

Brussels, 25 November 2020

Case No: 84329

Document No: 1138850

Decision No: 139/20/COL

Ministry of Labour and Social Affairs  
Postboks 8019 Dep  
0030 Oslo  
Norway

Dear Sir or Madam,

**Subject: Letter of formal notice to Norway concerning the exportability of sickness benefits in cash**

## 1 Introduction

- 1) On 28 October 2019, the then Norwegian Minister of Labour and Social Affairs stated during a press conference that Norway had since 2012 wrongfully applied the rights under EEA law of Norwegian residents to export three types of sickness benefits in cash – sick-pay (*sykepenger*), work assessment allowance (*arbeidsavklaringspenger*) and attendance allowance (*pleiepenger*) – to other EEA states. This statement received significant media attention and came to the attention of the EFTA Surveillance Authority (“the Authority”), prompting it to open an investigation.
- 2) The Authority is also assessing actions taken by Norway to comply with its obligation to remedy the breaches of EEA law that have occurred. Such actions might include taking steps to have criminal convictions set aside and to compensate victims of incorrect application of EEA law for prejudice suffered.<sup>1</sup> As such, the Authority has today sent a request for information to Norway concerning these issues<sup>2</sup> some of which are also the subject of cases currently pending

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<sup>1</sup> The obligation to remedy breaches of EEA Law is a consequence of, and an adjunct to, the rights conferred on individuals by the EEA Agreement that have been breached; cf. Case C-199/82 *San Giorgio* EU:C:1983:318, para 12.

<sup>2</sup> Doc No 1163586.

before the EFTA Court.<sup>3</sup> Some of those currently pending court cases are moreover concerned with other benefits, notably unemployment benefit.

- 3) This present letter of formal notice, by contrast, focuses on the Norwegian legislation that is currently in force as regards the three specific types of benefit that the Norwegian Government has admitted the wrongful application of. Notwithstanding the admission made by Norway in October 2019 that its effects are in conflict with EEA law, it has not been amended.
- 4) In this letter, the Authority takes the preliminary view that the Norwegian legislation, as currently in force, continues to unlawfully restrict the EEA law rights of recipients of the said benefits by requiring these recipients – without due justification – to stay (*oppholde seg*) in Norway. As set out below, the Authority in particular takes issue with the fact that the applicable provisions:
  - are in breach of Article 21(1) of Regulation 883/2004, which provides for a right to export acquired sickness benefits in cash during a stay or residence in another EEA State;
  - amount to unjustified restrictions on the free movement of workers, establishment and the freedom to provide services;
    - allow for criminal sanctions for related violations read in conjunction with Article 25-12 NIA which will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons;
  - constitute unjustified restrictions on the free movement of persons guaranteed under Directive 2004/38; and
  - contrary to Articles 3 and 7 EEA, create a state of ambiguity and legal uncertainty which preclude the possibility for concerned individuals to rely on the rights provided for by Article 21(1) of Regulation 883/2004 and/or the free movement of workers, establishment and the freedom to provide services and/or the free movement of persons guaranteed under Directive 2004/38.

## 2 Correspondence

- 5) By a letter dated 4 November 2019 (Doc No 1094489), the Internal Market Affairs Directorate (“the Directorate”) of the Authority informed the Norwegian Government that it had opened an own initiative case to examine whether the Norwegian legislation and ensuing administrative practice regarding the exportability of the three types of sickness benefits which this case concerns complied with EEA law. The Norwegian Government was also invited to provide further information on the case.
- 6) Following a request, the Directorate agreed to extend the deadline to respond until 11 December 2019 (Doc No 1100021). The Norwegian Government submitted its reply by way of a letter dated 11 December 2019 (Doc No 1103404).

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<sup>3</sup> See Cases E-8/20, E-13/20 and E-15/20.

On that same date, the internal audit department of the Norwegian Labour and Welfare Administration (“NAV”) published its report on the matter.<sup>4</sup>

- 7) On 4 March 2020, the Norwegian Government-appointed commission delivered an interim report on the boundaries of EEA law as regards the possibility of limiting the exportability of sickness benefits.<sup>5</sup>
- 8) The Directorate shared its preliminary assessment, in the form of a pre-Article 31 letter, with Norway on 11 March 2020 (Doc No 1118071). The Norwegian Government was invited to submit its observations, following which the Authority would consider whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Following a request, the Directorate agreed to extend the deadline to respond until 11 June 2020 (Doc No 1127734). The reply from Norway was received on 11 June 2020 (Doc No 1137756).
- 9) The Norwegian Government-appointed commission delivered a final report on 4 August 2020 entitled “The Blind Zone” (referred to as “the Arnesen Report”), which concluded that NAV “*over time has misinterpreted Regulation 883/2004 and overlooked the significance of the EEA Agreement's general rules on free movement. Thus, the residence requirements in the National Insurance Act Sections 8-9, 9-4 and 11-3 are applied too strictly.*”<sup>6</sup>
- 10) The correspondence to date confirms that the Norwegian Government agrees with the Directorate’s preliminary views on certain matters related to the interpretation of *Regulation (EC) No 883/2004 on the coordination of social security systems* (“Regulation 883/2004”)<sup>7</sup>,
  - that the Norwegian sick-pay, work assessment allowance and attendance allowance all constitute “sickness benefits” within the meaning of Regulation 883/2004; and
  - that Article 21(1) of Regulation 883/2004 covers residence as well as stays in another EEA State and, moreover, that the latter notion covers stays of short as well as long duration.

### 3 Relevant national law

- 11) The Norwegian provisions related to the exportability of the three types of sickness benefits here in issue, namely (1) sick-pay, (2) attendance allowance and (3) work assessment allowance, are to be found in the National Insurance Act

<sup>4</sup> Spesialoppdrag – Kartlegging av fakta i EØS-saken – Internrevisjonen 11 desember 2019, <https://www.nav.no/no/nav-og-samfunn/kontakt-nav/feiltolkning-av-eos-reglene/internrevisjonens-rapport-kartlegging-av-fakta-i-eos-saken>

<sup>5</sup> Trygd, oppholdskrav og reiser i EØS-området, 4 March 2020, [https://nettsteder.regjeringen.no/granskingsutvalg-trygddeforordning/files/2020/03/Trygd-oppholdskrav-og-reiser-i-E%C3%98S-omr%C3%A5det\\_web.pdf](https://nettsteder.regjeringen.no/granskingsutvalg-trygddeforordning/files/2020/03/Trygd-oppholdskrav-og-reiser-i-E%C3%98S-omr%C3%A5det_web.pdf)

<sup>6</sup> Blindsonen - Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området, Norges offentlige utredninger 2020:9, <https://www.regjeringen.no/no/dokumenter/nou-2020-9/id2723776/>

<sup>7</sup> The Act referred to at point 1 of Annex VI to the EEA Agreement.

