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**ORIGINAL**

**IN THE EFTA COURT**

**WRITTEN OBSERVATIONS**

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

**THE EFTA SURVEILLANCE AUTHORITY**

represented by

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acting as Agents,

**IN CASE E-2/22**

**A**

**v**

***Labour and Welfare Directorate (Arbeids- og Velferdsdirektoratet)***

*in which the National Insurance Court (Trygderetten) requests the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the material scope and application of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Article 29 of the EEA Agreement to a benefit such as the transitional benefit (overgangsstønad) under Section 15-5 of the National Insurance Act.*

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## 1 INTRODUCTION

1. The present case seeks to answer the question of whether the transitional benefit for single parents (*overgangsstønad*) in Section 15-5 of Chapter 15 of the Norwegian National Insurance Act (“the **NIA**”, *folketrygdloven*)<sup>1</sup> is covered by the material scope of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (“**Regulation 883/2004**” or “**the Regulation**”).
2. The plaintiff, (“**A**”), a Swedish national, moved to Norway in August of 2017 when her spouse at the time, a Norwegian national, started working in Norway. Immediately before moving to Norway, A had lived and worked in Sweden for over five years. In the spring of 2019, A was separated. The County Governor (*Statsforvalteren*) issued a separation permit (*separasjonsbevilling*) on 21 June 2019.
3. On 24 June 2019, A applied for the transitional benefit for single parents pursuant to Chapter 15 of the NIA. She stated in her application that she was expected to give birth on 25 July 2019 (the child was born on 28 July 2019). It was further stated in the application that A had been accepted at an educational institution in Oslo from the autumn of 2019, and that she would be studying for a bachelor’s degree in the period 2019-2022. The field in the application relating to employment was blank. As follows from the request for an advisory opinion, A’s case file confirmed that she was not employed at the time of application and that she subsequently has had no employment income in Norway nor been registered as an employed person in Norway.

By decision of 26 June 2019, NAV Employment and Benefits Office (*NAV Arbeid og ytelser*) rejected A’s application for the transitional benefit on the grounds that Section 15-2 of the NIA requires three years’ prior membership in the social security system to be eligible for the transitional benefit. A had been a member for just under two years. By decision of 29 October 2019, NAV Appeals (*NAV Klageinstans*) upheld the rejection on the same grounds as the lower instance. ESA notes that the requirement of five years’ prior membership in the social security system was

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<sup>1</sup> Act of 28 February 1997 No 19 on social security. In Norwegian: *Lov 28. februar 1997 nr. 19 om folketrygd*, available at <https://lovdata.no/dokument/NL/lov/1997-02-28-19>.

introduced on 1 January 2021. In the case pending before the National Insurance Court the relevant requirement was three years' prior membership.<sup>2</sup>

4. In the appeal to the National Insurance Court, A argued that the rejection of her application for the transitional benefit was contrary to EEA rules. According to A, the transitional benefit had to be considered a “maternity benefit” under Article 3(1)(b) of Regulation 883/2004 and that, accordingly, under Article 6 of Regulation 883/2004, A’s time in Sweden must be included for the purposes of determining whether the membership requirement provided for in Section 15-2 of the NIA is fulfilled.
5. NAV Appeals disagreed with A’s position and argued that it is established and consistent administrative practice going back to the conclusion of the EEA Agreement that the transitional benefit is presumed to fall outside the material scope of Regulation 883/2004 and its predecessor Regulation 1408/71, and that Section 15-2 of the NIA therefore had to be interpreted literally to the effect that membership in the social security system referred to a period of membership in Norway.<sup>3</sup> Additionally, in its submissions before the National Insurance Court, NAV argued that even if the transitional benefit comes within the scope of the Regulation because it relates to the risk “family expenses” (Article 3(1)(j) in conjunction with Article 1(z)) it must be treated as a non-contributory cash benefit under Article 70(2)(a)(i) also due to the fact that the transitional benefit is non-contributory and is intended to secure the member a minimum subsistence income.<sup>4</sup>
6. For the sake of good order, the EFTA Surveillance Authority (“ESA”) notes that on 27 January 2021, ESA’s Internal Market Affairs Directorate opened an own initiative case to investigate the transitional benefit. On 10 February 2021, it issued a request for information to the Norwegian Government concerning the benefit, observing that the eligibility conditions appear, *prima facie*, to bring the benefit within the scope of Regulation 883/2004.<sup>5</sup>
7. The Norwegian Government responded, *inter alia*, that when it:

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<sup>2</sup> Request for the Advisory Opinion, paragraph 14.

<sup>3</sup> Request for the Advisory Opinion, paragraph 10.

<sup>4</sup> Request for the Advisory Opinion, paragraph 58.

<sup>5</sup> Case No 86218 Doc No 1175938, available at [https://www.stortinget.no/globalassets/pdf/eu\\_open/esa\\_sak86218\\_trygdeforordningen\\_overgangsstonad\\_request\\_for\\_information.pdf](https://www.stortinget.no/globalassets/pdf/eu_open/esa_sak86218_trygdeforordningen_overgangsstonad_request_for_information.pdf).

*“entered the EEA Agreement, an assessment was made of the different benefits in relation to the former Regulation, Regulation 1408/71. The transitional benefit was discussed with the Commission, as Norway wanted to include the transitional benefit in annex VI as a benefit not covered by the Regulation. The Commission's view, however, was that this benefit was so special and peculiar that it would not be necessary to mention this in annex VI to keep it outside the scope the Regulation. However, the Commission could not provide any guarantee that this benefit could be excluded for all time, as this would ultimately be up to the EFTA-court or ECJ to decide.*

*Based on the discussions with the Commission, the Government concluded that the transitional benefit fell outside the scope of Regulation 1408/71 since the benefit covers a particular risk (sui generis) that is not covered by any of the branches of social security in Regulation 1408/71.”<sup>6</sup>*

8. ESA notes that, from the preparatory works relating to Norway's ratification of the EEA Agreement, it is apparent that not only did the Norwegian Government consider the benefit to be outside the scope of the Regulation. The Norwegian Government considered the benefit to be outside the scope of the EEA Agreement in general.<sup>7</sup>
9. On 1 April 2022, the Norwegian Government submitted a proposal to the Parliament regarding *Amendments to the National Insurance Act, etc. (visibility of international law obligations to social security coordination)*. There, the Government reiterated that it believes that the transitional benefit is not covered by the scope of Regulation 883/2004, with reference to the preparatory works from Norway's ratification of the EEA Agreement (referred to in point 8 above) and the view put forward there that the transitional benefit is outside of the scope of the EEA Agreement in general.<sup>8</sup>

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<sup>6</sup> See the Norwegian Government's Reply to the Request for Information, Doc No 1186641, 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>

<sup>7</sup> See St.prp. No 100 (1991-1992) p. 260: *“the National Insurance Act Chapter 12 [current Chapter 15] on benefits for single divorced and separated providers must be assumed to lie outside the material scope of the Agreement”*. In Norwegian: *“Folketrygdloven kapittel 12 om stønad til enslige, skilte og separerte forsørgere må anses å ligge utenfor Avtalens materielle virkeområde.”* Available at <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/repub/kap06.pdf>. All translations herein provided by ESA.

<sup>8</sup> Prop. 71 L (2021-2022) p. 47-48, available at <https://www.regjeringen.no/contentassets/479b9006cd88495fa6c0564883b7dfda/no/pdfs/prp202120220071000dddpdfs.pdf>.

ESA's understanding of the preparatory works of 1 April 2022 is that Chapter 15 of the NIA regulating the transitional benefit will not be affected by that proposal. There are no changes proposed. There is no change in the risk covered or change in entitlement conditions.

