied by the latter state.

74. It has to be noted that both requirements were found to be disproportionate by the Court of Justice, as being too exclusive in nature and as failing to take account of other elements potentially representative of the actual degree of attachment of the applicant for the financial aid with the society or with the labour market of the Member State concerned[29].

75. In its judgment of 20 June 2013, *Giersch and Others*, C-20/12, the Court of Justice added that the existence of a reasonable probability that the recipients of the financial aid to studies will return to settle in the state which granted the aid and make themselves available to the labour market of that state may be established on the basis of elements other than a prior residence requirement in relation to the student concerned.

76. With regard to the possibilities open to a Member State, the Court of Justice noted that, where the aid granted consists in, for example, a loan, a system of financing

[27] See for comparison, judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 79; 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 68; and 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 58.

[28] Case E-12/10 *EFTA Surveillance Authority* v *Iceland* [2011] EFTA Ct. Rep. page 117, paragraph 57. See also judgment of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 81, and the case-law cited therein.

[29] Judgments of 14 June 2012, *Commission* v *Netherlands*, C-542/09, EU:C:2012:346, paragraph 86; and 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 76.

which made the grant of that loan, or even the outstanding balance thereof, or its non-reimbursement, conditional on the student who receives it returning to that Member State after his studies abroad in order to work and reside there, could attain the objective pursued, without adversely affecting the children of migrant and frontier workers. In addition, the risk of duplication with equivalent financial aid paid in the Member State in which the student resides, with or without his parents, could be avoided by taking that aid into account in the grant of the aid paid by the Member State concerned[30]. Without implying that these possibilities would be appropriate in the present case they do indicate that there is some leeway for setting conditions which are less restrictive of free movement.

77. Moreover, as regards in particular frontier workers, the Court of Justice has accepted in its judgment of 20 June 2013, *Giersch and Others*, C-20/12, that, in order to avoid the risk of "*study grant forum shopping*" and to ensure that the frontier worker who is a taxpayer and who makes social security contributions in the Member State concerned has a sufficient link with the society of that Member State, the financial aid could be made conditional on the frontier worker, the parent of the student who does not reside in the Member State granting aid, having worked in that Member State for a certain minimum period of time[31].

78. However, in the judgment of 14 December 2016, *Verruga*, C-238/15, the Court of Justice rejected the Luxembourg Government's approach to draw inspiration in this respect, by analogy, from Article 24(2) of Directive 2004/38, which refers to the conditions for the acquisition of a right of permanent residence, set out in Article 16(1) of that directive.

79. It was only in order to illustrate how EU law makes it possible, in the context of economically inactive Union citizens, to avoid the risk of "*study grant forum shopping*", that the Court of Justice referred, in paragraph 80 of the judgment of 20 June 2013, *Giersch and Others*, C‑20/12, to Article 16(1) and to Article 24(2) of Directive 2004/38[32].

80. Therefore, the Court of Justice found that the rule in the Luxembourg legislation, which made the grant of financial aid for higher education studies to non-resident students conditional on a parent having worked in Luxembourg for a minimum continuous period of five years at the time the application for financial aid was made, went beyond what was necessary in order to attain the legitimate objective sought by the Luxembourg Government. This rule did not permit the competent authorities to grant that aid where the parents had worked in Luxembourg for a significant period of time and few short breaks taken by the parents of the students in the main proceedings were not liable to sever the connection between the applicant for financial aid and the Grand Duchy of Luxembourg[33].

81. As explained in Part 5.2 of this letter, the requirements applied with respect to migrant workers, in particular, such as the ones laid down in Section 31-5 first paragraph first, second and third indents of the Study Financing Regulation, are more likely to be fulfilled by Norwegian nationals.

