ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
BELGIUM

Your ref	Our ref	Date
	19/3515-	11 December 2019

Request for information concerning the exportability of Norwegian sickness benefits, work assessment allowance and attendance allowance

Dear Mr Pétursson,

Reference is made to the EFTA Surveillance Authority's letter 4 November 2019. The Authority refers to the press conference held on 28 October 2019 by the Norwegian Minister of Labour and Social Affairs, Anniken Hauglie. Following the press conference, the Authority has opened an own initiative case to examine Norwegian legislation and practice regarding the application of Article 21 of Regulation 883/2004. For the purpose of this examination, the Authority has requested the Norwegian Government to provide information and explanations regarding 11 questions.

The Norwegian Government would like to underline that this matter is handled with great seriousness. The Government has appointed an external commission, which has been given a deadline of 1 June 2020 for their final assessments. Further, Parliamentary hearings will be held on 9 and 10 January 2020.

1. Please explain what measures have now been taken by Norway to ensure the correct application of Regulation 883/2004 in the future and in respect of ongoing cases.

The Ministry of Labour and Social Affairs has instructed the Labour and Welfare Directorate to ensure correct application of Article 21 of Regulation 883/2004.

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The Labour and Welfare Administration and several agencies are now engaged to conduct a complete review of all such cases and rectify the mistakes that have been made.

The Labour and Welfare Administration has updated its circulars for work assessment allowance, sickness benefit and attendance allowance. New cases in these areas are now being handled according to new routines.

The Government has appointed an external commission.[1] The commission will investigate how such a misinterpretation could arise and continue over a long period of time, as well as the roles of the various parties involved. The commission will also assess whether practices prior to 2012 should also be reviewed. The commission has been given a deadline of 1 June 2020.

In parallel with this review, the Director of Labour and Welfare has called for an internal audit report on how the Labour and Welfare Administration follows up the Regulation. This is done in order to secure assessments that could provide a basis for improvements that can be implemented relatively quickly.

The Ministry of Labour and Social Affairs has asked the Directorate of Labour and Welfare to prepare reports on how this matter is followed up. The Ministry has also asked the Directorate for a detailed account of how it works with EEA regulations, as well as a self-assessment of the Directorate's competence as regards making sure that the practices are in line with the regulations.

2. Please explain how Norway plans to identify those individuals who have been affected by the wrongful application by the Norwegian Authorities of Regulation 883/2004, and potentially its predecessor.

The Directorate of Labour and Welfare has initiated extensive work to review all earlier cases back to 2012 to find out which individuals are entitled to repayment of previously collected amounts and who is entitled to benefits that have previously been denied or stopped. Each case is assessed individually. Dedicated resources have also been set up with the Labour and Welfare Administration's Call Center to respond to questions from the public.

According to present estimates, about 2 400 people have received wrongful demands for repayment due to misinterpretation of the regulations regarding work assessment allowances, sickness benefits and attendance allowance. About 90 per cent of the cases relate to work assessment allowances. No cases have been identified involving wrongful demands for repayment of attendance allowance.

[1] The mandate of the commission is available online here: https://www.regjeringen.no/no/aktuelt/granskingsutvalget-i-eos-saken-er-klart/id2677280/

The cases have been identified through machine searches in the IT systems of the Labour and Welfare Administration and a manual review of cases that may be relevant. It cannot be ruled out that further investigations will reveal additional cases.

It is challenging to get a total overview of how many people may have been refused benefits to which they may actually have been entitled. In the initial phase, persons that have been convicted, charged and those who have wrongfully received repayment claims are prioritised. The Directorate of Labour and Welfare has indicated that it is extremely difficult to identify all others who have been affected by the misinterpretation.

Due to the challenges in identifying all relevant cases, the Labour and Welfare Administration has used the media and www.nav.no to urge persons who believe they may have been impacted by this misinterpretation to contact the Labour and Welfare Administration. This can contribute to a faster processing of the cases.

3. Please explain how Norway intends to ensure that it provides appropriate remedies for those individuals who have suffered as a result of the wrongful application of EEA law in relation to the export of benefits.

The Labour and Welfare Administration will review all complaints and appeal cases that have been subject to a decision by the appeal body or the National Insurance Court after 1 June 2012 linked to incorrect application of the right to receive sickness benefits, work allowance benefits and attendance allowance in connection with stays in another EEA state. While reviewing these cases, the Labour and Welfare Administration has initiated a temporary suspension of deductions in all relevant cases.

