

Brussels, 20 October 2022
Case No: 85622
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Ministry of Social Affairs and Labour
Skógarhlíð 6
105 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning the retention of unemployment benefits during stays in other EEA States

1 Introduction and correspondence

1. By way of a letter dated 2 December 2020, the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had received a complaint concerning the suspension of the disbursement of unemployment benefits during stays in other EEA States for the purposes of receiving medical care (Doc No. 1155117).
2. The complainant was an Icelandic citizen who at the time was receiving unemployment benefits in Iceland. He intended to travel to another EEA State to seek dental treatment there. However, he was informed by the national Directorate of Labour (Vinnumálastofnun) that while he was allowed to leave the country with a view to obtaining medical care, the disbursement of the unemployment benefit would be suspended during the period in question.
3. In the letter referred to above, the Authority raised several questions with a view to establishing the relevant national law governing access to healthcare in other EEA States and entitlement to unemployment benefits. The Icelandic Government replied to the Authority’s questions by a letter dated 2 February 2021 (Doc No 1177816). The issues were further discussed at the package meeting held in Reykjavík in June 2022.
4. The Authority recalls that the freedom to receive services, including going to another EEA State with the objective of receiving medical care, is safeguarded both by primary and secondary EEA law: while Article 20 of Regulation 883/2004¹ and Article 7 of Directive 2011/24² both provide for the right to receive planned healthcare in other EEA States while Article 36 EEA guarantees the freedom to receive services in general.
5. Based on the correspondence and discussions referred to above, it has been established that Icelandic law allows for the retention of unemployment benefits during temporary stays in other EEA States only in one, specific situation.
6. Accordingly, pursuant to Icelandic law, entitlement to unemployment benefit is conditional on *inter alia* having legal residence and actually being physically present in

¹ Act referred to at point 1 of Annex VI to the EEA Agreement, *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems* (OJ 2004 L 166, p. 1), as corrected by OJ L 200, 7.6.2004, p. 1 and OJ L 204, 4.8.2007, p. 30, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011, with entry into force on 1 June 2012 (“**Regulation 883/2004**” or “**the Regulation**”).

² Act referred to at point 1c of Annex X to the EEA Agreement, *Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare* (OJ L 88, 4.4.2011, p. 45–65), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 153/204 of 9 July 2014, with entry into force on 10 July 2014 (“**the Directive**”).

Iceland. That condition is practiced vigorously by national authorities such as the Icelandic Welfare Appeals Committee and disappplied only if the beneficiary goes to another EEA State for the purpose of seeking work. In other situations, for example where the beneficiary has short-term stays in another EEA State for the purpose of visiting family or receiving healthcare, the disbursement of the unemployment benefit will be suspended for the duration of the stay.

7. The Authority further notes that, pursuant to Icelandic law, recipients of an unemployment benefit are allowed to retain those benefits for up to five days per calendar year in case of occasional illness, provided they remain present in Iceland. That right can be invoked *inter alia* in case of scheduled medical treatment anywhere in the country, despite the beneficiary not being able to actively seek work during that period.
8. The Authority considers that the Icelandic legislation and ensuing administrative practice at issue are in breach of Article 20 of Regulation 883/2004 and Article 7 of Directive 2011/24 and in breach of Article 36 EEA.

2 Relevant national law

9. Regulation 883/2004 has been made part of the Icelandic legal order as such by way of the adoption of an implementing regulation³.
10. According to the national transposition measures notified by the Icelandic Government, Directive 2011/24 is implemented into national law by several national acts and regulations. Article 7 of the Directive has been transposed by the Icelandic Act on Health Insurance No 112/2008⁴ and a national implementing regulation⁵.
11. The Icelandic Unemployment Insurance Act ("UIA")⁶ provides the conditions to fulfil in order to be eligible for unemployment benefits. Article 1 defines its scope as follows:

"This Act provides for unemployment insurance covering wage-earners and self-employed individuals on the domestic labour market in the event of their becoming unemployed."

12. Article 3 of the UIA sets out the definition of a wage-earner:

"Wage-earner: Any person who engages in paid employment in the service of others in at least 25% of full job capacity (full-time employment) each month, and for whom social security tax is paid according to the Social Security Tax Act."

13. Article 13(1) stipulates the general conditions which a person needs to fulfil in order to be considered as insured under the UIA:

"Wage earners (cf. item a of Article 3), who meet the following conditions shall be regarded as insured under this Act unless other interpretations follow from individual provisions of this Act:

- a. *They must be actively seeking employment (cf. Article 14) [...]*

³ In Icelandic: "Reglugerð um gildistöku reglugerða Evrópusambandsins um almannatryggingar nr. 442/2012."

