

Case handler: Miek Peeters
Tel: (+32)(0)2 286 1885
mpe@eftasurv.int

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Case No: 78982
Document No: 821849

EFTA SURVEILLANCE
AUTHORITY

Norwegian Ministry of Labour and Social Affairs
Postboks 8019 Dep
N-0030 Oslo
Norway

Dear Sir/Madam,

In a letter dated 4 May 2016 (Doc No 803050), the Internal Market Affairs Directorate ("the Directorate") requested information from the Norwegian Government about the residence requirement for the entitlement of unemployment benefits, especially for "unreal" frontier workers and the compliance of it with the EFTA Court Judgment in case *Jonsson* (E-3/12).

In this case, the EFTA Court concluded that, according to Article 71 of the historical Regulation 1408/71, "unreal" frontier workers were entitled to make a choice between the unemployment benefits of the state of residence and the state of their last employment, provided they were registered as a jobseeker in the latter state.

The Norwegian Government explained in its answer of 27 June 2016 (Doc No 810061) that the social security coordination Regulation has changed since the EFTA Court Judgment as there is a difference in wording between the historical Article 71 of Regulation 1408/71 and the current Article 65 of Regulation 883/2004. The new Regulation 883/2004 justifies the residence requirement for "unreal" frontier workers.

Having examined the information provided by the Norwegian Government, the Directorate has decided not to pursue the case further.

We also refer to the closure of two related complaint cases :

- Case 75123: see Closure Decision No 169/16/COL of 21 September 2016 (Doc No 809858) and the letter of the Directorate to inform you about the closure (Doc No 819467)
- Case 79313: see Closure Decision No 229/16/COL of 12 December 2016 and the letter of the Directorate to inform you about the closure (Doc No 821834)

This decision is, however, without prejudice to any decision in the future by the Authority to open a new case on this or a related issue in light of further development.

Yours faithfully,



Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate



**ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS**

EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
BELGIUM

Your ref	Our ref	Date
Case No: 78982	16/2211-	27.06.2016
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Request about requirement for unemployment benefits in Norway - case no 78982

Reference is made to the letter of 4 May 2016 from the EFTA Surveillance Authority (hereinafter "the Authority") concerning the requirement for unemployment benefits in Norway.

- 1. Has the Ministry issued regulations on exemptions from the requirement to stay in Norway, as foreseen in Section 4-2, second sentence of the National Insurance Act? If yes, please explain them.**

The Ministry of Labour and Social Affairs (hereinafter "the Ministry") has in the Regulation on unemployment benefits¹ issued exceptions to the requirement to stay in Norway.

In Chapter 1, the Ministry has issued some general exceptions from the requirement to stay in Norway:

- It may be granted unemployment benefits to a jobseeker who stay in Svalbard.
- A job seeker who is attending a job interview in another EEA Country may be exempted from the requirement to stay in Norway for up to three days.
- A job seeker who has received unemployment benefit for more than 52 weeks, can stay outside Norway for up to four weeks when he or she is on holiday.
- A job seeker who is establishing himself or herself in business, can during temporary stays abroad and where the stay abroad is an integral part of the establishment be exempted from requirement to stay in Norway.

¹ Forskrift 16. september 1998 nr. 890 om dagpenger under arbeidsløshet

- A job seeker who resides abroad and receive unemployment benefits as a form of "wage guarantee funds payed in advance", are exempted from the requirement to stay in Norway if he or she return to the Member State of residence.

A requirement to stay in Norway can for some groups be in defiance with Regulation 883/2004 Article 64 and 65. To ensure that the Norwegian legislation complies with Regulation 883/2004, the Ministry has in Section 13-4 issued exceptions on the requirement to stay in Norway to the following groups:

- A job seeker who receives Norwegian unemployment benefits and in accordance with Regulation 883/2004 Article 64 is going to another Member State to seek job there.
- A frontier worker who has worked in Norway and become partially or intermittently unemployed.
- An unreal frontier worker who is partially or intermittently unemployed, who was working in a regularly recurring shift or rotation, and has been traveling home to the Member State of residence during his or her time off.

2. Please explain how Section 4-2 of the National Insurance Act complies with the EFTA Court judgment E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* and Article 65 Regulation 883/2004.

Article 65 specify which Member State is competent for payment of unemployment benefit to unemployed persons who, during their last employment, were residing in a Member State other than the competent State.

The choice of law depends on whether the unemployed person is wholly or partly unemployed and whether he or she is a frontier worker or an unemployed person other than a frontier worker (hereinafter "unreal frontier worker").

