JUDGMENT OF THE COURT

5 May 2021*

(*Freedom to receive services – Freedom of movement for workers – Regulation (EEC) No 1408/71 – Regulation (EC) No 883/2004 – Retention of social security benefits in another EEA State – Sickness benefit – Stay – Restriction of a fundamental freedom – Justification*)

In Case E-8/20,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against

N

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 28 and 36, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- N, represented by John Christian Elden and Anders Brosveet, Advocates;

- the Norwegian Government, represented by Pål Wennerås, Lisa-Mari Moen Jünge, Kaja Moe Winther and Tone Hostvedt Aarthun, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Erlend Møinichen Leonhardsen, Ewa Gromnicka, Catherine Howdle and Carsten Zatschler, acting as Agents; and

- the European Commission ("the Commission"), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments of N, represented by Anders Brosveet; the Prosecuting Authority, represented by Henry John Mæland; the Norwegian Government, represented by Pål Wennerås and Lisa-Mari Moen Jünge; ESA, represented by Carsten Zatschler, Ewa Gromnicka and Erlend Møinichen Leonhardsen; and the Commission, represented by Denis Martin and Bernd-Roland Killmann, at the remote hearing on 26 November 2020,

gives the following

Judgment

I Legal background

EEA law

1 Article 28(1) and (2) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *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.*

2 Article 29 EEA reads:

> *In order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:*

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Contracting Parties.

3 Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

4 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), as amended by Council Regulation (EC) No 118/97 of 2 December 1996, Council Regulation (EC) No 1290/97 of 27 June 1997, Council Regulation (EC) No 1223/98 of 4 June 1998, Council Regulation (EC) No 1606/98 of 29 June 1998, Council Regulation (EC) No 307/1999 of 8 February 1999, Council Regulation (EC) No 1399/1999 of 29 April 1999, Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004, Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006, Council Regulation (EC) No 1791/2006 of 20 November 2006, Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 and Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 ("Regulation 1408/71"). Regulation 1408/71 was part of Annex VI (Social Security) to the EEA Agreement from its entry into force. Regulation 1408/71 was repealed from 1 June 2012.

5 Article 1 of Regulation 1408/71, entitled "Definitions", reads, in extract:

For the purpose of this Regulation:

...

(h) 'residence' means habitual residence;

(i) 'stay' means temporary residence;

...

6 Article 4(1) of Regulation 1408/71, entitled “Matters covered”, reads:

> *This Regulation shall apply to all legislation concerning the following branches of social security:*
>
> *(a) sickness and maternity benefits;*
>
> *(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;*
>
> *(c) old-age benefits;*
>
> *(d) survivors' benefits;*
>
> *(e) benefits in respect of accidents at work and occupational diseases;*
>
> *(f) death grants;*
>
> *(g) unemployment benefits;*
>
> *(h) family benefits.*

7 Article 19(1) of Regulation 1408/71, entitled “Residence in a Member State other than the competent State – General rules”, reads:

> *An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:*
>
> *(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;*
>
> *(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.*

8 Article 22(1) and (2) of Regulation 1408/71, entitled "Stay outside the competent State – Return to or transfer of residence to another Member State during sickness or maternity – Need to go to another Member State in order to receive appropriate treatment", reads:

> *1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:*
>
> > *(a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay;*
> >
> > *(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State; or*
> >
> > *(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:*
> >
> > > *(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State;*
> > >
> > > *(ii) to cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.*
>
> *2. The authorisation required under paragraph 1 (b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.*
>
> *The authorisation required under paragraph 1 (c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the*

treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.

9 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), as corrected by OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30, ("Regulation 883/2004") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33; and EEA Supplement 2011 No 54, p. 46), which entered into force on 1 June 2012, and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and the decision entered into force on 1 June 2012.

10 Article 1 of Regulation 883/2004, entitled "Definitions", reads, in extract:

For the purposes of this Regulation:

...

(j) 'residence' means the place where a person habitually resides;

(k) 'stay' means temporary residence;

...

11 Article 2 of Regulation 883/2004, entitled "Persons covered", reads:

1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

2. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

12 Article 3 of Regulation 883/2004, entitled "Matters covered", reads, in extract:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

...

13 Article 21 of Regulation 883/2004, entitled "Cash benefits", reads:

1. An insured person and members of his 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.

2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.

3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.

4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.

National law and practice

14 The material time in this case is 19 May 2010 to 31 October 2012 ("the material time"). At that time, the Act of 28 February 1997 on National Insurance (*lov 28. februar 1997 om folketrygd*) ("the National Insurance Act") read as follows.

15 The first paragraph of Section 11-1 of the National Insurance Act read:

The purpose of the work assessment allowance is to ensure income for members whilst they receive active treatment, participate in work-oriented measures or are being followed up in another way with a view to obtaining or retaining employment.

16 Section 11-3 of the National Insurance Act, entitled "Stay in Norway", read:

It is a condition for entitlement to benefits under this Chapter that the member stay in Norway.

Benefits may nevertheless be granted to a member who, pursuant to their activity plan, see Section 14 a of the Labour and Welfare Administration Act (arbeids- og velferdsforvaltningsloven), receives medical treatment or participates in a work-oriented measure abroad.

A member may also receive benefits under this Chapter for a limited period during a stay abroad if it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by the Labour and Welfare Administration.

17 Section 11-5 of the National Insurance Act, entitled "Reduced fitness for work", read:

It is a condition for entitlement to benefits under this Chapter that the member, due to sickness, injury or impairment, has suffered a reduction in their fitness for work to such an extent that the person concerned is prevented from retaining or obtaining gainful employment.

When the determination is being made as to whether the fitness for work is reduced to the extent that the person concerned is prevented from retaining or obtaining gainful employment, regard shall be had inter alia to health, age, fitness, education, professional background, interests, wishes, opportunities for returning to the current employer, employment opportunities at the place of residence and employment opportunities at other places where it is reasonable for the person concerned to accept employment.

18 Section 11-6 of the National Insurance Act, entitled "Need for assistance in obtaining or retaining employment", read:

It is a condition for entitlement to benefits under this Chapter that the member

(a) has a need for active treatment, or

(b) has a need for work-oriented measures, or

(c) after having tried measures under (a) or (b), still be considered to have a certain prospect of integrating into the labour market, and be followed up by the Labour and Welfare Administration (NAV) in order once again to be able to obtain or retain employment within his or her capabilities.

19 The first and second paragraphs of Section 11-7 of the National Insurance Act, entitled "Notification Duty", read:

In order to be entitled to benefits under this Chapter, the member must report to the Labour and Welfare Administration every fourteenth day (notification period) and provide information of importance for entitlement to the benefits. Notification shall be given using a notification form, by attending in person or in some other manner as determined by the Labour and Welfare Administration.

If the member, without reasonable grounds, fails to report on the scheduled day, entitlement to the benefits under this Chapter shall cease as from the day on which the member ought to have reported and until such time as the member reports once again. If the member has had a reasonable ground for failing to report, the benefits shall be paid with retroactive effect.

20 Section 11-8 of the National Insurance Act, entitled "Activity with a view to integrating into the labour market", read:

It is a condition for entitlement to benefits under this Chapter that the member contribute actively to the process of integrating into the labour market. The requirements for individual activity are to be adapted to the individual's function level and be determined at the time the benefit is granted.

21 From 28 February 2011, part 11.3.2 of Circular R40-00, which was replaced by Circular R45-00 from 28 February 2012, read:

Resident in Norway and stay in other EEA country

The Regulation's rules on this are applicable only to a move to another EEA country or in respect of members resident in another EEA country.

For workers or self-employed persons who are resident in Norway and are members of the social security scheme, the National Insurance Act's general rules on work assessment allowance during stays abroad also apply to stays in another EEA country, see the second and third paragraphs of Section 11-3 of the National Insurance Act. Accordingly, the Regulation's rules on the possibility of retaining entitlement to cash benefits in the event of sickness during a stay outside Norway as the competent country are not applicable.

