REPORT FOR THE HEARING

in Case E-1/18

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).

I Introduction

1. The EFTA Surveillance Authority ("ESA") contends that, by maintaining in force provisions which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23, and EEA Supplement 2012 No 35, p. 450) (the "Equal Treatment Directive").

2. Norway contests the action.

II Legal background

EEA law

3. Article 70 of the Agreement on the European Economic Area ("EEA" or "EEA Agreement") reads:

> *The Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII.*

The Equal Treatment Directive

4. The Equal Treatment Directive was incorporated into the EEA Agreement with certain adaptations at point 21b of Annex XVIII to the Agreement by Decision of the EEA Joint Committee No 33/2008 of 14 March 2008 ("Decision No 33/2008").[1] Constitutional requirements were indicated and the decision entered into force on 1 February 2009.

5. Recitals 14, 22, 24, and 26 of the Equal Treatment Directive read:

> *(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93 and C-351/00, that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.*
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> *(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.*
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> *(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a*

[1] OJ 2008 L 182, p. 30, and EEA Supplement 2008 No 42, p. 18.

means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life, Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

6. Article 1 of the Equal Treatment Directive reads in extract:

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

…

7. Article 2(1)(a) and (b) of the Equal Treatment Directive reads:

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

8. Article 3 of the Equal Treatment Directive, with the adaption provided for in Decision No 33/2008, reads:

> *With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

9. Article 14(1)(c) of the Equal Treatment Directive reads:

> *1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:*
>
> *…*
>
> *(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty*;

10. Article 16 of the Equal Treatment Directive reads:

> *This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.*

11. Article 28 of the Equal Treatment Directive reads:

> *1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.*
>
> *2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.*

The Pregnant Workers Directive

12. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) (the "Pregnant Workers Directive") was incorporated at point 16d of Annex XVIII to the

Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994.[2] Constitutional requirements were indicated and the Decision entered into force on 19 October 1994. The Pregnant Workers Directive was amended by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21, and EEA Supplement 2014 No 6, p. 149) and Directive 2014/27/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 65, p. 1). These two directives were added to point 16d of Annex XVIII to the Agreement by Decisions of the EEA Joint Committee No 105/2008 of 26 September 2008,[3] and No 239/2014 of 24 October 2014[4] respectively.

13. The 14th and 17th recitals of the Pregnant Workers Directive read:

> …
>
> *Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;*
>
> …
>
> *Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;*

14. Article 1(1) of the Pregnant Workers Directive reads:

> *1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.*

15. Article 8 of the Pregnant Workers Directive reads:

> *1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.*

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[2] OJ 1994 L 160, p. 1, and EEA Supplement 1994 No 17, p. 1.
[3] OJ 2008 L 309, p. 31, and EEA Supplement 2008 No 70, p. 20.
[4] OJ 2015 L 230, p. 46, and EEA Supplement 2015 No 52, p. 45.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

16. Article 11(2)(b) and Article 11(3) of the Pregnant Workers Directive read:

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized in this Article, it shall be provided that:

…

2. in the case referred to in Article 8, the following must be ensured:

…

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

The Parental Leave Directive

17. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13, and EEA Supplement 2015 No 58, p. 590) (the "Parental Leave Directive") was incorporated into the EEA Agreement at point 31a of Annex XVIII to the Agreement by Decision of the EEA Joint Committee No 40/2011 of 1 April 2011.[5] Constitutional requirements were indicated and the decision entered into force on 1 May 2012.

18. The Annex to the Parental Leave Directive is entitled "Framework Agreement on Parental Leave".

19. Points 12 and 19 of the General Considerations to the Framework Agreement on Parental Leave read:

12. Whereas in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective

[5] OJ 2011 L 171, p. 41, and EEA Supplement 2011 No 37, p. 48.

measures should be taken to encourage a more equal sharing of family responsibilities between men and women;

19. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave as well as the role of income among other factors in the take-up of parental leave when implementing this agreement;

20. Points 1 and 2 of Clause 1 of the Framework Agreement on Parental Leave read:

1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice.

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.

21. Clause 2 of the Framework Agreement on Parental Leave reads:

1. This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.

2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.

22. Point 5 of Clause 5 of the Framework Agreement on Parental Leave reads:

All matters regarding social security in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law and/or collective agreements, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national

law, collective agreements and/or practice, taking into account the role of income – among other factors – in the take-up of parental leave.

National law[6]

The Children Act

23. Pursuant to Section 2 of the Act of 8 April 1981 No 7 on Children and Parents (*Lov 8. april 1981 No. 7 om barn og foreldre (barnelova)*; the "Children Act"), the woman who has given birth to a child shall be regarded as the "mother" of the child. Pursuant to Sections 3, 4 first paragraph, and 6 of the Children Act, paternity (i.e. the "father" of a child) may be established by marriage to the "mother", declaration, or judgment. Similarly, pursuant to the first paragraph of Section 4a of the Children Act, a woman is considered the "co-mother" of a child, following either marriage to the "mother", declaration, or judgment.

24. Pursuant to Section 4a third paragraph of the Children Act, the provisions in laws and regulations that apply to a "father" shall equally apply to a "co-mother".

The Working Environment Act

25. Pursuant to Section 12-2 of the Act of 17 June 2005 No 62 on Working Environment, Working Hours and Employment Protection (*Lov 17. juni 2005 No. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven))* (the "Working Environment Act"), a woman is entitled to 12 weeks leave during the pregnancy. The first six weeks after the child is born are compulsory maternity leave, pursuant to Section 12-4 of the Working Environment Act.

26. Pursuant to Section 12-5 of the Working Environment Act, parents have the right to 12 months parental leave.

The National Insurance Act

27. The Act of 2 February 1997 No 19 on National Insurance (*Lov 2. februar 1997 No. 19 om folketrygd (folketrygdloven)*) (the "National Insurance Act") establishes the entitlement of parents to parental benefits, i.e. benefits from the National Insurance Scheme in connection with pregnancy, birth or adoption of a child. The National Insurance Act has been amended several times. The most recent amendments took effect after the expiry of the two-month period for compliance with ESA's reasoned opinion of 15 November 2017. The following provisions of the National Insurance Act are reproduced as they read at the material time, i.e. at the end of the two-month period for compliance with ESA's reasoned opinion.

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[6] All translations of national provisions are unofficial.

28. At the material time, Section 14-1 of the National Insurance Act read:

The purpose of the benefits provided pursuant to this chapter is to secure income for parents in connection with pregnancy, birth and adoption.

29. Section 14-6 of the National Insurance Act read:

The right to parental benefits is obtained through employment activities. Both the mother and the father may obtain the right to parental benefits by being employed with pensionable income (Section 3-15) for at least six of the last ten months before that person starts receiving the benefits, see Section 14-10, first and second paragraph, and 14-14 second paragraph.

…

Equal to employment activities is a period when subsistence benefits are paid in the form of unemployment benefits during unemployment under Chapter 4, sickness benefits under Chapter 8, benefits during a child's illness etc. under Chapter 9 or work assessment allowance under Chapter 11, or either parental benefits or pregnancy benefits under this chapter.

Equal to occupational activity is also a period with

a) salary from the employer during leave in connection with further education,

b) severance pay pursuant to Section 13(6) of the Act of 4 March 1983 No. 3 on the State's civil servants etc.,

c) severance pay pursuant to the third paragraph of Section 24 of the Act of 28 July 1959 No. 26 on the State Pension fund,

d) severance pay from the employer,

e) military service or mandatory civilian defence duty.

30. Section 14-9 of the National Insurance Act read:

In case of birth, the benefit period is 245 benefit days (49 weeks) with full rate or 295 benefit days (59 weeks) with reduced rate. The benefit period after birth is 230 benefit days (46 weeks) with full rate or 280 benefit days (56 weeks) with reduced rate.

In case of adoption, the benefit period is 230 benefit days (46 weeks) with full rate or 280 benefit days (56 weeks) with reduced rate.

Full rate implies that the parental benefit is paid with 100 per cent of the calculation basis. Reduced rate means that the parental benefit is paid with 80 per cent of the

calculation basis. The beneficiary chooses between full or reduced rate at the start of the benefit period, and the choice is valid for the whole benefit period. If both parents receive parental benefits, they must choose the same rate.

If the mother gives birth to multiple children at the same time or several children are adopted at the same time, the benefit period is extended with 25 benefit days (5 weeks) for each child that exceeds one if full rate is chosen. If reduced rate is chosen, the benefit period is extended with 35 benefit days (7 weeks). The provisions in Section 14-10 first and sixth paragraph apply accordingly.

The benefit period can be shared between the parents if both parents fulfil the conditions for right to parental benefits in accordance with Section 14-6. Exempted from sharing are the last 15 benefit days (3 weeks) before and the first 30 benefit days (6 weeks) after the birth, which is the part of the benefit period that is reserved for the mother at birth. Exempted from sharing are also 10 weeks that are reserved for the father (father's quota) and 10 weeks that are reserved for the mother (mother's quota), see Section 14-12. The first 6 weeks after birth that are reserved for the mother, are included in the mother's quota. The mother's quota cannot be taken before birth.

…

31. Section 14-12 of the National Insurance Act read:

If both parents satisfy the conditions for entitlement to parental benefits, 50 benefit days (10 weeks) of the benefit period are reserved for the father (father's quota) and 50 benefit days (10 weeks) of the benefit period are reserved for the mother (mother's quota). The first 30 benefit days (6 weeks) after birth that are reserved for the mother, are part of the mother's quota.

The father can take the father's quota irrespective of whether the conditions in Section 14-13 first paragraph are fulfilled….

…

32. Section 14-13 of the National Insurance Act read:

The father can receive parental benefits only if the mother after birth or adoption

a) starts working,

b) takes officially approved full-time education,

c) takes officially approved education combined with work that together provides full-time occupation,

d) due to illness or injury is dependent on help to look after the child,

e) is hospitalised,

f) attends a full-time introductory program pursuant to Chapter 2 of the Introduction Act,

g) attends a full-time qualification program under the Act of 18 December 2009 No 131 on Social Services in the Welfare Administration.

If the mother works part-time after the birth or adoption, the father's parental benefits are reduced corresponding to the reduction in the mother's working hours. If the mother's work percentage amounts to at least 75 per cent of full working hours, the father's parental benefits are calculated in accordance with his work percentage.

If the mother receives a partial parental benefit, see Section 14-16, the father's parental benefits under letter a) cannot constitute a larger part of the full benefit than that which corresponds to the mother's work percentage.

...

33. Section 14-14 of the National Insurance Act read:

If only the father has the right to parental benefits, the benefit period is limited to the benefit period after the birth or the taking into care, cf. Section 14-9. Both in case of birth and adoption deduction shall be made for the part of the benefit period reserved for the mother after birth, cf. Section 14-9 fifth paragraph. It is a prerequisite that the conditions in Section 14-13 are fulfilled during the period and within the benefit period after the birth or the taking into care, see Section 14-9 first and second paragraphs. The father's benefit period is reduced continuously when the conditions in Section 14-13 are not fulfilled.

The father can receive parental benefits only when the conditions in Section 14-13 are fulfilled.

Irrespective of the conditions in Section 14-13, the father can receive parental benefits in as many benefit days as the duration of the father's quota, see Section 14-12 first paragraph, if the mother receives a disability pension from the national insurance.

III Pre-litigation procedure

34. ESA opened a case, on its own initiative, with a view to assessing whether the Norwegian provisions concerning the right to parental leave comply with the Parental Leave Directive and the Equal Treatment Directive.

35. ESA informed the Norwegian Government of the opening of the case by a letter dated 28 October 2015 and requested information from the Norwegian Government. The Norwegian Government replied by letter on 15 December 2015.

36. On 13 July 2016, ESA sent Norway a letter of formal notice, concluding that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which renders the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is reciprocally not the case, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Equal Treatment Directive as adapted to the EEA Agreement by Protocol I thereto, and Clauses 2.1 and 2.2 of the Annex to the Parental Leave Directive, as adapted to the EEA Agreement by Protocol I thereto.

37. By letter dated 10 October 2016, Norway submitted to ESA its formal observations on the letter of formal notice, rejecting the view adopted by ESA.

38. On 15 November 2017, ESA delivered its reasoned opinion, in which it concluded that by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the fathers' entitlement to paid parental leave dependent upon the mother's situation whilst this is not the case in reverse circumstances, Norway has failed to fulfil its obligations arising from Article 14(1)(c) read in conjunction with Article 2(1)(c) of the Equal Treatment Directive as adapted to the EEA Agreement by Protocol I thereto. Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), ESA required Norway to take the measures necessary to comply with the reasoned opinion within two months following its receipt.

39. By letter dated 22 January 2018, Norway responded to the reasoned opinion, maintaining its position and providing some additional comments.

IV Procedure and forms of order sought by the parties

40. On 13 July 2018, ESA brought an action under the second paragraph of Article 31 SCA requesting the Court to:

1. *Declare that, by maintaining in force provisions such as Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, which render the father's entitlement to parental benefits dependent on the mother's situation whereas the mother's entitlement is not dependent on the father's situation, Norway has failed to fulfil its obligations under Article 14(1)(c) of the Act referred to at point 21b of Annex XVIII to the EEA Agreement (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the*

implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).

2. *Order the Kingdom of Norway to pay the costs of these proceedings.*

41. On 18 September 2018, Norway submitted a statement of defence, contesting the application and requesting the Court to declare that:

1. *The application is unfounded.*

2. *The EFTA Surveillance Authority bears the cost of the proceedings.*

42. On 19 October 2018, ESA submitted its reply. On 22 November 2018, Norway submitted its rejoinder.

43. On 16 November 2018, the European Commission ("the Commission") submitted written observations.

V Written procedure before the Court

44. Written arguments have been received from the parties:

- ESA, represented by Claire Simpson, Erlend Leonhardsen, Catherine Howdle, and Carsten Zatschler, Members of its Department of Legal and Executive Affairs, acting as Agents;

- Norway, represented by Kristin Hallsjø Aarvik, Ketil Bøe Moen, Advocates, Office of the Attorney General (Civil Affairs), and Ingunn Jansen, Senior Adviser, Ministry of Foreign Affairs, acting as Agents.