(“NIA”) of 28 February 1997 No 19 (*Folketrygdloven*) in its version currently in force.<sup>8</sup>

12) Section 8-9 on sick-pay was amended in 2006 and reads as follows:<sup>9</sup>

*“§ 8-9. Stay in Norway or abroad*

*It is a condition for the right to sick-pay that the member stays in Norway.*

*Nevertheless, sick-pay is paid abroad to*

- a) a person who is a member under sections 2-5, 2-6 or 2-8,*
- b) a member who is admitted to a Norwegian public health institution or whose stay is based on an agreement on social security with another country.*

*On application, a member may also otherwise receive sick-pay for a limited period during a stay abroad. He or she must prove that the stay abroad will not have a detrimental impact on the beneficiary’s state of health, prolong the incapacity for work or hinder the control and follow-up by the Labour and Welfare Administration.*

*When a member who works abroad is entitled to sick-pay from the social security, the employer pays the sick-pay and receives a reimbursement from the social security.”*

13) Section 9-4 on attendance allowance was amended in 2017<sup>10</sup> and refers to Section 8-9:

*“§ 9-4. Stay in Norway or abroad*

*The provision in § 8-9 on stay in Norway applies similarly. The limited period referred to in § 8-9 third paragraph, means under this chapter up to eight weeks during a twelve-month period.”*

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<sup>8</sup> LOV-1997-02-28-19 *Lov om folketrygd (folketrygdloven)*. The version currently in force was last amended by LOV-2019-12-20-93 and entered into force on 1 November 2020. The cited provisions are an unofficial translation.

<sup>9</sup> The provision was last amended by LOV-2006-16-20, entered into force on 1 July 2006. The amendment was of an editorial nature, replacing “the Office for social security” (*Trygdekontoret*) with “The Norwegian Labour and Welfare Administration” (NAV).

<sup>10</sup> The provision was last amended by LOV-2017-05-11-25, entered into force on 1 October 2017. By that amendment, the wording “limited period” was replaced by “a period up to eight weeks over a 12 month period”.

14) Section 11-3 on work assessment allowance was amended in 2018 and provides the following:<sup>11</sup>

*“§ 11-3. Stay in Norway*

*It is a condition for the entitlement to work assessment allowance that the member stays in Norway.*

*Work assessment allowance can nevertheless be given to a member who is receiving medical treatment or participates in a work-oriented measure abroad, in accordance with the activity plan, see § 14 a. of the Labour and Welfare Administration Act.*

*A member can also receive work assessment allowance while staying abroad for up to four weeks per calendar year. It is a prerequisite that the stay abroad is compatible with the implementation of the stipulated activity and does not impede the follow-up and control by the Labour and Welfare Administration. The member must apply in advance to the Labour and Welfare Administration for approval of the stay abroad.*

*The Ministry may, by way of regulations, lay down more detailed rules for the entitlement work assessment allowance according to the second and third paragraphs.”*

15) Section 25-12 on penalties<sup>12</sup> provides the following:

*“§ 25-12. Penalty for providing incorrect information and for not providing necessary information*

*“A penalty of a fine shall be applied to any person who, contrary to his or her better judgement, provides incorrect information or withholds information of importance for his or her social security rights, unless the offence is not subject to a stricter penal provision.*

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<sup>11</sup> The provision was last amended by LOV-2017-06-16-43, entered into force on 1 January 2018. By that amendment, the wording “limited period” was replaced by “four weeks over the calendar year”. Also, the obligation to apply for prior authorisation was explicitly spelled out in the provision.

<sup>12</sup> The provision was last amended by LOV-2008-12-19-109, entering into force on 1 January 2009.

*The same penalty shall apply to any person who pursuant to the Act is obligated to provide information and reports, but intentionally or negligently fails to do so.”*

#### **4 Relevant EEA law**

16) Article 3 EEA reads:

*“The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*

*They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.”*

17) Article 28 EEA provides that:

*“1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

*2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

*[...]”*

18) Article 31 EEA provides that:

*“1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established on the territory of any of these States.*

*[...]”*

19) Article 36 EEA reads:

*“1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

*[...]”*

20) Article 2 of Regulation 883/2004 lays down its personal scope:

*“Persons covered*

*This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.*

2. *It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.*"

21) Article 3(1) of Regulation 883/2004 holds its material scope which includes sickness benefits:

*"Matters covered*

*This Regulation shall apply to all legislation concerning the following branches of social security: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits."*

22) Article 1) (l) of Regulation 883/2004 gives the definition of "legislation":

*"legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); This term excludes contractual provisions other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the European Union. Such declaration shall be published in the Official Journal of the European Union;"*

23) Article 21(1) of Regulation 883/2004 grants the right to sickness benefits in cash while "residing" or "staying" in another EEA State than the competent EEA State:

*"Cash benefits*

1. *An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State."*

24) Article 1(j) and (k) of Regulation 883/2004 provide the definition of "residence" and "stay":

*j 'residence' means the place where a person habitually resides;*

*k 'stay' means temporary residence;"*

25) Article 6 of Directive 2004/38<sup>13</sup> on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, provides that:

*“1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*

*[...]*”

26) Article 7(1)(b) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, provides that:

*“1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*

*[...]*

*(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;*

## **5 The Authority’s assessment**

### **5.1 Sections 8-9, 9-4, 11-3 NIA as well as the ensuing administrative practice are incompatible with Article 21(1) of Regulation 883/2004**

#### *5.1.1 Relevant national law*

27) The Authority recalls that pursuant to national legislation, the rule is that in order to receive any of the three sickness benefits in cash at issue, which fall within the scope of Article 3(1) of Regulation 883/2004, a person must “stay” in Norway (*oppholder seg i Norge*). Exceptionally, those benefits may be retained during stays or residence in another EEA State. This limited possibility for individuals to export sickness benefits in cash is contingent upon the fulfilment of several conditions and, moreover, subject to prior authorisation. In any event, a prior authorisation will only allow for the export of the benefit during a limited period of time.

