



ATTORNEY GENERAL FOR CIVIL AFFAIRS

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The EFTA Court

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OSLO, 8 April 2022

**Written observations  
by The Norwegian Government, represented by  
the Labour and Welfare Directorate (Arbeids- og  
velferdsdirektoratet)**

represented by Ida Thue, advocate at the Office of the Attorney General for Civil Affairs,  
submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court, in

**Case E-2/22 A v Arbeids- og velferdsdirektoratet**

concerning a request for a preliminary ruling from Trygderetten (The Norwegian National  
Insurance Court)

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## 1 INTRODUCTION

- (1) The National Insurance Court has, by application dated 26 January 2022, requested the EFTA Court (hereinafter 'the Court') to give an advisory opinion on questions regarding a claim for a transitional benefit (*overgangsstønad*) lodged by a Swedish national. The questions read, as translated by the EFTA Court:
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?
- (2) These questions have arisen in a case between the appellant A (hereinafter 'the appellant') and the Norwegian Labour and Welfare Directorate (hereinafter 'NAV' or 'the Government')<sup>1</sup> pending before the National Insurance Court (hereinafter 'the referring court').
- (3) The case concerns the validity of the Government's decision to reject the appellant's claim for transitional benefit (*overgangsstønad*) on the basis that she had not been a member of the social security system in the last three years prior to the application, cf. Section 15-2 of the Norwegian National Insurance Act (*folketrygdloven*).
- (4) The appellant submits that the NAV should have taken insurance periods completed under Swedish law into account when assessing whether she met the membership requirement in Section 15-2. This question turns on whether the transitional benefit falls within the scope of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereinafter 'the Regulation').
- (5) The appellant claims that the transitional benefit is a 'maternity benefit', cf. Article 3(1)(b) of the Regulation. The referring court considers that there is much to suggest that a transitional benefit constitutes a 'family benefits' under Article 3(1)(j) of the Regulation. The Government will submit that the transitional benefit falls outside the scope of Regulation No 883/2004. The transitional benefit does not relate to one of risks listed in Article 3(1). The social security scheme in Chapter 15 of the National Insurance Act covers the heightened risk faced by the vulnerable group of single parents, of not being able to be self-supporting because they are alone in caring for a child.

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<sup>1</sup> The term 'the Government' will be used in the context of NAV's position as a party to the main proceedings, whereas NAV will be used in other contexts.

## 2 FACTS

- (6) The basic facts of the case, as set out in the order of reference, are as follows:
- (7) A is a Swedish national who moved to Norway with her husband in August 2017. Before moving to Norway, she had resided and been employed in Sweden for over five years.
- (8) A was separated in the spring of 2019 and applied for transitional benefit on 24 June 2019. In her application, A stated that she was pregnant with a baby due towards the end of July.
- (9) At the time of the application, A was not employed. A has not had any employment income or been registered as an employed person in Norway after applying for the benefit.
- (10) By decision of 26 June 2019, A's application was rejected. NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) found that the requirement in Section 15-2 of the National Insurance Act of three years' prior membership in the Norwegian national insurance scheme was not fulfilled. A had only just under two years of prior membership.
- (11) A appealed to NAV Appeals (*NAV Klageinstans*), but the rejection was upheld by decision of 29 October 2019, on the same grounds.
- (12) In her appeal to the National Insurance Court, A submitted that the transitional benefit was a "maternity benefit" under Article 3(1)(b) of Regulation No 883/2004, and that under Article 6 of that regulation, any insurance periods in Sweden had to be included in the assessment of whether the membership period under Section 15-2 of the National Insurance Act was met.
- (13) NAV Appeals argued that the transitional benefit fell outside of the scope of the Regulation, and that insurance periods completed in Sweden were irrelevant under relation Section 15-2.

## 3 THE TRANSITIONAL BENEFIT

### 3.1 Introduction

- (14) The order for reference contains an overview of the provisions in Chapter 15 of the National Insurance Act concerning the transitional benefit and the ancillary benefits in Section 15-11. The Government will nevertheless provide a brief description of the historical background (Chapter 3.2), the objectives pursued by the transitional benefit (Chapter 3.3), the nature of the transitional benefit (Chapter 3.4), as well as the requirements for its grant (Chapter 3.5).

