

Brussels, 11 March 2020
Case No: 84329
Document No: 1118071

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

Dear Sir or Madam,

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

1 Introduction and correspondence

- (1) On 28 October 2019, during a press conference, the then Norwegian Minister of Labour and Social Affairs, stated that the rights of Norwegian residents to export three types of sickness benefits in cash, i.e. sickness benefits (*sykepenger*), work assessment allowance (*arbeidsavklaringspenger*) and attendance allowance (*pleiepenger*), to other EEA countries had been wrongfully applied in Norway since 2012.
- (2) During the press conference, it was stated that, to date, they had become aware of some 2400 decisions concerning Norwegian residents which had been made without taking due account of EEA law. Moreover, there had been 48 cases which resulted in criminal convictions, including 36 cases of imprisonment, the longest being eight months, because of linked prosecutions regarding social security fraud and reimbursement claims from the Norwegian Labour and Welfare Administration (“NAV”).
- (3) By letter of 4 November 2019 (Doc No 1094489), the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had opened an own initiative case to examine the Norwegian legislation and practice regarding the application of *Article 21 of Regulation (EC) No 883/2004 on the coordination of social security systems* (“Regulation 883/2004”).¹ The Norwegian Government was also invited to provide information on the exportability of sickness benefits, work assessment allowance and attendance allowance so that it reached the Authority by 4 December 2019.
- (4) By letter of 26 November 2019 (Doc No 1099837), the Norwegian Ministry of Labour and Social Affairs requested an extension of the deadline to respond to the Authority’s letter of 4 November 2019. After considering the request, the extension was granted by letter of 27 November 2019 (Doc No 1100021), until 11 December 2019.

¹ The Act referred to at point 1 of Annex VI to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 76/2011, which entered into force on 1 June 2012.

- (5) The Norwegian Government submitted its reply to the Authority by letter of 11 December 2019 (Doc No 1103404). On 11 December 2019, NAV's internal audit department also published a report collecting facts of the EEA case.²
- (6) Whilst not directly connected to this case, the Directorate is aware of a letter from the European Commission dated 26 February 2020, to an individual in Norway.³ That letter concerns a number of issues regarding the interpretation of Article 21(1) of Regulation 883/2004. As is the Authority's standard practice, and in order to ensure a homogeneous interpretation of EEA law by the two institutions in the discharge of their respective responsibilities, as set out in Article 109 EEA, the case has been the subject of correspondence and discussion with the European Commission. As part of those discussions, the way in which the letter has been interpreted by some commentators in Norway has been touched upon. It has become clear that the Commission's letter was a reply to a researcher, to two very specific questions on the interpretation of Article 21(1) first sentence of Regulation 883/2004 and therefore must be read in that light. The Commission's letter did not refer, in any way, to the interpretation of the Article 21(1) as such or to the application of Regulation 883/2004 by the Norwegian authorities.
- (7) On 4 March 2020, the Government appointed commission delivered an interim/partial report on the relevant EEA law applicable to the Norwegian rules and practice.⁴

2 Relevant national law

- (8) The Norwegian provisions related to the three types of benefits relevant in this case are found in the National Insurance Act ("NIA") of 28 February 1997 No 19 (*Folketrygdloven*).⁵
- Section 8-9 for sickness benefits
 - Section 9-4, c.f. Section 8-9 on attendance allowance
 - Section 11-3 for work assessment allowance
- (9) These provisions all contain the requirement of "stay" in Norway ("opphold i Norge") as an entitlement criterion, with limited grounds for exception and are subject to prior authorisation.
- (10) Regulation 883/2004 is transposed into the Norwegian legal order by way of reference and in the form of a regulation (*Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen*).⁶ Section 1(3) of that implementing regulation stipulates that Regulation 883/2004 shall prevail in case of conflict with, inter alia, provisions in the NIA.

² Spesialoppdrag - D2019-10 *Kartlegging av fakta i EØS-saken*, Internrevisjonen 11. desember 2019.

³ https://rett24.no/articles/eu-kommisjonen-er-enig-med-karl-arne-utgard/_attachment/download/3a7f0a40-5495-4e2b-8b47-ec642e46610b:dd5c6d345bad292232406e957a93c2955bbf84be/Svar%20fra%20Kommisjonen.pdf

⁴ *Trygd, oppholds krav og reiser i EØS-området*, 4 March 2020.

