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ESA | EFTA Surveillance Authority

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's restrictions on the exportability of sickness benefits in cash, in breach of Article 21(1) of Regulation 883/2004, Articles 3 and 7 EEA, Articles 28, 31, 36 EEA and Articles 4, 6 and 7(1)(b) of Directive 2004/38

1 Introduction and correspondence

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 of Norwegian residents under EEA law to export three types of sickness benefits in cash to other EEA States: sick-pay (*sykepenger*), work assessment allowance (*arbeidsavklaringspenger*) and attendance allowance (*pleiepenger*). 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) By letter dated 4 November 2019[1], the Internal Market Affairs Directorate of the Authority ("**the Directorate**") informed the Norwegian Government that it had opened an own initiative case to examine whether the national legislation and ensuing administrative practice regarding the exportability of sickness benefits in cash complied with EEA law.

3) Following a request, the Directorate agreed to extend the deadline to respond until 11 December 2019.[2] The Norwegian Government submitted its reply by way of a letter dated 11 December 2019.[3] On that same date, the internal audit department of the Norwegian Labour and Welfare Administration ("**NAV**") published its report on the matter.[4]

4) The Directorate shared its preliminary assessment with Norway, in the form of a pre-Article 31 letter, on 11 March 2020.[5] 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.[6] The reply from Norway was received on 11 June 2020.[7]

5) The Norwegian Government-appointed commission delivered its 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."*[8]

6) On 25 November 2020, the Authority issued a letter of formal notice ("**the LFN**") to Norway concluding that the Norwegian legislation in force at the time continued to unlawfully restrict the rights, pursuant to EEA law, of recipients of sickness benefits in cash by requiring these recipients – without due justification – to stay

[1] Doc No 1094489.
[2] Doc No 1100021.
[3] Doc No 1103404.
[4] 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
[5] Doc No 1118071.
[6] Doc No 1127734.
[7] Doc No 1137756.
[8] *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/

(*oppholde seg*) in Norway.[9] The reply from Norway was received on 25 February 2021.[10]

7) In its reply (para 14), the Norwegian Government stated, *inter alia*, that since November 2019, "stays in another EEA country are equated with stays in Norway for persons that fall within the ambit of EEA law, and there has not been a requirement for prior application approval since then."

8) 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.[11] As such, on 19 May 2021, the Authority sent a supplementary request for information to Norway concerning these issues.[12]

9) The Authority notes that in its judgment delivered on 5 May 2021, the EFTA Court concluded *inter alia* that the Norwegian rules limiting the exportability of a work assessment allowance amounted to unjustified restrictions on the freedom to receive services under Article 36 EEA.[13] Furthermore, with regard specifically to the legal situation from 1 June 2012 when Regulation 883/2004 entered into force in the EEA, the EFTA Court held *inter alia* that Article 21(1) of Regulation 883/2004 precludes an EEA State from making the retention of entitlement to a cash benefit subject to conditions such as those established by Section 11-3(1) and (3) of the National Insurance Act (work assessment allowance).

10) The Authority further observes that on 4 May 2021, the day before the expected delivery of the judgment of the EFTA Court referred to above, the Norwegian Parliament adopted legislative amendments pertaining to sick-pay and attendance allowance by which the requirement to stay in Norway (*opphold i Norge*) is maintained.[14] These amendments, which are not in compliance with EEA law, as set out in the conclusions in the LFN and in this reasoned opinion entered into force on 1 June 2021. The amendments are also not in compliance with the findings of the EFTA Court in Case E-8/20. The Authority considers that those amendments fall within the scope of this reasoned opinion.

11) In this reasoned opinion, the Authority maintains its conclusion that Sections 8-9, 9-4 and 11-3 of the National Insurance Act ("**NIA**") (hereinafter referred to as "**the National Provisions**") as well as any administrative practice in accordance with the National Provisions (any such practice and the National Provisions are hereinafter jointly referred to as "**the National Measures**"):

- 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;

[9] Doc No 1138850.
[10] Doc No 1184098.
[11] 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, paragraph 12.
[12] Doc No 1200613.
[13] Case E-8/20 *Criminal Proceedings against N*, judgment of 5 May 2021, not yet reported.
[14] *Lovvedtak103(2020-2021),* https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=83049 and *LOV-2021-05-21* which entered into force on 1 June 2021.