### 3.2 Historical background

- (15) The transitional benefit was originally part of the 1964 Act on benefits for widows and unmarried mothers.<sup>2</sup> Section 5(1) provided that widows and unmarried mothers who were temporarily incapable of supporting themselves through their own work, either because they were taking care of children, or because they first after a transitional period and eventual

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<sup>2</sup> Act of 20 June 1964 No 1.

educational time could find suitable work, were entitled to a transitional benefit. Unmarried women that were pregnant could also claim transitional benefit during the last two months before birth, cf. Section 5(2).

- (16) Under Section 4(1) of the 1964 Act widows and unmarried women who needed education or training were to have her expenses covered as far as necessary and could be provided with a contribution for relocation to get started with a profession or for other purposes that were necessary to provide herself with income.
- (17) Pursuant to Section 6 (1) of the 1964 Act widows and unmarried mothers who because of training or work outside the home had to leave the care of their children to others, were entitled to a "helping" benefit.
- (18) This benefit scheme has since been amended, but the transitional benefit, the benefits in relation to education and relocation, and the day care benefit are still part of the special social security scheme for single parents in Chapter 15 of the National Insurance Act. All single parents are now eligible for these benefits.

### **3.3 Objectives**

- (19) The purpose of benefits under Chapter 15 is to provide parents that have the sole care of a child with a minimum subsistence income in a transitional period while they try to become self-supporting through work, training, or education. To the same end, the social security scheme in Chapter 15 covers various expenses necessary to participate in work, education, or training, in order to become self-supporting.

### **3.4 Nature**

- (20) The benefits in Chapter 15 reflect the objective in Section 15-1. Single parents with sole care of a child may receive the transitional benefit, cf. Section 15-5 and supplemental benefits under Section 15-11(1), covering expenses related to travelling or temporary relocating in connection with education (letter a to c), expenses for child supervision and housing in connection with education (letter d and e), expenses for teaching aids (letter f) and expenses for school fees (Section 15-11(4)). A relocation benefit may also be granted to persons who move to take up a job somewhere else (Section 15-11(2)), and a childcare benefit may be granted to persons who are registered at NAV as genuine job seekers (Section 15-11(3)).
- (21) The transitional benefit is given at a fixed rate<sup>3</sup> which is at the same level as other temporary income guarantee schemes under the National Insurance Act. The rate is approximately at the same level as the minimum benefit for work assessment allowance (benefits to secure income in the event of temporary sickness) under Chapter 11 of the National Insurance Act.
- (22) The main rule is that the transitional benefit may be granted for a total of three years, see Section 15-8(1) of the National Insurance Act. A member who has previously received transitional benefits for an entire benefit period may be granted a new benefit period until

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<sup>3</sup> See Section 15-7 of the National Insurance Act.

the child is entitled to a place in kindergarten. The benefit period may be extended by up to two years when the single mother or father is taking necessary and appropriate education, cf. Section 15-8(2). The benefit period may be extended until the child becomes 18 years old if the member is prevented from working because the child requires special supervision due to disability, sickness or major social problems, see Section 15-8(3). In direct connection with an ongoing benefit period, the benefit period may be extended by up to two years if the member or the child has a temporary illness that prevents the member from working, see Section 15-8(4).

### **3.5 Requirements**

#### **3.5.1 *The single parent requirement***

- (23) Section 15-4 of the National Insurance Act provides that benefits under Chapter 15 may be granted to a member who is a single mother or father and has sole care of a child.
- (24) The main rule is that persons who are single, separated or divorced are regarded as a 'single mother or father' under Section 15-4(2). A mother or father has the sole care of a child when she or he consistently has clearly more of the day-to-day care, see Section 15-4(3).

#### **3.5.2 *The requirement of being temporarily unable to be self-supporting through work***

- (25) Section 15-5 of the National Insurance Act provides that the transitional benefit may be granted to a member who, due to having sole care of a child, is temporarily unable to be self-supporting through his or her own work, or that can only access employment following a period of adjustment or education.
- (26) This requirement implies that there must be a causal relationship between having care of a child and being temporarily unable to be self-supporting through work. This is emphasised by Section 15-5(3), under which a member who without reasonable cause has terminated an employment relationship during the last six months preceding the time of application shall not receive transitional benefits.

#### **3.5.3 *The occupational activity requirement***

- (27) If the youngest child has turned one year, the member must meet the occupational activity requirement under Section 15-6 of the National Insurance Act. This means that the person must either be in employment amounting to at least half of full-time, have registered as a genuine job seeker, complete education or training amounting to at least half of full-time which is necessary and appropriate for the member to obtain or retain employment or establish her or his own business, see Section 15-6(1).
- (28) The activity obligation does not apply if the member is prevented from working due to care of a child requiring special supervision, see Section 15-6(4)
- (29) If the member is not in occupational activity, the transitional benefit shall nevertheless be granted if the child temporarily does not have a satisfying supervision arrangement, and this

is not attributable to the member. The same applies if the single mother or father or the child has an illness that prevents occupational activity, cf. Section 15-6(5).