10. As set out below, ESA considers that the transitional benefit for single parents in Section 15-5 of Chapter 15 of the NIA is covered by the material scope of Regulation 883/2004 as a family benefit and it does not fall under Article 70 of Regulation 883/2004.
11. To ESA, regardless of whether the benefit at issue is a family benefit and therefore falls under the scope of Regulation 883/2004, the stay requirement expressed in Section 15-3 appears to be at odds with the requirements of EEA law, such as the freedom to provide and receive services.<sup>9</sup> ESA understands from the preparatory works of 1 April 2022 that the Norwegian Government maintains the stay requirement as a condition for receiving the transitional benefit.

## 2 THE QUESTIONS REFERRED

### Question (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?

### Question (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?*

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<sup>9</sup> See case E-8/20 *Criminal proceedings against N*, not yet reported.

### 3 EEA LAW

12. Recital (37) of Regulation 883/2004 reads:

*As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.*

13. Article 1 **Definitions** provides:

[...]

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

[...]

(l) "**legislation**" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

*This term excludes contractual provisions other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the European Union. Such declaration shall be published in the Official Journal of the European Union;*

[...]

(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.

14. Article 3 **Matters covered** provides:

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

(a) sickness benefits;

(b) maternity and equivalent paternity benefits;

[...]

(f) benefits in respect of accidents at work and occupational diseases;

[...]

(h) unemployment benefits;

[...]

(j) family 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.

4. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations.

*5. This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences.*

15. Article 4 **Equality of treatment** reads:

*Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.*

16. Article 6 **Aggregation of periods** reads:

*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.*

17. Article 9 **Declarations by the Member States on the scope of the Regulation** provides:

*1. The Member States shall notify the Commission [...] in writing of the declarations referred to in Article 1(1), the legislation and schemes referred to in Article 3, [...] as well as substantive amendments made subsequently. Such notifications shall indicate the date of entry into force of the laws and schemes in question or, in the case of the declarations provided for in Article 1(1), the date from which this Regulation will apply to the schemes specified in the declarations by the Member States.*

*2. These notifications shall be submitted to the Commission of the European Communities every year and published in the Official Journal of the European Union.*

18. Chapter 9 on **Special non-contributory cash benefits** provides in **Article 70**

*General Provisions:*

*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. Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.*

*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.*

#### **4 NATIONAL LAW**

19. Chapter 15 of the NIA is devoted to **Benefits to a single mother or father**. The overall purpose of those benefits is established in Section 15-1, entitled “**The purpose of the benefits**”:

*The purpose of benefits under this chapter is to ensure income for members who have sole care for children, and to provide these members with temporary help to self-help so that they can be able to support themselves through their own work.*

20. Chapter 15 of the NIA contains four benefits for single parents: The transitional benefit (Sections 15-5 and 15-6), and three other benefits to cover expenses in relation to childcare, education and relocation (Sections 15-10 and 15-11). It is the transitional benefit covered by Sections 15-5 and 15-6 that is the subject matter of the present case.

21. Chapter 2 of the NIA is entitled **Membership**. Section 2-1, entitled **Persons residing in Norway**, provides that:

*Persons residing in Norway are compulsory members of the National Insurance Scheme.*

*Those who are staying in Norway are considered as residents, when the stay is intended to last or has lasted at least 12 months. A person who moves to Norway is considered a resident from the date of entry.*

*It is a condition for membership that the person in question has a legal residence in Norway. [...]*

22. At the time when the Plaintiff submitted her claim for the transitional benefit, Section 15-2, entitled **Prior membership** provided in relevant part:

*It is a condition for entitlement to benefits under this chapter that the person in question has been a member of the social security for the last three years before he or she submits a claim for benefits.*

(,,)

*The Ministry issues regulations on exemptions from the provision in the first paragraph.*

23. With regard to prior membership, Section 1 of Regulation 21 November 2015 No 1341 *On benefits for single mother or father under Chapter 15 of the National Insurance Act*<sup>10</sup> states that:

*The provision in Section 15-2 first paragraph of the National Insurance Act on prior membership does not apply to persons who have previously been members for a long period of time, and who becomes a member again after an interruption of less than ten years.*

Further, Section 2 of that Regulation provides for exceptions from the requirement of prior membership:

*Even if a person does not fulfil the condition in Section 1, exceptions may be made from the provisions on prior membership when special reasons make it reasonable. Emphasis should be placed on whether*

- a. the need for the benefit occurred while he or she was a member of the National Insurance Scheme,*
- b. she or he has previously been a member, and*
- c. she or he had special reasons for coming to Norway beyond work or education.*

*If the single mother or father was not a member when the need for the benefit occurred, an exception can only be made if he or she has previously been a long-term member.*

24. Further, Section 15-3, entitled **Stay in Norway**, reads:

*It is a condition for entitlement to benefits under this chapter that the member and the child reside in Norway.*

*The member still receives benefits during a stay abroad if*

- a. the member stays abroad for less than six weeks during a twelve-month period, or*
- b. the stay [abroad] is due to work for a Norwegian employer.*

25. Section 15-4, entitled **Single mother or father**, provides:

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<sup>10</sup> In Norwegian: *Forskrift 21. november 2015 nr. 1341 om stønad til enslig mor eller far etter folketrygdloven kapittel 15*, available at: <https://lovdata.no/nav/forskrift/2015-11-21-1341>.

*Benefits under this chapter can be granted to a member who is a single mother or father and has sole care for children.*

*A mother or father is also considered to be a person who, due to a death, has been given parental responsibility pursuant to Section 38 of the Children's Act.*

*Single mother or father means a member who is unmarried, separated or divorced. A member who lives with a person he or she has children with or is divorced or separated from, or lives in a marriage-like relationship in a joint household without a joint child, is not considered a single mother or father. If the member is married, the person in question is considered to be a single mother or father when the cohabitation has ended, and the marriage has been demanded to be dissolved by application for separation and divorce with the County Governor or by a case being brought before the courts. If a member gets a new child with the same partner whilst he or she is receiving benefits as a single mother or father for a joint child, neither parent is considered to be a single mother or father. The same applies if the mother or father has previously received benefits under this chapter for joint children.*

*A mother or father has the sole care for a child when he or she on a permanent basis has clearly more of the daily care than the other parent. None of the parents is considered to have the sole care for the child in living conditions as mentioned in Section 1-5 fourth paragraph or other close living conditions. The Ministry may issue regulations on what is considered other close housing conditions.*

*The member bears the burden of proving that he or she is a single mother or father with the sole care for children.*

26. Section 15-5, entitled **Transitional benefit**, states that:

*Transitional benefit is granted to a member who, due to caring for children, is temporarily unable to support themselves through their own work or can only get a job after a period of adjustment or education.*

*Benefit can 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 for children who require special supervision, transitional benefit may be granted until the child reaches the age of 18. Exceptions may be made from 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 without reasonable cause has terminated an employment relationship in the last six months before the time of application, will not receive transitional benefit.<sup>11</sup>*

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<sup>11</sup> In Norwegian: "§ 15-5. Overgangsstønad

Overgangsstønad ytes til et medlem som på grunn av omsorg for barn er midlertidig ute av stand til å forsørge seg selv ved eget arbeid, eller først etter en tid med omstilling eller utdanning kan få et arbeid.

Stønad kan gis til enslig mor eller far som har barn under åtte år. For et medlem som er forhindret fra å arbeide på grunn av omsorg for barn som krever særlig tilsyn, kan det innvilges overgangsstønad inntil barnet fyller 18 år. Det kan gjøres unntak fra aldersgrensen i første punktum i forbindelse med forlengelser etter § 15-8 annet ledd tredje punktum, fjerde ledd og femte ledd.

27. Section 15-6, entitled **Duty of vocational activity**, provides:

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

- a. is in work that makes up at least half of full time,*
- b. has reported themselves to the Labour and Welfare Service as a real jobseeker,*
- c. is carrying out education or training that constitutes at least half of the full time that the Labour and Welfare Service deems necessary and appropriate for the member to be able to get or keep a job, or*
- d. establishes its own business, see Section 4-6 third paragraph.*

*The Labour and Welfare Service shall, if necessary, arrange follow up to assess the member and whether measures are to be implemented with a view to transition to work.*

*A member who is a real jobseeker, cf. the first paragraph, letter b), must report to the Labour and Welfare Service every fortnight. The Labour and Welfare Service decides how notification is to take place.*

*The activity obligation does not apply if the member is prevented from working due to the care for children who require special supervision as mentioned in Section 15-8 third paragraph.*

*If the member is not in occupational activity pursuant to the first paragraph, transitional benefit is nevertheless granted if the child does not have a satisfactory supervision scheme and this cannot be attributed to the member themselves. The same applies if the single mother or father or child has an illness that prevents occupational activity. The disease must be documented with a doctor's certificate.*

*The Ministry may issue regulations on which education can be approved and the requirement to be a real jobseeker.<sup>12</sup>*

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*Et medlem som uten rimelig grunn har sagt opp et arbeidsforhold de siste seks månedene før søknadstidspunktet, får ikke overgangsstønad.”*

<sup>12</sup> In Norwegian: “§ 15-6. Plikt til yrkesrettet aktivitet

*Når det yngste barnet har fylt ett år, er det et vilkår for rett til overgangsstønad at medlemmet enten*

- a. er i arbeid som utgjør minst halvparten av full tid,*
- b. har meldt seg til arbeids- og velferdsetaten som reell arbeidssøker,*
- c. gjennomfører utdanning eller opplæring som utgjør minst halvparten av full tid som arbeids- og velferdsetaten vurderer er nødvendig og hensiktsmessig for at medlemmet skal kunne få eller beholde et arbeid, eller*
- d. etablerer egen virksomhet, se § 4-6 tredje ledd.*

*Arbeids- og velferdsetaten skal etter behov innkalle til samtaler for å vurdere oppfølging av medlemmet og om det skal settes i verk tiltak med sikte på overgang til arbeid.*

*Et medlem som er reell arbeidssøker, jf. første ledd bokstav b), må melde seg hver fjortende dag til arbeids- og velferdsetaten. Arbeids- og velferdsetaten bestemmer hvordan melding skal skje.*

*Aktivitetsplikten gjelder ikke hvis medlemmet er forhindret fra å arbeide på grunn av omsorg for barn som krever særlig tilsyn som nevnt i § 15-8 tredje ledd.*

*Om medlemmet ikke er i yrkesrettet aktivitet etter første ledd, ytes likevel overgangsstønad hvis barnet ikke har en tilfredsstillende tilsynsordning og dette ikke kan tilskrives medlemmet selv. Det samme gjelder dersom den enslige moren eller faren eller barnet har en sykdom som hindrer yrkesrettet aktivitet. Sykdommen må dokumenteres med legeerklæring.*

28. Section 15-7, entitled **The size of the transitional benefit**, states:

*Annual transitional benefit amounts to 2.25 times the basic amount.*

29. Section 15-8, entitled **Benefit period**, provides:

*The transitional benefit can be granted for a total of three years. A member who has previously received the transitional benefit for an entire benefit period, may be granted new benefit periods until the child is entitled to a day care place pursuant to Section 16 of the Day Care Act. In connection with childbirth, benefits can also be paid for up to two months before the birth.*

*The benefit period can be extended by up to two years when the single mother or father is undergoing necessary and appropriate education, cf. Section 15-6, first paragraph, letter c). If the single mother or father has the sole care for more than two children or got the 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 including the month in which a commenced educational year ends. The benefit is usually not granted after professional competence has been obtained.*

*The benefit period can be extended until the child reaches the age of 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 submitted that the member has been prevented from working as a result of the child's condition.*

*In direct connection to a current benefit period, the benefit period can be extended by up to two years if the member or child has a temporary illness that prevents the member from working. The disease must be documented with a doctor's certificate.*

*In direct connection to an ongoing benefit period, the benefit period can in special cases be extended to up to six months pending the start of school, child supervision, a specific job offer or after the member has registered as a real jobseeker at the Labour and Welfare Service.*

*The Ministry may issue regulations on the calculation of the length of the benefit period, including the division and shortening of the benefit period.*

30. Section 15-9, entitled **Reduction against income**, states that:

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

*The transitional benefit shall not be reduced if the earned income on an annual basis is less than half of the basic amount. The benefit is reduced by 45 percent of income over half of the basic amount.*

*Equated with earned income are unemployment benefits according to Chapter 4, sickness benefits according to Chapter 8, benefits for children's and other close*

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*Departementet kan gi forskrifter om hvilken utdanning som kan godkjennes og kravet om å være reell arbeidssøker."*

*relatives' illness according to Chapter 9, work clearance benefits according to Chapter 11 and maternity benefits and parental benefits according to Chapter 14.*

*The Ministry issues regulations on the determination and change of expected earnings. Exceptions may be made from the provisions in Section 22-12.*

31. Lastly, Section 15-13, entitled **The relationship to other National Insurance benefits etc.**, states:

*The transitional benefit under this chapter lapses to the extent that the person in question receives subsistence benefits from the National Insurance Scheme in the form of a pension or transitional benefit as a surviving spouse, disability benefit or equivalent benefits from abroad. The same applies when the person in question receives a contractual pension for which pension points are credited, see Section 3-19.*

## 5 LEGAL ANALYSIS

### 5.1 Introductory remarks

32. Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems was incorporated into the EEA Agreement by Joint Committee Decision No 76/2011 of 1 July 2011.<sup>13</sup> This act forms a complete, mandatory system of social security coordination deviations from which are clearly delineated in the Regulation itself or in the EEA Agreement. Regulation 883/2004 follows the basic principles of equality of treatment, aggregation of periods of insurance, employment, self-employment and residence, exportability of benefits (offsetting basic principles of territoriality of social protection) and uniform criteria for determining the applicable social security legislation while respecting the principle of proportionality by preventing the overlapping of benefits. The Regulation is applicable to all social security legislation listed in Article 3(1) as well as special non-contributory cash benefits covered by Article 70.

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<sup>13</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, was incorporated into the EEA Agreement in point 5 of Protocol 37 (containing the list provided for in Article 101) to the Agreement by Joint Committee Decision No 76/2011 of 1 July 2011; OJ L 262, 6.10.2011, p. 33 and entered into force in the EEA EFTA States on 1 June 2012. OJ L 166, 30.4.2004, p.1 (Corrigendum, OJ L 200, 7.6.2004, p.1 and OJ L 204, 4.8.207, p.30), as amended by: Regulation 988/2009 (OJ L 284, 30.10.2009, p.43); Commission Regulation 1244/2010 (OJ L 338, 22.12.2010, p.35); Regulation 456/2012 (OJ L 149, 8.6.2012, p.4); Commission Regulation 1244/2012 (OJ L 349, 19.12.2012, p.45); Commission Regulation 1372/2013 (OJ L 346, 20.12.2013, p.27), and Commission Regulation 1368/2014 (OJ L 366, 20.12.2014, p.15).

33. The mechanism chosen by Norway for transposition of Regulation 883/2004 into the Norwegian legal order was by way of reference and in the form of an Incorporating Regulation.<sup>14</sup> Section 1(3) of that Incorporating Regulation stipulates that the provisions of Regulation 883/2004 shall prevail in case of conflict with, *inter alia*, provisions of the NIA.
34. The pending case concerns the transitional benefit pursuant to Section 15-5 to 15-6 NIA. In addition to the transitional benefit, Chapter 15 NIA also contains three other benefits for single parents,<sup>15</sup> which are not at issue in the pending case.<sup>16</sup> They have no bearing on the assessment of the nature of the transitional benefit itself or its classification as a social security benefit under Regulation 883/2004. For the sake of completeness, ESA notes that none of those benefits are included in the Article 9 Declaration made by Norway.
35. Section 15-5 sets out that the transitional benefit is granted to a member who, due to caring for children, is temporarily unable to support themselves through their own work or can only get a job after a period of adjustment or education. Section 15-2 establishes the requirement of three years' prior membership in the Norwegian social security system, which is achieved through residence. Section 15-3 introduces a requirement of stay in Norway for both the beneficiary and the child (*opphold i Norge*). Section 15-4 establishes that the beneficiary is a single mother or a father who has the sole care for children. Section 15-6 introduces a duty of vocational activity once the child has reached the age of one.