- 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 Relevant national law

12) The National 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 ("NIA") of 28 February 1997 No 19 (*Folketrygdloven*) in its version currently in force.[15]

13) Section 8-9 on sick-pay was amended in 2006 and again in 2021. It reads as follows:[16]

"§ 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 during a stay abroad up to four weeks during a twelve-month period. Sick-pay may only be granted when the employer and the professional having issued the sick-leave agree that the stay abroad will not hinder planned activity and treatment. It is a further condition that the stay abroad will not hinder the control and follow-up by the Labour and Welfare Administration.

[15] LOV-1997-02-28-19 *Lov om folketrygd (folketrygdloven)*. The version currently in force was last amended by *LOV-2021-05-21* and entered into force on 1 June 2021. The cited provisions are an Authority translation.

[16] The provision was last amended by *LOV-2021-05-21*, entered into force on 1 June 2021. The amendment replaced the wording "a limited period" with "four weeks over a twelve-month period", designating the maximum period a benefit can be retained outside of Norway. Moreover, the amendment brought about a new condition and a further restriction, namely that retention of the benefit can only be allowed insofar as both the beneficiary's employer and the professional having issued the sick-leave certificate agree that the stay abroad will not hinder planned activity and treatment.

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."

14) Section 9-4 on attendance allowance was amended in 2017 and in 2021.[17] It reads:

"§ 9-4. Stay in Norway or abroad

It is a condition for the right to attendance allowance that the member stays in Norway.

Nevertheless, attendance allowance is paid abroad to

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

A member may also otherwise receive benefits pursuant to this chapter up to eight weeks during a twelve-month period. The member shall inform the Labour and Welfare Administration of the stay abroad.

When a member who works abroad is entitled to benefits pursuant to chapter 9, the employer pays the benefit and receives a reimbursement from the social security."

15) Section 11-3 on work assessment allowance was amended in 2018 and provides the following:[18]

"§ 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.

[17] The provision was last amended by *LOV-2021-05-21*, entered into force on 1 June 2021.
[18] 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.

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."

16) Section 25-12 on penalties[19] 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 judgment, 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.

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."

3 Relevant EEA law

17) 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."

18) 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.

[…]"

19) 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.

[…]"

20) Article 36 EEA reads:

[19] The provision was last amended by *LOV-2008-12-19-109*, entering into force on 1 January 2009.

"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.

[…]"

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

"Persons covered

1. 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."

22) 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."

23) 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;"

24) 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."

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[20] 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;

4 The Authority's Assessment

4.1 The National Measures are incompatible with Article 21(1) of Regulation 883/2004

[20] 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.

4.1.1 Relevant national law

27) The Authority recalls that pursuant to the National Provisions, 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, prior authorisation would only allow for the export of the benefit during a limited period of time.

28) The conditions for the export of sick-pay require *inter alia* that the stay or residence in another EEA State will not hinder the control and follow-up by NAV. Moreover, it is required that both the member's employer and the professional having issued the sick-leave certificate agree that the stay in another EEA State will not hinder planned activity and treatment.

29) The conditions for retaining the attendance allowance is *inter alia* that the member shall inform the NAV of the stay or residence in another EEA State. In that case, the member "*may also otherwise receive"* the benefit.

30) The requirement to obtain a prior authorisation is reflected in the wording of the national provisions[21] "*on application, a member may (…)"* or "*a member may also otherwise receive."*

31) The conditions for exporting the 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, whereby *"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 specifically regulate the exportability of the benefit.[22]

32) As already noted above, the National Provisions at hand provide that any permission 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(3) 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. Sick-pay may be retained *"up to four weeks during a twelve-month period"* in accordance with Section 8-9(3) NIA.

33) Regulation 883/2004 is transposed into the Norwegian legal order by way of reference and in the form of an implementing regulation.[23] Section 1(3) of that regulation stipulates that the provisions of Regulation 883/2004 shall prevail in case of conflict with, *inter alia*, the National Provisions.

34) Administrative circulars seek to clarify the relationship between the National Provisions and the national regulation transposing Regulation 883/2004. The circulars set out the national administration's interpretation of the National

[21] Section 8-9(3) and 9-4(3).

