



EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the European Commission, represented by Denis MARTIN and Bernd-Roland KILLMANN, members of its Legal Service, with a postal address for service in Brussels at the Legal Service, *Grefte Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

in Case **E-2/22**,

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the National Insurance Court (Norway), in the case:

A,

Appellant

against

Labour and Welfare Directorate

Respondent

requesting an advisory opinion regarding the interpretation of the act referred to in Point 1 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security schemes.

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. Ms A is a Swedish national.
2. Ms A moved from Sweden to Norway in August 2017 when her then spouse, a Norwegian national, got a job in Norway.
3. Before moving to Norway, Ms A had resided and been employed in Sweden for over five years. She had never been previously resident in Norway.
4. A and her spouse separated on 21 June 2019.
5. On 24 June 2019, Ms A applied for a transitional benefit (*overgangsstønad*) according to Section 15-5 of the Norwegian National Insurance Act. At that time, she was expecting a child. She stated in her application form that she would have studied for a bachelor's degree from 2019 to 2022 in Oslo. She also confirmed in the application form that she had no employment at the time of application.
6. On 26 June 2019, the competent Norwegian authority rejected the application on the grounds that Ms A did not satisfy the three years prior membership in the Norwegian social security system requirement pursuant to Section 15-2 of the National Insurance Act.
7. The child of Ms A was born on 28 July 2019.
8. Ms A appealed against the decision without success. She then applied to the National Insurance Court arguing that the refusal to grant her a transitional benefit was contrary to EEA law. She submitted that a transitional benefit had to be considered a "maternity benefit" under Article 3(1)(b) of Regulation (EC) No 883/2004. Therefore, taking into account her period of being member of the Swedish social security system pursuant to Article 6 of that regulation would lead her to fulfil the requirement of the three years prior membership to obtain the transitional benefit.

9. The competent Norwegian authority argued that it was practice in Norway to consider the transitional benefit to fall outside the scope of the predecessor of Regulation (EC) No 883/2004. In other words, the rules of the EEA Agreement, ever since its conclusion, were not applicable to the transitional benefit to the effect that the period of membership in the social security system referred to the one spent in Norway only.

II. THE QUESTIONS

10. The questions referred to the EFTA Court by the National Insurance Court are the following:

1) Does a benefit such as the transitional benefit (overgangsstønad) – see the first paragraph of Section 15-5 of the National Insurance Act, read in conjunction with the first sentence of the second paragraph – come within the material scope of Regulation (EC) No 883/2004 according to:

a. Article 3(1), in particular (j), or

b. Article 3(3), read in conjunction with Article 70?

2) Is it of any significance for the assessment under question 1) that there is a requirement of occupational activity for continued entitlement to a benefit when the youngest child becomes one year old, see Section 15-6 of the National Insurance Act?

III. THE APPLICABLE LAW

EEA and Union Law

11. Regulation (EC) No 883/2004 entered into force on 1 May 2010 between Member States and became applicable from 1 June 2012 to Iceland, Liechtenstein and Norway due Annex VI, Social Security, to the EEA Agreement as replaced by Joint Committee Decision No 76/2011. Point 1 of Annex VI reads:

“I. GENERAL SOCIAL SECURITY COORDINATION

ACTS REFERRED TO

1. 32004 R 0883: Regulation (EC) No 883/2004 ...

...

The provisions of Regulation (EC) No 883/2004 shall, for the purposes of this Agreement, be adapted as follows:

...

(k) The following shall be added to Annex X:

...

NORWAY

(a) Guaranteed minimum supplementary pension to persons who are born disabled or become disabled at an early age under the National Insurance Act;

(b) Special benefits in accordance with the Act of 29 April 2005 No. 21 on supplementary allowance to persons with short periods of residence in Norway."

12. Articles 1, 3, 6 and 70 of Regulation (EC) No 883/2004 read as follows:

“Article 1

Definitions

For the purposes of this Regulation:

...

(z) ‘family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.

...

Article 3

Matters covered

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

...

(b) maternity and equivalent paternity benefits;

...

(j) family benefits.

2. ...

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

...

Article 6

Aggregation of periods

Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

— *the acquisition, retention, duration or recovery of the right to benefits,*

— *the coverage by legislation,*

or

— *the access to or the exemption from compulsory, optional continued or voluntary insurance,*

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.

...