## 5.2 Article 9 and Annex X of Regulation 883/2004

36. Article 1(l) of Regulation 883/2004 defines the term "legislation" which covers, in respect of each EEA State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1).

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<sup>14</sup> Regulation 22 June 2012 No 585 on the incorporation of the social security regulations in the EEA Agreement. In Norwegian: *Forskrift 22. juni 2012 nr. 585 om inkorporasjon av trygdeforordningene i EØS-avtalen*, available at: <https://lovdata.no/pro/#document/SF/forskrift/2012-06-22-585>.

<sup>15</sup> Section 15-10 regulates benefit for childcare for a single mother or father who is working and therefore have to hand over the necessary supervision of children to other. This benefit is independent of the right to and the period for the transitional benefit. Section 15-11 covers additional/supplemental benefits for school fees and for relocation expenses. These benefits are granted only for the time period in which the single parent is entitled to a transitional benefit.

<sup>16</sup> Prop. 115 L (2014-2015) Section 1.2, available at <https://lovdata.no/static/PROP/prop-201415-115.pdf>.

37. Pursuant to Article 9 of the Regulation the EEA State shall notify the legislation and schemes referred to in Article 3, as well as substantive amendments made subsequently. Such notifications shall indicate the date of entry into force of the laws and schemes in question or, in the case of the declarations provided for in Article 1(1), the date from which this Regulation will apply to the schemes specified in the declarations by the EEA States in writing.
38. For the reference year 2019, Norway has notified its declaration to the European Commission containing the list of legislation and schemes referred to in Article 2 of Regulation 883/2004 and the date from which the Regulation will apply.<sup>17</sup> This list makes no reference to any of the benefits covered by Chapter 15 of the NIA, also in the context of special non-contributory cash benefits.
39. In line with CJEU case-law, once an EEA EFTA State has submitted a legal provision in the Article 9 declaration, the mandatory consequence is that the benefits referred to in this provision are considered as social security benefits within the meaning of the Regulation.<sup>18</sup> The result is that the material scope of the Regulation can encompass a benefit that according to the criteria developed in Article 3 would not normally fall within its scope.
40. It follows from the principle of sincere cooperation, laid down in Article 3 of the EEA Agreement, that every EEA EFTA State, for the purposes of the declarations covered by Article 9 of the Regulation, must carry out a proper assessment of its own social security regimes and, if necessary, following that assessment, declare them as falling within the scope of those regulations.<sup>19</sup> In such a situation the EEA EFTA States are then obliged to adhere to their declarations.<sup>20</sup> This does however not seem to be the case here, as Norway has never declared any of the benefits in Chapter 15 NIA as falling within the scope of the Regulation.

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<sup>17</sup> Available at <https://ec.europa.eu/social/main.jsp?catId=868&intPagId=2296&langId=en>.

<sup>18</sup> Case E-2/18 *C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein*, paragraphs 45-46; Case C-35/77 *Elisabeth Beerens v Rijksdienst voor Arbeidsvoorziening*, EU:C:1977:194; Case C-251/89 *Nikolaos Athanasopoulos and others v Bundesanstalt für Arbeit*, EU:C:1991:242, paragraph 28; Case C-225/10 *Juan Pérez García and Others v Familienkasse Nürnberg*, EU:C:2011:678, paragraph 36.

<sup>19</sup> See, by analogy Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen*; EU:C:2000:75, paragraph 51, and Case C-2/05 *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV*, EU:C:2006:69, paragraph 22.

<sup>20</sup> Case C-228/88 *Giovanni Bronzino v Kindergeldkasse*, EU:C:1990:85 and Case C-12/89 *Antonio Gatto v Bundesanstalt für Arbeit*, EU:C:1990:89.

41. The Circular, which sets out the national administration's interpretation of the provisions of Chapter 15 NIA<sup>21</sup> explains with regard to benefits covered by Chapter 15 that:

*“The previous Chapter 12 on benefits for single persons was not included in the declaration on which legislation falls within the scope of EU Council Regulation No 1408/71. From the Norwegian side, the view was thus that the EEA Agreement had no significance for the right to benefits under Chapter 12. The same will therefore apply to Chapter 15. Regulation 1048/71 has since been replaced by Regulation 883/2004, without leading to changes on this point.”<sup>22</sup>*

42. ESA recalls that the determination made by the State in the declaration does not predetermine the nature of the benefit and its classification in the light of the Regulation. Thus, even if a legal provision is not mentioned in the declaration within the meaning of Article 9 it does not necessarily mean that it does not fall within the scope of the Regulation.

43. The decision of whether the benefit falls into the scope of the Regulation must be determined for every benefit based on the criteria developed in Article 3. The scope of the benefit is then affirmed by the Court even if the respective EEA Member State did not submit a declaration in compliance with Article 9<sup>23</sup> or if that declaration did not include the benefit in the list.

44. In light of those considerations, ESA submits that the failure by the Norwegian Government to declare a benefit as a benefit falling within the scope of Regulation 883/2004 either under Article 3(1) or Article 3(3) does not predetermine the nature of the benefit or, for that matter, remove it from the scope of the EEA Agreement.<sup>24</sup>

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<sup>21</sup> Circular R15-00 *Circular to NIA Chapter 15 - Benefit for single mother or father* (In Norwegian: *Rundskriv til ftrl kap 15 – Stønad til enslig mor eller far*), available at <https://lovdata.no/nav/rundskriv/r15-00>.

<sup>22</sup> See Circular R-15-00, Section 3.1. In Norwegian: *“Tidligere kapittel 12 om stønad til enslige inngikk ikke i erklæringen om hvilken lovgivning som faller inn under virkeområdet til EU's rådsforordning (EØF) nr. 1408/71. Fra norsk side var således oppfatningen at EØS-avtalen ikke hadde betydning for stønadsrett etter kapittel 12. Det samme vil da gjelde for kapittel 15. Forordning 1408/71 er siden erstattet av forordning 883/2004, uten at det førte til endringer på dette punktet.”*

<sup>23</sup> Case C-100/63 *J.G. van der Veen, widow of J. Kalsbeek v Bestuur der Sociale Verzekeringsbank and nine other cases*, EU:C:1964:65; Case C-24/64 *A.M. Dingemans v Bestuur der Sociale Verzekeringsbank*, EU:C:1964:86; Case C-79/76 *Carlo Fossi v Bundesknappschaft*, EU:C:1977:59; Case C-20/96 *Kelvin Albert Snares v Adjudication Officer*, EU:C:1997:518; Case C-297/96 *Vera A. Partridge v Adjudication Officer*, EU:C:1998:280.

<sup>24</sup> See also paragraphs 7-11 and 55 of these written observations.

### 5.3 Article 70 is not applicable in the pending case

45. It follows from Article 3(3) of Regulation 883/2004 that, as well as applying to the branches of social security legislation explicitly listed in Article 3(1), the Regulation also applies to the special non-contributory cash benefits covered by Article 70.
46. Article 70 contains specific rules applicable to so called special non-contributory cash benefits which are provided under legislation which, because of their 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.
47. Article 70(2) sets out three concurrent conditions that must all be fulfilled in order for a benefit to be considered a special non-contributory cash benefit within the meaning of the Regulation.
48. First, special non-contributory benefits have to intend to provide either 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.
49. Second, their financing must exclusively derive 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.
50. The third condition is that the special non-contributory benefit must be listed in Annex X to the Regulation.
51. In the present case, it is not even necessary to assess the first two conditions, as the transitional benefit is not listed by Norway in Annex X to Regulation 883/2004.<sup>25</sup> It follows from case-law from the CJEU that “*the special non-contributory cash benefits are to be understood as solely those listed in Annex X to that regulation.*”<sup>26</sup>

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<sup>25</sup> See the link to Norway's declaration in footnote 17 above.