[22] FOR-2017-12-13-2100 *Forskrift om arbeidsavklaringspenger* and FOR-2017-12-13-2099 *Forskrift om beregning arbeidsavklaringspenger etter EØS*.

[23] FOR-2012-06-22-585 *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen*.

Provisions, including how they should be applied in practice in light of the boundaries of EEA law.

35) In its reply to the LFN, the Norwegian Government has emphasised that pursuant to a change in administrative practice, stays in other EEA States are now equated with stays in Norway.[24] NAV does not currently enforce the obligation to seek prior approval nor does it currently avail itself of its competence to restrict the export of a sickness benefit to a limited period of time. This current administrative practice is, according to the Norwegian Government, mirrored in updated circulars.[25]

36) As regards the updated circulars, the Authority notes that they do not consistently make clear that the benefits in question are no longer subject to *inter alia* a prior authorisation mechanism or a limited time condition. For example, the circular on sick-pay does not explicitly clarify that there is no requirement to obtain prior authorisation. Nor does it establish that the limited time condition is no longer applied.[26] Similar ambiguities exist in relation to the other two benefits at issue in this reasoned opinion.

37) Moreover, the Authority observes that the information pertaining to current administrative practice is dispersed throughout several, different sources. In fact, it is necessary to consult the sector-specific circular, the "EEA-Circular"[27] read in conjunction with the sector-specific circular and the NAV website in order to have the fullest possible understanding of the current administrative practice.

4.1.2 Assessment

38) Pursuant to Article 2(1), Regulation 883/2004 is applicable to all EEA nationals, whether economically active or not.

39) 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 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". The EFTA Court has confirmed that the terms "residing" and "staying" in Article 21(1) are intended to cover all forms of presence or residence in another EEA State.[28]

40) It is not disputed by the Government of Norway that Article 21(1) of Regulation 883/2004 applies to the three sickness benefits in question, i.e. sick-pay (*sykepenger*), work assessment allowance (*arbeidsavklaringspenger*) and attendance allowance (*pleiepenger*).[29]

41) Article 21(1) of Regulation 883/2004 provides that an insured person and members of his family residing or staying in an EEA State other than the competent EEA State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. The correspondence between the Authority and the Government of Norway to date has demonstrated a

[24] Reply by the Norwegian Government to the Authority's letter of formal notice (Doc No 1184098), para. 14.
[25] Idem, para 15 and the appendices referred to therein.
[26] *Rundskriv til ftrl kap 8 – Sykepenger*.
[27] Hovednummer 45 – *Rundskriv til EØS-avtalens bestemmelser om trygd.*
[28] Case E-8/20 *Criminal Proceedings against N*, para. 133.
[29] See letters from the Norwegian Government of 11 June 2020 (para. 12) and 25 February 2021 (para. 7).

diverging interpretation of the wording "*in accordance with the legislation it applies*".

42) Indeed, judging by previous correspondence,[30] the Norwegian Government seems to be of the view that the wording "*in accordance with the legislation it applies*" would provide a legal basis for imposing specific restrictions on the exportability of sickness benefits in cash. The Authority, on the other hand, has emphasised that the correct interpretation of Article 21(1) is that it is the *entitlement* to a sickness benefit, not the *export* of the benefit, that is to be provided in accordance with national law.[31]

43) In other words, provided that the beneficiary fulfils the regular, basic eligibility criteria, he or she is entitled to export pursuant to Article 21(1). As such, Article 21(1) does not allow an EEA State to impose any specific, export related criteria for the (continued) eligibility for the benefit in question.[32]

44) The Authority observes that its interpretation has received the fullest possible support by the EFTA Court, which has held that:

> *"(…) provided that the criteria for entitlement in national law are fulfilled, Article 21(1), including its wording "in accordance with the legislation it applies", cannot be interpreted as permitting an EEA State to impose any further conditions, such as requiring an insured person to be physically present on its territory."*[33]

45) Moreover, the Authority notes that the EFTA Court then went on to conclude that:

> *"It follows from the above that Article 21(1) of Regulation 883/2004 precludes an EEA State, in situations covered by that provision, from making retention of entitlement to a cash benefit subject to conditions, such as for example a condition as to physical presence on its territory or subjecting the right to a prior authorisation"*[34]

46) Finally, the Authority recalls that in the case cited above, which concerned the compatibility of the restrictions governing the export of the Norwegian work assessment allowance, the EFTA Court concluded that Article 21(1) precluded conditions such as (i) that the benefit may be provided only for a maximum of four weeks per year outside of Norway; (ii) that it must be demonstrated that the stay abroad is compatible with the activity obligations and does not impede follow-up and control; and (iii) that the person concerned must obtain prior authorisation and comply with the notification duty.