Article 70

General provision

1. *This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.*

2. *For the purposes of this Chapter, 'special non-contributory cash benefits' means those which:*

(a) *are intended to provide either:*

(i) *supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the*

persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. ...

4. *The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence."*

National law

13. Section 15 of the National Insurance Act (*Lov Nr 19 av 1997 om folketrygd*) contains the rules on benefits for single mothers or fathers. It reads as follows:

"Section 15-1.

Purpose

The purpose of benefits pursuant to this chapter is to secure income for members who have sole care for children, and to provide these members with temporary assistance for self-help, so that they may become self-supporting through their own work.

Section 15-2.

Prior membership

It is a condition for the right to benefit pursuant to this section that the person in question has been a member of social security for the last three years before he or she makes a claim for benefits. The Ministry provides regulations on exemptions from the provision in the first subsection.

...

Section 15-4.

Single mother or father

Benefits pursuant to this chapter can be given to a member who is a single mother or father and has sole care for children. 'Mother' or 'father' shall also include someone who has acquired parental responsibility due to death under Section 38 of the Children Act.

'Single mother or father' means a member who is unmarried, separated or divorced. A member who lives with a person with whom he or she has children or is divorced or separated, or lives in a marriage-like relationship in a common household without a common child, is not considered a single mother or father. If the member is married, the person in question is considered a single mother or father when the cohabitation has ceased and the marriage is required to be dissolved by an application for separation and divorce with the County Governor or by having a case brought before the courts. If a member has a new child with the same partner while receiving benefits to a single mother or father for a common child, none of the parents are considered to be a single mother or father. The same applies if the mother or father has previously received benefits pursuant to this section for a common child.

A mother or father has sole care for a child when he or she consistently has clearly more of the day-to-day care than the other parent. None of the parents are considered to have sole care for the child in case of living conditions as mentioned in section 1-5 fourth paragraph or other close living conditions. The Ministry may issue regulations on what are considered other close living conditions. The member himself or herself has the burden of proof that he or she is a single mother or father with sole care for children.

Section 15-5.

Transitional benefit

Transitional benefits are provided to a member who, due to the care of children, is temporarily unable to provide for himself/herself through his/her own work, or can only access employment following a period of adjustment or education.

Benefits may be given to a single mother or father who has children under the age of eight. For a member who is prevented from working due to the care of children who require special supervision, transitional benefits may be granted until the child reaches the age of 18. Exceptions may be made to the age limit in the first sentence in connection with extensions pursuant to section 15-8, second paragraph, third sentence, fourth paragraph and fifth paragraph.

A member who has for no reasonable cause terminated an employment relationship in the last six months before the date of application will not receive transitional benefits.

Section 15-6.

Occupational activity obligation

When the youngest child has reached the age of one year, it is a condition of the right to transitional benefit that the member either

- a. is in work that makes up at least half of full time,*
- b. has registered with the Norwegian Labour and Welfare Administration as a genuine jobseeker,*
- c. conducts education or training that constitutes at least half of the full time that the Norwegian Labour and Welfare Administration considers is necessary and appropriate for the member to be able to get or keep a job, or*
- d. establishes its own activities, see section 4-6, third subsection.*

The Norwegian Labour and Welfare Administration shall, as needed, summon the person concerned for discussions to consider further measures in respect of the member and whether measures shall be implemented with a view to transition to employment.

A member who is a genuine jobseeker, cf. first subsection letter b), must report every fourteen days to the Norwegian Labour and Welfare Administration. The Norwegian Labour and Welfare Administration decides how such reporting should take place.

The activity obligation does not apply if the member is prevented from working due to the care of children who require special supervision as mentioned in section 15-8, third subsection. If the member is not in vocational activity pursuant to the first subsection, transitional benefits are nevertheless provided if the child does not have a satisfactory supervision scheme and this cannot be attributed to the member himself. The same applies if the single mother or father or child has a disease that hinders vocational activity. The illness must be documented with a medical certificate.

The Ministry may issue regulations on which education can be approved and the requirement to be a genuine job seeker.

Section 15-7.

Amount of the transitional benefit

Annual transitional benefits amount to 2.25 times the basic amount.

Section 15-8.

Benefit period

Transitional benefits can be provided for three years in total. A member who has previously received transitional benefits for an entire period of benefit may be

granted new periods of benefit until the child is entitled to a kindergarten place pursuant to Section 16 of the Kindergarten Act. In connection with childbirth, benefits can also be provided for up to two months before birth.

The benefit period can be extended by up to two years when the single mother or father is under the necessary and appropriate education, cf. Section 15-6 first paragraph (c). If the single mother or father has sole care for more than two children or received sole care for children before the age of 18, the benefit period can be extended by up to three years. The benefit period can be further extended up to and down to the month in which an educational year begins. Benefits are usually not granted after vocational qualifications have been obtained.

The benefit period can be extended until the child turns 18 if the member is prevented from working because the child requires special supervision due to disability, illness or major social problems. The child's physical or mental condition must be documented by a doctor. Documentation must also be provided that the member is prevented from working as a result of the child's condition.

In direct connection with an ongoing period of benefit, the benefit period can be extended by up to two years if the member or child has a transient illness that prevents the member from working. The illness must be documented with a medical certificate.

In direct connection with an ongoing period of benefit, the benefit period may in special cases be extended for up to six months pending the start of school, child supervision, a specific employment offer or after the member has registered as a real job seeker at the Labour and Welfare Administration. The Ministry may issue regulations on calculating the length of the benefit period, including the division and reduction of the benefit period.

Section 15-9.

Deduction against income

The transitional benefit is reduced on the basis of employment income that the member has or can be expected to receive.

The transitional benefit shall not be reduced if the income from employment on an annual basis is less than half the basic amount. The benefit is reduced by 45 per cent of income over half the basic amount. The following shall be deemed equivalent to employment income: unemployment benefits pursuant to section 4, sickness benefit pursuant to section 8, benefits in the event of sickness of a child or other close relative pursuant to section 9, work assessment allowance pursuant to section 11 and maternity and parental benefit pursuant to section 14.”

IV. OBSERVATIONS

First question

14. The first question is whether the transitional benefit, as provided for in Section 15-5 of the Norwegian National Insurance Act, falls within the scope of Article 3 of Regulation (EC) No 883/2004. The referring National Insurance Court assumes that, potentially, the transitional benefit could be a “maternity benefit” under paragraph 1 point (b) of that provision, or a “family benefit” under its paragraph 1 point (j), or a so-called special non-contributory cash benefit under its paragraph 3. Ms A claims that the transitional benefit is a “maternity benefit”; the competent Norwegian authority considers the transitional benefit to fall outside the scope of Regulation (EC) No 883/2004.

15. Based on the information available, the Commission understands that the transitional benefit requires under the Norwegian National Insurance Act the following conditions to be fulfilled:
 - first, being a member of the Norwegian social security system for a certain period prior to the submission of the claim, that period being at the time of Ms A’s application three years (Section 15-2);

 - second, being a single parent and having the sole care of a child (Section 15-4);

 - third, being a parent who, due to having care of a child, is temporarily unable to be self-supporting through his or her own work, or can only access employment following a period of adjustment or education (first paragraph of Section 15-5);

 - fourth, having a child under the age of eight years old, or until the age of eighteen years, if the parent is prevented from working due to having care of a child requiring special supervision (second paragraph of Section 15-5).

16. The transitional benefit is not conditional on previous work or income. The amount of the transitional benefit is a fixed amount, independent from family expenses of

the parent applying for, regardless of how many children the parent has (Section 15-7 of the Norwegian National Insurance Act). However, if the parent has an income exceeding a certain amount, the transitional benefit is reduced by 45 % of the exceeding income (Section 15-9).

17. The transitional benefit is granted until the child attains eight years, for a period of no more than three years, which may be extended by up to two years under certain conditions. If the child requires special supervision due to psychological disability, sickness or major social problems, the transitional benefit is granted until the child has reached the age of 18 years (Section 15-8 of the Norwegian National Insurance Act).
18. Before entering into assessing which kind of benefit under Article 3 of Regulation (EC) No 883/2004 the transitional benefit could be, it appears worthwhile to recall that the distinction between benefits coming within the scope of that regulation and those which fall outside that scope is based essentially on the constituent elements of each benefit, in particular its purpose and the conditions for its grant, and not on whether it is classified as a social security benefit by national legislation¹.
19. A benefit is to be regarded as a social security benefit in so far as it is granted to recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position (first condition) and provided that it relates to one of the risks expressly listed in Article 3(1) of Regulation (EC) No 883/2004 (second condition)².
20. As regards the first condition, the provisions relating to the grant of the transitional benefit confer a legally defined right. The competent authority must grant the benefit automatically to persons who fulfil objective criteria as set out in the Norwegian

¹ See judgment of the EFTA Court of 5 May 2021, *Criminal proceedings against N*, E-8/20, point 50 and case law cited.

² See judgment of the EFTA Court of 5 May 2021, *Criminal proceedings against N*, E-8/20, point 51 and case law cited.

National Insurance Act, without any individual and discretionary assessment of personal needs.

21. The transitional benefit being a flat-rate sum that does not vary according to the number of children does not detract from the objective nature of the criteria for granting the benefit. Also the fact that the its amount is calculated by taking into account the applying person's resources does not imply its grant depending on an individual assessment of the applicant's personal needs, given that it is an objective, legally defined criterion entitling to the benefit without the competent authority's being able to take other personal circumstances into consideration. In order for it to be considered that the first condition has not been satisfied, the discretionary nature of the assessment, by the competent authority, of the personal needs of an applicant of a benefit must, above all, relate to eligibility for that benefit³.
22. Based on what is in the Norwegian National Insurance Act, the applying single parent's resources are not taken into account in conferring entitlement to the transitional benefit, but only in calculating the benefits. In other words, the transitional benefit must be granted if the applying single parent satisfies the conditions for his or her eligibility, irrespective of his or her resources. Consequently, the transitional benefit is granted without any individual and discretionary assessment of the personal needs of the recipient.
23. Finally, it is also of no importance that the grant of the transitional benefit is not subject to any contribution requirement. The method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit⁴.

³ See judgment of the Court of Justice of 2 September 2021, *INPS*, C-350/20, points 55 to 56 and the case law cited.

⁴ See Judgment of the Court of Justice of 24 October 2013, *Lachheb*, C-177/12, point 32 and the case law cited.

24. The first condition confirmed, it needs to be examined whether the second condition is fulfilled, that is whether the transitional benefit relates to one of the risks expressly listed in Article 3(1) of Regulation (EC) No 883/2004.
25. The referring National Insurance Court considers that it is a “family benefit”. The Commission shares the point of view of the National Insurance Court.
26. With regard to whether a particular benefit is one of the family benefits referred to in Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation, the phrase ‘to meet family expenses’ is to be interpreted as referring in particular to a public contribution to a family’s budget to alleviate the financial burdens involved in the maintenance of children⁵.
27. It is apparent that the transitional benefit is granted in respect of a child. Apart from the age criterion, there is no other condition linked to the child. In other words, it is the existence of one or more children who has to be maintained that is the essential feature of the transitional benefit⁶.
28. The transitional benefit is granted automatically to parents satisfying certain legally defined, objective criteria, without any individual and discretionary assessment of the applying parent’s or the child’s personal needs. The requirement that the single parent is temporarily unable to be self-supporting through his or her own work, or can only access employment following a period of adjustment or education, shows that the transitional benefit is granted irrespective of whether there is other income – except for certain other social security benefits under Section 15-13 of the Norwegian National Insurance Act – for the single parent or the child not deriving from employment.

⁵ See judgment of the Court of Justice of 2 September 2021, *INPS*, C-350/20, point 57 and the case law cited.

⁶ See judgment of the Court of Justice of 10 October 1996, *Hoever and Zachow*, C-245/94 and C-312/94, point 24.

29. The transitional benefit therefore fulfils both conditions to fall under Article 3(1) of Regulation (EC) No 883/2004, specifically it is a cash benefit intended in particular, by means of a public contribution to the family's budget, to alleviate the financial burdens involved in the maintenance of one or more children in the sense of Article 1(z) of that regulation.
30. It is of no significance, in that regard, whether that transitional benefit has also another function, namely, to secure a minimum income for a single parent thereby rendering that parent able to become self-supporting through his or her own work, as long as one of the functions relates to the branch of social security referred to in Article 3(1) of Regulation (EC) No 883/2004⁷.
31. As regards the argument that the transitional benefit is a "maternity benefit" because its grant is linked to childbirth, it is true that a mother may be eligible for the transitional benefit. It is nevertheless the case that the right to that benefit belongs to the single parent who has alone care of the child. In other words, the right to the transitional benefit may also accrue to the father. In such a situation, a benefit intended to enable one of the parents to devote himself or herself to raising a young child, and designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity, must be treated as a "family benefit"⁸.
32. The transitional benefit is also not a "special non-contributory cash benefit" under Article 3(3) read together with Article 70 of Regulation (EC) No 883/2004. In that connection, it is sufficient to note that it is clear from the wording of Article 70(2)(c) that the special non-contributory cash benefits are to be understood as solely those listed in Annex X to that regulation, as adapted by point 1(k) of Annex VI to the

⁷ See judgment of the Court of Justice of 2 September 2021, *INPS*, C-350/20, point 60 and the case law cited.