45. Pursuant to Article 20 of the Statute of the Court written observations have been received from:

- the Commission, represented by Anna Szmytkowska and Jonathan Tomkin, Members of its Legal Service, acting as Agents.

VI Summary of the pleas in law and arguments submitted to the Court

ESA

Introductory remarks

46. ESA opened this case on its own initiative, following developments in the case law of the Court of Justice of the European Union ("ECJ"), in particular the judgment in

Maïstrellis.[7] According to ESA, *Maïstrellis* concerned a provision on paid parental leave very similar to the provisions contested in the present case. The provisions at issue in the present case have been challenged in Norwegian courts,[8] which found them to a large extent to be the same as those at stake in *Maïstrellis*.[9] However, the Norwegian courts refrained from setting aside the national legislation.

47. According to ESA, this case concerns the conditions of the National Insurance Act on entitlement to parental benefits, the right to which is earned by fathers by working. The main rule is that each parent obtains an individual right to parental benefits through employment or similar activities, such as salaried leave during education. ESA refers to this as "the Section 14-6 employment criteria". Benefits are calculated by reference to the parent's salary, and the length of the parental benefit period depends on the rate (%) at which the benefits are paid.[10] If each parent independently meets the Section 14-6 employment criteria, each parent has an individual right to ten weeks of the parental benefit period, which is "reserved" for him/her. The remaining part of the parental benefit period is a "common period" which may be divided between the parents as they wish.

48. ESA submits that while the key conditions for acquiring the right to parental benefits are the same for the mother and the father, the National Insurance Act contains specific additional rules, which only apply to the father. First, the father is only entitled to parental benefits as part of the common period if the mother undertakes certain activities after birth/adoption ("the common period activity requirement"). Second, if after the birth/adoption the mother works less than 75%, the father's benefit is calculated not on basis of his own previous working time, but on the basis of the mother's work percentage ("the part-time rule"). No such provision limits the calculation of the parental benefit for the mother. Finally, if only the father meets the Section 14-6 employment criteria, he will receive no benefits, unless the mother carries out Section 14-13 activities during the whole of his benefit period ("the whole period activity requirement"). His benefits may be pro-rated again, according to the part-time rule, if the mother works part time.

49. In this regard, ESA considers that some of the rules on parental benefits (Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act) directly discriminate against fathers on grounds of sex. Under the relevant provisions of Norwegian law, whether a father is entitled to parental benefits in full, in part

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7 Judgment in *Maïstrellis*, C-222/14, EU:C:2015:473.

8 Reference is made to the Decision of the Social Security Court (*Trygdretten*) of 29 January 2016, TRR-2015-1542; Decision of the Social Security Court of 26 February 2016, TRR-2015-2010; Decision of the Social Security Court of 8 April 2016, TRR-2015-3349; Decision of the Social Security Court of 28 October 2016, TRR-2015-3925; Decision of the Social Security Court of 28 April 2017, TRR-2016-1688; Decision of the Social Security Court of 12 May 2017, TRR-2016-1405; and Decision of the Social Security Court of 7 July 2017, TRR-2016-809.

9 Judgment in *Maïstrellis*, cited above.

10 According to Section 14-9 of the National Insurance Act, benefits are paid - in case of birth - either at full rate (100%) for 49 weeks, or at reduced rate (80%) for 59 weeks. In case of adoption, the benefit period is 46 weeks at full rate (100%) or 56 weeks at reduced rate (80%). The beneficiary may choose which rate is applied and if both parents receive parental benefits, they must choose the same rate.

- or at all - depends on whether the mother is or has been working. In contrast, the mother's rights to such benefits are independent of the father's activities. Since mothers and fathers are in a comparable situation when it comes to bringing up children, the different treatment of mothers and fathers in relation to parental benefits, unlawfully discriminates against fathers on grounds of sex, in breach of Article 14(1)(c) of the Equal Treatment Directive. Moreover, such discrimination cannot be justified as "positive action" under Article 3 of the Equal Treatment Directive.

50. In the course of the investigation, ESA received a number of complaints on the issue. ESA adds that the provisions of the National Insurance Act on parental benefits were amended over the years. However, the amendments were very limited in scope and do not remedy Norway's failure to fulfil its obligations as set out in the present application.

The relevant provisions are "employment and working conditions"

51. ESA considers that the provisions at issue concern "employment and working conditions", within the meaning of Article 14(1)(c) of the Equal Treatment Directive. This follows from the judgment in *Maïstrellis*,[11] which concerned the right to paid parental leave, and not the right to leave, as argued by Norway. According to ESA, the ECJ did not give any indication that the "payment part" of *Maïstrellis* – had it ruled on it specifically – should be treated any differently than the right to leave. Even if it is considered that *Maïstrellis* only concerned the right to leave as such, as argued by Norway, it is hard to see why parental benefits are in any way less connected with "employment and working conditions" than a period of unpaid leave; in particular since such benefits effectively replace a parent's salary during his/her leave of absence from work.

52. In addition, ESA contends that, although the ECJ ruled in *Hofmann*[12] that maternity leave "which the State encourages [mothers] to take by the payment of an allowance" was a protective measure, it proceeded on the basis that the leave and associated allowance were otherwise working conditions that fell *prima facie* within the scope of the old Equal Treatment Directive.[13]

53. Moreover, ESA maintains that the right to parental benefits in this case is intimately connected with employment. First, the entitlement to these benefits depends, pursuant to Section 14-6 of the National Insurance Act, on whether the parent concerned has been working for a sufficient period prior to the benefit period. Second, the amount of the parental benefit will be calculated by reference to the salary of the parent concerned. Third, the benefit depends, from the father's perspective, on whether the mother does or does not work (or is in a situation deemed equivalent to work) after birth/adoption, and, if so, how much the mother works. Fourth, from the mother's perspective, the relevant provisions

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[11] Judgment in *Maïstrellis*, cited above.

[12] Reference is made to the judgment in *Hofmann*, 184/83, :EU:C:1984:273, paragraphs 22 and 25 to 26.

[13] Reference is also made to the Opinion of Advocate General Darmon in *Hofmann*, 184/83, EU:C:1984:231; and the judgment in *Commission* v *Italy*, 163/82, EU:C:1983:295.

require the mother to go back to work (or be in a situation deemed equivalent to work) after birth/adoption; if not, the father will not receive any parental benefits. Again, how much the mother works is relevant. Finally, according to a recent legislative White Paper, for example, the purpose of the rules is to ensure that "mothers and fathers can combine care for the child with employment activities".[14]

54. Thus, ESA disagrees with the position advanced by Norway that the relevant provisions are not "employment and working conditions". In particular, Norway's contention that this is so because the relevant provisions are part of a national social security scheme must be rejected. It is settled ECJ case law that social security provisions fall within the scope of the Equal Treatment Directive, provided that their subject matter is "access to employment, including vocational training and promotion, or working conditions".[15]

55. Furthermore, ESA submits that Norway's choice to grant paid parental leave through a combination of legislative acts and not through a single act should not, of itself, change the outcome of the case. It is true that without provisions on leave, an employee cannot stop working; however, without provisions on benefits an employee may not be able to afford to take the leave at all. The provisions work hand in hand. For example, recitals 19 and 20 of the Framework Agreement on Parental Leave (Annex to the Parental Leave Directive) recognise the role of income on the take-up of parental leave.