22 Circular R11-00 was drawn up to accompany Chapter 11 of the National Insurance Act. In the version in force from 1 March 2010, the following, inter alia, was stated as regards Section 11-3 of the National Insurance Act:

> *For the entitlement to work assessment allowance and additional benefits, there is a requirement to stay in Norway. The background for that provision is the need to be able to follow up on users in relation to correct benefits and work-oriented activities and to be able to know at all times whether the conditions for entitlement to the benefit are satisfied.*
>
> *The work assessment allowance is regarded as a cash benefit during sickness under EEA Regulation No 1408/71.*
>
> *Reference is made to the EEA Agreement's part on social security and accompanying circulars, and social security agreements Norway has with other countries and separate specific circulars. In the event of conflict between the Norwegian rules and the provisions in social security agreements, including the EEA Agreement, the agreement's rules take precedence, see Section 1-3 of the National Insurance Act.*
>
> *…*
>
> ***The third paragraph of Section 11-3 – Exemption for stay abroad not pursuant to the activity plan***
>
> *As a rule, it is not permitted to stay abroad and at the same time receive work assessment allowance and additional benefits. If the user is staying abroad and is thus not available for NAV, the benefit will lapse during that period.*
>
> *The third paragraph of Section 11-3 allows for benefits to be granted exceptionally also for a limited period during a stay abroad, such as in the event of temporary breaks between measures or during waiting periods for treatment/measures.*
>
> *Benefits should usually not be paid for longer than the period of a normal holiday trip. 'Normal holiday trip' means a period of up to four weeks. This presupposes, however, that it can be demonstrated that the stay abroad is compatible with the completion of the planned activity and does not impede follow-up and control by NAV. The key factor in that context is that the stay abroad does not negatively impact the preparation and implementation of the activity plan.*
>
> *Users must apply in advance for authorisation to keep receiving benefits during a temporary stay abroad. Users are to be given proper, repeated information to the effect that he or she must stay in Norway in order to be entitled to benefits under Chapter 11 and that he or she must notify NAV if they travel abroad.*

23 The following was added to Circular R11-00 from 6 June 2012:

> *Users must apply to the NAV office for prior authorisation before they may bring the work assessment allowance with them during a temporary stay in other countries. Form 11-03.07 should be used in so far as not precluded on time-related grounds. If NAV does not have any relevant activities to offer during the time period, it is not to be counted as a period of absence, see Sections 11-8 and 11-9.*
>
> *If the NAV office approves the application, authorisation may be given verbally and recorded in Arena. Consequences for follow-up must be considered, including submission of the notification form. The user must be informed about means of submission (notification form) and consequences of tardy submission of forms. If the NAV office does not approve the application, the user is to be provided with a written letter of refusal in which the reasons are stated and information is given about the general right of appeal: Section 29 of the Public Administration Act (forvaltningsloven). If the user decides to travel abroad despite the fact that NAV has not approved the application, stopping the work assessment allowance must be considered, see Sections 11-8 and/or 11-9.*

24 At the material time, the Penal Code of 22 May 1902 No 10 (*Almindelig borgerlig Straffelov 22. mai 1902 nr. 10*) ("the Penal Code") read as follows.

25 Section 270 of the Penal Code read, in extract:

> *Any person who, for the purpose of obtaining for himself or another an unlawful gain,*
>
> *...*
>
> *2. by the use of incorrect or incomplete information, ... or otherwise unlawfully influences the result of automatic data processing, and thereby causes loss or a risk of loss to any person, is guilty of fraud.*
>
> *The penalty for fraud is fines or imprisonment for a term not exceeding three years.*
>
> *...*

26 Section 271 of the Penal Code, read, in extract:

> *The penalty for gross fraud is imprisonment for a term not exceeding six years. Fines may be imposed in addition to a sentence of imprisonment. ...*
>
> *...*

27 Section 271a of the Penal Code, read:

> *Any person who by gross negligence commits fraud as described in Section 270 or Section 271 shall be liable to fines or imprisonment for a term not exceeding two years.*

II Facts and procedure

28 On 18 February 2016, after being reported by the Norwegian Labour and Welfare Administration ("NAV"), N was indicted for intentional aggravated social security fraud under Section 271 of the Penal Code.

29 The basis for the indictment was that, from 19 May 2010 to 31 October 2012, N was considered to have misled NAV to make total payments to him in the amount of NOK 309 458 in work assessment allowance. N failed to inform NAV that he had stayed abroad during certain periods without approval by NAV. He was thus not to be entitled to a work assessment allowance during that time. This gave rise to financial loss or a risk of financial loss for NAV. During the proceedings before Nedre Telemark District Court, the Prosecuting Authority amended its submissions to grossly negligent aggravated fraud.

30 On 4 March 2016, the District Court delivered its verdict of grossly negligent aggravated fraud and sentenced N to 75 days in prison. According to the request, the District Court based the conviction on the fact that, in November 2008, N was granted a rehabilitation allowance. In the decision, he was informed that he "must report to NAV locally" if he "travels outside Norway (applies to sickness benefit and rehabilitation allowance)". The same information was given each time N was granted a rehabilitation allowance for a new period.

31 According to the request, N was granted a rehabilitation allowance due to poor health, and also having been made redundant at his former place of employment. From 1 March 2010, N's rehabilitation allowance was replaced with a work assessment allowance due to legislative amendments.

32 By decision of 26 July 2010 granting a work assessment allowance, N was informed that "you must notify your NAV office if you ... plan to travel or move outside Norway". The same information was given each time N was granted a work assessment allowance until he was granted an invalidity pension from 1 November 2012.

33 Through acquaintances, N and his spouse were offered the use of a house in Italy and, during the material time, they had a total of 14 three and four-week stays in Italy.

34 According to the request, N applied for an exemption from the requirement to stay in Norway for two of those stays. He neither applied for authorisation nor gave notification

in respect of the other stays. Before the District Court, N testified that he worked from Italy when his health permitted. The District Court did not find that testimony credible and it was not relied upon. It did, however, find that it had not been proven that N had deliberately and for gainful purposes failed to inform NAV that during certain periods he had stayed abroad, but that N had acted in gross negligence. The District Court held that:

> *It is a condition for entitlement to a work assessment allowance that the person concerned stays in Norway, see Section 11-3 of the National Insurance Act. NAV can grant exemptions from that requirement for a limited period if the stay abroad is compatible with the implementation of the activity plan. The Court does not consider that the accused was in good faith when he had stays abroad without notifying his absence or applying for an exemption from the requirement of stay.*

35 The District Court further stated that, even if N's testimony were to be accepted, he would have to be convicted due to the requirement to stay in Norway, of which he was aware.

36 N appealed against the judgment of the District Court and, by judgment of 12 December 2016, Agder Court of Appeal sentenced him to 45 hours of community service, to be carried out within 90 days and, in the alternative, a prison sentence of 45 days. In its sentencing, the Court of Appeal emphasised that N could have obtained authorisation for stays abroad if he had applied. There was therefore a genuine possibility that the potential financial loss associated with his actions was significantly lower than the amount stated in the indictment.

37 The Prosecuting Authority appealed against the judgment of the Court of Appeal to the Supreme Court of Norway, which, by judgment of 15 March 2017, upheld the District Court's judgment.

38 In the autumn of 2019, NAV became uncertain as to whether its prevailing practice was contrary to Article 21 of Regulation 883/2004. NAV modified its practice later that autumn in accordance with the interpretation that the term "stays" (*"oppholder seg"*) includes all temporary stays that do not amount to establishing residence. NAV did not consider, however, that its earlier practice had been contrary to Regulation 1408/71.

39 On 8 November 2019, an investigative committee was appointed by the Norwegian Government to undertake an external review of the application of Regulation 1408/71 and Regulation 883/2004 in Norway. According to the request, the investigative committee was unanimous in finding that it had been contrary to Norway's obligations under EEA law since 1 June 2012 to refuse a work assessment allowance solely on the grounds that the recipient is in another EEA State.

40 According to the request, prior to N being reported to the police, NAV had adopted a decision to recover NOK 345 119 from N. The recovery decision was partly reversed by

decision of 19 December 2019. The part of the decision that was maintained amounts to NOK 199 370 and relates to the period before 1 June 2012.

41 On 19 March 2020, following petitions from both N and the Prosecuting Authority to have the criminal case reopened, the Criminal Cases Review Commission decided that the case should be reopened.

42 Against this background, the Supreme Court of Norway decided to stay the proceedings and make a reference to the Court. The request, dated 30 June 2020, was registered at the Court on 2 July 2020. The Supreme Court of Norway has referred the following questions to the Court:

Questions about the state of the law before 1 June 2012

1. *Is the term "sickness benefits" in Article 4(1)(a) of Regulation No 1408/71 to be interpreted as encompassing a benefit such as the work assessment allowance (arbeidsavklaringspenger)?*

2. *Is Article 22 of Regulation No 1408/71, or possibly Article 19, to be interpreted as conferring entitlement to receive cash benefits only when residing (bosetting) in an EEA State other than the competent State, or are shorter stays (opphold) such as in the present case also included?*

3. *If shorter stays such as in the present case are also included, is Article 22 of Regulation No 1408/71 and its reference to authorisation from the competent institution, or possibly Article 19, to be interpreted as meaning that the competent State may make a person's entitlement to be able to bring their work assessment allowance along subject to the condition that that person must have applied for and obtained authorisation to stay (oppholde seg) in another EEA State?*

4. *Should Regulation No 1408/71 be found not to confer entitlement to bring work assessment allowance along during a stay in another EEA State, or possibly not without authorisation from the competent institution pursuant to national rules, must it also be determined whether the national rules come within the scope of other EEA rules?*

5. *Do Articles 28 or 36 of the EEA Agreement apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State?*

6. *If that question is answered in the affirmative, is it a restriction on free movement under Article 28 of the EEA Agreement or Article 36 that national law lays down the following conditions:*

   (i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four

weeks per year; and

(ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and

(iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?

7. *If the condition in (i) constitutes a restriction, can the condition be justified as a general safeguarding of the considerations underlying condition (ii), that is to say, ensuring performance of defined activity obligations and also follow-up and control?*

8. *If condition (i) cannot be justified and conditions (ii) and (iii) constitute a restriction, can conditions (ii) and (iii) be justified on the basis of the same considerations?*

9. *If conditions (ii) and (iii) can be justified, is it compatible with Articles 28 and 36 of the EEA Agreement for a person who has failed to apply for and obtain authorisation to bring benefits along to another EEA State and who provides the competent institution with incorrect information about the place of stay (oppholdssted) to be ordered to repay the benefit which was thus unlawfully acquired under national law?*

10. *If that question is answered in the affirmative, is it compatible with Articles 28 and 36 of the EEA Agreement for the person concerned potentially to be subject to criminal sanctions for having provided incorrect information and thus having misled the competent institution into making unfounded payments?*

11. *If question 5 is answered in the negative, do Articles 4 or 6 of Directive 2004/38 apply in a situation where a national of an EEA State has a shorter leisure stay in another EEA State? In so far as Article 6 applies, does that provision impose obligations on the home State? If Articles 4 or 6 is applicable and may be relied on as against the home State, the same question as questions 6 to 10 are asked in so far as they fit.*

Questions about the state of the law after 1 June 2012

12. *Is the term "sickness benefits" in Article 3(1)(a) of Regulation No 883/2004 to be interpreted as encompassing a benefit such as a work assessment allowance?*

13. *Is the term "staying" in Article 21(1) of Regulation No 883/2004, which is defined as "temporary residence" in Article 1(k), to be interpreted as encompassing each*

and every short-term stay in another EEA State not constituting residence, including stays such as in the present case?

14. *If that question is answered in the affirmative, is Article 21 of Regulation No 883/2004 to be interpreted as only covering situations where the medical diagnosis is given during the stay in the other EEA State, or also situations where – as in the present case – the diagnosis is recognised by the competent institution before departure?*

15. *If Article 21 is applicable in a situation such as that in the present case, is that provision, including the condition "in accordance with the legislation it applies", to be interpreted as meaning that the competent EEA State may maintain the following conditions:*

    (i) that the benefit may be given only for a limited period of time which, according to administrative circulars, may not usually exceed four weeks per year; and

    (ii) that the stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution, and

    (iii) that the person concerned must apply for and obtain authorisation from the competent institution (and compliance with the notification duty is controlled through the use of a notification form)?

16. *If Article 21 precludes condition (i), but not (ii) and (iii), do (ii) and (iii) come within the scope of other EEA rules (see question 4 et seq.)?*

43 On 6 November 2020, the Court prescribed measures of organization of procedure ("MoP") pursuant to Article 49(1) and (3)(a) of the Rules of Procedure. The deadline to respond expired on 20 November 2020. The Court received replies to the MoP from N, the Prosecuting Authority, the Norwegian Government, ESA and the Commission.

44 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Preliminary remarks

45 As stated in the request, according to Section 11-3 of the National Insurance Act, an insured person must be physically present in Norway in order to be entitled to the work allowance benefits at issue.

46 The Court notes that it is settled case law that the provisions of Regulation 1408/71 and Regulation 883/2004, which have been adopted to give effect to Article 29 EEA, must be interpreted in light of the objective of that provision. That is, to contribute to the establishment of the greatest possible freedom of movement (see Case E-3/12 *Stig Arne Jonsson* [2013] EFTA Ct. Rep. 248, paragraph 73 and case law cited). This general aim must be taken account of when interpreting both Regulation 1408/71 and Regulation 883/2004.

47 It follows from the settled case law that the aim of Regulation 1408/71 and Regulation 883/2004 would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one EEA State, especially where those advantages represent the counterpart of contributions which they have paid (see *Stig Arne Jonsson*, cited above, paragraph 73 and case law cited, and compare the judgment in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 74).

48 The Court observes that the request does not specify N's nationality, although the questions referred are premised on the fact that he is an EEA national. The Court proceeds on this assumption.

Questions 1 and 12

49 By its first and twelfth questions, the referring court asks, in essence, whether a benefit such as the work assessment allowance constitutes a sickness benefit within the meaning of point (a) of Article 4(1) of Regulation 1408/71 and point (a) of Article 3(1) of Regulation 883/2004.

50 Regulation 1408/71 applies to all legislation concerning the branches of social security listed in points (a) to (h) of Article 4(1) of that regulation. The Court notes that the distinction between benefits excluded from the scope of Regulation 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, especially its purposes and the conditions on which it is granted, and not whether a benefit is classified as a social security benefit by national legislation (see Case E-4/07 *Þorkelsson* [2008] EFTA Ct. Rep. 3, paragraph 36).

51 A benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 4(1) of Regulation 1408/71 (see Case E-5/06 *ESA* v *Liechtenstein* [2007] EFTA Ct. Rep. 296, paragraphs 71 to 73 and case law cited). In the present case, as observed by all the parties, a scheme such as the work assessment allowance established by Section 11-1 of the National Insurance Act satisfies those conditions.

52 According to settled case law, social security benefits must be regarded, irrespective of the characteristics specific to different national legal systems, as being of the same kind when their purpose and subject matter as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of benefits. In order to distinguish between the various categories of social security benefits, the risk covered by each benefit must be taken into consideration (compare the judgment in *Czerwiński*, C-517/16, EU:C:2018:350, paragraphs 43 and 44 and case law cited).