47) The Authority considers it clear that the EFTA Court's conclusions as regards the restrictions on the export of the Norwegian work assessment allowance also applies to the other two sickness benefits subject of this reasoned opinion.

48) The Authority therefore upholds its conclusion 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, as provided for by the National Measures, do not comply with Article 21(1) of Regulation 883/2004.

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[30] See letter from the Norwegian Government of 11 June 2020, paras 14-15.
[31] Letter of Formal Notice, paras 45-51.
[32] *Idem*, paras 41 and 46.
[33] Judgment in Case E-8/20 *Criminal Proceedings against N*, para 143.
[34] *Idem*, para 148.

4.2 The National Measures amount to unjustified restrictions on free movement

4.2.1 The National Measures are incompatible with Articles 28 EEA, 31 EEA and 36 EEA

49) The Authority maintains that, in addition and/or in the alternative, the National Measures restrict the exportability of sickness benefits in cash and amount to unjustified restrictions on, depending on the facts, the free movement of workers, establishment and/or the freedom to provide services.

50) 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.[35] 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.

51) 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.

52) Thirdly, Article 36 EEA provides for the freedom to provide services, a right which is enjoyed by both providers and recipients of services.[36] For instance, tourists are recipients of services and the freedom to provide services covers EEA nationals who, for any reason and independently of other freedoms guaranteed by the EEA Agreement, visit another State where they intend or are likely to receive services.[37] The EFTA Court has clarified that *"[i]n the case of a person who is prevented from working(…), numerous explanations may explain their choosing to stay in another EEA State. However, in such circumstances, it can be assumed that such an individual will receive services in the EEA State in which he stays."*[38]

53) 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.[39] 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.[40]

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[35] 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.

[36] Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 48.

[37] 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; Case C-384/93 *Alpine Investments*, EU:C:1995:126, paragraphs 30 and 31 and case law cited.

[38] Case E-8/20 *Criminal Proceedings against N*, para 77.

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

[40] Case E-8/17 *Kristoffersen*, paragraph 114.

4.2.2 The National Measures constitute a restriction

54) The Authority recalls that the National Provisions, as concerns all three benefits, contain the requirement of stay in Norway. The National Provisions offer limited exceptions, subject to conditions and a corresponding prior authorisation procedure. The National Provisions prescribe that benefits may, in any case, be retained outside of Norway only during a limited period of time.

55) The National Measures constitute measures 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.[41]

56) With regard to the work assessment allowance the EFTA Court has confirmed the Authority's assessment that "*[ ], by its very essence, a condition limiting the duration of stays abroad (…) constitutes a restriction (…)"* and, moreover, that it is *"clear that a system of prior authorisation represents an additional burden for individuals choosing to stay in another EEA State (…)".*[42]

4.2.2.1 Justification of the restriction

4.2.2.1.1 Legitimacy of the aims pursued by the National Measures

57) Like any restriction to free movement, in order to be justified the National Measures must pursue a legitimate objective. It is not sufficient for the national measures to resort to a legitimate aim in the abstract. Rather, it must be assessed whether the measures at issue actually pursue the invoked aim.[43] 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.[44]

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.[45]

58) 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*."[46]

59) 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.[47]

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[41] Case E-14/15 *Holship Norge AS vs Norsk Transportarbeiderforbund*, paragraph 115.
[42] Case E-8/20 *Criminal Proceedings against N*, paras 85-86.
[43] Case E-14/15 *Holship, paragraph 125;* Case E-8/16 *Netfonds Holding,* paragraph 115.
[44] Case E-8/17 *Kristoffersen*, cited above, paragraph 115; and Case C-212/08 *Zeturf*, EU:C:2011:437, paragraph 48.
[45] Letter from the Norwegian Government of 11 June 2020, Doc No 1137756, para. 17.
[46] R8-00 *Rundskriv til folketrygdloven*. The cited parts are an Authority translation.
[47] *Idem*, point 6.2.2.4.