56. ESA considers that the cases cited by Norway in support of its position do not strengthen Norway's argument. Contrary to Norway's assertion, case law establishes that where an employment relationship confers entitlement to a benefit, the fact that the benefit is unaffected by the loss of employment does not mean that the benefit no longer falls within the scope of "working conditions". In *Meyers*[16] - a case similar to the present application – the ECJ rejected arguments to the same effect as those advanced by Norway here. In other words, in *Meyers*, as in the present case, the fact that a number of people receiving benefits may become unemployed following the initial award was not in itself sufficient to sever the link with "working conditions". In addition, unlike the benefits at stake in *Jackson and Cresswell*,[17] ESA considers the benefits at stake in the present case to be sufficiently connected with work to fall within the scope of the Equal Treatment Directive. Thus, both *Meyers* and *Jackson and Cresswell* are either neutral or reinforce ESA's position, namely, that the national provisions are sufficiently connected with

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[14] Reference is made to a Proposal from the Ministry to Parliament of 10 April 2018 regarding the changes that entered into force on 1 July 2018, Prop. 74 L (2017-2018), *Endringer I folketrygdloven og kontantstøtteloven (innfasing av treadling av foreldrepenger mv.)*, p. 2.

[15] Reference is made to the judgment in *Jackson and Cresswell*, C-63/91 and C-64/91, EU:C:1992:329, paragraph 28; and the judgment in *Meyers*, C-116/94, EU:C:1995:247, paragraphs 12, 13, 17, 20, 21 and 24.

[16] Judgment in *Meyers*, cited above.

[17] Judgment in *Jackson and Cresswell*, cited above.

employment to constitute "working conditions" within the meaning of the Equal Treatment Directive.

The mother and father are in comparable circumstances

57. According to ESA, the present case concerns parental benefits earned by carrying out "employment activities" since the employment criteria of Section 14-6 of the National Insurance Act must be met. Pursuant to Section 14-5 of the National Insurance Act, these benefits are paid "to secure income for parents in connection with ... birth and adoption". As stated in a Ministerial proposal to Parliament, the "parental benefit scheme is important to ensure children a good and safe start in life, and that mothers and fathers can combine the care for the child with employment activities".[18]

58. It is settled ECJ case law that the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing-up of children.[19] ESA considers that the key point of parental benefits is to allow parents to spend time with their children, which is something that mothers and fathers can do equally. According to the ECJ, the fact that women tend to bring up children more than men and therefore tend to suffer more work-related disadvantages than men does not prevent the situations being comparable. A man who decides to bring up children exposes himself to the same work-related disadvantages as a woman and is, thus, in a comparable position.[20]

The relevant provisions are directly discriminatory

59. ESA considers that the fact that Norway is not obliged by the Parental Leave Directive to grant paid parental leave does not exempt Norway from the application of the Equal Treatment Directive. In other words, if Norway chooses to grant parental benefits which fall within the category of "employment and working conditions", it must do so in line with the principle of equal treatment of men and women, as required by the Equal Treatment Directive in application of Article 70 EEA.[21]

60. According to ESA, there can be no doubt that the provisions at issue directly discriminate against fathers, in breach of Article 14(1)(c) of the Equal Treatment Directive. The father's rights to benefits are made contingent on whether the mother meets the criterion in Section 14-13 of the National Insurance Act after birth or adoption, and on how much time she works. No such conditions are attached to the mother's rights to benefits. It

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[18] Reference is made to a Proposal from the Ministry to Parliament of 10 April 2018, cited above.

[19] Reference is made to the judgment in *Maïstrellis*, cited above, paragraph 47; the judgment in *Griesmar*, C-366/99, EU:C:2001:648, paragraphs 46, 53, and 56; the judgment in *Roca Álvarez*, C-104/09, EU:C:2010:561, paragraph 24; the Opinion of Advocate General Kokott in *Roca Álvarez*, C-104/09, EU:C:2010:254, point 30; and the judgment in *Commission* v *France*, 312/86, EU:C:1988:485, paragraph 14.

[20] Reference is made to the judgment in *Griesmar*, cited above, paragraph 56.

[21] Reference is made to Case E-1/02 *ESA* v *Norway* [2003] EFTA Ct. Rep. 1, paragraph 45.

is settled ECJ case law that differences in treatment of this nature are directly discriminatory and prohibited by the Equal Treatment Directive.[22]

61. ESA finds it is instructive to consider the alternative, i.e. what the position would be if the parental benefits are not considered "working conditions". It contends that although the situation would, more generally, fall within the scope of EEA law - since parental leave is granted by the Parental Leave Directive and Regulation (EC) No 883/2004[23] applies to the coordination of such benefits - sex discrimination would be possible in respect of such benefits. The fundamental EEA principle of equal treatment[24] would therefore be circumvented, which would be an undesirable outcome.

62. ESA stresses that it only challenges the legality of Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act, and not the parental benefits regime as a whole. ESA does also not allege that parents are in comparable circumstances in periods that are specific to pregnancy or maternity leave, including the ten-week mother's share. It is also not disputed that Norway has a measure of discretion in how it introduces such maternity or other parental provisions, provided this is in line with EEA law. However, by allocating benefits into three periods with different purposes – (i) the mother's share, (ii) the father's share and (iii) the common period, which can be taken by either parent - Norway has made a deliberate policy choice.

63. According to ESA, the common period is not protective, as can be seen from the legislative history, its labelling and design, the information given to ESA on the implementation of the Pregnant Workers Directive, and the fact that it is not solely the mother's choice to take extra common period leave. In particular, the alleged "protective purpose" and the "activity requirement" apply at the same time, during the common period. These two purposes are at odds, if not mutually inconsistent. This leads to the conclusion that the benefits in the common period are not for protection of the mother, but for the bringing up of children by either parent on an equal footing. ESA submits further that the exception in Article 28(1) of the Equal Treatment Directive applies only when the focus of the measure is genuinely – and not just incidentally or partially – on protection.

64. ESA submits that directly discriminatory measures within the meaning of Article 14(1)(c) of the Equal Treatment Directive cannot be objectively justified. This follows from the ECJ's case law[25] and, inter alia, from the definitions of direct and indirect

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[22] Reference is made to the judgment in *Maïstrellis*, cited above; and the judgment in *Roca Álvarez*, cited above.

[23] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), incorporated into the EEA Agreement by Decision of the Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33, and EEA Supplement 2011 No 54, p. 46).

[24] Reference is made to Case E-1/02 *ESA* v *Norway*, cited above, paragraph 45.