82. The Norwegian Government has not explained why it has chosen the requirements, referred to above, to the exclusion of all other criteria. Nor, in the Authority's view, are there sufficient arguments to the effect that the requirements applied by Norway

[30] Judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 79.
[31] Judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 80.
[32] Judgment of 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 67.
[33] Judgment of 14 December 2016, *Verruga*, C-238/15, EU:C:2016:949, paragraph 69.

could not be replaced by less restrictive criteria, for example, such as referred to by the Court of Justice in its judgment of 20 June 2013, *Giersch and Others*, C‑20/12, and mentioned above in paragraph 76 of this letter.

83. As regards the requirements applied to frontier workers and their family members, such as laid down in Section 31-5 first paragraph fourth and fifth indents of the Study Financing Regulation, the judgment of 14 December 2016, *Verruga*, C-238/15, makes it clear that a requirement for a parent of the student to have worked in the EEA State granting the aid for a minimum continuous period of five years is to be considered as a disproportionate restriction of the free movement of workers.

84. It is to be noted that, in contrast with the Luxembourg legislation assessed in the judgment of 14 December 2016, *Verruga*, C-238/15, the Norwegian legislation does not require a *continuous* period of five years of work. However, the five years period of work for frontier workers or their family members is combined in Section 31-5 first paragraph fourth and fifth indents of the Study Financing Regulation with other conditions, namely, language proficiency and, in addition, as regards family members of frontier workers, residency in another Nordic country during the minimum period of the frontier worker's work. The cumulative effect of these conditions, in the Authority's view, goes beyond what is necessary in order to attain the legitimate objective sought by the Norwegian Government.

85. In its letter of 17 August 2015, the Norwegian Government claimed, first, that the national measure did not exclude other criteria. The applicant may be eligible for the support if he has a connection to Norway which is considered to be equivalent to the situations covered by the objective criteria in Section 31-5 first paragraph of the Study Financing Regulation. The Norwegian Government explained that if one of the objective criteria is partly fulfilled, and other factors of connection exist, the applicant may be eligible for support. For example, if the applicant is a child of a frontier worker in Norway who has worked there for two years, and the applicant has lived in a neighboring country and has some knowledge of the Norwegian language, he may be eligible for support if he, for example, has lived in Norway for a period of time, has other family there *etc*. If the applicant is a frontier worker who has worked in Norway for one year and does not speak Norwegian, the other factors of connection will have to be stronger to make the applicant eligible for support.

86. Second, the Norwegian Government claims that the share of EEA nationals settling in Norway after having received support for higher education abroad is lower than the share of Norwegian nationals in the same situation. This is, in particular, true for EEA nationals who studied in their home country. According to the Norwegian Government, several investigations show that a stable share of about 85 percent of Norwegian nationals who studied abroad have returned to Norway within about five years after graduation. An investigation over a period of three years showed that for EEA nationals studying in another country than their home country, the share was between 67 and 85 percent. For EEA nationals studying in their home country, the share of return was between 50 and 75 percent. This, according to the Norwegian Government, means that there is a reason to require a level of connection to Norway similar to the level represented by the provisions in Section 31-5 first paragraph of the Study Financing Regulation.

87. The Authority acknowledges that the provision in Section 31-5 second paragraph of the Study Financing Regulation partially limits the exclusionary character of the requirements under Section 31-5 first paragraph.

88. However, in view of the Authority, this provision is still too exclusionary, as it requires a connection to Norway which is considered to be *equivalent to the situations covered by the objective criteria* for an applicant to be eligible for financial support rather than merely seeking to establish a sufficient link with Norway.

89. The examples provided by the Norwegian Government in its letter of 17 August 2015 show that if an applicant does not fulfil one of the criteria in Section 31-5 first paragraph of the Study Financing Regulation, he might be still considered eligible, if he partially fulfils few of these criteria. The knowledge of the Norwegian language is emphasised in the assessment.

90. Therefore, as the criteria in Section 31-5 first paragraph of the Study Financing Regulation are indirectly discriminatory and more likely to be fulfilled by Norwegian nationals, Section 31-5 second paragraph also favours Norwegian nationals more than EEA nationals, not least because the former are more likely to have a connection to Norway considered to be equivalent to the situations covered by the abovementioned criteria.

91. In any case, this provision does not comply with the requirements of legal certainty. It is settled case-law as regards the implementation of directives that it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts[34]. A breach of obligations by an EEA State can arise simply on account of the lack of clarity of national provisions and the ambiguities that they contain[35]. In addition, it is a general principle of EEA law that for a restriction on a fundamental freedom to be justified, the measures must satisfy the principle of legal certainty[36].

92. Finally, it is a requirement of EEA law that national provisions do not render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EEA law, in particular those relating to fundamental freedoms[37]. Therefore, an EEA State may be found to be not fulfilling its obligations under EEA law if its national legislation leaves too much discretion in the hands of the national authorities[38].

93. As regards the Norwegian Government's arguments as to the share of EEA nationals settling in Norway after having received support for higher education abroad, they do not, contrary to the submissions of the Government, justify the requirement of a high level of connection to Norway.

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[34] See judgments of 23 May 1985 *Commission* v *Germany*, C-29/84, EU:C:1985:229, paragraph 23; 23 March 1995, *Commission* v *Greece*, C-365/93, EU:C:1995:76, paragraph 9; 20 March 1997, *Commission* v *Germany*, C-96/95, EU:C:1997:165, paragraphs 34 and 35; Case E-15-12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraph 52; and Case E-12/13 *EFTA Surveillance Authority* v *Iceland* [2014] EFTA Ct. Rep. 58, paragraph 71.

[35] See, for example, judgment of 21 October 2004, *Commission* v *Luxembourg*, C-445/03, EU:C:2004:655, paragraphs 77-82.

[36] See, *inter alia*, Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37; and Case E-9/11 *EFTA Surveillance Authority* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 99.

[37] See, to that effect, judgments of 20 February 2001, *Analir and Others*, C-205/99, EU:C:2001:107, paragraphs 37 and 38; 13 May 2003, *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraphs 84 and 85; and 10 March 2009 *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 64. See also to this effect Case E-9/11 *EFTA Surveillance Authority* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 100.

[38] See, for example, judgment of 8 November 2012, *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraphs 86 and 87.

94. First of all, it is not clear whether the lower share of the EEA nationals settling in Norway, in particular, of whose who studied in their home country, compared to the share of Norwegian nationals, is due to other reasons than just a level of connection to Norway.

95. Secondly, even if we were to agree that the return level depends on the level of connection, nationals of other States cannot, in general, compare to Norwegian nationals as regards their level of connection to Norway. Therefore, the aim to seek the same or similar level of return of foreign nationals and Norwegian nationals is by itself discriminatory, in particular having in mind that, as has been already explained, assistance granted for maintenance and education in order to pursue university studies constitutes a social advantage for migrant workers and frontier workers pursuant to Article 7(2) of Regulation No 492/2011.

96. Therefore, the Authority has to conclude that the requirements applied with respect to migrant workers, frontier workers and their family members, such as laid down in Section 31-5 first paragraph of the Study Financing Regulation, go beyond what is necessary in order to attain the legitimate objective sought by the Norwegian Government.

97. Consequently, the Authority takes the view that by requiring that migrant and frontier workers, and dependent family members, to comply with the requirements, such as those laid down in Section 31-5 of the Study Financing Regulation, in order to be eligible for study financing abroad, Norway has failed to fulfil its obligations under Article 28 EEA and Article 7(2) of Regulation No 492/2011.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by requiring that migrant and frontier workers, and dependent family members, comply with requirements such as those laid down in Section 31-5 of the Study Financing Regulation, in order to be eligible for study financing abroad, Norway has failed to fulfil its obligations arising from Article 28 of the EEA Agreement and from Article 7(2) of the Act referred to at point 2 of Annex V (*Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union*), as adapted to the EEA Agreement by Protocol 1 thereto.

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 Norwegian 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 Norwegian 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

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel.