Case No: 69199
Event No: 702285
Decision No: 248/14/COL

EFTA SURVEILLANCE AUTHORITY

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 failure to comply with its obligations under Article 28 of the EEA Agreement and Article 7(2) of the 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, by limiting the eligibility of EEA workers and their family members for the financial assistance to studies

1 Introduction

1. On 11 January 2011 (Event No 582951), the EFTA Surveillance Authority ("the Authority") received a complaint against Norway regarding the national rules on access to study financing for studies pursued outside Norway.
2. The complaint concerned a decision by the Norwegian State Educational Loan Fund to reject an application submitted by a daughter of an EEA migrant worker in Norway on the basis that she did not fulfil requirements of prior residence in Norway under the relevant national rules. The decision was also based on her failure to demonstrate proficiency in the Norwegian language.
3. According to the complaint, the residence requirement and the language requirement constitute indirect discrimination against migrant workers and their dependent family members in breach of EEA law.

2 Correspondence and the steps taken in the case

4. By a letter dated 14 April 2011 (Event No 594564), the Authority informed the Norwegian Government that it had received the complaint.
5. The issue raised in the complaint concerned essentially the same matter as was the subject of legal proceedings before the Court of Justice of the European Union ("Court of Justice") in Case C-542/09 *Commission* v *Netherlands*[1], therefore, the Authority decided to put further examination of the complaint on hold pending the outcome of the case. By a letter of 31 May 2011 (Event No 599517), the complainant was informed thereof.
6. On 14 June 2012, the Court of Justice delivered the judgment in the above mentioned case. In its letter of 10 July 2012 (Event No 640155), the Authority invited the Norwegian Government to provide information about the scope of the relevant national rules, to explain the policy objectives pursued by Norway with regard to the prior residence requirement, and the requirement relating to the proficiency in the Norwegian language. The Norwegian Government was also invited to comment on the judgment of the Court of Justice in Case C-542/09 *Commission* v *Netherlands*.
7. The Norwegian Government replied to the request for information by a letter dated 19 October 2012 (your ref.: 11/2195, Event No 650342).
8. With regard to the policy objectives pursued by Norway, the letter of 19 October 2012 stated that the aim of the Norwegian Study Financing Act was to provide the labour market in Norway with competent workers. In order to achieve this aim, it was necessary to ensure that a link exists between the person applying for a grant or student loan in relation to studies abroad and Norwegian society and its labour market. In this regard, the residence requirement was considered an important tool. In addition to the formal qualifications that students obtain through their studies abroad, Norway benefits from their competence in foreign languages, culture and society.
9. The letter of 19 October 2012 added that the Norwegian Government was in the process of considering the implications of the judgment in Case C-542/09 *Commission*

[1] Case C-542/09 *Commission* v *Netherlands* EU:C:2012:346.

v *Netherlands*. The matter was discussed at the package meeting in Norway of 25 and 26 October 2012[2]. By email of 6 May 2013, the Norwegian Government informed the Authority that the process of considering the implications of the judgment was still ongoing. The email stated that Norway was committed to amending the relevant rules in order to take into account the conclusions of the Court of Justice. However, Norway considered it necessary to wait for the outcome of other cases dealing with similar issues pending before the Court. Norway added that changes in the national rules would be decided through the budget process for 2015 which meant that any changes would take effect from the academic year 2015-2016.

10. Having examined the information provided for by the Norwegian Government, on 6 November 2013, the Authority issued a letter of formal notice to Norway (Event No 675338), in which it concluded that by limiting in Sections 2-3 and 33-2(1) of the Study Financing Regulation the eligibility of EEA workers who still are in an employment relationship for the financial assistance to studies in Norway and abroad to cases when the studies pursued are linked to their professional activities and by maintaining in force the prior residence requirement laid down in Section 33-5 of the Study Financing Regulation, together with the language proficiency requirement laid down in Section 34-1(1) second sentence of the Study Financing Regulation, Norway has failed to fulfil its obligations arising from Article 28 of the EEA Agreement and from Article 7(2) of Regulation No 492/2011.

11. On 3 March 2014, after an extension of the deadline, the Authority received a reply (Event No 701211) from the Norwegian Government to the letter of formal notice. In its reply the Norwegian Government undertook to remove the requirement of a link between the studies and the professional activities applied with respect to EEA nationals. As regards the requirements of prior residence and language proficiency the Norwegian Government stated that it is currently in the process of reviewing these requirements. However, any changes to the relevant national rules could take effect only from the academic year 2015-2016.

12. The case was further discussed with the Norwegian Government at the package meeting of 21 and 22 November 2013[3] in Norway and at the meeting on 8 April 2014 in Brussels.

3 Relevant national law

General rules on financial assistance to students

13. The Study Financing Act of 3 June 2005 No 37[4] ("the Study Financing Act") provides the legal basis for financial assistance, in the form of grants or loans, to students by the Norwegian State Educational Loan Fund.

14. 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

[2] See the follow-up letter to the package meeting (Event No 652036 in Case No 72128).
[3] See the follow-up letter to the package meeting (Event No 691859 in Case No 74044).
[4] *Lov om utdanningsstøtte*. LOV-2005-06-03-37.

special links to Norway. The Act also applies to other groups of foreign nationals who have links to Norway on the basis of their work or family ties.

15. The Regulation on financial assistance from the Norwegian State Educational Loan Fund ("the Study Financing Regulation")[5] (a new one being adopted for each academic year) lays down the following rules.

16. 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 another basis than studies, shall have the right to study financing on the same conditions as Norwegian nationals. According to Section 2-3 EEA workers shall have the right to study financing in Norway provided that their studies are linked to their professional activities in Norway. However, this requirement does not apply if the person has become involuntarily unemployed due to general changes on the labour market. Section 2-4 adds that EEA nationals, and their family members, who have been granted the right of permanent residence in Norway (*cf.* Sections 115 and 116 of the Immigration Act[6]), shall be treated on an equal footing with Norwegian nationals.

Rules on financial assistance for studies abroad

17. 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 to Norway, as further laid down in Chapter 6 (*studies in another Scandinavian country*) and Chapter 33 (*studies outside the Scandinavian* countries).

18. Section 33-1 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 33-3, this right applies also to EEA nationals, and their family members, who have the right of permanent residence in Norway.

19. Section 33-2(1) extends the right to study financing for studies abroad to EEA workers on condition that their studies abroad are linked to their profession. However, this requirement does not apply if the person has become involuntarily unemployed due to general changes on the labour market. Section 33-2(2) adds that family members of EEA workers shall in this regard have the right to study financing on the same basis as Norwegian nationals.

20. Section 33-5 lays down a general residence requirement which states that in order to qualify for educational support for studies pursued outside Norway applicants must have resided in Norway consecutively for at least two of the last five years prior to the start of their studies ("the "two out of five years" rule"). This requirement applies irrespective of the nationality of the applicant.

21. Derogation from the prior residence requirement may be provided under Section 33-7 of the Regulation if the applicant has been resident outside Norway while working for (a) the Norwegian Foreign Service, (b) a Norwegian missionary or an aid organization, (c) a Norwegian business, or (d) due to illness. Lastly, a derogation from the prior residence requirement is possible if the applicant has special ties to Norway, but only if

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[5] The current Study Financing Regulation: *Forskrift om tildeling av utdanningsstøtte for undervisningsåret 2013–2014*. FOR-2013-02-11-208.

[6] 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).

strong reasons justify it (Section 33-7(2)). If the special situation is linked to the parents it is required that the applicant was born in 1991 or later (Section 33-7(3)).

Requirement of proficiency in the Norwegian language

22. Section 34-1(1) first sentence of the Study Financing Regulation states that the minimum requirements for admission to Norwegian institutions for higher education (*cf.* Section 3-6 of the Higher education act[7]) must be fulfilled in order for students to qualify for financial assistance. Therefore, students with non-Nordic upper secondary school diplomas are required to demonstrate their proficiency in the Norwegian language by tests specified in Section 2-2(2) of Regulation of 31 January 2007 No 173 on access to higher education,[8] or by other documentation (*cf.* Section 2-2(3) of the latter Regulation).

23. Furthermore, Section 34-1(1) second sentence of the Study Financing Regulation explicitly states that the Norwegian language proficiency requirement applies also to students who apply for financial assistance for studies abroad.

4 Relevant EEA law

24. 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.

25. As regards free movement of workers, more specific rules are set out in Regulation No 492/2011 on freedom of movement for workers within the Union ("Regulation No 492/2011").[9] 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.

26. Article 2(2) 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 ("Directive No 2004/38")[10] defines who is to be considered a family member of an EEA national. According to this Article, a "family member" means the spouse (Article 2(2)(a)), the partner with whom the EEA national has contracted a registered partnership (Article 2(2)(b)), the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner (Article 2(2)(c)), and the dependent direct relatives in the ascending line and those of the spouse or partner (Article 2(2)(d)).

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[7] *Lov om universiteter og høyskoler (universitets- og høyskoleloven)*. LOV-2005-04-01-15.

[8] *Forskrift om opptak til høyere utdanning*. FOR-2007-01-31-173.

[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.

[10] 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.

27. According to Article 7(1) of Directive 2004/38 all EEA nationals shall have the right of residence on the territory of another EEA State, *inter alia*, provided they are following a course of study and have comprehensive sickness insurance cover in that EEA State and have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host EEA State.

28. Article 24(1) of Directive 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.

29. According to Article 7(3)(d) of Directive 2004/38 an EEA national who is no longer a worker shall retain the status of worker if he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

5 The Authority's Assessment

1. Introduction

30. The Authority notes that, as regards prior residence requirements, the rules of the Study Financing Regulation referred to above are in substance comparable to the rules in the Netherlands at issue in Case C-542/09 *Commission* v *Netherlands*[11] and the national rules examined in a more recent judgment by the Court of Justice regarding financial assistance to students, *i. e.* Case C-20/12 *Giersch*.[12]

31. According to the national rules examined in Case C-542/09 *Commission* v *Netherlands* students were required, in order to receive funding for higher education pursued outside the Netherlands, in addition of being eligible for funding for higher education in the Netherlands, to have resided in the Netherlands for at least three out of the six years ("the "three out of six years" rule"). This condition applied irrespective of the student's nationality.

32. The Court of Justice concluded that the "three out of six years" rule constituted indirect discrimination against migrant workers and members of their families, prohibited by the rules on the freedom of movement for workers laid down in the Treaty on the Functioning of the European Union ("TFEU") and Regulation No 1612/68 (now Regulation No 492/2011), unless it was objectively justified.

33. The Netherlands sought to justify the restriction by the objective of encouraging student mobility. The Court of Justice noted that the objective referred to by the Netherlands constituted an overriding reason relating to the public interest, capable of justifying a restriction of the principle of non-discrimination on grounds of nationality. However, a restriction on a fundamental freedom guaranteed by the Treaty, such as freedom of movement for workers, could be justified only if it was appropriate for attaining the legitimate objective pursued and did not go beyond what is necessary in order to attain that objective.

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[11] Case C-542/09 *Commission* v *Netherlands*, cited above.
[12] Case C-20/12 *Giersch* EU:C:2013:411.

34. In this regard, the Court acknowledged that the prior residence requirement was appropriate for attaining the objective of promoting student mobility. However, the Netherlands failed to demonstrate why it had opted for the "three out of six years" rule, prioritising length of residence to the exclusion of all other representative elements for showing the actual degree of attachment between the concerned party and that Member State.[13]

35. In Case C-20/12 *Giersch* the Court of Justice examined such rules as were provided by Luxembourg legislation, which made grant of financial assistance for higher education studies conditional upon residence by the student in the EEA State concerned.

36. It concluded that such rules were, in principle, precluded by Article 7(2) of Regulation No 492/2011. They gave rise to a difference in treatment, amounting to indirect discrimination, between persons who resided in the EEA State concerned and those who, not being residents of that EEA State, were the children of frontier workers carrying out an activity in that EEA State. The residence requirement, while being appropriate for ensuring the attainment of a legitimate objective, *i. e.* increasing the proportion of residents with a higher education in order to promote the development of the economy of the EEA State, nevertheless went beyond what was necessary in order to attain the objective pursued.[14]

37. Moreover, when assessing the relevant Norwegian rules, the recent judgment of the Court of Justice in Case C-46/12 *L. N.*[15] should be taken into account. In this case the Court of Justice had an occasion to further interpret relevant requirements of EEA law with regard to the access to study financing of an EEA national who enters the territory of a Member State in order to pursue a course of study while at the same time being employed.

38. The Court of Justice ruled that Articles 7(1)(c) and 24(2) of Directive 2004/38 must be interpreted as meaning that an EEA national who pursues a course of studies in a host EEA State whilst at the same time pursuing effective and genuine employment activities such as to confer on him/her the status of "worker" within the meaning of Article 45 TFEU may not be refused maintenance aid for studies which is granted to the nationals of that State. The fact that the person entered the territory of the host EEA State with the principal intention of pursuing a course of study is not relevant for determining whether he/she is a "worker" within the meaning of Article 45 TFEU and, accordingly, whether he/she is entitled to that aid under the same terms as a national of the host EEA State under Article 7(2) of Regulation No 492/2011.[16]

2. The existence of discrimination

The scope of EEA law

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[13] According to the information available to the Authority, the Netherlands amended the Law on the Financing of Studies of 2000 (*Wet studiefinanciering* 2000) and abolished the residence requirement altogether. The law entered into force on 29 May 2013.

[14] In July 2013, Luxembourg amended the Law of 22 June 2000 on State financial aid for higher education and provided for students, who are not resident in Luxembourg, the right to study financing, if their parents, EEA nationals, are workers in Luxembourg (published in *Mémorial* A No 132, 25.07.2013).

[15] Case C-46/12 *L. N.* EU:C:2013:97.

[16] On 29 June 2013, Denmark abolished restrictions for EEA workers to receive study financing at the same time pursuing employment activities, previously provided for in Regulation No 455 of 8 June 2009 on State education assistance (*Bekendtgørelse nr. 455 af 8. juni 2009 om statens uddannelsesstøtte*).

39. 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.

40. 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.[17]

41. 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.[18] 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.

42. 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.[19]

43. 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/herself rely on that provision in order to obtain that funding if, under national law, such funding is granted directly to the student.[20]

44. In other words, social benefits for a migrant worker within the meaning of Article 7(2) of Regulation No 492/2011 are the benefits, provided with regard to him/her or his/her family members, *i. e.*, as concerns children, the children of an EEA worker or his/her spouse or partner, who are under the age of 21 *or* who are dependants.

45. 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.[21] In particular, conditions which may be more easily fulfilled by national workers than EEA workers are prohibited.[22]

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[17] Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 15; Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 33; and Case C-20/12 *Giersch*, cited above, paragraph 37.

[18] Case 39/86 *Lair* [1988] ECR 3161, paragraphs 23, 24 and 28; Case 197/86 *Brown* [1988] ECR 3025, paragraph 25; Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 23; Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 34; and Case C-20/12 *Giersch*, cited above, paragraph 38.

[19] Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 12 and 13; Case 39/86 *Lair*, cited above, paragraph 24; Case C-3/90 *Bernini,* cited above, paragraph 23; and Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 35.

[20] Case 316/85 *Lebon*, cited above, paragraphs 12 and 13; Case C-3/90 *Bernini*, cited above, paragraph 26; Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 48; and Case C-20/12 *Giersch*, cited above, paragraph 40.

[21] See Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44; C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 41; Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 53; *Commission* v *Netherlands*, cited above, paragraph 37; and Case C-20/12 *Giersch*, cited above, paragraph 41.

[22] See, to that effect, Case E-3/05 *EFTA Surveillance Authority* v *Norway* [2005] EFTA Court Report page 102, paragraph 55 on Regulation (EEC) No 1408/71; Case C-278/94 *Commission* v *Belgium* [1996] ECR

The requirement of a link with professional activities

46. In view of the above, the Authority notes that the requirements in Sections 2-3 and 33-2(1) of the Study Financing Regulation, to the effect that EEA workers have the right to study financing, accordingly, in Norway and abroad, only if their studies are linked to their professional activities in Norway, are applied solely to EEA workers prior to their acquisition of the right of permanent residence. There are no indications in the Norwegian legislation examined above that equivalent requirements are applied with respect to Norwegian nationals.

47. In Case 39/86 *Lair* the Court of Justice has accepted that Member States may require some continuity or link between the previous occupational activity and the course of study. Nevertheless, this conclusion applies only with regard to migrant workers when they are no longer in an employment relationship.[23] The case law was codified in Article 7(3)(d) of Directive 2004/38.

48. The provisions in Sections 2-3 and 33-2(1) of the Study Financing Regulation, however, are formulated in a way as to include EEA workers who still are in an employment relationship.

49. Accordingly, it must be concluded that the requirements in Sections 2-3 and 33-2(1) of the Study Financing Regulation to the extent they are applied to EEA workers who still are in an employment relationship entail direct discrimination based on nationality between persons enjoying the status of "worker" within the meaning of Article 28 EEA, on the one hand, and Norwegian workers, on the other, prohibited in Article 28 EEA and Article 7(2) of Regulation No 492/2011.

50. Furthermore, it has to be noted that according to settled case law the concept of "worker" within the meaning of Article 28 EEA has an autonomous meaning specific to EEA law and must not be interpreted narrowly.[24] That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he/she receives remuneration.[25]

51. The low level of or origin of the resources for that remuneration, the rather low productivity of the person concerned, or the fact that he/she works only a small number of hours per week do not preclude that person from being recognised as a "worker" within the meaning of Article 28 EEA.[26]

I-4307, paragraphs 27 and 28; Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44; and Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 53.

[23] Case 39/86 *Lair*, cited above, paragraphs 36 and 37.

[24] See, to that effect, *inter alia* Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16; Case 197/86 *Brown*, cited above, paragraph 21; Case C-3/90 *Bernini*, cited above, paragraph 14; Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 23; and Case C-46/12 *L. N.*, cited above, paragraph 39.

[25] See Case 66/85 *Lawrie-Blum*, cited above, paragraph 17; Case C-413/01 *Ninni-Orasche*, cited above, paragraph 24; Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 26; and Case C-46/12 *L. N.*, cited above, paragraph 40.

[26] See, to that effect, Case 66/85 *Lawrie-Blum*, paragraph 21; Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15; Case C-3/90 *Bernini*, cited above, paragraph 16; and Case C-46/12 *L. N.*, cited above, paragraph 41.

52. In order to qualify as a "worker", the person concerned must nevertheless pursue effective and genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary.[27]

53. The objectives pursued by an EEA national in applying to enter the territory of a host EEA State are of no account, as long as he/she pursues or wishes to pursue effective and genuine employment activities.[28] Even if an EEA national enters the territory of a host EEA State for the sole purpose to following a course of study, he/she shall not to be deprived of his/her rights to equal treatment, provided that he/she satisfies the above mentioned condition of pursuing effective and genuine employment.

The prior residence requirement

54. Secondly, the Authority notes that the requirement laid down in Section 33-5 of the Study Financing Regulation of having resided in Norway for two consecutive years out of the last five to qualify for educational support outside Norway can more easily be met by Norwegian nationals than by nationals from the other EEA States.

55. Generally, a residence requirement can be more easily satisfied by nationals of that state than by nationals of other EEA States. Thus, it is already as such liable to operate mainly to the detriment of nationals of other EEA States, since non-residents are in the majority of cases foreigners.[29]

56. 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.[30]

57. Although, admittedly, certain migrant workers and their family members may be in a position to satisfy the prior residence requirement, the requirement nevertheless would have the effect of total exclusion from the financial assistance of frontier workers and their family members.

58. In that regard, it should be noted that the Court of Justice has already held that both migrant and frontier workers, since they have participated in the labour market of a Member State, have in principle created a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment, as compared, respectively with national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant and frontier workers also contribute to the financing of the social policies of that State.[31]

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[27] See, *inter alia*, Case 53/81 *Levin* [1982] ECR 1035, paragraph 17, Joined Cases C-22/08 and C-23/08 *Vatsouras and Kouptantze*, cited above, paragraph 26; and Case C-46/12 *L. N.*, cited above, paragraph 42.

[28] Case C-46/12 *L. N.*, cited above, paragraph 47.

[29] Case E-3/05 *EFTA Surveillance Authority* v *Norway*, cited above, paragraph 56; Case E-1/09 *EFTA Surveillance Authority* v *Liechtenstein* [2010] EFTA Court Report page 46, paragraph 29; and Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 28 and 29. See also, Case C-206/10 *Commission* v *Germany* [2011] ECR I-03573.

[30] See, to that effect, Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14; and Case C-20/12 *Giersch*, cited above, paragraph 45.

[31] Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 66; and Case C-20/12 *Giersch*, cited above, paragraph 63, and the case law cited therein.

59. It follows that the prior residence requirement laid down in Section 33-5 of the Study Financing Regulation creates an inequality in treatment as regards access to export of study financing between, on the one hand, Norwegian workers and, on the other, migrant workers residing in Norway or frontier workers employed in Norway, contrary to Article 28 EEA and Article 7(2) of Regulation No 492/2011.

The requirement of proficiency in language

60. Finally, the same considerations as listed in points 54-59 apply to the language requirement, provided by the second sentence of Section 34-1(1) of the Study Financing Regulation.

61. With regard to financial assistance 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 assistance of certain students, again mainly to the detriment of nationals of other EEA States and their family members.