60) 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."*[48]

61) With regard to the specific objective of encouraging recruitment, the EFTA Court held:[49]

> *"(…) mere generalisations concerning the capacity of a specific measure to encourage recruitment (…) are not enough to show that the aim of that measure is capable of justifying derogations from one of the fundamental freedoms of EEA law and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (…)."*
>
> *"In particular, "sickness benefits" (…) are health-related benefits and cannot be considered to be primarily instruments of national employment policy designed to improve opportunities for entering the labour market.(…)"*
>
> *"While a benefit such as that at issue is awarded to a person whose reintegration into employment life is difficult and to that extent impacts employment policy to a certain degree, the main objective of granting sickness benefits is the improvement of the state of health and the quality of life of insured persons. Thus, considerations devised to fit the specific purposes of the employment policy of re-integrating persons into the labour market cannot justify the restriction in question."*

62) On that basis, as regards the Norwegian work assessment allowance, the EFTA Court concluded that considerations devised to fit the specific purposes of the employment policy of re-integrating persons into the labour market could not justify the restriction in question. The Authority takes the view that this conclusion is equally applicable to the restrictions applying to the other two benefits addressed by this reasoned opinion.

63) For the sake of good order, the Authority notes that the objective of encouraging recruitment can, in principle, serve as a legitimate aim justifying activity requirements. 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. It is also legitimate for the national legislator/competent authorities to wish to monitor compliance with the requirements for social security benefits.

4.2.2.1.2 Suitability and consistency of the National Measures at issue

64) For any restriction of free movement, like the National Measures, it is for the EEA State imposing it to demonstrate that the restriction is suitable for attaining the stated objectives. That suitability test is supplemented by a requirement that the

[48] R11-00 *Rundskriv til folketrygdloven*. The cited parts are an Authority translation.
[49] Case E-8/20 *Criminal Proceedings against N*, paras 104-106.

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.[50]

65) Whether a measure is suitable for attaining the aims pursued must be assessed concretely and contextually. The Authority maintains that the Norwegian Government has not 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 regards the conditions linked to the exportability, including the prior authorisation system, with its time limitation.

66) The Authority recalls that, as regards the National Measures, 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, entails that the implementation of the control/follow-up justification advanced by Norway is not coherent.[51]

67) The EFTA Court has concluded in the same way with regard to the time-limit and the prior authorisation mechanism provided for in Section 11-3(3) NIA on work assessment allowance:[52]

> *"(…) the national rule makes no comparable limitation for an insured person travelling and staying away from his home municipality or residence within Norway for tourism or other purposes. Rather, the general system for monitoring compliance under Section 11-7 of the National Insurance Act is that the insured person reports to NAV every fourteenth day. Such notifications are intended to provide NAV with relevant information for an insured person's entitlement to the benefit. This applies regardless of the circumstances of the travels within Norway. It has not been demonstrated that the limited time condition reflects the legitimate objectives in a consistent and systematic manner when for travels within Norway it is sufficient for compliance and supervision to report to NAV every second week. It does not appear that a notification system would impede NAV from being able to verify that a recipient continues to satisfy the conditions for the benefit.*
>
> *(…)*
>
> *"As with the limited time condition, the prior authorisation condition does not apply to travel within Norway. For travels within Norway, the fortnightly reporting requirement is regarded as sufficient, and no similar assessment of non-scheduled activities or offers of other relevant activities appears to take place. Travels within Norway are thus treated in a more favourable manner than travels to other EEA States without sufficient justification. Therefore, the measures are not suitable for a coherent pursuit of the stated objectives."*

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[50] Case E-8/17 *Kristoffersen*, cited above, paragraph 118 and C-168/14 *Grupo Itevelesa*, ECLI:EU:C:2015:685, paragraph 76.

[51] Reference is made to the Written Observations of the Government of Norway in Case E-8/20, para. 121 and paras. 131-139.

[52] Case E-8/20 *Criminal Proceedings against N,* paras 109 and 117.

68) In the Authority's view, this must apply equally to the assessment of the restrictions applicable to the sick-pay benefit and the attendance allowance.