#### **3.5.4 The requirement that the child must be under eight years old**

- (30) Section 15-5(2) provides that the benefits may be given to a single mother or father who has a child that is under eight years old. For a member who is prevented from working due to having care of a child that requires special supervision, transitional benefit may be granted until the child becomes 18 years old.

## **4 ARTICLE 3(1) OF THE REGULATION**

### **4.1 Introduction**

- (31) According to settled case-law, the distinction between benefits coming within the scope of Regulation No 883/2004 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 legislation.<sup>4</sup>
- (32) A benefit may be regarded as a social security benefit under Article 3(1) of the Regulation provided that two requirements are met. The first condition is that it is granted without any individual and discretionary assessment of personal needs on the basis of a legally defined position. The second condition is that the benefit must relate to one of the risks expressly listed in Article 3(1) of Regulation.<sup>5</sup>
- (33) Social security benefits must be considered, 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.<sup>6</sup>
- (34) A benefit such as the transitional benefit meets the first condition. It is granted without any individual and discretionary assessment of personal needs on the basis of a legally defined position. The main rule is that a single parent who, due to having care of a child under eight years old, is temporarily unable to be self-supporting through his or her own work, or who can only access employment following a period of adjustment or education, cf. Section 15-5 of the National Insurance Act, is entitled to the transitional benefit provided that the other

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<sup>4</sup> See Case E-8/20 *Criminal proceedings against N* para 50, and C-350/20 *O.D. and others*, para 52, with further references.

<sup>5</sup> See Case E-8/20 *Criminal proceedings against N* para 51, and C-350/20 *O.D. and others*, para 53, with further references.

<sup>6</sup> See Case E-8/20 *Criminal proceedings against N* para 52, with further references.

requirements of prior membership (Section 15-2) and occupational activity (Section 15-6) are fulfilled.

- (35) This conclusion is not altered by the fact that employment income and benefits deemed equivalent to employment income under Section 15-9 of the National Insurance Act lead to a reduction in the transitional benefit, or that the transitional benefit lapses in so far as the person receives certain other subsistence benefits, cf. Section 15-13. These provisions do not imply any individual and discretionary assessment on the part of the authorities (NAV).
- (36) The Government is, however, of the opinion that the transitional benefits does not meet the second condition, as it does not relate to one of the risks expressly listed in Article 3(1). The transitional benefit covers a special risk (*sui generis*), namely the risk of single parents not being able to support themselves, see Chapter 4.2 below.

#### **4.2 The transitional benefit does not relate to any of the risks listed in Article 3(1)**

- (37) The transitional benefit gives single parents who cannot provide for themselves because of the care for child, or who can only access employment following a period of adjustment or education, a minimum subsistence income in a transitional period while they try to become self-supporting through work, training, or education. The ultimate purpose of the benefits in Chapter 15 is the person becoming self-supporting.
- (38) Recipients of the transitional benefit are eligible for ancillary benefits under Section 15-11, to cover expenses in connection with travelling, relocating, day care, housing, teaching aids, and school fees which the single parent incurs while he or she is completing necessary education.
- (39) These benefits cover the risk of single parents not being able to support themselves because of the sole care for a child. They are intended to provide sufficient income in a transitional period, as well as cover expenses related to work, education or training that are necessary in order to become self-sufficient, see Section 15-11 of the National Insurance Act.
- (40) The risk of not being able to support yourself because of the sole care of a child is not one of the risks listed in Article 3(1). The transitional benefit and the ancillary benefits granted to single parents under Chapter 15 of the National Insurance Act consequently fall outside the scope of the Regulation.
- (41) In its proposal for a new social security regulation, the Commission had suggested that the list of branches of social security covered should not be exhaustive and was "intended to be flexible enough to cover new forms of social security schemes as they arise"<sup>7</sup>. This was not accepted by the Council. In the end, the material scope of the Regulation was extended only to cover statutory pre-retirement schemes (Article 3(1)(i)).<sup>8</sup>

<sup>7</sup> COM(1998) 779 final p 6.

<sup>8</sup> Se COM(2004) 44 final p 3.