62. Accordingly, the Norwegian language proficiency requirement laid down in the second sentence of Section 34-1(1) of the Study Financing Regulation creates an inequality in treatment as regards access to export of study financing between, on the one hand, Norwegian workers and, on the other, migrant workers residing in Norway or frontier workers employed in Norway, contrary to Article 28 EEA and Article 7(2) of Regulation No 492/2011.

3. Possible justification

The directly discriminatory requirement of a link with professional activities

63. A directly discriminatory measure of national law infringes Article 28 EEA and Article 7(2) of Regulation No 492/2011, unless it can be justified by grounds of public policy, public security or public health and is proportionate, *i. e.* does not go beyond what is necessary with regard to the objective pursued.[32]

64. The Authority takes the view that the directly discriminatory requirements laid down in Sections 2-3 and 33-2(1) of the Study Financing Regulation cannot be justified by any of the grounds mentioned above.

65. The exclusionary and discriminatory character of the requirements in Sections 2-3 and 33-2(1) of the Study Financing Regulation is moreover evidenced by the fact that the circumstances at issue in Case C-46/12 *L. N.*[33] are altogether precluded in Norway by these requirements. In other words, according to the Norwegian rules at issue, Norway does not even have to assess, if EEA nationals pursue effective and genuine activities, in order to receive assistance to studies, because such EEA nationals are entirely excluded from such assistance, unless the studies are linked with their professional activities.

66. The Norwegian Government, moreover, does not contest the conclusions made by the Authority with respect to the requirements at issue.

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[32] See, to that effect, Case E-13/11 *Granville Establishment* [2012] EFTA Court Report page 400, paragraphs 49-51.

[33] Cited above.

67. Consequently, by limiting the eligibility of EEA workers who still are in an employment relationship for the financial assistance to studies in Norway and abroad to cases when the studies pursued are linked to their professional activities, Norway has failed to fulfil its obligations under Article 28 EEA and Article 7(2) of Regulation No 492/2011.

The indirectly discriminatory requirements of prior residence and proficiency in language

A. The existence of a 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.[34]

69. In its letter of 19 October 2012, the Norwegian Government stated that the prior residence requirement in Section 33-5 of the Study Financing Regulation and the language proficiency requirement in second sentence of Section 34-1(1) of the Regulation were important tools to achieve the aim of the Study Financing Act, *i. e.* to provide society and the labour market with competent workers. Norway needed workers with competence in foreign languages, and culture in addition to the formal qualifications they obtained through their studies abroad. In order to achieve this aim, it was necessary to ensure the existence of a link between the person applying for the study financing and the Norwegian society.

70. 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.[35]

B. The appropriateness of the measures applied

71. 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 the 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 societies in order to receive social advantages, such as financial assistance for education.[36]

72. 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.

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[34] See, *inter alia*, Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 38; and Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 81.

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

[36] See Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 57, and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 49.

73. As was already mentioned above, 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.[37]

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

75. As to the need to ensure the return to Norway of the persons studying abroad, admittedly, imposition of residence and language requirements could make it reasonably more likely that the persons will return to work in the country.

76. The possible appropriateness of the requirements may moreover be supported by the case law of the Court of Justice, which in the other context 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.[38]

77. In that regard, it must be accepted that the 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.[39]

78. 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/her studies abroad and be employed there, compared to the persons who do not speak Norwegian.

79. Accordingly, the prior residence requirement in Section 33-5 of the Study Financing Regulation and the language proficiency requirement in second sentence of Section 34-1(1) of the Regulation may be regarded as appropriate for attaining the objective of encouraging student mobility and providing society and the labour market with competent workers.[40]

C. The proportionality of the measures applied

80. 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"*.[41]

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[37] Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 65; and Case C-20/12 *Giersch*, cited above, paragraph 63.

[38] See, to that effect, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraphs 35 and 36; Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 26; and Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraphs 54 and 55.

[39] Case C-20/12 *Giersch*, cited above, paragraph 65.

[40] See for comparison, Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 79; and Case C-20/12 *Giersch*, cited above, paragraph 68.

[41] Case E-12/10 *EFTA Surveillance Authority* v *Iceland* [2011] EFTA Court Report page 117, paragraph 57. See also Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 81, and the case law cited therein.

81. Accordingly, it falls to 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.

82. Norway would have needed at least to show why it opted for the "two out of five years" residence rule and the Norwegian language proficiency requirement, to the exclusion of all other representative elements.

83. In that regard, it must be examined whether only these two conditions, chosen by Norway, can ensure with reasonable probability that the recipients of the financial assistance to 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.

84. As mentioned above, the Court of Justice has already examined the proportionality of residence requirements regarding grant of financial assistance to studies, in particular, in Case C-542/09 *Commission* v *Netherlands* and Case C-20/12 *Giersch*. 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.

85. It has to be noted that both requirements were declared disproportionate by the Court of Justice, as being too exclusive in nature and failing to take into 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.[42]

86. In Case C-20/12 *Giersch* 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.

87. 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 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/her 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/her parents, could be avoided by taking that aid into account in the grant of the aid paid by the Member State concerned.[43]

88. Moreover, as regards in particular frontier workers, the Court of Justice has accepted in Case C-20/12 *Giersch* 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.[44]

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[42] Case C-542/09 *Commission* v *Netherlands*, cited above, paragraph 86; and Case C-20/12 *Giersch*, cited above, paragraph 76.

[43] Case C-20/12 *Giersch*, cited above, paragraph 79.

[44] Case C-20/12 *Giersch*, cited above, paragraph 80.

89. The Norwegian Government has not explained why it has chosen a prior residence requirement, referred to above, together with the language proficiency requirement, 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, could not be replaced by less restrictive criteria, for example, such as referred to by the Court of Justice in Case C-20/12 *Giersch* and mentioned above.

90. In any case, the combination of the "two out of five years" residence rule and the Norwegian language proficiency requirement, provided for by the Study Financing Regulation, is certainly too exclusive and goes beyond what is necessary in order to attain the objective pursued by Norway.

91. In its letter of 19 September 2012, the Norwegian Government explained that Section 33-7(1) of the Study Financing Regulation lists five different situations in which derogations from the prior residence requirement under Section 33-5 can be made. It can either be the applicant himself/herself who is covered by the derogations, or his/her parent or spouse. If it is applicant's parent, then the applicant must be under a certain age to be covered by one of the derogations listed.

92. The Authority acknowledges that the derogations listed in Section 33-7(1) of the Regulation limit the exclusionary character of the prior residence requirement under Section 33-5.

93. However, in the view of the Authority, the derogations from the prior residence requirement are too limited, as they do not take into account the situation of EEA workers who solely through their participation on the labour market in Norway can demonstrate sufficient links to Norwegian society for the purposes of meeting the specific policy objectives pursued by Norway.

94. Furthermore, the Authority notes that the derogations listed in point (a) and (b) of Section 33-7(1), referring to periods of residence outside Norway working for the Norwegian Foreign Service or a Norwegian missionary or an aid organization, respectively, are not relevant to EEA workers.

95. Similarly, the derogation which may be provided under Section 33-7(2) on the basis that the applicant has special ties to Norway, if strong reasons justify it, is much too narrow to take into account the rights of EEA workers under Article 7(2) of Regulation No 492/2011. In the letter of 19 September 2012 Norway itself stated that the additional derogation provided for in Sections 33-7(2) and (3) of the Study Financing Regulation was a narrow exclusionary provision and rarely applied.

96. Furthermore, in its reply to the letter of formal notice the Norwegian Government does not provide additional arguments in favour of the proportionality of the requirements at issue and, moreover, states that it is currently in the process of reviewing these requirements with a view to identify possible adjustments to the regulations.

97. Consequently, the Authority takes the view that by requiring that migrant and frontier workers, and dependent family members, to comply with the residence requirement, *i. e.* the "two out of five years" rule, together with the language proficiency requirement, in order to be eligible for export of study financing, Norway has failed to fulfil its obligations under Article 28 EEA and Article 7(2) of Regulation No 492/2011.

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 limiting in Sections 2-3 and 33-2(1) of the Study Financing Regulation the eligibility of EEA workers who still are in an employment relationship for the financial assistance to studies in Norway and abroad to cases when the studies pursued are linked to their professional activities and by maintaining in force the prior residence requirement, such as laid down in Section 33-5 of the Study Financing Regulation, together with the language proficiency requirement, as laid down in Section 34-1(1) second sentence of the Study Financing Regulation, 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.

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 *two months* following notification thereof.

Done at Brussels, 02 July 2014

For the EFTA Surveillance Authority

Frank Büchel
College Member

Xavier Lewis
Director