[25] Reference is made to the judgment in *Kuso*, C-614/11, EU:C:2013:544, paragraphs 50 to 53 (in particular paragraph 51); and the judgment in *Kleist*, C-356/09, EU:C:2010:703, paragraph 41.

discrimination in the Equal Treatment Directive. Only indirect discrimination can be objectively justified.

The relevant provisions do not fall within Article 3 of the Equal Treatment Directive

65. ESA maintains that the provisions at issue do not fall within Article 3 of the Equal Treatment Directive. Pursuant to Article 1 of the Equal Treatment Directive, the purpose of that directive is to ensure equal treatment between men and women, i.e. to treat men and women in comparable situations the same way. Article 3 of the Equal Treatment Directive, which permits measures that deviate from the purpose of the Directive, constitutes an exception and must, therefore, be interpreted strictly.[26] Both the Court and the ECJ have held that Article 3 "is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society".[27] Thus, Article 3 concerns the authorisation – in appropriate cases – of "positive action".

66. ESA considers that Article 3, according to its wording, applies to "specific advantages" which are provided to the "underrepresented sex" "in order to make it easier" for that sex "to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". However, the provisions at issue do not confer a "specific advantage" on women to help (i.e. to "make it easier for") them get back to work or compensate them for the disadvantages of childbearing. On the contrary, the provisions at issue simply require women to go back to work/be in a situation deemed equivalent, and if they do not, the father of their child will receive no or only reduced parental benefits, and, hence, the family is financially penalised.

67. ESA contends that the effect of the provisions at stake may be entirely contrary to the desired aim, for example, in the situation where the woman stopped working for a number of years to have children and seeks to re-enter the labour market. In this situation, the ECJ has held that similar provisions might "far from ensuring full equality in practice between men and women in working life, [be] liable to perpetuate a traditional division of roles between men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties".[28]

68. To the extent that the provisions at issue are designed also to encourage fathers to spend time alone with their children, ESA maintains that the provisions cannot fall under Article 3 of the Equal Treatment Directive, since Article 3 concerns "specific advantages" for the underrepresented sex in order "to prevent or compensate for disadvantages in

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[26] Reference is made to Case E-1/02 *ESA* v *Norway*, cited above, paragraph 37; and the judgment in *Kalanke*, C-450/93, EU:C:1995:322, paragraph 21.

[27] Reference is made to the judgment in *Roca Álvarez*, cited above, paragraph 33; and Case E-1/02 *ESA* v *Norway*, cited above, paragraph 37.

[28] Reference is made to the judgment in *Maïstrellis*, cited above, paragraph 50; and the judgment in *Lommers*, C-476/99, EU:C:2002:183, paragraph 39.

professional careers". First, it is difficult to see which disadvantage for fathers in their professional careers the measure is intended to prevent or provide compensation for. Second, the provisions at issue do not confer any "specific advantages" on fathers, rather they are disadvantageous to fathers.

69. As regards the models of positive action identified by Advocate General Tesauro,[29] and relied upon by Norway, ESA submits that these models do not provide any guidance on what is permitted under Article 3 of the Equal Treatment Directive; nor have these models been recognised by the European Courts. If, however, the Court were to find these models relevant for the purposes of Article 3, ESA considers the third model identified by Advocate General Tesauro to be more appropriate than the second model relied upon by Norway. The most important aspect of the third model is that the action involves positive discrimination "as a remedy for the persistent effects of historical discrimination of legal significance". This model of action is accorded the strictest degree of scrutiny by the ECJ and the Court and, in ESA's view, the provisions at issue in this case do not pass the test of the relevant case law.[30]

70. Moreover, ESA considers that – even if Article 3 of the Equal Treatment Directive were to apply – the provisions at issue do not comply with the proportionality test.

71. In this regard, ESA disagrees with Norway's assertion that the relevant standard for review is to be found in *Philip Morris*.[31] ESA considers *Philip Morris* to concern the relevance of scientific uncertainty in the context of a measure designed to protect the health and life of humans. The aim forwarded by Norway is, however, not concerned with protection of the health and life of humans; it is more an aim of social policy in the field of employment. In sum, the test applied in *Philip Morris* is not relevant or appropriate in the present case. This means that the burden to demonstrate that the provisions at issue comply with the principle of proportionality lies with Norway.

72. As regards suitability, ESA considers it highly questionable that the provisions at issue are suitably thought through and targeted. Furthermore, the provisions at issue do not comply with the principle of consistency. The Court has established that in "accordance with this principle, a State must not take, facilitate or tolerate measures that would run counter the achievement of the stated objectives of a given national measure".[32] The ECJ has established a similar standard.[33] According to ESA, the relevant provisions do not meet this test.

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[29] Reference is made to the Opinion of Advocate General Tesauro in *Kalanke*, C-450/93, EU:C:1995:105, point 9.
[30] Reference is made to Case E-1/02 *ESA* v *Norway*, cited above; and the judgment in *Kalanke*, cited above.
[31] Reference is made to the judgment in Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 83.
[32] Reference is made to the judgment in Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 8, paragraph 43.
[33] Reference is made to the judgment in *Dickinger*, C-347/09, EU:C:2011:582, paragraph 56.

73. In addition, measures that automatically and unconditionally, and without any flexibility, give priority to one promoted group go beyond what is necessary.[34] In this regard, ESA submits, first, that the provisions at issue do not provide any flexibility. If the mother does not meet the common period/whole period activity requirement, the father automatically and unconditionally loses his right to parental benefits. Second, ESA considers that the duration of the provisions at issue is unlimited. The principle that fathers' rights to parental benefits are contingent upon activities undertaken by the mothers has been part of Norwegian law since 1978. It is settled case law that measures with no temporal limitation will exceed what is necessary.[35] Thus, the provisions at issue in this case, also for this reason, do not comply with the principle of proportionality.

74. Finally, ESA considers that Norway failed to demonstrate compliance with the principle of proportionality. The research referred to by Norway says little or nothing about the appropriateness or effect of the relevant provisions as such. Instead, it is concerned with the system of "parental leave schemes" in Norway in general or certain aspects of it, such as the father's share. It is difficult to understand how that research cited by Norway can in any way be seen as demonstrating that the changes starting in the 1990s can be attributed to the relevant provisions.

Conclusion

75. As a result, ESA considers that the provisions at issue in the present case - Section 14-13 first, second and third paragraphs and Section 14-14 first paragraph of the National Insurance Act – are incompatible with Article 14(1)(c) of the Equal Treatment Directive.

Norway

Introductory remarks

76. According to the Norwegian Government, the mother's right to maternity leave is implemented by a combination of two acts. The Working Environment Act concerns the right to leave, including a compulsory period of maternity leave, and the benefits in Chapter 14 of the National Insurance Act provide the mother with an adequate allowance during her leave. If the mother does not meet the criteria in Section 14-6, she will receive a lump sum payment instead of parental benefits, pursuant to Section 14-17 of the National Insurance Act. Thus, the rules on parental benefits in Chapter 14 of the National Insurance Act implement the Pregnant Workers Directive in domestic law. The leave granted to each parent under the Parental Leave Directive is implemented in domestic law through the Working Environment Act.