<sup>26</sup> Case C-769/18 *Caisse d'assurance retraite and de la santé au travail d'Alsace-Moselle*, EU:C:2020:203, paragraph 35. See also Case C-447/18 *Generálny riaditeľ Sociálnej poisťovne Bratislava*, EU:C:2019:1098, paragraph 32.

Consequently, since the transitional benefit is not listed in Annex X, it cannot be classified as a special non-contributory cash benefit.

52. Even though the question does not arise in the present case, as the transitional benefit cannot be regarded as a special non-contributory cash benefit under Article 70, ESA would nevertheless make the following observation regarding the relationship between social security benefits and special non-contributory benefits: Under the previous regulation, Regulation 1408/71, the concepts of, on the one hand, social security benefits, and, on the other, special non-contributory benefits, were mutually exclusive. A benefit that satisfied the conditions of a social security benefit could therefore not be analysed also as a special non-contributory benefit.<sup>27</sup> The same must be true under the current Regulation 883/2004. It can therefore not be held that if the transitional benefit is covered by Article 3(1) of Regulation 883/2004, it must *then be* a special non-contributory cash benefit under Article 70.<sup>28</sup>

53. ESA also submits that even if the transitional benefit were to be deemed to be a special non-contributory cash benefit this does not render Article 6 of the Regulation non-applicable. Therefore, when imposing the requirement of three years of prior membership (increased to five years of since 1 January 2021) Norway would have to aggregate the periods of residence in another EEA Member State for these purposes.

#### **5.4 Nature of the benefit and the risks covered**

54. The material scope of Regulation 883/2004 is defined in Article 3, according to which it applies to all legislation concerning the branches of social security benefits listed therein.

55. With regard to the classification of the benefit as a social security benefit falling into the scope of the Regulation, ESA recalls that the different classes of benefits are to be interpreted and applied not according to the respective criteria of any national legislation, but in accordance with EEA law.<sup>29</sup>

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<sup>27</sup> Case C-286/03 *Silvia Hosse v Land Salzburg*, EU:C:1985:139, paragraph 36; C-299/05 *Commission v Parliament and Council*, EU:C:2007:608, paragraph 51.

<sup>28</sup> As argued by NAV in paragraph 58 of the Request for the advisory opinion.

<sup>29</sup> Case C-69/79 *W. Jordens-Vosters v Bestuur van de Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie*, EU:C:1980:7 paragraph. 6.

56. With regard to determining the precise nature of the benefit at issue in the main proceedings, it is settled case-law of the European Courts that social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object 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 the benefits.<sup>30</sup> ESA submits that similar considerations are relevant for the determination of the nature of the benefit within a particular social security system.

57. In accordance with established case-law, a benefit may be regarded as a social security benefit provided that it fulfils two conditions. First, in so far as it is granted, this must be without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position.<sup>31</sup> Second, the benefit must relate to one of the risks expressly listed in Article 3(1) of Regulation 883/2004.<sup>32</sup>

#### **5.4.1 First condition - individual and discretionary assessment**

58. With respect to the first condition, ESA submits that the benefit at issue is granted without any individual and discretionary assessment of personal needs, to individuals who fulfil the requirements set out in Section 15-5 as well as the conditions of prior membership in Section 15-2, stay in Norway in Section 15-3<sup>33</sup> and being a single parent in Section 15-4.

59. The European Courts have consistently held that for a benefit to be regarded as a social security benefit it must be granted to recipients without any individual and

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<sup>30</sup> Case E-8/20 *Criminal Proceedings against N*, paragraph 52; Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, EU:C:2008:494, paragraph 21.

<sup>31</sup> Case C-286/03 *Hosse*, paragraph 37.

<sup>32</sup> Case E-8/20 *Criminal Proceedings against N*, paragraph 51. See also Case C-286/03 *Hosse* paragraph 37; Case C-249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*, EU:C:1985:139, paragraphs 12-14; Case C-78/91 *Rose Hughes v Chief Adjudication Officer, Belfast*, EU:C:1992:331, paragraph 15; Case C-160/96 *Manfred Molenaar and Barbara Fath-Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg*, EU:C:1998:84, paragraph 20; and Case C-215/99 *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter*, EU:C:2001:139, paragraph 25; Case C-433/13 *Commission v Slovakia*, EU:C:2015:602, paragraph 71, and Case C-679/16 *Proceedings brought by A (Assistance for a disabled person)*, EU:C:2018:601, paragraph 32.

<sup>33</sup> ESA considers the stay requirement in itself to be in breach of EEA law, see paragraph 11 of these written observations.

discretionary assessment of personal needs on the basis of a legally defined position. This condition is satisfied if a benefit is granted in the light of objective criteria which, if they are met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.<sup>34</sup>

60. In relation to benefits which are granted, refused or the amount of which is calculated by taking into account the recipient's resources the CJEU has previously held that the grant of such benefits does not depend on an individual assessment of the applicant's personal needs, provided that objective, legally defined criterion gives entitlement to the benefit without the competent authority being able to take other personal circumstances into consideration.<sup>35</sup>

61. In addition, the CJEU has held that, in order for it to be considered that the condition of individual and discretionary assessment of personal needs has not been satisfied, the discretionary nature of the assessment, by the competent authority, of the personal needs of a recipient of a benefit must, above all, relate to eligibility for that benefit. Those considerations apply, *mutatis mutandis*, in respect of the individual character of the assessment by the competent authority of the personal needs of a recipient of a benefit.<sup>36</sup>

62. It is apparent from the wording of Sections 15-2 to 15-5 that those provisions confer rights on individuals, e.g. "*conditions for the entitlement*" ("*vilkår for rett til*") in Sections 15-2 and 15-3 NIA and that the benefit "*is granted*" ("*ytes*") in the main provision in Section 15-5. The wording of these provisions clearly show that they are rights-based provisions, as opposed to discretionary-based rights.

63. As regards the benefits at issue in the main proceedings, according to Sections 15-2 to 15-5 NIA, it is first a condition that the individual must be a member of the national insurance scheme for a predefined period, they must stay in Norway and be a single parent with the sole care for a child. Moreover, it is a condition that the

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<sup>34</sup> Case C-372/18 *Ministre de l'Action et des Comptes publics v Mr and Mrs Raymond Dreyer*, EU:C:2019:206, paragraph 33; see, to that effect, *inter alia*, Case C-78/91, *Hughes*, paragraph 17; Case C-433/13, *Commission v Slovakia*, paragraph 73, and Case C-679/16 A (*Assistance for a disabled person*), paragraph 34.

<sup>35</sup> Case C-66/92 *Genaro Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland*, EU:C:1993:341, paragraph 15; Case C-406/04 *Gérald De Cuyper v Office national de l'emploi*, EU:C:2006:491, paragraph 23; Case C-361/13 *Commission v Slovakia*, EU:C:2015:601, paragraph 52; Case C-372/18 *Dreyer*, paragraph 34.

<sup>36</sup> Case C-372/18 *Dreyer*, paragraph 34; Case C-679/16 A (*Assistance for a disabled person*), paragraph 38.

member due to the care for a child is temporarily unable to provide for themselves through their own work or only after a time of adjustment or education can get a job. That benefit may be claimed by any single parent, in principle, until the child is one year old. It is common ground that eligibility for the benefit is independent of the applicant's resources.

64. A recipient's resources are taken into account in determining the actual amount which will be paid to him or her, in line with Sections 15-7 NIA and 15-9 NIA. The level of transitional benefit gets reduced by 45 % of income over half of the basic amount when the person in question receives unemployment benefits, sickness benefits, benefits for children's illness, work clearance benefits, maternity benefits and parental benefits. The amount of reduction against income is, in essence, calculated on the basis of objective criteria applied without distinction to all recipients according to their level of resources.

