

Case No: 77396
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REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Article 28 of the EEA Agreement and Article 7(2) of Regulation (EU) No 492/2011 *on freedom of movement for workers within the Union* in relation to support for studies abroad for EEA workers and their family members

1 Introduction

1. By letter dated 17 June 2015,¹ the Internal Market Affairs Directorate (“the Directorate”) of 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 newly amended rules for study financing in Norway.
2. Following the infringement proceedings against Norway in the context of Case No 69199,² the Norwegian Government, by letter of 17 March 2015,³ informed the Authority of the adoption 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 and the reasoned opinion of 2 July 2014.⁴
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 in the context of infringement proceedings in the abovementioned case to be too exclusive and go beyond what was necessary in order to attain the objective pursued by Norway, was replaced by several different criteria.
4. The amended rules provide for more possibilities for EEA workers and their family members to receive support for studies abroad, compared with the older rules. However, as set out below, the Authority takes the view that the 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 was sent to the Norwegian Government on 17 June 2015.⁵ The Norwegian Government replied by letter of 17 August 2015.⁶
6. The case was discussed at the package meetings in Norway in November 2015 and October 2016.⁷
7. On 18 October 2017, the Authority sent a letter of formal notice to Norway,⁸ concluding that Section 31-5 of the Study Financing Regulation was in breach of Article 28 of the EEA Agreement (“EEA”) and Article 7(2) of Regulation (EU) No 492/2011 *on freedom of movement for workers within the Union*⁹ (“Regulation 492/2011”).

¹ Doc No 757521

² Case 69199 – complaint against Norway concerning access to student loans for children of migrant workers.

³ Doc No 750659 / your ref. 11/2195

⁴ Docs No 675338 and 702285

⁵ Doc No 757521

⁶ Doc No 769530 / your ref. 11/2195

⁷ See the follow-up letter to the 2015 package meeting, Doc No 776934, and follow-up letter to the 2016 package meeting, Doc No 824382.

⁸ Doc No 783169

⁹ 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.

8. The case was discussed at the package meeting in Norway in October 2017.¹⁰
9. By letter dated 16 February 2018,¹¹ Norway replied to the letter of formal notice maintaining that it did not agree with the Authority's conclusion.
10. The case was discussed at the package meeting in Norway in October 2018,¹² during which the Norwegian Government reiterated its position that the system of financial assistance to studies abroad was proportionate, but noted that it might be willing to consider some adjustments or minor amendments within the current system.
11. By letter dated 10 May 2019,¹³ the Norwegian Government submitted proposed changes to Section 31-5 of the Study Financing Regulation to the Authority in order to, as far as possible, accommodate the Authority's concerns in the case. The changes proposed to Section 31-5 first paragraph were to reduce the requirement of work in Norway for frontier workers from five years to two out of five years. The proposed changes to the second paragraph of the provision were to clarify the content of the discretionary assessment under that paragraph.
12. By letter of 28 August 2019,¹⁴ the Directorate set out its preliminary view that the proposed changes were not sufficient to bring Section 31-5 of the Study Financing Regulation in compliance with EEA law.
13. The case was discussed at the package meeting in Norway in October 2019. In the follow-up letter to the package meeting,¹⁵ the Norwegian Government was invited to provide information on whether, and if so how, changes could be introduced to Section 31-5 of the Study Financing Regulation to bring it in compliance with EEA law.
14. By letter dated 15 January 2020,¹⁶ the Norwegian Government replied to the follow-up letter, referring to its letter of 16 February 2018 concerning the proportionality of the system and stating that, at this stage, there are no plans to change the requirements in Section 31-5 of the Study Financing Regulation, with the exception of the changes described in the letter of 10 May 2019.
15. By e-mail of 22 January 2020,¹⁷ the Norwegian Government explained that the mentioned changes would be adopted in spring 2020 and be applicable for the academic year 2020-2021.

3 Relevant national law

General rules on financial support to students

¹⁰ See the follow-up letter to the package meeting, Doc No 878916.

¹¹ Doc No 898344

¹² See the follow-up letter to the package meeting, Doc No 1039214.