The EFTA Court judgment E-3/12 addressed the category wholly unemployed unreal frontier worker. Consequently, our understanding is that the Authority in question 2 only addresses this particular category, and not the other three categories² of Article 65.

Article 65 paragraph 2 first sentence states that a wholly unemployed unreal frontier worker who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. According to Article 65 paragraph 5 (a) he or she shall receive unemployment benefits from the Member State of residence as if he or she had been subject to that legislation during his last activity as an employed or self-employed person.

However, if an unemployed person, other than a frontier worker, *does not* return to his state of residence, he or she shall make himself/herself available to the

² Wholly unemployed frontier worker, partly unemployed frontier worker and partly unemployed unreal frontier worker

employment services in the Member State to whose legislation he or she was last subject and receive unemployment benefits from this state, cf. the last section in paragraph 2.

The principle of Article 65 is thus that both a wholly unemployed frontier worker and a wholly unemployed unreal frontier worker shall receive unemployment benefits from the Member State of residence. Only if the unreal frontier worker *does not return* to the Member State of residence, shall he or she receive unemployment benefits from the Member State where he or she last were employed.

Whether the unemployment benefits are granted by the Member State in which the unreal frontier worker was last employed or by the State of residence is consequently not a choice, but will according to Article 65 depend on whether he or she has chosen to return to the Member State of residence or not.

In this regard, the wording of Regulation 883/2004 Article 65 is different to the wording of the former Regulation 1408/71 Article 71. Accordingly, the EFTA Court judgment E-3/12 which addresses the interpretation of Regulation 1408/71 Article 71 is not applicable for the interpretation of Regulation 883/2004 Article 65.

The Court of Justice of the European Union (hereinafter "the CJEU") has in Case C-443/11 Jeltres and others made a judgement on the interpretation of Regulation 883/2004 Article 65.

The Jeltres case addresses the subcategory "atypical frontier workers". Unreal frontier workers is clearly a different category of workers than the former subcategory atypical frontier workers. The main conclusion of the Jeltres case is as such not directly applicable for an unreal frontier worker, but the judgement contains several *general interpretations on Article 65*, which are clearly relevant also for the unreal frontier workers.

That the new Regulation should be interpreted in the sense that the decisive criterion is not where the unreal frontier workers register as a job seeker, but whether the unemployed are returning to their State of residence or not, is supported both by the CJEU's statements in the Jeltres case, and by the opinion of Advocate General Mengozzi in the same case³.

The CJEU lay down that Article 65 of Regulation No 883/2004 has replaced Article 71 of Regulation No 1408/71 but has partially amended its content⁴.

It is established that Article 65 should be interpreted in such a way that a worker other than a wholly unemployed frontier worker shall make himself or herself available for the employment services in the Member State of residence if he or she *returns* to that State, and for the employment services in the Member State of his or her last employment if he or she *does not return* to the Member State of residence⁵.

³ Opinion of Advocate General Mengozzi, delivered on 10 January 2013 - case c-443/11

⁴ Case C- 443/11 Jeltres and others para 25

⁵ Case C- 443/11 Jeltres and others, para 27

The CJEU points out that it is an innovation in Article 65 that one can register for employment services in a country other than where one receives unemployment benefits⁶. It has been introduced something new in Article 65 of Regulation 883/2004, and the Regulation now clearly distinguishes between the Member State which pays benefits and the Member State where the jobseeker should be make himself/herself available, cf. the opinion of Advocate General Mengozzi para 35⁷.

The CJEU further states that the opportunity for unemployed frontier workers in Article 65 to make themselves available for the employment services in Member State where he or she last worked is merely a supplementary step, and that this cannot be interpreted as it provides for choice of applicable legislation. This give them the right to unemployment *services* from both countries, but not unemployment *benefits*. The wording of Article 65, links the obligation to pay unemployment benefits to whether the **wholly unemployed unreal frontier worker** returns to the Member state of residence or not, and which Member State that will be responsible for the unemployment *benefit* is thus an obligation and not a choice⁸.

When Article 65 gives unreal frontier workers the opportunity to make themselves available for employment service both in the country of residence and the in Member State they last worked it must be quite clear that the applicable law for unemployment benefits to **wholly unemployed unreal frontier workers** cannot be decided solely by which Member State they make themselves available. The wording of Article 65 relate the applicable law directly to the condition "*who continues to reside in that Member State or returns to that Member State*".