- (42) This means that there are social security schemes in the EEA States that will continue to fall outside the material scope of the Regulation because they cover other risks than the ones that listed in Article 3(1) of the Regulation.
- (43) There are several examples in the case-law of the CJEU of benefits falling outside the scope of the current and former social security regulations because they did not relate to any of the listed risks.<sup>9</sup> The transitional benefit is yet another such example.
- (44) The Government's stance on the benefits in Chapter 15 of the National Insurance Act was communicated to the Commission during the negotiations on the EEA Agreement.<sup>10</sup>
- (45) The Commission's opinion was that this benefit scheme was so special and so particular for Norway that it should not be necessary to mention it in Annex VI to keep them outside the scope of the social security regulation. The Commission could, however, not provide any guarantees, and stated that this would ultimately have to be decided by the Court.<sup>11</sup>
- (46) The Government's position that the transitional benefit falls outside the scope of the social security regulations has never been contested by the EFTA Surveillance Authority (ESA).
- (47) It should be added that Norway is a party to two other social security conventions: the International Labour Organization (ILO) Social Security (Minimum Standards) Convention, 1952 (No 102), and the European Code of Social Security, 1964 (Council of Europe). Both conventions cover family benefits and maternity benefits, see the ILO convention parts VII and VIII and the Council of Europe convention parts VII and VIII.
- (48) In its proposal for the Regulation, the Commission stated that "all the classic branches of social security as defined under ILO Convention No 102 are covered" by the Regulation<sup>12</sup>.
- (49) The transitional benefit has never been reported to the ILO or the Council of Europe. The position of the Government has been that the benefits under Chapter 15 of the National Insurance Act fall outside the scope of those conventions.
- (50) The transitional benefit has much in common with the 'minimex' in Case C-249/83 *Hoeckx*. The 'minimex' was a benefit that adopted need as its essential criterion since it was granted

<sup>9</sup>See for example, Case C-39/76 *Mouthaan* (payment of arrears of salary), Case C-171/82 *Valentini* (a guaranteed income retirement scheme), Case C-249/83 *Hoeckx* (a general minimum subsistence benefit), Case C-25/95 *Otte* (adaptation allowance to employees in the coal-mining industry), Case C-57/96 *Meints* (compensation scheme for agricultural workers, whose contract of employment has been terminated), Case C-361/13 *Commission v Slovakia* (Christmas bonus), C-679/16 A (personal assistance for a severely disabled person) and Case C-447/18 *UB v Generálny riaditeľ Sociálnej poisťovne Bratislava* (an additional benefit for certain high-level sportspersons),

<sup>10</sup> Description of important provisions in Regulations EC 1408/71 and 574/72. The deviations from Norwegian legislation represented by these regulations (*En redegjørelse for vesentlige bestemmelser i EF-forordningene 1408/71 og 574/72. De fravik fra norsk lovgivning forordningene representerer*), note (*notat*) from the Convention Office (Konvensjonskontoret), 22 November 1991, p 8–9 (enclosed as an Annex). At the time, the transitional benefit and the ancillary benefits were part of Chapter 12 of the National Insurance Act of 17 June 1966 No 12, see Section 12-3.

<sup>11</sup> *Ibid.*

<sup>12</sup> COM(1998) 779 final p 6.



to any person who did not have adequate means and was unable to obtain them either by his or her own efforts or in any other way. The 'minimex' did not require periods of work or contribution, and it was sufficient to show that the applicant was prepared to accept work unless prevented by his state of health or compelling social reasons. The applicant also had to exercise his rights to social benefits or even any rights to maintenance (see para 13).

- (51) The same goes for the transitional benefit. Need is the essential criterion of its application, cf. Section 15-5(1) on the member being temporarily unable to be self-supporting through his or her own work. The transitional benefit does not require any periods of employment or contribution. As in *Hoeckx*, there is an occupational activity requirement (Section 15-6), but with exceptions related to health and social reasons (children under one year, children with special needs, lack of supervision arrangements, the health of the parent or the child). And, finally, applicants for the transitional benefit are required to exercise their rights to social benefits and sources of employment income, see Sections 15-9 and 15-13.
- (52) Admittedly, Section 15-2 contains a requirement of five years of prior membership of the Norwegian social security system, but this requirement can be met simply by residing in Norway, see Section 2-1 of the National Insurance Act.
- (53) The main difference between *Hoeckx* and the present case, seems to be that the 'minimex' was considered as a general social benefit (see para 14), while the transitional benefit and the ancillary benefits are reserved for a special group (single parents who cannot provide for themselves due to having sole care of a child).
- (54) Instead of adopting a general security scheme for persons who cannot support themselves, such as in *Hoeckx*, the Norwegian legislator chose to create a special social security scheme for a particularly vulnerable group of persons, who typically are in a difficult situation and in need of assistance.
- (55) The result is the same. Both the "general social benefit" in *Hoeckx*, and the social security scheme in Chapter 15 for single parents who cannot support themselves fall outside the material scope of Article 3(1) of the Regulation.

#### **4.3 The transitional benefit is not a 'maternity benefit' (Article 3(1)(b))**

- (56) The Regulation contains no definition of the term 'maternity or equivalent paternity benefit' in Article 3(1)(b). Some guidance is, however, provided by the para 19 of the preamble:

*« In some cases, maternity and equivalent paternity benefits may be enjoyed by the mother or the father and since, for the latter, these benefits are different from parental benefits and can be assimilated to maternity benefits strictu sensu in that they are provided during the first months of a new-born child's life, it is appropriate that maternity and equivalent paternity benefits be regulated jointly.»*

- (57) Maternity or equivalent paternity benefits must consequently be understood as benefits that are provided in relation to pregnancy, birth and the first period of a new-born child's life.

- (58) Norwegian social security law contains three benefits connected to maternity and paternity: 1) pregnancy benefit, cf. Section 14-4 of the National Insurance Act, 2) parental benefits due to birth and adoption, cf. Sections 14-5 to 14-16 of the National Insurance Act, and 3) lump sum maternity and adoption grant (for persons who do not qualify for parental benefit), cf. Section 14-17 of the National Insurance Act.
- (59) These three benefits all have the objective of securing income for parents in connection with pregnancy, birth and adoption, cf. Section 14-1 of the National Insurance Act.
- (60) The first two benefits are salary related, cf. Sections 14-4 and 14-7 of the National Insurance Act. The third benefit is a lump sum, cf. Section 14-17 of the National Insurance Act.
- (61) The pregnancy benefit and the parental benefits due to birth and adoption are classified as maternity and equivalent paternity benefits under Article 3(1)(b) of the Regulation.
- (62) The lump sum is classified as a 'special childbirth and adoption allowance' under Article 1(z).<sup>13</sup>
- (63) The Government submits that the transitional benefit cannot be regarded as a maternity or equivalent paternity benefit within the meaning of Article 3(1)(b) of the Regulation.
- (64) The transitional benefit does not have the specific objective of securing income for parents related to pregnancy, birth and the first period of the new-born child's life. The purpose of the transitional benefit is rather to cover the risk of single parents not being self-supporting because they are alone with a small child.
- (65) Although a single parent may receive the transitional benefit during the period before and after birth, it is not a necessary requirement that the applicant is expecting a child or is the parent of a new-born child. It is sufficient that the child is under eight years old, cf. Section 15-5(1) of the National Insurance Act. For single parents with children that require special supervision, transitional benefit may be granted until the child becomes 18 years old, cf. Section 15-15(2) of the National Insurance Act.
- (66) For example, a single parent with a child that is five years old may apply for the transitional benefit for the first time. This confirms that the transitional benefit is not related to the first period of a child's life, and that it cannot be classified as a 'maternity benefit'.
- (67) Similarly, in Case C-361/13 *Commission v Slovakia*, the CJEU held that a Christmas bonus could not be classified as an 'old age pension' within the meaning of Article 3(1)(d) of the Regulation. The bonus was not only paid to recipients of an old-age pension. Recipients of an invalidity pension, a social pension, a widow/widower's pension, or an orphan's pension could also be entitled to the Christmas bonus (see para 57).

<sup>13</sup> See Annex VI to the EEA Agreement No 1 letter c.

- (68) In the present case, the transitional benefit cannot be classified as a ‘maternity or equivalent paternity benefit’ within the meaning of Article 3(1)(b) of the Regulation, since it is not paid only to applicants with new-born children, but also to applicants that have older children.

#### **4.4 The transitional benefit is not a ‘family benefit’ (Article 3(1)(j))**

##### **4.4.1 The concept of ‘family benefits’**

- (69) Article 1 (z) of the Regulation provides that the term ‘family benefits’ in Article 3(1)(j) of the Regulation means “all benefits in kind or in cash intended to meet family expenses”.
- (70) The term ‘family benefits’ has been given a quite broad interpretation in the case-law of the CJEU. In Case C-104/84 *Kromhout*, the CJEU stated that “family benefits or family allowances are intended to provide social assistance for workers with dependent families in the form of a contribution by society towards their expenses” (see para 14). The phrase ‘to meet family expenses’ has been interpreted as referring in particular to a public contribution to a family’s budget to alleviate the financial burdens involved in the maintenance of children<sup>14</sup>.
- (71) However, case-law from the CJEU also shows that is not in itself sufficient for a benefit to be classified as a ‘family benefit’, that the recipient has a child and that the benefit is intended to secure income for the recipient.
- (72) In Case C-299/05 *Commission v Parliament*, the Commission argued that the Swedish and Finnish child care allowance was used to meet the expenses resulting, for the child’s family, from the child’s disability or sickness, and that a benefit intended to alleviate the financial burdens involved in the maintenance of children was a ‘family benefit’, see para 36–38.
- (73) The CJEU instead held that the child care allowances were intended to enable the parents to provide for the care, supervision and possibly rehabilitation of the children, and stated that these allowances constituted sickness benefits, see para 57–59.

##### **4.4.2 The purpose of the transitional benefit**

- (74) It should be underscored at the outset, that the purpose of the transitional benefit is not to cover family expenses. Other benefits under Norwegian law have the objective of covering family expenses, see Chapter 4.4.4 below.
- (75) As explained in Chapter 3.2 above, the ultimate purpose of the social security scheme under Chapter 15 of the National Insurance Act is the person becoming self-supporting through work, training, or education. The transitional benefit provides them with a minimum income while they try to become self-supporting through work, training, or education.

<sup>14</sup> See C-350/20 *O.D. and others*, para 57, with further references.

**4.4.3 The nature of the transitional benefit**

- (76) The benefits in Chapter 15 reflect this objective. Single parents who have sole care of a child may receive the transitional benefit to secure income (Section 15-5), but also a wide range of ancillary benefits under Section 15-11, intended to help the person become self-supporting. These cover expenses in connection with travelling, relocating, day care, housing, teaching aids, and school fees.
- (77) Together, these benefits form a social security benefit scheme that covers the heightened risk faced by the vulnerable group of single parents of not being able to be self-supporting because they are alone in caring for a child. The composite nature of the benefits covered by Chapter 15 demonstrates the *sui generis* character of that benefit scheme.
- (78) In any event, a benefit that gives the recipient the right to supplementary benefits covering his or her traveling expenses, relocation expenses, housing expenses, teaching aids and school fees, cannot be regarded as a 'family benefit'.
- (79) As mentioned in Chapter 3.3 above, the transitional benefit is provided at a fixed rate, and at approximately the same level as the minimum benefit for work assessment allowance under the Chapter 11 of the National Insurance Act.
- (80) In other words, the transitional benefit covers only what is considered as a minimum income for the parent. It does not cover any extra expenses related to the maintenance of the child.
- (81) The transitional benefit is reduced by employment income and benefits deemed equivalent to employment income under Section 15-9 of the National Insurance Act. It also lapses in so far as the person receives certain other subsistence benefits, cf. Section 15-13.
- (82) The transitional benefit is not reduced by any of the Norwegian social security benefits that are classified as 'family benefits' under Article 3(1) of the Regulation – such as advances of maintenance payments, cash grants or child benefits (see Chapter 4.4.5). This confirms that the transitional benefit is not connected to or intended to cover family expenses.

**4.4.4 The conditions for the grant of the transitional benefit**

- (83) The transitional benefit is only given to single parents with sole care of a child that is under eight years old, or a child that requires special supervision that is under eighteen years old.
- (84) As mentioned in Chapter 4.4.1 above, Case C-299/05 *Commission v Parliament*, shows that a requirement that the person has a child, is not in itself sufficient for a benefit to be classified as a 'family benefit'.
- (85) Benefits under Chapter 9 of the Norwegian National Insurance Act (benefits in the event of sickness of a child or other close relatives) are therefore classified as sickness benefits. Those benefits are intended to compensate for the loss of employment income for working parents in the event of sickness of a child or childminder and a child's disability, cf. Section 9-1 of the National Insurance Act.

