ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
BELGIUM

Your ref	Our ref	Date
84329	20/4486-10	25 February 2021

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

1. Introduction

1. Reference is made to the EFTA Surveillance Authority's letter of 25 November 2020.

2. The Authority concludes in its letter that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the National Insurance Act (NIA), insofar as they restrict the exportability of sickness benefits in cash, Norway has failed to fulfil its obligations under EEA law, such as Article 21 of Regulation 883/2004, Articles 28 EEA, 31 EEA and 36 EEA, Articles 4, 6 and 7(1)(b) of Directive 2004/38, Articles 3 and 7 EEA.

3. In the letter the Norwegian Government is requested to submit its observations within two months of receipt of the letter, which upon request was extended to 25 February 2021 by the Authority’s letter of 18 December 2020.

2. Observations

2.1 Preliminary observations

4. Sickness benefit is awarded an insured employee or self-employed person if he or she is incapable of working due to sickness, cf. Chapter 8 of the NIA. The recipient must attempt work-related activities as early as possible, and persons who can perform a part of his or her usual tasks, will receive partial benefit. An insured occupationally active person who cares for a child under the age of 18 who, due to illness or injury, needs constant supervision and care, is entitled to attendance allowance, cf. Chapter 9 of the

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NIA. Work assessment allowance is granted to insured persons whose working capacity is reduced by at least 50 per cent due to illness, injury or defect while he or she is undergoing active treatment or vocational measures, cf. Chapter 11 of the NIA.

5. The Government has publicly acknowledged, as has the national Expert Commission[1], that the administrative practice since June 2012 has been unlawful in certain cases insofar as national authorities have refused to grant or have denied sickness benefit, attendance allowance and work assessment allowances solely on the ground that the recipient is present in another EEA State. This has also been communicated the Authority in the Government's letters dated 11 December 2019 and 11 June 2020.

6. We reiterate that the Labour and Welfare Service is currently engaged in rectifying the mistakes that have been made in aforementioned administrative practice and has reimbursed cash benefits that may have been erroneously recovered, cf. the Government's letter 7 January 2021. Furthermore, we point out that as of November 2019 the Service changed its practice with effect from June 2012. We will elaborate on this below, in section 14. The Government considers that the current practice complies with our EEA obligations, and believes that to some extent, it even goes beyond what is required by EEA law.

7. As stated in our letter to the Authority dated 11 June 2020, and as correctly pointed out by the Authority, the Government agrees with the Authority's view on several issues concerning the interpretation of EEA law, including Regulation 883/2004. It remains undisputed that sickness benefit, work assessment allowance and attendance allowance constitute "sickness benefits" within the meaning of Regulation 883/2004. Furthermore, the Government agrees with the Authority that Article 21 of the Regulation covers residence as well as stays in another EEA State, and that the latter notion covers stays of short as well as long duration.[2]

8. Although there is much common ground between the Authority and the Government, it appears that some matters remain in dispute, notably the interpretation of Sections 8-9, 9-4 and 11-3 of the NIA in light of Article 21 of Regulation 883/2004. In the Government's opinion there are still questions to be answered regarding the interpretation of EEA law and the potential constraints it entails for national legislators when designing the national Social Security Scheme.

9. We refer to the legal proceedings currently pending before the EFTA Court in case E-8/20 where several questions regarding the interpretation of notably Article 21 have been raised.[3] In this regard we note that there seems to be differences between the Authority and the Government in the interpretation of the relevant provisions of the NIA in light of

[1] Norwegian Official Report (NOU) 2020: 9
[2] The Government's letter dated 11 June 2020, section 6-7
[3] Request for an Advisory Opinion from the EFTA Court by Norges Høyesterett dated 30 June 2020 in criminal proceedings against N (Case E-8/20)

Article 21 of Regulation 883/2004. The fact that the Commission provided for a third alternative understanding of the EEA law in this context, substantiates that no certain conclusions can be drawn as to the national authorities' obligations in this respect until delivery of the advisory opinion by the Court.

10. The Government has already presented its interpretation and views as regards the questions raised by the Authority in the present case, both in previous letters to the Authority as well as in the written observations made to the EFTA Court in case E-8/20. We mainly refer to these. For the sake of completeness, however, the Government will provide some brief comments to the Authority's arguments in the following.

2.2 Reply to the Authority's statement that Sections 8-9, 9-4, 11-3 NIA as well as the ensuing administrative practice are incompatible with Article 21 (1) of Regulation 883/2004

11. The Authority seems to be of the opinion that the eligibility criterion of "stay in Norway", and the related conditions for export, as well as the authorisation mechanism, including its limits in time, in Section 8-9,9-4 and 11-3 of the NIA and their application do not comply with Article 21 of Regulation 883/2004.[4]

12. In the written observations regarding the interpretation of Article 21 in E-8/20, the Government has notably held that the requirement in Section 11-3 (3), that the stay abroad must be compatible with scheduled activity and follow-up, cf. Sections 11-7, 11-8, 11-10, and 11-11, is compatible with Article 21. Furthermore, the Government is of the opinion that it is uncertain whether prior authorisation, cf. Section 11-3 (3), is incompatible with Article 21 and awaits further clarification from the EFTA Court.

13. Even though the case before the EFTA Court specifically relates to work assessment allowance, we believe that the answers regarding the scope of Article 21 also will provide guidance with regard to the interpretation and application of Section 8-9 (sickness benefit) and 9-4 (attendance allowance).

14. Regardless of the outcome of the E-8/20 case, we would like to underscore, as noted above, that the Norwegian Labour and Welfare Service has changed its administrative practice with regard to the requirement for residence in Norway cf. NIA sections 8-9 (sickness benefit), 9-4 (attendance allowance) and 11-3 (work assessment benefits). As of November 2019, stays in another EEA country are equated with stays in Norway for persons that fall within the ambit of EEA law, and there has not been a requirement for prior application approval since then. For this group of beneficiaries, the residence requirements with associated requirements for prior application/approval only apply to travel outside the EEA. Although this practice, in the Government's opinion, is more

[4] Letter of formal notice from the Authority to the Norwegian Government, dated 25 November 2020, section 53

lenient than what is required by EEA law, this will be upheld at least until an advisory opinion is provided by the EFTA Court.

15. In order to mirror the current practice of Sections 8-9, 9-4 and 11-3, changes have also been made to the relevant circulars. Please find enclosed the updated circulars as requested (appendix 1-7). Furthermore, information regarding this change of practice is made publicly available on the web page of the Norwegian Labour and Welfare Administration (appendix 0).

16. Lastly, the Government withholds that the Norwegian legislation, as such, is in accordance with our obligations under the EEA Agreement.

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

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

2.3 National law and Articles 28 EEA, 31 EEA and 36 EEA

19. According to the Authority Section 8-9, 9-4 and 11-3 of the NIA and the measures these provisions comprise, are liable to hinder or make less attractive the exercise of free movement as guaranteed by the EEA Agreement, even if there is no discrimination on grounds of nationality.[5]

20. As the written observations in case E-8/20 reveals, there seems to be diverging opinions regarding the relationship between Regulation 883/2004 and other EEA law. The Government expects the Court to provide answers concerning both the scope and interpretation of Article 36 EEA in relation to work assessment allowance in that case. Those answers may again be useful when assessing the other types of benefits in question under the same provision and may as well provide guidance on what impact the other free movement provisions may have on the national legislation. The Government

[5] Letter of formal notice from the Authority to the Norwegian Government, dated 25 November 2020, section 60

maintains that the national legislation is in conformity with the provisions of the EEA Agreement.

21. Without prejudice to the aforementioned, the Government underlines that in case of conflict between the national law and EEA law, Section 2 of the Act relating to the implementation in Norwegian law of the main part of the Agreement on the European Economic Area (EEA) etc. ensures that EEA law will prevail.

22. In line with what has been stated above in Point 2.2., the Government holds that the relevant provisions of the NIA are in accordance with our EEA obligations, including Article 28, 31 and 36 of the EEA-Agreement. National law will have to be interpreted in light of our EEA obligations and in the case of conflict national legislation will have to be deviated from. We also refer to what is stated above regarding the change of practice that has been made by the Norwegian Labour and Welfare Service to assure compliance with EEA law, see sections 14 and 15.

2.4 Comments regarding Criminal sanctions

23. In the event that the contested measures would be considered compliant with EEA law, the Authority considers that imposing criminal sanctions for related violations will, depending on the circumstances, constitute an unjustified restriction on the free movement of persons.

24. As regards the Government's understanding of the general requirements EEA law imposes on national criminal law, we refer to the Government's written observations in case E-8/20, sections 168-173, and to Government's letters dated 11 December 2019[6]. In the following we will therefore only give certain additional comments on the system of penalties for breaches of the national social security regulations.

25. Section 25-12(1) of the NIA makes a person subject to criminal sanctions (fines) for providing incorrect information or withholding information of relevance to his or her social security rights or duties under the law. The same applies under Section 25-12(2) to persons who are ordered by the competent authority to provide information or notifications, but intentionally or negligently fails to do so. Furthermore, Section 25-12 provides that the criminal sanctions entail fines unless stricter criminal sanctions apply. This refers to Sections 221 of the Penal Code on false statements and Sections 371-373 on fraud, both of which make the person concerned subject to fines or imprisonment.

26. The Government underscores that no person is convicted because of "relatively minor" violations and/or mere non-compliance with procedural or formal requirements. Neither has anyone been convicted or fined just for having stayed abroad or not having obtained a prior authorisation before travelling. Rather, the convictions concern those who have provided the competent institution with incorrect information relevant for the assessment

[6] Government's letter dated 11 December 2019, answer to question 10.

of whether the conditions for the benefit are met or not, or for withholding such information. We also underscore that Section 25-12 of the NIA cannot and will not be used to sanction any person for "a mere failure to observe administrative requirements", as seems to be suggested by the Authority.[7] As we have described, the provision entails sanctions where the person intentionally or negligently fails to provide information or withholds information. In a situation concerning a minor violation, such as a mere failure to observe administrative requirements, a temporary suspension of the benefit will – depending on the circumstances – be a more likely measure to apply.[8]

27. For the sake of completeness, we reiterate that the Norwegian Labour and Welfare Service currently equates stays in Norway with stays in other EEA States and does not require prior authorisation. Any stays in another EEA state are therefore equated with domestic stays. All beneficiaries are however still obliged to provide necessary information in accordance with Section 21-3 of the NIA. Breaches of this obligations may in specific situations amount to sanctions.

28. On this basis, the Government holds that the national system of penalties for breaches of the national social security regulations is in conformity with EEA law, and does not provide for disproportionate penalties.

2.5 National law and Articles 4, 6 and 7 (1)(b) of Directive 2004/38

29. In its letter the Authority argues that the national measures in Norway which restrict the export of the three sickness benefits in question, by making them subject to certain conditions and by providing for a prior authorisation scheme, which includes time limitation, breach the free movement rights under Directive 2004/38.[9] Furthermore, the Authority notes that, in its response 11 June 2020, the Norwegian Government did not engage on the question of whether the contested measures are compatible with the Directive.[10]

30. The Government has presented its views on the interpretation of Article 4, 6 and 7 (1) (b) of Directive 2004/38 in the written observations to the EFTA-Court in E-8/20.[11] In short, the Government argues that national measures such as those at issue in the proceedings in E-8/20, do not infringe the right to leave the territory of that State for the purpose of Article 4 of Directive 2004/38. With regards to the interpretation of Article 6 of Directive 2004/38 the Government notes that it gives an EEA national a right of residence for three months on the territory of another member state, and therefore does not impose obligations on the EEA State of which that national is a citizen. For a further elaboration on the Government´s view, we refer to the written observations section 8.

[7] Letter of formal notice from the Authority to the Norwegian Government, dated 25 November 2020, section 90
[8] See e.g. Section 11-10 (2) of the NIA which regulates the situations where entitlement to work assessment allowance will be suspended due to the person's failure to comply with the notification duties.
[9] Letter of formal notice from the Authority to the Norwegian Government, dated 25 November 2020, section 93.
[10] Idem, section 94
[11] Written observations by the Government of Norway in case E-8/20, section 8, page 34

2.6 Final remarks

31. As underlined in our letter of 11 June 2020, our main concern for the future is to ensure that national law and practice in this field are fully compliant with our obligations under EEA law, and the Government welcomes the Authority's viewpoints in this important matter.

32. As mentioned above (see Points 2.2 and 2.3), the Government is of the opinion that the Norwegian legislation as such is in accordance with EEA law, hereunder Regulation 883/2004. However, the Government takes note of the Authority's position on the matter, being that the current national legal framework and the maintenance of Sections 8-9, 9-4 and 11-3 as is may create a state of ambiguity in breach of EEA-law.

33. The Government considers it of outmost importance that the applicable law is easy to find and accessible for members of the National Insurance Scheme, as well as for the actors in the judiciary and the administration to ensure that it is complied with. The present case has shown the need for a closer look at the legislation in question to further clarify the Norwegian legislation. Therefore, the Government has appointed a law committee to, inter alia, examine whether the regulation in NIA, as a whole, needs material or formal amendments to better conform with the EEA law in general and Regulation 883/2004 in particular. The committee is notably mandated to look at how to ensure an easily accessible national legislation within the limits/boundaries imposed by the EEA Agreement's rules on/requirements as to implementation/transposition of EEA law. With this as a backdrop, the committee is requested to review the current legislation and propose a statutory provision. In this process the committee will have to assess and make sure to respect both accessibility requirements pursuant to national legislation as well as those deriving from EEA law. Please find enclosed a copy of the committee's mandate (appendix 8).

34. We kindly inform the Authority that the law committee is scheduled to deliver its report 15 June 2021. The recommendations will be taken into careful consideration, and we are hopeful that they may come up with alternatives on how to make rights and obligations emanating from EEA law more accessible in the national social security legislations, including the NIA, than they are today.

35. Furthermore, regarding the interpretation of Sections 8-9, 9-4 and 11-3 in light of Article 21 of Regulation 883/2004 we refer to the ongoing legal proceedings before the EFTA Court as referred to above. The Government believes the answers from the EFTA Court will provide clarification of the interpretation of Article 21, hereunder whether competent authorities may impose conditions relating to activity and the possibility to request prior authorisation. In our opinion the conclusions made by the Court, and also the following ruling by the Norwegian Supreme Court (Norges Høyesterett), will have bearing on the

assessment of whether the current national regulations involve ambiguity and uncertainty that need to be rectified. Furthermore, we expect answers to some of the Authority's questions about recovery and criminal sanctions.

36. Based on the above, we assume that the present viewpoints from both the Government and the Authority will have to be seen in light of the result of the upcoming legal clarification of the EFTA Court. The Government on its part awaits the answers from the Court with great impatient and will of course take the Court's interpretations into due consideration.

37. On this basis, the Government respectfully disputes that Norway has failed to fulfil its obligations under the EEA Agreement by maintaining in force Sections 8-9, 9-4 and 11-3 of the NIA.

Yours sincerely

Ulf Pedersen
Director General

This document is signed electronically and has therefore no handwritten signature

Enclosures:
Appendix 0-8