28) The conditions for the export of both sick-pay and attendance allowance are identical and require that the person concerned must prove that the stay or residence in another EEA State will not have a detrimental impact on the beneficiary’s state of health, prolong the incapacity for work or hinder the control and follow-up by NAV. The requirement to obtain a prior authorisation is reflected

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<sup>13</sup> The Act referred to at point 3 of Annex VIII 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.



in the wording of the national provisions<sup>14</sup> “*on application, a member may (...)*” or “*a member may also receive.*”

- 29) The conditions for exporting work assessment allowance require that the stay or residence in another EEA State is compatible with the implementation of the activity plan and does not impede the control and follow-up by NAV. Here, the prior authorisation mechanism is explicitly foreseen in the wording of Section 11-3(3) NIA “the member must apply in advance (...)” For the purpose of completeness, the Authority notes that two implementing regulations on work assessment allowance have been adopted based on Section 11-3(4) NIA, neither of which seem to pertain to the exportability of the benefit.<sup>15</sup>
- 30) Furthermore, permission from the authorities to export the relevant benefits is, if granted, only valid for a limited period of time. More specifically, the export of an attendance allowance is limited up to “*eight weeks during a twelve-month period*” pursuant to Section 9-4 NIA, while the export of a work assessment allowance is limited to “*up to four weeks per calendar year*” pursuant to Section 11-3(3) NIA. The “*limited period*” of time for which a sick-pay benefit may be exported is, however, not further specified.
- 31) Regulation 883/2004 is transposed into the Norwegian legal order by way of reference and in the form of an implementing regulation.<sup>16</sup> Section 1(3) of that regulation stipulates that the provisions of Regulation 883/2004 shall prevail in case of conflict with, inter alia, provisions in the NIA.
- 32) The administrative circulars seek to clarify the relationship between the provisions of the NIA and the national regulation transposing Regulation 883/2004. The circulars set out the national administration’s interpretation of the provisions related to the three benefits in question. Statements in the current circular regarding Section 8-9 NIA on sick-pay clarify that, in the event of a conflict, the provisions in Regulation 883/2004 take precedence over the NIA.<sup>17</sup>
- 33) The Authority notes that the Norwegian Government has referred to several administrative circulars (*rundskriv*) and amendments made therein in order to reflect that sickness benefits in cash are now exportable.<sup>18</sup> However, Norway has not provided a complete overview of the precise changes that were made to the circulars, which would allow the Authority to assess their accuracy, relevance and compatibility with EEA law.

### 5.1.2 Assessment

- 34) Pursuant to Article 2(1), Regulation 883/2004 is applicable to all EEA nationals, whether economically active or not.
- 35) Article 21(1) of Regulation 883/2004 provides for the right to sickness benefits in cash while “residing” or “staying” in another EEA State than the competent EEA

<sup>14</sup> Section 8-9(3), 9-4, 11-3(3) NIA.

<sup>15</sup> FOR-2017-12-13-2100 *Forskrift om arbeidsavklaringspenger* and FOR-2017-12-13-2099 *Forskrift om beregning arbeidsavklaringspenger etter EØS.*

<sup>16</sup> FOR-2012-06-22-585 *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen.*

<sup>17</sup> R08-00 *Rundskriv til ftrl kap 8 – Sykepenger.*

<sup>18</sup> Reply by the Norwegian Government to the Authority’s request for information, Doc No 1103404 dated 11 December 2019, pages 2 and 6.

State, in accordance with the legislation applying to the benefit in question. Pursuant to the definitions contained in Article 1 (j) and (k) of Regulation 883/2004, *residence* covers “the place where the person habitually resides” and *stay* refers to “temporary residence”.

- 36) By explicitly referring to both “residing or staying”, Article 21(1) of Regulation 883/2004 covers situations in which an EEA national “stays” on the territory of another EEA State than the competent State, making no exceptions for specific types of stays depending on their purpose and length. Consequently, the provision covers stays such as a day trip, a holiday, a family visit or a longer stay. Article 21(1) Regulation 883/2004 however also covers those stays in another EEA State which are intended to be permanent, i.e. “residence” in the meaning of the Regulation, c.f. Article 1(j).
- 37) With regard to the scope of the Regulation, defined in its Article 3, the Authority first observes that the Norwegian benefits in question are set out and covered by “legislation”, namely the relevant chapters and provisions of the NIA cited above, in line with what is foreseen by Article 1(l) of Regulation 883/2004. Secondly, the purpose and character of the benefits in question entail that they qualify as a “social security” benefit. Finally, the Authority considers, and Norway has agreed, that the benefits in question are to be classified as “sickness benefits”, insofar as they cover the risk connected to a morbid condition involving temporary suspension of the activities of the person concerned<sup>19</sup>, c.f. Article 3(1)(a) of Regulation 883/2004.
- 38) In its reply of 11 June 2020, the Norwegian Government confirms the classification of the three benefits in question as “sickness benefits” within the meaning of Regulation 883/2004 and, moreover, the understanding that Article 21(1) of Regulation 883/2004 covers residence as well as temporary stays in another EEA State.
- 39) In its letter of 11 June 2020, the Norwegian Government begins by explaining that, while the relevant national provisions do indeed contain the requirement of “stay in Norway”, they also provide for specific (second paragraph of Section 11-3 NIA) and general (third paragraph of Section 11-3 NIA) exceptions. As such, Norway argues, the national provisions do not impose an absolute requirement of stay in Norway.<sup>20</sup>
- 40) Secondly, Norway contends that Article 21(1) of Regulation 883/2004 allows for national, substantive conditions to apply to the export of a sickness benefit in cash, insofar as they reflect the general eligibility conditions for the benefit in question.<sup>21</sup> Furthermore, Norway argues that, as a logical corollary, the EEA State must be allowed to assess the fulfilment of said conditions in advance of the stay in another EEA State by means of a prior authorisation procedure.
- 41) The Authority recalls that what is at issue are not the regular, basic eligibility criteria for the relevant benefits under Norwegian law, but rather a set of provisions which specifically restrict the export of these benefits, *inter alia* by means of making such export subject to a prior authorisation procedure.

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<sup>19</sup> Case C-503/09 *Stewart*, EU:C:2011:500 paragraph 37

<sup>20</sup> Letter from the Norwegian Government of 11 June 2020, Doc No 1137756, para. 12.

<sup>21</sup> *Idem*, para. 14.

