ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Avenue des Arts 19H,
B-1000 Bruxelles
BELGIUM

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Reply to the reasoned opinion concerning the exportability of sickness benefits in cash

1. Introduction

1. Reference is made to the EFTA Surveillance Authority's reasoned opinion of 9 June 2021 concerning the exportability of sickness benefits in cash. In the reasoned opinion, the Authority holds that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the National Insurance Act (NIA) (“the National Measures"), Norway has failed to fulfil its obligations under EEA law, namely Article 21 of Regulation 883/2004, Articles 3, 7, 28, 31 and 36 EEA and Articles 4, 6 and 7(1)(b) of Directive 2004/38.

2. The Government would like to start by reiterating that it has publicly acknowledged that the administrative practice since June 2012 has been wrongful in certain cases insofar as national authorities have refused to grant or have denied sickness benefit, attendance allowance and work assessment allowance based solely on the ground of the recipient staying in another EEA State. This was communicated to the Authority in the Government’s letters dated 11 December 2019, 11 June 2020 and 25 February 2021. In light of the recent legal clarifications from the Supreme Court and the EFTA Court, the Government also acknowledges that the wrongful practice dates back to 1994.

3. As previously stated, the wrongful practice was changed as of November 2019. It is the view of the Government that the current practice is in compliance with our EEA obligations. Accordingly, the Government does not share the Authority’s assessment that Norway is currently in breach of its EEA obligations. The Government will comment on this in section 5 below. Before turning to the legal arguments, we will in sections 2–4

Postal address	Office address	Telephone	Department	Reference
Postboks 8019 Dep 0030 Oslo postmottak@asd.dep.no	Akersgata 64 www.asd.dep.no	+47 22 24 90 90 Org. nr. 983 887 457	Department of Welfare Policy	Sara Elisabeth Nordahl Bruvoll +47 22 24 83 17

below give a short overview of the recent clarifications of the Supreme Court, as well as the ongoing legislative and rectification processes.

2. The Supreme Court judgement of 2 July 2021

4. In the Government's letter of 25 February 2021 (paragraph 9), we referred to the legal proceedings which were then pending before the EFTA Court in case E-8/20 and the Norwegian Supreme Court. In the Government's opinion (paragraph 35) the conclusions made by the EFTA Court, and also the following ruling by the Supreme Court of Norway, were expected to give legal clarifications relevant to the case at hand. This has indeed been the case.

5. The Supreme Court delivered its judgement 2 July 2021[1]. The case was a re-opened case where a recipient (N) of work assessment allowance had been convicted of social security fraud. According to the indictment, N had travelled to Italy without obtaining an authorisation and failed to notify the Labour and Welfare Service of his whereabouts. The question before the Supreme Court was whether the conditions set out in Section 11-3 NIA were in conflict with EEA law. The case concerned the legal situation both before and after the incorporation of Regulation 883/2004 into the EEA Agreement. During the preparatory phase of the new hearing, the Supreme Court requested and received an advisory opinion from the EFTA Court.

6. The EFTA Court (case E-8/20) held that Article 21 (1) of Regulation 883/2004 precludes an EEA State from making retention of entitlement to a cash benefit subject to conditions, such as a condition of presence in Norway, and exemptions for short-term stays in another EEA State subject to a time limit condition and a system of prior authorisation. Therefore, Article 21(1) precludes conditions such as those at issue in the main proceedings.

7. Furthermore, the EFTA Court found that the said conditions constitute a restriction on the freedom to receive services under Article 36 EEA. The EFTA Court further held that the Norwegian Government had not put forward arguments to justify these conditions as suitable or that they did not go beyond what was necessary.

8. In its judgement, the Supreme Court found that the requirement of stay in Norway in Section 11-3 NIA is contrary to Article 21 of Regulation 883/2004 (paragraph 140). Furthermore, the Supreme Court found that the said conditions constitute an unlawful restriction under Article 36 EEA (paragraph 184). The Supreme Court concludes that the national insurance authorities' application of a requirement of stay therefore has been contrary to EEA rules during the entire indictment period (paragraph 189). N was thus acquitted. The judgement is in line with the advisory opinion of the EFTA Court.

[1] The Supreme Court's decision of 2 July 2021, HR-2021-1453-S (case number 20-046393STR-HRET): https://www.domstol.no/en/enkelt-domstol/supremecourt/rulings/2021/supreme-court-criminal-cases/hr-2021-1453-s/

9. In the Government's opinion, the Supreme Court's judgement clarifies that a requirement to stay in Norway in order to receive sickness benefit, attendance allowance and work assessment allowance are in not in line with EEA law. The administrative practice has thus, as stated above, been wrong since 1994, insofar as the competent authorities have refused to grant or have denied sickness benefit, attendance allowance and work assessment allowances based solely on the ground of the recipient staying in another EEA State.

3. The process of rectifying cases

Non-criminal cases

10. In light of the above, the Ministry of Labour and Social Affairs has instructed the Labour and Welfare Service by letter 2 July 2021 to start rectifying cases *prior to June 2012*. Two of the three[2] benefits which were replaced by work assessment allowance from 1 March 2010 had similar requirements of stay in Norway: rehabilitation allowance (rehabiliterings-penger) and vocational rehabilitation allowance (attføringspenger). The Labour and Welfare Service is therefore asked to review cases prior to June 2012 concerning sickness benefit, attendance allowance and work assessment allowance, and the two previous benefits rehabilitation allowance and vocational rehabilitation allowance.

11. The Labour and Welfare Service has previously been engaged in rectifying the mistakes that have been made in cases concerning stays in other EEA countries *after June 2012*, cf. the Government’s letter 7 January 2021.

Criminal cases

12. The Director of Public Prosecutions is currently working with The Labour and Welfare Service in order to identify cases where the convicted individual temporarily stayed abroad in the EU/EEA area *prior to June 2012.*

13. The Norwegian Criminal Cases Review Commission has previously reopened all the 54 cases the Director of Public Prosecutions had requested reopening. In 2020, 18 cases were reopened. The other 36 cases were reopened at the commission meeting on 25 and 26 August 2021, and will be forwarded to the court for reconsideration. The Director of Public Prosecutions is still gathering information in two cases.

14. It should be noted that the defendants themselves can still bring their cases before The Criminal Cases Review Commission if they consider that the conditions for reopening are present and wish the Commission's assessment of this.

[2] The third benefit – time limed disability benefit (tidsbegrenset uførestønad) – did not have any conditions regarding stay in Norway as such.

4. The legislative process on the amendment of Sections 8-9, 9-4 and 11-3 NIA

15. As mentioned in the Government's letter 25 February 2021, the Government considers it of utmost importance that Norwegian law is accessible, both for members of the National Insurance Scheme, as well as for the professional actors in the judiciary and the administration. The present case has shown that there is a need for an evaluation of the national legislation in question.

16. Therefore, the Government appointed a law committee to, inter alia, examine whether the regulation in NIA, as a whole, could benefit from material or formal amendments in order to make it more accessible. The committee delivered its report[3] 15 June 2021.

17. The report was sent on public consultation on 25 June 2021[4]. The Ministry particularly asked for views on the proposed changes to legislation included in the report.

18. Furthermore, and importantly, the Ministry stated that it intends to present a bill to the Parliament based on the committee's recommendations amending the sections of the NIA which regulate the right to receive sickness benefit, attendance allowance and work assessment allowance during stays in other EEA states. The deadline for the public consultation is 25 October 2021.

19. The Ministry plans to present a law proposal before Parliament as soon as possible after that.

5. Sections 8-9, 9-4 and 11-3 NIA and Articles 3 and 7 EEA

20. As mentioned above, the Government has acknowledged that the practice of the eligibility criterion of "stay in Norway", and the related conditions for export, as well as the authorisation mechanism, including its limits in time, has not been in line with Norway's EEA obligations.

21. However, this practice was eliminated in November 2019 and the current practice is fully in line with Norway's EEA obligations. The Government refers to the description of the current practice in our reply to the letter of formal notice of 25 February 2021. We would like to add that after the Norwegian Government-appointed commission delivered its final report 4 August 2020, NOU 2020: 9 (referred to as “the Arnesen Report” by the Authority), the Labour and Welfare Service was asked to follow up the recommendations.

[3] Norwegian Official Report (NOU) 2021: 8, Trygd over landegrensene – Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser: https://www.regjeringen.no/no/dokumenter/nou-2021-8/id2860696/
[4] https://www.regjeringen.no/no/dokumenter/horing-nou-2021-8-trygd-over-landegrensene-gjennomforing-og-synliggjoring-av-norges-trygdekoordineringsforpliktelser/id2864068/

One of ten main measures is to thoroughly go through the structures of and the methods of producing the circulars. This work has high priority.

22. The Authority claims that the national provisions give rise to an unclear and ambiguous legal situation.

23. With regard to the wording of Sections 8-9, 9-4 and 11-3 NIA, the Government considers it a fundamental objective that the applicable legislation should be as clear and accessible as possible. Accordingly, and in light of the wrongful administrative practice, the Government considers that the wording of the relevant provisions of the NIA should be amended to ensure that the rules of the regulation are reflected in the NIA. In this respect, we refer to Section 4 above, which describes the ongoing legislative process.

24. Both EEA law and Norwegian law are of a fragmentary character and require an interpretive process based on different factors of law. Regarding Article 3 and 7 EEA, and the CJEU case law concerning national provisions in conflict with EU law as referred to in paragraphs 102–109 of the Authority's reasoned opinion, the Government therefore maintains that there is a relevant difference between cases where national law correctly interpreted is contrary to EEA law and must be set aside on the basis of general rules on *conflicting* provisions (e.g. the Norwegian EEA Act Section 2), and cases where provisions in national legislation explicitly provides for *exceptions or derogations* in supplementary regulations (e.g. Section 1-3 NIA).

6. Comments regarding criminal sanctions

25. In the event that the contested measures, i.e. a requirement to stay in Norway in order to receive sickness benefits, would be considered compliant with EEA law, the Authority considers that imposing criminal sanctions for related violations will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons.

26. The Government maintains that the current practice is in line with EEA law, and thus the question of whether the criminal sanctions in Section 25-12 NIA does not arise in the case at hand.

7. Final remarks

27. The Government assures the Authority that the legislative process of amending Sections 8-9, 9-4 and 11-3 NIA has high priority. The Government will present a law proposal as soon as possible after the public consultation is finished. There can be no doubt of the Government's commitment to ensuring that national law is clear and unambiguous. The Government will keep the Authority up to date on the legislative process.

28. Our main concern for the future is to ensure that national law and practice in this field are fully compliant with our obligations under EEA law.

29. The Government remains at the Authority's disposal, should you have any further questions.

Yours sincerely

Ulf Pedersen
Director General

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