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[34] Reference is made to Case E-1/02 *ESA* v *Norway*, cited above; and the judgment in *Kalanke*, cited above.

[35] Reference is made to Case E-1/02 *ESA* v *Norway*, cited above, paragraph 53; and, by analogy, to the judgment in *Association Belge des Consommateurs Test-Achats*, C-236/09, EU:C:2011:100, paragraphs 31 to 33.

77. As regards the "common period" in the National Insurance Act, the Norwegian Government submits that if the parents wish for the father to receive parental benefits instead of the mother in the common period, the mother has to return to work or engage in a comparable activity. The activity requirement does not apply to the ten-week period reserved for the father. Accordingly, a father can claim parental benefits in this period even where the mother does not work or engage in any activity. The part-time rule in Section 14-13 second paragraph is a continuance or consequence of the activity requirement in Section 14-13 first paragraph. If only the father meets the requirement of Section 14-6, there are no "reserved periods" or "common period". The father can claim parental benefits (instead of the mother) during the entire parental benefits period if the mother meets the activity requirement.

Parental benefits fall outside the scope of the Equal Treatment Directive

78. According to the Norwegian Government, the case at issue concerns parental benefits which are not paid by the employer, but are provided to parents pursuant to a social security scheme. A social security benefit cannot be excluded from the scope of the Equal Treatment Directive solely because it is part of a national security system. However, the ECJ has stated in the context of Article 14 of the Equal Treatment Directive that such a scheme "will fall within the scope of that directive only if the subject matter is access to employment, including vocational training and promotion, or working conditions".[36] The subject matter of the parental benefits at issue in this case is not access to employment or working conditions. In the present case - like in *Jackson and Cresswell* - parental benefits are granted merely to provide parents with an income in connection with the birth or adoption of a child. The fact that the criteria of Section 14-6 of the National Insurance Act may incentivise parents to seek employment prior to starting a family in order to qualify for parental benefits is not sufficient for parental benefits to concern "access to employment" and fall within the scope of the Equal Treatment Directive. Parental benefits are not provided by a parent's employer, the right to parental benefits is separate to the right to parental leave from work, and parents who are not employed may receive parental benefits. Quite simply, the conditions governing a social security benefit which a parent can qualify for and receive while being unemployed cannot constitute "employment and working conditions".

79. The Norwegian Government does not agree with ESA that the facts and issues in *Maïstrellis* are similar to those in the present case. *Maïstrellis* concerned the right to parental leave, not the right to a social security benefit, such as parental benefits. This is clear from the question the ECJ considered. Although, in terms of the facts, the relevant national provisions in *Maïstrellis* concerned paid parental leave, the ECJ's findings, with respect to the Equal Treatment Directive, were limited to the conditions for granting parental leave. Furthermore, *Maïstrellis* should not be interpreted in the broad manner proposed by ESA. It is the right to leave that enables parents to interrupt their professional

[36] Reference is made to the judgment in *Jackson and Cresswell*, cited above, paragraph 28.

activities and, as such, has consequences for the exercise of such professional activities. In *Maïstrellis* the right to paid parental leave was provided in legislation applicable to civil servants, not in a national social security scheme. In other words, the basis for the right was the person's profession/occupation. The right did not apply to all citizens and was in addition to female civil servants' right to a separate maternity leave. In the present case, all employees are entitled to parental leave, under the Working Environment Act, and the right to parental leave is not dependent on the situation of the other parent. Consequently, the present case must be distinguished from *Maïstrellis*.

80. The Norwegian Government also disagrees with ESA's statement that the right to parental benefits is "intimately connected with employment". Where a social security benefit is intended merely to provide income support, it does not fall within the scope of the Equal Treatment Directive.[37] That the benefit might indirectly affect employment does not alter this position. Furthermore, while parents qualify for parental benefits through occupational activities, it is not – unlike the situation in *Meyers* – a condition for receiving parental benefits that the recipient is engaged in remunerative work when he or she receives parental benefit. A parent may receive parental benefits where he or she is unemployed (voluntarily or involuntarily). In such a scenario, the parent does not require "leave" from the employer. Further, the parental benefits do not replace the parent's "salary". This illustrates that the conditions for granting parental benefits are not employment conditions. It is inaccurate to assume, as ESA does, that "parental benefits are only paid while the parent is on leave from work". If the criteria of Section 14-6 of the National Insurance Act are met, the parent will receive parental benefits if he or she is unemployed (i.e. is not on leave from work). The parent cannot, however, work and receive benefits the same time (unless the parent works and claims parental benefits part time pursuant to Section 14-16 of the National Insurance Act).

81. Moreover, according to the Norwegian Government, the relevant test is not, as submitted by ESA, whether an employee can afford to take leave without receiving social security benefits to determine whether such benefits are "employment and working conditions". Member States are not obliged, under the Parental Leave Directive, to provide social security benefits during the minimum period of parental leave provided to workers under the directive.[38] It is clear that the provisions on leave and provisions on benefits do not go hand in hand under EEA law. The conditions for providing parents with social security benefits while on parental leave under national law fall outside the scope of the Parental Leave Directive, and the ECJ has confirmed that there is no obligation on Member States to provide social security benefits during parental leave.[39]

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[37] Ibid., paragraph 31.

[38] Reference is made to Point 5 of Clause 5 of the Framework Agreement on Parental Leave.

[39] Reference is made to the judgment in *Gómez-Limón Sánchez-Camacho*, C-537/07, EU:C:2009:462, paragraphs 41 to 42.

82. Accordingly, the rules on parental benefits do not fall within a person's "employment and working conditions" within the meaning of Article 14(1)(c) of the Equal Treatment Directive.

The provisions on parental benefits do not constitute discrimination on grounds of sex

83. The Norwegian Government considers that the Equal Treatment Directive is without prejudice to the Parental Leave Directive; an obligation to provide parental benefits to both parents on identical terms cannot derive from the Equal Treatment Directive (or Regulation (EC) No 883/2004). Also, Directive 79/7/EEC[40] only applies to statutory social security schemes which provide protection against the risks listed in Article 3(1) of that directive. This does not include social security benefits in connection with the birth of a child. Such matters are regulated in the Pregnant Workers Directive and the Parental Leave Directive.[41]

84. Furthermore, the Norwegian Government submits that the Equal Treatment Directive is – according to Article 16 thereof - also without prejudice to the right of Member States to recognise distinct rights to paternity leave. While under the Pregnant Workers Directive, EEA States are required to provide women with maternity leave and an adequate allowance during such leave, fathers do not have the right to paid paternity leave. It is for the EEA States to determine whether or not to grant fathers the right to paternity leave and the conditions for such leave. The ECJ has stated in several cases that the Equal Treatment Directive cannot be used to expand the rights in the Pregnant Workers Directive or the Parental Leave Directive.[42] Accordingly, it does not follow from the Equal Treatment Directive that an obligation exists to provide parental benefits to both parents on equal terms.