- 42) Moreover, the Authority notes that the requirement in Section 8-9(3) of the NIA according to which the stay abroad must not be detrimental to the state of health or prolong the inability to work, does not reflect or relate to any of the regular eligibility criteria for granting this benefit according to chapter 8 of the NIA, contrary to what Norway has advanced<sup>22</sup>. This observation applies equally to Section 9-4 on attendance allowance.
- 43) Returning to the interpretation of Article 21(1) of Regulation 883/2004, the Authority underlines that Regulation 883/2004 does not harmonise the national social security systems and that it is, at the outset, for the EEA states to determine the eligibility criteria for social security benefits. However, in cross-border situations covered by Regulation 883/2004, such as where an insured person wishes to export a sickness benefit in cash, the national provisions must be considered in light of EEA law. Specifically, and as concerns the case at hand, the right to export such benefits is one of the fundamental principles of Regulation 883/2004.
- 44) The Norwegian Government argues that the requirement of “stay in Norway” can be upheld as a legitimate reason to restrict the export of sickness benefits in cash, referring to the wording of Article 21(1) of Regulation 883/2004, whereby the entitlement to a cash benefit while residing or staying in another EEA State shall be provided “in accordance with the legislation it [the competent authority] applies”.
- 45) The Authority does not share this view. In fact, the wording of Article 21(1) of Regulation 883/2004 clearly provides that it is the *entitlement* to a sickness benefit, not the *export* of the benefit, that is to be provided in accordance with the national legislation. That is, the principle of exportability as expressed by Article 21(1) of Regulation 883/2004, cannot be affected by the national eligibility criteria.
- 46) Provided that the national entitlement criteria are fulfilled, Article 21(1) of Regulation 883/2004 requires that the insured person staying or residing in an EEA State other than the competent EEA State “shall be entitled to cash benefits”. In other words, it lays down an absolute right to export the acquired benefit without permitting the EEA States to impose any specific, export-related conditions. As long as the person in question complies with the national criteria for (continued) eligibility for the benefit in question, it will not be in line with Article 21(1) to limit the exportability of such a benefit to another EEA State. Any other interpretation would deprive the provision of its effect and thereby jeopardise the effectiveness of the principle of exportability.
- 47) Only the above reading of Article 21(1) of Regulation 883/2004 would appear to both advance and reconcile the dual objective of Regulation 883/2004 i.e. to allow for the co-existence of different national social security systems while at the same time preventing individuals from losing their rights merely by crossing a national border within the EEA.
- 48) The Authority recalls that the CJEU has confirmed this reading in its judgment in *Tolley*<sup>23</sup>.

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<sup>22</sup> *Idem*.

<sup>23</sup> Case C-430/15 *Tolley*, EU:C:2017:74, paragraphs 88-89.

“88) *“In that regard, the argument [...] that the words ‘satisfies the conditions of the legislation of the competent State’ permit the Member States to lay down a residence condition for provision of the cash benefits referred to in Article 22(1)(b) of Regulation No 1408/71 cannot succeed. As the Advocate General has observed [...], such an interpretation, by permitting the entitlement conferred by Article 22(1)(b) to be defeated by a national residence requirement, would render that provision entirely devoid of purpose.*”

89) *It follows that Article 22(1)(b) of Regulation No 1408/71 prevents a competent State from making retention of entitlement to a benefit such as that at issue in the main proceedings subject to a condition as to residence and presence on its territory.”*

49) While that case concerned a provision in the former Regulation 1408/71<sup>24</sup> which only explicitly mentioned “residence” in another EEA State (as opposed to the corresponding Article 21(1) of Regulation 883/2004 explicitly referencing both stay and residence), the Authority is of the opinion that the CJEU’s interpretation in *Tolley* is equally applicable to “stay” in another EEA State. The CJEU clearly stated that the phrase “*satisfies the conditions of the legislation of the competent State*” cannot be interpreted as allowing for a national residence and presence requirement, as it would render that provision entirely devoid of its purpose.<sup>25</sup> Article 21(1) of Regulation 883/2004, which covers both stay and residence, contains a similar qualifier to its predecessor, i.e. “*in accordance with the legislation of the competent Member State*”. However, and in line with the CJEU’s findings in *Tolley*<sup>26</sup>, in the Authority’s view, such national criteria cannot encompass a presence requirement that would render the exportability principle in Article 21(1) of Regulation 883/2004 void.

50) Significantly, the Authority recalls that, while the system under Regulation 1408/71 explicitly provided for a prior authorisation regime in Article 22(1)(b)<sup>27</sup>, this was dispensed with when Regulation 883/2004 was introduced.

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<sup>24</sup> The Act previously referred to at point 1 of Annex VI to the EEA Agreement, *Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community*, applicable to the EEA EFTA States until 1 June 2012.

<sup>25</sup> Case C-430/15, *Tolley*, paragraphs 88-89.

<sup>26</sup> *Idem*

<sup>27</sup> Article 22 of Regulation No 1408/71 read:

‘1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

...(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State;

...shall be entitled:

...(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

- 51) In light of this, a prior authorisation system for sickness benefits cannot be reconciled with the wording of Article 21(1) of Regulation 883/2004.
- 52) In this respect, the Authority further recalls that the obligation on the EEA EFTA States to incorporate Regulations into their national legal orders requires an incorporation *as such*, pursuant to Article 7 EEA, thus leaving no room for exemptions or adaptations on a national level, apart from those agreed in the relevant Joint Committee Decision.
- 53) The Authority therefore concludes that the eligibility criterion of “stay in Norway”, the related conditions for export as well as the related prior authorisation mechanism, including its limitation in time, in Sections 8-9, 9-4 and 11-3 of the NIA and their application do not comply with Article 21(1) of Regulation 883/2004.