The Government has established a legal aid system for those who wish to appeal the result of the new decision made by the Norwegian Labour and Welfare Administration (following the above-mentioned review).[2] This system also institutes a legal aid scheme for persons who submit claims for compensation as a consequence of the misinterpretation of the EEA regulations. In criminal cases, the accused is entitled to free legal advice without means testing in cases relating to compensation following criminal prosecution.

The Office of the Director of Public Prosecutions is in contact with the Norwegian Criminal Cases Review Commission regarding those who have been convicted based on misinterpretation of the regulations. The Criminal Cases Review Commission can provide guidance for those who wish to reopen a criminal case, and can also assist in appointing a public defender. All identified persons who have been convicted and/or charged have been contacted.

The Government is considering setting up a special compensation scheme to ensure that all those who have been affected will receive the fastest and easiest possible resolution.

[2] https://www.regjeringen.no/no/aktuelt/ny-rettshjelpsordning-skal-sikre-berorte-i-eos-saken/id2680904/

The Government has proposed additional funds to the Labour and Welfare Administration and the National Insurance Court in the fiscal budget for 2020. This will allow the Labour and Welfare Administration to ensure sufficient follow-up of those directly impacted by the case. The National Insurance Court will receive additional resources to ensure the shortest possible processing time.

4. Please confirm whether the practice and underlying national legislation in breach of Article 21 of Regulation 883/2004 only concern the following types of benefits: sickness benefit (sykepenger), work assessment allowance (arbeidsavklaringspenger) and attendance allowance (pleiepenger).

The Labour and Welfare Administration informed the Ministry by letter dated 27 October 2019 that they had changed their practice concerning the right to receive sickness benefits, work assessment allowance (WAA) and attendance allowance while staying in another EEA State according to Article 21. The National Insurance Court have stated in its rulings that the incorrect practice of the law applies to sickness benefit and work assessment allowance. As far as we know, the National Insurance Court has not decided on this issue in any cases regarding attendance allowance. We also refer to the answer to question 2, second paragraph.

The Labour and Welfare Administration has established a group to examine other benefit and service areas, in light of Norway's obligations under the EEA Agreement. The Ministry will follow up the conclusions of the group if needed.

The Government would like to point out that further issues under Regulation 883/2004 may be identified as part of the ongoing review. The Ministry has already instructed the Labour and Welfare Administration to change practice on one specific matter, regarding applicable legislation after Article 11 for a subgroup of WAA-recipients.[3]

5. According to Minister Hauglie, the incorrect practice started in June 2012, when Regulation 883/2004 entered into force in the EEA EFTA States. Does the Norwegian Government consider that the principle of exportability of sickness benefits in cash provided for in Regulation 1408/71, the previous version of Regulation 883/2004, fundamentally differs from the current legal situation, if so, please explain the reasoning behind this.

Whereas Regulation 883/2004 maintains and clarifies key aspects of the social security coordination set out in Regulation 1408/71, there are also notable differences. Regarding the specific regulation of exportability of sickness benefits there are, as the Ministry sees it, two main differences.

[3] For further details, see https://www.regjeringen.no/no/dokumenter/eksport-av-arbeidsavklaringspenger-for-ikke-yrkesaktive---tolkning-av-trygdeforordning-8832004-artikkel-11/id2681122/

First, Article 10 of Regulation 1408/71 (Waiving of residence clauses) does not apply to sickness benefits, but only to invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants. In contrast, under Regulation 883/2004 the general principle of the retention of a right when residing in another EEA State applies to all cash benefits covered by the Regulation, unless otherwise set out therein, cf. Article 7.

Second, Regulation 1408/71 contains no general provisions on persons residing in the competent State but staying in another EEA State. Under Article 22 of that Regulation such persons are entitled to cash benefits from the competent State in two situations. Article 22(1)(a) applies to persons whose condition require benefits in kind which become necessary on medical grounds during a stay in another EEA State. Article 22(1)(c) applies to persons who have been authorized by the competent institution to go to the territory of another EEA State to receive there the treatment appropriate to his condition. The wording and the structure of the provisions on cash benefits in the Chapter on sickness in Regulation 1408/71 indicates that there is no general and unconditional right to cash benefits for persons residing in the competent State while staying in another EEA State. In contrast, the wording of Article 21 of Regulation 883/2004 indicates that there is such a general and unconditional right under that Regulation.