The CJEU state in the judgement of the Jeltés case, and in case-law relating to Regulation 1408/71, that a condition to stay in the country in the unemployment benefit do not intervene with the free movement of labour if the refusal by the Member State of last employment to

⁶ Case C- 443/11 Jeltés and others, para 28 " *The possibility, provided for in Article 65(2) of Regulation No 883/2004, for the wholly unemployed frontier worker to make himself available, as a supplementary step, to the employment services of the Member State where he was last employed, is new compared to the content of Article 71(1)(a)(ii) of Regulation No 1408/71. The worker concerned, whatever links he has maintained in that State and, in particular, if his chances of reintegration into working life are best there, may thus also receive assistance in looking for new employment in that State. [...]*"

⁷ Opinion of Advocate General Mengozzi, delivered on 10 January 2013 - case c-443/11, para 35: "[...] Article 65 decoupled the Member State which pays benefit from the Member State in which the worker may register with the employment services. More precisely, Article 65(2) of Regulation No 883/2004 provides that the frontier worker must 'make himself available to the employment services in the Member State of residence' and 'may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person'."

⁸ Case C- 443/11 Jeltés and others para 31: "[...] The provision lays down that a wholly unemployed frontier worker must make himself available to the employment services of his State of residence. That is an obligation, not a right. According to Article 65(5)(a) of that regulation, that worker is to receive benefits, and thus unemployment benefit, in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Only as a supplementary step may he register with the employment services of the Member State of his last employment. In accordance with Article 56(1) of the Implementing Regulation, which refers to Article 65(2) of Regulation No 883/2004, that registration concerns only the seeking of employment."

pay unemployment benefit merely means that the entitlement to benefits is transferred to the Member State of residence⁹.

It is our opinion that Section 4-2 of the National Insurance Act¹⁰ complies fully with Article 65 Regulation 883/2004.

As explained under question 1, the Ministry has made exceptions from the requirement to stay in Norway for the groups where it is not possible to have a requirement because this will result in lapse of entitlement to unemployment benefits. This will however not be the case for wholly unemployed unreal frontier workers who according to Article 65 shall receive unemployment benefit from the Member State of residence when they choose not to remain in Norway. For this group, it has thus not been necessary to issue an exemption from the requirement to stay in Norway to comply with Regulation 883/2004.

The requirement of actual stay in Norway is substantiated for several reasons.

Firstly it establishes a connection between the Member State in which the right to unemployment benefits are acquired and the obligation to pay these benefits. The benefits are calculated on the basis of previous income, usually in Norway, and the level of compensation of previous income is based on the premise that the unemployed person is actually living in Norway. The calculation of unemployment benefits should seek to balance two interests in particular; To ensure a reasonable income for the unemployed, but at the same time give sufficient incentives for him or her to resume work as soon as possible. If the unemployed person lives in a state with a substantially lower cost level than Norway, this balance will be disturbed. Too generous benefits relative to cost level will for some groups lead to clearly reduced efforts to reassume work.

Secondly, the obligation to live or be present in Norway is related to other conditions for unemployment benefits. The unemployed person must actively search for jobs, and several of the requirements are more easily complied with if the person stays in the country. Reference is made to, inter alia, the requirement that the job seeker must be a "genuine job seeker" with a duty to report and appear in person. Section 4-5 first paragraph and Section 4-8 of the National Insurance Act are among the relevant provisions. They read as follows:

Section 4-5. Genuine job seekers

To be entitled to unemployment benefits, the member must be a genuine job seeker. By genuine job seeker is meant a person who is able to work, and willing to

- *take any type of employment that is paid in accordance with a collective wage agreement or common practice,*
- *take employment anywhere in Norway,*
- *take employment regardless of whether it is full-time or part-time,*
- *to participate in labour market schemes.*

Section 4-8. Duty to report and appear in person

⁹ Opinion of Advocate General Mengozzi, delivered on 10 January 2013 - case c-443/11, para 54, 57, 60 and 62.

¹⁰ Folketrygdloven § 4-2

In order to be entitled to unemployment benefit, the member must register as a job seeker with the Norwegian Labour and Welfare Administration.

The member must report every two weeks (the reporting period). The Norwegian Labour and Welfare Administration decides how such reporting shall take place.

The Norwegian Labour and Welfare Administration may decide that the member is to appear in person outside the set reporting dates.

If the member, without having reasonable grounds, fails to report on the set date, the right to unemployment benefit will lapse from and including the date on which the member should have reported and until the date on which he/she again reports.

Thirdly, by requiring the unemployed to have his or her actual stay in Norway, important control possibilities are clearly strengthened. The Norwegian Labour and Welfare Administration (NAV) has a control unit whose main task is to control the conditions for unemployment benefits, i.e. whether the beneficiaries in fact are unemployed and fulfil their obligation to seek jobs, or if they are occupied by activities incompatible to the requirements for unemployment benefits.

The control unit may apply spot checks in concrete cases. The control of unemployment benefits is, however, primarily based on controlling different registers to which the control unit have access, cf. Sections 21-4 and 21-4 a) of the National Insurance Act. By comparing persons filed in different registers with those on unemployment benefits, the control unit is able to control whether the persons are working or studying contrary to the requirements for unemployment benefits.

Basically the control procedure is electronical, enabling the control unit to assess a large number of persons. For persons appearing in more – seemingly “contradictory” registers – a more thorough assessment is made. The unit has in this way revealed around 4 000 examples of misuse of unemployment benefits and related benefits yearly.

A comparable control is not possible for persons living abroad. The Labour and Welfare Administration does not have the competence to access foreign registers, and there are no international agreements on the control of unemployment benefits. Some limited control is possible by controlling from which country electronic employment status forms are sent (by the IP address), and the authorities may approach other states’ authorities in concrete cases with a request for assistance. However, there is no realistic possibility to uncover, for instance, whether the unemployed person is working abroad in breach of the conditions for unemployment benefits.

The requirement of actual stay must also be seen in the context that unemployment benefits is considered to be not barely a substitute for the loss of income, but also contain an element of a more general labour market service. Those who register as job seekers, thus may expect some follow-up services, such as help in finding jobs and offers of labour market measures. These kind of services presupposes that it is possible to follow up the individual jobseeker in practice. It is clearly more difficult to provide services to job seekers who do not reside in Norway, than to job seekers that are far beyond its borders.

The rules on entitlement to unemployment benefits for unreal frontier workers are changed from the previous Regulation 1408/71 to the current Regulation 883/2004, cf. the CJEU's decision C-443/11 (Jeltes and others). As we see it, the EFTA Court judgment E-3/12 on the right to unemployment benefit for wholly unemployed unreal frontier workers, is therefore not applicable for the interpretation of Regulation 883/2004 Article 65.

As described above, it is the Ministry's opinion that Section 4-2 of the National Insurance Act¹¹, with the exceptions we have issued, fully complies with Article 65 in Regulation 883/2004.

Yours sincerely,


Acting Deputy Director General


Senior Adviser

¹¹ Folketrygdloven § 4-2

Case handler: Miek Peeters
Tel: (+32)(0)2 286 1885
e-mail: mpe@eftasurv.int

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EFTA SURVEILLANCE
AUTHORITY

Ministry of Labour and Social Affairs
Postboks 8019 Dep
N-0030 Oslo
Norway

Dear Sir/Madam,

Subject: Residence requirement for unemployment benefits in Norway

The Internal Market Affairs Directorate of the EFTA Surveillance Authority ("the Directorate") is currently assessing whether Norwegian provisions concerning the right to unemployment benefits comply with Regulation 883/2004.

Section 4-2 of the Norwegian National Insurance Act¹ ("*Lov om folketrygd*") of 28 February 1997 requires an actual stay in Norway to be entitled to unemployment benefits. It foresees that the Ministry may issue regulations on exemptions from this requirement:

*"To be entitled to unemployment benefit, the member must stay in Norway.
The Ministry may issue regulations on exemptions from the requirement to stay in Norway."*²

In its judgment in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*³, the EFTA Court concluded that, according to Article 71(1)(b) of Regulation 1408/71⁴, "unreal" frontier workers ("*workers, other than frontier workers*") are entitled to make a choice between the benefits offered by the State in which they were last employed and those offered by the State in which they reside solely by making themselves available either to the employment services of the State of residence or the State of last employment⁵. The fact that the person resided outside the latter country was not relevant. The unemployed person, however, must comply with the conditions to be met in order to receive unemployment benefits of that State.

According to the EFTA Court, a requirement of actual presence seriously compromises the choice of the unreal frontier worker as it will deter him from returning to his State of residence and make it unduly difficult to seek employment opportunities in another EEA State.⁶

Norway is invited to provide the following information:

¹ Lov om folketrygd (folketrygdloven).

² Unofficial translation by the Authority.

³ Case E-03/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136.

⁴ Article 71 Regulation 1408/71 is currently Article 65 Regulation 883/2004.

⁵ Case E-03/12, cited above, paragraph 63.

⁶ Case E-03/12, cited above, paragraph 72.

1. Has the Ministry issued regulations on exemptions from the requirement to stay in Norway, as foreseen in Section 4 -2, second sentence of the National Insurance Act? If yes, please explain them.
2. Please explain how Section 4 -2 of the National Insurance Act complies with the EFTA Court judgment E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* and Article 65 Regulation 883/2004.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *6 June 2016*.

Yours faithfully,



Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate