



ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
BELGIUM

Your ref
84329

Our ref
19/3515-

Date
11 June 2020

Own initiative case against Norway concerning the exportability of Norwegian cash benefits

Dear Mr. Petursson,

1. Introduction

1. Reference is made to the EFTA Surveillance Authority's letter of 11 March 2020.
2. The Authority concludes in that letter that, by maintaining in force Sections 8-9, 9-4 11-3 and 25-12 of the National Insurance Act, Norway has failed to fulfil its obligations pursuant to Article 21 of Regulation 883/2004, Articles 3 EEA, 28 EEA, 31 EEA and 36 EEA as well as Article 7(1)(b) of Directive 2004/38.
3. In the letter the Norwegian Government is invited to submit its observations by 11 April 2020, which later has been extended to 11 June 2020.

2. Observations

2.1 Preliminary observations

4. The Government welcomes this opportunity to comment on the Authority's preliminary assessment.
5. It should be underscored at the outset that the Government agrees with the Authority's view on several issues concerning the interpretation of Regulation 883/2004.
6. First, it is undisputed that sickness benefits, work assessment allowance and attendance allowance constitute "sickness benefits" within the meaning of Regulation 883/2004.¹

¹ The Authority's letter, paras 17-20

7. Second, 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 The relevant circulars have been amended accordingly and the Directorate of Labour and Welfare has informed the Ministry that it has changed its practice, as observed in the Authority's letter.³ The Government therefore considers that current practice is in conformity with Article 21 of Regulation 883/2004.
8. Finally, the Government shares the view, as stressed in our previous letter of 11 December 2019, that previous convictions based on conduct which did not constitute a violation of the criminal law must be remedied.⁴ Several cases are currently being litigated in the national appellate courts. In three of these cases, two before Borgarting lagmannsrett (Court of Appeals) and one before Høyesterett (Supreme Court), requests for advisory opinions from the EFTA Court are imminent.
9. While there is thus much common ground between the Authority and the Government as concerns the proper interpretation of EEA law, it appears that some matters remain in dispute. These issues are commented upon in the following.

2.2 National law and Article 21 of Regulation 883/2004

10. The Authority considers that the eligibility criterion of "stay in Norway", as laid down in Sections 8-9, 9-4 and 11-3, is not in conformity with the "principle of exportability" in Article 21(1) of Regulation 883/2004.⁵ Furthermore, the Authority is of the view that that provision also prevents a prior authorisation requirement.⁶
11. Those viewpoints raise questions both as regards the proper interpretation of national law and EEA law.
12. It may be purposeful to briefly set out the scheme provided in Sections 8-9, 9-4 and 11-3. Since those sections are virtually identical, the scheme may for the sake of convenience be illustrated by Section 11-3 concerning work assessment allowance. The first paragraph of that section requires, as the Authority correctly notes, "stay in Norway". However, specific (second paragraph) and general (third paragraph) exceptions are made for stays abroad. Hence, the third paragraph provides that work assessment allowance can also be granted for time limited stays abroad insofar as the stay is "compatible with the implementation of the planned activity and does not hinder Arbeids- og velferdsetatens [the competent institution's] monitoring and control". The person concerned may thus under these conditions apply for authorisation to obtain or maintain work assessment allowance for a stay abroad. Therefore, sections 8-9, 9-4 and 11-3 do not impose an absolute requirement of "stay in Norway", but allow for stays abroad subject to the aforementioned conditions and prior authorisation.
13. This raises two questions. First, are such substantive conditions, e.g. "compatible with the implementation of the planned activity" in conformity with Article 21 of the Regulation? Secondly, does Article 21 of the Regulation allow compliance with such conditions to be verified through a prior authorisation requirement? The Government

² The Authority's letter, para 29.

³ The Authority's letter, paras 24-25.

⁴ The Authority's letter, paras 56.

⁵ The Authority's letter, paras 21-22, 28-29 and 31.

⁶ The Authority's letter, paras 21, 23 and 30-31.

cannot see that the Authority directly answers the first question, even though it seems relevant in order to answer the second question.

14. As for the first question, it should be recalled that Regulation 883/2004, in accordance with its fourth recital and settled case law, only coordinates national laws and does not harmonise their content. Therefore, Article 21 makes export of cash benefits provided by the competent institution subject to the condition that it is “in accordance with the legislation it [the competent institution] applies”. Insofar as the conditions for export reflect general conditions linked to the justification and objective of the allowance in question, it seems that both the wording and purpose of Article 21 allows such conditions to be maintained also in the export situation. This would seem to include conditions such as that laid down in Section 11-3 third paragraph, i.e. “compatible with the implementation of the planned activity”. This condition reflects the purpose of, and basic conditions for, granting work assessment allowance in the first place, see Sections 11-1 and 11-6 to 11-9. The same reasoning applies to similar conditions applicable to the other allowances, e.g. that the stay abroad will not be detrimental to the state of health or prolong the work inability (Section 8-9 third paragraph) and equivalent conditions (Section 9-4). Hence, the Government appointed expert commission tasked with investigating national practice in this field (the Expert Commission hereinafter) held in its first report that such conditions were compatible with Article 21 of the Regulation.⁷
15. The logical corollary of that conclusion is that the EEA States must also be able to assess these conditions prior to the stay abroad, i.e. a prior authorisation requirement. This is especially prudent given the nature of the aforementioned conditions, which require – sometimes medical – assessments to be made by the competent institution in order to avoid the risk that the stay abroad has detrimental effects for the health and work rehabilitation of the person concerned. Hence, insofar as these substantive conditions fall within the caveat “in accordance with the legislation” the competent institution applies, that same caveat must logically also accommodate a prior authorisation scheme. This was also the conclusion of the Expert Commission.⁸