The Ministry would like to add that the finding that a national measure is consistent with a provision of secondary EEA law does not as such have the effect of removing that measure from the provisions of the EEA Agreement. The question remains whether regulations of residence or stay, and corresponding requirements as to prior authorisation, amount to a restriction under the free movement provisions, and – if so – whether a restriction is justified. Each individual case must be assessed in the light of all relevant facts applicable to that case. One essential question to assess is, in that respect, whether the situation falls within the scope of one of those freedoms, notably Article 28 (freedom of movement workers and self-employed persons) or Article 36 (freedom of movement of services).

For the sake of completeness, it is recalled that there is no provision in the EEA Agreement corresponding to Article 21(1) TFEU (the right of citizens of the European Union to move and reside freely within the territory of a Member State other than which they are nationals).

The question asked is, however, within the mandate of the independent commission of inquiry, and the Ministry will therefore await their findings before drawing a final conclusion on this matter.

6. In the context of a complaint case (Case No 77886) concerning the exportability of a work assessment allowance for a person wanting to move residence from Norway to Sweden, representatives of the Authority received the following reassurances from the Norwegian Government concerning potentially conflicting national legal provisions when they met to discuss the case in 2017:

"The representatives of the Authority noticed that the Norwegian National Insurance Act (NIA) only foresees the possibility to export the WAA for persons, staying abroad ("persons may also be granted WAA during a limited period of residence abroad" …), but not for people, who have their residence abroad. The representatives of the Authority asked the representatives of the Norwegian Government how they think this provision could be conciliated with Article 21.1 of Regulation 883/2204 on the export of cash benefits, covering both stay and residence abroad. The representatives of the Norwegian Government explained that the Norwegian legislation does cover both situations as Regulation 883/2004 applies even though the NIA does not cover all its provisions. When a Norwegian legal provision is in conflict with Regulation 883/2004, Regulation 883/2004 prevails as there is a horizontal Norwegian law implementing Regulation 883/2004."

7. In light of the above, please explain why national rules securing priority of EEA law, such as Section 1(3) of the national regulation transposing Regulation 883/2004, or alternatively the priority rule in Section 2 of the EEA Act, were not applied to the cases discussed at the press conference?

This question is within the mandate of the independent commission of inquiry, who is asked to examine this particular case of malpractice. The Ministry will await their findings before drawing a final conclusion to this matter. In view of the seriousness of the case, it should also be noted that Parliamentary hearings will be held on 9 and 10 January 2020.

8. Please provide details on and specific references to national legislation including the National Insurance Act or any other linked acts or regulations, as well as any relevant circulars (rundskriv), which are in conflict with Article 21 of Regulation 883/2004 as incorporated into Norwegian legal order.

The legislation in question is a regulation, which is implemented in the Norwegian legal system through incorporation, in accordance with the requirements of the EEA Agreement. It was incorporated by Regulation (forskrift) of 22 June 2012 No 585, in force as of 1 June 2012, on the Incorporation of the Social Security Regulations of the EEA Agreement section 1. This means that Article 21 of Regulation 883/2004 is, as such, part of the Norwegian legislation, and it will prevail over the provisions in the National Insurance Act. This is laid down in paragraph 3 of section 1 of the Regulation of 22 June 2012 No 585, containing a list of the national legislation that must be deviated to the extent needed to secure implementation of Regulation 883/2004. Such a derogation is in accordance with section 1-3 of the National Insurance Act.

The provisions of the National Insurance Act has a general application. Some of these provisions, such as the requirement of "stay" in paragraph 1 of section 11-3, do not apply within the scope of Regulation of 22 June 2012 No 585. As mentioned above, Regulation 883/2004 will prevail over the provisions of the National Insurance Act. Thus, section 8-9

(which also apply to attendance allowance, cf. section 9-15) and section 11-3 must be read in conjunction with the Regulation of 22 June 2012 No 585 and Article 21 of Regulation 883/2004.

In accordance with the aforementioned, the Norwegian Labour and Welfare Directorate has made a circular explaining the scope of Regulation 883/2004. The relevant circular, Hovednummer 45, is divided in the same way as the National Insurance Act, equivalent to its chapter subdivision. By letter of 12 November 2019, the Labour and Welfare Directorate has informed the Ministry, that necessary amendments have been made in the said circular.