⁴ In Icelandic: "Lög nr. 112/2008 um sjúkratryggingar."

⁵ In Icelandic: "Reglugerð um heilbrigðisþjónustu sem sótt er innan aðildarríkis EES-samningsins en hægt er að veita hér á landi og um hlutverk innlands tengiliðar vegna heilbrigðisþjónustu yfir landamæri nr 484/2016."

⁶ In Icelandic: "Lög um atvinnuleysistryggingar nr. 54 frá 14. júní 2006." In this letter of formal notice, the Authority cites the official translation provided by the Icelandic Ministry of Welfare.

c. They must be resident in Iceland and actually present in the country (cf., however, Section VIII)."

14. Article 14 of the UIA is headed "Active employment searches", with its first paragraph reading as follows:

"Those who meet the following conditions shall be regarded as actively seeking employment:

b. they must be in sufficiently good health to accept work or take part in active labour-market measures (cf., however, the fifth paragraph) [...]

d. they must be willing and able to accept work without any special period of notice;

15. Article 14(5) of the UIA contains an important exemption from the requirements of Article 14(1), which reads as follows:

"Insured persons are regarded as actively seeking employment, despite occasional illnesses lasting up to total of five days which may be taken in a maximum of two parts during each twelve-month period, provided they have been registered within the system for total of five months since their first registration during the same period (cf. Article 29). Insured persons shall inform the Directorate of Labour of the beginning and end of period of illness without unreasonable delay. They shall also submit medical certificates within a week of the end of a period of illness if the Directorate of Labour so requests."

16. Article 42 of the UIA, headed "Employment searches in another Member State", replicates to a large extent the provision found in Article 64 of Regulation 883/2004. It stipulates the following:

"The Directorate of Labour is authorised to grant unemployment benefits according to Chapter VII. to a person who is insured under this Act and is seeking employment in another EEA State which is a Contracting Party to the EEA Agreement or the Convention establishing the European Free Trade Association or in the Faroe Islands, provided that he fulfils the following conditions:

a. They must have applied to the Directorate of Labour for unemployment benefit;

b. they must have met the conditions of this Act during at least the four weeks immediately preceding their date of departure;

c. they must be entitled to seek employment freely in the other Member State according to the laws of that state, and

d. they must register themselves as seeking employment at a labour exchange in the state in which the search takes place under the laws of that state within seven working days of their date of departure.

[...]"

17. Article 43 of the UIA lays out the length of the period the benefit is paid while the recipient seeks work in another EEA State:

“The Directorate of Labour may pay unemployment benefit under Article 42 for a continuous period of up to three months from the insured person’s date of departure, though in no case for a longer time than the remainder of the period under Article 29.

When an insured person receives a temporary job in another Member State for a time that is shorter than the remainder of the period referred to in the first paragraph, or resigns from his/her job or loses it for valid reasons within the period, he/she may be paid unemployment benefit under Article 42 for the remainder of the period provided for under the first paragraph.

The provisions of the second paragraph shall not apply if work in another Member State confers entitlement on the person according to the legislation of that state regarding unemployment insurance.”

3 Relevant EEA law

18. Article 3(1)(h) of Regulation 883/2004, entitled “[m]atters covered”, provides:

“This Regulation shall apply to all legislation concerning the following branches of social security: [...] unemployment benefits.”

19. Article 7 of Regulation 883/2004 contains a provision on the waiving of residence rules:

“Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.”

20. Article 20 of Regulation 883/2004 concerns travel with the purpose of receiving benefits in kind, including the obtention of a pre-authorisation from national authorities to that effect:

“ 1. Unless otherwise provided for by this Regulation, an insured person travelling to another [EEA] State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another [EEA] State with the purpose of receiving the treatment appropriate to his/her condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the [EEA] State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness.

3. Paragraphs 1 and 2 shall apply mutatis mutandis to the members of the family of an insured person.”

21. Article 63 of Regulation 883/2004 has a special provision vis-à-vis Article 7 of the same Regulation:

“For the purpose of this Chapter, Article 7 shall apply only in the cases provided for by Articles 64, 65 and 65a and within the limits prescribed therein.”

22. Article 64 of the Regulation, headed “Unemployed persons going to another Member State”, reads:

“1. A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his entitlement to unemployment benefits in cash under the following conditions and within the following limits:

(a) before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;

(b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he has gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he ceased to be available to the employment services of the Member State which he left. In exceptional cases, the competent services or institutions may extend this period;

(c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;

(d) the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense.

2. If the person concerned returns to the competent Member State on or before the expiry of the period during which he is entitled to benefits under paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that Member State. He shall lose all entitlement to benefits under the legislation of the competent Member State if he does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his entitlement.

3. Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months.

4. The arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member

State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation.”

23. Article 7 of Directive 2011/24 is entitled “general principles for reimbursement of costs” and provides that:

“1. Without prejudice to Regulation (EC) No 883/2004 and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.

[...]

4. The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

24. Article 36(1) of the EEA Agreement concerning the freedom to provide and receive services stipulates the following:

“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.”

4 The Authority’s assessment

4.1 Failure to give full effect to Article 20 of Regulation 883/2004 and Article 7 of Directive 2011/24

4.1.1 The right to receive healthcare in other EEA States pursuant to secondary EEA legislation

25. There are several provisions of EEA secondary legislation which guarantee the right to receive benefits in kind, including medical treatment, in situations where a person is staying temporarily in another EEA State than that of residence. For example, the provision set out in Article 19 of Regulation 883/2004 applies to the case of a temporary stay in another EEA State for purposes unrelated to medical treatment (tourist, business traveller etc.).
26. Other rules apply when a person goes to another EEA State with the express purpose of receiving healthcare. For this type of planned patient mobility, EEA secondary legislation has two different legal approaches: benefits in kind pursuant to Article 20 of Regulation 883/2004 must and shall be approved by the competent institution if the conditions set out therein are fulfilled, while, as a main rule, the reimbursement of benefits in kind pursuant to Article 7 of Directive 2011/24 requires no authorisation.
27. Accordingly, EEA secondary legislation provides for a dual and parallel system of planned patient mobility, including the reimbursement thereof. Article 7(1) of the Directive emphasises explicitly the existence of two alternative procedures. Only one of the procedures shall apply to any given situation (c.f. consideration nr. 30 of the

Directive's preamble). Nevertheless, the Directive foresees a priority measure for the procedure set out in Article 20 of the Regulation, by requiring competent institutions to ascertain whether the conditions are fulfilled and, in the affirmative, grant prior authorisation pursuant to the Regulation.

28. As regards Article 20 of Regulation 883/2004, the Authority observes that this provision does not grant an automatic right to receive authorisation from the competent institution. However, if the two conditions provided therein are met, the competent institution of the home State cannot refuse such authorisation. Accordingly, authorisation must be granted where the treatment in question is among the benefits provided for by the legislation in the State where the person concerned resides *and* the same or equally effective treatment cannot be offered in the home State within a medically justifiable time-limit.
29. With respect to Article 7 of Directive 2011/24, the Authority observes that this provision requires the home State to ensure the reimbursement of costs related to cross-border healthcare provided that the treatment in question is part of the basket of benefits available in the home State.

4.1.2 *Failure to give full effect to Article 20 of Regulation 883/2004 and Article 7 of Directive 2011/24⁷*

30. The Authority recalls that, pursuant to the national transposition measures notified by the Icelandic Government, Article 20 of Regulation 883/2004 has been made part of the national legal order as such while Article 7 of Directive 2011/24 has been implemented into national law.
31. As explained above, the provisions set out in Article 20 of the Regulation and Article 7 of the Directive provide a right for individuals to receive planned healthcare in other EEA States subject to the fulfilment of the conditions set out therein. However, in the case of a recipient of unemployment benefits availing himself of that right, the national requirements to be *present* in Iceland and to be actively seeking employment are maintained by national authorities. ESA recalls in this context that it is settled case law that a presence requirement, such as that maintained by Iceland, "is in fact significantly more restrictive than a residence requirement".⁸
32. Consequently, while beneficiaries receiving unemployment benefits from the Icelandic competent authority are allowed to travel to another EEA State for the purpose of obtaining healthcare and will be reimbursed for any expenses, the disbursement of their unemployment benefit will be suspended during that period. As such, the exercise of one right guaranteed by EEA secondary legislation, namely the right to seek healthcare in another EEA State, deprives the beneficiary of the other, namely his right to receive unemployment benefits – which usually would also mean that it would deprive that EEA national of their primary source of income in a situation where the EEA national is not employed.