2.3 The main part of the EEA Agreement and Directive 2004/38

16. Conformity with the Regulation need not necessarily be the end of the matter, however. It is possible, as the Expert Commission indicated, that the aforementioned substantive conditions as well as the prior authorisation requirement must be assessed against the main part of the EEA Agreement. The most relevant provisions would seem to be Article 28 EEA concerning free movement of workers and Article 31 EEA concerning inter alia self-employed persons.⁹
17. Insofar as those provisions are applicable and the national measures would be deemed restrictions on free movement, it seems to the Government that such restrictions would still be justified. The substantive conditions as well as the prior authorisation requirement seek to attain legitimate objectives such as bringing people back to working life and promoting full employment, promoting health as well as ensuring compliance with the conditions designed to attain those aims. Furthermore, both the substantive conditions and the requirement of prior authorisation appear suitable and necessary to attain these

⁷ Trygd, oppholdskrav og reiser i EØS-området, p xx

⁸ Trygd, oppholdskrav og reiser i EØS-området, p xx

⁹ See, likewise, Trygd, oppholdskrav og reiser i EØS-området, p xx

aims. Although the Expert Commission was wary of concluding on these matters, it seems fair to say that the tenor of its report was supportive of such an analysis.¹⁰

18. Hence, the Government submits that Sections 8-9, 9-4 and 11-3 are in conformity with Article 21 of Regulation and Articles 28 and 31 EEA. This conclusion also makes it superfluous to specifically comment on whether Article 36 EEA and Article 7(1)(b) of Directive 2004/38 also could be applicable.

2.4 Legal certainty and Article 3 EEA

19. Should the application of Sections 8-9, 9-4 or 11-3 lead to a result that, at the outset, seems incompatible with Article 21 of Regulation 883/2004, there is nevertheless no conflict between national law and EEA law. This follows from the domestic regulation implementing Regulation 883/2004. Section 1(3) of the domestic regulation provides a derogation from provisions of the National Insurance Act (NIA) to the extent necessary to comply with Regulation 883/2004. Consequently, it follows from Norwegian law that provisions of the NIA can only be applied to the extent that they are compatible with Regulation 883/2004, as correctly interpreted. Put differently; Regulation 883/2004 prevails over Sections 8-9, 9-4 and 11-3 of the NIA.
20. The Authority considers for its part, referring to two ECJ judgments concerning France, that Sections 8-9, 9-4 and 11-3 create a state of legal ambiguity and uncertainty conflicting with Article 21 of Regulation 883/2004 and Article 3 EEA.¹¹
21. The Government notes at the outset that this analysis seems informed by an incomplete understanding of the system laid down in Sections 8-9, 9-4 and 11-3, as explained above. As for the judgments cited by the Authority, the facts of those cases differ from those at issue here. The regulation in Norway does not turn on administrative circulars, let alone purely internal circulars. Both the regulation implementing Regulation 883/2004 and the NIA explicitly provides a derogation from provisions of the NIA to the extent necessary to comply with Regulation 883/2004. The latter is implemented in Norwegian legislation and applies, as held just above, also when (other) national provisions seem to lead to another conclusion. Whereas Regulation 883/2004 may raise difficult issues, this relationship between Regulation 883/2004 and (other) parts of national legislation is neither ambiguous nor uncertain. Bearing this in mind, and appreciating that regulations must be implemented as *such*, it is difficult to see how the implementing method is incompatible with the principle of legal certainty and Article 3 EEA. Norway has clearly provided in its legislation how a potential conflict between the contested sections of the NIA and Regulation 883/2004 is to be resolved.

2.5 Criminal sanctions

22. The Authority raises two concerns as regards criminal sanctions. First, the Authority observes that it is a disproportionate restriction to impose criminal sanctions on persons exercising their rights of free movement under EEA law.¹² That is undisputed¹³.

¹⁰ Trygd, oppholdskrav og reiser i EØS-området, p xx.

¹¹ The Authority's letter, paras 32-40 and 44.

¹² The Authority's letter, para 57.

¹³ As previously observed by the Government, see the Authority's letter para 56.

23. Secondly, the Authority considers that the national legislation does not make it sufficiently clear that “the consequence of staying abroad while receiving cash benefits could be the imposition of criminal sanctions, including imprisonment.”¹⁴
24. The Government does not agree with this description of national law. It will be recalled at the outset that Sections 8-9, 9-4 and 11-3 require the persons concerned to apply and obtain authorisation to obtain or maintain the allowance before staying abroad. Furthermore, other sections in the law requires the individuals concerned, whether the stay is in Norway or abroad, to fill in forms in order to verify that the conditions for the allowance are still being fulfilled, see e.g. Section 11-10. These forms contain questions such as whether the individual is on holiday or other leaves of absence. Section 25-12(1) of NIA makes a person subject to criminal sanctions 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 obliged under NIA to provide information or notifications, but deliberately or by fault fails to do so. Furthermore, Section 25-12 provides that the criminal sanctions entail fines unless stricter criminal sanctions apply. This refers to, as the Authority correctly observes, 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.
25. Therefore, it is apparent from the aforementioned provisions that a person who maintains an allowance during a stay abroad without applying for authorisation in accordance with NIA and, as the case may be, gives incorrect information on the notification forms is subject to criminal sanctions, including fines as well as imprisonment. This state of affairs is in fact lucidly presented by the Authority itself in the beginning of its letter.¹⁵ The Government therefore disputes that the contested provisions fail to adhere to the requirement of legal certainty in the EEA law.

2.6 Identification of affected individuals and appropriate remedies

26. In late October 2019 the Labour and Welfare Administration (NAV) initiated the process of identifying individuals affected by the wrongful application of Article 21 of Regulation 883/2004. An updated estimate indicates that approximately 1100 – 1200 people had received wrongful demands for repayment due to misinterpretation of the Regulation regarding work assessment allowances, sickness benefits and attendance allowance. Most of these cases have been processed. Approximately 1000 persons have received a total of 47 million NOK in repayment. Furthermore, 55 million NOK of outstanding debts to the Labour and Welfare Administration have been deleted. Around 250 cases still remain. In most of these cases, the individual has stayed abroad both after and prior to 1 June 2012. Therefore, the Government will await the consideration of the national courts, and the advisory opinions of the EFTA Court before processing them, ref. no. 8 above.
27. In addition, the Labour and Welfare Administration has identified approximately 5000 – 6000 cases in which benefits may have been refused/stopped. Approximately 750 cases have been processed. The processing of the remaining cases is currently

¹⁴ The Authority's letter, paras 60-61.

¹⁵ The Authority's letter, para 12.

postponed due to the covid-19 pandemic. However, the Labour and Welfare Administration aims to resume processing these cases in the near future in order to finalize this work by the end of 2020.

28. The Government will await the considerations of the national courts, and the advisory opinions of the EFTA Court, ref. no. 8 above¹⁶, regarding possible cases prior to 1 June 2012.
29. As stated in our letter of 11 December 2019, the Government has established a legal aid system for those who wish to appeal the result of the new decision made by the Labour and Welfare Administration.
30. The Norwegian Government has set up a special compensation scheme to ensure that people who can substantiate an economic loss, will receive a speedy and simple resolution to their claim. The compensation scheme is managed by the Labour and Welfare Administration. The Administration has been instructed to consider that a basis of liability exists in cases where Article 21 of Regulation 883/2004 is wrongfully applied.
31. The Government has established an independent appeals committee. The Committee will process appeals regarding rejected claims. The legal aid system applies to these cases.

2.7 Final remarks

32. The Government welcomes, as stated at the beginning of this letter, the opportunity to engage in a legal dialogue with the Authority. Our main concern for the future, as the Authority will appreciate, is to ensure that national law and practice in this field are fully compliant with our obligations under EEA law.
33. The Government appointed to this end the aforementioned Expert Commission. In addition, the Government is presently in the process of appointing a Law Commission to specifically examine whether the regulation in NIA, as a whole, needs material or formal amendments to better conform with EEA law and Regulation 883/2004 in particular. The current process with the Authority presents another source of valuable information and dialogue.
34. The Expert Commission's first report illustrates that some legal issues are quite clear, while others are not. Many of the outstanding questions will hopefully be resolved by virtue of the pending referrals from national courts to the EFTA Court. The Government has meanwhile set out its preliminary views on the questions raised by the Authority. While the Government agrees with the Authority regarding several of the issues raised, the Government respectfully disagrees with some of the claims made by the Authority. It is undisputed that previous practice was based on an erroneous interpretation of Article 21 of Regulation 883/2004. The Government does not consider, however, that the relevant provisions of national law infringed Article 21 of Regulation 883/2004 or the main part of the EEA Agreement.

¹⁶ <https://www.regjeringen.no/no/aktuelt/eos-saker-settes-pa-vent/id2696974/>

35. Therefore, 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, 11-3 and 25-12 of the National Insurance Act.

Yours sincerely,

Dag Holen
Director General

This document is signed electronically and has therefore no handwritten signature