9. Please describe and explain the nature of the restrictions on the exportability of cash benefits in the relevant Norwegian legislation. In particular, the Norwegian Government is invited to elaborate on:
   a. The substantive content of the criteria linked to stay in Norway, and notably to which extent the criterion limits stay or residence in other EEA States. Please explain the differences, if any, between “stay” and “residence” situations.
   b. Whether there is in fact a prior authorisation mechanism in place for such stays in other EEA States pursuant to the applicable national legislation and/or relevant administrative practice.
   c. Whether there is in fact a prior authorisation mechanism in place for residence in other EEA States pursuant to the applicable national legislation and/or relevant administrative practice.

Legislation regarding export in the EEA in particular
As previously explained in our answer to question 8 above, Regulation 883/2004 prevails over the general rules of the National Insurance Act. Some of the provisions in the National Insurance Act, such as the requirement of "stay" in paragraph 1 of section 11-3, do not apply within the scope of Regulation of 22 June 2012 No 585, since such an application will not comply with Article 21 of Regulation 883/2004. Article 21 (which is a part of Norwegian law) does not differ between "stay" and "residence".

Administrative practice and circulars
When a resident in another EEA State applies for sickness benefit, work assessment allowance or attendance allowance, the case is considered with regards to the Council Regulation No. 883/2004 Article 21.

If a resident in Norway who receives sickness benefit, work assessment allowance or attendance allowance would like to move to another EEA State, it follows from the Norwegian Labour and Welfare Administration's practice that there is no requirement to send an application to receive cash benefit in another EEA State.

However, all beneficiaries have a duty to inform the Labour and Welfare Administration about any changes in their situation that may affect the entitlement to the benefit in question, see section 21-3 of the National Insurance Act. The continued right to these benefits depend on whether the terms and conditions of the cash benefit are met, based on an individual assessment of the case. This duty is applied equally to all recipients. The duty therefore applies to recipients moving to another EEA State, as well as recipients who move within Norway. This is in accordance with Article 21, which states that the insured person shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies.

Recipients of sickness benefit, work assessment allowance or attendance allowance are therefore obliged to provide information on travels both within Norway and in the EEA if such travel may affect their right to the benefit in question, i.e. activity plan, ongoing medical treatment.

If a person wants to move within Norway, he or she continues to be followed up by the Labour and Welfare Administration, but from the local office in the new municipality. Recipients moving to another EEA State will have their case transferred from their local office to a special branch within the Labour and Welfare Administration that handles recipients residing in another EEA State.

10. Can Norway please explain the system of penalties for breaches of social security regulations, in particular those related to Article 21 of Regulation 883/2004. Can Norway confirm that any penalties imposed on individuals comply with the principle of proportionality.

Failing to meet the requirements for social security benefits does not in itself give grounds for criminal liability under Norwegian law. However, a person who provides false information or withholds information of importance for his or her social security rights, may, depending on the circumstances, be criminally liable pursuant to the National Insurance Act or the Penal Code. These provisions apply equally to all social security benefits.

Under section 25-12 para. 1 of the National Insurance Act, a penalty of a fine shall be applied to any person who, contrary to his or her better judgement, provides false information or withholds information of importance for rights and obligations under the Act. Section 25-12 para. 2 stipulates that the same penalty shall apply to any person who pursuant to the Act is obligated to provide information and reports, but intentionally or negligently fails to do so. These provisions only apply if the offence is not subject to a stricter penal provision.

Under section 221 para. 1 of the Penal Code (20 May 2005 No. 28), a penalty of a fine or imprisonment for a term not exceeding two years shall be applied to any person who in writing or orally provides false information to a public authority under a duty to testify (litra c) or when the statement is intended to serve as evidence (litra d). As this provision is stricter than the penal provision of the National Insurance Act, section 221 of the Penal Code will

apply instead of section 21-15 of the National Insurance Act where a person has provided false information to the Labour and Welfare Administration.

If a person makes use of false or incomplete information to the Labour and Welfare Administration with intent to obtain benefits that he or she is not entitled to, sections 371–374 on fraud in the Penal Code will apply. Section 371 on fraud applies to any person who with the intent to obtain an illicit gain for himself/herself or others either (a) causes, strengthens or exploits a mistaken belief and thereby deceives someone into doing or omitting to do something by which someone suffers a loss or risks a loss, or (b) makes use of false or incomplete information or otherwise illicitly affects the result of automated data processing, thereby causing someone a loss or risk of loss (litra b).

Violations of section 371 are sanctioned with a fine or imprisonment for a term not exceeding two years. Aggravated fraud is punishable by imprisonment for a term not exceeding six years pursuant to section 372. In determining whether the fraud is aggravated, particular weight shall be given to, inter alia, whether it resulted in considerable financial damage (litra a) or was committed on multiple occasions or over an extended period of time (litra c). Under section 373 on minor fraud, fraud is punishable by a fine if culpability is low because the value concerned was negligible and other circumstances suggest it. Social security fraud cases that are prosecuted usually concern fraud to an extent that is considered aggravated due to the amount of money concerned.

Negligent fraud is punishable only if the negligence is gross, pursuant to section 374. Grossly negligent fraud is punishable by a fine or imprisonment for a term not exceeding one year. If the grossly negligent fraud is deemed to be aggravated, imprisonment for a term not exceeding two years may be applied.

The provisions on false statement and intentional fraud in the Penal Code may be applied cumulatively. When determining the penalty in social security fraud cases, however, it is largely insignificant whether or not the person charged is convicted of false statement in addition to fraud.

General principles for determining the penalty in social security fraud cases have been laid down in the case law of the Supreme Court. The most important factors in such cases are the degree of culpability and the extent of the fraud. This applies equally to fraud concerning all types of benefits. Furthermore, the Supreme Court has emphasized that the social security system is, to a great extent, based on trust, as benefits are provided based on self-declarations. As the probability of irregularities being revealed is generally low, it has been stressed that considerations of general deterrence are particularly important in these cases.

As a general rule, the penalty for first-time intentional social security fraud is imprisonment, and not a community sentence, if the amount of money concerned exceeds the national insurance basic amount at the time of the offence (NOK 99 858 as of May 2019). Special circumstances may lead to derogations from this general rule. In cases where the concerned

amount is just above the level indicating imprisonment, the sentence will typically be set to 15 days. Sentences will be longer depending on the amount of financial damage, the degree of culpability and other circumstances, and may be set to several months. As an overall assessment is required in each case, and the circumstances may differ considerably from case to case, it is difficult to indicate a general level of punishment.

Grossly negligent social security fraud is punished significantly milder than intentional fraud. Compared to intentional fraud, the amount of money concerned must generally be larger for grossly negligent social security fraud to amount to imprisonment. If the violation is sanctioned with imprisonment, the sentence will generally be set to half of what it would have been set to if the fraud had been intentional.

It follows from the above that the penalties for violations of the National Insurance Act are determined in accordance with the principle of proportionality, reflecting both the level of culpability and the extent of the fraud, as well as considerations of general deterrence. The nationality of the person involved and his or her state of residence are irrelevant in this regard.

The issue in the present case is to establish to what extent the National Insurance Act has been wrongfully applied in the light of Article 21 of Regulation 883/2004. For persons having been convicted based on conduct which does not constitute a wrongful act, any element of punishment will of course be disproportionate.

11. The Norwegian Government is invited to elaborate on and confirm whether EEA nationals, including permanent residents and their family members have been expelled due to non-compliance with the above mentioned provisions of the National Insurance Act and/ or subsequent criminal proceedings against them in that context. Please also explain how the requirements of Article 28 of Directive 2004/38/EC were fulfilled in those cases.

When the Ministry of Justice and Public Security became aware of the possibility that foreign nationals had been expelled as a result of wrongful decisions pursuant to the National Insurance Act and subsequent criminal proceedings, the Directorate of Immigration and the Immigration Appeals board were requested to examine the potential impact on cases handled according to the Immigration Act.

The Immigration Appeals Board has so far examined case overviews as far back as 2015, but have not found any decisions of expulsion of EEA nationals or family members based on the aforementioned circumstances.

The Directorate of Immigration has asked the Director of Public Prosecutions to identify foreign nationals who may have been wrongfully convicted, in order to establish whether any such person has been expelled. Eight convicted foreign nationals were identified, of which

three had been considered expelled (including one case that was pending at the time and mentioned in national media), but no decision of expulsion was issued in either case. The Directorate maintains dialogue with the Director of Public Prosecutions, and will examine any cases that might be identified at a later point.

As no relevant expulsion cases have been identified, the question concerning Article 28 of Directive 2004/38/EC is not applicable.

Yours sincerely,

Tom Gulliksen
Director General

Camilla Landsverk
Deputy Director General

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