⁷ The Authority is not aware whether the specific dental care sought by the complainant related to a benefit in kind provided for by Icelandic legislation, c.f. Article 20 (2) of Regulation 883/2004 and Article 7(1) of Directive 24/2011. However, as the correspondence with the Icelandic Government has demonstrated, the Icelandic rules at issue and notably the suspension of unemployment benefits, apply generally to any healthcare received in another EEA State.

⁸ E-13/20 *O v the Norwegian Government, represented by the Labour and Welfare Directorate (Arbeids- og velferdsdirektoratet)*, paragraph 40.

33. The Authority recalls that that Article 3 EEA requires the EFTA States to take all appropriate measures to guarantee the application and effectiveness of EEA law.⁹ In *Wahl* and *ESA v Iceland*, the EFTA Court held:

“Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented [...] prevails over conflicting national law and to guarantee the application and effectiveness of the directive.”¹⁰

34. The Authority considers that *a fortiori* the same applies in respect of regulations.
35. In that respect, the Authority considers that the suspension of the disbursement of unemployment benefits in a situation such as that described above will, undoubtedly, frustrate the effectiveness of the right to free movement of the individuals falling under the Regulation and, in particular, the right to receive healthcare governed by the relevant substantive provisions in question. Thus, the Authority considers that Iceland has failed to give full effect to Article 20 of the Regulation and Article 7 of the Directive. Accordingly, Iceland has failed to fulfil its obligation arising from Article 20 of the Regulation and Article 7 of the Directive, thereby also acting in breach of its obligations under Article 3 EEA.

4.2 The suspension of unemployment benefits during stays in other EEA States for the purpose of receiving healthcare amounts to an unjustified restriction in breach of Article 36 EEA

4.2.1 Introduction

36. Additionally, the Authority considers that the suspension of an unemployment benefit during temporary stays in another EEA State for the purpose of receiving healthcare amounts to an unjustified restriction on the free movement of services, in breach of Article 36 EEA.
37. In support for its conclusion, the Authority will first demonstrate that the circumstances in question are not exhaustively regulated by Article 64 of Regulation 883/2004, with the consequence that they fall to be assessed under Article 36 EEA (point 4.2.2). Second, the Authority will demonstrate that the national requirements at issue amount to an unjustified restriction of the freedom to provide services, in breach of Article 36 EEA (point 4.2.3).

4.2.2 The national requirements at issue fall to be assessed under Article 36 EEA

38. Before turning to the arguments in support of the applicability of Article 36 EEA to the national law at issue, the Authority recalls that among the conditions to fulfil in order to qualify for unemployment benefits pursuant to Icelandic law, is that the beneficiary has legal residence in Iceland, is physically present in the country while actively seeking employment and is willing and able to accept employment offers without any special period of notice. The requirement to be present in Iceland is disapplied only in one very specific situation, namely where the beneficiary avails himself of the right set out in Section 43 of the UIA to go to another EEA State to seek work there.
39. Moreover, pursuant to Icelandic law, recipients of unemployment benefits are allowed to retain those benefits for up to five days per calendar year in case of occasional illness, provided they remain present in Iceland. That right can be invoked *inter alia* in case of

⁹ Case E-2/10 *Pór Kolbeinsson* [2010] EFTA Ct. Rep. 234, paragraph 46.

¹⁰ Case E-15/12 *Wahl*, paragraph 54 and Case E-12/13 *EFTA Surveillance Authority v Iceland*, paragraph 73.

scheduled medical treatment anywhere in the country, despite the beneficiary not fulfilling the requirement of actively seeking work during that period.

