Supplementary Materials for "The Shadow Effect of Courts: Judicial Review and the Politics of Preemptive Reform"

Tommaso Pavone
School of Government & Public Policy, University of Arizona
tpavone@arizona.edu

Øyvind Stiansen
PluriCourts, University of Oslo
oyvind.stiansen@jus.uio.no

July 10, 2021

Contents

A Transparency Appendix (TRAX): Source Material for Active Citations **iii**

A.1 Norwegian legislation making residency in Norway a condition for receiving sick pay . . . vii

A.2 Communication from the Government to the Parliament's EEA Committee concerning the transposition of EU Regulation No. 883/2004 . . . viii

A.3 Letter from the Government to the NAV Directorate concerning the transposition of EU Regulation No. 883/2004 . . . ix

A.4 White Paper No. 46 (2012-2013) . . . x

A.5 2012 Interview with Progress Party Leader Siv Jensen . . . xi

A.6 Discussion of internal concerns about compliance with EEA obligations in NAV's Internal Audit . . . xii

A.7 National Insurance Court Ruling on June 16th, 2017 . . . xv

A.8 Discussion of the NAV's response to the National Insurance Court rulings in the NAV's internal audit . . . xvi

A.9 Testimony by the President of the National Insurance Court to the Parliament's Standing Committee on Scrutiny and Constitutional Affairs xviii
A.10 Discussion on the NAV's internal online discussion board xxii
A.11 Incorrect information reported by Norway to the EFTA Surveillance Authority xxiv
A.12 Letter from the National Insurance Court to NAV concerning a possible referral to the EFTA Court xxvi
A.13 Email from NAV to the Ministry of Labor about the National Insurance Court's possible referral to the EFTA Court xxix
A.14 Email and letter from NAV to the Ministry of Labor about a second possible referral to the EFTA Court xxx
A.15 Internal email ordering NAV officials to stop processing all complaints concerning "exports" of social benefits to EEA countries xxxiii
A.16 Correspondence between NAV and the Ministry of Foreign Affairs concerning the National Insurance Court's competence to submit cases to the EFTA Court xxxv
A.17 Letter from the NAV to the Ministry of Labor recommending changes in practice to avoid a referral to the EFTA Court xxxvii
A.18 Email and Letter from the Ministry of Labor to the NAV approving the proposed policy change xxxix
A.19 Letter from NAV to the National Insurance Court concerning changes in the NAV's practice xlii
A.20 Statement by NAV director, Sigrun Vågeng, at the October 2019 press conference xliii
A.21 Initial implementation of minimalist reforms xlvi
A.22 Challenges in implementing only minimalist reforms li
A.23 Letter from the EFTA Surveillance Authority to the Ministry of Labor . . liii
A.24 Minister Hauglie's Decision to Change Policy liv
A.25 National Insurance Court Ruling on June 12th, 2017 lvi
A.26 Questions to the President of the National Insurance Court Concerning the Relationship between the National Insurance Court and Other Institutions within the Executive Branch at the January 2019 Public Hearing in the Parliament's Standing Committee on Scrutiny and Constitutional Affairs . lix
A.27 Question to the President of the National Insurance Court concerning what happened after the NAV changed its practice and why no cases were referred to the EFTA Court at the January 2019 Public Hearing in the Parliament's Standing Committee on Scrutiny and Constitutional Affairs . . . lxii

A.28 Op-Eds by former EFTA Court President Carl Baudenbacher concerning Norway's strategy towards the EFTA Court lxv
A.29 Op-Eds by Norway's attorney general Fredrik Sejersted lxvii
A.30 Request by Minister of Labor Anniken Hauglie to be summoned to Parliament lxxii
A.31 White Paper No. 5 (2012-2013) lxxii
A.32 The Sundvolden Platform lxxiv
A.33 Translations of excerpts of Norwegian language news coverage lxxiv
A.34 Excerpts of English language news coverage lxxxii
A.35 2013 proposal to relax NAV policy blocked by the political leadership in the Ministry of Labor lxxxv

A Transparency Appendix (TRAX): Source Material for Active Citations

This transparency appendix, available in full at the APSR Dataverse (see `https://doi.org/10.7910/DVN/GSO5FP`), provides the source materials for our process tracing analysis. As recommended by Moravcsik (2014, 48), we have included excerpts from the analysis that allow readers to consider each piece of evidence employed and "assess precisely how they relate to broader claims, and evaluate whether they have been interpreted or analyzed correctly." Accordingly, each entry below contains the excerpts from the source material needed to verify the key claims and place them in the appropriate context, the information needed to locate the source, and a brief description of how the source supports our empirical claims (Moravcsik, 2014, 50).

To further allow readers to understand how the different pieces of evidence increase confidence in the hypothesized pathway, Figure A1 reproduces Figure 2 from the article with the following changes: Instead of examples of hypothetical evidence, Figure A1 references each of pieces of evidence by their section numbers. Because the included evidence is all from a "low litigiousness + weak judicial review context", our concern is tracing the lower pathway. The upper pathway, which has been studied by existing work considering the US case (Epp, 2010), is therefore shaded out.

The first part of the mechanism illustrated in the lower pathway is the recalcitrant

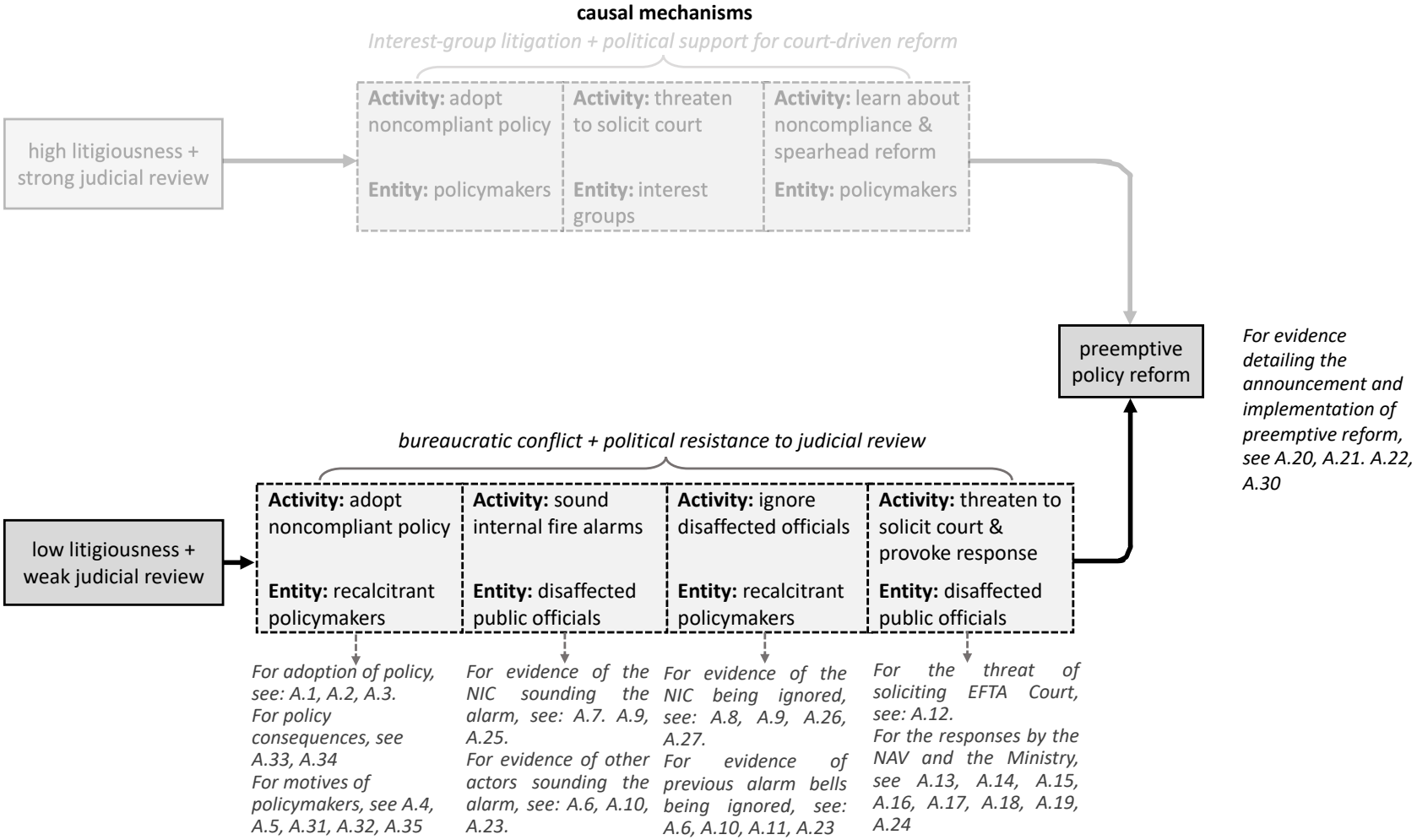

Figure A1: Unpacking Shadow Effects into Entities, Activities, and Pieces of Evidence as Referenced in Transparency Appendix

policymakers adopting a noncompliant policy. Here, our evidence can be grouped in three categories. First, sections A.1, A.2, and A.3 provide evidence of the legislation making residency in Norway a condition for receiving sick pay and the decision of policymakers to not adapt to the changing EU regulations prohibiting such a residency requirement. Sections A.33 and A.34 provide evidence of the consequences of this policy, as reported in the Norwegian and English language media. Finally, sections A.4, A.5, A.31, A.32, A.35 provide evidence of the motivations of the "recalcitrant policymakers" that adopted "the noncompliant policy".

The second part of the mechanism is the "sounding of internal fire alarms" by "disaffected public officials". Sections A.7, A.9, and A.25 provide evidence of the National Insurance Court (NIC) sounding the alarm. We also include evidence of previous (unsuccessful) attempts by other actors to sound the alarms, as these unsuccessful efforts help demonstrate how the threat of soliciting the EFTA Court was crucial for triggering a politics of preemptive reform. This evidence is included in Sections A.6, A.10, and A.23.

The third part of our mechanism is the "recalcitrant policymakers" ignoring "the disaffected officials". The evidence of how the NIC was ignored (and why) is provided in sections A.8, A.9, A.26, and A.27. Similarly, we also provide evidence of policymakers' decision to ignore previous attempts to sound the alarms. This evidence is included in sections, A.6, A.10,A.11, and A.23.

The letter providing evidence of disaffected officials in the NIC threatening to solicit the EFTA Court is included in section A.12 and evidence of the reactions and responses this threat prompted by "recalcitrant policymakers" in the NAV and the Ministry of Labor is provided in sections A.13, A.14, A.15, A.16, A.17, A.18, A.19, and A.24.

Finally, evidence detailing the outcome of the process – the announcement and implementation of preemptive reform – is included in sections A.20,A.21,A.22 and A.30.

In addition to the evidence of each part of the mechanism we trace, sections A.28 and A.29 provide excerpts from the newspaper skirmishes between former president of the EFTA Court, Carl Baudenbacher, and the Norwegian Attorney General, Fredrik Sejersted. These excerpts provide contextual evidence of the relationship between the

EFTA Court and the Norwegian government and of the Norwegian strategy towards the Court.

A.1 Norwegian legislation making residency in Norway a condition for receiving sick pay

In 2006, Norwegian legislation was amended to make residency in Norway a condition for receiving sick pay. Norwegian noncompliance with EEA obligations resulted from this (and other similar) provisions were enforced also for travels and stays within the EEA. The relevant text reads:

> Det er et vilkår for rett til sykepenger at medlemmet oppholder seg i Norge.
>
> Likevel ytes det sykepenger i utlandet til
>
> a) en person som er medlem etter §§ 2-5, 2-6 eller 2-8, 1
>
> b) et medlem som er innlagt i helseinstitusjon for norsk offentlig regning, eller som får oppholdet dekket etter avtale med et annet land om trygd.
>
> Etter søknad kan et medlem også ellers få sykepenger i en begrenset periode under opphold i utlandet. Han eller hun må godtgjøre at utenlandsoppholdet ikke vil forverre helsetilstanden, forlenge arbeidsuførheten eller hindre Arbeids- og velferdsetatens kontroll og oppfølging.
>
> Når et medlem som arbeider i utlandet, har rett til sykepenger fra trygden, utbetaler arbeidsgiveren sykepengene og får refusjon fra trygden.

> *It is a condition of entitlement to sick pay that the member resides in Norway.*
>
> *Nevertheless, sickness benefits are paid abroad to*
>
> *a) a person who is a member under sections 2-5, 2-6 or 2-8, 1*
>
> *b) a member who is admitted to a Norwegian public health institution or who is covered by a stay with another country for social security.*
>
> *On application, a member may also otherwise receive sickness benefit for a limited period during a stay abroad. He or she must prove that the stay abroad will not worsen the state of health, prolong the incapacity for work or hinder the control and follow-up of the Labor and Welfare Administration.*

When a member who works abroad is entitled to sickness benefit from the national insurance, the employer pays the sickness benefit and receives reimbursement from the social security scheme (our translation).

Folketrygdloven, § 8-9. https://lovdata.no/dokument/NL/lov/1997-02-28-19/KAPITTEL_5-4-1#KAPITTEL_5-4-1 (retrieved April 23rd, 2020).

A.2 Communication from the Government to the Parliament's EEA Committee concerning the transposition of EU Regulation No. 883/2004

The communication from the Government to the Parliament's EEA Committee clearly established the Government's official position to be that transposing EU Regulation No. 883/2004 did not require legislative changes. In its communication with the Parliament's EEA Committee, the EU Regulation is included in the list of regulations being transposed, but not in the list of regulations requiring legislative changes (and, consequently, the attention of Parliament). Furthermore, the regulation itself is described as not involving any comprehensive changes of existing coordination rules and as being transposable using the same legal basis as existing rules:

> Det dreier seg altså ikke om en grunnleggende eller gjennomgripende substansiell omlegging av selve koordineringssystemet. Grunnprinsippene for koordineringen og de viktigste trekkene i systemet er i all hovedsak de samme som før. Det generelle utgangspunktet for koordineringen vil fortsatt være at en person som har rett til trygdeytelser i en medlemsstat, ikke skal tape sin rett ved å flytte til en annen medlemsstat. Koordineringsreglene innebærer ikke harmonisering av medlemsstatenes trygdelovgivninger.
>
> *It is therefore not a fundamental or comprehensive substantial transformation of the coordination system. The basic principles of coordination and the main features of the system are essentially the same as before. The general*

starting point for coordination will still be that a person entitled to social security benefits in one Member State should not lose his right by moving to another Member State. The coordination rules do not imply harmonization of the Member States social security legislations (our translation).

Gjeldende koordineringsinstrumenter for trygdeordninger (forordning nr. 1408/71 og 574/72) er inkorporert i norsk rett ved forskrift av 30. juni 2006 nr. 731 med hjemmel i en rekke lover, herunder lov om folketrygd §§ 1-3 og 25-15. Den nye forordningen vil kunne inkorporeres i norsk rett ved forskrift på samme hjemmelsgrunnlag og vil ikke medføre behov for andre endringer i forhold til norsk rett.

Current coordination instruments for social security schemes (Regulations Nos. 1408/71 and 574/72) are incorporated in Norwegian law by regulation of June 30, 2006 No. 731 on the basis of a number of laws, including law on National Insurance Sections 1-3 and 25-15. The new regulation could be incorporated into Norwegian law by regulation on the same legal basis and will not require any other changes in relation to Norwegian law (Our translation).

Ministry of Foreign Affairs, "EU-rettsakter som etter en foreløpig oversikt vil kunne behandles i EØS-komiteen 1. juli 2011", June 20th, 2011.
URL:`https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20110620.pdf`(retrieved February 16th, 2020)

A.3 Letter from the Government to the NAV Directorate concerning the transposition of EU Regulation No. 883/2004

In this May 2019 letter to the NAV Directorate, the Ministry of Labor informed the Directorate that it did not consider the new regulations to require significant changes to existing rules:

De nye forordningene vil i alt vesentlig ikke medføre vesentlige materielle regelendringer (verken når det gjelder stønads- eller lovvalgsregler), og følgelig heller ikke endringer i trygdens utgifter. I EØS-rammenotatet om saken er det lagt til grunn at omleggingen ikke vil medføre vesentlige merkostnader. Dette har vært konklusjonen siden forordningen ble vedtatt i 2004, og denne konklusjonen sluttet daværende Rikstrygdeverket seg til.

In essence, the new regulations will not result in material rule changes (neither in the case of benefit rules or rules regarding law selection), and consequently neither changes in social security costs. The EEA Framework Memorandum on the case assumes that the rescheduling will not result in significant additional costs. This has been the conclusion since the regulation was adopted in 2004, and this conclusion was supported by Rikstrygdeverket [NAV's predecessor](Our translation.)

Ministry of Labor, "Implementering av forordning 883/2004 med gjennomføringsforordning", May 11th, 2009. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20090511.pdf` (retrieved February 14th, 2020)

A.4 White Paper No. 46 (2012-2013)

This white paper provides context concerning how the Norwegian government perceived the new EU regulations at the time they were transposed into Norwegian law. The excerpt below is the full discussion of the regulation in the white paper and illustrates how the government recognized that its "room for maneuver" was restricted by EEA obligations:

Trygdekoordineringsreglene (forordning (EF) nr. 883/2004 og 987/2009) skal underbygge retten til fri bevegelighet, ved at de sikrer at personer som benytter sin frie mobilitet ikke taper opptjente trygderettigheter. Trygdekoordineringsreglene innskrenker handlingsrommet for å regulere inn- og utvandreres tilgang til, og muligheter for, å ta med seg trygdeytelser til et annet land.

Social security coordination rules (Regulation (EC)) 883/2004 and 987/2009) shall underpin the right to free movement by ensuring that persons who exercise their free mobility do not lose earned social security rights. Social security coordination rules restrict the scope for action to regulate immigrants' and emigrants' access to, and opportunities to bring social security benefits to other countries (Our translation).

Ministry of Labor, "Flere i Arbeid", White Paper No. 46 (2012-2013), August 9th, 2013. Page 22. `https://www.regjeringen.no/contentassets/26dc321559c24ee8b8779b6c5105ae42/no/pdfs/stm201220130046000dddpdfs.pdf`(retrieved February 18th, 2020)

A.5 2012 Interview with Progress Party Leader Siv Jensen

This interview provides context concerning how so-called "exports" of social benefits and potential EEA restrictions on such exports were perceived by leading Norwegian politicians. In 2013, Siv Jensen became Minister of Finance in a coalition government with the Conservative Party:

– Vi er for arbeidsinnvandring, men mot velferdsflyktninger. Derfor er vi nødt til å sette begrensninger. Dersom vi møter hindre i EØS-systemet, får vi heller utfordre dem, sier Jensen til NTB.

I en tale til landsstyret i Fremskrittspartiet lørdag, viste hun til den europeiske gjeldskrisen og uttrykte stor bekymring for det hun beskriver som eksport av norske trygdeordninger.

– I 1998 var denne eksporten på 2,2 milliarder kroner. I 2008 var beløpet steget til 4,3 milliarder. Kontantstøtten tilsvarer 53 prosent av en polsk årslønn, barnetrygden tilsvarer 15 prosent og minstepensjonen to årslønner, sa Jensen.

– We are for work immigration, but against welfare refugees. Therefore, we have to set restrictions. If we encounter obstacles in the EEA system, we will have to challenge them, Jensen tells NTB.

In a speech to the national board of the Progress Party on Saturday, she pointed to the European debt crisis and expressed great concern at what she describes as the export of Norwegian social security benefits.

– In 1998, these exports amounted to NOK 2.2 billion. In 2008, the amount had risen to NOK 4.3 billion. The cash benefit [for parents of young children not participating in government child care] corresponds to 53 percent of a Polish annual salary, the child benefit [benefit paid to all parents] equals 15 percent and the minimum pension two annual salaries, Jensen said (Our translation).

"Jensen vil stanse trygdelekkasjen til EU-borgere" *Dagens Næringsliv*, February 25th, 2012. `https://www.dn.no/samfunn/jensen-vil-stanse-trygdelekkasjen-til-eu-borgere/1-1-1787293`(retrieved April 5th, 2020).

A.6 Discussion of internal concerns about compliance with EEA obligations in NAV's Internal Audit

NAV's internal audit report provides evidence that the NAV Directorate flagged potential conflicts between the residency requirement under domestic law and Norway's EEA obligations as early as 2009. According to the evidence provided in internal report, that Directorate received somewhat conflicting instructions from the Ministry of the Labor. NAV is instructed to let EEA rules prevail over domestic law, but also that the residency requirement shall apply as a main rule. This part of the internal audit report does not provide clear evidence of the motivations of the different decision makers, but it demonstrates that the Ministry of Labor did receive signals from the bureaucracy that provisions in the domestic law were in potential conflict with EEA obligations, yet failed to correct Norwegian noncompliance with those rules:

I NAVs svar på Høring om arbeidsavklaringspenger, arbeidsevnevurdering m.m. i brev av 14. mars 2008, gir de blant annet innspill til opphold i Norge (§ 11-3). Direktoratet støtter departementets forslag til at: "det skal være mulig å motta ytelser under korte utenlandsopphold uten forutgående

tillatelse dersom det godtgjøres at oppholdet er forenlig med gjennomføringen av planen samt etatens oppfølging av brukeren.". Direktoratet viser imidlertid til (side 9 i brevet):

"...at EØS avtalens regler, som går foran de nasjonale reglene, innebærer at en del brukere vil kunne ha større rett til å motta trygdeytelser fra Norge under opphold i utlandet enn etter de nasjonale reglene. Dette kan også gjelde for lengre utenlandsopphold, jfr. prinsippet i EØS avtalens art. 1, bokstav h, angående begrepet 'bostedsland', (...)".

Direktoratet er på dette tidspunktet usikker på hvordan AAP skal håndteres i forhold til dagjeldende EU-forordning (1408/71), og i høringssvaret (side 9) skrives følgende:

"Reglene om eksport av ytelser er forskjellig for dagens tre livsoppholdsytelser, og vi antar at arbeidsavklaringspenger bør kategoriseres som kontantytelse under sykdom. **Vi ber spesielt om at departementet i odelstingsproposisjonen klargjør hvordan ytelser etter kapittel 11 skal forholde seg til EØS avtalen og andre trygdeavtaler.** Departementet bes samtidig presisere hvorvidt hensikten er å muliggjøre eksport av arbeidsavklaringspenger til medlemmer etter §§ 2-5 eller 2-6, i så fall bør § 11-3 endres." (Internrevisjonens utheving).

Departementet legger i Ot.prp. nr. 4 (2008–2009) – kapittel 4.4.2.4, som ble godkjent i statsråd den 10. oktober 2008, til grunn at AAP vil bli ansett som en kontantytelse under sykdom (jamfør forordning 1408/71). Departementet understreker "at dersom det er motstrid mellom § 11-3 og forordningen, vil EØS-reglene gå foran.". Departementet foreslår videre allerede i neste setning at det som hovedregel skal være et vilkår for rett til AAP at personen oppholder seg i Norge. Unntakene som foreslås er slik de blir i folketrygdloven § 11-3. Departementet har ingen øvrige klargjøringer eller presiseringer knyttet til EØS-avtalen. Innstillingen til lovforslaget fra arbeids- og sosialkomiteen ble fremmet i Stortinget gjennom Innst. O. nr. 28 (2008–2009) den 4. desember

2008. Komiteen støttet i sin innstilling forslaget til krav om opphold i Norge med de unntak som er gitt i § 11-3.

In the NAV's response to the Hearing on work assessment allowance, work ability assessment, etc. in a letter of 14 March 2008, they, among other things, provide input for residence in Norway (§ 11-3). The Directorate supports the Ministry's proposal that: " It should be possible to receive benefits during short foreign stays without prior permission if it is shown that the stay is compatible with the implementation of the plan and the agency's follow-up of the user. " However, the Directorate refers (page 9 of the letter):

" ... that the EEA Agreement's rules, which precede the national rules, mean that some users may have a greater right to receive social security benefits from Norway during their stay abroad than under the national rules. This may also apply to longer stays abroad, cf. the principle of the EEA Agreement Art. 1, letter h, concerning the term 'country of residence ', (. . .)' '.

At this time, the Directorate is uncertain about how AAP should be handled in relation to the current EU regulation (1408/71), and the consultation response (page 9) states:

"The rules on the export of benefits are different for today's three life-support benefits, and we believe that work assessment allowance should be categorized as cash benefit during illness. ***In particular, we ask that the Ministry in the bill clarify how benefits under Chapter 11 should relate to the EEA Agreement and other social security agreements.*** *-6, in which case section 11-3 should be amended." (Internal audit's emphasis).*

The Ministry lays in Ot.prp. No. 4 (2008–2009) - Chapter 4.4.2.4, which was approved by the Cabinet on October 10, 2008, on the grounds that AAP will be considered a cash benefit during illness (cf. Regulation 1408/71). The Ministry emphasizes "that if there is a conflict between § 11-3 and the regulation, the EEA rules will take precedence. " Furthermore, the Ministry already proposes

in the next sentence that as a general rule, there should be a condition for the right to AAP that the person resides in Norway. The exceptions proposed are as stated in section 11-3 of the National Insurance Act. The Ministry has no other clarifications or clarifications related to the EEA Agreement. The proposal for a bill from the Labor and Social Committee was put forward in Parliament through Proposal No. 28 (2008–2009) on December 4, 2008. In its recommendation, the Committee supported the proposal for a requirement to stay in Norway with the exceptions given in § 11-3 (Our Translation).

Internrevisjonen (2019, 12).