65. ESA therefore submits that, in line with established case-law, a benefit such as the transitional benefit must be considered for the purposes of its classification as a "social security contribution" granted without any individual assessment of the recipient's personal needs. This is true despite the fact that the calculation of the amount depends also on the recipients' level of resources or varies according to their resources.<sup>37</sup>

#### **5.4.2 Second condition - risks covered and purpose of the benefit**

66. With respect to the second condition, the question is which risk the benefit at issue covers. As the Court held in case E-8/20 *Criminal Proceedings against N*, "*in order to distinguish between the various categories of social security benefits, the risk covered by each benefit must be taken into consideration*".<sup>38</sup>

67. ESA submits that, a benefit such as the transitional benefit covers the risk connected to raising a child by oneself, which involves temporary suspension of the person's activities, so in essence, to meet family expenses. In principle, this will mean that the benefit is to be considered as a family benefit, even if there are additional risks being covered simultaneously – like the risks of maternity or unemployment.

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<sup>37</sup> Case C-372/18 *Dreyer*, paragraph 28.

<sup>38</sup> Case E-8/20 *Criminal Proceedings against N*, paragraph 52.

68. The eligibility conditions which must be fulfilled in order to receive the transitional benefit for single parents are set out in paragraph 63 of these written observations. The conditions for receiving the transitional benefit which are relevant for the assessment of the risks covered are set out in Sections 15-5 and 15-6 NIA. Section 15-5 paragraph 1 sets out that benefit is available to a social security member who due to the care for a child is temporarily unable to provide for themselves through their own work or only after a time of adjustment or education can get a job. Section 15-5 paragraph 2 sets requirements for the child's age (one year). The requirement for vocational activity to be entitled to the transitional benefit is stated in Section 15-6.
69. NAV claims the transitional benefit and indeed all *"[t]he benefits in Chapter 15 relate to a different risk than what comes under Article 3(1)(a) to (j) of the Regulation"*.<sup>39</sup> They argue that *"[t]he transitional benefit relates to the risk of encountering difficulties in being self-supporting through one's own income when caring for child alone. That benefit is intended to assist in self-assistance, so that the benefit recipient is able to become self-supporting through his or her own work."*<sup>40</sup> NAV further asserts that the transitional benefit is not intended to cover family expenses and that it cannot be regarded as a maternity benefit.
70. According to NAV *"[t]he purpose of the transitional benefit is to secure a minimum income for persons who have become sole providers for a child, not to give a contribution toward the maintenance of that child. Another important purpose of the benefit is to ensure that the benefit recipient has an income while he or she is in the process of becoming self-supporting through his or her own work."*<sup>41</sup>
71. Pursuant to Article 3(1)(j) of Regulation 883/2004, *"all benefits in kind or in cash intended to meet family expenses"* shall be considered to constitute family benefits.<sup>42</sup> Article 1(z) of Regulation 883/2004 defines "family benefit" as all benefits in kind or in cash intended to meet family expenses, excluding advances of

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<sup>39</sup> Request for the Advisory Opinion, paragraph 45.

<sup>40</sup> Request for the Advisory Opinion, paragraph 46-47.

<sup>41</sup> Request for the Advisory Opinion, paragraph 48.

<sup>42</sup> Case E-6/12 EFTA Surveillance Authority v Norway, [2013] EFTA Ct. Rep. 618, paragraph 96. See also e.g. Case C-462/20 *Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) and Others v Presidenza del Consiglio dei Ministri*, EU:C:2021:894, paragraph 27; Case C-802/18 *Caisse pour l'avenir des enfants*, EU:C:2020:269, paragraph 38.

maintenance payments and special childbirth and adoption allowances mentioned in Annex I.

72. In line with established case-law, family benefits are intended to provide social assistance for persons with dependent families in the form of a contribution by society towards their expenses. In that regard, the CJEU has held that 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 children.<sup>43</sup>

73. More specifically, the CJEU has held that:

*“a benefit intended to enable one of the parents to devote himself or herself to the raising of 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”<sup>44</sup>*

74. In light of the case-law cited above, ESA submits with respect to the transitional benefit that it is a benefit which is similarly intended to mitigate financial and other difficulties related to not being able to support oneself due to circumstances in which the *sine qua non* is the recipient having one or more children.<sup>45</sup> As set out in Section 15-5 first paragraph NIA, the key requirement for receiving the transitional benefit is, furthermore, that it is the care for a child which is the causal reason for the recipient either being unable to provide for themselves through work or only after a time of adjustment or education can get work.<sup>46</sup>

75. Indeed, it is explained in the preparatory works to Section 15-5 first paragraph that *“parents who are alone in caring for children are considered to be in a more difficult situation than other parents with a view to being able to work and obtain competence for themselves. If the single mother or father of does not have sole*

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<sup>43</sup> See also to that effect, Case C-177/12 *Lachheb*, EU:C:2013:689, paragraphs 34-35; C-449/16 *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*, EU:C:2017:485, paragraph 23.

<sup>44</sup> Case C-275/96 *Anne Kuusijärvi*, EU:C:1998:279, paragraph 60. Emphasis added.

<sup>45</sup> See similarly C-78/91 *Hughes* paragraph 19.

<sup>46</sup> In paragraph 55 of the Request for an Advisory Opinion NAV argued that it follows from CJEU case-law that a requirement of having a child in order to be entitled to a benefit is not in itself sufficient for the benefit to be regarded as a family benefit for the purposes of the Regulation. However, NAV only refers to one case, C-299/05 *Commission v Parliament and Council*, which clearly does not support this argument.

*carer responsibility, the status as single would not be something which sets him or her in a care situation which the transitional benefit is intended to compensate.”<sup>47</sup>*

In other words, the risk which is mitigated by the transitional benefit is the special care situation for a parent who cares for one or more children alone.

76. In this context, NAV makes the argument that the purpose of the benefit is not to contribute towards the maintenance of the child. This is, however, immaterial. It seems clear that a benefit which is provided to a single parent will in practice also go towards the needs of the child, such as food, clothes, housing and all other expenses belonging to the diverse category of costs which EEA nationals, by virtue of their role as parents, are obliged to bear for their offspring until such time that the child has obtained the capacity to provide for themselves. The fact that there may also be other benefits which are specifically aimed at providing for the maintenance of the child more directly,<sup>48</sup> cannot in itself entail that the transitional benefit is not a family benefit.

77. Moreover, it follows from the preparatory works to Section 15-5 first paragraph that the purpose of the transitional benefit to a single mother or father is to mitigate the added burden it is to be alone in the actual and daily care and thereby contribute to self-help. Indeed, the preparatory works explicitly state that, like the causation requirement set out in Section 15-5 first paragraph, “it is the sole care which is the starting point for the benefit.”<sup>49</sup>

78. It follows from the above that a benefit such as the transitional benefit at issue in the main proceedings is intended to cover the risk of being alone in caring for a child and must therefore be regarded as a family benefit, within the meaning of Article 3(1)(j) of Regulation 883/2004.

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<sup>47</sup> Ot.prp. No. 76 (2007-2008) Section 4.7.1, available at: <https://www.regjeringen.no/contentassets/b9b3836d78fd4c6cb6920fabd5476f44/nn-no/pdfs/otp200720080076000dddpdfs.pdf> (In Norwegian: «Foreldre som er aleine om omsorg for barn vert rekna å vere i ein vanskelegare situasjon enn andre foreldre med omsyn til å kunne arbeide og skaffe seg kompetanse. Har ikkje den einslege mora eller faren eineomsorg, vil ikkje statusen som einsleg vere noko som set han eller ho i ein slik særleg omsorgssituasjon som overgangsstønad er meint å kompensere.») Chapter 15 was subsequently amended in 2015, however those amendments do not alter the assessment of the purpose of the benefit at issue under the Regulation.