40. It is further recalled that the provisions set out in Sections 42-43 of the UIA transpose Article 64 of Regulation 883/2004 into the Icelandic legal order. The Icelandic Government has confirmed that, in its view, EEA law prescribes for the retention of unemployment benefits during temporary stays abroad only in the specific situation covered by Article 64 of Regulation 883/2004, there being no scope for assessing the legality of national restrictions under Article 36 EEA. In support for its view, the Icelandic Government referred to, *inter alia*, the EFTA Court's judgement in case E-13/20.¹¹
41. The Authority recalls that that judgement was based on very specific facts, where the EEA national operated self-employed activities in one EEA State over a long time period while receiving unemployment benefits from and being registered as a jobseeker in another EEA State. In that context and on that background, the EFTA Court held that Articles 64, 65 and 65a "exhaustively regulate the three situations in which the competent EEA State is required to allow recipients of an unemployment allowance to reside or stay in the territory of another EEA State".¹² Therefore, the Authority cannot agree with the view of the Icelandic Government.
42. Article 63 of Regulation 883/2004 provides that "*for the purposes of this Chapter, Article 7 [on the waiving of residence rules] shall apply only in the cases provided for by Articles 64 and 65 and within the limits prescribed therein.*" Article 64 of the Regulation provides for a right to retain unemployment benefits in a situation where the beneficiary chooses to go to another EEA State *in order to seek work there*, subject to further conditions set out therein.
43. In the Authority's view, the literal interpretation of Article 63 of the Regulation is simply that it determines in what situations the prohibition on national residence and presence requirements set out in Article 7 shall apply. Accordingly, that provision merely clarifies the application of Article 7 to the specific situations covered by Articles 64, 65 and 65a, rather than seeking to regulate the free movement of unemployed persons in general. That understanding finds support in the wording "*for the purposes of this Chapter*" and "*within the limits prescribed therein*", demonstrating the limited scope of Article 63.
44. Moreover, the interpretation offered by the Authority is the one that best promotes one of the main objectives of Regulation 883/2004, namely to coordinate, not harmonise, national social security systems, c.f. the judgement of the EFTA Court in Case E-13/20 O.¹³
45. The Authority further considers that extensive and well-established case law supports its understanding of Article 64 of the Regulation read in conjunction with Articles 63 and 7, including its relation to the applicability of the fundamental freedoms.
46. Accordingly, in *Testa*, the CJEU emphasised that Article 69 of Regulation 1408/71 – the predecessor to the current provision contained in Article 64 of Regulation 883/2004 – provided the recipient of an unemployment benefits with an advantage he would otherwise not necessarily enjoy pursuant to national legislation.¹⁴ In that same vein, the CJEU in Case C-62/91 *Gray* referred to the provision as one that attaches conditions to

¹¹ Position communicated by the representatives of the Icelandic Government at the package meeting held in Reykjavík on 8 June 2022 (Doc No 1294470, page 26).

¹² Case E-13/20 *O v Arbeids- og velferdsdirektoratet*, paragraph 42.

¹³ *Ibid*, paragraph 38. See also consideration no. 4 of the preamble to Regulation 883/2004.

¹⁴ Judgment of the Court of 19 June 1980 in joined cases 41/79, 121/79 and 796/79, *Vittorio Testa, Salvinio Maggio and Carmine Vitale v Bundesanstalt für Arbeit*, ECLI:EU:C:1980:163, paragraphs 14-15.

the rights and advantages which it accords in order to ensure freedom of movement.¹⁵ The Authority takes the view that it cannot be deduced that, due to the fact that Article 64 provides beneficiaries with a specific right to retain unemployment benefits when they seek work in other EEA States, in all other situations the right to free movement is quashed. In particular, this must be so in a scenario such as that at issue in the present letter of formal notice, where an EEA national seeks to stay in another EEA State in order to receive medical services there.

47. Moreover, in that very same judgement, the CJEU made another important clarification as to the nature of Article 64 of the Regulation. It held that:

“(...) the system set up by Article 69 [Article 64 Reg 883/2004] is an optional system which applies only to the extent to which such application is requested by a worker...”¹⁶

Thus, the CJEU emphasised that the provision is optional and only applies when the unemployed person chooses to invoke the right set out therein for that specific situation, i.e. going to another EEA State to seek work. The Authority considers that, the right set out in Article 64 of Regulation 883/2004 being optional, there is no basis to conclude that the provision exhaustively regulates the right to free movement of unemployed persons in general. In particular this cannot be the case when the reason for the exercise of free movement is wholly unrelated to the employment status of the person in question but is rather motivated by the wish to rely on another fundamental freedom under the EEA Agreement, such as *“the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions,”*¹⁷ for instance in the form of medical services provided for consideration, which it is settled case law will *“fall within the scope of the provisions on the freedom to provide services”*¹⁸

48. In that respect, the Authority also finds it useful to recall that the EFTA Court, in Case E-8/20 *Criminal proceedings against N*, made clear that:

“The finding that a national measure does not fall within the scope of a provision of a legal act incorporated into the EEA Agreement, in this case point (b) of Article 22(1), does not have the effect of removing that measure from the scope of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement.”¹⁹

49. Accordingly, the Authority takes the view that the question of whether the fundamental freedoms apply to unemployed persons not availing themselves of the specific right set out in Article 64 of Regulation 883/2004 in circumstances such as the present letter of formal notice, must be answered following the same methodology and reasoning as that applied by the EFTA Court in *E-8/20*. There, the EFTA Court concluded that none of the specific provisions in Regulation 1408/71 pertaining to the export of sickness benefits applied to the facts of the case, since none of the provisions sought to regulate short-term stays in another EEA State. The parallel with the complainant’s case, and in fact any unemployed person travelling to another EEA State for purposes unrelated to job-seeking, appears evident to the Authority. Accordingly, the provision contained in Article 64 of Regulation 883/2004 applies to the specific situation in which an unemployed person goes to another EEA State to seek work there and allows the beneficiary to retain the benefit up to three months, subject to the fulfilment of certain conditions.

¹⁵ Judgment of the Court (Third Chamber) of 8 April 1992 in Case C–62/91, *Gordon Sinclair Gray v Adjudication Officer*, EU:C:1992:177, paragraph 11.

¹⁶ *Idem*, paragraph 19.

¹⁷ Case E-8/20 *Criminal Proceedings against N*, paragraph 75.

¹⁸ Joined cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320 Paragraph 42.

¹⁹ Case E-8/20 *Criminal Proceedings against N*, paragraph 68.

Conversely, that provision does not address the situation where an unemployed person undertakes a shorter stay in another EEA State for a purpose not related to job-seeking.²⁰

50. Having reached the conclusion in *E-8/20* that none of the relevant provisions of secondary EEA legislation applied to the facts of the case, the EFTA Court went on to state – unsurprisingly – that the national measures at hand fell to be assessed under the fundamental freedoms.²¹ In light of the assessments set out above, the Authority sees no reason why the situation of unemployed persons not availing themselves of the right provided for by Article 64 of Regulation 883/2004 should be treated any differently, as that right will have nothing to do with the reason the beneficiary wanted to exercise his fundamental right to free movement.
51. Furthermore, the Authority finds it important to clarify its reading of the CJEU’s judgment in case C-245/10 *Rydergård*. Here, the CJEU made clear that:

“It follows that the conditions set out on Article 69(1) of Regulation No 1408/71 must be construed as being exhaustive and that the competent authorities of the Member States are not entitled to impose additional conditions.”²²

52. The Authority considers that in the cited passage, the CJEU merely made clear that *if* an unemployed person has availed himself of the right provided for by Article 64 of the Regulation to export the benefit while seeking work in another EEA State, *then* the rights and obligations of both that individual and the authorities involved are exhaustively regulated by the said provision. This means in particular that the EEA States cannot impose additional conditions upon the individuals to those set out in Article 64. The Authority takes the view that there is no basis in *Rydergård* or other case law to suggest that Article 64 of the Regulation exhaustively regulates *all situations* in which an unemployed person wishes to retain the benefit while staying in another EEA State. Consequently, cases not falling within the specific situation which Article 64 seeks to regulate fall to be assessed under the fundamental freedoms.
53. As such, the Authority finds that the judgments in C-551/16 *Klein Schiphorst*²³, C-406/04 *De Cuyper*²⁴ and C-228/07 *Petersen*²⁵ accurately illustrate the difference between situations where Article 64 does exhaustively regulate the export of an unemployment benefit on the one hand, and situations where it does not on the other.
54. In *Klein Schiphorst*, the CJEU was faced with a situation where the beneficiary had chosen to avail himself of the rights set out in Article 64, going to another EEA State to seek work there while retaining his unemployment benefit. However, he exceeded the three-month deadline provided for by Article 64(1)(c), incorporated also by the relevant national law as such. Here, the CJEU found the national measure at issue to comply with Article 64(1)(c), without subsequently assessing whether it amounted to an unjustified breach of any fundamental freedom.

²⁰ See, to that effect also Tarjei Bekkedal and Mads Andenæs “Er mottakere av dagpenger beskyttet av EØS-avtalens grunnleggende rett til fri bevegelighet?”, *Lov og rett* 2022/3 p. 145.

²¹ Case E-8/20 *Criminal Proceedings against N*, paragraph 69.

²² Judgment of the Court (Fifth Chamber) of 21 February 2002, *Arbetsmarknadsstyrelsen v Petra Rydergård*, ECLI:EU:C:2002:111, paragraph 19.

²³ Judgment of the Court (First Chamber) of 21 March 2018, *J. Klein Schiphorst v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekering*, ECLI:EU:C:2018:200 (“*Klein Schiphorst*”).