⁵ LOV-1997-02-28-19 Lov om folketrygd (folketrygdloven).

⁶ FOR-2012-06-22-585 Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen.

- (11) The relationship between the general provisions of the NIA and the national regulation transposing Regulation 883/2004 are sought explained in circulars (*Rundskriv*). The circulars set out the administration's interpretation of the provisions related to the three benefits in question. Statements in the current circular regarding Section 8-9 NIA for sickness benefits clarify that, in the event of a conflict, the provisions in Regulation 883/2004 take precedence over the NIA⁷. Further reference is made to a separate EEA Circular.⁸
- (12) As regards criminal sanctions, Section 25-12(1) of the NIA provides that a person who provides false information or withholds information of relevance to his or her social security rights, is liable to a criminal sanction in the form of a fine or other, more severe criminal sanctions such as those in Section 221 of the Penal Code on false statements and Sections 371-373 on fraud, pursuant to which fines or a prison sentence may be imposed. Section 25-12(2) extends this criminal liability to any person who, pursuant to the NIA, is obliged to provide information or reports, but intentionally or negligently fails to do so.

3 Relevant EEA law

- (13) Article 3 EEA reads:

“The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

- (14) Article 28 EEA provides that:

- “1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
- 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment*

[...]”

- (15) Article 21(1) of Regulation 883/2004 on the coordination of social security systems stipulates that:

“Article 21 Cash benefits

⁷ R08-00 Rundskriv til ftrl kap 8 – Sykepenger.

⁸ R45-00 Hovednr. 45 – Rundskriv til EØS-avtalens bestemmelser om trygd.

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. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.”*

[...]”

- (16) Articles 7(1)(b) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, provides that:

“All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;

[...]”

4 The Directorate’s assessment

4.1 Maintaining in force national law in conflict with EEA law

4.1.1 National legal provisions in breach of Article 21(1) of Regulation 883/2004 and the principle of exportability of cash benefits

- (17) At the outset, the Directorate notes that sickness benefits, work assessment allowance and attendance allowance should be classified as “*sickness benefits*” within the meaning of Regulation 883/2004.
- (18) According to settled case law of the Court of Justice of the European Union (“CJEU”), for benefits to be covered by Regulation 883/2004, they should be “*granted to recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relate to one of the risks in Article 3(1).*”⁹

⁹ *Inter alia* Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* EU:C:2011:500, paragraph 32 and Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* [2008] EFTA Court Report 3, paragraph 36 .

- (19) All the benefits which are the subject of this case are related to sickness or risks of sickness. They should all therefore be classified as a sickness benefit. As beneficiaries of work assessment allowances are not permanently incapable of work, the benefit should be regarded as a sickness benefit and not an invalidity benefit. The benefit aims at supporting persons while finding their way back to the labour market.
 - (20) An attendance allowance serves to support individuals with care obligations and is payable directly to carers who have to take leave from work due to caring obligations for sick children or due to the illness of child carers or close relatives. It exists in order to compensate for loss of earnings, and is payable subject to the same eligibility criteria as sick benefits.
 - (21) Sections 8-9 (sickness benefits), 9-4 (attendance allowance) and 11-3 (work assessment allowance) of the NIA all contain the requirement of “stay” in Norway (“*opphold i Norge*”) as an entitlement criterion, with limited grounds for exception and subject to prior authorisation.
 - (22) Given the fact that Regulation 883/2004 does not harmonise social security systems, it is up to the relevant EEA State to determine eligibility criteria for their social security benefits, and to conduct individual assessments to establish whether individuals are entitled to such benefits. However, given the principle of exportability of sickness benefits in cash in Article 21(1) of Regulation 883/2004, the eligibility criterion of “*stay in Norway*” is not in line with Regulation 883/2004.
 - (23) Article 21(1) of Regulation 883/2004 does not foresee that EEA States may set up a system of prior authorisation for the continued access to acquired benefits.
 - (24) According to the Norwegian Government’s reply to the Directorate’s request for information, the relevant administrative circulars have been updated as concerns sickness benefits, work assessment allowance and attendance allowance. However, the Directorate observes that the national legal provisions in the NIA, cited above, which are not in line with Article 21(1) of Regulation 883/2004, remain in force.
 - (25) In its reply to the Directorate, the Norwegian Government explained that the Ministry of Labour and Social Affairs has instructed NAV to ensure correct application of Article 21(1) of Regulation 883/2004. It also stated in the reply that NAV had informed the Ministry, by letter dated 27 October 2019, that it had changed its practice concerning the right to receive sickness benefits, work assessment allowance and attendance allowance while staying in another EEA State in order to comply with Article 21(1) of Regulation 883/2004.
 - (26) In its reply date 11 December 2019, the Norwegian Government emphasised that Article 21(1) of Regulation 883/2004, by virtue of Section 1(3) of the national regulation transposing Regulation 883/2004, would prevail over the conflicting provisions in the NIA. In this letter, Norway also
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informed the Authority that the relevant circulars had been amended to reflect the prevalence of Regulation 883/2004.