## **5.2 Sections 8-9, 9-4 and 11-3 NIA as well as the ensuing administrative practice amount to unjustified restrictions on free movement**

### *5.2.1 Sections 8-9, 9-4 and 11-3 NIA are incompatible with Articles 28 EEA, 31 EEA and 36 EEA*

- 54) The Authority considers that, in addition and/or in the alternative, the relevant provisions of national law and the ensuing administrative practice restrict the exportability of sickness benefits in cash and therefore amount to unjustified restrictions on, depending on the facts, the free movement of workers, establishment and/or the freedom to provide services.
- 55) The Authority recalls, first, that the freedom of movement of workers in the EEA provided for in Article 28 EEA entails the right to leave the home State and go to another EEA State without being placed at a disadvantage.<sup>28</sup> It applies, for example, to a national of another EEA State who works in Norway and is a member of the Norwegian social security system. Imposing restrictions on the possibility to retain acquired benefits while staying or residing in the home State (e.g. to visit family and friends) would make the exercise of free movement less attractive for this person.
- 56) Secondly, Article 31 EEA stipulates that the right of free movement shall also apply to self-employed persons. For example, self-employed persons may rely on the right of establishment to pursue their activities in another EEA State (e.g. Norway). Imposing restrictions on the possibility to retain acquired benefits during a stay or residence in their home State would make the exercise of this freedom less attractive.

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2. The authorisation required under paragraph 1(b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

...(emphasis added)

<sup>28</sup> Case C-415/93 *Bosman*, ECLI:EU:C:1995:463, paragraphs 94-96; Case C-318/05 *Commission v Germany*, ECLI:EU:C:2007:495, paragraphs 114-115; Case C-269/09 *Commission v Spain*, ECLI:EU:C:2012:439, paragraphs 52-54 and Case C-187/15 *Pöpperl*, ECLI:EU:C:2016:550, paragraphs 23-24.

57) Thirdly, Article 36 EEA provides for the freedom to provide services, a right which is enjoyed by both providers and recipients of services.<sup>29</sup> Tourists are recipients of services and the freedom to provide services covers EEA nationals who, independently of other freedoms guaranteed by the EEA Agreement, visit another State where they intend or are likely to receive services.<sup>30</sup> Imposing restrictions on the possibility to retain acquired benefits while receiving such services in another EEA State would make the exercise of the free movement less attractive.

58) In line with the EFTA Court's case law, any measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EEA Agreement are an encroachment upon this freedom.<sup>31</sup> A restriction on those rights may be permissible only if it pursues a legitimate objective justified by overriding reasons in the public interest and, moreover, if it is suitable for attaining that objective and does not go beyond what is necessary in order to attain it.<sup>32</sup>

#### 5.2.1.1 Existence of a restriction

59) As mentioned above, the relevant national legislation as concerns all three benefits, in Sections 8-9, 9-4 and 11-3 NIA, respectively contain the requirement of stay in Norway. They offer limited exceptions, subject to conditions and a corresponding prior authorisation procedure. In cases where NAV adopts a favourable decision under the prior authorisation procedure, any stay outside of Norway will be limited in time.

60) In the Authority's view, these measures are liable to hinder or make less attractive the exercise of free movement as guaranteed by the EEA Agreement, even if there is no discrimination on grounds of nationality.<sup>33</sup>

#### 5.2.1.2 Justification of the restriction

##### 5.2.1.2.1 Legitimacy of the aims pursued by the measures at issue

61) Any restriction to free movement must pursue a legitimate objective and must be justified by overriding reasons in the public interest. It is not sufficient for the national measures at issue to resort to a legitimate aim in the abstract. Rather, it must be assessed whether the measures at issue actually pursue the invoked aim.<sup>34</sup> It is for the EEA State imposing those restrictions to demonstrate that this is the case. The Authority notes that aims of a purely economic or administrative nature cannot justify a restriction on free movement.<sup>35</sup>

<sup>29</sup> Case E-4/04 *Pedicef* [2005] EFTA Ct. Rep. 1, paragraph 48.

<sup>30</sup> Case C-186/87 *Cowan*, EU:C:1989:47, paragraph 15 and Case C-274/96 *Bickel and Franz*, EU:C:1998:563, paragraph 15; , C-384/93 *Alpine Investments*, EU:C:1995:126, paragraphs 30 and 31 and case law cited

<sup>31</sup> Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 108

<sup>32</sup> Case E-8/17 *Kristoffersen*, paragraph 114.

<sup>33</sup> Case E-14/15 *Holship Norge AS vs Norsk Transportarbeiderforbund*, paragraph 115.

<sup>34</sup> Case E-14/15 *Holship*, paragraph 125; Case E-8/16 *Netfonds Holding*, paragraph 115

<sup>35</sup> Case E-8/17 *Kristoffersen*, cited above, paragraph 115; and Case C-212/08 *Zeturf*, EU:C:2011:437, paragraph 48.

- 62) The Norwegian Government claims that the substantive conditions that must be fulfilled in order to allow export, as well as the related prior authorisation mechanism, seek to attain legitimate objectives. Those objectives include bringing people back to working life and promoting full employment, promoting health as well as ensuring compliance with the conditions designed to attain those aims.<sup>36</sup>
- 63) The Authority notes that those objectives are detailed further in the relevant circulars. Accordingly, as regards sick-pay, the reason for the requirement of stay in Norway is *“mainly that it is not possible to exert the necessary control with regard to the character of the illness, its development, duration and impact on work capacity when the insured person is abroad. Moreover, a stay abroad could hinder the follow-up of the person who is on sick-leave with a view to bringing that person back to work.”*<sup>37</sup>
- 64) Concerning attendance allowance, the requirement of stay in Norway appears to be rooted first and foremost in NAV’s possibility to exert its control-functions and it is not based on considerations of maintaining activity and follow-up, contrary to sick-pay<sup>38</sup>.
- 65) As regards work assessment allowance, *“the requirement of stay in Norway must be seen in conjunction with the aim of the benefit itself (...) that the member shall carry out an active, occupational rehabilitation and get back to work by the help of NAV. A prerequisite is therefore that the member is available for follow-up. The follow-up by NAV suggests that relevant activities mainly take place in Norway.”*<sup>39</sup>
- 66) Ensuring the return to work and the promotion of conditions for full employment are aims which are reflected in the preamble to the EEA Agreement and its Part V. To this extent, these appear to be legitimate aims in principle capable of justifying restrictions.

#### 5.2.1.2.2 Suitability and consistency of the measures at issue

- 67) In order for a restriction to be justified, it is for the EEA State imposing the restriction to demonstrate that the measures at issue are suitable for attaining the stated objectives. That suitability test is supplemented by a requirement that the aims pursued by the measures at issue form part of a coherent policy which genuinely reflects a concern to attain that aim in a consistent and systematic manner.<sup>40</sup> The Authority recalls that it is for the EEA State imposing those restrictions to demonstrate that this is the case.
- 68) Whether a measure is suitable for attaining the aims pursued must be assessed concretely and contextually. The Authority cannot see that the Norwegian Government has demonstrated *specifically* that the national restrictions on the exportability of the three sickness benefits in cash are suitable for attaining the aims pursued, both as concerns the *stay in Norway* criterion as such, and as

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<sup>36</sup> Letter from the Norwegian Government of 11 June 2020, Doc No 1137756, para. 17.