69) Further, the Authority recalls that one aspect of the National Measures is that a stay outside Norway must not impede or hinder the control and follow-up by NAV. The Norwegian Government has thus far failed to provide any 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. 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.

70) 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 demonstrates that the control and follow-up requirements apply 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.

71) Finally, the Authority recalls that in accordance with the applicable national legislation in force at the time, the LFN addressed the fact that the substantive conditions which applied specifically to the export of sick-pay and attendance allowance, as opposed to work assessment allowance, required that the stay in another EEA State would not have a detrimental impact on the beneficiary's state of health nor prolong the incapacity for work. The Authority concluded that Norway had failed to demonstrate how stays away from the person's primary residence within Norway were less likely to have a detrimental impact on the beneficiary's health or prolong the incapacity for work – yet such domestic stays were not limited by the applicable national legislation.[53]

72) The EFTA Court has held that:[54]

> *"[t]ravelling to another EEA State does not represent a particular additional risk of falling ill compared to travelling within Norway"*.
>
> *(…)*
>
> *"An authorisation therefore is neither suitable not necessary to counter, in a consistent and systematic manner, the risk of insured persons falling ill when travelling to another EEA State, when for travels within Norway it is sufficient to report to NAV every second week."*

73) The Authority notes that following recent legislative amendments,[55] the conditions described above in paragraph 71 of this reasoned opinion no longer apply pursuant to Section 8-9 on sick-pay and Section 9-4 on attendance allowance.[56]

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.

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[53] See similarly, Joined Cases E-11/07 and E-1/08 *Rindal and Slinning*, 2008 EFTA Ct. Rep. 320, paragraph 45.
[54] Case E-8/20 *Criminal Proceedings against N*, paras 126-127.
[55] *LOV-2021-05-21*, entered into force on 1 June 2021.
[56] With regard to sick-pay, it is made clear that the legislative amendments apply as of the entry into force. With regard to attendance allowance, the legislative amendments allow for retroactive effect subject to the fulfilment of certain conditions.

4.2.2.1.3 Proportionality

75) The proportionality test implies that the National Measures 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.[57] The National Measures fail to meet this test.

76) 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.[58] The Norwegian Government has provided no such evidence.

77) The Authority observes that the National Measures 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 retain any of the three sickness benefits in question, that right is limited in time. As explained above in paragraph 32, sick-pay may be retained up to four weeks during a twelve-month period. By contrast, the limit for the export of an attendance allowance is "*eight weeks during a twelve-month period*". The export of a work assessment allowance is limited "*up to four weeks per calendar year*". The Norwegian Government has failed to provide 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) With regard to the Norwegian work assessment allowance the EFTA Court has held that:[59]

> *"As persons in receipt of benefits follow individualised activity plans, their needs in terms of follow-up and control may vary significantly. Consequently, as a maximum of four weeks outside Norway per year does not take the individual needs of persons sufficiently into account, the condition goes beyond what is necessary.*
>
> *Consequently, national legislation such as that at issue in the main proceedings which makes retention of the right to sickness (…) subject to a ceiling on the time spent abroad, not usually exceeding four weeks per year, goes beyond what is necessary to attain the objective pursued and therefore amounts to an unjustified restriction on the free movement of services guaranteed by Article 36 EEA."*

80) The Authority further observes that, based on the applicable national legislation in force at the time, the LFN addressed the fact that as regards sick-pay and attendance allowance, it was *for the beneficiary to demonstrate* that the stay in another EEA State would 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 concluded that Norway had failed to provide any explanation for why it was necessary to place the burden of proof on the beneficiary. The

[57] 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.
[58] Case E-8/17 *Kristoffersen*, cited above, paragraph 123.
[59] Case E-8/20 *Criminal Proceedings against N,* paragraphs 112-113.

Authority notes that following recent legislative amendments,[60] those conditions no longer apply pursuant to Section 8-9 on sick-pay and Section 9-4 on attendance allowance.

81) 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 alternatively, *ex post* control), rather 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 to 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.