⁸ See judgment of the Court of Justice of 11 June 1998, *Kuusijärvi*, C-275/96, points 60 to 63.

EEA Agreement. Since the transitional benefit does not appear in that annex, it does not constitute such a benefit⁹.

33. Norway recently expressed the view that already at the time, when Norway entered the EEA Agreement, the Norwegian government concluded that the transitional benefit was not falling within the scope of Regulation (EC) No 883/2004 and that it perceived to have the Commission, despite denying to give any guarantee, sharing this view¹⁰. To rebut this argument, it is sufficient to state that, in its interpretation of the EEA Agreement, the Court cannot be bound by mere expectations of the Contracting Parties as to the exact content of the obligations the Parties enter into¹¹.
34. In conclusion, the Commission is of the opinion that a benefit such as the transitional benefit at issue in the main proceedings constitutes a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.

Second question

35. With its second question, the referring National Insurance Court would like to know whether it is of any significance for the transitional benefit with regard to its being a “family benefit” that there is a requirement of occupational activity for continued entitlement to a benefit when the youngest child becomes one year old under *Section 15-6* of the National Insurance Act.

⁹ See judgment of the Court of Justice of 12 March 2020, *Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle*, C-769/18, point 35.

¹⁰ See letter of the Royal Norwegian Ministry of Labour and Social Affairs to the EFTA Surveillance Authority, dated 10 March 2021, available at

<https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Information%20concerning%20the%20transitional%20benefit%20for%20single%20parents%20%28overgangsst%C3%B8nad%29%20and%20Regulation.pdf> .

¹¹ See judgment of the EFTA Court of 14 December 2007, *EFTA Surveillance Authority/Liechtenstein*, E-5/06, point 63.

36. In this respect the Commission refers to the case-law of the Court of Justice who explicitly held that, even where a benefit can perform a dual function, namely, to keep poorly paid workers in employment and to meet family expenses, it is by virtue of that second function that a benefit, such as family credit, still falls within the category of “family benefits”¹².
37. This case-law leads the Commission to conclude that a requirement of occupational activity for continued entitlement to a benefit when the youngest child reaches a certain age is not of any significance for the assessment of a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.

Outlook

38. The Commission wishes also to explain the consequences of the transitional benefit at issue in the main proceedings being a “family benefit”.
39. In the main proceedings, Ms A, a Swedish national residing in Norway, has not received the transitional benefit because she did not complete the required period of insurance under the Norwegian social security legislation. Since the transitional benefit is a “family benefit” – or for the matter any other benefit falling under Article 3(1) of Regulation (EC) No 883/2004 – Article 6 of that regulation requires the Norwegian competent authority to take into account, for the acquisition of the right to benefits, periods of insurance, residence or employment completed in another EU Member State or EEA State.
40. Consequently, the Commission takes the view that, as long as the transitional benefit qualifies under any of those listed Article 3(1) of Regulation (EC) No 883/2004, the refusal to grant the transitional benefit to Ms A because she was not insured under the Norwegian legislation for at least three years – as the legislation at stake required at the time of the application – was contrary to Article 6 of that regulation.

¹² See judgments of the Court of Justice of 16 July 1992, *Hughes*, C-78/91, point 19 as well as of 15 March 2001, *Offermanns*, C-85/99, point 45.

V. CONCLUSION

41. For the reasons discussed above, the Commission considers that the questions from the National Insurance Court should be answered in the following sense:

- 1. A benefit such as the transitional benefit at issue in the main proceedings constitutes a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.**
- 2. A requirement of occupational activity for continued entitlement to a benefit when the youngest child reaches a certain age is not of any significance for the assessment of a “family benefit” within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, read together with Article 1(z) of that regulation.**

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