²⁴ Judgment of the Court (Grand Chamber) of 18 July 2006 in case C-406/04 *Gérald De Cuyper v Office national de l’emploi*, ECLI:EU:C:2006:491.

²⁵ Judgment of the Court (Third Chamber) of 11 September 2008, in Case C-228/07, *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, ECLI:EU:C:2008:494.

55. On the other hand, both *De Cuyper* and *Petersen* concerned cases where the beneficiary did not go to another EEA State with a view to seeking work there. In both cases, the CJEU assessed whether the national measures at issue constituted a breach of the fundamental freedoms.
56. In *De Cuyper*, the CJEU set out by confirming that the benefit at issue fell within the scope of Regulation 1407/81, being an unemployment benefit.²⁶ Next, the CJEU determined that the facts of Mr De Cuyper's case were not covered by any of the relevant provisions of the Regulation, *inter alia* because his stay in another EEA State was unrelated to job-seeking:

"In that regard, Regulation No 1408/71 provides for only two situations in which the competent Member State is required to allow recipients of an unemployment allowance to reside in the territory of another Member State while retaining their entitlement to it. Firstly, there is the situation provided for in Article 69 of the regulation, allowing unemployed persons who go to a Member State other than the competent State 'in order to seek employment there' to retain their entitlement to unemployment benefit. Secondly, there is the situation referred to in Article 71 of that regulation, relating to unemployed persons who, during their last employment, were residing in the territory of a Member State other than the competent State. It is clear from the order for reference that a situation such as that of Mr De Cuyper is not covered by either of those articles.

It is established that national legislation such as that in this case which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18 EC on every citizen of the Union (see, to that effect, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 31, and Case C-224/02 Pusa [2004] ECR I-5763, paragraph 19).

*Such a restriction can be justified, with regard to Community law, only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions."*²⁷

57. The CJEU followed the same methodology in *Petersen*, stating first that "*Regulation No 1408/71 does not contain any provisions governing cases such as the one which is the subject of the main proceedings*". The CJEU then recalled in the traditional fashion that while in the absence of harmonisation the EEA States retain the power to organise their social security schemes, they must nonetheless exercise that power in compliance with the fundamental freedoms. Thereafter, the CJEU went on to assess whether the national conditions at issue amounted to an unjustified restriction on the freedom of movement of workers.²⁸
58. As the EFTA Court has noted,²⁹ the judgments in *De Cuyper* and *Petersen* concerned national unemployment benefits with the particular feature that the beneficiaries were exempted from the requirement to be available for work. In the view of the Authority, that fact does not allow for the conclusion that insofar as the beneficiary *is* subject to a national requirement to be available for work, his right to retain the unemployment benefit during any short-term stay in another EEA State for any purpose, and regardless of which freedom that stay would normally fall under, would be governed solely by Article 64 of Regulation 883/2004.

²⁶ *De Cuyper*, paragraph 27-35.

²⁷ *De Cuyper*, paragraphs 38-40.

²⁸ *Petersen*, paragraphs 40-44.

²⁹ E-13/20, paragraph 52.

59. At any rate, the Authority recalls that pursuant to Icelandic law, recipients of an unemployment benefit are exempted from the requirement of actively seeking work for up to five days per calendar year in case of occasional illness, provided they remain present in Iceland, c.f. Article 14(5) UIA. That right can be invoked *inter alia* in case of scheduled medical treatment anywhere in the country, despite the beneficiary not being able to actively seek work during that period.
60. With reference to the above, the Authority considers that in a situation where the beneficiary has not availed himself of the specific right set out in Article 64, and at any rate where the purpose for the exercise of free movement is wholly unrelated to the employment status of the person in question but is rather motivated by the wish to rely on another fundamental freedom under the EEA Agreement, national conditions for the retention of the unemployment benefit during stays in another EEA State fall to be assessed under the applicable fundamental freedoms.³⁰
61. Applied to the case of the complainant, the exceptions set out in Articles 42-43 UIA concerning beneficiaries wishing to seek work in another EEA State are irrelevant, as those provisions are not relevant for those seeking medical care in another EEA State.
62. In light of the above, the Authority concludes that a national measure resulting in the suspension of an unemployment benefit during stays in another EEA State for the purpose of receiving healthcare must be compatible with the provisions of the main part of the EEA Agreement.