85. Furthermore, the Norwegian Government submits that there is a clear distinction between the rights given to pregnant workers, workers who have recently given birth, or are breastfeeding, and the rights given to parents of either sex to take leave to care for their child. The purposes of the two sets of rights are different, as are the circumstances of a woman, who has given birth and, under EEA law, is entitled to maternity and parental leave, and a man, who is, under EEA law, entitled to parental leave only. The provisions in Chapter 14 of the National Insurance Act reflect the differences in circumstances of women and men. ESA confirmed this position in a case commenced against Norway following a complaint in the field of maternity and parental leave.[43]

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[40] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24; incorporated in the EEA Agreement at the time of its signing in 1992).

[41] Reference is made to Article 4(2) of Directive 79/7/EEC.

[42] Reference is made to the judgment in *Gillespie*, C-342/93, EU:C:1996:46, paragraphs 18 to 20; and the judgment in *Montull*, C-5/12, EU:C:2013:571, paragraphs 61 to 64.

[43] Reference is made to Annex 1 of the Defence (ESA Decision No 230/16/COL of 12 December 2016 in Case No 79153).

86. According to the Norwegian Government the purpose of maternity leave and the right to pay during such leave is, due to the Pregnant Workers Directive, inextricably linked under EEA law. The Pregnant Workers Directive lays down minimum requirements and does not preclude EEA States from applying or introducing laws and regulations which are more favourable to the protection of the safety and health of such workers. In respect of the mother, parental benefits are, inter alia, provided to protect her health and wellbeing, as well as to enable her to breastfeed her child. The reason for providing the mother with parental benefits is, therefore, not simply "childcare", as ESA seems to suggest.

87. Furthermore, the Norwegian Government considers that, in its judgment in *Hofmann*,[44] the ECJ held that the purpose of maternity leave after the compulsory period remains the protection of a woman in connection with the effects of pregnancy and childbirth. Where a national measure has the purpose of the protection of a woman in connection with the effects of pregnancy and childbirth, it may be applied to the mother to the exclusion of the father, pursuant to Article 28 of the Equal Treatment Directive. Maternity leave serves to protect women only, regardless of whether maternity leave is divided into compulsory and voluntary leave periods and regardless of its duration.

88. In this regard, the Norwegian Government submits that the legislative history of the maternity leave in Norwegian law shows that the period in which the father could claim parental benefits instead of the mother was introduced for the protection of women. The father's right was subsidiary. He could claim maternity benefits if the mother resumed work and did not claim her right to maternity benefits in full. However, although fathers could claim maternity benefits if the mother returned to work, few did. In order to encourage families to share care responsibilities more equally, Norway introduced a separate benefit period for fathers, while, at the same time, it extended the total period of maternity benefits. The father's quota therefore added to the existing maternity benefits period, the purpose of which remained the protection of the mother. The fact that in the common period either parent may claim parental benefits does not mean that in this period men and women are in comparable situations. It also does not mean that parental benefits are no longer provided for reasons connected to pregnancy, childbirth and breastfeeding. These considerations still apply, but they are carefully balanced against other considerations.

89. In addition, the Norwegian Government contends that, in its judgment in *Hofmann*, the ECJ accepted that a period of six months could legitimately be reserved for the mother to the exclusion of any other person. Most official bodies recommend exclusive breastfeeding for at least six months. In the common period the parents can choose whether they wish to follow these recommendations or not. This is another reason why it must be within the discretion of each EEA State to treat the mother more favourably for a period of at least six months after the child is born.

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[44] Reference is made to the judgment in *Hofmann*, cited above, paragraphs 25 to 27.

90. Nevertheless, the Norwegian Government accepts that, after a period of time, the primary purpose of parental benefits may gradually shift from the protection of a woman to the protection of the child and childcare. At that point in time, it will be possible to draw a valid comparison between a man and a woman claiming parental benefits to care for their child. Since EEA States enjoy a margin of discretion, and parental benefits schemes balance a number of considerations, it is for the national courts to decide at what point parental benefits are unconnected to pregnancy, childbirth and breastfeeding.[45]

91. Consequently, the Norwegian Government submits that the Court should accept a period such as the common period to be a voluntary period of protection of the mother and conclude that, legally, a man and a woman who has given birth are not in comparable situations. This ensures legal certainty. If the Court were to find that the common period exceeds a period which can legitimately be assumed to be for the protection of the mother, the Norwegian Government contends that a least for a substantial part of this period - which is similar to the period accepted in *Hofmann* - the relevant provisions do not constitute discrimination.

92. The Norwegian Government submits that if ESA's reasoning were to be accepted, EEA States which provide only, or primarily, women with the right to parental benefits will have to amend their benefits schemes radically. Another possible outcome would be that States such as Norway which provide for particularly generous parental benefits schemes for fathers are prohibited from making part of these rights conditional upon certain criteria that do not apply to women, whereas such States would, in the same period, not be prohibited from excluding fathers from the parental benefits scheme.

93. Finally, the Norwegian Government submits that the conditions of Chapter 14 of the National Insurance Act are the same in respect of childbirth and the adoption of a child. In respect of adoption, parental benefits are not provided to the mothers for reasons connected with pregnancy, childbirth and breastfeeding. Nonetheless, the ECJ accepted that a distinction between men and women regarding their differential entitlements to adoption leave was legitimate and did not amount to discrimination on grounds of sex.[46]

The relevant provisions are permissible under Article 3 of the Equal Treatment Directive

94. Should the Court find that parental benefits fall within the scope of the Equal Treatment Directive, and that the conditions for receiving such benefits constitute discrimination on grounds of sex, the Norwegian Government submits that the provisions of Sections 14-13 and 14-14 of the National Insurance Act are authorised as "positive action" under Article 3 of the Equal Treatment Directive.

95. The Norwegian Government emphasises that the relevant provisions are gender neutral and can also apply to a woman claiming parental benefits. As the "father" may be

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[45] Reference is made to the judgment in *Sass*, C-284/02, EU:C:2004:722, paragraphs 54 to 56.

[46] Reference is made to the judgment in *Commission* v *Italy*, cited above.

a man or a woman, and the provisions in Chapter 14 of the National Insurance Act do not refer to men or women, there is no direct discrimination based on sex. Instead, the situation is covered by the definition of indirect discrimination, in that the relevant provisions will in most cases in fact apply to men. Provisions that indirectly discriminate against men on grounds of sex may, in principle, be justified as positive action under Article 3 of the Equal Treatment Directive.

96. Moreover, the Norwegian Government submits that even if the relevant provisions are considered to constitute direct discrimination on grounds of sex, they may still be justified under Article 3 of the Equal Treatment Directive. There is nothing in the wording of Article 3 to suggest that its application is limited to measures that constitute indirect discrimination. Pursuant to Article 2(1)(b) of the Equal Treatment Directive there is, by definition, no indirect discrimination if the measure "is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".

97. As regards the concept of "positive action", the Norwegian Government submits that this is an exception to the principle of equal treatment.[47] It is clear from case law[48] that discriminatory measures may be justified. Measures under Article 3 of the Equal Treatment Directive are intended to achieve substantive, rather than formal, equality, and focus on the right to equal treatment as between groups, rather than the right to equal treatment as between individuals belonging to different groups.[49] The measure must not confer an advantage on the individual woman or all women. The relevant measure must be an advantage to women as a group, with a view to ensuring full equality in practice between men and women in working life.