53 As noted in the written observations of the Norwegian Government and ESA, it is necessary to examine whether a benefit such as that at issue in the main proceedings must be regarded as a sickness benefit, an invalidity benefit or an unemployment benefit, within the meaning of points (a), (b) and (g) of Article 4(1) of Regulation 1408/71.

54 A sickness benefit, within the meaning of point (a) of Article 3(1) of Regulation 883/2004, covers the risk connected to a state of ill health involving temporary suspension of the concerned person's activities. By contrast, an invalidity benefit, within the meaning of point (b) of Article 3(1) of that regulation, is intended, as a general rule, to cover the risk of disability of a stipulated degree, where it is probable that such disability will be permanent or long-term. An unemployment benefit covers the risk associated with the loss of income suffered by a worker following the loss of his or her employment, even though he or she is still able to work. A benefit granted if that risk, namely loss of employment, materialises, and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment, must be regarded as constituting an unemployment benefit (compare the judgment in *Pensionsversicherungsanstalt*, C-135/19, EU:C:2020:177, paragraphs 32 to 34, and case law cited).

55 In this regard, as observed by ESA, it is apparent that the work assessment allowance is granted to persons who are incapable of obtaining or retaining gainful employment due to illness, injury or another impairment. As observed by the Norwegian Government in its response to the MoP, "a basic requirement for qualifying for the work assessment allowance is that the person concerned suffers from 'sickness, injury or impairment' (Section 11-5) which may involve 'a need for active [medical] treatment (Section 11-6(1) litra a)'." Therefore, such a benefit cannot be classified as an unemployment benefit, within the meaning of point (g) of Article 4(1) of Regulation 1408/71.

56 As regards the classification of the work assessment allowance as an invalidity or sickness benefit, it should be noted that, as explained by the Norwegian Government in its response to the MoP, the duration of the activity plans ranges from two months to about a year. As it further explained, the work assessment allowance is only granted for up to a year at a time. Lastly, under the first paragraph of Section 11-10 of the National Insurance Act, the work assessment allowance may be granted for a period of up to four years.

57 In addition, the Court understands that, in accordance with Section 11-11 of the National Insurance Act, as elaborated upon in Circular R11-00, the person concerned is to receive regular follow-ups from NAV to ascertain, inter alia, whether the person concerned still has a need for assistance to gain employment and, if it is found that assistance is no longer required, entitlement to the rehabilitation allowance is to be suspended or terminated.

58 It follows that a benefit such as the work assessment allowance at issue in the main proceedings is intended to cover the risk of temporary incapacity as opposed to permanent or long-term invalidity and must therefore be regarded as a sickness benefit, within the meaning of point (a) of Article 4(1) of Regulation 1408/71.

59 The notion of sickness benefits has not been altered by the adoption of Regulation 883/2004 nor the subsequent case law concerning the interpretation of that regulation (compare the judgment in *Pensionsversicherungsanstalt*, cited above, paragraph 32).

60 Consequently, the answer to the first and twelfth questions is that a benefit such as the work assessment allowance at issue in the main proceedings constitutes a sickness benefit within the meaning of point (a) of Article 4(1) of Regulation 1408/71 and point (a) of Article 3(1) of Regulation 883/2004.

Questions 2 to 4

61 By its second to fourth questions, the referring court, in essence, asks whether Article 19 and/or Article 22 of Regulation 1408/71 must be interpreted as precluding a requirement to stay in the competent State in order to receive a benefit such as that at issue in the main proceedings. The Court considers it appropriate to examine these questions together.

62 The Court notes that, according to settled case law, sickness benefits fall within Chapter 1 of Title III of Regulation 1408/71, which consists of Articles 18 to 36 (compare the judgment in *von Chamier-Glisczinski*, C-208/07, EU:C:2009:455, paragraph 41). The Court observes that the benefit at issue is a social security benefit within the meaning of Article 4(1) of Regulation 1408/71, and is therefore to be exportable (see Case E-5/06 *ESA* v *Liechtenstein*, cited above, paragraph 74). In this regard, recital 15states that, in the field of sickness and maternity benefits, it is necessary to guarantee the protection of persons living or staying in an EEA State other than the competent EEA State. Thus, provisions which derogate from the exportability of social security benefits must be interpreted strictly

(compare the judgments in *Jauch*, C-215/99, EU:C:2001:139, paragraph 21, and *Hosse*, C-286/03, EU:C:2006:125, paragraphs 24 and 25).

63 Article 19 of Regulation 1408/71 guarantees, at the expense of the competent State, the right for an employed or self-employed person, as well as for members of that person's family, residing in another EEA State the condition of whom requires treatment in the territory of the EEA State of residence to receive sickness benefits in kind provided by the institution of the latter EEA State or cash benefits provided by that institution on behalf of the institution in the competent State by an agreement(compare the judgment in *Tolley*, C-430/15, EU:C:2017:74, paragraph 71 and case law cited).

64 Consequently, that provision relates only to situations in which an insured person who applies to the competent institution of an EEA State for a sickness benefit resides in another EEA State on the date of his application (compare the judgment in *Tolley*, cited above, paragraph 72).

65 It is apparent from the request that N was resident in Norway, within the meaning of point (h) of Article 1 of Regulation 1408/71, when he applied to the competent institution of that EEA State for the benefit at issue, and only ever had short-term stays in Italy, of three to four weeks each. Thus, his situation does not fall within the scope of Article 19.

66 Point (b) of Article 22(1) of Regulation 1408/71 concerns, inter alia, the situation where an employed or self-employed person transfers his residence during sickness to an EEA State other than that of the competent institution (compare the judgment in *Tolley*, cited above, paragraph 74). The Court observes that the other parts of Article 22are not of relevance in the present case.

67 It is clear from the request that a person such as N – spending short-term stays in Italy – does not belong to the categories of persons targeted by point (b) of Article 22(1) of Regulation 1408/71, which is limited to the retention of sickness benefits in case of transferring "residence" to another EEA State. Accordingly, a person in a situation such as that at issue in the main proceedings does not come within the scope of point (b) of Article 22(1).

68 This interpretation of Regulation 1408/71 must be understood without prejudice to the solution which flows from the potential applicability of provisions of the main part of the EEA Agreement (compare the judgment in *von Chamier-Glisczinski*, cited above, paragraph 66). The finding that a national measure does not fall within the scope of a provision of a legal act incorporated into the EEA Agreement, in this case point (b) of Article 22(1), does not have the effect of removing that measure from the scope of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement (compare the judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 38 and case law cited). It follows that the non-applicability, as the case may be, of Articles 19 or 22 to a situation such as that at issue in the main proceedings does not of itself prevent the person

concerned from claiming, pursuant to the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement, the retention of a sickness benefit in cash during short-term stays in another EEA State.

69 Accordingly, the answer to the second, third and fourth questions must be that a situation such as that at issue in the main proceedings does not come within the scope of Article 19 or Article 22 of Regulation 1408/71. However, that finding does not have the effect of removing national rules such as a presence requirement in the case at hand from the scope of the provisions of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement.

Questions 5 to 8

70 By its fifth to eighth questions, the referring court seeks, in essence, to ascertain whether conditions such as those laid down in the third paragraph of Section 11-3 of the National Insurance Act, limiting entitlement to benefits such as those at issue in the present proceedings, are compatible with Articles 28 and 36 EEA. The Court considers it appropriate to examine these questions together.

71 It should be recalled that EEA law does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. Nevertheless, when exercising that power, the EEA States must comply with EEA law (see Case E-2/18 *Concordia*, judgment of 14 May 2019, paragraph 43).

72 According to Article 29 EEA, the legal acts in the field of social security incorporated into Annex VI to the EEA Agreement are intended to provide freedom of movement for workers and self-employed persons, in particular, by securing the payment of benefits to persons resident in the territory of another EEA State. While the legal acts implementing Article 29 EEA, in particular Regulation 1408/71 and Regulation 883/2004, contain provisions derogating from the principle of the exportability of social security benefits, such as regarding special non-contributory benefits, their purpose remains the facilitation of one of the fundamental objectives of the EEA Agreement, which is to encourage the movement of persons within the EEA and their integration into the society of other EEA States (compare the judgment in *Habelt and Others*, C-396/05, C-419/05 and C-450/05, EU:C:2007:810, paragraphs 81 and 82). The right to retain social security benefits when going to another EEA State is an embodiment of this fundamental objective and a corollary of the exercise of the fundamental freedoms guaranteed by the EEA Agreement.

73 It is necessary to determine whether a situation such as that at issue in the main proceedings falls within the scope of Articles 28 and 36 EEA. In that regard, the Norwegian Government and the Commission have expressed doubts, in light of the information contained in the request, as to the applicability of Article 28 EEA.

74 Any EEA national who exercises the right of freedom of movement to seek employment or has been employed in an EEA State other than that of residence falls within the scope of Article 28 EEA (see Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 50). Article 28 EEA may also apply to former workers who have ceased to pursue an occupation, insofar as such individuals may be entitled to certain advantages acquired by virtue of their employment relationship. Although the description of the facts provided by the referring court contains nothing to suggest that the freedom of movement for workers is relevant in this case, N submitted both in his written observations and at the hearing that, for at least for some of the periods that he stayed in Italy, he worked remotely in accordance with his activity plan as his actual employment possibility in 2012 allowed for remote work. It is for the referring court to determine the facts of the case as regards the applicability of Article 28 EEA in the main proceedings.

75 The freedom to provide services conferred by Article 36 EEA also includes the "passive" freedom to provide services, namely the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions (compare the judgment in *Piringer*, C-342/15, EU:C:2017:196, paragraph 35). Likewise, persons established in an EEA State who travel to another EEA State as tourists or for the purposes of education must be regarded as recipients of services (compare the judgments in *Ruska Federacija*, C-897/19, EU:C:2020:262 paragraph 52; *Navileme and Nautizende*, C-509/12, EU:C:2014:54, paragraphs 10 and 11 and case law cited; and *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 16).

76 With respect to Article 36 EEA, it should be noted that no provision of the EEA Agreement affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services. Thus, services within the meaning of Article 36 EEA may vary widely in nature, including those which are provided over an extended period, even over several years (compare the judgments in *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraph 26, and *von Chamier-Glisczinski*, cited above, paragraph 74).

77 In the case of a person who is prevented from working, as in the case of recipients of a benefit such as that at issue, numerous explanations may explain their choosing to stay in another EEA State. However, in such circumstances, it can be assumed that such an individual will receive services in the EEA State in which he stays.

78 On the basis of the foregoing, it follows that a person such as N who has exercised his freedom to move and to receive services in an EEA State other than his home State comes within the scope of Article 36 EEA.

Restriction of the freedom to provide services

79 With regard to the question as to whether the application of national legislation such as that at issue in the main proceedings constitutes an obstacle to the free movement of services

under Article 36 EEA, it should be observed, first of all, that all measures which prohibit, impede or render less attractive the exercise of the free movement of services must be regarded as restrictions (see Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 85 and case law cited).

80 Furthermore, it is of no relevance whether restrictions are imposed by the home State or by the host State. As the Court held in *Rindal and Slinning*, Article 36 EEA also applies to any national rules that render the provision of services between EEA States more difficult than the provision of services purely within an EEA State (see Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320, paragraph 44).

81 By its sixth question, the referring court, in essence, asks whether the imposition of three conditions on recipients of a benefit such as that at issue in the main proceedings seeking to stay abroad, as contained in the third paragraph of Section 11-3 of the National Insurance Act, are compatible with Article 36 EEA.

82 The Court recalls that, under Section 11-3 of the National Insurance Act, it is a condition for the entitlement to benefits that the insured person stays in Norway. Under the third paragraph of Section 11-3, benefits may be granted as an exemption from the presence requirement if the stay abroad is for a limited time and it can be demonstrated that it is compatible with the completion of the planned activity and does not impede follow-up and control.

83 According to administrative practice referred to in the request, benefits can only be granted exceptionally for stays abroad. Further, benefits should usually not be paid for longer than a limited period normally fixed, up to four weeks (the limited time condition), provided that it can be demonstrated that the stay abroad is compatible with the completion of the planned activity, and that it does not impede follow-up and control by NAV (the activity and control condition). As pointed out by the Norwegian Government, the Supreme Court has construed this condition as requiring the insured person to be granted authorisation in advance in order to be entitled to retain benefits during a stay abroad (the prior authorisation condition).

84 In light of the above, the Court will proceed on the basis that such a presence requirement, as a main rule, denies benefits if the insured person is not physically present in Norway. Exemptions may be granted by prior authorisation, and authorisation will be refused unless the stay in another EEA State is for a limited period of time and it can be demonstrated that the stay is compatible with the implementation of the insured person’s activity plan and does not impede control and follow-up by NAV.

85 It is sufficient to observe that, by its very essence, a condition limiting the duration of stays abroad, such as the condition in the main proceedings, constitutes a restriction on the freedom to receive services abroad because it is liable to render the provision of services

between EEA States more difficult than within the home State and is liable to lead to the loss of benefits or to limit the places to which the individual may travel.

86 It is clear that a system of prior authorisation represents an additional burden for individuals choosing to stay in another EEA State compared to those staying in Norway. In particular, it is settled case law that prior authorisation schemes amount to a restriction on the freedom to provide services (see Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 76 and case law cited). The same must therefore apply, *mutatis mutandis*, to the freedom to receive services. As regards the condition that the stay abroad must be compatible with the planned activity and possibility of control by Norwegian authorities, these requirements, by their very nature, will severely limit the circumstances in which such authorisation may be obtained.

87 In addition, the restrictive effects of legislation such as that at issue in the main proceedings are, contrary to what the Norwegian Government maintains, not to be considered too uncertain and indirect to be regarded as constituting a restriction contrary to Article 36 EEA.

88 In particular, unlike the situation giving rise to the judgment in *Commission* v *Spain*, C-211/08, EU:C:2010:340, referred to by the Norwegian Government, the possible retention of the sickness benefits at issue depends, not on a future and hypothetical event occurring for the insured person concerned but, on a circumstance linked directly to the exercise of the right to freedom of movement for reasons of tourism or other purposes.

89 Referring to *Commission* v *Spain*, the Norwegian Government submitted that with regard to an insured person travelling to another EEA State for reasons relating to tourism, and not to any inadequacy in the health service to which he is affiliated, the rules on freedom of movement of services offer no guarantee that the consequences will be neutral. However, *Commission* v *Spain* is not transposable to a situation such as that in the present case, as the restriction derives from the rules of just one EEA State and does not result from disparities between the social security legislation of EEA States, while moving from one EEA State to another.

90 It follows from the foregoing considerations that a measure such as that at issue in the main proceedings entails a restriction within the meaning of Article 36 EEA.

Justification

91 It should be recalled that the freedom to provide services may only be restricted by rules that are justified by overriding reasons in the public interest, which are appropriate to securing the attainment of the legitimate objective pursued, and proportionate having regard to that objective (see, inter alia, Case E-19/15 *ESA* v *Liechtenstein*, cited above, paragraph 86).

92 Accordingly, it should first be examined whether there are legitimate objectives that may justify a restriction upon the freedom to receive services.

93 Next, it should be examined whether the conditions for exemptions from the presence requirement are suitable to achieve the legitimate objective pursued. It is for the EEA State imposing a restriction to demonstrate that the measures it has adopted are suitable for attaining the stated objectives. Moreover, the measure must genuinely reflect a concern to attain the aims pursued in a consistent and systematic manner (see *Kristoffersen*, cited above, paragraph 118).

94 Finally, it is necessary to consider whether the conditions go beyond what is necessary in order to attain that objective. This implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law (see *Kristoffersen*, cited above, paragraphs 121 and 122).

95 It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. It must also be pointed out that reasons invoked by an EEA State as justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (compare the judgment in *DW*, C-651/16, EU:C:2018:162, paragraph 34).

Legitimate objectives

96 As regards the reasons which may justify a restriction on the provision of services when it comes to the legislation at issue, the Norwegian Government submits that there are several objective justifications. It submits that the national legislation is intended to (i) avoid the risk of a serious undermining of the financial balance of the national social security system; (ii) avoid the risk of the abuse of sickness benefits; (iii) reflect the need to monitor compliance with the requirements for social security benefits; and (iv) facilitate the integration of persons excluded from the labour market and promote a high level of employment.

97 As the Court has held, the risk of seriously undermining the financial balance of the social security system may constitute an overriding general-interest reason capable of justifying a restriction on the free movement of services in so far as it could have consequences for the overall level of public-health protection (see *Rindal and Slinning*, cited above, paragraph 55). It is also legitimate for the national legislature to wish to monitor compliance with the requirements for social security benefits. As regards the objective of seeking to avoid the risk of the abuse of sickness benefits, the Court recalls the cumulative

subjective and objective test for the determination of abuse and that the scope of EEA law cannot be extended to cover abuse (see *Campbell*, cited above, paragraphs 69 to 71).

98 Lastly, the Court considers that the encouragement of recruitment constitutes, in principle, a legitimate aim of EEA States' social or employment policy.

The objective of encouraging recruitment

99 The Court observes that the encouragement of recruitment constitutes a legitimate aim of social policy and that, in choosing the measures capable of achieving the aims of their social and employment policy, the EEA States have a broad margin of discretion (compare the judgment in *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 26). However, given the particular characteristics of the measure at issue, the obstacle which it entails clearly cannot be justified in the light of such objectives.

100 In particular, the margin of discretion which the EEA States enjoy in matters of social policy cannot have the effect of frustrating the implementation of one of the fundamental principles enshrined in the EEA Agreement or of a provision of EEA law (compare the judgments in *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraphs 52 and 53, and *ITC*, C-208/05, EU:C:2007:16, paragraph 40 and case law cited).

101 The Norwegian Government argues that the work assessment allowance, similar to unemployment benefits in the narrow sense, occupies a special place in social security systems. Unemployment benefits are not only social security benefits, but also important instruments of labour market and employment policy with the aims of integrating persons excluded from the labour market and ensuring a high level of employment.

102 At the hearing, the Commission emphasised the importance of the distinction between sickness benefits and unemployment benefits. Only ancillary elements of a sickness benefit may concern the labour market, since the primary purpose pertains to the health of the insured individual. However, labour market considerations cannot prevail over the classification of work assessment allowance as a sickness benefit, and may not alter its fundamental character as such. Thus, the Commission maintains, considerations devised to fit the specific purposes of employment policies, such as to re-integrate persons into the labour market, cannot be applied to sickness benefits.

103 The Court notes that it is for the EEA State to demonstrate that the measures it has adopted are suitable for attaining the stated objectives. Moreover, the measure must genuinely reflect a concern to attain the aims pursued in a consistent and systematic manner (see *Kristoffersen*, cited above, paragraph 118).

104 The Court observes that mere generalisations concerning the capacity of a specific measure to encourage recruitment, as submitted by the Norwegian Government, are not enough to show that the aim of that measure is capable of justifying derogations from one of the

fundamental freedoms of EEA law and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (compare the judgment in *Age Concern England*, C-388/07, EU:C:2009:128, paragraph 51 and case law cited).

105 In particular, "sickness benefits" within the meaning of point (a) of Article 4(1) of Regulation 1408/71 are health-related benefits and cannot be considered to be primarily instruments of national employment policy designed to improve opportunities for entering the labour market. The Court further recalls that the term "sickness benefits" must be interpreted uniformly for the purpose of applying that regulation, not according to the type of national legislation containing the provisions giving those benefits (compare the judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 35).

106 While a benefit such as that at issue is awarded to a person whose reintegration into employment life is difficult and to that extent impacts employment policy to a certain degree, the main objective of granting sickness benefits is the improvement of the state of health and the quality of life of insured persons. Thus, considerations devised to fit the specific purposes of the employment policy of re-integrating persons into the labour market cannot justify the restriction in question.

The time-limit

107 By its seventh question, the referring court asks, in essence, whether the condition providing that the benefit recipient may stay abroad only for a limited period of time, normally not exceeding four weeks per year, may be justified by the need to ensure that any stay abroad is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution.

108 It is legitimate for an EEA State to monitor compliance with the requirements of social security benefits. However, as regards such a criterion predicated upon a maximum stay abroad in the territory of another State, in circumstances such as those of the main proceedings, such a condition goes beyond what is necessary to achieve the objective pursued.

109 As also argued by ESA, the national rule makes no comparable limitation for an insured person travelling and staying away from his home municipality or residence within Norway for tourism or other purposes. Rather, the general system for monitoring compliance under Section 11-7 of the National Insurance Act is that the insured person reports to NAV every fourteenth day. Such notifications are intended to provide NAV with relevant information for an insured person's entitlement to the benefit. This applies regardless of the circumstances of the travels within Norway. It has not been demonstrated that the limited time condition reflects the legitimate objectives in a consistent and systematic manner when for travels within Norway it is sufficient for compliance and supervision to report to

NAV every second week. It does not appear that a notification system would impede NAV from being able to verify that a recipient continues to satisfy the conditions for the benefit.

110 It has not been sufficiently demonstrated why a general control system is unsatisfactory with regard to insured persons on shorter stays in another EEA State compared to insured persons physically present in Norway, but travelling away from their residence or home municipality, for example for leisure or for other purposes. Accordingly, it cannot be maintained that the competent institution may have particular difficulties in monitoring compliance with the entitlement to the benefits when it comes to shorter stays in another EEA State.

111 Moreover, under Article 19 of Regulation 1408/71, Norway is responsible for paying sickness benefits to insured persons who reside in another EEA State. The Court also notes that, according to Article 22(2), the competent institution may only refuse authorisation for return to the State of residence or transfer of residence to another EEA State under point (b) of Article 22(1), if it "is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment". The Court observes that a time limit condition cannot be considered necessary in order to monitor compliance with entitlement in the case of insured persons on shorter stays in other EEA States, where that does not apply for insured persons who return to or reside in other EEA States.

112 As persons in receipt of benefits follow individualised activity plans, their needs in terms of follow-up and control may vary significantly. Consequently, as a maximum of four weeks outside of Norway per year does not take the individual needs of persons sufficiently into account, the condition goes beyond what is necessary.

113 Consequently, national legislation such as that at issue in the main proceedings which makes retention of the right to sickness benefit within the meaning of point (a) of Article 4(1) of Regulation 1408/71 subject to a ceiling on the time spent abroad, not usually exceeding four weeks per year, goes beyond what is necessary to attain the objective pursued and therefore amounts to an unjustified restriction on the free movement of services guaranteed by Article 36 EEA.

The activity and control and prior authorisation conditions

114 By its eighth question, the referring court, in essence, asks whether the conditions requiring that stays abroad are compatible with the performance of defined activity obligations and do not impede follow-up and control by the competent institution, and that the person concerned must obtain authorisation for such stays, may be justified on the basis of the same considerations, namely preserving the financial balance of the national social security system and monitoring compliance with the requirements for social security benefits.

115 The Court recalls that the need to monitor compliance with the requirements for social security benefits is a legitimate objective.

116 With respect to the prior authorisation requirement, the Norwegian Government has stated that NAV will take the activity plan as the starting point for control and follow-up. A lack of scheduled activity during the relevant time period will thus militate in favour of granting authorisation. It is further explained that a lack of scheduled activity does not fully answer the question as to whether NAV has any relevant activities to offer during the time period. NAV may also be in a position to offer non-scheduled activities such as summer work, internships or other forms of follow-up in the period in question. NAV must therefore also assess the need for, and availability of, such measures before determining whether the stay abroad is compatible with the requirements of activity and follow-up specified in Sections 11-8 and 11-11 of the National Insurance Act. As such, NAV would also be in a position to ascertain in advance whether the stay may be prejudicial to health. If so, that could give reason to deny an authorisation.

117 As with the limited time condition, the prior authorisation condition does not apply to travel within Norway. For travels within Norway, the fortnightly reporting requirement is regarded as sufficient, and no similar assessment of non-scheduled activities or offers of other relevant activities appears to take place. Travels within Norway are thus treated in a more favourable manner than travels to other EEA States without sufficient justification. Therefore, the measures are not suitable for a coherent pursuit of the stated objectives.

118 With respect to the principle of proportionality, it is necessary that any condition, such as a system of prior authorisation, may be justified with regard to the overriding considerations mentioned above, that it does not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (compare the judgments in *Elchinov*, cited above, paragraph 44; *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 82; and *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraph 83).

119 It has not been demonstrated why less restrictive measures, such as a prior notification system, would not be sufficient, whilst minimising the restriction upon the free movement of services. In any event, the reasons invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures if necessary, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the attainment of the stated objectives (compare the judgment in *DW*, cited above, paragraph 34).

120 Accordingly, such a system of prior authorisation must be considered disproportionate.

121 Given this conclusion, it is, strictly speaking not necessary to examine the conditions attached to it, namely, that the stay abroad is compatible with the fulfilment of defined activities and follow-up. Nevertheless, in the spirit of cooperation with the referring court

and to provide it with as complete an answer as possible, the Court will briefly address those conditions.

122 The Norwegian Government argues that the activity and control conditions, controlled via a system of prior authorisation, have been undertaken, inter alia, with a view to preserving the financial balance of the national social security system. In this regard, the Court notes that, with respect to the suitability and necessity of the measures in question for achieving this purpose, it has held that a system of prior authorisation for reimbursement of costs of hospital treatment abroad would appear to represent a necessary and reasonable way of attaining the aim in question, namely avoiding the possible risk of seriously undermining the social security system's financial balance (see *Rindal and Slinning*, cited above, paragraph 60; compare also the judgments in *Smits and Peerbooms*, cited above, paragraph 80, and *Müller-Fauré and van Riet*, cited above, paragraph 81).

123 However, in these cases referred to above, at issue was whether the social security system should be obliged to pay for treatments undertaken by individuals abroad, in some cases including treatments that were not available in the home State. In such circumstances, the systemic risk to the social security system from unrestricted access to a range of potentially expensive treatments abroad is clearly evident (see *Rindal and Slinning*, cited above, paragraph 61). In the main proceedings, however, no payment for treatment undertaken in another EEA State is at issue.

124 In its oral submissions, the Norwegian Government noted that the activity and control conditions, as well as the need for prior authorisation to ensure compliance with the former, are geared, in part, towards ensuring that persons in receipt of the benefit do not become sick when they are abroad, necessitating that the State must pay for medical treatment, and thereby placing a burden upon the social security system.

125 It must be recalled that the reasons that may be invoked by an EEA State in justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted and by specific evidence supporting the arguments (see Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1040, paragraph 82). In the present case, it must be held that the Norwegian Government has not put forward any argument capable of supporting the assertion that, were insured persons at liberty to go without prior authorisation to another EEA State, in circumstances such as those of the main proceedings, that would be likely to seriously undermine the social security system's financial balance.

126 Although an EEA State bears the risk of covering such costs for insured persons entitled under its social security system when those persons travel to other EEA States, an activity and control requirement as well as a prior authorisation requirement does not remedy this risk in a consistent and systematic manner. Travelling to another EEA State does not represent a particular additional risk of falling ill compared to travelling within Norway.

127 An authorisation therefore is neither suitable nor necessary to counter, in a consistent and systematic manner, the risk of insured persons falling ill when travelling to another EEA State, when for travels within Norway it is sufficient to report to NAV every second week.

128 On the basis of the foregoing, the activity and control conditions, as well as the need for prior authorisation to ensure compliance with the former, such as that at issue in the main proceedings, are not capable of being justified and are thus incompatible with Article 36 EEA.

129 Accordingly, the answer to the fifth, sixth, seventh and eighth questions must be that Article 36 EEA must be interpreted as precluding national rules such as those at issue in the main proceedings.

Questions 9 to 11

130 In light of the answer given to the fifth, sixth, seventh and eighth questions, it is not necessary to answer the ninth and tenth questions. Nor is it necessary to answer the eleventh question, as that question is conditional on the answer to the fifth question being negative.

Question 13

131 By its thirteenth question, the referring court asks, in essence, whether the term "staying" in Article 21(1) of Regulation 883/2004 is to be interpreted as encompassing each and every short-term stay in another EEA State not constituting residence, including stays such as those at issue in the main proceedings.

132 Article 21(1) of Regulation 883/2004 is applicable in respect of an insured person and members of his family residing or staying in an EEA State other than the competent EEA State. The term "residence" is defined in point (j) of Article 1 as meaning "the place where a person habitually resides". In contrast, the definition of "stay" in point (k) of Article 1 is defined as meaning "temporary residence".

133 The juxtaposition of the terms "residing" and "staying" in the wording of Article 21(1) of Regulation 883/2004, as well as the contrasting definition of "stay" in point (k) of Article 1, which defines "stay" as "temporary residence", makes it clear that the term "staying" in Article 21(1) must be interpreted as covering a short-term stay in another EEA State not constituting residence within the meaning of point (j) of Article 1. The terms "residing" and "staying" in Article 21(1) are intended to cover all forms of presence or residence in another EEA State. It should be noted that a "stay" encompasses both a short-term stay as well as a visit of longer duration (compare the judgment in *I*, C-255/13, EU:C:2014:1291, paragraph 50). This understanding is confirmed, inter alia, by a comparison of the different language versions, including the Danish, French, German and Swedish texts. Accordingly, the term "staying" in Article 21(1) must be understood as including short-term stays such as those at issue in the main proceedings.

134 In the light of the foregoing, the answer to the thirteenth question must be that the term "staying" in Article 21(1) of Regulation 883/2004 must be interpreted as encompassing short-term stays in another EEA State not constituting "residence" within the meaning of point (j) of Article 1 of that regulation, such as those at issue in the main proceedings.

Question 14

135 By its fourteenth question, the referring court asks whether Article 21 of Regulation 883/2004 is to be interpreted as only covering situations where the medical diagnosis is given during a stay in an EEA State other than the competent EEA State or also situations where, as in the main proceedings, the diagnosis is recognised by the competent institution before departure.

136 There is no basis in the wording of Article 21 for limiting the applicability of that article to situations where a medical diagnosis is given during a stay in an EEA State other than the competent EEA State. Moreover, there is nothing to suggest that the provision is not to be interpreted in line with its clear wording.

137 Accordingly, the answer to the fourteenth question must be that Article 21 of Regulation 883/2004 must be interpreted as covering situations where a medical diagnosis is given during a stay in an EEA State other than the competent EEA State as well as situations where, as in the main proceedings, the diagnosis is recognised by the competent institution before departure.

Question 15

138 By its fifteenth question, the referring court asks, in essence, whether Article 21 of Regulation 883/2004, in particular its wording "in accordance with the legislation it applies", is to be interpreted as meaning that the competent EEA State may maintain conditions that: (i) the benefit may be provided only for a maximum of four weeks per year outside of Norway; (ii) the stay abroad is compatible with the activity obligations and does not impede follow-up and control by the competent institution; and (iii) the person concerned must obtain authorisation and comply with the notification duty through the use of a notification form.

139 The Court recalls that, pursuant to Article 7 of Regulation 883/2004, unless otherwise provided for by the Regulation, cash benefits payable under the legislation of one or more EEA States or under the Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in an EEA State other than that in which the institution responsible for providing benefits is situated. A condition of presence could be equivalent, in practice, to a habitual residence clause, if, in particular, such condition requires long periods of presence in the EEA State concerned and/or if that condition must be met for as long as the benefit in question is paid. In such cases, a presence requirement can be

assimilated to a residence clause within the meaning of Article 7 of Regulation 883/2004 (compare the judgment in *Stewart*, cited above, paragraph 73). The Court notes that, in circumstances such as those of the main proceedings, a presence requirement, which excludes entitlement to sickness benefits during short-stays abroad, is in fact significantly more restrictive than a residence requirement (see *Stig Arne Jonsson*, cited above, paragraphs 69 to 74). Article 7 provides that EEA States cannot make benefits conditional on residence. It follows that an EEA State cannot condition such benefits on continuous physical presence either.

140 Article 21(1) of Regulation 883/2004 goes on to provide that an insured person and members of his family residing or staying in an EEA State other than the competent EEA State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. Article 21(1) does not set any conditions for this entitlement.

141 In this respect, it should be recalled that legal acts in the field of social security incorporated into the EEA Agreement are not intended to lay down the criteria creating the right to benefits. Each EEA State retains the competence to determine in its domestic legislation the conditions for granting benefits under a social security system, albeit in compliance with EEA law (see Case E-2/18 *Concordia*, cited above, paragraph 43, and compare the judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 99).

142 With respect to Article 21(1) of Regulation 883/2004 itself, the wording "in accordance with the legislation it applies" has to take account of the broader context of Article 29 EEA, which provides for coordination, rather than harmonisation, of domestic legislation in this area. As such, it leaves it up to each EEA State to lay down the criteria for the entitlement to cash benefits in accordance with their domestic legislation.

143 However, Article 21 of Regulation 883/2004 does not provide a basis for derogating from the right to retain social security benefits when going to another EEA State as expressed in that provision. Thus, provided that the criteria for entitlement in national law are fulfilled, Article 21(1), including its wording "in accordance with the legislation it applies", cannot be interpreted as permitting an EEA State to impose any further conditions, such as requiring an insured person to be physically present on its territory. An interpretation permitting the entitlement conferred by Article 21(1) to be defeated by a requirement as to physical presence on an EEA State's territory would render that provision devoid of purpose (compare the judgment in *Tolley*, cited above, paragraph 88).

144 It follows that Article 21(1) of Regulation 883/2004 prevents a competent EEA State from making retention of entitlement to a cash benefit such as that at issue in the main proceedings subject to a condition as to physical presence on its territory (compare the judgment in *Tolley*, cited above, paragraph 89).

145 The first condition referred to in the fifteenth question places a limitation of four weeks on the right to retain the entitlement to cash benefits while in another EEA State set out in

Article 21(1) of Regulation 883/2004. In effect, it requires an insured person to be physically present in Norway for a minimum of 11 months per year, with any authorised absence being classified as an exception to the general requirement that the insured person remains in Norway.

146 The second and third conditions require the insured person to stay in Norway unless it can be demonstrated that staying abroad is compatible with the planned activity and does not impede follow-up and control by NAV by way of a notification form. These conditions subject the right to retain cash benefits under Article 21(1) of Regulation 883/2004 to a prior authorisation scheme. In effect, these conditions constitute a requirement to be physically present in Norway, which can be lifted following approval by the competent institution of an application by the insured person.

147 Article 21(1) of Regulation 883/2004 must be interpreted as precluding a prior authorisation requirement such as that described in the third condition. Any other interpretation would disregard the unconditional entitlement contained in Article 21(1) as well as the fact that its wording constitutes an explicit departure from the wording of its predecessor, Article 22(1) of Regulation 1408/71, which provided for the possibility for EEA States to subject the retention of benefits in the case of a transfer of residence to authorisation by the competent institution.

148 It follows from the above that Article 21(1) of Regulation 883/2004 precludes an EEA State, in situations covered by that provision, from making retention of entitlement to a cash benefit subject to conditions, such as for example a condition as to physical presence on its territory or subjecting the right to prior authorisation. Therefore, Article 21(1) precludes conditions such as those listed by the referring court in the fifteenth question. This conclusion entails that a further assessment of such conditions under other provisions of EEA law is not necessary.

149 In the light of the foregoing, the answer to the fifteenth question must be that Article 21(1) of Regulation 883/2004 must be interpreted as precluding conditions such as (i) that the benefit may be provided only for a maximum of four weeks per year outside of Norway; (ii) that it must be demonstrated that the stay abroad is compatible with the activity obligations and does not impede follow-up and control by the competent institution; and (iii) that the person concerned must obtain authorisation and comply with the notification duty through the use of a notification form. Accordingly, a further assessment of those conditions under other provisions of EEA law is not necessary.

Question 16

150 Having regard to the answer given to the fifteenth question, as well as the fifth, sixth, seventh and eighth questions, it is not necessary to answer the sixteenth question.

IV Costs

151 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **The answer to the first and twelfth questions is that a benefit such as the work assessment allowance at issue in the main proceedings constitutes a sickness benefit within the meaning of point (a) of Article 4(1) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and point (a) of Article 3(1) of Regulation (EC) No 883/2004 on the coordination of social security systems.**

2. **The answer to the second, third, and fourth questions must be that a situation such as that at issue in the main proceedings does not come within the scope of Articles 19 or 22 of Regulation (EEC) No 1408/71. However, that finding does not have the effect of removing national rules such as those at issue in the main proceedings from the scope of the provisions of the main part of the EEA Agreement or another legal act incorporated into the EEA Agreement.**

3. **The answer to the fifth, sixth, seventh, and eight questions must be that Article 36 EEA must be interpreted as precluding legislation of an EEA State, such as that at issue in the main proceedings, which makes the right of insured persons to retain sickness benefits in cash within the meaning of point (a) of Article 4(1) of Regulation (EEC) No 1408/71 in the case of a stay in another EEA State subject to**

   - a requirement that the recipient of sickness benefits may stay abroad only for a limited period of time which may not usually exceed four weeks per year; and

   - a system of prior authorisation, which provides for such authorisation to be refused unless it can be demonstrated that the stay in another EEA State is compatible with the performance of defined activity obligations and does not impede follow-up and control by the competent institution.

4. **In light of the answer given to the fifth, sixth, seventh and eighth questions, it is not necessary to answer the ninth, tenth and eleventh questions.**

5. **The answer to the thirteenth question must be that the term "staying" in Article 21(1) of Regulation (EC) No 883/2004 must be interpreted as**

encompassing short-term stays in another EEA State not constituting "residence" within the meaning of point (j) of Article 1 of that regulation, such as those at issue in the main proceedings.

6. **The answer to the fourteenth question must be that Article 21 of Regulation (EC) No 883/2004 must be interpreted as covering situations where a medical diagnosis is given during a stay in an EEA State other than the competent EEA State as well as situations where, as in the main proceedings, the diagnosis is recognised by the competent institution before departure.**

7. **The answer to the fifteenth question must be that Article 21(1) of Regulation (EC) No 883/2004 must be interpreted as precluding conditions such as**

   (i) that the benefit may be provided only for a maximum of four weeks per year outside of Norway;

   (ii) that it must be demonstrated that the stay abroad is compatible with the activity obligations and does not impede follow-up and control by the competent institution; and

   (iii) that the person concerned must obtain authorisation and comply with the notification duty through the use of a notification form.

   Accordingly, a further assessment of such conditions under other provisions of EEA law is not necessary.

8. **Having regard to the answer given to the fifteenth question, as well as the fifth, sixth, seventh and eighth questions, it is not necessary to answer the sixteenth question.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 5 May 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President