82) In that respect, the Authority notes that, as regards the exportability of a work assessment allowance during shorter stays in another EEA State, the EFTA Court has held that:[61]

> "*As also argued by ESA, the national rule makes no comparable limitation for an insured person travelling and staying away from his home municipality or residence within Norway for tourism or other purposes. Rather, the general system for monitoring compliance under Section 11-7 of the National Insurance Act is that the insured person reports to NAV every fourteenth day. Such notifications are intended to provide NAV with relevant information for an insured person's entitlement to the benefit. This applies regardless of the [62]circumstances of the travels within Norway. It has not been demonstrated that the limited time condition reflects the legitimate objectives in a consistent and systematic manner when for travels within Norway it is sufficient for compliance and supervision to report to NAV every second week. It does not appear that a notification system would impede NAV from being able to verify that a recipient continues to satisfy the conditions for the benefit."*
>
> *"It has not been sufficiently demonstrated why a general control system is unsatisfactory (…) Accordingly, it cannot be maintained that the competent institution may have particular difficulties in monitoring compliance with the entitlement to the benefits when it comes to shorter stays in another EEA State."*

83) Further, the Authority observes the lack of procedural rules resulting in *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.

84) 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

[60] *LOV-2021-05-21*, entered into force on 1 June 2021.
[61] Judgment in Case E-8/20 *Criminal Proceedings against N,* paragraphs 109-110.
[62] See Case E-11/07, *Rindal and Slinning*, EFTA Ct. Rep. 320 in paragraphs 48.

and predictable.[63] The Authority observes, based on the above, that the national rules and ensuing administrative practices fail to meet that benchmark.

85) In light of the above, the Authority must maintain its conclusion that the Norwegian Government has failed to demonstrate that the contested National Measures are not capable of being replaced by alternative measures that are equally useful but less restrictive.

4.2.3 Criminal sanctions – disproportionate restriction on free movement

86) The Authority notes that in Case E-8/20, the EFTA Court concluded that the measures amounted to unjustified restrictions and therefore decided not to address this issue.

87) In the event that any of the National Measures would be considered compliant with EEA law, the Authority maintains 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.

88) The Authority would first recall, as the EFTA Court held in Case E-1/11 *Dr A*:[64]

> *"(…) the EEA States retain the competence to take disciplinary action and impose criminal sanctions (…) provided that the general principles of EEA law are respected."*

89) 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.

90) 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:[65]

> *"(…) so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons."*

91) The Authority takes note of the fact that the Norwegian Government, in its reply to the LFN, has emphasised that Section 25-12 of the NIA *"cannot and will not be used to sanction any person for 'a mere failure to observe administrative requirements,' as seems to be suggested by the Authority."*[66]

92) Notwithstanding the above reassurance, as a matter of fact and law Section 25-12 of the NIA, as currently construed, provides a legal basis in national law to impose criminal sanctions for a mere failure to observes administrative requirements.

93) The Authority therefore maintains its view that 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,

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[63] Case C-318/10 *SIAT,* ECLI:EU:C:2012:415 and Case C-49/16 *Unibet International*, ECLI:EU:C:2017:491, paragraph 41.
[64] Case E-1/11 *Dr. A*, cited above, paragraph 73.
[65] Case C-118/75 *Watson and Belmann*, ECLI:EU:C:1976:106, paragraph 21.
[66] Reply by the Norwegian Government to the Authority's letter of formal notice, paragraph 26.

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.

4.3 The National Measures are incompatible with Articles 4, 6 and 7(1)(b) of Directive 2004/38

94) 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.[67] The Authority maintains the view that this 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.

95) 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.[68]

96) It is the Authority's conclusion 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.

97) The Authority notes that, in its response to the LFN, the Norwegian Government has essentially referred to its written observations to the EFTA Court in Case E-8/20. The Authority further observes that the case referred to only concerned the unjustified restrictions applicable to the export of the work assessment allowance, while this reasoned opinion is targeting all the National Measures, *i.e.* it also addresses the Norwegian sick-pay and attendance allowance.

98) The Authority maintains its conclusion that the Norwegian Government has not provided an acceptable justification for this restriction and must therefore conclude that the contested measures are incompatible with Articles 4, 6 and 7(1)(b) of Directive 2004/38.

4.4 Maintaining in force national provisions in conflict with EEA law

99) The Authority maintains that the National Provisions, which are in conflict with EEA law, give rise to an unclear and ambiguous legal situation.

100) To the Authority's understanding, the position of the Norwegian Government is that even if the wording and conditions of those national provisions were found to be in breach of EEA law, they could be maintained as is because Norwegian legislation as such is in accordance with the obligations pursuant to EEA law.