A.7 National Insurance Court Ruling on June 16th, 2017

This ruling of the National Insurance Court demonstrates that learning about noncompliance with EEA rules did not lead NAV officials to change practice. The ruling is important because it holds that the NAV must consider the relevant provisions of the EU regulations, which the NAV subsequently failed to do. The following excerpt of the ruling is taken from the report of the NAV's internal audit:

Ettersom ankemotparten ikke har foretatt noen vurdering av artikkel § 21 og den betydning for anvendelsen av folketrygdloven § 8-9 i et tilfelle som Aps, finner retten det riktig å oppheve det påankede vedtaket slik at hennes krav om sykepenger kan vurderes opp mot artikkel 21. Retten vil bemerke at artikkel 21 etter sin ordlyd ikke bare gjelder i tilfeller hvor medlemmet bosetter seg i en annen medlemsstat enn den kompetente stat, men også i tilfeller hvor medlemmet oppholder seg i en annen medlemsstat

Since the respondent of the appeal [i.e. NAV] has not made any assessment of article 21 [of the EU regulation] and the significance for the application of section 8-9 of the National Insurance Act in a case such as [the applicant's case], the court finds it appropriate to cancel the appealed decision so that her claim for sickness benefit can be assessed against article 21. The Court

would note that Article 21, in its wording, applies not only in cases where the member lives in a Member State other than the competent State, but also in cases where the member temporarily resides in another Member State (Our translation).

National Insurance Court ruling, cited in Internrevisjonen (2019, 62).

A.8 Discussion of the NAV's response to the National Insurance Court rulings in the NAV's internal audit

The NAV's internal audit provides important evidence concerning the internal response in the NAV to the National Insurance Court's rulings, including why the NAV failed to change its policy. The following excerpts show that these rulings were debated internally in the NAV. The excerpts also suggest that one of the reasons for NAV's failure to change its practices was "disagreements" concerning the National Insurance Court's legal interpretation. In addition, the excerpts suggest that changing practice to comply with the National Insurance Court's rulings was not prioritized by NAV officials. The internal audit thus provides strong evidence that the National Insurance Court's rulings did not fly under the radar of NAV officials. A possible alternative explanation of the evidence would be that a response to the National Insurance Court rulings was delayed by relatively slow bureaucratic processes within the NAV. Such an explanation is, however, rendered less plausible by the comparison with the NAV's very prompt response to the subsequent letter from the National Insurance Court warning about a possible referral to the EFTA Court. The relevant excerpts include:

Trygderetten opphever 16. juni 2017 et vedtak om sykepenger under opphold i EØS-området, hvor det stilles spørsmål om NAVs rundskriv gir en riktig forståelse av trygdeforordningen 883/2004 artikkel 21. Når kjennelsen mottas i klageinstansen legges denne til fagnettverket Lovvalg- og medlemskap (MEL), som vurderte den aktuelle saken, og informerte fagmøtet på sykepenger i september 2017 (det første fagmøtet etter sommerferien). Vi får

opplyst at det var uenighet i fagmøtet om Trygderettens tolkning, blant annet på grunn av at de på dette tidspunktet bare var kjent med én slik kjennelse. I tillegg var fire uker utenlandsopphold for arbeidsavklaringspenger nylig blitt lovfestet, jf. Prop.74L (2016–2017) med virkning fra 1. januar 2018. Videre var klageinstansen kjent med at det foregikk arbeid med å utrede muligheter for å avgrense utenlandsopphold for sykepengemottakere til fire uker, som ledd i forenkling av folketrygdloven kapittel 8 og 9, i henhold til bestilling fra departementet i brev datert 8. mai 2017. Direktoratet svarer departementet i brev datert 2. oktober 2017.

The National Insurance Court cancels a decision on sick pay during a stay in the EEA on 16 June 2017, and raises questions about whether the NAV's circulaire gave a correct understanding of the [EU] National Insurance Regulation 883/2004 Article 21. When the decision is received by the [NAV's] appeal body, it is sent to the professional network MEL, which assesses the matter in question, and informs the sickness benefit meeting in September 2017 (the first meeting after the summer holidays). We are informed that there was disagreement in the meeting concerning the interpretation of the National Insurance Court, partly because they were only aware of one such ruling at this time. In addition, four weeks' stay abroad for clarification money was recently made statutory, cf. Prop.74L (2016–2017) with effect from 1 January 2018. Furthermore, the Appellate Body was aware that work was underway to investigate opportunities to limit stays abroad for sick pay recipients to four weeks, as part of the simplification of National Insurance Act chapters 8 and 9, in accordance with an order from the Ministry in a letter dated May 8, 2017. The Directorate responds to the Ministry in a letter dated October 2, 2017 (Our translation).

Etter det Internrevisjonen erfarer skjer det lite i saken fra direktoratets side gjennom oktober og det meste av november. Til tross for flere purringer fra NAV Klageinstans tar det lang tid før problemstillingene blir grepet fatt i.

> Internrevisjonen får opplyst at årsaken er at mange andre saker da vurderes å være mer presserende, samt fravær. Internrevisjonens inntrykk er at direktoratet er sårbart på internasjonalt område og ikke har andre ressurser å sette inn ved fravær.
>
> *According to the Internal Audit's investigations, little is done in the case by the Directorate through October and most of November. Despite several reminders from the NAV Complaints Office, it takes a long time for the issues to be addressed. The Internal Audit is informed that the reason is that many other cases are then considered to be more urgent, as well as absenteeism. The Internal Audit's impression is that the Directorate is vulnerable in the international field and has no other resources to invest when employees are absent* (Our translation).

Internrevisjonen (2019, 43,46)

A.9 Testimony by the President of the National Insurance Court to the Parliament's Standing Committee on Scrutiny and Constitutional Affairs

The January 2019 Parliamentary testimony of the President of the National Insurance Court, Trine Fernsjø, provides important information concerning how the National Insurance Court perceived NAV's response to its rulings and the National Insurance Court's motivation for threatening to refer a case to the EFTA Court. In the hearing, Fernsjø is flanked by two legal advisors, relies on a record of all relevant National Insurance Court rulings, and seems careful not to be perceived as a political actor. Of particular interest to us is the evidence she provides of NAV failing to adjust its practice even in an individual case in August 2018, the NAV's general unwillingness to change comply with previous rulings, the failure of the NAV to pursue the normal courses of action in cases of disagreement between the NAV and the National Insurance Court, and the National Insurance Court's motivation for threatening a referral to the EFTA Court:

I denne andre perioden [av Trygderettens rettspraksis] opphevet eller henviste Trygderetten 12 vedtak fattet av NAV. Syv av vedtakene ble opphevet fordi NAV ikke hadde drøftet EØS-reglene og ingen av disse sakene kom tilbake til Trygderetten. De kom altså ikke tilbake med en EØS-rettslig vurdering. Jeg er ikke kjent med at Trygderetten i denne andre perioden vurderte artikkel 21 og kom til at krav om opphold i Norge kunne opprettholdes. Altså, der trygderetten drøftet artikkel 21 var det enighet om forståelsen av bestemmelsen.

I den tredje perioden fra april 2018 og fram til nå har Trygderetten avsagt 47 ankesaker fra NAV. I denne perioden har Trygderetten fastholdt standpunktet om at det er I strid med artikkel 21 å kreve opphold i Norge, men desverre finner vi også i denne [perioden] saker hvor Trygderetten ikke har vurdert artikkelen. I august 2018 avsa Trygderetten en kjennelse I ankesak 173677. I denne kjennelsen uttrykte Trygderetten eksplisitt at oppholdskravet I folketrygdeloven må vike for artikkel 21 og den saken sendte vi tilbake til NAV. Og den kom tilbake til oss etter veldig kort tid — jeg mener at det var circa en måned , veldig ekspiditt og bra – men i den saken som da fikk ankesaknummer 183099 opprettholdt NAV at det kunne stilles krav om opphold I Norge. Dette var første gang NAV opprettholdt sitt avslag på grunn av opphold i utlandet når Trygderetten hadde uttalt helt klart lovforståelsen I en tidligere behandling av saken.

I tillegg kom det utover høsten ankesaker der NAV stilte krav om opphold i Norge til tross for at lovforståelsen – Trgyderettens lovforståelse – må ha vært kjent før disse sakene ble oversendt til oss. Så høsten 2018 så var det klart for oss at NAV ikke innrettet seg etter Trygderettens lovfortståelse. Så det var i en spesiell situasjon høsten 2018. De retter som hadde saker til behandling hos oss den høsten de hadde da egentlig.. ja, de hadde i hvert fall to valg: de kunne foreslå å sette rett med fem medlemmer eller de kunne vurdere å innhente en rådegivende uttalselse fra EFTA-domstolen. Tre enkeltretter I

Trygderetten vurderte å be EFTA-domstolen om en rådgivende uttalelse. Jeg var orientert om dette og jeg synes det var et godt alternative til å sette rett med fem medlemmer. Og det var egentlig av tre grunner. Det er fordi det dreide seg om et rent rettslig spørsmål, fordi det på det tidspunktet, altså, det var ingen intern uenighet i Trygderetten om forståelsen av artikkel 21, og fordi EFTA-domstolen har en særlig rolle når det gjelder tolkningen av Trygdeforordningen og dens rekkevidde.

In this second period [of the development of the National Insurance Court's case law], the National Insurance Court annulled or referred 12 decisions made by the NAV. Seven of the decisions were cancelled because the NAV had not discussed the EEA rules and none of these cases returned to the National Insurance Court. Thus, they did not return with an EEA legal assessment. I am not aware that the National Insurance Court during this second period considered Article 21 and concluded that requirements for residence in Norway could be upheld. Thus, where the National Insurance Court discussed Article 21, there was agreement on the understanding of the provision.

In the third period from April 2018 until now, the National Insurance Court has handed down decisions in 47 appeal cases from NAV. During this period, the National Insurance Court has maintained the position that it is contrary to Article 21 to require residence in Norway, but unfortunately in this [period] we also find cases where the National Insurance Court has not assessed the article. In August 2018, the National Insurance Court issued a ruling in appeal 173677. In this ruling, the National Insurance Court explicitly stated that the residency requirement in the National Insurance Act cannot apply because of Article 21 and the case was returned to the NAV. And it came back to us after a very short time – I think it was about a month, very expeditious and good – but in the case that then got appeal case number 183099 the NAV maintained that a requirement could be made to stay in Norway. This was the first time the NAV had maintained its refusal to stay abroad when the National Insurance

Court had clearly stated the legal understanding in a previous examination of the case.

In addition, in autumn, appeals came in which the NAV demanded residence in Norway despite the fact that the legal understanding – the National Insurance Court's legal understanding – must have been known before these cases were sent to us. So in the fall of 2018, it was clear to us that the NAV did not [intend to] comply with the National Insurance Court's interpretation of the law. So it was in a special situation in the fall of 2018. The panels that had cases to deal with that fall they really had .. yes, at least they had two choices: they could propose to form panels with five members or they could consider to obtain an advisory opinion from the EFTA Court. Three individual panels in the National Insurance Court considered asking the EFTA Court for an advisory opinion. I was informed about this and I think it was a good alternative to forming a panel with five members. And it was really for three reasons. This is because it was a purely legal matter, because at that time there was no internal disagreement in the National Insurance Court regarding the understanding of Article 21, and because the EFTA Court has a special role in interpreting the Social Security Regulation and its scope (Our translation).

Fernsjø: –Vi er jo vant med at klageinstansen, eller NAV da, forholder seg til det resultatet vi kommer til i saken. Det er jo det som er det vanlige. Og hvis de ikke er enig i vår kjennelse så bringer de den gjerne inn for retten. Det er det som er vanlig. Eller de kan kontakte departmentet og be om en lovendring. Eller de kan be oss om å avsi en femmedlems-kjennelse neste gang de sender en lignende sak. Det pleier de å gjøre.

Member of Parliament, Freddy Øvstegård: –Men det gjorde de altså ikke i disse sakene?

Fernsjø: –Nei, de gjorde ikke det i dette sakskomplekset her.

Øvstegård: –Vil du dele noen mening om hvordan du vurderer det?

Fernsjø: –Nei det... Det... Det som... Når det kommer... Når vi fikk en sak tilbake som viste veldig klart at vi var uenige, det var viktig at vi fikk den uenigheten opp sånn at.. Fordi det var de vi virkelig kunne ta tak i det. Så det var bra... Det som da ble 183099-saken.

Fernsjø: – We are used to the appellate body, or the NAV that is, accepting the result we reach in the case. That's the usual thing. And if they do not agree with our ruling then they will typically bring it to court [i.e. The Court of Appeals]. That's what is common. Or they can contact the department and request a legislative change. Or they may request that we render five-member panel ruling the next time they file a similar case. That's what they usually do.

Member of Parliament, Freddy Øvstegård: –But they did not in these cases?

Fernsjø: – No, they didn't do it in this complex of cases.

Øvstegård: – Would you like to share some opinions on how to evaluate it?

Fernsjø: – No it ... The ... That which... When it comes ... When we got a case back that showed very clearly that we disagreed, it was important that we got that disagreement explicit so that .. Because then we could really address it. So that was good ... What then became the 183099 case (Our translation)

Testimony by the President of the National Insurance Court, Trine Fernsjø, in a hearing held by the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, January 9th, 2020.
https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/Videoarkiv/Arkiv-TV-sendinger/?mb
/2020/H264-full/Hoeringssal1/01/09/Hoeringssal1-20200109-183544.mp4&msid=256&dateid=
10004380 (retrieved February 19th 2020).