<sup>48</sup> See the arguments made by NAV in paragraphs 52-54 of the Request for the Advisory Opinion.

<sup>49</sup> Ot.prp. No 76 2007-2008 Section 4.7.2, emphasis added. (In Norwegian: «Ein viser til at formålet med stønad til einsleg mor/far er å avhjelpe den meirbelastninga det er å vere aleine om den faktiske og daglege omsorgen og slik leggje til rette for hjelp til sjølvhjelp. Det er nettopp eineomsorgen som er utgangspunktet for stønaden, ikkje meirkostnader ved separat hushald.»)

### **5.4.3 The requirement of occupational activity for continued entitlement to a benefit**

79. Having concluded that the transitional benefit from the perspective of classification under Article 3 of the Regulation primarily concerns risk covered by family benefits, ESA will make an additional submission with regard to the national court's question as to whether additional conditions, such as a condition of work activity imposed after the child reaches a certain age, changes the nature of the benefit.
80. The fact that a social security benefit has one or more functions or purposes, one covered by one of the branches of social security legislation listed in Article 3(1) and one or more falling outside the scope of the risks these cover, does not have the effect of removing the benefit from the scope of Regulation 883/2004 altogether.<sup>50</sup> Thus, even if the transitional benefit would have additional purposes not encompassed by Article 3(1), the benefit will still be covered by the Regulation as long as at least one of these purposes are covered by the risks covered by the benefits listed in Article 3(1).
81. Furthermore, in cases where it is necessary to distinguish between different categories of social security benefits covered by Article 3(1) of the Regulation because the benefit has the characteristics of several of the risks covered, the CJEU has established a 'centre of gravity' test aimed to determine which of the risks covered by the benefits listed in Article 3(1) the benefit in question has a "greater connection" with.<sup>51</sup> In this assessment the risk covered by each benefit listed in Article 3(1) must be taken into consideration,<sup>52</sup> before examining the national benefit in question in order to decide which of the risks the benefit has the greatest connection to.<sup>53</sup>

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<sup>50</sup> See Case C-78/91 *Hughes*, paragraphs 19-20; Case C-85/99 *Vincent Offermanns and Esther Offermanns*, EU:C:2001:166, paragraph 45 regarding Regulation 1408/71, and Case C-350/20 *O.D. and Others v Istituto nazionale della previdenza sociale (INPS)*, EU:C:2021:659, paragraph 60 regarding Regulation 883/2004.

<sup>51</sup> Case C-517/16 *Stefan Czerwiński v Zakład Ubezpieczeń Społecznych Oddział w Gdańsku*, EU:C:2018:350, paragraph 53.

<sup>52</sup> Case C-406/04 *De Cuyper*, paragraph 27; Joined Cases C-216/12 and C-217/12 *Caisse nationale des prestations familiales v Hliddal and Bornand*, EU:C:2013:568, paragraph 52, Case C-517/16 *Czerwiński*, paragraph 44; Case C-135/19 *Pensionsversicherungsanstalt v. CW*, EU:C:2020:177, paragraph 31.

<sup>53</sup> This approach is used in e.g. Case C-517/16 *Czerwiński* paragraphs 41-48 and Case C-135/19 *Pensionsversicherungsanstalt* paragraphs 31-41.

82. In that context, ESA notes first, that the vocational activity requirement was introduced as a condition for transitional benefit in Section 15-6 NIA by 1998 amendments to the National Insurance Act. At that time this requirement was applicable when the child reached 3 years. The preparatory works stated that:

*“The Welfare Report states that single parents, like others with minor children, should in principle be able to support themselves through their own work when consideration for the child makes it possible. The government is in favour of establishing benefit schemes that stimulate and facilitate self-sufficiency after a transitional period.*

*The scheme means that it should normally be a condition for entitlement to the transitional benefit that the provider is either employed, resumes an established employment relationship or is a jobseeker after the youngest child has reached the age of three. Single parents in education should also be entitled to transitional benefits. In the Government's view, the work must account for at least half of full time.[...]*<sup>54</sup>

83. Second, ESA also notes that Circular R15-00 recalls the following statements in preparatory works Prop. 7 L (2011-2012):

*“Benefits for single mothers or fathers in the National Insurance Act, Chapter 15, have a two-sided purpose, to secure income for single parents and provide intermediate assistance for self-help so that the benefit recipient can be able to support themselves through their own work [...]*<sup>55</sup>

84. With reference to Prop. 7 L (2011-2012), the Circular further states that:

*“With the amendments to the law in 1998, reference was made to several new measures that made the situation easier for parents of young children, including*

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<sup>54</sup> Ot.prp.nr.8 (1996-1997) in Norwegian: «I Velferdsmeldingen uttales at enslige forsørgere, som andre med mindreårige barn, i utgangspunktet bør kunne forsørge seg selv ved eget arbeid når hensynet til barnet gjør det mulig. Regjeringen går inn for å etablere stønadsordninger som stimulerer til og legger til rette for selvforsørging etter en overgangsperiode.

Opplaget innebærer at det normalt skal være et vilkår for rett til overgangsstønad at forsørgeren enten er i arbeid, gjenopptar et etablert arbeidsforhold eller er arbeidssøker etter at det yngste barnet har fylt tre år. Enslige forsørgere under utdanning bør også ha rett til overgangsstønad. Etter Regjeringens syn må arbeidet utgjøre minst halvparten av full tid.»

<sup>55</sup> See Circular R15-00 regarding Section 15-6 NIA and Prop. 7 L (2011-2012) Section 2.1 (in Norwegian: “Stønader til einsleg mor eller far i folketrygdlova kapittel 15 har eit tosidig formål, å sikre inntekta til aleineforeldre og gi mellombels hjelp til sjølvhjelp slik at stønadsmottakaren kan bli i stand til å forsørge seg sjølv ved eige arbeid [...]”) The preparatory works are available at: <https://www.regjeringen.no/contentassets/c35b81caf62a47e5a25924efb6997c5d/nn-no/pdfs/prp201120120007000dddpdfs.pdf>.

*increased day care coverage, longer maternity leave and time account arrangements. In the following years, the period of parental benefit has been extended further, and the day care coverage is good. The Ministry therefore believes that there is now reason to change the requirements for activity in order to enter working life. (...)*

*The Ministry is of the opinion that single parents should be entitled to the transitional benefit in the first year of life of the child without a requirement of activity outside the home, such as for working parents who are on paid maternity leave. The total benefit period is also not proposed to be changed. (...)*

*The Ministry proposes that the scope of the activity should be at the current level, i.e. at least half of the usual full-time position or at least half of the usual full-time studies, or by registering as a jobseeker with the Labour and Welfare Service. (...)*

*The Ministry draws attention to the fact that the regulations contain exceptions from the activity requirement if the parent does not succeed in obtaining satisfactory supervision for the child.<sup>56</sup>*

85. It appears to ESA that at the time when Norway made these amendments to the transitional benefit, it drew upon other existing social security benefits from its system, like the maternity benefit and unemployment benefits.

86. It follows from the above that a benefit such as the transitional benefit is a family benefit within the meaning of Article 3(1)(j) of Regulation No 883/2004. It is of no importance, in that regard, whether the benefit has a dual function, namely, both that of a contribution to the costs resulting from the being sole parent unable to support themselves and that of an instrument intended to encourage employment and education necessary for entry into a job market, since the benefits' centre of

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<sup>56</sup> Circular R15-00 under the heading *Duty of vocational activity*, available at: [https://lovdata.no/nav/rundskriv/r15-00#KAPITTEL\\_2-6](https://lovdata.no/nav/rundskriv/r15-00#KAPITTEL_2-6). Emphasis added. (In Norwegian: «Ved lovendringane frå 1998 blei det vist til fleire nye tiltak som letta tilhøvet for småbarnsforeldre, mellom anna auka barnehagedekning, lengre svangerskapspermisjon og tidskontoordning. I åra etter dette er perioden med foreldrepengar forlenga ytterlegare, og barnehagedekninga er god. Departementet meiner derfor det no er grunn til å endre krava til aktivitet for å komme ut i arbeidslivet (...)

*Departementet meiner at einslege foreldre framleis skal ha rett til overgangstønad i det første leveåret til barnet utan krav til aktivitet utanfor heimen, likt med yrkesaktive foreldre som er i lønna fødselspermisjon. Den samla stønadsperioden er heller ikkje foreslått endra. (...)*

*Departementet foreslår at omfanget av aktiviteten skal vere på gjeldande nivå, det vil seie minst halv tid av vanleg full stilling eller minst halvparten av vanlege fulltidsstudiar, eller gjennom å melde seg som arbeidssøklar hos Arbeids- og velferdsetaten.(...)Departementet gjer merksam på at regelverket inneheld unntak frå aktivitetskravet dersom forelderen ikkje lykkast med å få tak i tilfredsstillande tilsyn til barnet.»*

gravity is as a family benefit within the meaning Article 3(1)(j) of Regulation 883/2004.<sup>57</sup>

87. In assessing the centre of gravity of the benefit ESA first observes that the main condition of Section 15-5 will always be applicable. It is therefore always the care for a child which must be the causal reason for the recipient either being unable to provide for themselves through work or only after a time of adjustment or education can get work. The activity requirement is in addition to this condition and only comes into play for a continued entitlement to the benefit after the child turns one. Moreover, the activity requirement does not change the nature of the benefit itself. To the extent that activity leads to income, the amount paid in the form of a benefit will be reduced accordingly pursuant to Section 15-9. Nonetheless, the purpose of the benefit, even in a reduced amount, which is actually paid in such a scenario, still follows from the main condition of Section 15-5.

88. Second, the activity requirement is applied in a discretionary manner. It is apparent, for instance, from in particular Section 5 of the Regulation *on benefits for single mother or father under Chapter 15 of the National Insurance Act*,<sup>58</sup> as well as from Circular R15-00, that in the context of carrying out education or training and assessment of the necessity and appropriateness for the beneficiary to be able to get or to keep a job, NAV's discretionary competence is very broad. Circular R15-00, referring to Section 15-6 NIA, states that "*Neither the statutory provision nor the regulation provide specific rules on which educations can be considered necessary and appropriate. [...] In addition, pursuant to Section 15-6 letter c, a specific discretionary assessment must be made both of whether education is necessary and whether the education in question is appropriate.*"<sup>59</sup>

89. This requirement is also not absolute. For example, Section 15-6 NIA establishes that if the member is not in occupational activity pursuant to the first paragraph, the

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<sup>57</sup> See to that effect: Case C-517/16 *Czerwiński* paragraphs 41-48 and Case C-135/19 *Pensionsversicherungsanstalt*, paragraphs 31-41. The Authority notes that should the Court find that the transitional benefit also has the purpose of covering a risk not covered by Article 3(1) of the Regulation, the Regulation still applies as long as one of its purposes is covered by Article 3(1), see to this effect Case C-350/20 *O.D. and Others*, paragraphs 59-61; Case C-78/91 *Hughes*, paragraphs 19-20; and Case C-85/99 *Offermanns*, paragraph 45.

<sup>58</sup> See link to the Regulation in footnote 10 above.

<sup>59</sup> In Norwegian: "*Verken lovbestemmelsen eller forskriften gir konkrete regler om hvilke utdanninger som skal kunne anses som nødvendig og hensiktsmessig. [...] Utover det må det etter § 15-6 bokstav c gjøres en konkret skjønnsmessig vurdering både av om utdanning er nødvendig og om den aktuelle utdanningen er hensiktsmessig. [...]*" See link to the Circular in footnote 21 above.

transitional benefit is nevertheless granted if the child does not have a satisfactory supervision scheme and this cannot be attributed to the member themselves. The same applies if the single mother or father or child has an illness that prevents occupational activity. Similarly, the activity obligation does not apply if the member is prevented from working due to the care for children who require special supervision as mentioned in Section 15-8 third paragraph of the NIA. Therefore, the activity requirement is always mitigated by the needs of a child, illness or disease as depending on the personal circumstances of the beneficiary.

### 5.5 Application of the aggregation principle

90. In the Request for the Advisory Opinion the national court rightly points out that if Regulation 883/2004 applies to the case, it does not seem doubtful that the Appellant, under Article 6 of that Regulation is entitled to have “her time in Sweden” included in the calculation of whether she fulfils the membership requirement in Section 15-2 of the NIA.<sup>60</sup>
91. Article 6 of Regulation 883/2004 sets out the principle of aggregation of periods of insurance, employment, self-employment or residence completed under the legislation of any other EEA State as though they were periods completed under the legislation of the competent EEA State, where the legislation of the competent EEA State makes the acquisition, retention, duration or recovery of the right to benefits conditional upon the completion of such periods. The competent EEA State must take them into account to the extent necessary.
92. The principle of aggregation of benefits is the subject of Decision No H6 of the Administrative Committee for the Coordination of Social Security Systems.<sup>61</sup> Recital (2) of the Decision states: “*Article 6 of Regulation (EC) No 883/2004 provides for the principle of aggregation of periods. This principle should be applied in a uniform way which includes the aggregation of periods which, under national legislation, count only in terms of qualifying for or in terms of increasing the benefit.*”

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<sup>60</sup> Request for the Advisory Opinion, paragraph 29.

<sup>61</sup> Administrative Commission for the Coordination of Social Security Systems Decision No H6 of 16 December 2010 *concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation 883/2004 on the coordination of social security systems*; OJ C 45 of 12.2.2011, p.5.

93. Recital (5) to Decision No H6 recalls that “*it is necessary to recognise the principle that Member States retain jurisdiction to determine their national conditions for granting social security benefits — provided that these conditions are applied in a non-discriminatory way [...]*”.
94. The CJEU has given the principle of equal treatment a broad interpretation, prohibiting not only direct discrimination based on nationality but also covert forms of discrimination which, by applying other distinguishing criteria, *de facto* achieve the same result.<sup>62</sup>
95. The wording of Article 6 of Regulation 883/2004 is clear – if the legislation of the competent EEA State makes reception of the benefit conditional on completing the periods of residence or periods of membership in the national social security scheme (which in the present case is set at three years, but, due to subsequent amendments, is from 1 January 2021 set at five years) refusal to aggregate relevant periods completed under legislation of another EEA State, such as in the present case Sweden, would be in breach not only of Article 6, but also of the principle of equal treatment expressed in Article 4 and recital (5) of Regulation 883/2004. It aims at ensuring that all persons to whom the Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any EEA State as the nationals thereof, unless otherwise provided.
96. Taking into account the above arguments, ESA submits that a benefit such as the transitional benefit comes within the material scope of Regulation 883/2004 as a family benefit. Therefore, ESA submits that in a situation such as in the present proceedings, national authorities have to apply the aggregation principle and thus take into account the plaintiff’s periods of insurance, employment, self-employment or residence completed in Sweden.

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<sup>62</sup> See Case C-41/84 *Pietro Pinna v Caisse d’allocations familiales de la Savoie*, EU:C:1986:1 and Case C-349/87 *Elissavet Paraschi v Landesversicherungsanstalt Württemberg*, EU:C:1991:372.

## 6 CONCLUSION

Accordingly, the ESA respectfully requests the Court to answer the questions from the national court to the effect that:

- 1. A benefit such as the transitional benefit (overgangsstønad) comes within the material scope of Regulation 883/2004 as a family benefit within the meaning of Article 3(1)(j).***
- 2. A requirement of occupational activity for continued entitlement to a benefit when the child reaches 1 year of age is of no significance for the classification of transitional benefit as a family benefit within the meaning of Article 3(1)(j) read together with Article 1(z) of that Regulation.***

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