- (27) The Directorate notes that the principle of exportability of cash benefits was already established by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (“Regulation 1408/71”), the predecessor to Regulation 883/2004, which was part of the EEA Agreement until the incorporation of Regulation 883/2004 into the EEA Agreement by Joint Committee Decision No 76/2011.
- (28) Whereas Article 22 of Regulation 1408/71 concerned the transfer of residence to another EEA State, and in principle allowed for an authorisation scheme, the CJEU made it clear in case C-430/15 *Tolley* that making an entitlement to a cash benefit subject to a condition of residence and presence on its territory was prevented by Article 22(1)(b) of Regulation No 1408/71.¹⁰ The CJEU stated that the authorisation could only be refused if the movement of the person would be prejudicial to his state of health or receipt of medical treatment¹¹.
- (29) Following the entry into force of Regulation 883/2004 in the EEA in 2012, which is the currently applicable EEA Act, Article 21(1) of Regulation 883/2004 now explicitly provides that “[a]n 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” (emphasis added).
- (30) The Directorate notes that, contrary to the situation under Article 22 of Regulation 1408/71, Article 21(1) of Regulation 883/2004 does not foresee a prior authorisation scheme for such stays or moving of residence in other EEA States. It is the Directorate’s view that a system of prior authorisation for stays in or move of residence to other EEA States therefore is contrary to the purpose and wording of Regulation 883/2004. Therefore, the national legal provisions foreseeing prior authorisation for such stays, as provided for in relevant administrative circulars,¹² are not in line with Article 21(1) of Regulation 883/2004.
- (31) Accordingly, as its information presently stands, the Directorate must conclude that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the NIA, Norway has failed to fulfil its obligations arising from Article 21(1) of Regulation 883/2004.

4.1.1.1 Conflicting national legislation and issues related to legal certainty

- (32) Whereas the Directorate acknowledges and welcomes relevant changes to administrative circulars, the national legal provisions in Sections 8-9, 9-4 and

¹⁰ Case C-430/15 *Tolley*, para. 88-91.

¹¹ Case C-430/15 *Tolley*, para. 91.

¹² R08-00 Rundskriv til ftrl kap 8 – Sykepenger, R09-00 Rundskriv til ftrl kap 9 – Stønad ved barns og andre nærstående sykdom and R11-00 Rundskriv til ftrl kap. 11 – Arbeidsavklaringspenger.

11-3 of the National Insurance Act which conflict with Regulation 883/2004 remain in force and continue to give rise to an unclear and ambiguous legal situation.

- (33) The judgment of the CJEU in Case C-167/73 *Commission v France*¹³ and subsequent case-law is relevant to the issue at hand. Case C-167/73 *Commission v France*,¹⁴ concerned a provision of the French Maritime Employment Law allowing for discrimination based on nationality, namely that a certain proportion of the crew of a ship had to be French nationals.
- (34) The Commission had argued that these discriminatory provisions breached the provisions of the EEC Treaty relating to freedom of movement of workers and certain Articles of Regulation No 1612/68 on the freedom of movement for workers. The French Government argued that there was no issue, given the fact that it had provided instructions to relevant authorities to treat such Community nationals in the same way as French nationals.
- (35) The CJEU held that:¹⁵

“41. [...] it follows that although the objective legal position is clear, namely, that Article 48 and Regulation No 1612/68 are directly applicable in the territory of the French Republic, nevertheless the maintenance in these circumstances of the wording of the Code du Travail maritime gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on community law.” (emphasis added)

“48. It follows that in maintaining unamended, in these circumstances, the provisions of Article 3(2) of the Code du Travail Maritime as regards the nationals of other Member States, the French Republic has failed to fulfil its obligations under Article 48 of the Treaty and Article 4 of Regulation No 1612/68...” (emphasis added)

- (36) The CJEU has confirmed this view on several occasions.¹⁶
- (37) In a subsequent case, the French Government maintained precisely that by virtue of a Ministerial Circular, the conflicting, national provisions were in practice no longer applied to Community nationals.¹⁷ The CJEU refused this line of argumentation and held that:¹⁸

“[t]his uncertainty can only be reinforced by the internal character of the purely administrative directions to waive the application of the national law.”

¹³ Case C-167/73, *Commission v France*, [EU:C:1974:35](#).

¹⁴ Case C-167/73, *Commission v France*, cited above.

¹⁵ Case C-167/73, *Commission v France*, cited above, paragraphs 41, 48

¹⁶ [C-159/78](#) para. 22, [C-307/89](#) para. 13-14, [C-58/90](#) para 12-13, [C-351/90](#) para. 18 and [C-259/01](#) para 18-19.

¹⁷ [C-307/89](#) para. 12

¹⁸ Case C-167/73, *Commission v France*, cited above, paragraph 13.

- (38) The Directorate considers that Sections 8-9, 9-4 and 11-3 of the NIA therefore create a state of *legal ambiguity and uncertainty*, in breach of Norway's obligations under Article 21(1) of Regulation 883/2004. By virtue of their wording, these Sections preclude the possibility for concerned individuals to rely on the rights provided for by Article 21(1) of Regulation 883/2004.
- (39) The Directorate recalls that the principle of loyalty requires Norway to take all measures necessary to guarantee the application and effectiveness of EEA law.¹⁹ Moreover, the principle of loyalty and sincere cooperation, as provided for by Article 3 EEA, also suggests that the conflicting legal provisions in the NIA should be revoked or amended.
- (40) Accordingly, as its information presently stands, the Directorate must conclude that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the NIA, Norway has failed to fulfil its obligations arising from Article 21 of Regulation 883/2004 on the coordination of social security systems as read in conjunction with Article 3 EEA.

4.1.2 National legal provisions disproportionately restricting free movement – disproportionality of criminal sanctions

- (41) Notwithstanding the Directorate's views on the breach outlined in Section 4.1.1 above, the Directorate also considers Sections 8-9, 9-4 and 11-3 of the NIA to constitute a disproportionate restriction on free movement, as set out below.

4.1.2.1 Disproportionate restriction on free movement

- (42) In addition to being in conflict with Article 21(1) of Regulation 883/2004, the Directive is of the preliminary view that Sections 8-9, 9-4 and 11-3 of the NIA are incompatible with the freedom of movement provided for under Article 28 EEA and Article 7(1)(b) of Directive 2004/38.
- (43) The aforementioned national provisions restricting such stays abroad for concerned persons may also entail an unjustifiable restriction under both Article 31 EEA on the freedom of establishment and Article 36 EEA on the freedom to provide services, for example insofar as concerned recipients of the aforementioned benefits simultaneously might be e.g. tourism service recipient while staying in other EEA States.
- (44) The considerations set out in Section 4.1.1 above concerning the principle of loyalty and legal certainty apply equally to national provisions which are incompatible with free movement provisions, as well as those which form part of the legal basis for imposing criminal sanctions under Norwegian criminal law.

¹⁹ Case E-7/97 *EFTA Surveillance Authority v Norway*, para 16.

- (45) The Directorate recalls that Article 28 EEA provides for the freedom of movement for workers in the EEA. This entails the right to leave the home State and reside in another EEA State without being placed at a disadvantage.²⁰ Moreover, economically inactive persons enjoy the same right under Article 7(1)(b) of Directive 2004/38. The EFTA Court has ruled that Article 7(1)(b) of Directive 2004/38 prohibits home EEA States from imposing measures which hinder an economically inactive person from moving to another EEA State.²¹
- (46) The Directorate takes the view, firstly, that the *stay in Norway* requirement in Sections 8-9, 9-4 and 11-3 NIA constitutes a hindrance to the freedom of movement of the concerned persons, as it discourages any stay in or moving of residence to another EEA State.
- (47) Secondly, the requirement of *stay in Norway* is liable to deter recipients of cash benefits under the NIA, who are already staying or reside in another EEA States and who are subsequently informed about the *stay in Norway* criteria in the NIA, from continuing their stay abroad.
- (48) In the preliminary view of the Directorate, the *stay in Norway* requirement amounts to a restriction of Article 28 EEA and Article 7(1)(b) of Directive 2004/38. In certain situations, the *stay in Norway* requirement could also be considered to constitute a restriction pursuant to Articles 31 and 36 EEA. Norway has not provided any justification for these restrictions or sought to argue that they are justified and/or proportionate.
- (49) Accordingly, as its information presently stands, the Directorate must conclude that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the National Insurance Act, Norway has failed to fulfil its obligations pursuant to Article 28 EEA and Article 7(1)(b) of Directive 2004/38 and Article 3 EEA.