- (86) Here a clear parallel to the transitional benefit can be seen. In both cases, the child makes it difficult for the parent be self-supporting. For benefits covered by Chapter 9, it is related to the child's sickness. For benefits under Chapter 15, it is related to the parent being alone in caring for a small child or for a child that needs special supervision, cf., Sections 15-5(2) and 15-8(2). And just as benefits under Chapter 9 cover the risk of sickness, the various benefits under Chapter 15 covers the heightened risk faced by this group of not being able to be self-supporting because they are alone in caring for a child (hence the various ancillary benefits aimed at making them self-supporting, coupled with the activity obligation).
- (87) When the youngest child has turned one year, the person must either be in employment amounting to at least half of full-time, have registered as a genuine job seeker, or complete education or training amounting to at least half of full-time. The requirement in Section 15-6 of the National Insurance Act demonstrates that the objective of the benefits in Chapter 15 is indeed to make the person self-supporting through work, training or education.
- (88) Only persons who cannot pursue an occupational activity because the child is under one years old, or because the child needs special supervision, are exempted from occupational activity requirement in Section 15-6. The transitional benefit is nevertheless granted if the child does not have a satisfying supervision arrangement, and this is not attributable to the member, or if the parent or the child has an illness that prevents occupational activity, cf. Section 15-6(5). There are striking similarities between these provisions and the benefits in the event of child's sickness under Chapter 9 of the Norwegian National Insurance Act. This only confirms that the transitional benefit cannot be regarded as a 'family benefit'.

#### **4.4.5 Family expenses are covered by other benefits under Norwegian law**

- (89) Family expenses are covered through other benefits under Norwegian law.
- (90) First, single parents may be entitled to advances of maintenance payments. The other parent is obliged to pay a monthly maintenance payment under the Children and Parents Act.<sup>15</sup> . If it is not paid on time, or the other parent is unable to pay, single parents may receive an advance maintenance payment (*bidragsforskott*).<sup>16</sup> In *C-85/99 Offermanns*, the CJEU held that advance maintenance payments were family benefits under Article 4(1)(h) of Regulation No 1408/71. Under Regulation 2004/883 Article 1(z), advances of maintenance payments listed in Annex X are excluded from the term family benefits.<sup>17</sup>
- (91) Secondly, parents are entitled to child benefits, see the Act on Child Benefits.<sup>18</sup> The purpose of the child benefits is to contribute to covering the expenses related to the maintenance of children, see Section 1(1). Section 9 provides that a single parent receives child benefits for one child more than the actual number of children (expanded child benefit). This additional amount is intended to contribute towards covering extra expenses incurred in being the sole

<sup>15</sup> Act of 8 April 1987 No 7.

<sup>16</sup> See Act of 17 February 1989 No 2.

<sup>17</sup> See Annex VI to the EEA Agreement No 1 letter b.

<sup>18</sup> Act of 8 March 2002 No 4.

provider and living alone with the child, see Section 1(2). The child benefit is classified as a 'family benefit' under Article 3(1)(j) of the Regulation.

- (92) Thirdly, parents may apply for cash benefits under the Act on Cash Benefits.<sup>19</sup> The purpose of the cash benefit is to help parents to spend more time caring for their own children, to give them genuine freedom of choice as regards type of care for their children and to bring about greater equality in the transfers the individual family receives for childcare from the State, irrespective of the childcare arrangements made by the parents, cf. Section 1. The cash benefit is granted for children between one and three years of age who do not have a place or only have a part-time place at a day care, see Section 2. The cash benefit is regarded as a 'family benefit' within the meaning of Article 3(1)(j) of the Regulation.

#### **4.4.6 The present case is not comparable to the CJEU case-law on 'family benefits'**

- (93) The Government is of the opinion that the transitional benefit cannot be compared to any of the benefits that have been classified as 'family benefits' in the case-law of the CJEU.
- (94) None of these benefits were based on an occupational activity requirement, cf. Section 15-6 of the National Insurance Act, nor did they exhibit the composite character of the benefits in Sections 15-5 and 15-11 of the National Insurance Act (see Chapters 3.3 and 4.4.3 above).
- (95) Some of the benefits that were classified as 'family benefits,' were calculated on the basis of the number and/or age of the children, see for example Case C-78/91 *Hughes* para 19 and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* para 24. Such requirements are a clear indication that benefit is "a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children". The same reasoning applies to benefits that require a certain number of children, see C-449/16 *Martinez Silva* para 24.
- (96) That is not the case for the transitional benefit. It is intended to provide a minimum means of subsistence only for the parent and does not cover expenses related to the maintenance of the child. Such expenses are covered by advances of maintenance payments and child benefits (see Chapter 4.4.5).
- (97) The CJEU has also stated that benefits "intended to enable one of the parents to devote himself or herself to the raising of a young child", in particular "remunerating the service of bringing up a child, meeting other costs of caring for and bringing up a child and, as the case may be, mitigating the financial disadvantages entailed in giving up income from full-time employment", are 'family benefits,' see *Hoever and Zachow* para 25, Case C-275/96 *Kuusijärvi* paras 59–65, Case C-333/00 *Maaheimo* paras 26–28, Case C-469/02 *Commission v Belgium* para 16 and Case C-216/12 *Hliddal* paras 21 and 56–58.
- (98) The transitional benefit and the ancillary benefits in Sections 15-5 and 15-11 of the National Insurance Act are not intended to remunerate the service of bringing up a child or provide compensation for income that is lost when a parent chooses to stay at home with a child. The benefits in *Hoever and Zachow*, *Kuusijärvi*, *Maaheimo*, *Commission v Belgium* and *Hliddal*

<sup>19</sup> Act of 26 June 1998 No 41.

are instead comparable to other social security benefits under Norwegian law, namely the cash benefit (see Chapters 4.4.5) and the parental benefits (see Chapter 4.3).

- (99) The transitional benefit in fact pursues the opposite objective of bringing the parent back into activity, be it work, training or education. Persons who without reasonable cause have terminated an employment relationship during the last six months are not eligible for the transitional benefit, see Section 15-5(3) of the National Insurance Act. The essential purpose of making the person self-supporting through work, training or education is also reflected in the activity requirement and the ancillary benefits, cf. Sections 15-6 and 15-11. This confirms that the social security scheme in Chapter 15 of the National Insurance Act indeed covers a special risk (*sui generis*), namely the heightened risk faced by this vulnerable group of not being able to be self-supporting because they have sole care for a child.

## 5 ARTICLE 70: SPECIAL NON-CONTRIBUTORY CASH BENEFITS

- (100) If the EFTA Court nevertheless were to conclude that the transitional benefit comes within the scope of the Regulation, the Government submits in the alternative that the transitional benefit is a special non-contributory cash benefit within the meaning of Article 70(2) of the Regulation.

- (101) Special non-contributory cash benefits are defined in Article 70(2) as benefits that:

*“(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;*

*(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.”*

- (102) The transitional benefit meets the first requirement in Article 70(2)(a)(i), of providing 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. As explained in Chapter 3.3 above, the transitional benefit is at the same level as other temporary minimum income schemes under the National Insurance Act. Hence, in the event that the EFTA Court were to conclude that the transitional benefit covers risks listed in Article 3(1), it must in any event be regarded as giving supplementary and/or substitute cover, see Sections 15-9 and 15-13 of the National Insurance Act.

- (103) The requirements in Article 70(2)(b), are also met. Section 23-10(3) of the National Insurance Act provides that the contribution provided by state shall at least cover the costs related to benefits provided under Chapter 15. Consequently, the financing of the transitional benefit and the ancillary benefits derives exclusively from compulsory taxation intended to cover general public expenditure. The conditions for granting and for calculating these benefits are not dependent on any contribution in respect of the beneficiary.
- (104) The requirement in Article 70(2)(c), that the benefit is listed in Annex X, cannot apply in the circumstances of the present case. The Government cannot be blamed for failing to include the transitional benefit and the ancillary benefits in Annex X to the Regulation. The opinion of the Norwegian Government has been that the benefits under Chapter 15 fall outside the scope of the Regulation. This has never been contested by the EFTA Surveillance Authority (ESA) or the Commission, see chapter 4.2 above. In such a situation, it should be sufficient that the material requirements in Article 70(2)(a) and (b) are met.

## 6 ANSWER TO THE QUESTIONS

Based on the foregoing, the Norwegian Government respectfully submits that the questions posed by the referring court should be answered as follows:

*A benefit such as the transitional benefit, cf. Section 15-5 of the Norwegian National Insurance Act, falls outside the scope of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.*

If the EFTA Court nevertheless should find that a benefit such as the transitional benefit relates to one of the risks listed in Article 3(1) of the Regulation, the Government respectfully submits in the alternative that the questions should be answered as follows:

*A benefit such as the transitional benefit, cf. Section 15-5 of the Norwegian National Insurance Act, must be regarded as a special non-contributory cash benefit within the meaning of Article 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.*

• • •

Oslo, 08/04/2022



ATTORNEY GENERAL FOR CIVIL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL  
FOR CIVIL AFFAIRS

Ida Thue  
advokat

Annex:

*Description of important provisions in Regulations EC 1408/71 and 574/72. The deviations from Norwegian legislation represented by these regulations (only in Norwegian)*