101) Indeed, in its reply to the LFN, the Norwegian Government explained that:

[67] Case E-26/13 *Gunnarson*, [2014] EFTA Ct. Rep. 254, paragraph 82.
[68] *Idem*, paragraphs 91-92.

"*17. Section 1-3 of the NIA states that the King in Council may conclude mutual agreements with foreign countries regarding rights and obligations pursuant to this law, hereunder, make exceptions to the provisions of the law. Regulation 883/2004 is implemented in the Norwegian legal system, and made part of Norwegian Legislation, through incorporation by Regulation (forskrift) of 22 June 2012 No 585, cf. Section 1-3 of the NIA, in force as of 1 June 2012, on the Incorporation of the Social Security Regulations of the EEA Agreement Section 1. In compliance with Art. 7(1)(a) EEA, the Regulation has been incorporated as such into the national legislation. EEA law does not require a regulation to be incorporated in a specific law/act, as long as the incorporation assure that the legal situation remains sufficiently clear and unambiguous.*

18. It is clearly provided in Paragraph 3 of Section 1 of Regulation (forskrift) of 22 June 2012 No 585 that the NIA must be deviated from to the extent necessary to secure compliance with Regulation 883/2004. The Government therefore argues that the relationship between Regulation 883/2004 and NIA is neither ambiguous nor uncertain.

(…)

21. (…) the Government underlines that in case of conflict between the national law and EEA law, Section 2 of the Act relating to the implementation in Norwegian law of the main part of the Agreement on the European Economic Area (EEA) etc. ensures that EEA law will prevail.

22. National law will have to be interpreted in light of our EEA obligations and in the case of conflict national legislation will have to be deviated from. We also refer to what is stated above regarding the change of practice that has been made by the Norwegian Labour and Welfare Service to assure compliance with EEA law (…)"

102) The Authority recalls the particular relevance of the CJEU's judgment in Case C-167/73 *Commisson v France*[69] and subsequent case-law. That 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.

103) The European 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.

104) The CJEU held that (emphasis added):[70]

> *"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***

[69] Case C-167/73, *Commission v France*, EU:C:1974:35.
[70] *Idem,* paragraphs 41 and 48.

> ***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…"*

105) The CJEU has confirmed this view on several occasions.[71]

106) 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.[72] The CJEU refused this line of argumentation as well and held that:[73]

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

107) 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:" It was emphasised that the prevalence of Regulation 883/2004 over national law is reflected in national legislation and the relationship between those sets of rules is neither ambiguous nor uncertain. Therefore, the Norwegian Government suggested that the judgments referred to by the Authority in paragraphs 99-103 above are not pertinent.

108) The Authority respectfully disagrees with the Norwegian Government's view on this. 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 the National Provisions.

109) 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.

110) Moreover, the Authority recalls that the current, Norwegian administrative circulars are still ambiguous as regards a beneficiary's right to retain benefits while staying or residing in another EEA State, as outlined in greater detail in paragraphs 34-37 of this reasoned opinion.

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[71] 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,

[72] C-307/89 *Commission v. France*, ECLI:EU:C:1991:245, paragraph 12.

[73] *Idem*, paragraph 13.

111) The Authority further observes that a recent parliamentarian debate concerning a legislative amendment, provides a pertinent example as to the continuing legal uncertainty surrounding the exportability of sickness benefits under Norwegian law, in a manner which is addressed by this reasoned opinion and which is in breach of EEA law.[74] Reference is also made to paragraph 10 of this reasoned opinion.

112) With reference to the above, the Authority upholds its conclusion that, by maintaining in force the National Provisions, 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).

113) Indeed, the Authority reiterates 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.[75] 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.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

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

[74] https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2020-2021/refs-202021-05-03?m=5

[75] Case E-7/97 *EFTA Surveillance Authority v Norway*, paragraph 16.

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

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, c.f. Articles 28 EEA, 31 EEA and 36 EEA respectively;
- 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 pursuant to Article 28 EEA; and
- are incompatible with the free movement of persons guaranteed under Articles 4, 6 and 7(1)(b) of 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 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.

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

Done at Brussels,

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni S. Kristjánsson College Member

For Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Catherine Howdle.