ATTORNEY GENERAL – CIVIL AFFAIRS

To the EFTA Court

Oslo, 9 October 2020

WRITTEN OBSERVATIONS

BY

THE GOVERNMENT OF NORWAY

represented by Pål Wennerås and Lisa-Mari Moen Jünge, advocates at the Attorney General of Civil Affairs, Kaja Moe Winther, and Tone Hostvedt Aarthun, respectively deputy director and senior advisor at the Ministry of Foreign Affairs, acting as agents, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

Case E-8/20 Criminal proceedings against N

concerning a request for a preliminary ruling from Norges Høyesterett (Supreme Court of Norway).

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1 INTRODUCTION

1. The extent to which Norwegian rules and administrative practice concerning social security benefits have been and are compatible with EEA law has dominated the domestic debate lately. The Government has publicly acknowledged, as has a national Investigative Committee, that administrative practice has been unlawful in so far as national authorities have refused to grant sickness benefit, attendance allowance and work assessment allowances "solely on the ground that the recipient is present in another EEA State".[1]

2. The Labour and Welfare Agency is currently engaged in rectifying mistakes that have been made in the aforementioned administrative practice and has for reasons of fairness reimbursed cash benefits that may have been erroneously recovered.

3. The questions referred by the Supreme Court do not concern administrative practice, but the compatibility of national regulation with EEA law. To this end, the national court asks various questions concerning the interpretation of EEA law.

4. It is clear from the order for reference that the Supreme Court appreciates legal guidance from the EFTA Court in this case. The number of questions asked also indicates that the referring court considers that this case raises complex legal questions. If so, this view is shared by the Government. The Government's main interest in this case is to obtain legal clarification rather than to achieve a particular result. It is from this perspective that the Government submits observations concerning the interpretation of EEA law in this case.

2 FACTS

5. The basic facts of the case, as set out in the order for reference, are as follows.

6. N was granted a rehabilitation allowance in November 2008.[2] The reason was poor health combined with the fact that he had become redundant at his place of employment.[3] This benefit was in March 2010 commuted into a work assessment allowance due to a legislative change.

7. N was several times informed that he would have to report to the welfare administration about any travels abroad or departures from Norway.[4] This information was given each time N was granted work assessment allowance.

8. During the period from May 2010 to October 2012, N had a total of fourteen stays in Italy.[5] Each stay lasted between three and four weeks.[6] N applied and obtained an authorisation only for two of those stays.[7] He neither applied for authorisation nor gave notification in respect of the other stays. These obligations are described further under Section xx below.

[1] Order for reference, para 41.
[2] Order for reference, para 10.
[3] Order for reference, para 10.
[4] Order for reference, para 10.
[5] Order for reference, para 10.
[6] Order for reference, para 10.
[7] Order for reference, para 11 and HR-2017-560-A para 9.

9. N alleged before the District Court that he worked from Italy when his health permitted, but the court was not convinced by that testimony, and it was not relied upon.[8]

3 WORK ASSESSMENT ALLOWANCES

3.1 Introduction

10. The order for reference provides an overview of Chapter 11 in the National Insurance Act (NIA) concerning work assessment allowance.[9] Since many of the questions referred relate specifically to the conditions in Section 11-3(3) of NIA, it is important to set out and explain their legal context. Consequently, the Government will first describe the objectives of the work assessment rules, their nature and scope, and more particularly the activity requirements (Sections 3.2-3.4), which will be useful background for the presentation of the rules on residence requirements and the exceptions from such requirements (3.5) as well as the notification requirements (3.6). Thereafter follows a brief presentation of the calculation and duration of the benefits as well as challenges posed as regards monitoring and control (3.8).

3.2 Objectives

11. Chapter 11 of NIA was the result of a law reform in 2008. The rules on medical rehabilitation allowance, work rehabilitation allowance and temporary invalidity allowance were, by amendment of 19 December 2008 nr. 106, consolidated under one new allowance, namely the "work assessment allowance".

12. The objective of this law reform was to provide more resources to provide earlier and increased provision of active treatment and work-oriented measures, which in turn would expedite members obtaining or retaining employment, cf. the travaux preparatoires:

> *"The ministry proposes that present day rehabilitation benefits, vocational rehabilitation benefits and time limited invalidity benefits are replaced by a new temporary social security benefit and that this is named work assessment allowance … The proposal accommodates earlier and closer follow-up of the recipient and thereby faster return to work or work oriented activity."*[10]

> *"An essential objective behind the proposed amendments in the Parliamentary Report was to focus on the individual user's possibilities rather than limitations. The main reforms in the report includes the establishment of the qualification programme, a more flexible and coordinated use of the agency's use of measures and instruments, establishment of a more systematic process of cooperation between user and agency (need and work ability assessments) as well as the establishment of a simpler and more work-oriented, temporary income security scheme."*[11]

[8] Order for reference, para 11.
[9] Order for reference, Section 4.
[10] Ot.prop.nr 4 (2008-09) p. 8.
[11] Ot.prop.nr 4 (2008-09) p. 10.

"If the Labour- and Welfare Service is to succeed in getting more people back to work, it is important that the regulation is designed so that the agency's attention and resources to a higher degree are directed towards the follow-up work and that resources are freed from administrative routines such as calculation, payments, decision making etc."[12]

13. This law reform thus emphasised that this novel social security benefit should, in addition to providing income, function as an instrument for labour market policy by integrating persons excluded from the labour market and promoting a high level of employment. This overarching objective crosses political dividing lines in Norway and is often referred to and consumed in one simple word, namely "the workline" [arbeidslinjen]. This is also expressed other places in the travaux preparatoires:

"The Ministry's proposal for a transition to a new National Insurance benefit entails a clearer anchoring of the workline than in the current income security system."[13]

14. The purpose of the work assessment allowance is enshrined in Section 11-1(1) of the National Insurance Act:

"The purpose of the work assessment allowance is to ensure income for members whilst they receive active treatment, participate in work-oriented measures or are being followed up in another way with a view to obtaining or retaining employment."[14]

15. Section 11-1(2) provides that the purpose of additional benefits, regulated in Section 11-12, is as follows:

"The purpose of additional benefits is to compensate for expenses which members have in connection with the implementation of a work-oriented measure."[15]

16. The purpose is furthered explained in the travaux preparatoires:

"The proposal is based on the desire to emphasise the National Insurance Act's general objective to provide help for self-help, which for the recipients of these benefits is specified as assistance to be able to obtain employment. …. The Ministry proposes that the purpose of work assessment allowance should be to secure income while receiving active treatment, participating in a work-oriented measure or receiving other follow-up with a view to obtaining or retaining work."[16]

3.3 Nature and scope

17. The nature and scope of the work assessment allowance are defined by its two basic conditions. The first one is reduced fitness for work, as provided for in Section 11-5:

"Section 11-5. Reduced capacity for work

[12] Ot.prop.nr 4 (2008-09) p. 11 (office translation).
[13] Ot.prop.nr 4 (2008-09) p. 14.
[14] Order for reference, para 24.
[15] Office translation.
[16] Ot.prop.nr 4 (2008-09) p. 15 (office translation).

It is a condition for entitlement to benefits under this Chapter that the member, due to sickness, injury or impairment, has suffered a reduction in their fitness for work to such an extent that the person concerned is prevented from retaining or obtaining gainful employment.

When the determination is being made as to whether the fitness for work is reduced to the extent that the person concerned is prevented from retaining or obtaining gainful employment, regard shall be had inter alia to health, age, fitness, education, professional background, interests, wishes, opportunities for returning to the current employer, employment opportunities at the place of residence and employment opportunities other places where it is reasonable for the person concerned to accept employment.''[17]

18. The Government notes that the citation above, taken from the English translation of the order for reference, refers to being "*prevented* from retaining or obtaining gainful employment." This could give the impression that the allowance concerns persons which have no fitness for work, which is erroneous. It is more accurate to translate the Norwegian word "hindres" as being "restricted" or "limited" from retaining or obtaining gainful employment, which corresponds with the heading "reduced fitness for work".

19. Although there must be a causal link between the reduced fitness for work and sickness, injury, or impairment, it is not required that the medical condition is the predominant or essential reason. This follows implicitly from the range of factors to be considered under the second subparagraph, and it is also stated in the travaux preparatories:

"… it is not required that sickness, injury or impairment is the main cause for the reduced fitness for work, but that the health problems shall be a significant contributory cause."[18]

20. Section 11-5 must be read in conjunction with Section 11-13(1), which provides as follows:

"Work assessment allowance is given to a member whose employment ability has been reduced (cf. Section 11-5) by at least half, and who fulfils at least one of the conditions in Section 11-6."[19]

21. In addition, Section 11-18(2) provides that the work assessment allowance, albeit at a reduced rate, is available when the employment ability is only reduced by 40 %. Furthermore, Section 11-18(5) allows for work assessment allowance for a six-month period where the person concerned works as much as 80 % if he or she is close to obtaining a full-time job. The travaux preparatoires provides the following:

"…. the work assessment allowance shall lapse when the recipient works more than 60 percent (threshold value). The Ministry acknowledge that it can be difficult to determine in advance which months will be the last six months a person receives work assessment allowance. The background for the proposal is, however, to stimulate recipients who have already increased their work effort to fully support themselves through their own work. The

[17] Order for reference, para 25.
[18] Ot.prop.nr 4 (2008-09) p. 19 (office translation).
[19] Office translation.

Ministry therefore believes that the key is that, for a limited period, it should be possible to combine 80 percent work and 20 percent benefit to help the person get a full-time job."[20]

22. The second basic condition for a work assessment allowance is the need for assistance in obtaining or retaining employment, see Section 11-6:

''Section 11-6. Need for assistance in obtaining or retaining employment

It is a condition for entitlement to benefits under this Chapter that the member

(a) have a need for active treatment, or

(b) have a need for work-oriented measures, or

(c) after having tried measures under (a) or (b), still be considered to have a certain prospect of integrating into the labour market, and be followed up by the Labour and Welfare Administration (NAV) in order once again to be able to obtain or retain employment within his or her capabilities."[21]

3.4 Activity requirements and plans

23. The corollary of the need for active treatment, work-oriented measures, and follow-up, as laid down in Section 11-6, is that the person concerned is required to actively participate in such measures. That requirement is laid down in Section 11-8:

"Section 11-8 Activity with a view to integrating into the labour market

It is a condition for entitlement to benefits under this Chapter that the member contribute actively to the process of integrating into the labour market. The requirements for individual activity are to be adapted to the individual's function level and be determined at the time the benefit is granted."[22]

24. The travaux preparatories provides as follows:

"The purpose of the assistance and follow-up which a receiver of an work assessment allowance is offered is to make the person concerned able to obtain or retain a work they can perform, i.e. to improve the ability to perform gainful work… For most of the recipients the main activity will be to receive treatment to improve the gainful work ability and/or to participate in work-oriented measures… The Ministry maintains that, since an important purpose of the scheme is the transition to work, it will only exceptionally be relevant to exempt the receiver from the condition that the person concerned himself participate actively with a view to enter into or return to work. Periods without activity shall therefore be as brief as possible…"[23]

25. The activity requirements are established in an "activity plan", cf. the Labour and Welfare Administration Act Section 14a third paragraph:

[20] Ot.prop.nr 4 (2008-09) p. 38-39 (office translation).
[21] Order for reference, para 26.
[22] Order for reference, para 27.
[23] Ot.prop.nr 4 (2008-09) p. 22 (office translation).

> *"Users who have been determined to have a need for assistance, have the right to participate in the preparation of a concrete plan for how they will obtain work (activity plan)."*[24]

26. Activity plans will be customised according to individual needs and abilities. Different plans will therefore contain a variety of activities. An activity plan may consist of either medical treatment or work-oriented measures and/or partial work – or preferably a combination of those elements. Cases from the National Insurance Court [Trygderetten] provide examples of what the activity plan may contain, which include studies,[25] physical treatment,[26] psychological treatment combined with work-oriented measures,[27] psychiatric treatment combined with work practice and studies, and part-time work combined with individual training and health controls.[28]

27. Also, within the specific category of work-oriented measures, the concrete measure will vary depending on the person's needs and abilities. For instance, persons uncertain of what their abilities are will enrol in a clarification program aimed at testing skills and abilities. The clarification measures will as a starting point last for four weeks but will in practise usually be extended. Work-oriented rehabilitation may consist of specific motivational training or lifestyle guidance. Persons who would like to try a certain kind of job, may enrol in a work training program, whilst persons who need assistance or practical adaptations may be provided help in order to evaluate how their workplace can be adjusted to their needs. Other types of work-oriented measures may be specific follow-up measures (e.g. mentors or teaching supervisors), wage subsidies or skill-enhancing courses.[29] The different types of measures are regulated in the Labour market Regulation.[30]

28. The activity plan constitutes a working paper which must be followed up by decisions on allocation of measures, services and benefits. The travaux preparatoires describes the importance of these individual plans for reaching the overarching objectives of obtaining or retaining gainful employment:

> *"The Ministry refers to the aim of getting as many people as possible to work, with the help of appropriate assistance and targeted follow-up. An important prerequisite for success is that the recipient is motivated and actively participates in the process. The Ministry thus considers it important that the recipient is involved from the outset in the process of specifying what kind of work should be the aim, and in the planning of how that aim should be achieved. As a general rule, it should be formulated which profession, which occupational direction or industry the assistance is to be aimed at. The assessment shall be based on the user's resources and barriers in relation to the opportunities in the labour market."*[31]

29. The corollary of the activity requirement in Section 11-8 is loss of entitlement to allowances if the person concerned fails to participate in scheduled activity, cf. Section 11-9:

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[24] Office translation.
[25] TRR-2012-2065.
[26] TRR-2011-1958.
[27] TRR-2015-48.
[28] TRR-2016-1491.
[29] See the welfare administration's homepage for further examples and more in-depth descriptions: https://www.nav.no/no/person/arbeid/oppfolging-og-tiltak-for-a-komme-i-jobb/tiltak-for-a-komme-i-jobb
[30] FOR-2015-12-11-1598. See also Circular R76-12-01 on supplementary rules for the welfare administration's application of this regulation.
[31] Ot.prop.nr 4 (2008-09) p. 56 (office translation).

> *"In the event of absence from scheduled activity, cf. Section 11-8, the work assessment allowance and the additional benefits is suspended until the conditions for receiving the benefits are fulfilled again.*
>
> *Absence until one day per notification period, and absence due to strong welfare reasons, shall not result in reduction of the benefits. Absence that is caused by strong welfare reasons must be documented."*[32]

30. The work assessment allowance can nevertheless be granted in periods where there is no activity, cf. Section 11-13(2):

> *"It can also be given work assessment allowance*
>
> *a. in waiting period during the development of the activity plan, cf. the work- and welfare administration Act Section 14 a,*
>
> *b. in waiting period before active treatment or a work-oriented measure commences,*
>
> *c. […]"*[33]

31. According to Section 11-11, the recipients will receive regular follow-up by the welfare administration, see also Section 4 of the Work Assessment Regulation.

3.5 Residence requirement and exceptions

The residence requirement as well as the applicable exceptions are closely linked to, and informed by, the activity requirements. This is explained in the following, for purposes of which subheadings are used for the sake of clarity.

3.5.1 Main rule: Residence in Norway in accordance with activity plan

32. The work assessment allowance requires as a *main rule* residence in Norway, cf. Section 11-3(1):

> *"It is a condition for entitlement to benefits under this Chapter that the member stay in Norway"*

33. The legislative rationale is explained in Circular 11-00:

> *"The background for that provision is the need to be able to follow up on users in relation to correct benefits and work-oriented activities and to be able to know at all times whether the conditions for entitlement to the benefit are satisfied."*

3.5.2 First exception: Stay abroad in accordance with activity plan

34. There are two exceptions to the residence requirement. The first one is laid down in Section 11-3(2):

[32] Office translation.
[33] Office translation.

"Benefits may nevertheless be granted to a member who, pursuant to their activity plan (see Section 14a of the Labour and Welfare Administration Act), receives medical treatment or participates in a work-oriented measure abroad."

35. This provision thus allows for a work assessment allowance abroad insofar as the recipient receives medical treatment or participates in a work-oriented measures abroad. The reason why this exception is framed broadly is because such a stay abroad occurs "pursuant to their activity plan". In so far as medical treatment or work-oriented measures abroad are included in the activity plan, there is – in this regard – no relevant distinction as regards those receiving such measures in Norway according to their activity plan.

36. It follows that the key question is whether it is approved to include medical treatment or work-oriented measures abroad in the activity plan, which entails a simultaneous exemption from the residence requirement in Section 11-3(1).[34] Circular 11-00 provides further guidance in this regard:

"Medical treatment abroad

It follows from the exception provision in the second paragraph that benefits can still be granted to persons receiving medical treatment abroad. It is a requirement that there exist medical statements from the treater [behandler] which justify the need for such treatment, including a treatment and follow-up plan. Moreover, it is presupposed that the treatment is scientifically based and generally recognised in medical practice in Norway.

[…]

Work oriented measures abroad

It follows from the exception provision in the second paragraph that a benefit may also be given to a user which in accordance with his activity plan participates in a work-oriented measure abroad. The decisive issue is that insofar as a work-oriented measure abroad is authorised under the regulation concerning work-oriented measures, the user can maintain work assessment allowance during implementation of the work-oriented measure abroad under Section 11-3 second paragraph.

When this opportunity is opened, it becomes decisive whether it is warranted/necessary and appropriate to implement the work-oriented measure abroad in order to be able to obtain or retain work that he or she can perform, cf. NIA Section 11-6 and regulation concerning work-oriented measures.

Work oriented measures abroad can in some instances be appropriate for medical reasons, where work-oriented measures and active treatment occurs in parallel."[35]

3.5.3 Second exception: Stay abroad outside the activity plan

37. The second exception to the residence requirement is provided by Section 11-3(3):

[34] Circular R11-00 p. 12-13.
[35] Circular R11-00 p. 12-13 (office translation).

> *"A member may also receive benefits under this Chapter for a limited period during a stay abroad if it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by the Labour and Welfare Administration."*

38. Unlike Section 11-3(2), the exception in Section 11-3(3) is quite narrow and contains several conditions, both of which relates to the activity plan.

39. As regards the first condition that the stay abroad must be "for a limited period", it will be recalled that one of the basic requirements for entitlement to work assessment allowance is the need for active treatment, work-oriented measures or other follow-up (Section 11-6 cf. 11-11). This correlates to a corresponding duty to actively participate in the measures (Section 11-8). Failing to do so, the person concerned no longer qualifies for work assessment allowance (Section 11-9). A stay abroad outside the ambit of the activity plan is therefore prima facie incompatible with the system. However, there may be waiting periods during the preparation of the activity plan or before active treatment or work-oriented measures commences, during which Section 11-13 clarifies that the work assessment allowance still runs although there is no activity. These gaps accordingly provide room for holidays, although it should be borne in mind that both Chapter 11 of NIA as well as the travaux preparatoires presuppose that "[p]eriods without activity shall therefore be as brief as possible…"[36] This explains the rationale behind the first condition that the stay abroad must be of a "limited period". It is an extrapolation of the waiting periods for planning and treatment that can be expected. Further reference is made to Circular 11-00:

> *"The third paragraph of Section 11-3 allows for benefits to be granted exceptionally also for a limited time period during a stay abroad, such as in the event of temporary breaks between measures or during waiting periods for treatment/measures*
>
> *Benefits should usually not be paid for longer than the period of a normal holiday trip. 'Normal holiday trip' means a period of up to four weeks."*[37]

40. Although the administrative circular cited refers to four weeks, the questions referred (6 and 15) adds "pr year". It is true that the current law contains this qualification, but it does not appear that administrative circulars in the relevant period contained this requirement. NAV Board of Appeals (Klageinstansen) gave general guidance in 2013 and 2014 that neither Section 11-3(3) nor administrative circulars contained limitations as to how many stays an insured person had abroad during a year, but that a concrete assessment was required in each application for authorisation.[38] In that regard, the practice of the welfare administration National Insurance Court [Trygderetten] has observed that the four weeks indicated in the administrative circulares is "not an absolute limit".[39] This is also, perhaps more importantly, consistent with the wording in Section 11-3(3), i.e. a limited period of time.

41. The second condition is that stay abroad are "compatible with the completion of the planned activity and do not impede follow-up and control". This requirement simply reflects that the stay abroad must, like the domestic situation, be compatible with the basic

[36] Ot.prop.nr 4 (2008-09) p. 22.
[37] Order for reference, para 29.
[38] The guidance was provided on NAVs internal digital platform "Erfaringsforum".
[39] TRR-2011-1958.

requirements for entitlement to the work assessment allowance. Further reference is made to Circular 11-00:

> *"This [stay abroad for a limited period] presupposes, however, that it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by NAV. The key factor in that context is that the stay abroad does not negatively impact the preparation and implementation of the activity plan."* [40]

42. Third and finally, the competent institution may only grant an exemption under Section 11-3(3) where it is "demonstrated" that the stay abroad is compatible with the completion of the planned activity and do not impede follow-up and control, i.e. the person concerned must apply for prior authorisation.[41] Further reference is made to Circular 11-00:

> *"Users must apply in advance for authorisation to keep receiving benefits during a temporary stay abroad. Users are to be given proper, repeated information to the effect that he or she must stay in Norway in order to be entitled to benefits under Chapter 11 and that he or she must notify NAV if they travel abroad."*[42]

43. The requirement of prior authorisation is necessary because the substantive condition of compatibility with planned activity, follow-up and control requires ex ante assessments by the officials engaged in the preparation and implementation of activity plan.

44. The importance of the prior authorisation and adherence to that requirement was described as follows when the case at hand was adjudicated by the Supreme Court in 2017:

> *"Significant considerations of effective enforcement apply, cf. e.g. Rt-2003-320 paragraph 13 and Rt-2008-717 paragraphs 13-14. The social security administration has great need to be able to follow-up, administer and control. This concerns an area of mass administration. The system is to a high degree based on self-notification and trust. The risk of detection in the event of abuse is limited."*[43]

45. The objectives of ensuring that a stay must be "compatible with the completion of the planned activity and …. not impede follow-up and control" also explains why the prior authorisation requirement in Section 11-3(3) concerns stays abroad and not domestic travel. Planned activities will usually be domestic based since medical treatment and work-oriented measures are provided by domestic institutions, while the availability of such measures abroad usually presuppose that they are implemented in an activity plan in accordance with Section 11-3(2). Some activities will not even be provided for in the other EEA State of destination. Following an application under Section 11-3(3), the welfare authorities can thus control that the stay abroad is compatible with the activities and, if necessary, adjust the requirements in the activity plan. This aspect was also observed by the Investigative Committee:

> *"The purpose of cash benefits in the event of sickness is to compensate for lack of income as a result of sickness. In addition, the cash benefit is often combined with activity*

[40] Order for reference, para 29.
[41] Cf. e.g. HR-2017-560 – A, paras 8 and 11.
[42] Order for reference, para 29.
[43] HR-2017-560-A, para 15 (office translation).

obligations for the recipient. Such activity obligations are aimed at bringing the person back to working life. Where these activity obligations are such that, without being in breach of EEA law, they require residence in the territory of the National Insurance State, the member will have to request a reorganisation of the obligations before travel abroad can be made. Such authorisation schemes are not precluded by EEA law."[44]

46. Hence, the prior authorisation scheme only reflects that stays abroad present challenges distinct from domestic travel as concerns compatibility with active treatment and work-oriented measures scheduled in the activity plan, but it also connected with the distinct challenges posed by stays abroad with regard to the national authorities' duty – and corresponding right of the recipient – to follow-up in accordance with Section 11-11.

47. In addition, the scope of the prior authorisation requirement reflects that a stay abroad and a stay domestically are not comparable in relation monitoring and control of other factors that determine entitlement to work assessment allowance, e.g. income. This is also commented upon in Section 3.8 below.

3.6 Notification requirements and other information obligations

48. Recipients of work assessment allowance have a general duty, irrespective of place of stay, to report to the welfare administration every fourteenth day and provide information relevant as to rights of the benefit, cf. Section 11-7.[45]

«Section 11-7. Notification duty

In order to be entitled to benefits under this Chapter, the member must report to the Labour and Welfare Administration (every fourteenth day (notification period) and provide information of importance for entitlement to the benefits. Notification shall be given using a notification form, by attending in person or in some other manner as determined by the Labour and Welfare Administration."[46]

49. On that basis, NAV has drawn up a notification form containing four questions, the last of which reads as follows:

"Have you had holiday or absence which has prevented you from accepting employment or completing a planned activity. Yes/No"

50. Accordingly, it follows from NAVs practice that a holiday, such as that at issue in the main proceedings, shall be notified by answering this question "Yes".

3.7 Calculation and duration

51. The basis for calculating work assessment allowances is determined by the members pension contributory income in the year prior to the reduction of fitness for work, or alternatively the average of the income received in the three last years, cf. Section 11-15. Section 11-16(1) provides that the work assessment allowance shall constitute 66 % of the

[44] The preliminary legal assessment, p. 33.
[45] Order for reference, para 31.
[46] Ibid.

basis for work assessment allowance, in other words two thirds of the income received before the fitness for work reduction.

52. The level of the work assessment allowance is designed to provide incentives for members expediently obtaining or retaining work, cf. the travaux preparatories:

> *"It is important to secure income for persons who receive assistance and follow-up. The ultimate aim, however, is for each to be self-provided through work. In determining the benefit level, both of these factors must be taken into account. It must also be taken into account that the recipients of temporary benefits will have better opportunities to affect their future income level than people who have already received a permanent benefit."*[47]

53. The work assessment allowance is, as set out above, reduced due to simultaneous work, cf. Section 11-18. The benefit provided will thus correspond to the reduced employment ability. In addition, there are other factors which can influence the amount of work assessment allowance the person is entitled to. One such factor may be specific benefits, income, or payments the person receives from the employer. Section 11-19, and the Work Assessment Regulation Section 14, provide for more detailed rules on the reduction under such circumstances.

54. As for duration, Section 11-10(1) provides as follows:

> *"Benefits in this chapter are given for as long as required in order for the member to carry out the scheduled activity with a view to obtaining work, cf. Section 11-8, but still not longer than for four years."*[48]

55. Furthermore, Section 3 of the Work Assessment Regulation provides that a grant of work assessment allowance can only be made for up to one year at a time. In this regard, the travaux preparatoires provides as follows:

> *"It is as mentioned an objective that the period with work assessment allowance shall not be longer than what is necessary in order to make the recipient capable of working, or in order to clarify that the person fulfils the conditions for obtaining invalidity pension. To clarify this, the Ministry will provide in regulation that a grant of work assessment allowance within such outer duration as a main rule shall be determined for a maximum of one year at a time."*[49]

3.8 Monitoring and control

56. The welfare administration can monitor compliance and ensure control by the requirements of prior authorisation (Section 11-3(3)), follow-up (Section 11-11) and the duties of information and notification (Section 11-7).

57. While these instruments are important, they do not ensure sufficient control in all respects, e.g. as concerns incorrect information relating to factors such as work carried out and unreported income. It is therefore also necessary to employ other tools for monitoring such

[47] Ot.prop.nr 4 (2008-09) p. 34 (office translation).
[48] Office translation.
[49] Ot.prop.nr 4 (2008-09) p. 26 (office translation).

aspects. These instruments are normally only available when the person is residing in Norway. This poses a challenge as regards stay abroad, for purposes of which it is in any event necessary to be made aware of the stay abroad.

58. This is described as follows in the Investigative Committee's report:

> *"As far as the committee understands, the welfare authority's control of the member's financial situation – typically that the information provided about income during the sick leave period is correct – is secured through register merging, information from other agencies such as the police, the Tax Administration, the Norwegian Labor Inspection Authority and the Customs, the daily work at the welfare authority's offices and notifications from the audience, to name a few. A number of the control methods are based on the member being in Norway. The control must take a different approach where the person is abroad, and it is therefore necessary to know where the person stays."*[50]

4 REGULATION NO 1408/71

4.1 Question 1: Notion of "sickness benefits"

59. By its first question, the Supreme Court asks, in essence, whether the notion of "sickness benefits" in Article 4(1)(a) of Regulation No 1408/71 shall be interpreted as covering a benefit such as the work assessment allowance at issue in this case.

60. According to settled case law, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71.[51]

61. As for the first issue, the Government observes that the work assessment allowance is granted on the basis of a legally defined position. An applicant is legally entitled to the benefit insofar as the conditions are fulfilled. It is granted to recipients with reduced capacity for work and who take part in one of three specific activities as defined in the NIA.[52] It is not a means-tested benefit. Rather, it is granted without any further discretional tests, provided that the conditions in the NIA are met. Some of those conditions indeed rely on an individual and concrete assessment, but not on an overarching test of personal needs or individual circumstances in addition to that.[53] An applicant is thus legally entitled to the benefit insofar as all the conditions in the NIA are fulfilled.

62. With regard to determining the precise nature of the benefit at issue in the main proceedings, it will be recalled that social security benefits must be regarded, irrespective of their characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the

[50] The Investigative Committee's report p. 321-322 (office translation).
[51] E.g. Case C-228/07 Petersen, para 19.
[52] See in particular Section 11-1 of the NIA.
[53] As an illustration of the opposite, see Case C-433/13 Commission v. Slovak Republic, para. 72 et seq.

conditions for granting them are identical.[54] Characteristics that are purely formal, on the other hand, are not relevant criteria for the classification of the benefits.[55]

63. It may be noted at the outset that Norwegian authorities, as expressed by travaux preparatories[56] to Chapter 11 of NIA and Circular 11-00 – have considered that the work assessment allowance is a cash benefit during sickness within the meaning of Regulation No 1408/71.

64. The notion of sickness benefits "covers the risk connected to a morbid condition involving a temporary suspension of the concerned person's activities".[57] This corresponds to Section 11-5 of the NIA, which requires that sickness, injury or defect must be a substantial contributing factor to the person's reduced ability to work.

65. As beneficiaries of work assessment allowances are not permanently incapable of work, the benefit should, in contrast, not be regarded as an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71.

66. Nor does the notion of "unemployment benefits" in Article 4(1)(g) at the outset seem to cover work assessment allowances. While there are some similarities as concerns occupational rehabilitation, an unemployment benefit is of more limited scope as it "covers the risk of associated with the loss of revenue suffered by a work following the loss of his employment although he is still able to work."[58] More generally, important characteristics of unemployment benefits are whether the recipients are required to register as job-seekers, to keep themselves available on the employment market, or to refrain from undertaking an activity as an employed or self-employed person the income from which exceeds a specified ceiling.[59]

67. In *De Cuyper* and *Petersen*, however, the Court seemed to give "unemployment benefits" a wider interpretation than before. It held that an allowance could be considered an unemployment benefit even though the persons concerned were not required to register as job-seekers and consequently from the requirement of being able to work.[60] The Court observed in *Petersen* that the purpose of the benefit was "to provide an applicant for an invalidity benefit who is unemployed or has no income, when the circumstances indicate that the pension should be granted, with the financial means to meet his needs until a definitive decision is adopted on his application and, consequently, during a period in which it is still uncertain whether the applicant can return to professional life."[61] This has some of the attributes of the work assessment allowance, which inter alia encapsulates the former "time limited invalidity pension". Furthermore, by including the previous "work rehabilitation benefit", the work assessment allowance covers persons that appear more closely tied to return to the employment market than those at issue in *Petersen*. However, *Petersen* and *De Cuyper* also emphasised that unemployment was an essential condition for the grant of the benefit and that the benefit was closely linked to the national regulation

[54] Case C-228/07 Petersen, para 21.
[55] Ibid.
[56] Ot.prp.nr.4 (2008–2009) p. 18.
[57] Case C-503/09 Stewart, para 37.
[58] Case C-406/04 De Cuyper, para 27.
[59] E.g. Case C-25/95 Otte, para 36 and Case C-228/07, Petersen, para 29.
[60] Case C-406/04 De Cuyper, para 34.
[61] Case C-228/07 Petersen, para 23.

and administration of unemployment benefits proper. These and other factors distinguish the benefits at issue in *Petersen* and *De Cuyper* from a work assessment allowance.

68. Drawing the lines together, the Government concludes that a work assessment allowance is a sickness benefit within the meaning of Article 4(1)(a) of Regulation No 1408/71.

69. Without prejudice to this classification under Regulation No 1408/71, the aforementioned similarities between a work assessment allowance and unemployment benefits proper are relevant as regards the assessment under the main Agreement, as we shall return to below.

4.2 Question 2: Notion of "residence"

70. By its second question, the national court essentially asks whether Article 22 of Regulation No 1408/71, or possibly Article 19, only confers entitlement to cash benefits when residing in an EEA State other than the competent state, or whether also stays such as in the present case fall within its scope.

71. The Government notes at the outset that Article 10 of Regulation No 1408/71 is not applicable in the present case. It does not cover sickness cash benefits and, moreover, is limited to *residence* in another State.

72. The provision most relevant to the question referred is Article 22(1)(b), second alternative:

> *"A worker who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking into account where appropriate of the provisions of Article 18, and:*
>
> *(a) […]*
>
> *(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to… or to transfer his residence to the territory of another Member State, or*
>
> *c) […] shall be entitled:*
>
> *(i) […]*
>
> *(ii) to cash benefits provided by the competent institution in accordance with the legislation which it administers."*

73. As concerns the literal interpretation, it may be observed that Article 22(1)(b) makes entitlement to cash benefits inter alia subject to the condition that the worker has transferred "residence" to another State. The notion of "residence" is defined in Article 1(h): "'residence' means habitual residence".

74. With regard to the contextual interpretation, it is noteworthy that the provisions in Article 22 differentiate between staying and residing in another State. Article 22(1)(a) thus provide for entitlement to benefits where a worker's "condition necessitates immediate benefits during a *stay* in the territory of another Member State". The notion of "stay" means, according to Article 1(i), temporary residence.

75. It follows thus from the wording of Article 22(1)(b), the legal context of which it forms part, and its purpose, expressed by the definitions provided in Article 1(h) and (i), that that provision requires residence – habitual residence – in another State for the worker to be entitled to maintaining cash benefits.

76. Consequently, a stay (temporary residence) in another Member State, such as that at issue in the main proceedings, falls outside the scope of Article 22(1)(b) of Regulation No 1408/71.

4.3 Question 3: Prior authorisation requirement

77. By its third question, the Supreme Court essentially asks whether Article 22 of Regulation No 1408/71 allows the competent EEA State to make entitlement to a work assessment allowance during a stay in another Member State conditional on prior authorisation.

78. This question is hypothetical given the Government's answer to the preceding question.

79. It may be added, however, that within its scope of application, Article 22(1)(b) and (2) requires the transfer of residence to be authorised. This means that Article 22 does not oblige the competent Member State to grant the benefit provided for therein in the absence of any authorisation granted by the competent institution.[62]

80. Hence, even if Article 22(1)(b) were to be construed as also covering a stay in another EEA State, entitlement to the benefits provided therein would in any event presuppose prior authorisation.

5 ARTICLE 28 AND 36 EEA: SCOPE AND RESTRICTIONS

5.1 Question 4: Nature of Regulation No 1408/71

81. By its fourth question, the national court essentially asks whether compliance with Article 22 of Regulation No 1408/71 precludes an assessment of whether the national rules are compatible with the freedoms enshrined in the main part of the EEA Agreement.

82. Article 29 EEA does not provide for the harmonisation of the social security legislation of the States, but only for the coordination of the legislation.[63]Regulation No 1408/71 only coordinates the EEA States' legislation.[64] It is thus for the legislation of each State to determine the conditions for granting social security benefits.[65] When exercising that power, however, the EEA States must comply with EEA law.[66]

83. Consequently, the applicability of Regulation No 1408/71 is without prejudice to the solution which flows from the potential applicability of provisions in the main part of the EEA Agreement.[67] Therefore, the finding that a national measure may be consistent with

[62] Case C-430/15 Tolley, paras 90-92.
[63] See, mutatis mutandis, e.g. Joined Cases C-393/99 and C-394/99 Hervein and Others, para 50, and Case E-4/07 Torkelsson, para 38.
[64] Ibid, para 52.
[65] Case C-345/09 van Delft, para 84.
[66] Ibid.
[67] E.g. Case C-208/07 Chamier-Glisczinski, para 66.

Regulation No 1408/71 does not necessarily have the effect of removing that measure from the scope of the provisions in the main part of the EEA Agreement.[68]

5.2 Question 5: Scope of Articles 28 and 36 EEA

84. By its fifth question, the national court essentially asks whether Articles 28 EEA (workers) or Article 36 EEA (services) apply to a short leisure stay in another EEA State.

85. As concerns Article 28 EEA, it will be recalled that any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'.[69] The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[70] The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship.[71] Finally, it is also settled case law that nationals of an EEA State seeking employment in another EEA State fall within the scope of Article 28 EEA.[72]

86. The order for reference contains nothing suggesting that the freedom of movement for workers is relevant in this case. N neither sought employment during his stays in Italy nor was he employed there. Those trips concerned, as the question referred explicitly states, "short leisure stay[s]".

87. As concerns Article 36 EEA, it is settled case law that persons established in a Member State who travel to another Member State as tourists must be regarded as recipients of services.[73] What is perhaps less settled is precisely in what situations a person is regarded as a tourist for the purposes of Article 36 EEA.

88. In this regard, it seems clear that not any stay in another Member State involving non-economic activity is capable of bringing that person within the scope of application of Article 36 EEA. Such an interpretation would mean that the passive right to receive services under Article 36 EEA, in practice, covered all free movement not involving economic activity. This would entail that Article 36 EEA (and Article 45 TFEU) in practice was given the same scope as the right to free movement on the basis of Union citizenship, which would be both contrary to a systematic interpretation of the Treaty and contradictory to the case law of the ECJ concerning Article 21 TFEU. [74]

89. It is true that the ECJ applied Article 36 EEA in a case of tourism where Article 21 TFEU could have been applicable in the EU context, e.g. I.N.[75] In that case, however, there was a direct link between the right to receive services and the national measure at issue. It concerned detention and extradition, both of which directly negated the person's right to receive services as a tourist. Similar observations can be made in relation to other cases in which

[68] Ibid.
[69] E.g. Case C-14/09 Hava Genc, para 19.
[70] E.g. Ibid.
[71] E.g. Case C-138/02 Collins, para 27 and case law cited.
[72] E.g. Case C-208/07 Chamier-Gliszczinski, para 70 and the case law cited.
[73] E.g. Case C-211/08 Commission v Spain, para 51 and case law cited.
[74] To that effect, see Opinion in C-195/16 Offenburg, paras. 71-73, see also Opinion in Case C-221/11 Demirkan para. 50.
[75] Case C-879/19 PPU Criminal case against I.N. para. 51-53.

Article 45 TFEU has been applied, e.g the right to receive health services in another EEA State.[76]

90. The present case concerns the right to retain benefits during stays in another EEA State. It does not directly relate to the right to travel, stay, and receive services as a tourist. Applying Article 36 EEA in such a case would, it seems, substitute the right to receive services with a general right of free movement. The Government therefore submits that Article 36 EEA, although in principle applicable to measures that restrict the reception of services, is not applicable in a case such as that in main proceedings.

91. It may be added that the aforementioned observations on scope of application also partly relates to what constitutes a restriction for the purposes of Article 36 EEA. The dividing line between the two is not always easily made. The aforementioned conclusion could therefore also be based on the fact that there is no restriction within the meaning of Article 36 EEA, which is the subject matter of the next question.

5.3 Question 6: Restriction under Article 28 or 36 EEA

92. By its sixth question, the national court essentially asks whether conditions such as those laid down in Section 11-3(3) of NIA, either separately or together, constitute a restriction on free movement of workers or services.

93. Without prejudice to the preceding answer, the Government will for the purposes of answering this question presuppose the applicability of Article 36 EEA.

94. When assessing whether social security legislation constitutes a restriction on the right to receive services in another Member State, in particular on the grounds of tourism, the restrictive effects must be assessed in light of the coordination laid down by Regulation No 1408/71.[77] With regard to an insured person whose travel to another Member State is for reasons relating to tourism, and not to any inadequacy in the health service to which he is affiliated, the rules on freedom of movement of services offer no guarantee that the consequences will be neutral.[78]

95. Given the disparities between the legislation of one EEA State and another in matters of social security cover and the fact that the objective of Regulation No 1408/71 is to coordinate the national laws but not to harmonise them, the conditions attached to a stay in another EEA State may, according to the circumstance, be to the insured person's advantage or disadvantage.[79]

96. It follows that, even where its application is less favourable, such legislation is still compatible with Article 28 or 36 EEA if it does not place the person concerned at a disadvantage as compared with those who pursue all their activities in the Member State were it applies.[80]

[76] E.g. Case C-158/96 Kohll and Case C-157/99 Peerboms.
[77] See, to that effect, Case C-211/08 Commission v Spain, para 61.
[78] Ibid.
[79] Ibid.
[80] Case C-493/04 Piatkowski, para 34.

97. In addition, it remains to be ascertained whether the restrictive effects of such legislation in any event are too uncertain and indirect for the purposes of the passive rights under Article 36 EEA.[81]

98. As for the facts of this case, the order for reference only provides that N had several stays in Italy. It does not set out any facts concerning whether the legislation at issue placed N at disadvantage as concerns the right to receive services nor the concrete effects of that legislation in that regard.

99. Based on the facts set out in the order for reference, it would in any event appear that any restrictive effects are too uncertain and indirect for the purposes of the right to receive services.[82] It should be recalled that an insured person whose travel to another Member State is for reasons relating to tourism, and not to any inadequacy in the health service to which he is affiliated, the rules on freedom of movement of services offer no guarantee that the consequences will be neutral.[83]

6 ARTICLE 28 AND 36 EEA: JUSTIFICATION

6.1 Question 7 and 8: Introduction

100. By its seventh and eight question, which should be considered together, the referring court asks whether conditions such as those laid down in Section 11-3(3) may be justified, provided that the Court finds that the conditions constitute restrictions. Those conditions, as set out in the questions referred, may be repeated here:

> *(i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four weeks per year; and*
>
> *- (ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and*
>
> *- (iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?*

101. The referring court asks specifically whether those conditions can be justified for reasons of "ensuring performance of defined activity obligations and also follow-up and control". As concerns the first condition, the referring court asks whether it can be justified as "a general safeguarding of the[se] considerations"

102. The Government thus understands the questions referred as seeking general guidance as to whether the conditions may be justified for reasons of overriding public interest. This includes, but is not necessarily limited to, the reasons referred to in the questions. Such an approach to the questions referred is in any event purposeful in order to provide the

[81] Case C-211/08 Commission v Spain, para 72.
[82] Ibid.
[83] Case C-211/08 Commission v Spain, para 61.

national court "with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it."[84]

103. In this regard, it may be added that the questions referred relates to whether the conditions may be "justified", which leave some ambiguity as to whether this also includes the suitability and necessity of the measures. The Government considers that the latter interpretation is intended, which also by implication is presupposed by the subsequent questions referred. It is in any event appropriate that the EFTA Court provides guidance to the referring court as concerns suitability and necessity.

6.2 Mandatory requirements

6.2.1 Introduction

104. Restrictions on the freedom of movement must be justified by public interest grounds set out in the EEA Agreement, or imperative requirements of public interest.[85] Overriding reasons of public interest that justify substantive provisions may also justify control and enforcement measures needed to ensure compliance with them.[86]

105. When considering the justification of the contested measures, regard should not only be had to aims that may be gathered from travaux preparatoires, but also by considering whether the rules in question, viewed objectively, promote aims that constitute mandatory requirements.[87]

106. The ECJ has recognised several imperative requirements of public interest relevant to the national rules at issue in this case.

107. First of all, integrating persons excluded from the labour market and promoting a high level of employment constitutes imperative requirements of public interest.[88] This has been inferred from the fact that these are aims pursued by the EEA and the EU. It will be recalled that recital number 11 of the preamble to the EEA Agreement emphasises the objective of ensuring "economic and social progress and to promote conditions for full employment", corresponding to Article 3(3) TEU. Therefore, the legitimacy of the aim of integrating persons excluded from the labour market and thus promoting a high level of employment cannot be called into question since those are ends pursued by the EEA.[89] Furthermore, encouragement of recruitment is a legitimate aim of social policy, and that assessment must also apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers.[90] Further reference can be made to the opinion in *De Cuyper* as concerns the Scandinavian social security legislation as a means of implementing an "activating" labour market policy.[91]

[84] E.g. Case E-4/19 Campell, para 45.
[85] E.g. Case C-198/14 Visnapuu, para 110 and the case law cited.
[86] E.g. Case C-113/89 Rush Portuguesa, para 18 and Joined Cases C-369/96 and C-376/96 Arblade and Others, para 38.
[87] E.g. Joined Cases C-49, C-50, C-52 to 54 and C-68 to 71/98 Finalarte, paras 40-41.
[88] E.g., to this effect, Case C-670/18 CO, para 36 and case law cited.
[89] E.g., to this effect, Case C-670/18 CO, para 36 and case law cited.
[90] Ibid, para 37 and case law cited
[91] Opinion in Case C-406/04 De Cuyper, para 62.

108. Secondly, the need to monitor compliance with the requirements for social security benefits constitutes an overriding requirement of public interest.[92]

109. Third, avoidance of the risk of abuse is, according to settled case law, an imperative requirement of public interest.[93] It is particularly relevant to employment related benefits.[94]

110. Fourth, while reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom, national legislation may be justified when it is dictated by reasons of an economic nature in the pursuit of an objective of public interest.[95] Hence, the risk of seriously undermining the financial balance of the social security system constitutes an overriding reason in the public interest.[96]

111. Finally, although considerations of an administrative nature cannot justify a derogation by an EEA State from the rules of EEA law, it is clear from the case-law that EEA States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities."[97] The ECJ has inter alia rejected alternative schemes which "would require a case-by-case examination and would represent a considerable administrative burden" and which would make the national scheme "significantly more difficult to manage and would, moreover, be fraught with uncertainties".[98]

6.2.2 Assessment

112. Work assessment allowances, similar to unemployment benefits in the narrow sense, occupies a special place in social security systems. Such benefits are not only social security benefits. They are also important instruments of labour market and employment policy.

113. The objectives of the conditions in Section 11-3 of NIA, and Section 11-3(3) more particularly, reflects this duality. Those objectives, as set out in Section 11-1, are (i) to ensure income for members whilst (ii) they receive active treatment, participate in work-oriented measures or are being followed up in another way with a view to obtaining or retaining employment.

114. The latter concerns in other words the aims of integrating persons excluded from the labour market and ensuring a high level of employment. Both are mandatory requirements.

115. Section 11-3(3) also explicitly refers to control by the Labour and Welfare Administration. This refers to the need for monitoring compliance with the conditions for the benefit as well as its amount, which also has been recognised as a mandatory requirement. This is closely linked with two other mandatory requirements, namely prevention of the risk of abuse and the risk of seriously undermining the financial balance of the social security system.

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[92] Case C-406/04 De Cuyper, para 41. See also, to this effect, Case C-499/06 Nerkowska, para 37 and case C-461/11 Radziejewski, para 46.
[93] See, to this effect, e.g. C-311/08 SGI, para 66
[94] Opinion in Case C-406/04 De Cuyper paras 59 and 64.
[95] E.g. Case C-651/16, DW, para 33.
[96] Ibid.
[97] Case C-512/13 Sopora, para 33.
[98] E.g. Case C-126/15 Commission v Portugal, para 84. See also Case C-546/11 Dansk jurist- og Økonomforbund, para 70.

116. Finally, while some of the conditions require discretionary and complex assessments, others – such as the temporal requirements of stays abroad – reflects the need for rules that are easily managed and supervised. This is another imperative requirement of public interest.

117. Consequently, conditions such as those as laid down in Section 11-3(3) of NIA are justified for reasons of overriding public interest.

6.3 Suitability

118. National measures must also comply with the two limbs of the proportionality principle, the first of which is that they must be suitable to attain their objectives.[99] The suitability requirement may also, as appropriate, involve an assessment of whether the national measures attain the objectives in a consistent and systematic manner.[100]

119. It appears straightforward to confirm that the conditions in Section 11-3(3) are suitable for attaining the abovementioned aims.[101]

120. First, the requirement that any stay abroad is compatible with the completion of the planned activity and does not impede follow up and control by the Labour Welfare Administration is suitable to attain the legitimate objectives of integrating persons excluded from the labour market and ensuring a high level of employment.

121. Second, the prior authorisation requirement is a means of attaining the same objectives, i.e. integrating persons excluded from the labour market and ensuring a high level of employment. In addition, it is a suitable and effective means of ensuring the mandatory requirements of monitoring compliance, prevention of abuse and avoiding the risk of seriously undermining the social security system.

122. Third, the requirement that the stay abroad must be for a limited period is likewise suitable for attaining the foregoing objectives. Leaving the restrictive effects aside, which primarily are of relevance for the necessity test, the modified residence requirement in Section 11-3(3) is an effective means of ensuring compatibility with the planned activity, follow-up and control by the Labour Welfare Administration, and thus all of the mandatory requirements presented above. It also ensures that these legitimate objectives are ensured through rules which are easily managed and supervised by the competent authorities.

6.4 Necessity

6.4.1 Introduction[102]

123. The necessity requirement entails a functional test of whether the objectives may be achieved in an equally effective manner by measures that are less restrictive of free movement.[103]

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[99] E.g. Case C-55/94 Gebhard, para 37 and C-110/05 Commission v Italy, para 59.
[100] E.g. Case C-375/14 Laezza, para 36 and the case law cited.
[101] See the Investigative Committee's report p. 314.
[102] The Investigative Committee analyses the necessity in Section 4.6 of the preliminary legal assessment. See also Section 4.7 and 4.8.
[103] E.g. Case E-4/04 Pedicel, para 56 and Case C-456/10 Anett, para 45.

124. This entails that the EEA States are free to decide the level at which they intend to ensure the protection of the objectives of the general interest and also in the way in which that level must be attained.[104] The fact that one EEA State imposes less strict rules than another EEA State does accordingly not mean that the latter's rules are disproportionate and hence incompatible with EEA law.[105] Since the EEA States thus retain the right to set their level of protection, the proportionality principle does not involve an assessment of its expediency (proportionality sensu stricto).[106]

125. As EEA law presently stands, the EEA States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable to achieving it.[107] It is, therefore, for the national authorities to find the right balance between the different interests involved, while not going beyond what is appropriate and necessary to achieve the aim pursued by the EEA State concerned.[108] Hence, the ECJ considers whether it appears unreasonable for the national authorities of a Member State to take the view that the measure may be appropriate and necessary to achieve a legitimate aim in the context of national employment policy, consisting of the promotion of full employment by facilitating access to the labour market.[109]

126. It is, however, for the national authorities to demonstrate that the national measures are justified and proportionate.[110]

127. Finally, the EFTA Court has observed that the proportionality principle calls for an analysis of the circumstances of law and fact which characterise the situation in the EEA State concerned.[111] Therefore, the EFTA Court has opined that the national court is generally in a better position than the Court to undertake it and that the Court should only give general guidance as to which elements are to be taken into account.[112]

6.4.2 Assessment – compatibility with activity plan, follow-up and control

128. The necessity of the condition that any stay abroad is compatible with completion of the planned activity, follow up and control by the Labour Welfare Administration can hardly be disputed.

129. Participation in active treatment measures, work-oriented measures as well as follow-up are essential for enabling the person concerned to obtain or retain employment.[113] It is difficult to see any alternatives to those requirements, let alone any less restrictive measures that could attain these aims in an equally effective manner.

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[104] See Case C-299/02 Commission v Netherlands, para 18.
[105] Case C-384/94 Alpine Investments, para 51.
[106] E.g., to this effect, Case C-61/12 Commission v Lithuania, para 60 and Case C-333/14 Scotch Whisky Association, para 35.
[107] E.g. Case C-144/04 Mangold, para 63 and Case C-411/05 Palacios de la Villa, para 68.
[108] Palacios de la Villa, ibid, para 71.
[109] Ibid, para 72.
[110] E.g. Case C-297/05 Commission v Netherlands, para 76 and C-110/05 Commission v Italy, para 62.
[111] Case E-4/04 Pedicel, para 57.
[112] Ibid.
[113] Section 3.4.

130. Therefore, it does not go beyond what is necessary to attain the aims of integrating persons excluded from the labour markets and ensuring a high level of employment to require that also stays abroad must be compatible with this basic condition.

6.4.3 Assessment – prior authorisation

131. A system of prior authorisation may be necessary and proportionate to the aims pursued, if the same objectives cannot be attained by less restrictive measures, in particular by a system of declarations.[114] Relevant factors include whether prior authorisation reflects a need for information and whether ex post control could provide an equally effective guarantee of compatibility with the national rules.[115] The necessity of prior authorisation is particularly borne out in areas where there is a risk of adverse effects which cannot be remedied by subsequent control.[116]

132. These factors explain why Article 22 of Regulation No 1408/71 makes entitlement to cash benefits (litra b) and benefits in kind (litra c) conditional on prior authorisation by the competent institution. The case at issue in the main proceedings falls outside the scope of Article 22(1)(b) since it concerns a stay – not residence – in another EEA State. Article 22(1)(b) nevertheless implicitly supports the necessity of a prior authorisation scheme for cash benefits. It is difficult to see how such a condition could be validly adopted by the EU legislature, if such a condition were deemed unnecessary when assessing a similar national requirement under the main part of the EEA Agreement.

133. This brings us to the judgment in *De Cuyper*. This case concerning unemployment benefits arose in a situation falling outside those regulated in Articles 69 to 71 in Regulation No 1408/71 and was instead assessed under Article 21 TFEU.[117] The Court held that an absolute residence requirement was necessary to ensure control of compliance with the relevant conditions for unemployment benefit.[118] The prior authorisation scheme at issue in this case pursue similar aims, but the national legislature has opted for a less restrictive measure by allowing for exceptions subject to prior authorisation. The reasoning in *De Cuyper* thus appears to apply a fortiori as regards the requirement of prior authorisation.

134. With these introductory reflections in place, we now turn to assess the relevant factors set out at the start of this section.

135. First, whether and to what extent a stay abroad is compatible with scheduled active treatment measures, work-oriented measures and follow-up may involve the need for fact-specific and professional assessments. In some cases, the competent institution may have a need for supplementary information allowing it to assess the compatibility with the scheduled activity and, if appropriate, to consider potential adjustments to the scheduled activity. The nature of the assessment and the need for information thus militate in favour of a prior authorisation scheme rather than an ex post control system.[119]

[114] E.g. Case C-452/01 Ospelt, para 41 and case law cited.
[115] To this effect, ibid, para 43.
[116] Ibid, para 44.
[117] Case C-406/04 De Cuyper, paras 38 et seq.
[118] Ibid, paras 45-47.
[119] E.g. Case C-452/01 Ospelt, para 43.

136. Second, active treatment measures, work-oriented measures and follow-up are designed to ensure that the person concerned obtains or retains employment and does so in an expedient manner. If a stay abroad is incompatible with such measures, it will prolong the path to obtaining or retaining employment. It may also be prejudicial to health where the activity plan involves active treatment measures, i.e. medical treatment. The prior authorisation scheme may thus prevent such adverse effects from occurring, which on the other hand cannot be remedied by an ex post control system.[120]

137. It is of course true that the benefits of a prior authorisation scheme and corresponding avoidance of risks will not always materialise. In some cases, it may be evident that the conditions are fulfilled, which may be easily ascertained within the confines of an ex post control system. It is not sensible or satisfactory to design a system with only a few scenarios in mind, however. The whole point of the prior authorisation scheme is that it allows for sufficient control in all instances falling within the scope of Chapter 11, some of which it seems self-evident that only a prior authorisation scheme will afford sufficient control.

138. For these reasons, the Government maintains that a prior authorisation requirement for work assessment allowances, such as that laid down in Section 11-3(3), is necessary to attain the legitimate aims of the national legislation.

139. Finally, it may be added that a system of prior authorisation must also be based on objective, non-discriminatory criteria, which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.[121] It falls outside the scope of these proceedings to assess this matter as the applicant has not alleged that the prior authorisation scheme fails to adhere to these requirements nor has the national court referred any questions on this issue. The Government nevertheless adds that the conditions for authorisation are explicitly laid down in Section 11-3(3). Furthermore, any recipient of work assessment allowance is, in accordance with administrative circulars, made explicitly aware of the need to apply under Section 11-1(3) in advance of a planned stay abroad.[122]

6.4.4 Assessment – "limited period of time"

140. Finally, it remains to be assessed whether it is necessary to require that the stay abroad be of limited time period. One could argue that as long as the authorities may assess in advance that the stay abroad is compatible with scheduled activity and follow-up, it goes beyond what is necessary to also impose a temporal restriction on the stay abroad.

141. In order to respond to such an objection, the Government will first assess the necessity of this requirement in light of the aims of (i) integrating excluded persons from the labour market and attaining a high level of employment, as well as the need for rules which are easily managed, and thereafter (ii) against the objectives of monitoring compliance, preventing the risk of abuse and the risk of seriously undermining the financing of the social security system.

142. As concerns the first set of objectives, it will be recalled that work assessment allowance requires need for active treatment, or work-oriented measures or other follow-up measures (Section 11-6) and a corresponding duty to participate actively in the implementation of

[120] Ospelt, ibid, para 44.
[121] See, by analogy, e.g. Case C-777/18 WO, para 62.
[122] Order for reference, para 29.

these measures (Sections 11-8 and 11-9). An activity plan shall to this end be drawn up in accordance with Section 11-8. The activity plan may consist of active treatment, work-oriented measures and follow-up with a view to expedient return to working life. The exception to this activity is the waiting period while the activity plan is worked out and potential waiting periods between active treatment and when a work-oriented measure can start (Section 11-13).

143. The logic of this system is reflected in the two exceptions provided in Section 11-3(2) and (3). Since the whole rationale in Chapter 11 is that the key to expedient and successful return to working life is the activity plan, it is no coincidence that the first exception provided in Section 11-3(2) concerns the situation where a stay abroad is integrated in the activity plan. Section 11-3(3) should logically only complement the exception in Section 11-3(2) in periods where there irrespective of an activity plan may be expected to be inactivity, i.e. waiting periods before the activity plan can be drawn up and waiting periods before active treatment and work-oriented measures can be implemented, cf. Section 11-13. The travaux preparatories and administrative regulations confirm that this is the rationale of the exception provided in Section 11-3(3) and the reason why it contains the reservation for "limited period of time".[123]

144. If the requirement of a limited period of time in Section 11-3(3) were dispensed with, Section 11-3(2) would be rendered redundant and the persons concerned could disregard the logic of the system according to which stays abroad preferably should be planned in accordance with the activity plan. If one accepts that the greatest chance to success is through rehabilitation scheduled in an activity plan, it follows that such an alternative system without a temporal limitation in Section 11-3(3) would not be equally effective in ensuring rehabilitation and a high level of employment.

145. Furthermore, the system seeks to attain the aim of employing rules which are easily managed and supervised. The requirement of limited period of time in Section 11-3(3) is a generalisation based on the expected length of the waiting periods before an activity plan is drawn up and before the scheduled activities.[124] This allows the objectives pursued by the legislation, integrating excluded persons from the labour market and attaining a high level of employment, to be ensured through rules which are easily managed and supervised by the competent authorities.

146. Second, if dispensing with the temporal requirement in Section 11-3(3) would be deemed not negatively impact the attainment of the aforementioned objectives, it is necessary to next consider the objectives of monitoring compliance and prevention of abuse.

147. As previously mentioned, *De Cuyper* held that an absolute residence requirement was necessary in order to monitor compliance with the conditions for unemployment allowances. Less restrictive measures, such as production of documents or certificates, would not in an equally effective manner ensure control of conditions pertaining to income and the family situation of the person concerned. i.e. factors influencing whether the person concerned was still entitled to the benefit and, if so, at what rate.[125] The reasoning in *De Cuyper* is not universal, however. The Court noted that unemployment allowances are of a

[123] See Section 3.5.3 above.
[124] Ibid.
[125] Case C-406/04 De Cuyper, para 45-47.

specific nature which justifies arrangements that are more restrictive than those imposed for monitoring in respect of other benefits.[126]

148. It is therefore necessary to assess whether a benefit such as the work assessment allowance displays characteristics which, by virtue of its specific nature, justifies similar restrictions.

149. In this regard, it will be recalled that the work assessment allowance is available for persons who retains a not insignificant part of their work ability and who may even be in part-time work. Sections 11-18 and 11-19 contain detailed regulation concerning the reduction of work assessment allowances corresponding to work-related income. This means that the work assessment allowance poses a similar need for monitoring compliance as the ECJ found as regard unemployment benefits in *De Cuyper*.

150. It is true that the risk of unreported income is in general more pronounced with regard to unemployment benefits, which usually require that the person is an active job seeker. But this difference is only a matter of degree and not in principle, i.e. the risk that a person on unemployment benefit obtains 100 % unreported income as compared with 50% as regards the person on work assessment allowance. Furthermore, the judgment in *De Cuyper* reveals that such a difference is not of decisive importance. The scope of the national regulation in that case concerned senior recipients of unemployment benefits (at least 50 years of age) who had been unemployed for at least two years.[127] These persons were, moreover, exempted from the conditions of being available for work and registering as a job-seeker.[128] *De Cuyper* thus concerned a category of unemployed persons representing a relative low likelihood of obtaining work and corresponding risk of abuse in the form of unreported income received in another State.

151. Nor are there less restrictive measures which could ensure equally effective control. Much like the situation in *De Cuyper*, alternatives such as the production of documents or certificates by the person concerned, would not allow the national authorities to verify the true situation as concerns inter alia income. It is apparent that when the persons concerned are residing in Norway, the authorities have the necessary tools for assessing compliance with the conditions for work assessment allowance, in particular as regards income obtained in the relevant period and the other factors determining the amount of the allowance.[129] Similar instruments are not available to stays abroad. It may be added that information exchange between authorities is to some extent ensured as concerns situations falling with the scope of Regulation No 1408/71 and the implementing regulation. But outside the scope of the regulation, which is the situation in the present case as well as *De Cuyper*, there is no similar information exchange.

152. A parallel could be drawn with case law in the field of taxation. Tax regimes often distinguish between resident and non-resident companies for reasons of fighting tax evasion. The ECJ has regularly dismissed this justification on the grounds that Directive 77/99 (now Directive 2011/16) reduces the risk of tax evasion by allowing the Member State concerned to obtain necessary information from the authorities in the other Member State. Those directives are not part of the EEA Agreement. The ECJ has consequently in several cases held that residence requirements were incompatible with Article 56 TFEU, but could be justified for

[126] Ibid, para 45.
[127] Para 10
[128] Paras 11 and 30.
[129] Section 3.8 above.

reasons of fighting tax evasion under Article 40 EEA.[130] The only caveat is where there are bilateral agreements providing information exchange "as effective" as the EU directives.[131]

153. Therefore, having regard to the foregoing, the Government submits that there are no less restrictive measures that would attain the objective of monitoring compliance and preventing abuse as effectively as the temporal requirement in Section 11-3(3), according to which the stay abroad must be of a limited time period. Doing away with this condition would, it seems to the Government, amount to applying a principle of proportionality strictu senso, for which there is neither any support in the general case law[132] nor in the judgment most relevant to the case at hand (*De Cuyper*).

154. It may be added that this conclusion does not prejudice the assessment of whether this requirement, after 2012, was compatible with Article 21 of Regulation 883/2004. The latter assessment is distinct from the proportionality test carried out under the main part of the EEA Agreement.

7 ARTICLE 28 AND 36 EEA: RECOVERY AND PENALTIES

7.1 Question 9: Administrative recovery measures

155. By its ninth question, the referring court asks, in essence, whether a person can be ordered to repay benefits acquired in a situation where the person has travelled to another EEA State without having obtained prior authorisation and, moreover, has provided the competent institution with incorrect information pertaining to these holidays.

156. The background for that question is an administrative order by NAV for recovery of the work assessment allowance obtained in the absence of prior authorisation.[133] The legal premise of the question referred is that it is compatible with EEA law to require that the stay abroad is compatible with the performance of the persons activity obligations and follow-up and control and to require prior authorisation to that end.

157. Overriding reasons of public interest that justify substantive provisions also justify control and enforcement measures needed to ensure their compliance. Hence, EEA law does not prohibit EEA States from enforcing those rules by appropriate means.[134] If the legislation at issue is compatible with EEA law, administrative measures designed to ensured compliance with that legislation are also, in principle, in accordance.[135] The only caveat is that administrative or punitive measures must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the EEA.[136]

158. It is thus apparent that the proportionality of the recovery is closely linked to the proportionality of the prior authorisation requirement. It is therefore purposeful to recall

[130] E.g. Case C-540/07, Commission v Italy, paras 69-72.
[131] E.g. Case C-48/11, Veronsaaijen oikeudenvalvontayksikkö, paras 34-39 and case law cited.
[132] Section 6.4.1.
[133] Order for reference, para 16. The order for recovery has been maintained for the period before 1. June 2012.
[134] E.g. Joined Cases C-369/96 and C-376/96 Arblade and Others, para 38.
[135] See, to this effect and a fortiori, Case C-347/09 Dickinger, paras 31-32, and the Opinion in that case, para 48.
[136] E.g. Case C-430/05 Ntionik, para 54.

that a prior authorisation requirement compatible with EEA law typically presupposes a need for information, that a system of ex post control could not provide an equally effective control, and is particularly borne out in areas where there is a risk of adverse effects which cannot be sufficiently remedied by subsequent control.[137] In this regard, the Government observed above that the necessity of the prior authorisation requirement in Section 11-3(3) is borne out of these factors. More particularly, the Government noted that a stay abroad which is incompatible with active treatment measures, work-oriented measures and follow-up may prolong the path to obtaining or retaining employment and can be prejudicial to health where the activity plan involves active treatment measures, i.e. medical treatment. The prior authorisation scheme may thus prevent such adverse effects from occurring, which on the other hand cannot be remedied by an ex post control system.[138] It is on this basis that the prior authorisation requirement in Section 11-3(3) is proportionate and compatible with EEA law, which the question referred presupposes.

159. The order for recovery is an administrative measure. It is limited to the funds obtained without prior authorisation. It does not involve a charge of punitive interests or the like. Administrative recovery thus amounts to enforcement of a prior authorisation requirement which the question refers presupposes is proportionate. Therefore, like the prior authorisation, it does not go beyond what is strictly necessary for the objectives pursued.

160. This reasoning is corroborated by considering the legal consequences which the ECJ has inferred from infringements of prior authorisation requirements laid down in EU law. While the Government considers *Tolley* particularly relevant, it may by way of introduction be purposeful to first set out the general reasoning enshrined in the case law.

161. Infringements of EU rules concerning prior authorisation regularly means that the ensuing measure or action becomes unlawful.[139]Enforcement of such an infringement entails nullifying the unlawful consequences. Failure to carry out a prior assessment of environmental effects under Directive 85/337, for instance, may thus require the revocation or suspension of a consent already granted.[140] A failure to notify state aid may similarly require the national court order recovery, even if that aid has subsequently been declared compatible with the common market by the Commission or ESA.[141] Such consequences are deemed necessary to ensure the effectiveness of prior authorisation requirements and the need for control which justifies such conditions.[142]

162. The same reasoning has been applied within the field of social security. The judgment in *Tolley* is instructive in this regard. This case concerned whether a British citizen was entitled, under Article 22(1)(b) of Regulation No 1408/71, to a sickness benefit after transferring residence to Spain. UK legislation prevented this on account of a residence requirement. In 2007, five years after Mrs Tolley had moved, UK authorities thus determined that entitlement to the sickness benefit had ceased as of her transfer to Spain in 2002.[143] The ECJ held that the residence requirement was unlawful and that Mrs Tolley in principle had

[137] Section 6.4.3.
[138] Ospelt, ibid, para 44.
[139] E.g. Case C-443/98 Unilever, paras 49-50.
[140] E.g. Case C-201/02 Wells, para 65 and Joined Cases C-196/16 and C-197/16 Comune di Corridonia and Others para 35.
[141] Case C-368/04, Transalpine, paras 40 and 56.
[142] See, to this effect, e.g. Case C-368/04, Transalpine, para 42.
[143] Case C-430/15 Tolley, paras 20-21.

retained her right under Article 22(1)(b) of Regulation No 1408/71 to receive the sickness benefits in Spain.[144]

163. The remaining question in the case concerned the legal consequences which should be attached to the fact that Mrs Tolley had not applied for prior authorisation from the British authorities before transferring residence to Spain. The ECJ held in this regard that Article 22(1)(b) of Regulation No 1408/71 made the right to export of the benefit at issue subject to the condition that the person concerned has sought and obtained from the competent institution authorisation to transfer his residence to the territory of another Member State. [145] The Court acknowledged the truthfulness of the argument that an authorisation admittedly could only be denied on the grounds set forth in Article 22(2) of Regulation No 1408/71 (prejudicial to his state of health or receipt of medical treatment), but reiterated that that provision "cannot oblige the Member States to grant an employed or self-employed person the benefit of Article 22(1)(b) in the absence of any authorisation granted by the competent institution.[146] In this regard, the Court referred to the reasoning of the advocate general. He noted in essence that the objectives of the authorisation requirement were to avoid potential adverse effects from the residence abroad, e.g. that the provision of treatment might be jeopardised.[147] If, even in the absence of an authorisation, the person concerned would still be entitled to the benefit provided those risks did not materialise, it would impede the attainment of the objectives pursued by the authorisation requirement.[148] The lack of legal consequences could encourage transfers of residence without authorisation, thus presenting the risk that the relevant adverse effects arise after the event.[149] Therefore, the person concerned could not be entitled to the benefit where authorisation was not obtained before transfer of residence.[150]

164. The basic tenet of the Court's reasoning is that authorisation requirements are instrumental in avoiding potential adverse effects from occurring. It would therefore undermine the effectiveness of such requirements, and ultimately the objectives which those requirements seek to attain, if the person concerned nevertheless could maintain entitlement to the benefit in the absence of authorisation. Therefore, it is also immaterial whether the person would have fulfilled the substantive conditions and that an authorisation thus could not have been denied, as long as he or she in fact did not apply for an authorisation. *Tolley* also demonstrates that this reasoning is not affected by the presence of unlawful national condition capable of deterring an application (the residence requirement).

165. It therefore appears that Government's reasoning concerning the proportionality of the legal consequences drawn from an infringement of the prior authorisation requirement under Section 11-3(3), is implicitly corroborated by the logic of the Court's reasoning in the aforementioned case law and in *Tolley* in particular. In conclusion, the Government thus submits that administrative recovery of a work assessment allowance obtained in the absence of a prior authorisation does not go beyond what is necessary to attain the legitimate objectives underpinning that rule.

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[144] Ibid, para 89 and the order of the judgment, nr. 3 second paragraph.
[145] Ibid, para 90.
[146] Ibid, para 91-92.
[147] Opinion in Case C-430/15 Tolley, para 124.
[148] Ibid, para 125
[149] Ibid.
[150] Para 126.

7.2 Question 10: Criminal penalties

166. By its tenth question, the national court essentially asks whether it is compatible with Articles 28 or 36 EEA to impose criminal sanctions on a recipient of a work assessment allowance on the basis that the person concerned has provided incorrect information and thereby misled the competent institution into making unfounded payments.[151]

167. This question presupposes that the authorisation scheme is a justified restriction compatible with EEA law.

168. As regards infringements of domestic rules, it is settled case law that penalties may not be imposed insofar as the national rules which have been infringed are contrary to EEA law.[152] Conversely, EEA law does not preclude appropriate penalties for infringements of domestic rules that are compatible with EEA law.[153]

169. Criminal law is not harmonized in the EEA and the EEA EFTA States retain the competence to impose criminal sanctions under the conditions set out in national law.[154]

170. Therefore, the ECJ held for instance in *Dickinger* that, with the caveat that criminal legislation may not restrict the fundamental freedoms guaranteed by EU law, Article 49 EC precludes the imposition of criminal penalties for infringing requirements laid down by national gambling legislation, *if such legislation is not compatible with Article 49 EC*.[155] This reflected the Advocate General's opinion, who noted that if that gambling legislation was considered to be in accordance with EU law, the criminal penalties designed to ensure compliance with that legislation are also in accordance, in principle, unless they themselves infringe other rules such as fundamental rights.[156]

171. The situation in which the application of criminal legislation may itself infringe the fundamental freedoms typically concerns discrimination. This is borne out of the two cases cited in *Dickinger*, namely *Cowan* and *Calfa*.[157]

172. Penalties must also not go beyond what it strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the EEA Agreement.[158] The wording "so disproportionate" reveals a high threshold.[159]

173. In the absence of any discrimination, the ECJ has not found penalties such as fines and detention disproportionate for even minor offences.[160] Cases in which the penalty has been considered to be so disproportionate to the gravity of the infringement that it becomes an

[151] The investigative committee describes the EEA requirements in relation to sanctions in Sections 4.3.2 and 7.4 of the preliminary legal assessment. The Committee does however not evaluate the specific sanctions provided by the NIA or the Penal Code.
[152] E.g. Case 8/77 Sagulo, para 6.
[153] Ibid, last sentence.
[154] Case E-1/11 A, para 73.
[155] Case C-347/09 Dickinger paras 31-32.
[156] Opinion in Dickinger, ibid, para 48.
[157] Case C-186/87 Cowan, para 19, Case C-348/96 Calfa, para 17. See also Case C-118/75 Watson and Belmann, paras 22-23.
[158] E.g. Case C-322/16 Global Starnet, para 60.
[159] Compare Case C-347/09 Dickinger Dickinger, ibid, para 31.
[160] Watson and Belmann, ibid, para 21.

obstacle to the freedoms enshrined in the EEA Agreement have involved penalties which "negates the very right conferred and guaranteed by the Treaty."[161] This has inter alia concerned persons exercising their rights of residence in another Member State and who have been deported or imprisoned for failure to register residence. In those instances, like the discriminatory measures at issue in *Cowan*, the penalties themselves directly infringe the right to free movement.

174. The penalty at issue in this case concerns a conviction for grossly negligent fraud for failing, first, to seek prior authorisation to receive work assessment allowance abroad and, secondly, subsequently failing to give correct information on notification forms.

175. The objective of those obligations is to ensure compatibility of the stay abroad with scheduled activity, follow-up and control, which are necessary means for attaining the mandatory requirements recognised by EEA law.[162] Furthermore, the question referred presupposes that both the activity requirements as well as the prior authorisation (and notification) condition are compatible with EEA law.

176. A criminal penalty for failing to adhere to conditions concerning entitlement to a work assessment allowance is neither discriminatory nor, in so far as Article 36 would be deemed applicable in this case, negates the very right conferred and guaranteed by the EEA to receive services .

177. Therefore, EEA law does not preclude criminal penalties designed to ensure compliance with a prior authorisation requirement laid down in national legislation, if that legislation is in compliance with EEA law.

8 DIRECTIVE 2004/38

8.1 Question 11: Scope of Articles 4 and 6

178. By the first and second limb of the eleventh question, the national court essentially asks whether Articles 4 or 6 of Directive 2004/38 applies in a situation where a national of an EEA State has a shorter leisure stay in another EEA state and, if so, whether those articles impose obligations on the state of which the EEA national is a citizen.

179. Article 4 of Directive 2004/38 confers on EEA nationals a right to leave the territory of a EEA State to travel to another EEA State. It therefore imposes obligations on the state of which the EEA national is a citizen insofar that he or she is present there at the material time. The provision is typically invoked in opposition to decisions of national authorities seeking to limit or restrict such a right, e.g. restrictions on freedom of movement on grounds of public policy and public security.[163] It is clear that the present case does not involve a denial of exit rights within the meaning of that article.

180. Article 6 of Directive 2004/38 gives EEA nationals the right of residence on the territory of another EEA State for up to three months. It follows from the wording, purpose, and context

[161] Ibid. para 20. See also Case C-265/88 Messner, para 14 and Case C-329/97 Ergat, para 57.
[162] Sections 6.4.2 and 6.4.3.
[163] Guild, Tomkin and Peers, The EU Citizenship Directive. A Commentary, 2. ed. (2019) p. 93.

of that provision that it only imposes obligations on the host EEA State. This has been confirmed by EU case law.[164]

181. The EFTA Court has interpreted the directive differently in two contexts, however. First, it has interpreted Article 7 more broadly than the ECJ in the distinct situation of derived rights of residence for third-country nationals in the home EEA State of the EEA national after returning from another EEA state in which they have genuinely resided in accordance with Article 7.[165] That case law is specifically based on Article 7, both in respect of the stay in another Member State and the return to the Member Stat. It does not concern Article 6 of the Directive.

182. There is one case that at first sight would appear to have more general relevance, however, although that case too concerned Article 7 and not Article 6. In the *Gunnarsson* case concerning discriminatory taxation, the Court inferred from Article 7(1)(b) that that provision prohibited the home EEA State from hindering a national of an EEA state from moving to another State.[166] The notion of hindrance in this regard concerned discrimination.[167] In that case, which to date is the only one in which the EFTA Court has seemingly held that Article 7 *in general* imposes obligations on the home Member State in the sense of hindering free movement, the EFTA Court explicitly distinguished one contrary ECJ case (*Turpeinen*) on the grounds that its application of Article 21 TFEU could not be understood as rejecting the applicability of the directive.[168] Today, however, it is settled case law that the ECJ does not interpret Article 7 (or Article 6) of the directive as encompassing similar obligations on the home Member State as follows from Article 21 TFEU.[169]

183. Therefore, while the Government accepts the sui generis interpretation of Article 7 in the distinct situations at issue in *Jabbi* and *Campbell*, it would strongly advise against extending *Gunnarsson* to mean that Articles 6 and 7 entail a kind of general *Dassonville* hindrance test applicable to the home Member State. That would mean a *complete* import of Article 21 TFEU into the EEA Agreement, which would *fundamentally* alter the scope and nature of the EEA Agreement in conflict with the principle of homogeneity. It could potentially even impose more significant obligations on the EFTA States than the EU Member States in so far as the conditions in Directive 2004/38, in several respects, seem to leave less room for manoeuvre than Article 21 TFEU.[170]

184. If such a step were to be contemplated, it should in any event preferably be the centrepiece of a future case where all the EFTA States would have incentives to participate.

185. Should the EFTA Court nevertheless consider Article 6 applicable as against the home EEA State in this case, the Government submits that the answers to question 6 to 10 would be similarly applicable as regards Directive 2004/38.

[164] See, mutatis mutandis, Case C-456/12, O and B, paras 37-44.
[165] Case E-28/15 Jabbi and Case E-4/19 Campbell.
[166] Case E-26/13 Gunnarsson, para 82.
[167] Ibid, paras 82 and 84.
[168] Ibid, para 81.
[169] See, mutatis mutandis, Case C-673/16 Coman, para 18 cf para 23 and the case law cited
[170] See e.g. Article 27 of Directive 2004/38.

9 REGULATION NO 883/2004

9.1 Question 12: Notion of "sickness benefits"

186. By its twelfth question, the referring court essentially asks whether a benefit such as the work assessment allowance is a sickness benefit within the meaning of Article 3(1)(a) of Regulation no 883/2004.

187. The Government has already set out, in response to the first question referred, why it considers that the work assessment allowance is a sickness benefit for the purposes of Article 4(1)(a) of Regulation No 1408/71. Neither the wording, purpose of the context of Article 3(1)(a) of Regulation No 883/2004 suggests any substantive amendment to scope of "sickness benefits" or, for that matter, the other benefits listed. The Court thus relies on case law under the old regime when describing the benefits covered by Regulation No 883/2004.[171]

188. The Government accordingly considers, for the reasons given in response to the first question referred, that the work assessment allowance is a sickness benefit within the meaning of Article 3(1)(a) of Regulation no 883/2004.

9.2 Question 13: Notion of "staying"

189. By its thirteenth question, the national court essentially asks whether the term "staying" in Article 21(1) of Regulation No 883/2004 covers any stay in another EEA State not constituting residence, including stays such as in the present case.

190. Article 21 provides that the competent institution shall provide cash benefits in accordance with the legislation it applies to an insured person and his or her family "residing or staying" in another Member State. Article 1(j) defines "residence" as "the place where a person habitually resides, while Article 1(k) defines "stay" as "temporary residence".

191. The juxtaposition of the two situations militates in favour of stay covering any situations not constituting residence. The word "temporary", as opposed to "habitual", residence suggests the same. Yet it may be added that the word temporary "residence" complicates somewhat the literal interpretation, as it seems to connotate some temporal and substantive limitations. However, bearing in mind that Article 21 covers a "stay", which hardly connotes any limitations, it seems unlikely that the definition "temporary residence" was meant to limit the meaning of stay. The intention was more likely to emphasise, as noted initially, temporary *as opposed to* habitual residence.

192. Consequently, a literal, contextual and teleological interpretation suggests that staying within the meaning of Article 21(1) of Regulation No 883/2004 covers any stay in another EEA State not constituting residence, including stays such as in the present case.

9.3 Question 14: Place of medical diagnosis

193. By its fourteenth question, the Supreme Court essentially asks whether Article 21 of Regulation No 883/2004 only covers situations where the medical diagnosis is given during

[171] See Case C-372/18 Dreyer, para 32 and case law cited.

a stay (or residence) in an EEA State other than the competent State or whether it also covers situations where the diagnosis is given in the competent State.

194. The Government observes at the outset that the wording offers no support for the proposition that the place of diagnosis is a relevant criterion, let alone that Article 21 is limited to situations where a medical diagnosis is given in another EEA State than the competent state. The same goes for the objectives pursued by Regulation No 883/2004 and Article 21, as set out in recital 13 and 20 to the preamble.

195. The only potential grounds for a restrictive interpretation would have to be based on a contextual interpretation. Article 27 of Regulation No 987/2009 regulates the procedure for medical diagnosis in another EEA State than the competent State. This could possibly be interpreted as presupposing that Article 21 of Regulation No 883/2004 is limited to that situation. One should be careful, however, with such *a contrario* reasoning in general and in particular when interpreting a basic regulation in light of an implementing regulation. It seems that Article 27 of Regulation No 987/2009 simply reflects the practical need to regulate how a medical diagnosis is to be given with effect for the competent State when the illness occurs in another EEA State, while there is no need to regulate that situation where it occurs in the competent State.

196. The Government accordingly considers that Article 21 of Regulation No 883/2004 applies irrespective of whether the relevant medical diagnosis is given in the competent State or in another EEA State.

9.4 Question 15: Notion of "in accordance with the legislation it applies"

197. By its fifteenth question, the national court essentially asks whether conditions such as those laid down in Section 11-3(3) of NIA are compatible with Article 21 of Regulation No 883/2004, having specific regard to the notion of "in accordance with the legislation it applies".

198. It is purposeful at the outset to recall the wording of Article 21(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."*

199. The reference to national legislation harkens back to the fact that Article 48 TEUV, like 51 of the EC Treaty or Article 21 EEA, does not provide for the harmonisation of the social security legislation of the EEA States, but only for the coordination of the legislation.[172] Hence, Regulation No 883/2004 only coordinates the EEA States' legislation.[173]

200. It follows thus from settled case law that EEA law does not detract from the power of the EEA States to organise their social security systems.[174] In the absence of harmonisation at EEA level, it is for the legislation of each EEA State to determine the conditions for granting

[172] E.g. Joined Cases C-393/99 and C-394/99 Hervein and Others, para 50.
[173] Ibid, para 52.
[174] Case C-345/09 van Delft, para 84.

social security benefits.[175] However, when exercising that power, the EEA States must comply with EEA law.[176]

201. Consequently, as confirmed by the specific reference to the legislation of the competent State, Article 21(1) does not, in principle, interfere with the conditions for benefits laid down in the law of the competent State. Yet the substantive autonomy granted to the EEA States does not reach so far as allowing them to enact or maintain conditions that render Article 21 of Regulation No 883/2004 devoid of purpose.

202. In this regard, it is first appropriate to assess whether that is the case as regards the requirement in Section 11-3(1) that a stay abroad must be of a limited period of time, which accordance to practice must usually not exceed four weeks.

203. Relevant guidance is provided by *Tolley*. UK legislation contained an absolute residence condition which altogether excluded the right under Article 22(1)(b) of Regulation No 1408/71 to maintain cash benefits when *residing* in another Member State. The national authorities invoked in favour of its rule that Article 22(1)(b) conferred entitlement to the benefit on a worker who "satisfies the conditions of the legislation of the competent state." This argument was summarily dismissed by the Court since such an interpretation, by permitting the entitlement conferred by Article 22(1)(b) to be defeated by national residence requirement, would render that that provision "entirely devoid of purpose". The same reasoning applies a fortiori to Article 21 of Regulation No 883/2004, as it covers both staying and residing in another EEA State.

204. Similar reasoning has been applied as regards Article 10(1) of Regulation No 1408/71, which prohibits certain benefits from being rejected by reason of the fact that the recipient resides (not stays) in an EEA State other than the competent State. The judgment in *Stewart* held that that provision precludes one of the listed benefits therein from being refused "on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated".[177]

205. Both *Tolley* and *Stewart* concerned absolute residence requirements laid down in UK legislation. Section 11-3(3) of NIA provides an exemption from the absolute residence requirement in Section 11-3(3) and allows for, subject to other conditions, for stays abroad for about a month. Furthermore, Section 11-3(2) does not impose a temporal requirement at all, in situation where the stay abroad is laid down in the activity plan. The Norwegian rules are thus less restrictive that those at issue in *Tolley* and *Stewart*.

206. The temporal limitation in Section 11-3(3) nevertheless precludes longer stays in another EEA State and residence altogether, which seems to conflict with both a literal and teleological interpretation of Article 21 of Regulation No 883/2004. These restrictive effects are not significantly altered by the exception in Section 11-3(2) since it is rarely justified and necessary to plan active treatment and work oriented measures abroad.

207. The Government therefore concludes that Article 21 of Regulation No 883/2004 precludes the application of the requirement in Section 11-3(3) that the stay abroad must be of a limited period of time. This conclusion is based on a literal and teleological interpretation of

[175] Ibid.
[176] Ibid.
[177] Case C-503/09 Stewart, paras 61-62.

Article 21 of Regulation No 883/2004, which distinguishes the legal assessment from that applicable before entry into force of Regulation No 883/2004.

208. It is clear, on the other hand, that Article 21 of Regulation No 883/2004 does not preclude the requirement in Section 11-3(3) that the stay abroad must be compatible with scheduled activity and follow-up. Participation in scheduled activity and availability for follow-up by the competent institutions is a fundamental requirement for acquiring a work assessment allowance as well as maintaining it. It applies to all recipients, irrespective of whether the stay is in Norway or abroad. Dispensing with such a requirement would thus entail reverse discrimination, which Article 21 certainly does not require.

209. This brings us to the third and final requirement in Section 11-3(3) concerning prior authorisation. The Government is uncertain whether it is compatible with Article 21 of Regulation No 883/2004 to require prior authorisation. National authorities therefore do not presently impose such a requirement. The Investigative Committee considered, however, that Article 21 of Regulation No 883/2004 does not preclude a prior authorisation requirement, but that the compatibility of such a condition must be assessed under the main part of the EEA Agreement. [178] The Government therefore welcomes legal clarification from the EFTA Court on this issue. In order to assist the EFTA Court in this regard, the Government will present arguments for and against the compatibility of a prior authorisation scheme with Article 21 of Regulation No 883/2004.

210. The case *against* the compatibility of a prior authorisation requirement runs as follows.

211. The *wording* in Article 21 does not provide for such a requirement.

212. A *contextual* interpretation would emphasise that the previous *requirement* of prior authorisation has not been carried over from Article 22(1)(b), unlike the carrying over of a prior authorisation requirement concerning benefits in kind, cf. Article 20 of Regulation No 883/2004.

213. As for a teleological interpretation, reference may be had to recital 21 to the preamble, which states that provisions on prior authorisation have been improved, taking into account the relevant decisions of the CJEU.

214. The case *for* the compatibility of a prior authorisation requirement essentially disputes the merits of the foregoing arguments, in the reverse order. Since it seeks to disprove the foregoing line of reasoning, it requires a longer explanation.

215. Recital 21 to the preamble is not relevant for the interpretation of Article 21. The reference in recital 21 to "improved" provisions on prior authorisation in light of the Court's case law, refers to case law concerns benefits in kind and to amendments of the provisions requiring prior authorisation in Article 20 of Regulation No 883/2004.[179]

216. As for the literal interpretation of Article 21, it may be purposeful to first recall that the consequence of the prior authorisation requirement in Article 22(1)(b) of Regulation No 1408/71 was that "*that provision* cannot oblige the Member States to grant an employed or

[178] See the preliminary legal assessment, Social Security, residence requirements and travel within the EEA-Area ("Trygd oppholdskrav og reiser i EØS-området"), Section 4.2.5, p. 33-35.
[179] COM (2004) 44 final, p. 5 (amendment 53) and COM (2003) 596 final p. 4, point 2.1.15.

self-employed person *the benefit of Article 22(1)(b) of the regulation* where he has transferred his residence to the territory of another Member State in the absence of any authorisation granted by the competent institution."[180] In other words, even if the insured person fulfilled the conditions in the competent Member State for entitlement to the benefit, that person could not benefit from the right laid down in Article 22(1)(b) in the absence of the authorisation required therein. The rights of the persons concerned therefore depended on, as the Advocate General observed, the Member States dispensing with the prior authorisation requirement laid down in Article 22(1)(b), as nothing prevents them from providing a wider protection than that available under that regulation.[181] Article 21 of Regulation No 883/2004 no longer imposes a prior authorisation requirement as a matter of EEA law. This is distinct from the issue of whether Article 21 of Regulation No 883/2004 thereby also *precludes* a prior authorisation requirement laid down in national law. Since the the EEA States remain competent to impose substantive and procedural conditions in accordance with national legislation, a prior authorisation requirement is only precluded if it renders Article 21 of Regulation No 883/2004 devoid of purpose. That is not the case.

217. The contextual argument espoused above has limited merit as benefits in kind and cash benefits are fundamentally different. Article 20 of Regulation No 883/2004, like its predecessor Article 22(1)(c) in Regulation No 1408/71, confers on the insured persons concerned an entitlement to benefits in kind in accordance with the legislation of the Member State in which the benefits are provided, as though the covered person were insured in that State.[182] Insured persons are thus granted rights which they would not otherwise have, since, as they involve reimbursement by the institution of the place of stay in accordance with the legislation administered by it, those rights can by definition not be guaranteed to those persons under the legislation of the competent Member State alone.[183] Since benefits in kind thus amounts to EEA creating an autonomous right separate from the legislation in the Competent State, it is logical that it also regulates the procedural aspect by imposing a prior authorisation requirement. Conversely, cash benefits remain governed by the legislation of the EEA State of affiliation and the EU legislature have thus, in this respect, not granted rights which they would not otherwise have. It was therefore an anomaly that Article 22(1)(b) of Regulation No 1408/71 imposed a prior authorisation requirement since it is logical that both the substantive and procedural conditions were left to the competent EEA State. Therefore, it seems entirely logical that the prior authorisation requirement has been maintained as concerns benefits in kind, while leaving the EEA State of affiliation to regulate both the substantive and procedural conditions for cash benefits.

218. This brings us to the logic of the system in Article 21 as concerns cash benefits. Since the EEA States are entitled to set substantive conditions for entitlement to a cash benefit, it seems inconsistent if there was a per se prohibition on a prior authorisation requirement. This would significantly hamper the effectiveness of those substantive conditions, as the competent institution would in some cases be incapable of effectively monitoring them, including in situations that may be prejudicial to health. It seems unlikely that Article 21 of Regulation No 883/2004 should be interpreted as preventing the competent Member State from maintaining procedural conditions necessary to avoid such consequences – not the

[180] Case C-430/15 Tolley, para 92.
[181] Opinion in Case C-430/05 Tolley, paras 124-125.
[182] Case C-56/01 Inizian, para 20.
[183] Ibid, para 22.

least since the competent institution was previously precluded, by Article 22(2) of Regulation No 1408/71, from *granting authorisation* where it would prejudice health or medical treatment. When exercising the power to determining the substantive and procedural conditions for the grant of cash benefits, EEA States must still comply with EEA law and the provisions on free movement in so far as they apply. This allows EEA law to separate those prior authorisations schemes which are necessary from those which are not.

219. The Government leaves it to the EFTA Court to consider the merits of the two countervailing arguments presented above.

220. The question referred also refers to the notification duty enshrined in Section 11-7, according to which recipients of work assessment allowance have a general duty to report to the welfare administration every fourteenth day and provide information relevant as to rights of the benefit.[184] This duty is implemented by the use of notification forms drawn up by the Labour and Welfare Administration. Such a general information duty by use of notification forms, applicable to all, does not appear to be precluded by Article 21 of Regulation No 883/2004.

221. It seems, in fact, consistent with the general information obligations set out in Article 76(4) of Regulation No 883/2004, according to which the persons concerned must inform the institutions of the competent Member State as soon as possible of any change in their personal situation which affects their rights to benefits. This would appear to include information regarding holiday or other absence preventing completion of measures set out in the activity plan.[185] Article 76(5) Regulation No 883/2004 also provides that a failure to provide information covered by Article 76(4) may result in proportionate measures in accordance with national law.

10 ARTICLE 28 AND 36 EEA

10.1 Question 16: Applicability of Articles 28 and 36

222. By its sixteenth question, the national court essentially asks whether the conditions in Section 11-3(3) fall to be assessed under other EEA rules if they are found to be compatible with Article 21 of Regulation No 883/2004. Further reference is made to question 4 et seq.

223. This question refers to questions number 4-8, which in principle should be answered in the same manner. This would only be different if compatibility with Regulation No 883/2004, unlike Regulation No 1408/71, excludes the national measures from an assessment under the provisions of the main part of the EEA Agreement. That is, therefore, essentially what the referring court is essentially asking.

224. Since there are no fundamental difference between the two regulations, both being coordinating in nature, the Government considers that it is sufficient to refer to the answers submitted to questions 4-8.

[184] Order for reference, para 31.
[185] Section 3.6 above.

11 ANSWER TO THE QUESTIONS

Based on the foregoing, the Norwegian Government respectfully submits that the questions posed by the referring court should be answered as follows:

1. A benefit such as the work assessment allowance is a sickness benefit for the purposes of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999.

2. Article 22 of Regulation No 1408/71 confers entitlement to cash benefits, in a situation as that at issue in the main proceedings and subject to the other conditions applicable, where the worker or self-employed person has transferred his residence to the territory to another EEA State, and therefore does not cover stays such as that at issue in the main proceedings. The same applies to Article 19 of Regulation No 1408/71.

3. In the light of the preceding answer, it is not necessary to answer the third question referred.

In the alternative: Article 22(1)(b) and Article 22(2) of Regulation No 1408/71 means that a person retains the right to receive the benefits referred to in Article 22(1)(b) after transferring his residence to an EEA State other than the competent state, provided that he has obtained authorisation for that purpose and fulfils the other conditions therein.

4. The finding that a national measure may be consistent with Regulation No 1408/71 does not necessarily have the effect of removing that measure from the scope of the provisions in the main part of the EEA Agreement.

5 and 6. Article 28 EEA does not apply in a situation such as that at issue in the main proceedings.

Persons established in a Member State who travel to another Member State as tourists must be regarded as recipients of services and thus fall within the scope of application of Article 36 EEA. However, conditions for entitlement to a work assessment allowance, such as those at issue in the main proceedings, do not affect the persons' right to travel freely as a tourist and to receive services for the purposes of Article 36 EEA.

7 and 8. In the light of the preceding answer, it is not necessary to answer the seventh and eight question referred.

In the alternative: National legislation such as that at issue in the main proceedings may be justified for reasons of general interests such as integration of excluded persons from the labour market and promotion of a high level of employment, monitoring compliance, prevention of abuse, the risk of seriously undermining the financial balance of the social security system and ensuring rules which are easily managed and supervised.

The national legislation must also be suitable to attain their objectives and do not go beyond what is necessary in order to attain them. The latter condition requires that the

objectives may not be achieved in an equally effective manner by measures that are less restrictive of free movement.

9. In the event that the two conditions to which the ninth question refers are justified and proportionate, which is a matter for the national court to ascertain in light of the answer given to the seventh and eight question above, an administrative measure ordering repayment of a benefit such as the work assessment allowance, which has been obtained in the absence of an authorisation required by national law and thus rendering the national authorities unable to verify in advance whether the stay at issue was compatible with inter alia the requirement that the stay abroad is compatible with scheduled activity, follow-up and control, does not go beyond what is necessary to attain the rules pursued.

10. Subject to the same caveat as given above, a criminal penalty for obtaining a benefit such as the work assessment allowance without authorisation required by national law and by providing incorrect information to the competent institution, such conduct having been deemed grossly negligent and entailing risk of loss for the deceived party, thus qualifying as grossly negligent fraud under the criminal code in that State, does not in of itself go beyond what is strictly necessary for the objectives pursued or is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedom enshrined in Article 36 EEA, should that provision be deemed applicable. The concrete assessment is in any event a matter for the national court to determine.

11. National measures such as those at issue in the main proceedings do not infringe the right to leave the territory of that State for the purposes of Article 4 of Directive 2004/38. Article 6 of Directive 2004/38 gives an EEA national a right of residence for three months on the territory of another EEA State and therefore does not impose obligations on the EEA State of which that national is a citizen.

12. A benefit such as the work assessment allowance is a sickness benefit for the purposes of Regulation No 883/2004.

13. Stays such as those at issue in the main proceedings are stays within the meaning of Article 21(1) of Regulation No 883/2004, as each of those constitutes a temporary residence for the purposes of Article 1(k) of Regulation No 883/2004.

14. Article 21 of Regulation No 883/2004 covers both situations where the medical diagnosis is given during a stay in an EEA State other than the competent State and where that diagnosis is given in the competent State prior to departure.

15. By making an insured person entitled to cash benefits provided by the competent institution in accordance with the legislation it applies, Article 21 of Regulation No 883/2004 reflects that Article 48 TFEU does not provide for the harmonisation of the social security legislation of the EU and EEA States, but only for their coordination. It is thus for the legislation of each EEA State to determine the conditions for granting social security benefits. National conditions must not, however, render Article 21 of Regulation No 883/2004 devoid of purpose. A condition that precludes stays in another EEA State beyond four weeks is therefore not compatible with Article 21 of Regulation No 883/2004. In addition, when EEA States determine the conditions for granting social security benefits, the EEA State must comply with EEA law. Consequently, the referring court must assess those conditions in light of the answers given above to questions 5 to 8.

16. The finding that a national measure may be consistent with Regulation No 883/2004 does not necessarily have the effect of removing that measure from the scope of the provisions in the main part of the EEA Agreement.

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Oslo, 9 October 2020

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