<sup>37</sup> R8-00 *Rundskriv til folketrygdloven*. The cited parts are an unofficial translation.

<sup>38</sup> *Idem*, point 6.2.2.4.

<sup>39</sup> R11-00 *Rundskriv til folketrygdloven*. The cited parts are an unofficial translation.

<sup>40</sup> Case E-8/17 *Kristoffersen*, cited above, paragraph 118 and C-168/14 *Grupo Itevelesa*, ECLI:EU:C:2015:685, paragraph 76.

regards the conditions linked to the exportability, including the prior authorisation system, with its time limitation.

- 69) The Authority understands that for the three benefits in question, there are no comparable conditions applicable to stays or changes of residence *within* Norway. Given the size of the country, an individual could potentially stay or move far away from their primary residence over extended periods of time, thereby affecting activity plans or other check-ups to a similar degree as a stay in another EEA State would. For the same reason, the fact that no prior authorisation is required for movement within Norway as opposed to movement within the EEA, raises doubts as to the coherent implementation of the control/follow-up justification advanced by Norway.
- 70) Further, the Authority recalls that one of the conditions which is applicable to all three benefits in the present case is that their export will not hinder the control and follow-up by NAV. The Norwegian Government has thus far not provided convincing arguments as to why the exercise of NAV's control function and follow-up would be considerably more difficult or impossible when a person stays or resides in another EEA State, in particular for (very) short stays. The Authority notes that, *inter alia*, administrative cooperation among national authorities is foreseen by Articles 76 and 82 of Regulation 883/2004, as operationalised by Article 27 of the Implementing Regulation in the context of medical examination and that the person concerned has the possibility of visiting medical staff in other EEA States. Further, similar coordination issues could arise when travelling or moving residence within Norway, giving rise also to questions about the consistency of the national measures at issue in this respect.
- 71) Moreover, in its correspondence with the Authority on this matter, Norway has not sought to distinguish the control and follow-up requirements as they are applied to the three benefits. This would implausibly suggest that control and follow-up requirements are applied to an equal degree, regardless of whether the request for export concerns sick-pay, attendance allowance or work assessment, even though the benefits are of a different nature.
- 72) Additionally, there is no similar, let alone comparable, limitation on the period during which the benefits in question may be retained when moving within Norway, although it could take place far away from the person's primary residence, extend over very long periods and therefore would appear just as likely to hinder the control and follow-up by NAV.
- 73) Finally, the Authority recalls that the substantive conditions which apply specifically to the export of sick-pay and attendance allowance, as opposed to work assessment allowance, are that the stay in another EEA State will not have a detrimental impact on the beneficiary's state of health nor prolong the incapacity for work. It has not been substantiated by Norway and it is therefore not clear why stays away from the person's primary residence within Norway would appear less likely to have a detrimental impact on the beneficiary's health or prolong the incapacity for work – yet such domestic stays are not limited by the applicable national legislation.<sup>41</sup>

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<sup>41</sup> See similarly, Joined Cases E-11/07 and E-1/08 *Rindal and Slinning*, 2008 EFTA Ct. Rep. 320, paragraph 45.



74) In light of the above, the Authority finds that the Norwegian Government has failed to demonstrate that the contested measures at issue are suitable to attaining their aims, or pursue them in a consistent and systematic manner.

#### 5.2.1.2.3 Proportionality

75) The proportionality test implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful in order to attain the goal of the measure but less restrictive to the fundamental freedoms of EEA law.<sup>42</sup> The Authority considers that the measures at issue put in place by Norway fail to meet this test.

76) As a preliminary remark, the Authority stresses that the Norwegian Government in its reply has merely stated that the measures at issue appeared necessary without providing any further explanations whatsoever. The Authority recalls that it is for the EEA State invoking a derogation from one of the fundamental freedoms to show in each individual case that its rules are necessary and proportionate to attain the aim pursued.<sup>43</sup>

77) Moreover, the Authority observes that the restrictions on the export of benefits apply equally to both residence and stay (and to both short stays and longer stays) in another EEA State. The Authority cannot see that any consideration has been given as to whether this equal treatment of all export situations, regardless of their length and purpose, is required and proportionate.

78) The Authority recalls that where NAV decides to allow the person concerned to export any of the three sickness benefits in question, that export right is limited in time. As explained above, the temporal limit is not specified in case of sick-pay (“for a limited period”). By contrast, the limit for the export of an attendance allowance is specified to “eight weeks during a twelve-month period”, and “up to four weeks per calendar year” in the case of work assessment allowance. The Authority has not received any explanation for this discrepancy or why the permissible export of any benefit could not be allowed for a longer period than what is currently foreseen. Moreover, by limiting the export in time, the free movement rights of individuals are restricted.

79) The Authority further observes that in the case of sick-pay and attendance allowance, the relevant provisions explicitly demand that it is *for the member to demonstrate* that the stay in another EEA State will not have a detrimental impact on the beneficiary’s state of health, prolong the incapacity for work, or hinder the control and follow-up by NAV. The Authority has received no explanation for why it is necessary to place the burden of proof on the member. Additionally, the Authority notes that it appears unclear whether any similar requirements would apply to the export of a work assessment allowance.

80) Finally, the Authority observes the following on the prior authorisation mechanism. The Authority has yet to receive any information on why less stringent measures such as for example a notification system (or alternative, *ex post* control), rather

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<sup>42</sup> Case E-8/17 *Kristoffersen*, cited above, paragraphs 121-122 and C-168/14 *Grupo Itevelesa*, ECLI:EU:C:2015:685, paragraph 72 and 76.

<sup>43</sup> Case E-8/17 *Kristoffersen*, cited above, paragraph 123.

than a prior authorisation mechanism, would not be sufficient, at least for certain export situations. A notification system might entail that in the absence of a negative feedback within a certain deadline, the person concerned would be allowed to go the other EEA State as planned. Moreover, the Authority has not seen any explanation regarding the extent to which the illnesses which form the basis for sick-pay are of such a nature that they could deteriorate further in case of travel to another EEA State. Therefore, it seems disproportionate to subject all exports to a prior authorisation.

- 81) Further, the Authority observes the lack of procedural rules such as *inter alia* the lack of clarity as to how long in advance a recipient must apply for prior authorisation, including whether that deadline depends on the type of benefit or the envisaged length of the export. Moreover, there seems to be no clarity regarding which deadline – if any - applies to NAV when deciding upon an export request.
- 82) In this context, the principle of legal certainty, as developed in EEA law, requires that rules and practices which restrict the fundamental freedoms are clear, precise and predictable.<sup>44</sup> The Authority observes, based on the above, that the national rules and ensuing administrative practices fail to meet that benchmark.
- 83) In light of the above, the Authority must conclude that the Norwegian Government has failed to demonstrate that the contested measures are not capable of being replaced by alternative measures that are equally useful but less restrictive.

### 5.2.2 Criminal sanctions – disproportionate restriction on free movement

- 84) In the event that the contested measures would be considered compliant with EEA law, the Authority considers that imposing criminal sanctions for related violations will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons. A notable example is where the violations are only relatively minor and/or concern mere non-compliance with procedural or formal requirements.
- 85) The Authority would first recall, as the EFTA Court held in *Dr A*<sup>45</sup>:
- “(...) the EEA States retain the competence to take disciplinary action and impose criminal sanctions (...) provided that the general principles of EEA law are respected.”*<sup>46</sup>
- 86) The CJEU’s judgment in *Watson and Belmann* is of particular relevance. The case involved a challenge to Italian legislation whereby nationals of other EEA States had to notify the local authorities within a prescribed time period of their entry into Italy. Those who did not comply with that requirement were subject to fines and/or imprisonment.
- 87) Importantly, the CJEU confirmed that *“such an obligation could not in itself be regarded as an infringement of the rules concerning freedom of movement for persons”*, before underlining that any criminal sanctions must not be:<sup>47</sup>

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<sup>44</sup> Case C-318/10 *SIAT*, ECLI:EU:C:2012:415 and Case C-49/16 *Unibet International*, ECLI:EU:C:2017:491, paragraph 41.

<sup>45</sup> Case E-1/11 *Dr. A*, cited above

<sup>46</sup> Case E-1/11 *Dr. A*, cited above, paragraph 73.

*“(...) so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons.”*

- 88) In its letter of 11 December 2019, the Norwegian Government provided an overview of the system of penalties for breaches of the national social security regulations. It was explained, *inter alia*, that persons who fraudulently provide false information or withhold information, are liable to criminal sanctions in the form of a fine or imprisonment.
- 89) However, to the Authority’s understanding, criminal sanctions in the form of a fine could also be imposed based on the NIA Section 25-12 for far less serious breaches of national law. For example, it would appear that a failure to comply with an administrative requirement to notify the national authorities and seek their prior approval before undertaking a short travel to another EEA State could be sanctioned by a fine.
- 90) The Norwegian Government has not demonstrated that there are no less restrictive measures available which would be equally deterrent and effective, such as a temporary suspension of the benefit, where the breach consists in a mere failure to observe administrative requirements related to residence or stay in another EEA State. The Authority recalls that it is for the EEA State invoking a derogation from one of the fundamental freedoms to show in each individual case that its rules are necessary and proportionate to attain the aim pursued.

### **5.3 Sections 8-9, 9-4 and 11-3 NIA as well as the ensuing administrative practice are incompatible with Articles 4, 6 and 7(1)(b) of Directive 2004/38**

- 91) The Authority recalls that economically inactive persons enjoy the same right of free movement under Articles 6 and 7(1)(b) of Directive 2004/38. The EFTA Court has ruled that Article 7(1)(b) of Directive 2004/38 prohibits the home EEA State from imposing measures which hinder an economically inactive person from moving to another EEA State.<sup>48</sup> In the Authority’s view, that must apply equally to shorter periods covered by Article 6 of the Directive, as the case may be in combination with Article 4 of the Directive.
- 92) Restrictions on rights conferred under Directive 2004/38 can only be justified with reference to the grounds explicitly referred to in its Article 27(1), i.e. public policy, public security or public health. The EFTA Court has concluded that restrictions in this respect may only be justified with reference to those specific grounds, excluding other overriding reasons in the public interest.<sup>49</sup>
- 93) It is the view of the Authority that the national measures in Norway which restrict the export of the three sickness benefits in question, by making them subject to certain conditions and by providing for a prior authorisation scheme, which includes a time limitation, breach the free movement rights under Directive 2004/38.

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<sup>47</sup> Case C-118/75 *Watson and Belmann*, ECLI:EU:C:1976:106, paragraph 21.

<sup>48</sup> Case E-26/13 *Gunnarson*, [2014] EFTA Ct. Rep. 254, paragraph 82.

<sup>49</sup> *Idem*, paragraphs 91-92.

- 94) The Authority notes that, in its response of 11 June 2020, the Norwegian Government did not engage on the question of whether the contested measures are compatible with Directive 2004/38.
- 95) In the absence of any justification for this restriction, the Authority must conclude that the contested measures are unjustified pursuant to Directive 2004/38.

#### 5.4 Maintaining in force national law in conflict with EEA law

- 96) The national legal provisions in Sections 8-9, 9-4 and 11-3 NIA, which are in conflict with Regulation 883/2004, give rise to an unclear and ambiguous legal situation.
- 97) The judgment of the CJEU in Case C-167/73 *Commission v France*<sup>50</sup> and subsequent case-law are relevant to the issue at hand. The case concerned a provision of the French Maritime Employment Law allowing for discrimination based on nationality, namely that a certain proportion of the crew of a ship had to be French nationals.
- 98) The Commission had argued that these discriminatory provisions breached the provisions of the EEC Treaty relating to freedom of movement of workers and certain Articles of Regulation No 1612/68 on the freedom of movement for workers. The French Government argued that there was no issue, given the fact that it had provided instructions to relevant authorities to treat such Community nationals in the same way as French nationals.
- 99) The CJEU held that (emphasis added):<sup>51</sup>
- “41. [...] it follows that although the objective legal position is clear, namely, that Article 48 and Regulation No 1612/68 are directly applicable in the territory of the French Republic, nevertheless the maintenance in these circumstances of the wording of the Code du Travail maritime gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on community law.” [...]*
- 48. It follows that in maintaining unamended, in these circumstances, the provisions of Article 3(2) of the Code du Travail Maritime as regards the nationals of other Member States, the French Republic has failed to fulfil its obligations under Article 48 of the Treaty and Article 4 of Regulation No 1612/68...”*
- 100) The CJEU has confirmed this view on several occasions.<sup>52</sup>

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<sup>50</sup> Case C-167/73 *Commission v France*, EU:C:1974:35. The case concerned a provision of the French Maritime Employment Law allowing for discrimination based on nationality, namely that a certain proportion of the crew of a ship had to be French nationals. The Commission had argued that these discriminatory provisions breached the provisions of the EEC Treaty relating to freedom of movement of workers and certain Articles of Regulation No 1612/68 on the freedom of movement for workers. The French Government argued that there was no issue, given the fact that it had provided instructions to relevant authorities to treat such Community nationals in the same way as French nationals.

<sup>51</sup> *Idem*, paragraphs 41 and 48.

101) In a subsequent case, the French Government maintained precisely that by virtue of a Ministerial Circular, the conflicting, national provisions were in practice no longer applied to Community nationals.<sup>53</sup> The CJEU refused this line of argumentation and held that:<sup>54</sup>

*“[t]his uncertainty can only be reinforced by the internal character of the purely administrative directions to waive the application of the national law.”*

102) In its reply of 11 June 2020, the Norwegian Government recalled that, by virtue of Section 1(3) of the NIA, the provisions of Regulation 883/2004 shall prevail in case of conflict. For that same reason, the Norwegian Government stated that the *“regulation in Norway does not rely on administrative circulars, let alone purely internal circulars:”* That Regulation 883/2004 prevails is reflected in national legislation and the relationship between those sets of rules is neither ambiguous nor uncertain. Therefore, Norway suggested that the judgments referred to by the Authority in paragraphs 94-97 above are not pertinent.

103) The Authority does not share this view. Indeed, in the first judgment referred to above, the conflicting, national provision under French law would be set aside by Article 48 of the Treaty and Article 4 of Regulation No 1612/68 since it was directly applicable under French law. Therefore, the objective legal situation was clear. This would seem comparable to how the Norwegian Government has presented Section 1(3) of the NIA, whereby Regulation 883/2004 shall prevail in case of conflict with provisions of the NIA.

104) However, the judgments referred to clarify that even in such a case, maintaining in force conflicting national provisions may create a state of legal ambiguity and uncertainty. The CJEU added that precisions in administrative circulars cannot repair that ambiguity. Moreover, it follows from established case law of the European courts that a prior authorisation mechanism like the one at issue must be based on objective, non-discriminatory criteria, which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.<sup>55</sup>

105) Therefore, the Authority concludes that, by maintaining in force national provisions such as Sections 8-9, 9-4 and 11-3 of the NIA, by requiring recipients of cash benefits to stay in Norway, Norway has created a state of ambiguity and legal uncertainty, in breach of Norway's obligations under Article 21(1) of Regulation 883/2004, Article 3 and 7 EEA and the duty to give effect to regulations incorporated into the EEA Agreement. By virtue of their wording, these Sections preclude the possibility for concerned individuals to rely on the rights provided for by Regulation 883/2004, such as Article 21(1).

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<sup>52</sup> C-159/78 *Commission v. Italy*, ECLI:EU:C:1979:243, paragraph 22, C-307/89 *Commission v France*, ECLI:EU:C:1991:245, paragraphs 13-14, C-58/90 *Commission v Italy*, ECLI:EU:C:1991:329, paragraphs 12-13, C-351/90 *Commission v. Luxembourg*, paragraph 18, and C-259/01 *Commission v France*, ECLI:EU:C:2002:719, paragraphs 18-19 and C-522/04 *Commission v Kingdom of Belgium*, ECLI:EU:C:2007:405,

<sup>53</sup> C-307/89 *Commission v. France*, ECLI:EU:C:1991:245, paragraph 12.

<sup>54</sup> *Idem*, paragraph 13.

<sup>55</sup> See Joined Cases E-11/07 and E-1/08 *Rindal and Slinning*, 2008 EFTA Ct. Rep. 320 paragraph 48 and Case C-777 *WO v Vas Megyei Kormanyhivatal*, EU:C:2020:745, paragraph 62.

- 106) Indeed, the Authority recalls that the principle of loyalty as expressed in article 3 EEA Agreement requires Norway to take all measures necessary to guarantee the application and effectiveness of EEA law.<sup>56</sup> Moreover, the principle of loyalty and sincere cooperation, as provided for by Article 3 EEA, also requires that the conflicting legal provisions in the NIA should be revoked or amended.
- 107) Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the NIA, Norway has also failed to fulfil its obligations arising from Article 3 and 7 EEA and Article 21(1) of Regulation 883/2004 on the coordination of social security systems.

## 6 Conclusion

- 108) Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force national legislation such as Sections 8-9, 9-4, and 11-3 NIA, insofar as they restrict the exportability of sickness benefits in cash, by notably:

- imposing a prior authorisation requirement for stays in another EEA State;
- limiting the total length of stays of benefit recipients in another EEA State, as the case may be, to eight, or respectively four, weeks per year;
- imposing on the benefit recipient the burden of proof that a stay in another EEA State is compatible with eligibility criteria of the benefit in question;
- imposing sanctions of a disproportionate nature for failure to comply with the requirement to stay in Norway; and/or
- creating a state of ambiguity and legal uncertainty which preclude the possibility for concerned individuals to ascertain their rights and obligations;

Norway has failed to fulfil its obligations under EEA law in that measures such as the ones in question:

- are in breach of Article 21(1) of Regulation 883/2004, which provides for a right to export acquired sickness benefits in cash during a stay or residence in another EEA State;
- amount to unjustified restrictions on the free movement of workers, establishment and the freedom to provide services;
- allow for criminal sanctions for related violations read in conjunction with Article 25-12 NIA which will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons; and
- constitute unjustified restrictions on the free movement of persons guaranteed under Directive 2004/38;
- contrary to Articles 3 and 7 EEA create a state of ambiguity and legal uncertainty which preclude the possibility for concerned individuals to rely on the rights provided for by Article 21(1) of Regulation 883/2004 and/or

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<sup>56</sup> Case E-7/97 *EFTA Surveillance Authority v Norway*, paragraph 16.

the free movement of workers, establishment and the freedom to provide services under the EEA Agreement and/or the free movement of persons guaranteed under Directive 2004/38.

- 109) In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.
- 110) After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

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.*