4.1.2.2 Disproportionate restriction on free movement – criminal sanctions

- (50) Additionally, the above provisions of the NIA, as well as Section 25-12 of the NIA, read in conjunction with Section 221 and 371-374 of the Penal Code, have been applied in such a way that persons appear to have been sanctioned, in some cases even imprisoned, for exercising their right to free movement.
- (51) Bearing in mind that around 40 individuals had been sentenced to prison²² and around two thousand people had received requests to pay back benefits, the Directorate in its letter of 4 November 2019, requested Norway to explain the system of penalties for breaches of the NIA and how it complied with the EEA law principle of proportionality.
- (52) In its reply, the Norwegian Government explained that a person who provides false information or withholds information of importance to his or

²⁰ Case C-415/93 *Bosman*, paras. 94-96; Case C-318/05 *Commission v Germany*, paras. 114-115; Case C-269/09 *Commission v Spain*, paras. 52-54; and Case C-187/15 *Pöppel*, paras. 23-24.

²¹ Case E-26/13 *Gunnarsson* para. 82.

²² Some up to eight months.

her social security rights might be criminally liable to a fine based on Section 25-12 of the NIA. This provision only applies if the offence is not subject to the stricter provisions in the Penal Code.²³

- (53) Norway also provided an overview of the relevant, stricter provisions of the Penal Code such as Section 221 on false statements and Sections 371-374 on fraud.
- (54) Norway explained that general principles for determining the penalty for social security fraud have been developed through the case-law of the Supreme Court. The most important factors are the degree of culpability and the extent of the fraud. Considerations of general deterrence are particularly important in such cases, since social security benefits are to a large extent based on self-declarations.
- (55) Norway takes the view that penalties for violations of the NIA are determined in accordance with the principle of proportionality, reflecting both the degree of culpability and the extent of the fraud, as well considerations of general deterrence.
- (56) Finally, Norway stressed that any punishment would of course be disproportionate for a conviction based on conduct which did not constitute a wrongful act. The Directorate shares this position.
- (57) Notwithstanding Norway's explanations, the Directorate is of the view that criminal sanctions such as those imposed pursuant to the abovementioned provisions of the NIA and the Penal Code, are a disproportionate restriction on the free movement of the concerned persons, where the exercise of free movement by the individuals concerned elevates the conduct to a criminal offence. It appears that there are several examples of criminal convictions as well as imprisonment due to such *stays* in other EEA States. It is clear that a sanction imposed on persons for exercising their right to free movement can never be proportionate.
- (58) The EFTA Court clarified in *Dr. A* that:

“Accordingly, the EEA States retain the competence to take disciplinary action and impose criminal sanctions (...) provided that the general principles of EEA law are respected.”²⁴

- (59) As regards the proportionality test in particular, the CJEU has held that:

“In particular, the Court has held that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality (see, by analogy, Case C-81/12 Asociația Accept [2013] ECR I-0000, paragraph 63 and the case-law cited).”²⁵

²³ Unofficial translation available [here](#).

²⁴ Case E-1/11 *Dr. A*, para. 73.

²⁵ Case C-418/11 *Texdata*, para. 51.