¹³ Doc No 1068974

¹⁴ Doc No 1083493

¹⁵ Doc No 1096584

¹⁶ Doc No 1108100

¹⁷ Doc No 1109839

16. The Study Financing Act of 3 June 2005 No 37¹⁸ provides the legal basis for financial support, in the form of grants or loans, to students by the Norwegian State Educational Loan Fund.
17. 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.
18. The Regulation on Financial Support from the Norwegian State Educational Loan Fund ("the Study Financing Regulation")¹⁹ lays down further rules concerning study financing. A new regulation is adopted for each academic year.
19. Section 2-1 of the Study Financing Regulation states, as a general rule, that study financing is 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. Furthermore, 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/she is eligible for study support only if the studies have a connection with the previous work. The requirement for a connection with previous 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 also defines which family members of an EEA worker are entitled to study financing on the same conditions as Norwegian nationals. Moreover, 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 Act²⁰), shall be treated in the same way as Norwegian nationals.

Rules on financial support for studies abroad

20. With regard to studies pursued abroad, Section 2-7 of the Study Financing Regulation states that special requirements shall apply with regard to nationality and connection to Norway, as further laid down in Chapter 6 (studies in another Nordic country) and Chapter 31 (studies outside the Nordic countries).
21. 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.

¹⁸ Lov om utdanningsstøtte. LOV-2005-06-03-37.

¹⁹ The current Study Financing Regulation: Forskrift om tildeling av utdanningsstøtte for undervisningsåret 2019–2020. FOR-2019-03-15-254.

²⁰ 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.

22. 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.
23. Section 31-2 extends the right to study financing for studies abroad to EEA workers and their family members.
24. Section 31-5 of the Regulation 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.
25. In particular, under Section 31-5 first paragraph the applicant is eligible for support if he fulfils one of the criteria listed below:
 - a) the applicant has lived in Norway for a consecutive period of two of the last five years prior to the education abroad;
 - b) the applicant has attended school or studied in Norway for a total period of three years;
 - c) the applicant has children, partner or parents who live in Norway while the applicant is studying abroad. If the applicant's basis for the right to study financing is Section 2-3, then this family member must be another individual in addition to the EEA worker from which the right to student support is derived under Section 2-3. 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;
 - d) the applicant is an EEA frontier worker and 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;
 - e) the applicant is a family member of an EEA frontier worker who has worked in Norway for at least five years, and the applicant has lived in another Nordic country during this period and is proficient in the Norwegian language equivalent to level B1 under the Common European Framework of Reference for Languages.
26. If none of these criteria are fulfilled, Section 31-5 second paragraph provides that the applicant may also be eligible for support if, based on an overall discretionary assessment, he has a connection to Norway which is considered to be equivalent to the situations covered by the objective criteria in the first paragraph. Section 31-5 second paragraph further states that knowledge of the Norwegian language is emphasised in the assessment.

4 Relevant EEA law

27. Article 28(1) EEA provides that freedom of movement for workers shall be secured among EU Member States and EEA EFTA States. This shall, pursuant to Article 28(2) EEA, entail the abolition of any discrimination based on nationality between workers of EU Member States and EEA EFTA States

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

28. As regards free movement of workers, more specific rules are set out in Regulation 492/2011. Under Article 7(2) of Regulation 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.
29. 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*²¹ ("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

30. As mentioned above, Article 7(2) of Regulation 492/2011 provides that 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.
31. The provision in Article 7(2) of Regulation 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.²²
32. According to settled case law of the Court of Justice of the European Union ("the CJEU"), 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 492/2011.²³ 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.
33. Furthermore, study financing granted by an EEA State to the children of workers constitutes, for the EEA worker, a social advantage for the purposes

²¹ 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.

²² Judgment of 14 June 2012, C-542/09 *Commission v Netherlands*, EU:C:2012:346, paragraph 33 and the case law cited therein; judgment of 20 June 2013, C-20/12 *Giersch and Others*, EU:C:2013:411, paragraph 37; and judgment of 14 December 2016, C-238/15 *Verruga*, EU:C:2016:949, paragraph 39 and the case law cited therein.

²³ C-542/09 *Commission v Netherlands*, cited supra, paragraph 34 and the case law cited therein; C-20/12 *Giersch and Others*, cited supra, paragraph 38; and C-238/15 *Verruga*, cited supra, paragraph 40.

of Article 7(2) of Regulation 492/2011, where the worker continues to support the child.²⁴

34. The members of an EEA worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation 492/2011. Since the grant of funding for studies to a child of an EEA worker constitutes a social advantage for the 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.²⁵
35. It is settled case law that the equal treatment rule laid down both in Article 28 EEA and in Article 7(2) of Regulation 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.²⁶ In particular, conditions which may be more easily fulfilled by national workers than EEA workers are prohibited.²⁷

5.2 The requirements applied to EEA workers and their family members – indirect discrimination on the ground of nationality

36. As already mentioned, 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 with several criteria as of the academic year 2015-2016.
37. 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 – point a)

38. Section 31-5 first paragraph point a) 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.
39. 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 and its reasoned opinion of 2 July 2014 in Case 69199. There, the Authority concluded that the prior residence requirement creates an inequality in treatment as regards access to export of

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

²⁵ C-316/85 *Lebon*, cited supra, paragraphs 12 and 13; judgment of 26 February 1992, C-3/90 *Bernini*, EU:C:1992:89, paragraph 26; C-542/09 *Commission v Netherlands*, cited supra, paragraph 48; C-20/12 *Giersch and Others*, cited supra, paragraph 40; and C-238/15 *Verruga*, cited supra, paragraph 40.

²⁶ C-542/09 *Commission v Netherlands*, cited supra, paragraph 37 and the case law cited therein; C-20/12 *Giersch and Others*, cited supra, paragraph 41; and C-238/15 *Verruga*, cited supra, paragraph 41.

²⁷ See, to that effect, judgment of 3 May 2006, E-3/05 *EFTA Surveillance Authority v Norway* [2006] EFTA Ct. Rep. 102; paragraph 55; judgment of 12 September 1996, C-278/94 *Commission v Belgium*, EU:C:1996:321, paragraphs 27 and 28; judgment of 27 November 1997, C-57/96 *Meints*, EU:C:1997:564, paragraph 44; and judgment of 10 September 2009, C-269/07 *Commission v Germany*, EU:C:2009:527, paragraph 53.

study financing, contrary to Article 28 EEA and Article 7(2) of Regulation 492/2011.²⁸

40. In particular, as confirmed also by the CJEU in its judgments *Commission v Netherlands*²⁹ and *Giersch and Others*³⁰, 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.
41. 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 considered 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.³¹
42. The requirement of prior residence for a consecutive period of two of the last five years, such as the one laid down in Section 31-5 first paragraph point a) 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 – point b)*

43. Under Section 31-5 first paragraph point b) 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.
44. 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.
45. 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 criterion, 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.
46. 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.

²⁸ 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.

²⁹ C-542/09 *Commission v Netherlands*, cited supra, paragraph 38.

³⁰ C-20/12 *Giersch and Others*, cited supra, paragraph 44.

³¹ Ibid, paragraph 45 and the case law cited therein.

47. 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 point b) of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified.

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

48. Section 31-5 first paragraph point c) of the Study Financing Regulation provides that the applicant is eligible for study support abroad if he has a family member (a child, a partner or a parent) residing in Norway while the applicant is studying abroad. If the applicant's basis for the right to study financing is Section 2-3 (family member of an EEA worker), then this 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, moreover, be proficient in the Norwegian language.

49. 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 already been discussed above (paragraphs 38-42 above). It is clear that Norwegian nationals will more readily be able to comply with this condition than EEA nationals.

50. With regard to the language proficiency requirement, in the context of granting financial support for studies abroad, which in the 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.

51. 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 point c) of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality, which is permissible only if it is objectively justified.

5.2.4 The requirements applicable to frontier workers – point d)

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

53. 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.

54. 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
55. As regards the language proficiency requirement, and as noted in paragraph 50 above, 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.
56. 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 point d) of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality, which is permissible only if it is objectively justified.

5.2.5 The requirements applicable to family members of frontier workers – point e)

57. Section 31-5 first paragraph point e) 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.
58. The same arguments as discussed above in paragraphs 52-56 apply to the requirements in Section 31-5 first paragraph point e) of the Study Financing Regulation.
59. 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.
60. 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.
61. The Authority notes that this is another residence requirement, despite the fact that it does not require residence in Norway, but rather residence in another Nordic country.
62. 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 countries.
63. 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

³² Judgment of 10 July 2019, C-410/18 *Aubriet*, EU:C:2019:582, paragraph 28 and the case law cited therein.

students, again mainly to the detriment of nationals of other EEA States and their family members.

64. Therefore, the combination of the requirements, such as those laid down in Section 31-5 first paragraph point e) of the Study Financing Regulation, that the applicant is a family member of an EEA frontier worker who has been employed in Norway for at least five years, that he/she has lived in another Nordic country during that time and is sufficiently proficient in the Norwegian language, constitutes indirect discrimination on the ground of nationality, which is permissible only if it is objectively justified.

5.2.6 *The discretionary assessment – the second paragraph*

65. Even if none of the requirements in Section 31-5 first paragraph are fulfilled, the second paragraph provides that the applicant may nevertheless be eligible for study support abroad if he, based on an overall discretionary assessment, has a connection to Norway which is considered to be equivalent to the situations covered by the objective criteria in the first paragraph.
66. The provision thus requires a connection to Norway which is *equivalent* to the situations covered by the objective criteria in the first paragraph. Since it has been established that those objective criteria are indirectly discriminatory and more likely to be fulfilled by Norwegian nationals than other EEA nationals, the second paragraph also favours Norwegian nationals over other EEA nationals, as the former are more likely to have a connection to Norway equivalent to the situations covered by the first paragraph.
67. Accordingly, the requirement of a connection to Norway equivalent to the situations covered by the objective criteria in the first paragraph, such as laid down in Section 31-5 second paragraph of the Study Financing Regulation, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified.

5.3 Possible justification

5.3.1 *The existence of an overriding reason of public interest*

68. 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.³³
69. 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 EEA 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.

³³ See, *inter alia*, C-542/09 *Commission v Netherlands*, cited *supra*, paragraph 81; C-20/12 *Giersch and Others*, cited *supra*, paragraph 46; and C-238/15 *Verruga*, cited *supra*, paragraph 44.

70. 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.
71. The Authority agrees with the Norwegian Government, as it did in the context of Case 69199,³⁴ 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 on the free movement of workers.³⁵

5.3.2 *The appropriateness of the measures applied*

72. As regards the need to ensure the existence of a link between the person applying for study financing and the Norwegian society, the CJEU has recognized the EEA States' power, subject to the respect of certain conditions, to require nationals of other EEA States to show a certain degree of integration in their societies in order to receive social advantages, such as financial support for education.³⁶
73. 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.
74. As regards migrant workers and frontier workers, the fact that they have participated in the employment market of an EEA State establishes, in principle, a sufficient link of integration with the society of that EEA State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages.³⁷
75. In other words, as concerns migrant workers and frontier workers, the link of integration is already established simply by the fact of their participation in the employment market in Norway and payment of taxes there by virtue of their employment.³⁸ Accordingly, it cannot be argued that migrant and frontier workers do not have a sufficient link with Norwegian society.
76. As to the need to ensure the probability of 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.

³⁴ 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.

³⁵ See for comparison, C-542/09 *Commission v Netherlands*, cited supra, paragraphs 71 and 72; and C-20/12 *Giersch and Others*, cited supra, paragraphs 53-56.

³⁶ See judgment of 15 March 2005, C-209/03 *Bidar*, EU:C:2005:169, paragraph 57; and judgment of 18 November 2008, C-158/07 *Förster*, EU:C:2008:630, paragraph 49.

³⁷ C-542/09 *Commission v Netherlands*, cited supra, paragraph 65; C-20/12 *Giersch and Others*, cited supra, paragraph 63; and C-238/15 *Verruga*, cited supra, paragraph 49.

³⁸ See C-542/09 *Commission v Netherlands*, cited supra, paragraph 66; C-20/12 *Giersch and Others*, cited supra, paragraph 63; and C-238/15 *Verruga*, cited supra, paragraph 50.

77. The possible appropriateness of the requirements may, moreover, be supported by the case law of the CJEU, which in 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 EEA State or their attachment to that State.³⁹
78. The Court has also accepted that a frontier worker is not always integrated in the EEA State of employment in the same way as a worker who is resident in that State.⁴⁰
79. Similar considerations may be applied to 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.
80. 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 student mobility and providing society and the labour market with competent workers.⁴¹

5.3.3 The proportionality of the measures applied

General considerations

81. 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*”.⁴²
82. 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.
83. As such, Norway would have needed 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 indicating a certain degree of attachment to Norway.
84. 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 this in a less restrictive manner, with regard to free movement of workers.

³⁹ See, to that effect, judgment of 18 July 2007, C-212/05 *Hartmann*, EU:C:2007:437, paragraphs 35 and 36; judgment of 18 July 2007, C-213/05 *Geven*, EU:C:2007:438, paragraph 26; and judgment of 11 September 2007, C-287/05 *Hendrix*, EU:C:2007:494, paragraphs 54 and 55.

⁴⁰ C-20/12 *Giersch and Others*, cited supra, paragraph 65.

⁴¹ See for comparison, C-542/09 *Commission v Netherlands*, cited supra, paragraph 79; C-20/12 *Giersch and Others*, cited supra, paragraph 68; and C-238/15 *Verruga*, cited supra, paragraph 58.

⁴² Judgment of 28 June 2011, E-12/10 *EFTA Surveillance Authority v Iceland* [2011] EFTA Ct. Rep. 117, paragraph 57. See also C-542/09 *Commission v Netherlands*, cited supra, paragraph 81, and the case law cited therein.

The case law of the CJEU

85. The CJEU has already examined the proportionality of residence requirements for workers regarding the grant of financial assistance to studies, in particular, in its judgments *Commission v Netherlands* and *Giersch and Others*. 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.
86. It has to be noted that both requirements were found to be disproportionate by the Court, 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 EEA State concerned.⁴³
87. In *Giersch and Others*, the CJEU 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.
88. With regard to the possibilities open to an EEA State, the Court noted that, where the aid granted consists in, for example, a loan, a system of financing 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 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 EEA 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 EEA State concerned.⁴⁴ 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.
89. Moreover, as regards in particular frontier workers, the CJEU has accepted in *Giersch and Others* 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 EEA State concerned has a sufficient link with the society of that EEA State, the financial aid could be made conditional on the frontier worker, the parent of the student who does not reside in the EEA State granting aid, having worked in that Member State for a certain minimum period of time.⁴⁵
90. However, in the judgment *Verruga*, the CJEU 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.

⁴³ C-542/09 *Commission v Netherlands*, cited supra, paragraph 86; and C-20/12 *Giersch and Others*, cited supra, paragraph 76.

⁴⁴ C-20/12 *Giersch and Others*, cited supra, paragraph 79.

⁴⁵ *Ibid*, paragraph 80.

91. It was only in order to illustrate how EEA law makes it possible, in the context of economically inactive EEA nationals, to avoid the risk of “*study grant forum shopping*”, that the Court referred, in paragraph 80 of *Giersch and Others*, to Article 16(1) and to Article 24(2) of Directive 2004/38.⁴⁶
92. Therefore, the CJEU 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 Luxembourg.⁴⁷
93. In its judgment *Aubriet*, the CJEU scrutinised an amended version of this rule in the Luxembourg legislation, according to which the student’s parents needed to have worked in Luxembourg for a continuous period of at least five years in the course of a reference period of seven years preceding the application for financial aid. The Court concluded that such a requirement also went beyond what was necessary in order to attain the legitimate objective sought by the Luxembourg Government.⁴⁸

The Norwegian Government’s arguments

94. In its letter of 16 February 2018, replying to the Authority’s letter of formal notice, the Norwegian Government provided several arguments in relation to the proportionality of the national measure.
95. The Norwegian Government noted that the wording of Section 31-5 first paragraph of the Study Financing Regulation was chosen to establish objective and clear criteria for the situations which represent a sufficient connection to Norway. However, according to the Government, the criteria in the first paragraph only provide examples of certain relevant criteria and do not in any way negate other factors that may be relevant in the assessment under the second paragraph. The Government further noted that, in its opinion, it was only consistent to require the same level of connection to Norway under the first and the second paragraph of Section 31-5.
96. In its letter of 17 August 2015, the Norwegian Government also 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 neighbouring 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.

⁴⁶ C-238/15 *Verruga*, cited supra, paragraph 67.

⁴⁷ Ibid, paragraph 69.

⁴⁸ C-410/18 *Aubriet*, cited supra, paragraph 46.

97. In its reply to the letter of formal notice, the Norwegian Government moreover stated that a solution of economic incentive to ensure the probability of return to Norway, such as that referred to in the case law of the CJEU, had not been considered a better alternative. Such a scheme would necessitate major changes to the current support scheme and important issues and practical difficulties would have to be addressed. The Norwegian Government further noted that, having regard to the extremely low rate of rejections on study grant financing for studies abroad, such alternative solutions would in practice entail a significantly more restrictive regime on EEA nationals than the current rules.

Section 31-5 first paragraph of the Study Financing Regulation

98. As explained in Part 5.2 of this reasoned opinion, the requirements applied with respect to migrant workers and their family members, in particular, such as the ones laid down in Section 31-5 first paragraph points a), b) and c) of the Study Financing Regulation, are more likely to be fulfilled by Norwegian nationals.
99. The Norwegian Government has not explained why it has chosen the requirements, referred to above, to the exclusion of all other possible criteria. Nor, in the Authority's view, are there sufficient arguments put forth by Norway to the effect that the requirements applied could not be replaced by less restrictive criteria.
100. As regards migrant workers, it appears that the only relevant requirements of Section 31-5 first paragraph are points a) and b) concerning requirements of residence for two out of the last five years and schooling or studying for a total period of three years. As noted above, the requirement of schooling or studying in Norway could be seen as a disguised requirement of prior residence, thus being essentially equivalent to a residence requirement. In that context, it is recalled that the CJEU has already ruled that a requirement of prior residence for migrant workers for three out of the last six years is disproportionate.⁴⁹
101. As regards the requirements applied to frontier workers and their family members, such as laid down in Section 31-5 first paragraph points d) and e) of the Study Financing Regulation, the judgment *Verruga* 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 on the free movement of workers. The judgment *Aubriet* moreover confirms that the same applies where the requirement of work for a continuous period of five years has a seven year reference period.
102. It is to be noted that, in contrast with the Luxembourg legislation assessed in *Verruga*, 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 points d) and e) 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 employment. The cumulative effect of these conditions,

⁴⁹ C-542/09 *Commission v Netherlands*, cited *supra*, paragraph 86.

in the Authority's view, goes beyond what is necessary in order to attain the legitimate objective sought by the Norwegian Government.

103. With regard to family members of migrant and frontier workers, the Authority further recalls that members of an EEA worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation 492/2011. Since the grant of funding for studies to a child of an EEA worker constitutes a social advantage for the 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.⁵⁰
104. However, as the right to equal treatment in respect of social advantages is derived from the worker, the requirements for connection to Norway should relate to the situation of the worker and not to that of the family member. Provisions that put additional requirements of connection on family members, such as laid down in points c) and e) of Section 31-5 first paragraph, can therefore not be proportionate.
105. Therefore, the Authority takes the view 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.

Section 31-5 second paragraph of the Study Financing Regulation

106. 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.
107. However, in view of the Authority, this provision is still too restrictive, 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.
108. Having established that the criteria in the first paragraph require a level of connection to Norway which is too high and thus too restrictive, it must also be held that a provision, such as the second paragraph, which requires equivalent connection to those situations, also is too restrictive.
109. The Authority is thus of the view that Norway cannot maintain disproportionate requirements in the first paragraph merely because a provision opening up for an assessment of different elements in order to establish whether equivalent situations exist, is set out in the second paragraph, according to which a discretionary assessment can be made. The second paragraph of Section 31-5 does not in itself remedy the disproportionate character of the objective criteria in the first paragraph.
110. In any case, the Authority takes the view that this provision fails to meet the requirements of legal certainty as it gives too much discretion without any indications of which factors could be relevant in the assessment. It is settled case law that 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

⁵⁰ C-316-85 *Lebon*, cited supra, paragraphs 12 and 13; C-3/90 *Bernini*, cited supra, paragraph 26; C-542/09 *Commission v Netherlands*, cited supra, paragraph 48; C-20/12 *Giersch and Others*, cited supra, paragraph 40; and C-238/15 *Verruga*, cited supra, paragraph 40.

they contain.⁵¹ In addition, in order for a restriction on a fundamental freedom to be justified, the measures must satisfy the principle of legal certainty.⁵² Furthermore, 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.⁵³ Therefore, an EEA State may be found to be in breach of its obligations under EEA law if its national legislation leaves too much discretion in the hands of the national authorities.⁵⁴

111. As regards possible alternative solutions to the current system, the Norwegian Government has maintained that a solution of economic incentive to ensure the probability of return to Norway, such as that referred to in the case law of the CJEU, had not been considered a better alternative. According to the Government, such an alternative solution would in practice entail a significantly more restrictive regime on EEA nationals, having regard to the extremely low rate of rejections of applications for study financing abroad.
112. In this regard, the Authority notes that the Norwegian Government has not submitted statistics concerning the low rate of rejections or any further evidence supporting the statement that such an alternative system would be more restrictive than the current regime. In any event, a low rate of rejected applications does not necessarily give a correct picture of the current system, as potential applicants might be prevented from applying due to the strict requirements laid down in Section 31-5 of the Study Financing Regulation.

Conclusion

113. Consequently, the Authority concludes that by requiring that migrant and frontier workers, and their 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 under Article 28 EEA and Article 7(2) of Regulation 492/2011.
114. Lastly, the Authority notes that, as mentioned above, the Norwegian Government has proposed changes to Section 31-5 of the Study Financing Regulation, reducing the requirement of work in Norway for frontier workers to 2 out of 5 years and adding guidance to the discretionary assessment under the second paragraph. However, according to the Directorate's preliminary assessment, those changes are not sufficient to bring the system into compliance with EEA law. Moreover, those changes have not been

⁵¹ See, for example, judgment of 21 October 2004, C-445/03 *Commission v Luxembourg*, EU:C:2004:655, paragraphs 77-82.

⁵² See, *inter alia*, judgment of 23 November 2004, E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37; and judgment of 16 July 2012, E-9/11 *EFTA Surveillance Authority v Norway* [2012] EFTA Ct. Rep. 442, paragraph 99.

⁵³ See, to that effect, judgment of 20 February 2001, C-205/99 *Analir and Others*, EU:C:2001:107, paragraphs 37 and 38; judgment of 13 May 2003, C-385/99 *Müller-Fauré and van Riet*, EU:C:2003:270, paragraphs 84 and 85; and judgment of 10 March 2009, C-169/07 *Hartlauer*, EU:C:2009:141, paragraph 64. See also to this effect E-9/11 *EFTA Surveillance Authority v Norway*, cited *supra*, paragraph 100.

⁵⁴ See, for example, judgment of 8 November 2012, C-244/11 *Commission v Greece*, EU:C:2012:694, paragraphs 86 and 87.

adopted yet and would, in any event, not come into effect until the academic year 2020-2021.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by requiring that migrant and frontier workers, and their 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 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*.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels, 1 April 2020

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

Frank J. Büchel
Responsible College Member

Högni Kristjánsson
College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

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