4.2.3 *The national conditions at issue amount to an unjustified restriction of the freedom to provide services, in breach of Article 36 EEA*

63. The Authority finds it necessary to, first, provide clarification on the scope and applicability of Article 36 EEA. Notably, the Icelandic Government has emphasised that Article 36 EEA establishes a prohibition of restrictions on the freedom to *provide* services, whereas the national law at issue in no way impedes the possibility to *receive* services (emphasis added by the Icelandic Government).³¹
64. In that respect, it is sufficient for the Authority to recall that pursuant to well-established case law, Article 36 EEA equally protects the right to receive services. To that effect, the EFTA Court has held in *E-8/20* that:

“The freedom to provide services conferred by Article 36 EEA also includes the “passive” freedom to provide services, namely the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions (compare the judgment in Piring, C-342/15, EU:C:2017:196, paragraph 35).”³²

65. Turning to the question of whether the national conditions at issue amount to a restriction, the Authority observes that any national 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.³³ It is settled case law that this also applies with respect to medical services.³⁴

³⁰ See to that effect the judgement of the Norwegian National Insurance Court in case TRR-2019-2736 and Tarjei Bekkedal and Mads Andenæs “Er mottakere av dagpenger beskyttet av EØS-avtalens grunnleggende rett til fri bevegelighet?”, *Lov og rett* 2022/3 p. 145.

³¹ Answer to question 10 in the aforementioned letter from the Icelandic Government of 2 February 2021, Doc No 1177816.

³² Case E-8/20 *Criminal Proceedings against N*, paragraph 75.

³³ Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 73.

³⁴ Joined cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320, paragraph 44.

66. The Authority recalls that among the conditions to fulfil in order to qualify for an unemployment benefit pursuant to Icelandic law, is that the beneficiary has legal residence in Iceland, is actually present in the country while actively seeking employment and is willing and able to accept employment offers without any special period of notice. The requirement to be present in Iceland is disapplied only in one very specific situation, namely where the beneficiary avails himself of the right set out in Section 43 of the UIA to go to another EEA State to seek work there. In other situations, for example where the beneficiary spends short-term stays in another EEA State for the purpose of visiting family or receiving healthcare, the unemployment benefit will be suspended for the duration of the stay.
67. The Authority contends that there can be no doubt that the prospect of seeing one's unemployment benefit suspended will make it less attractive to exercise the freedom to go to another EEA State in order to receive a service there.
68. It follows from the foregoing considerations that a measure such as that at issue entails a restriction within the meaning of Article 36 EEA.
69. Any restriction must pursue a legitimate objective justified by overriding reasons in the public interest. It must also be assessed whether the measure in question goes beyond what is necessary in order to attain the chosen objective. This implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.³⁵ It is for the EEA State imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.³⁶ The Authority notes that aims of a purely economic or administrative nature cannot justify a restriction on free movement.³⁷
70. The Authority recalls that, pursuant to Icelandic law, namely Article 14(5) UIA, recipients of an unemployment benefit are allowed to retain those benefits for up to five days per calendar year in case of occasional illness, provided they remain present in Iceland. That right can be invoked *inter alia* in case of scheduled medical treatment anywhere in the country, despite the beneficiary not being able to actively seek work during that period. Accordingly, the stay requirement of Article 13(1)(c) is effectively suspended when the recipient invokes the exception set out in Article 14(5) UIA. On that basis, the Authority considers that the restriction at issue fails to pursue its aim in a consistent and systematic manner.
71. Accordingly, the Icelandic Government has failed to demonstrate that the contested restriction is justified.
72. In light of the above, the Authority concludes that the suspension of an unemployment benefit during temporary stays in another EEA State for the purpose of receiving healthcare amounts to an unjustified restriction on the free movement of services, in breach of Article 36 EEA.

5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force national rules whereby an unemployment benefit is suspended during stays in another EEA State, in particular for the purpose of receiving healthcare,

³⁵ Case E-8/20 *Criminal Proceedings against N*, paragraph 94.

³⁶ Case E-8/16 *Netfonds Holdings and others*, [2017] EFTA Ct. Rep. 163, paragraph 117.

³⁷ Case E-8/17 *Kristoffersen*, cited above, paragraph 115; and Case C-212/08 *Zeturf*, EU:C:2011:437, paragraph 48.

Iceland has failed to fulfil its obligation arising from Article 20 of Regulation 883/2004, Article 7 of Directive 2011/24 and thereby also has breached Article 3 EEA, and Iceland is in breach of Article 36 EEA.

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

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

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