- (60) The Directorate further notes that as the EFTA Court has held, *inter alia* in Case E-9/11 *EFTA Surveillance Authority v The Kingdom of Norway*²⁶, that national rules of the EEA States which restrict fundamental freedoms, such as the free movement of persons, must satisfy the principle of legal certainty. In the case at hand, it does not appear obvious from a reading of the relevant national legislation that the consequence of *staying* abroad while receiving cash benefits could be the imposition of criminal sanctions, including imprisonment.
- (61) Where national law does not satisfy this EEA law requirement of legal certainty, clarity and precision, the lack of transparency in itself suggests that the relevant measure restricts the rights conferred by EEA law to a disproportionate extent,²⁷ and therefore is not in line with EEA law.
- (62) Accordingly, as its information presently stands, the Directorate must conclude that by maintaining in force Sections 8-9, 9-4, 11-3 and 25-12 of the National Insurance Act, read in conjunction with Sections 221 and 371-374 of the Penal Code, and as applied by NAV and national courts, making stays or residence in other EEA States punishable as a criminal offence in certain situations, Norway has failed to fulfil its obligations pursuant to Article 28 EEA and Article 7(1)(b) of Directive 2004/38.
- (63) The national provisions restricting such *stays* in other EEA States for concerned persons may also, depending on the circumstances, entail an unjustifiable restriction under Article 31 EEA on the freedom of establishment and Article 36 EEA on the freedom to provide services.

4.2 Identification of affected individuals and appropriate remedies

- (64) In its reply letter, the Norwegian Government informed the Authority that acquiring an full overview of the individuals affected by the wrongful application of Article 21 of Regulation 883/2004 was challenging. Therefore, persons that had been convicted or charged or those who had wrongly been sent requests to repay benefits would be prioritised. Estimates indicated that around 2400 persons had received wrongful requests to pay back benefits, of which most related to work assessment allowances. Around 40 individuals had received prison sentences. It would be “extremely difficult” to identify all others affected by the wrongful application of Article 21 of Regulation 883/2004, according to Norway.
- (65) Further, Norway informed the Authority that it was considering setting up a special compensation scheme for those affected in order to provide appropriate remedies quickly and easily. To date, the Directorate is unaware of any steps taken by Norway to set up such a special compensation scheme or to process those cases where Article 21 of Regulation 883/2004 has been wrongly applied.

²⁶ Case E-9/11 *EFTA Surveillance Authority v The Kingdom of Norway* [2012] EFTA Ct. Rep. 442, paragraphs 99-100 and the case-law cited therein.

²⁷ Case C-318/10 *SIAT* [2012] ECR I-0000, paragraphs 58-59 and the case-law cited therein.

4.3 Correct and accurate information

- (66) The Directorate would like to emphasise that mutual trust and loyal co-operation are at the foundation of the Authority's relationship with the EEA EFTA States. This means that all dealings with the Authority should be conducted in the spirit of such co-operation. The Authority relies on the provision of correct and accurate information from the EEA EFTA States in order to fulfil the tasks entrusted to it under the EEA Agreement as well as the Surveillance and Court Agreement.
- (67) Article 3 EEA requires the EEA EFTA States to take all measures necessary to guarantee the application and effectiveness of EEA law. The Directorate notes that a similar obligation follows from Articles 2 and 6 of the Surveillance and Court Agreement. The principle of effectiveness is inherent in the principle of loyalty, and requires observance of EEA law. The principle of loyalty also requires EEA EFTA States to practice transparency and disclose all relevant information to the Authority.

5 Conclusion

- (68) Based on the currently available information, the Directorate has now concluded that by maintaining in force Sections 8-9, 9-4 and 11-3 of the National Insurance Act, Norway has failed to fulfil its obligations pursuant to Article 21(1) of the Regulation (EC) 883/2004 on the coordination of social security systems as read in conjunction with Article 3 EEA.
- (69) Moreover, as its information presently stands, the Directorate must conclude that, by maintaining in force Sections 8-9, 9-4 and 11-3 of the National Insurance Act, Norway has also failed to fulfil its obligations pursuant to Article 28 EEA and Article 7(1)(b) of Directive 2004/38, as read in conjunction with Article 3 EEA.
- (70) Further, based on the available information, the Directorate must conclude that by maintaining in force Sections 8-9, 9-4, 11-3 and 25-12 of the National Insurance Act, read in conjunction with Sections 221 and 371-374 of the Penal Code, and as applied by NAV and national courts, making stays or residence in other EEA States punishable as a criminal offence in certain situations, Norway has failed to fulfil its obligations pursuant to Article 28 EEA and Article 7(1)(b) of Directive 2004/38.
- (71) The national provisions restricting such *stays* in other EEA States for concerned persons may also, depending on the circumstances, entail an unjustifiable restriction under Article 31 EEA on the freedom of establishment and Article 36 EEA on the freedom to provide services.
- (72) In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by *11 April 2020*. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Gunnar Thor Petursson
Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gunnar Thor Petursson.