98. As regards the objectives of the legislation, the Norwegian Government submits that an important objective under Norwegian family and gender equality policies is to facilitate the possibility for women to participate in professional work in line with men, and for men to share family obligations in line with women. The Norwegian welfare state is structured to further this objective. One significant barrier to gender equality is, however, that women still assume a larger share of family obligations. There is thus a need to encourage men to share family obligations more equally, and to introduce other conditions for leave arrangements that incentivise women to return to work. The rules on parental benefits in the National Insurance Act are an important instrument to achieve Norwegian family and gender equality policies. As such, the rules are carefully designed to promote shared parenting.

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[47] Reference is made to the judgment in *Commission* v *France*, cited above; the judgment in *Lommers*, cited above; and the judgment in *Roca Álvarez*, cited above.

[48] Reference is made to the judgment in *Lommers*, cited above, paragraphs 30 to 31; and the judgment in *Roca Álvarez*, cited above, paragraphs 32 to 39.

[49] Reference is made to the judgment in *Commission* v *France*, cited above, paragraph 12; the judgment in *Kalanke*, cited above, paragraphs 18 to 19; and the judgment in *Roca Álvarez*, cited above, paragraph 33.

99. The Norwegian Government submits that the mother's option of returning to work will reduce the overall time that she stays away from work and, accordingly, reduce disadvantages to her career as a result of childbirth. Leave from work in connection with childbirth is detrimental to women's pay. Women stay away longer than men in connection with the birth of the child, which increases gender inequalities in working life. If it were not possible for the father to claim parental benefits instead of the mother, the mother could feel obliged to stay home for the full benefits period for financial reasons.

100. In reaction to ESA's argument that the family is penalised under the current system, the Norwegian Government submits that if both parents meet the conditions of Section 14-6 of the National Insurance Act, the mother can either return to work or continue to stay at home; either way, the family receives the parental benefits in the "common period". If only the father qualifies for parental benefits, it is more attractive financially to the family that the mother returns to work or engages in other comparable activity. The activity requirement does not penalise the family but enables the parents to choose whether the mother or the father receives such benefits. Further, the activity requirement ensures that the father, in the period in which he receives parental benefits instead of the mother, has the primary role in relation to the exercise of parental duties.

101. In addition, the Norwegian Government submits that even though the provisions specifically apply to the father's right to claim parental benefits, this does not mean that the provisions cannot be an advantage to the mother. Although it is certainly beneficial for the father himself to be the primary caregiver for a period, for the purposes of Article 3 of the Equal Treatment Directive, the relevant provisions represent an advantage to the mother in working life.

102. The Norwegian Government submits further that there is no inconsistency between the aims of providing parental benefits for the protection of the mother, and encouraging fathers to claim parental benefits if the parents decide that the mother should return to work. Norway wants the father to stay at home instead of the mother, not together with the mother. In this case, it must be clear that the objective of protecting the mother in respect of her individual situation following childbirth is not contrary to the objective of encouraging mothers generally to return to work.

103. The Norwegian Government considers that, according to case law, it is sufficient for the EEA State to demonstrate that, although there may be scientific uncertainty as regards the suitability and necessity of the disputed measure, it is reasonable to assume that the national measure would be able to contribute to the relevant objective.[50] While previous cases concerned the protection of health, the present case has similarities with such case law. Where there are several measures which all seek to obtain the same objective, and

[50] Reference is made to Case E-16/10 *Philip Morris*, cited above, paragraph 83; the judgment in *The Scotch Whisky Association*, C-333/14, EU:C:2015:845, paragraphs 55 to 56; and the Opinion of Advocate General Fennelly in *Imperial Tobacco*, C-376/98 and C-74/99, EU:C:2000:324, point 160.

which may co-exist, interact, and primarily have long-term effects, it must be sufficient to demonstrate that it may reasonably be concluded from the evidence submitted that the means chosen are appropriate and necessary for achieving the relevant objective. The Norwegian Government has submitted statistics and research to the effect that the provisions at issue in this case have a positive effect on the inequalities between men and women in respect of family obligations and working life. There can be no obligation to produce evidence which shows with certainty that the provisions reduce actual instances of inequality between men and women. Strict documentation requirements would prevent the adoption of measures to promote women.

104. According to the Norwegian Government there can be no doubt that the activity requirements in Chapter 14 of the National Insurance Act are suitable for achieving the stated aims. This is a clear advantage to women, generally and long-term, and is likely to reduce actual instances of inequality between men and women in working life. It is, however, difficult to measure such the effects of the provisions more accurately. The suitability test, however, does not require more than some effect for the aim pursued,[51] and the measures at issue have at least some effect.

105. The Norwegian Government maintains that the provisions are appropriate and necessary. According to research, part-time work among women was reduced, and increased among men. There was also a decline in working hours for fathers and an increase in the working hours of mother in families with children under the age of four, and a reallocation of the time mothers and fathers spend on paid and unpaid work. Studies suggest, further, that fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits, so that the father has the main responsibility for the child. Fathers who stay at home on their own to care for their child (while the mother returns to work) become more competent caregivers and are more likely to assume an equal share of family obligations in the long term.

106. Further, the Norwegian Government submits that it is inappropriate to compare the provisions at issue to quotas for access to certain positions. Men are not automatically and unconditionally excluded from claiming parental benefits. If both parents qualify for parental benefits, the father has an unconditional right to parental benefits in the parental benefits period reserved to him. In addition, Section 14-13 of the National Insurance Act provides in itself flexibility. It is therefore not an absolute and unconditional requirement that the mother returns to work. The parental benefits scheme involves a number of individual assessments with respect to the circumstances of the family.

107. Furthermore, the Norwegian Government submits that it does not follow from the principle of proportionality that measures without temporal limitations will, as such, fail the proportionality test. Most of the measures accepted under EEA and EU law to date, are indefinite measures. If ESA's argument that all measures must be temporary to be

[51] Reference is made to the judgment in *Ahokainen*, C-434/04, EU:C:2006:609, paragraph 32.

proportionate is correct, this would not only alter the way in which EEA States adopt measures in national law, but also imply a radical shift in settled case law.

108. In sum, the Norwegian Government submits that the provisions at issue in this case comply with the principle of proportionality.

Conclusion

109. To conclude, the Norwegian Government maintains that it has three separate and alternative submissions, which all lead to the conclusion that the provisions at issue do not constitute unlawful discrimination on grounds of sex. Thus, the Court should declare ESA's application to be unfounded.

European Commission

110. The Commission supports ESA's position. In particular, as regards the objective of affording a parent the opportunity to combine giving care to a child with the pursuit of an employed activity, the Commission considers men and women to be in a comparable situation. The unequal treatment detailed in ESA's application cannot be justified as positive action. The national provisions cannot be considered as conferring a specific advantage that facilitates the pursuit of a vocational activity or compensates for disadvantages in professional careers. Instead, the provisions establish discriminatory criteria as regards the eligibility for the benefits in question.

Bernd Hammermann
Judge-Rapporteur