A.10 Discussion on the NAV's internal online discussion board

The NAV's internal audit reports evidence of lower-level officials in the NAV asking questions concerning the compatibility between the NAV's application of domestic law and

Norways's EEA obligations in 2014 and 2015. The internal audit's report finds that these questions were not addressed by superiors in the NAV system, but provides little information about why the questions were not addressed:

> Internrevisjonen har funnet tre innlegg på Erfaringsforum der det er blitt stilt tydelig spørsmål ved om NAVs praktisering av artikkel 21 i forordningen er riktig. To av dem ble stilt i 2014, det tredje i 2015. I alle innleggene siteres forordningens ordlyd om "bosat eller opholder sig" og spørsmålsstiller lurer på om NAVs praksis om kun å bruke forordningen for de som er bosatt i utlandet, kan være riktig i og med at det står bosatt eller oppholder seg.
>
> To av spørsmålene blir ikke besvart av noen fra NAV Klageinstans. Det skal legges til at i begge tilfellene blir disse spørsmålene stilt som "oppfølgingsspørsmål" i forumtråder som ble startet av andre ansatte, og som i utgangspunktet handlet om andre problemstillinger.
>
> Det tredje spørsmålet blir besvart av NAV Klageinstans. Den som svarte startet med å sitere fra forordningen artikkel 21 og folketrygdloven § 8-9 og skrev deretter at man kan ha rett til sykepenger i et annet EØS-land hvis man kan regnes som bosatt der. Det blir gitt en veiledning til hva man skal legge vekt på i vurderingene om i hvilket land en person skal regnes som bosatt etter EU-rett. Spørsmålet om formuleringen "eller oppholder seg" betyr at det ikke er et krav til å være bosatt for å kunne ha rett på sykepenger i et annet EØS-land, blir ikke besvart.
>
> Ingen av disse tre spørsmålene ble løftet opp til NAV Klageinstans styringsenhet og dermed heller ikke til direktoratet.

> *The Internal Audit has found three posts on the Experience Forum where clear questions have been asked about whether NAV's practice of Article 21 of the Regulation is correct. Two of them were asked in 2014, the third in 2015. In all the posts, the regulation cites the word "resident or residing" and the questioner wonders whether NAV's practice of only applying the regulation to*

those living abroad can be correct given [the phrasing] being resident or residing.

Two of the questions are not answered by anyone from the NAV Complaints Office. It should be added that in both cases, these questions are posed as "follow-up questions" in forum threads that were started by other employees and which were basically about other issues.

The third question is answered by the NAV Complaints Body. The respondent started by quoting from Article 21 of the Ordinance and section 8-9 of the National Insurance Act and then wrote that one can be entitled to sickness benefit in another EEA country if one can be regarded as resident there. Guidance is given on what to emphasize in assessing which country a person should be considered to be resident under EU law. The question of whether the wording "or staying" means that there is no requirement to be a resident in order to be entitled to sick pay in another EEA country is not answered.

None of these three questions were raised to the NAV Complaints Authority's management unit and thus not to the Directorate (our translation).

Internrevisjonen (2019, 28).

A.11 Incorrect information reported by Norway to the EFTA Surveillance Authority

The NAV's internal audit discusses the information reported by Norway to the EFTA Surveillance Authority in 2017 following a 2015 individual complaint to the Surveillance Authority. From the report it is clear that Norway reported incorrect information and that bureaucrats that participated in the meeting were aware that the reported information was incorrect but decided not to intervene:

> Den 27. oktober 2017 avholdes selve pakkemøtet. Her deltar NAV med tre bisittere, som er representanten fra Arbeids- og tjenesteavdelingen og de to fra NAV Nordre Aker. Den 30. november 2017 oversender departementet ESAs

oppsummering etter møtet til de som var bisittere. Når det gjelder spørsmålet om begrepet "senter for livsinteresser", skriver ESA at de har blitt orientert om at det kan ha vært en misforståelse. Dette fordi begrepet kun blir brukt som en del av vurderingen for om brukeren kan gjennomføre hensiktsmessige oppfølgingsaktiviteter, og ikke som en selvstendig vurdering. Dette er i tråd med utgangspunktet for rutinen til NAV Nordre Aker som kun behandler de som allerede regnes som bosatt i et annet land. Men det er ikke i tråd med hva resten av NAV vurderer når det er spørsmål om opphold. Av ESAs oppsummering fremgår det at de er blitt orientert om at norsk lovgivning omfatter muligheten til å ta ut AAP under utenlandsopphold. Ifølge oppsummeringen gjelder dette både hvis man er bosatt i et annet EØS-land eller ved opphold i et annet EØS-land, med. Her er begrunnelsen at hvis det er konflikt mellom folketrygdloven og forordning 883/2004, går sistnevnte foran. At praksisen i NAV er å gi avslag på AAP under utenlandsopphold med bakgrunn i bestemmelsen i folketrygdloven § 11-3 om krav om opphold i Norge, blir ikke formidlet til ESA.

Den som representerte direktoratet som bisitter på pakkemøtet, har oppgitt at hun ikke hadde EØS-kompetanse og heller ikke kjente til NAVs praksis i disse sakene. De to fra NAV Nordre Aker som var bisittere på møtet, har oppgitt at de kjente til NAVs praksis, men at deres rolle kun var å svare vedrørende sin klagesak.

On October 27, 2017, the package meeting itself is held. Here the NAV participates with three sitters, who are the representative from the Labor and Services office and the two from NAV Nordre Aker. On November 30, 2017, the Ministry submits the ESA's summary following the meeting to those who were visiting. When it comes to the question of the term "center of life interests", ESA writes that they have been informed that there may have been a misunderstanding. This is because the term is only used as part of the assessment for whether the user can carry out appropriate follow-up activities, and not as

an independent assessment. This is in line with the principle of NAV Nordre Aker's routine, which only deals with those who are already considered resident in another country. But that is not in line with what the rest of the NAV considers when there are questions about stays. ESA's summary shows that they have been informed that Norwegian legislation includes the possibility of withdrawing AAP during foreign stays. According to the summary, this applies both if you are resident in another EEA country or when staying in another EEA country. Here the reason is that if there is a conflict between the National Insurance Act and Regulation 883/2004, the latter takes precedence. That the practice in the NAV is to refuse AAP during a stay abroad based on the provision of section 11-3 of the National Insurance Act on requirements for residence in Norway, is not communicated to ESA.

The person who represented the Directorate as a visitor at the package meeting stated that she did not have EEA expertise and was not aware of the NAV's practice in these cases. The two from NAV Nordre Aker who were visiting the meeting have stated that they knew about the NAV's practice, but that their role was only to respond questions related to the complaint their were responsible for (Our translation).

Internrevisjonen (2019, 35-36).

A.12 Letter from the National Insurance Court to NAV concerning a possible referral to the EFTA Court

On November 19th 2018, the National Insurance Court sent a letter informing the NAV that it was considering submitting a case to the EFTA Court. The letter also explained that the reason for why the National Insurance Court was considering such a referral is that the NAV had failed to change its practice to comply with previous National Insurance Court rulings:

Retten vurderer å forelegge spørsmålet om EØS-forordning 883/2004 artikkel

21 også omfatter kortvarige opphold i land innenfor EØS-området for EFTA-domstolen. Man ber i så fall om en rådgivende uttalelse på dette spørsmål fra domstolen.

Bakgrunnen for dette er at Trygderetten i en rekke kjennelser har lagt til grunn at artikkel 21 omfatter også kortvarige opphold i utlandet, jf. blant annet TRR-2017-1058. Folketrygdloven §§ 8-9 og 11-3 må i så fall vike for regelen i artikkel 21. Verken NAV eller NAV Klageinstans ser ut til å ha tatt denne praksis inn over seg. Rundskrivet legger fremdeles den samme oppfatning til grunn. Det er således viktig at spørsmålet blir avklart.

The Court is considering to refer the question of whether EEA Regulation 883/2004 also includes short-term stays in EEA countries to the EFTA Court. In this case, an advisory opinion will be requested from the Court.

The reason for this is that in a number of decisions the National Insurance Court has held that Article 21 also covers short-term stays abroad, cf., among others, TRR-2017-1058. In this case, sections 8 to 9 and 11-3 of the National Insurance Act must be set aside in favor of the rule in Article 21. Neither the NAV nor the NAV Appeals Authority appears to have adopted this practice. The circulaire still uses the same view. It is thus important that this question is clarified (Our translation).

Letter from the National Insurance Court to NAV concerning Appeal No. 18/00741, November 19th 2018.
`https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20181119.pdf` (February 18th, 2020).

TRYGDERETTEN

NAV Klageinstans Midt-Norge
Postboks 6245 Bedriftssenter

5893 BERGEN

MOTTATT
23 NOV. 2018
NAV Klageinstans vest

Deres ref.: Vår ref.: Ankesak nr.18/00741 - tki Dato: 19.11.2018

ANKESAK NR. 18/00741: [redacted]
NAV KLAGEINSTANS

SPØRSMÅL OM Å FORELEGGE SAKEN TIL UTTALELSE FOR EFTA-DOMSTOLEN

Retten vurderer å forelegge spørsmålet om EØS-forordning 883/2004 artikkel 21 også omfatter kortvarige opphold i land innenfor EØS-området for EFTA- domstolen. Man ber i så fall om en rådgivende uttalelse på dette spørsmål fra domstolen.

Bakgrunnen for dette er at Trygderetten i en rekke kjennelser har lagt til grunn at artikkel 21 omfatter også kortvarige opphold i utlandet, jf. blant annet TRR-2017-1058. Folketrygdloven §§ 8-9 og 11-3 må i så fall vike for regelen i artikkel 21. Verken NAV eller NAV Klageinstans ser ut til å ha tatt denne praksis inn over seg. Rundskrivet legger fremdeles den samme oppfatning til grunn. Det er således viktig at spørsmålet blir avklart.

Retten ber om partenes kommentarer til dette.

Videre ber retten partene om eventuelt å komme med forslag til spørsmål man ønsker å stille EFTA-domstolen i denne forbindelse.

Retten ber om tilbakemelding på dette og eventuelle forslag til spørsmål innen tre uker.

Tor Kielland
rettens administrator

Figure A2: Letter from the National Insurance Court concerning a possible referral to the EFTA Court

A.13 Email from NAV to the Ministry of Labor about the National Insurance Court's possible referral to the EFTA Court

On November 27th, 2018, the NAV's directorate notified the Ministry of Labor about the National Insurance Court's threat of referring a case to the EFTA Court. The prompt response is telling in light of its previous protracted defiance of the National Insurance Court:

> Som avtalt sender jeg over henvendelse fra Trygderetten vedørende foreleggelse om tolkningen av artikkel 21 for EFTA-domstolen. Jeg overservender også kopi av kjennelse der vi er blitt bedt om å vurdere om det skal tas ut søksmål. Som sagt henger sakene tett sammen og jeg setter pris på en tilbakemelding på om dette er noe dere ønsker forelagt for en vurdering eller om dere forøvrig har noen tanker rundt problemstillingen.
>
> *As agreed, I forward a letter for the National Insurance Court concerning a [potential] referral concerning the interpretation of Article 21 before the EFTA Court. I also forward a copy of the case in which we have been asked to consider whether legal action should be taken. As I said, the cases are closely related and I would appreciate your feedback on whether this is something you would like to be submitted for an assessment or if you have any other thoughts on the matter* (Our translation).

Email from the NAV to the Ministry of Labor, November 27th, 2018. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20181127.pdf` (retrieved February 18th, 2020).

A.14 Email and letter from NAV to the Ministry of Labor about a second possible referral to the EFTA Court

On December 11th, 2018, the NAV notified the Ministry of Labor concerning a second letter on from the National Insurance Court concerning a possible referral to the EFTA Court. The NAV also reminded the Ministry that it needed instructions on how to proceed (Internrevisjonen, 2019, 47). On December 20th, 2018 the NAV followed up in a formal letter to the Ministry of Labor. From this letter, it is clear that the NAV considered the change in practice needed to comply with the National Insurance Court to be "significant". Again, the relative urgency in the NAV's response is also striking when compared to the NAV's protracted defiance of the National Insurance Court's previous rulings:

> Trygderetten har i brev av 19. november 2018 og 7. desember 2018 varslet om at de vurderer å forelegge spørsmål om artikkel 21 i trygdeforordning 883/2004 for EFTA-domstolen for en rådgivende uttalelse. Det er spørsmål om artikkel 21 også omfatter kortvarige opphold innenfor EØS-området, se vedlegg 1 og 2. Dette gjelder ankenr 18/00741 og 18/3099. En kort oppsummering av sakene følger som vedlegg 3.
>
> Arbeids- og velferdsdirektoratet ønsker dialog med Arbeids- og sosialdepartementet for avklaring før vi svarer Trygderetten i de to nevnte sakene. Vi ønsker også å diskutere spørsmålets materielle side, herunder eventuelt behov for lovendring. Trygderetten har bedt om partenes kommentarer og eventuelle forslag til spørsmål man ønsker å stille EFTAdomstolen. NAV Klageinstans har utarbeidet forslag til slike spørsmål, se vedlegg 4. Trygderetten har nå gitt utsatt frist for besvarelse i begge de ovennevnte sakene til 31.januar.
>
> Problemstillingen i de to nevnte sakene er om krav om opphold i Norge for rett til henholdsvis sykepenger og arbeidsavklaringspenger i folketrygdloven §§ 8-9 og 11-3 er i strid med bestemmelsen i trygdeforordning 883/2004 artikkel 21. Problemstillingen vil også være relevant for øvrige kontantytelser, som for eksempel pleiepenger.

Trygderetten har i flere kjennelser lagt til grunn at også kortvarige opphold i utlandet omfattes av retten til eksport i artikkel 21, og således kommet til annet resultat enn det som følger av NAV's rundskriv. Kjennelsenes saksnummere fremgår av vedlegg 3.

Trygderetten peker i brevene av 19. november 2018 og 7. desember 2018 på at NAV ikke ser ut til å ha tatt deres tolkning innover seg, blant annet ved at rundskrivet ikke er endret.

Arbeids- og velferdsdirektoratet har hatt noe dialog med NAV Klageinstans om disse spørsmålene, og NAV Klageinstans har redegjort for sitt syn i notat av 5. juli 2018. Notatet følger som vedlegg 5. Vi er enige med Klageinstansen når de i notatet blant annet peker på at den rettskildemessige situasjonen synes uavklart.

Dersom Trygderettens kjennelser legges til grunn i fremtidig saksbehandling, vil dette innebære en vesentlig omlegging av dagens praksis i forhold til retten til å oppholde seg i utlandet for mottagere av kontantytelser. Forholdet til tidligere avgjorte saker må eventuelt også vurderes. Klageinstansen har intil videre satt i bero behandling av innkomne klagesaker som gjelder disse spørsmålene.

Vi mener det er behov for et møte med departementet på nyåret, i god tid før fristen den 31. januar, og ber om at departementet innkaller oss til et slikt møte. Forståelsen av artikkel 21 får betydning for eksport av flere kontantytelser i folketrygdloven, bla. kapittel 8, kapittel 9, og kapittel 11. Denne henvendelsen bør derfor forelegges for flere avdelinger i departementet for innspill og eventuell deltagelse i møtet.

In letters of 19 November 2018 and 7 December 2018, the National Insurance Court has notified us that they are considering submitting questions on Article 21 of Social Security Regulation 883/2004 to the EFTA Court for a advisory opinion. There are questions whether Article 21 also includes short-term stays

within the EEA area, see Appendices 1 and 2. This applies to Appeals Nos. 18/00741 and 18/3099. A short summary of the cases is in appendix 3.

The Directorate of NAV wants a dialogue with the Ministry of Labor and Social Affairs before we respond to the National Insurance Court in the two aforementioned cases. We also want to discuss the substantive side of the question, including any need for legislative amendment. The National Insurance Court has asked about the parties' comments and any suggestions on questions one would like to ask the EFTA Court. The NAV Complaints Authority has prepared proposals for such issues, see Appendix 4. The National Insurance Court has now granted a deferred deadline for answering in both of the above cases until 31 January.

The issue in the two aforementioned cases is about the requirement to stay in Norway for the right to respectively sick pay and work clarification money in sections 8 to 9 and 11-3 of the National Insurance Act are contrary to the provision in Social Security Regulation 883/2004 Article 21. The issue will also be relevant to other cash benefits, such as nursing money.

The National Insurance Court has in several orders assumed that short-term stays abroad are also covered of the right to export in Article 21, and thus reached a different result than that which follows NAV's circulaire. The case numbers of the orders are set out in Appendix 3.

In the letters of November 19, 2018 and December 7, 2018, the National Insurance Court points out that NAV does not appear to have complied with their interpretation of the law, partly because the circulaire has not changed.

The Directorate of Labor and Welfare has had some dialogue with the NAV Complaints Office about these questions, and the NAV Complaints Authority has presented its view in a note of July 5, 2018. The note follows as appendix 5. We agree with the Complaints Authority when they point out in the note, among other things the legal situation seems unclear.

If the National Insurance Court's decisions are used in future case processing, this will entail a substantial restructuring of current practice in relation to the right to reside in abroad for recipients of cash benefits. The relationship to previously settled cases may also need to be considered. The Appellate Body has for the time being put on hold of complaints received which addresses these issues.

We believe there is a need for a meeting with the Ministry in the New Year, well in advance of the deadline of January 31, and request that the ministry convene us for such a meeting. The understanding of Article 21 is significant for the export of several cash benefits in the National Insurance Act, among other things in Chapter 8, Chapter 9, and Chapter 11. This request should therefore be submitted to several departments in the Ministry for input and eventual participation in the meeting.

Letter from the NAV to the Ministry of Labor concerning the right to export cash benefits within the EEA-area. December 20th, 2018.
`https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20181220.pdf` (retrieved February 18th, 2020).

A.15 Internal email ordering NAV officials to stop processing all complaints concerning "exports" of social benefits to EEA countries

On December 18th, 2018, NAV ceased processing all complaints concerning so-called "exports" of social benefits to EEA countries:

> Styringsenheten har bestemt at KA skal stanse all behandling av klage- og ankesaker som gjelder eksport av kontantytelser i EØS-området fra i dag.
>
> Viser til at Trygderetten i en rekke saker på sykepenger og APP har omgjort NAVs vedtak med hensyn til eksport av kontantytelser innad i EØS-området.

Det gjelder altså forholdet mellom det lovfestede bostedskravet i folketrygdloven på den ene siden og trygdeforordningen 883/2004 artikkel 21 på den andre.

Trygderetten har nylig informert oss om at de i en sykepenkesak, og en AAP-sak, vurderer å løfte spørsmålet inn for EFTA-domstolen.

KA sendte et notat til Ytelsesavdelingen i juli i år, men det har dessverre ikke resultert i nødvendige avklaringer enda.

[UTELATT] vil orientere Trygderetten om at vi stanser vår behandling av disse sakene. Videre vil [UTELATT] informere NAV ved [UTELATT].

Vi ber om at avdelingdirektørene informerer saksbehandlerne på sykepenger, kapittel 9 og AAP i dag.

The management unit has decided that KA will suspend all processing of appeal and appeal cases relating to the export of cash benefits in the EEA area beginning today.

Referring to a number of cases on sickness benefit and APP, the National Insurance Court has reversed the NAV's decision regarding exports of cash benefits within the EEA area.

This applies, therefore, to the relationship between the statutory housing requirement in the National Insurance Act on the one hand and Article 21 of the Social Security Ordinance 883/2004 on the other.

The National Insurance Court recently informed us that in a sickness case, and an AAP case, they are considering raising the issue before the EFTA Court.

KA sent a note to the Benefits Department in July this year, but unfortunately it has not resulted in the necessary clarifications yet.

[REDACTED] will inform the National Insurance Court that we will stop our processing of these cases. Furthermore, [REDACTED] will inform NAV at [REDACTED].

We request that the office directors inform the case managers on sickness benefits, Chapter 9 and AAP today (Our translation).

Email from Grethe Børsheim to all office directors, December 18th, 2018. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20181218.pdf` (retrieved February 18th 2020.)

A.16 Correspondence between NAV and the Ministry of Foreign Affairs concerning the National Insurance Court's competence to submit cases to the EFTA Court

On January 16th 2019, the NAV sent an email to the Ministry of Foreign Affairs querying if it could be argued that the National Insurance Court lacked the authority to submit a case to the EFTA Court. The Ministry of Foreign Affairs replied that the EFTA Court was likely to accept a submission from the National Insurance Court. This email exchange suggests that Norwegian officials considered alternative approaches to avoid adjudication before the EFTA Court without changing NAV practices. This interpretation is strengthened by Norway's previous record of adopting a restrictive interpretation of what constitutes a "court or tribunal" to argue that submissions to the EFTA Court are inadmissable (see Baudenbacher, 2019*b*, 100-101):

> Vet ikke om du er rette til å svare på dette spørsmålet. Hvis ikke er det fint om du kan sette meg i kontakt med rette person.
>
> Trygderetten vurderer å forelegge spørsmål om EØS-forordning 883/2004 artikkel 21 for EFTA-domstolen, hvor man ber om en rådgivende uttalelse. Vi er usikre på om Trygderetten har kompetanse til å forelegge spørsmål for EFTA-domstolen, på lik linje med ordinære domstoler. Trygderetten er et forvaltningsorgan, men omtales ofte som domstols lignende [sic] (kan blant annet ikke instrueres).
>
> Har dere mulighet til å bistå med en avklaring her?

Don't know if you are the right [person] to answer this question. If not, it would be nice if you can put me in touch with the right person.

The National Insurance Court is considering submitting questions on EEA Regulation 883/2004 Article 21 to the EFTA Court asking for an advisory opinion. We are uncertain whether the National Insurance Court has jurisdiction to submit questions to the EFTA Court, in the same way as ordinary courts. The National Insurance Court is an administrative body, but is often referred to as court-like (cannot be instructed, among other things).

Do you have the opportunity to assist with clarification here? (Our translation).

Meg bekjent har ikke dette spørsmålet vært oppe for EFTA-domstolen når det gjelder Trygderetten. EFTA-domstolen har imildertid i andre skaer lagt listen lavt med tanke på når kravene i ODA-avtalen artikkel 34 kan anses for å være oppfyllt. Jeg tenker kanskje særlig på avgjørelse E-1/11, der Statens Helsepersonellnemd ble ansett for å tilfredsstille kravene i artikkel 34 (Norge argumenterte imidlertid mot en slik tolkning, men fikk ikke medhold av domstolen).

To my knowledge, this question has not been raised before the EFTA Court with regard to the National Insurance Court. However, in other cases, the EFTA Court has set the bar low when considering the requirements of Article 34 of the ODA Agreement. I may think in particular of Decision E-1/11, where the State Health Personnel Board was considered to satisfy the requirements of article 34 (Norway argued, however, against such an interpretation, but did not obtain agreement from court) (Our translation).

Email correspondence between a NAV official and a lawyer in the Ministry of Foreign Affairs, January 16th 2019.

`https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190116.pdf` (retrieved

February 19th 2020).

A.17 Letter from the NAV to the Ministry of Labor recommending changes in practice to avoid a referral to the EFTA Court

On January 24th, 2019 the NAV sent a letter to the Ministry of Labor recommending the changes in domestic practices necessary to avoid a referral to the EFTA Court. This letter is particularly important to our analysis because it provides direct evidence of (1) that the change in practice was *intended* to avoid a referral to the EFTA Court and (2) that a preemptive reform was considered less costly than allowing the EFTA Court to render an opinion:

> Som nevnt i vårt brev av 20. desember -18, er direktoratet blitt kjent med at Trygderetten nå vurderer å forelegge spørsmålet om forståelsen av og virkeområdet for forordningens artikkel 21 nr. 1 for EFTA-domstolen. Problemstillingen i de aktuelle sakene berører NAVs praksis knyttet til anvendelsen av av folketrygdloven § 8-9 og § 11-3 som stiller krav til at stønadsmottakeren oppholder seg i Norge. NAV har til nå ansett at forordning 883/2004 ikke kommer til anvendelse i tilfeller der mottakeren bor og arbeider i Norge og kun skal oppholde seg i et annet EØS-land i en kort periode, og at sakene dermed skal behandles utelukkende i samsvar med folketrygdlovens regler.
>
> Trygderetten anser at forordningen kommer til andvendelse også under midlertidige opphold og har omgjort NAVs vedtak i flere saker der mottakeren bor og arbeider – evt. har arbeidet – i Norge.
>
> Det bemerkes imidlertid at NAV ikke kan ha noen reell mulighet til å påvirke en eventuell beslutning fra Trygderettens side om å forelegge saken for EFTA-domstolen. Det antas likevel at en endring som bringer NAVs praksis nærmere Trygderettens syn, minsker sannsynligheten for at retten kommer til å anmode EFTA-domstolen om en slik uttalelse. Direktoratet ønsker derfor å

tilpasse fremtidig praksis slik at forordnigens artikkel 21 ikke bare anvendes på stønadsmottakere som er bosatt i EØS-land, men også vurderes i saker der mottakeren bor og arbeider i Norge.

As mentioned in our letter of 20 December -18, the Directorate has become aware that the National Insurance Court is now considering submitting the question of the understanding and scope of Article 21 (1) of the Regulation to the EFTA Court. The issue in the relevant cases concerns NAV's practice related to the application of § 8-9 and § 11-3 of the National Insurance Act, which require that the beneficiary resides in Norway. NAV has so far considered that Regulation 883/2004 does not apply in cases where the recipient lives and works in Norway and will only reside in another EEA country for a short period of time, and that the cases should therefore be dealt with exclusively in accordance with the National Insurance Act rules.

The National Insurance Court considers that the regulation also applies during temporary stays and has reversed NAV's decision in several cases where the recipient lives and works – possibly worked – in Norway.

However, it should be noted that the NAV has no real opportunity to influence a possible decision by the National Insurance Court to submit the case to the EFTA Court. However, it is assumed that a change that brings the NAV's practice closer to the National Insurance Court's view will reduce the likelihood that the court will request an opinion from the EFTA Court. The Directorate therefore wishes to adapt future practice so that Article 21 of the Regulation is applied not only to beneficiaries residing in EEA countries, but also considered in cases where the recipient lives and works in Norway.

Direktoratet er etter nærmere overveielse kommet til at praksis bør endres slik at den i større grad enn hva som har vært tilfellet fram til nå, kommer i samsvar med Trygderettens syn. Direktoraret ønsker også å endre/presisere praksis fordi situasjonen over tid synes å ha utviklet seg i en retning som gjør

at gjeldende praksis ikke lenger ivaretar brukernes behov på en tilfredsstillende måte.

Etter direktoratets syn vil det også være å foretrekke at man endrer norsk praksis i stedet for å få en avgjørelse fra EFTA-domstolen. Vi bygger vår oppfatning på at norske myndigheter ved å endre praksis i større grad vil ha muligheten for å selv vurdere hvilken betydning et midlertidig utenlandsopphold skal har for retten til de aktuelle ytelsene enn om vi får en uttalelse fra EFTA-domstolen om betydningen av forordningens artikkel 21.

The Directorate has, upon further consideration, concluded that practice should be changed so that, to a greater extent than what has been the case so far, it is in accordance with the National Insurance Court's view.The Directorate also wants to change / clarify practices because the situation over time seems to have developed in a direction that prevents current practices from satisfying the users' needs satisfactorily.

In the directorate's view, it would be preferable to change Norwegian practice instead of obtaining a decision from the EFTA Court. We consider that, by changing practices, the Norwegian authorities will have a greater opportunity to decide for themselves the importance of temporary stay abroad for the right to the benefits in question than if we receive a decision from the EFTA Court.

Letter from NAV's directorate to the Ministry of Labor, January 24th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190124b.pdf` (retrieved April 5th).

A.18 Email and Letter from the Ministry of Labor to the NAV approving the proposed policy change

The correspondence between the Ministry of Labor and the NAV concerning the proposed policy changes reveals that the initial plans concerned only limited policy changes. Decision makers were also concerned with limiting the consequences of the changes in

practice. This is clear for instance by the email sent from the Ministry of Labor to NAV on February 22nd, 2019 notifying the NAV that the political leadership in the Ministry had approved the NAV's proposed policy changes:

> Da har vi fått avklaring fra politisk ledelse om å gi dere tilslutning til å gi tilbakemelding til Trygderetten om at dere nå vil legge om praksis i tråd med Trygderettens forståelse av artikkel 21. Vi har videre fått tilslutning til at slik praksis bør legges om for saker framover i tid (både førstegangssaker og ved klager), da det vil være svært administrativt krevende om etaten skal gjennoppta alle saker hvor de har avslått søknaden, om disse sakene i dete hele tatt kan identifiseres.
>
> Vi vil be om at dere vurdere [sic] tiltak/rammer, slik at det ikke blir lengre perioder med mottak av korttidsytelser enn før. Dette kan være rutiner/krav om å søke eller melde fra på forhånd, presisere at selv om man kan oppholde seg i hele EØS-området, kan man ikke avvikle ferie mens man mottar sykepenger osv.
>
> Dette kommer nå per epost pga. tidsperspektivet, men vi vil også sende tilbakemeldingen i et mer formelt brev til uka.
>
> *We have now received approval from the political leadership that you will report back to the National Insurance Court and that you will change practice in line with the National Insurance Act's understanding of Article 21. We have further received support for these changes only being applied to future cases (both initial cases and complaints), as it will be very administratively demanding if the agency will reopen all cases where they have rejected the application, if these cases can be identified at all.*
>
> *We would like you to consider measures / frameworks so that there are not longer periods of receipt of short-term benefits than before. These may be routines / requirements to apply or notify in advance, clarifying that even though you can stay throughout the EEA area, you cannot take a vacation*

while receiving sick leave, etc.

This is now coming by email due to time perspective, but we will also send the feedback in a more formal letter next week (Our translation).

Email from Sara Bruvoll from the Ministry of Labor to the NAV, February 22nd, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190222.pdf` (retrieved April 5th, 2020)

Arbeids- og sosialdepartementet viser til deres brev av 21.12.2018 samt brev av 24.01.2019 vedrørerende rett til kontantytelser under midlertidige oppholdet i andre EØS-land, og anvendelsen av forordning 883/2004 artikkel 21.

Arbeids- og sosialdepartementet gir tilslutning til etaten enderer sin praksis slik at forordning 883/2004 artikkel 21 kommer til anvendelse også på kortvarige opphold, og slik at man fra norsk side ikke kan stanse eller avslå en kontantyteslse kun på grunnlag av at brukeren skal oppholde seg i et annet EØS-land.

Departementet ber om at direktoratet vurderer rammer/tiltak som gjør at etateten har kontroll på sakene. Dette kan for eksempel være rutiner/krav om å søke eller melde fra før man reiser til annet EØS-land, presisere at man uansett ikke har rett til sykepenger under ferie mv. Videre må etaten sørge for at krav om aktivitet for å ha rett til ytelsen i kapittel 8 og 11 overholdes.

Vi ber om tilbakemelding på hvilke tiltak direktoratet tenker å sette i verk og hvordan direktoratet vil følge opp dette.

The Ministry of Labor and Social Affairs refers to their letter of 21.12.2018 and letter of 24.01.2019 concerning the right to cash benefits during their temporary stay in other EEA countries, and the application of Article 21 of Regulation 883/2004.

The Ministry of Labor and Social Affairs endorses the practice, so that Regulation 883/2004 Article 21 applies also for short-term stays, and so that

Norway cannot stop or refuse a cash benefit only on the basis of the user's stay in another EEA country.

The Ministry requests that the Directorate consider frameworks / measures that allow the agency to control the cases. This may be, for example, routines / requirements to apply or report before traveling to another EEA country, to specify that you are not entitled to sickness benefits during holidays, etc. Furthermore, the agency must ensure that activity requirements for entitlement to benefits in Chapters 8 and 11 are complied with.

We ask for feedback on what measures the Directorate intends to implement and how the Directorate will follow up on this (our translation).

Letter from Sara Bruvoll from the Ministry of Labor to the NAV, March 5th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190305.pdf` (retrieved April 5th, 2020).

A.19 Letter from NAV to the National Insurance Court concerning changes in the NAV's practice

In a brief email to the National Insurance Court on February 26th, 2019, the NAV replied to the National Insurance Court's notification of a possible referral to the EFTA Court. The NAV noted that it would now change its practice and asked that the individual case be returned to them.

> Retten ber klageinstansen ta stilling til betydning av artikkel 21 i forordning 883/2004 hat[sic] i denne saken. Videre at Trygderetten vurerer å be EFTA-domstolen om en rådgivende uttalelse. Vi har forelagt spørsmålet for direktoratet som igjen har tatt dette opp med departementet. Departementet har nå kommet til at praksis på dette området bør endres. Vi ber derfor om at saken returneres til oss for ny vurdering.

The court asks the appellate body to consider the meaning of Article 21 of Regulation 883/2004 has in this case. Furthermore, the National Insurance Court considers asking the EFTA Court for an advisory opinion. We have submitted the question to the Directorate, which has again raised this with the Ministry. The Ministry has now decided that practices in this area should be changed. We therefore request that the case be returned to us for review (Our translation).

Email from the NAV to the National Insurance Court, February 26th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190226.pdf` (retrieved April 5th, 2020).

A.20 Statement by NAV director, Sigrun Vågeng, at the October 2019 press conference

At the October 28th, 2019 press conference, NAV director Sigrun Vågeng presented the reform as resulting from internal legal assessments in NAV following the National Insurance Court's rulings. She did not mention the National Insurance Court's threats of referrals to the EFTA Court. The account provided by Vågeng seems to be inconsistent with the available evidence in that it places too much emphasis on the NAV's own legal assessment and omits the role played by shadow of the EFTA Court in prompting announced reforms. We interpret this as attempts to put a more positive spin on the scandal.

I 2017 fikk vi de første kjennelsene fra Trygderetten som viste at retten til å ta med seg kontantytelser til EU/EØS-land endret seg. Den første kjennelsen fikk vi fra Trygderetten mot slutten av året. Sommeren 2018 meldte NAVs klageinstans til direktoratet at det var grunnlag for å se på praksisen vår. Vår praksis hadde tatt utgangspunkt i reglene i folketrygdloven som sier at man må oppholde seg i Norge for å få rett til arbeidsavklaringspenker, sykepenger, og pleiepenger. På bakgrunn av dette satte vi i gang en grundig

juridisk vurdering. Dette er kompliserte juridiske vurderinger i grensen mellom norsk lovgivning og EU/EØS rett. Konklusjonen på gjennomgangen var at vår praksis hadde vært basert på en feil tolkning. Til dere som er berørt av denne situasjonen: Dette er veldig leit og jeg beklager det naturligvis på det sterkeste. Jeg kan forsikre alle om at vi tar dette på største alvor og at vi setter inn betydelige ressurser på å behandle sakene til de berørte som har mistet retten til ytelser, som har måttet tilbakebetale ytelser, og de som har blitt anmeldt. Dette arbeidet prioriteres høyt. Vi skal rette opp i de sakene der hvor vi har gjort feil. Vi har endret praksis for fremtidige saker og vi vil nå også gå gjennom alle saker på områdene helt tilbake til de nye EU/EØS-reglene kom i 2012. Som utøvende organ har NAV anmeldt og domstolene har dømt. Vi har nå varslet både departmentet og riksadvokaten om at både vår og domstolene sin forståelse og praktiseringen av regelverket har vært feil. Vår vurdering er at vi fra norsk side ikke kan stanse eller avslå en ytelse på grunnlag av opphold i et EU/EØS-land. Sommeren 2019 innførte vi derfor ny praksis for kortvarige opphold samtidig som vi selv tok initiativet til å vurdere retten til kontantytelser ved lengre opphold. Vi har nå konkludert med at vi mener det er riktig å endre praksis også for lengre opphold og at alle saker tilbake til 2012 må gjennomgås.

In 2017, we received the first rulings from the National Insurance Court showing that the right to bring cash benefits to EU / EEA countries had changed. We received the first ruling from the National Insurance Court towards the end of the year. In the summer of 2018, NAV's appeal body informed the Directorate that there were grounds for reviewing our practice. Our practice had been based on the rules of the National Insurance Act which states that one must reside in Norway in order to be entitled to work clearance allowances, sick pay, and nursing money. Against this background, we initiated a thorough legal assessment. These are complicated legal assessments at the border between Norwegian law and EU / EEA law. The conclusion of the review

was that our practice had been based on an incorrect interpretation. To you who are affected by this situation: This is very sad and of course I apologize most strongly. I can assure everyone that we take this most seriously and that we invest significant resources in dealing with the cases of those affected who have lost the right to benefits, who have had to repay benefits, and those who have faced criminal charges. This work is given high priority. We will correct the cases where we have made mistakes. We have changed the practice for future cases and we will now also go through all cases in the areas as far back as the new EU / EEA rules came in 2012. As an executive body, NAV has filed charges and the courts have judged people. We have now notified both the ministry and the Attorney General that both our understanding and the courts' understanding and practice of the regulations have been incorrect. Our assessment is that, on the Norwegian side, we cannot stop or refuse a benefit based on residence in an EU / EEA country. Therefore, in the summer of 2019, we introduced new practices for short-term stays while also taking the initiative to assess the right to cash benefits for longer stays. We have now concluded that we believe it is appropriate to change practices also for longer stays and that all issues back to 2012 must be reviewed (Our Translation).

Dette har vært en komplisert juridisk vurdering i grensen mellom norsk lovgiving og EU/EØS rett. Vi har gjort grundige vurderinger etter at kjennelsen fra Trygderetten ikke var i overenstemmelse med vår gjeldende praksis. Vi har kommet til at vår praksis må endres. Vi jobber nå med å få oversikt over hvilke saker som er behandlet feil og skal rette opp for de av dere som dette berører.

This has been a complicated legal assessment at the border between Norwegian legislation and EU / EEA law. We have made thorough legal assessments after the National Insurance Court's ruling was not in accordance with our current practice. We have come to realize that our practice must change. We are now working to get an overview of the issues that have been dealt with incorrectly

and to correct it for those of you affected by this (our translation).

Press conference with Minister of Labor Anniken Hauglie, NAV director Sigrun Vågeng, and director of Public Prosecutions Tor-Aksel Busch, October 28th, 2019. `https://e24.no/privatoekonomi/i/kJxaVL/nav-skandalen-trygdemottagere-uriktig-doemt-til-fengsel` (retrived April 9th, 2020).

A.21 Initial implementation of minimalist reforms

Through June 2019, the NAV continued to put into practice the minimalist reforms agreed on with the Ministry of Labor:

> Det vises til tidligere korrespondanse vedrørende rett til kontantytelser under midlertidige opphold i andre EØS-land og andvendelsen av forordning 883/2004 artikkel 21. Departementet ga i brev, datert 5. mars 2019, tilslutning til at etaten endrer sin praksis slik at forordning 883/2004 artikkel 21 kommer til anvendelse også på kortvarige opphold, og slik at man fra norsk side ikke kan stanse eller avslå en kontantytelse kun på grunnlag av at brukeren skal oppholde seg i et annet EØS-land.
>
> Departementet ba i over nevnte brev om at direktoratet vurderer rammer/tiltak som gjør at etaten har kontroll på sakene og at krav til aktivitet for å ha rett til ytelsen i kapittel 8 og 11 overholdes. Departementet ba om tilbakemelding på hvilke tiltak direktoratet tanker å sette i verk og hvordan direktoratet vil følge dette opp.
>
> Vedr sykepenger Når den sykmeldte leverer krav om sykepenger gjennom dagens digitale selvbetjeningsløsning får de spørsmål om de har oppholdt seg i utlandet. Svarer de ja på dette spørsmålet blir de veiledet til å levere søknad om å beholde sykepenger under utenlandsopphold digitalt. Det vil ta noe tid å endre denne digitale løsningen, men Arbeid- of velferdsdirektoratet ser for seg at det kan utvikles en ny digital selvbetjeningsløsning som forenkler søknadsprosedyrene ved at løsningen skiller seg på opphold innenfor- og uten-

for EØS-området. En slik løsning vil stille de samme kravene til kontroll av utenlandsoppholdet, men vil forenkle dialogen mellom sykmeldte og NAV ved opphold innenfor EØS-området.

Reference is made to previous correspondence regarding the right to cash benefits during temporary stays in other EEA countries and the application of Regulation 883/2004 Article 21 applies also to short-term stays, and so that the Norwegian state cannot stop or refuse a cash benefit only on the basis of the user staying in another EEA country.

In the above-mentioned letter, the Ministry asked that the Directorate consider frameworks / measures that allow the agency to control the cases and that requirements for activity to be entitled to the benefits in Chapters 8 and 11 are complied with. The Ministry requested feedback on the measures the Directorate intends to implement and how the Directorate will follow up on this.

Regarding sick pay. When the sick person submits sick pay claims through today's digital self-service solution, they are asked whether they have stayed abroad. If they answer yes to this question, they will be guided to submit an application to keep sick leave during their stay abroad digitally. It will take some time to change this digital solution, but the Directorate of Labor and Welfare envisages that a new digital self-service solution can be developed that simplifies the application procedures by making the solution different for stays inside and outside the EEA. Such a solution would impose the same requirements for control of the stay abroad, but would simplify the dialogue between the sick person and NAV for stays within the EEA area (our translation).

Generelt. Arbeids- og velferdsdirektoratet vil sende ut en fagmelding til alle NAV-kontorene om å endre praksis vedørerende midlertidig utenlandsopphold innenfor EØS-området i henhold til Trygderettens forståelse av EØS-forordning 883/2004 article 21. Tilsvarende vil rundskriv oppdateres i henhold

vår beskrivelse i dette brevet. Endringen vil gjelde med virkning fremover i tid. Praksisendringen vil innebære at NAV-kontorene ikke kan avslå søknad om utenlandsopphold kun på bakgrunn av at brukren skal oppholde seg i et annet EØS-land. Pågående klagesaker, vil vurderes etter ny praksis.

In general. The Directorate of Labor and Welfare will send out a professional report to all NAV offices to change practices concerning temporary residence abroad within the EEA in accordance with the National Insurance Act's understanding of EEA Regulation 883/2004 article 21. The corresponding circulaire will be updated according to our description in this the letter. The change will apply with effect in the future. The change in practice will mean that the NAV offices cannot refuse an application for a stay abroad only on the grounds that the user must reside in another EEA country. Ongoing complaints cases will be assessed according to new practice (our translation).

Letter from the NAV to the Ministry of Labor, June 21th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190621.pdf` (retrieved April 6th 2020)

Ny praksis: Arbeidsavklaringspenger ved kortvarig utenlandsopphold innenfor EØS-området Publisert 25. juni 2019 Arbeids- og sosialdepartementet har etter innspill fra Trygderetten bestemt at arbeidsavklaringspenger ikke kan stanses eller avslås kun på grunnlag av at brukeren skal oppholde seg, eller har oppholdt seg i et annet EØS-land. Dette betyr at NAV med umiddelbar virkning må endre praksis i tilfeller hvor brukeren skal reise til et EØS-land, slik at EØS-forordning 883/2004 artikkel 21 kommer til anvendelse. EØS-forordning 883/2004 artikkel 21 gir en mottaker av arbeidsavklaringspenger fra NAV rett til å beholde ytelsen ved opphold i et annet EØS-land, så lenge øvrige vilkår for å motta arbeidsavklaringspenger er oppfylt. Det vil ikke lenger være nødvendig å søke om å beholde arbeidsavklaringspengene ved opphold i EØS-området. Ved opphold i EØS på tidspunkter uten avtalt aktivitet i aktivitetsplanen

- Dersom det ikke er avtalt aktivitet på et tidspunkt kan brukeren oppholde seg i resten av EØS i samme grad som brukeren har kunnet oppholde seg i hele Norge før praksisendringen.
- Dersom brukeren i denne perioden blir innkalt til aktivitet i Norge, er det ikke gyldig fraværsgrunn at han eller hun har oppholdt seg i EØS og dermed har hatt for lang hjemreise til å rekke en aktivitet.

Ved opphold som vil medføre endringer i aktivitetsplanen

- Brukeren må melde fra til NAV-kontoret om fremtidige opphold i EØS i perioder med tiltak og behandling. NAV-kontoret må kjenne til varigheten på oppholdet slik at eventuell oppfølging i utlandet planlegges.
- Oppholdet kan gjennomføres dersom det kan lages en aktivitetsplan likeverdig med den brukeren har i Norge.
- Brukeren må kontakte NAV-kontoret minst fire uker før oppholdet i EØS slik at aktivitetsplanen skal kunne tilpasses og eventuell oppfølging i utlandet planlegges.

Hvem omfattes av praksisendringen?

- Praksisendringen som er beskrevet her gjelder både norske- og utenlandske statsborgere som er omfattet av EØS-forordningens personkrets.
- Pågående klagesaker skal vurderes etter ny praksis.
- Reiser til land utenfor EØS skal behandles etter folketrygdloven § 11-3 med tilhørende begrensninger på oppholdets varighet.

New practice: Work assessment allowance for short stays abroad within the EEA area Published June 25, 2019 The Ministry of Labor and Social Affairs has decided, following input from the National Insurance Court, that work assessment allowances cannot be stopped or rejected only on the basis of that the user will stay or have stayed in another EEA country. This means that the

NAV with immediate effect must change the practice in cases where the user is going to travel to an EEA country so that Article 21 of EEA Regulation 883/2004 applies. EEA Regulation 883/2004 Article 21 entitles a recipient of work assessment allowance from the NAV to retain the benefit during residence in another EEA country, as long as other conditions for receiving work assessment allowance is met. It will no longer be necessary to apply for retention of work clarification money on residence in the EEA area. When staying in the EEA at times without an agreed activity in the activity plan

- *If there is no scheduled activity at one point, the user can stay in the rest of EEA to the same extent that the user has been able to reside throughout Norway before practice change.*
- *If the user is summoned to activity in Norway during this period, it is not valid absenteeism that he or she has stayed in the EEA and thus has had too long a home journey to reach an activity*

For stays that will entail changes in the activity plan

- *The user must report to the NAV office about future stays in the EEA during periods of measures and treatment. The NAV office must know the duration of the stay so that follow-up can be planned.*
- *The stay can be completed if an activity plan can be created equivalent to the one that the user has in Norway.*
- *The user must contact the NAV office at least four weeks before their stay in the EEA so that the activity plan should be adaptable and any follow-up abroad can be planned.*

Who is covered by the practice change?

- *The practice change described here applies to both Norwegian and foreign nationals covered by the EEA Regulation.*

- *Ongoing complaint cases should be assessed in accordance with new practice.*
- *Travel to countries outside the EEA shall be dealt with in accordance with Section 11-3 of the National Insurance Act and the corresponding restrictions on length of stay* (our translation).

Internal NAV notice concerning work assessment allowances, June 25th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190625.pdf` (retrieved April 6th 2020).

A.22 Challenges in implementing only minimalist reforms

The reforms that were eventually enacted were more comprehensive than the minimalist reforms initially agreed on by the NAV and the Ministry of Labor. Evidence from the NAV's internal audit and internal correspondence, suggest that this change was prompted by bureaucrats in the NAV questioning the feasibility of the minimalist strategy.

> Det vises til tidligere korrespondanse vedrørende rett til kontantytelser under opphold i andre EØS-land (EF forordning 883/2004 artikkel 21), der departementet ga sin tilslutning til at NAV skulle endre praksis i tråd med Trygderettens forståelse av artikkel 21 sitt anvendelsesområde. Dette slik at artikkel 21 også skal vurderes ved kortvarige utenlandsopphold innen EØS.
>
> I vår dialog videre innad i NAV, viser det seg at artikkel 21 heller ikke har vært vurdert ved midlertidig utenlandsopphold utover de rent kortvarige. Vi har notert oss at departementet har gitt sin tilslutning til å endre praksis fremover i tid, men vi ser et behov for å ha en dialog med departementet på hvordan vi skal håndtere saker som anmodes gjenopptatt eller saker der vi vet at artikkel 21 er vurdert feil. Erfaringsmessig vil det kommer [sic] spørsmål om gjennopptak når vi endrer praksis. Vi ønsker særlig diskutere [sic] dette fordi vi i ettertid ser at det er en stor risiko for at det er flere saker med domfellelse der det er utslagsgivende at artikkel 21 ikke har vært vurdert. Disse sakene

dreier seg i hovedsak om saker med utenlandsopphold av noe lengre varighet eller der det er flere hyppige utenlandsopphold. Vi arbeider nå med å skaffe oss en oversikt over grunnlaget for domfellelsene. Vi har også flere til dels store tilbakekrevingssaker.

Reference is made to previous correspondence regarding the right to cash benefits during stays in other EEA countries (EC Regulation 883/2004 Article 21), in which the Ministry agreed that NAV should change practice in line with the National Insurance Court's understanding of Article 21's scope. This is so that Article 21 should also be considered for short-term stays abroad within the EEA.

In our further dialogue within the NAV, it appears that Article 21 has also not been considered for temporary stays abroad beyond the purely short-term stays. We have noted that the ministry has agreed to change the practice in the future, but we see a need to have a dialogue with the ministry on how to deal with cases that are requested be resumed or cases where we know that Article 21 is applied incorrectly. Experience shows that changes in practice lead to calls for reopening old cases. We particularly want to discuss this because in retrospect we see that there is a great risk that there are several cases of conviction where it is decisive that Article 21 has not been considered. These cases are mainly cases of stays abroad of somewhat longer durations or where there are several frequent overseas stays. We are now working to get an overview of the basis for the convictions. We also have several large recovery cases (Our translation).

Email from NAV to Sara Bruvoll in the Ministry of Labor, August 30th, 2019. `https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2019/eos-saken-korrespondanse/vedlegg-tidslinje-stortinget/20190830.pdf`(retrieved April 5th 2020).

A.23 Letter from the EFTA Surveillance Authority to the Ministry of Labor

On September 30, 2015, the EFTA Surveillance Authority responded to a complaint lodged by a Norwegian citizen residing in Sweden who had been denied his work assessment allowance by the NAV. The Surveillance Authority sent a letter to the Ministry of Labor seeking additional information concerning NAV's social benefits policy restrictions and emphasized that a strict residency requirement would not be compatible with EU Regulation No. 883/2004:

> *On 2 September 2015, the EFTA Surveillance Authority ("The Authority") received a complaint against Norway concerning the refusal by the Norwegian Labor and Welfare Administration ("NAV") to export the Work Assessment Allowance (Arbeidsavklaringspenger ("AAP") to Sweden. According to the complainant, this decision is contrary to the waiving of residence rules clause in Article 7 of Regulation (EC) No. 883/2004 on the coordination of social security systems...*
>
> *...In that situation, Article 7 of Regulation (EC) No 883/2004 provides that neither the acquisition, nor the retention of the benefit may be denied on the sole ground that the person concerned resides in another Member State than the one paying the benefit...*
>
> *...With regard to the condition that a beneficiary should stay in Norway to receive AAP, it seems that such a condition could be capable of putting some nationals of EEA States at a disadvantage simply because they have exercised their right to free movement. Such measures could be accepted if objectively justified and proportionate to the aim pursued.*
>
> *The Directorate would like to invite the Norwegian Government to submit its observations on the nature of AAP...In addition, the Norwegian Government is invited to provide any other information it deems relevant to the case, so that it reaches the Authority by 31 October 2015. The Authority would wel-*

come copies of relevant national legislation, including English translations if available. . .

Letter from the EFTA Surveillance Authority to the Norwegian Ministry of Labor, September 30th, 2016. `https://static.vg.no/spesial/2020/nav/30.09.15.pdf`(retrieved December 10th 2020).

A.24 Minister Hauglie's Decision to Change Policy

The final report of the government-appointed inquiry includes summaries of Minister of Welfare and Labor Anniken Hauglie's communication with her bureaucracy when the decision was taken to reform preemptively rather than to allow a referral to be submitted to the EFTA Court. These summaries suggest (1) that Hauglie – due to the government's

Case handler: [redacted]
Tel: [redacted]
e-mail: [redacted]

Brussels, 30 September 2015
Case No: 77886
Document No: 774469

EFTA SURVEILLANCE AUTHORITY

Ministry of Labour and Social Affairs
Postboks 8019 Dep,
0030 Oslo
Norway

Dear Sir/Madam,

Subject: Complaint against Norway concerning refusal to export the work assessment allowance

On 2 September 2015, the EFTA Surveillance Authority ("the Authority") received a complaint against Norway concerning the refusal by the Norwegian Labour and Welfare Administration ("NAV") to export the Work Assessment Allowance (*Arbeidsavklaringspenger* ("AAP")) to Sweden.

According to the complainant, [redacted] this decision is contrary to the waiving of residence rules clause in Article 7 of Regulation (EC) No 883/2004[1] on the coordination of social security systems.

The complainant is a Norwegian citizen who is residing in [redacted] and who is currently receiving AAP. He would like to move to Sweden together with his wife as he is of the opinion that they have better chances of finding work there. However, the export of AAP to Sweden was refused by NAV on the grounds that it would be more difficult to monitor the job-searching activities and that export could delay his re-integration into the labour market. The complainant has expressed his willingness to travel from Sweden to Norway to facilitate the monitoring of his employment opportunities. By denying him the right to export AAP to Sweden, the complainant argues that the exercise of his right to free movement is hindered.

For a benefit to be covered by Regulation (EC) No 883/2004, it should be regarded as a "social security benefit". According to settled case law of the Court of Justice of the European Union ("CJEU"), a social security benefits is "granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks in Article 3(1) of Regulation (EC) No 883/2004"[2].

According to Chapter 11, § 11.1-3, of the National Insurance Act (*Folketrygdloven),* the purpose of AAP is to ensure income for members of the National Insurance Scheme while receiving active treatment, attending vocational measures or receive other assistance with a view to obtain or retain employment. It is granted to persons who have been affiliated to the

[1] The Act referred to at point I of Annex VI to the EEA Agreement.
[2] See for instance Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* EU:C:2011:500, paragraph 32 and Case E-4/07 *Jón Gunnar Þorkelsson and Gildi-lífeyrissjóður* [2008] EFTA Court Report 3, paragraph 36 .

Rue Belliard 35, B-1040 Brussels, tel: (+32)(0)2 286 18 11, fax: (+32)(0)2 286 18 00, www.eftasurv.int

Page 2

EFTA SURVEILLANCE AUTHORITY

National Insurance Scheme for at least 3 years (or at least one year in case of employed activity) and who are incapable of obtaining or retaining gainful employment due to illness, injury or disability. Creating and respecting an Activity Plan is a condition for receiving AAP. As a general rule, a person receiving AAP must reside and stay in Norway (§11.3 of the National Insurance Act).

It follows from the conditions for granting and receiving AAP that it is intended to provide claimants with the financial means to meet their needs and to allow them to, (gradually) return after work after illness. The award of AAP depends on objective criteria laid down in Chapter 11 of the National Insurance Act. It is the preliminary view of the Internal Market Affairs Directorate that AAP would qualify as a social security benefit which is directly related to the risk of invalidity in Article 3(1)(c) of Regulation (EC) No 883/2004.

In that situation, Article 7 of Regulation (EC) No 883/2004 provides that neither the acquisition, nor the retention of the benefit may be denied on the sole ground that the person concerned resides in another Member State than the one paying the benefit[3]. The only exceptions to that prohibition are those expressly provided for in Regulation (EC) No 883/2004, in particular Article 70 and Annex X thereof, Since AAP is not mentioned in Annex X it follows that invalidity benefits are as a rule exportable to another EEA State.

With regard to the condition that a beneficiary should stay in Norway to receive AAP, it seems that such a condition could be capable of putting some nationals of EEA States at a disadvantage simply because they have exercised their right to free movement[4]. Such measures could be accepted if objectively justified and proportionate to the aim pursued[5].

The Directorate would like to invite the Norwegian Government to submit its observations on the nature of AAP for the purposes of Article 3 of Regulation (EC) No 883/2004 and the reasons for limiting the payment of AAP to persons residing and staying in Norway in the light of Article 7 of Regulation (EC) No 883/2004 and the principle of equal treatment enshrined in Article 28(2) of the EEA Agreement.

In addition, the Norwegian Government is invited to provide any other information it deems relevant to the case, so that it reaches the Authority by *31 October 2015.* The Authority would welcome copies of relevant national legislation, including English translations if available.

Yours faithfully,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate

[3] Case C-356/89 *Newton v Chief Adjucation Officer* EU:C:1991:265, paragraph 23.
[4] See for instance Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* EU:C:2011:500, paragraph 86.
[5] See for instance Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* EU:C:2011:500, paragraph 87.

Figure A3: Letter from the EFTA Surveillance Authority to the Norwegian Ministry of Labor

commitment to combat social security "exports" – perceived it as politically costly to relax the residency requirement and (2) that she was convinced that policy nevertheless had to be changed because it was "risky" to allow the EFTA Court to get involved:

> Statsråden ga sin tilslutning til embetsverkets tilrådning 21. februar 2019. I merknadene til saken i departementets interne systemer, ga statsråden uttrykk for at saken var vanskelig, og en praksisendring kunne være uheldig i lys av regjeringsplattformens formuleringer om trygdeeksport. Hun ga like fullt uttrykk for at juristene i departementet var de mest kompetente til å vurdere dette, men spurte om det kunne tenkes andre "innskjerpende" tiltak. Overfor utvalget har daværende statsråd Hauglie gitt uttrykk for at hun hele tiden mente at praksis måtte innrettes slik at Norges EØS-rettslige forpliktelser ble overholdt.
>
> *The Minister agreed with the bureaucracy's recommendation on 21 February 2019. In the comments on the case in the ministry's internal systems, the Minister stated that the case was difficult, and a change in practice could be unfortunate in light of the government platform's formulations on social security exports. She nevertheless expressed that the lawyers in the ministry were the most competent to assess this, but asked if other "restrictive" measures could be considered. To the committee, the then Minister Hauglie has stated that she always believed that practice had to be arranged so that Norway's EEA legal obligations were complied with.* (Our translation).

Summary of internal government notes in the final report of the government-appointed inquiry (Arnesen et al., 2020, 227).

> (Our translation).

Summary of internal government notes in the final report of the government-appointed inquiry (Arnesen et al., 2020, 227).

A.25 National Insurance Court Ruling on June 12th, 2017

One June 12th, 2017, the NIC ruled in a case concerning a Latvian national who had lost his left leg after a work-related accident in Norway. Because he had repeatedly traveled to Latvia to stay with his wife and children, the NAV decided that he was no longer entitled to his cash benefits from Norway and that he had to pay back benefits he had already received during the period when he resided in Latvia. In its ruling, the NIC clearly states that under EEA law, EEA national are entitled to cash benefits from the competent state, which in this case was Norway, no matter where in the EEA area they reside. The NIC further ordered the NAV to reassess the case, considering the relevant EEA rules:

> Ankesaken ble oversendt Trygderetten ved ekspedisjon datert 13. september 2016.
>
> [utelatt] ble utsatt for en arbeidsulykke den 12. november 2011 da han arbeidet i Norge. Han måtte amputere skadet venstre ben og fikk brudd i nakken. Han har måtte amputere venstre legg. NAV har den 1. januar 2012 godkjent tap av venstre legg som yrkesskade.
>
> Det fremgår av sakens opplysning at [utelatt] har kone og barn i Latvia og at han ofte har reist på besøk hjem.
>
> Han har oppebåret sykepenger og arbeidsavklaringspenger.
>
> Ankesaken her gjelder vedtak om omgjøring av vedtak om rett til arbeidsavklaringspenger for perioder i 2012, 2013, 2014 og 2015 fordi han har hatt opphold i hjemlandet. Ankesaken gjelder også vedtak om tilbakebetaling om uberettiget mottatt arbeidsavklaringspenger.
>
> NAV har ikk vurdert sakskomplekset i henhold til EØS-avtalen og særregelen som gjelder for arbeidstakere i EU/EØS.
>
> Når det gjelder rett til sykepenger, har folketrygdloven §8-55 særregler for sykepenger for yrksskade. Det fremgår av paragrafens bokstav e) at sykepenger utbetales utenfor Norge uten hensyn til bestemmelsene i § 8-9. Folketrygdlovens kapittel 11 har ikke tilsvarende bestemmelse for arbedisavklaringspenger. Det

følger imidlertid av artikkel 11 nr. 3 litera a) i Rådsforordning 883/2004, trygdeforordningen, at Norge er kompetent land fordi [utelatt] arbeidet i Norge. Etter artikkel 21 har en trygdet, som er bosatt eller oppholder seg på en anden meldemsstats territorium enn den kompetente stat, rett til kontantytelser fra den kompetente stat. Det vil si at utgangspunktet er at [utelatt] hadde rett til arbeidsavklaringspenger fra Norge selv om han oppholdt seg i hjemlandet. Tvistespørsmålet vil være om han kunne anses å oppfylle de materielle vikår for rett til arbeidsavklaringspenger i de perioder han oppholdt seg i hjemlandet.

Det fremgår av sakens dokumenter at han hadde ønske om å være hjemme. Han har imidlertid også ytres ønske senere at han ønsker å komme i arbeid igjen i Norge.

NAV Klageinnstans anmodes om å vurdere vedtak vedørende omgjøring av rett til arbeidsavklaringspenger samt vedtak om tilbakebetaling i relasjon til EØS regelverket. Kopi av NAVs vurdering bes oversendt advokat [utelatt] med en frist på tre uker for tilsvar.

The appeal was sent to the National Insurance Court [...] dated 13 September 2016.

[redacted] was involved in a work accident on 12 November 2011 while working in Norway. He had to amputate his injured left leg and suffered a broken neck. He has had to amputate his lower left leg. On 1 January 2012, NAV approved the loss of the left leg as an occupational injury.

It appears from the information in the case that [redacted]] has a wife and children in Latvia and that he has often traveled home to visit.

He has received sick pay and work clearance money.

The appeal case here concerns a decision on reversal of a decision on the right to work clearance allowance for periods in 2012, 2013, 2014 and 2015 because

he has resided in his home country. The appeal also applies to decisions on reimbursement of unjustifiably received work clearance allowance.

The NAV has not assessed the case complex in accordance with the EEA agreement and the special rule that applies to employees in the EU / EEA.

With regard to the right to sickness benefits, the National Insurance Act §8-55 has special rules for sickness benefits for occupational injuries. It appears from letter e) of the section that sickness benefits are paid outside Norway without regard to the provisions in § 8-9. Chapter 11 of the National Insurance Act does not have a corresponding provision for labor clearance money. However, it follows from Article 11 no. 3 letter a) in Council Regulation 883/2004, the Social Security Ordinance, that Norway is a competent country because [redacted] work in Norway. Under Article 21, an insured person who resides or resides in the territory of a Member State other than the competent State is entitled to cash benefits from the competent State. That is, the starting point is that [omitted] was entitled to work clearance money from Norway even if he stayed in his home country. The question of dispute will be whether he could be considered to fulfill the material temporary years for the right to work assessment allowance during the periods he stayed in his home country.

It appears from the case documents that he wished to be at home. However, he also later expressed a wish that he would like to return to work in Norway.

NAV Klageinnstans is requested to consider decisions regarding the conversion of the right to work clearance allowance as well as decisions on reimbursement in relation to the EEA regulations. A copy of NAV's assessment is requested from the lawyer [redacted] with a deadline of three weeks for reply(Our translation).

NIC ruling on June 12th, 2017. Available at `https://static.vg.no/spesial/2020/nav/21.08.17.pdf?fbclid=IwAR3rz27g6CqQ_XtVrHWcg5z1ypaUeXWA7bmtUAfWZFbAo_50dxGvGhYhXdg` (retrieved December 22nd, 2020).

A.26 Questions to the President of the National Insurance Court Concerning the Relationship between the National Insurance Court and Other Institutions within the Executive Branch at the January 2019 Public Hearing in the Parliament's Standing Committee on Scrutiny and Constitutional Affairs

Following the testimony of the President of NIC, Trine Fernsjø, before the Parliament's Standing Committee on Scrutiny and Constitutional Affairs (See Section A.9 above), members of the committee had the opportunity to ask questions. Several members of the committee asked questions concerning why the NIC had not followed the "chain-of-command" within the executive branch. At each occasion, Fernsjø rebutted by highlighted the independent and court-like status of the NIC.

> Eva Kristin Hansen , (Saksordfører, Arbeiderpartiet): Hadde Trygderetten på noe tidspunkt kontakt med Departmentet om disse spørsmålene? Fernsjø: Det har vi ikke hatt. Og det.. Trygderetten avsier enkeltkjennelser og de gir vi til partene. Og partene tar stilling til hva de skal gjøre videre. Og NAV vurderer hva de skal gjøre med sin praksis videre. Og det er jo sånn at det er NAV som har kontakten med Departementet om hva som da skal skje. Vi varsler jo ikke departementet eller direktoratet. Det gjør vi ikke.
>
> (...)
>
> Svein Harberg (Høyre): Du sa at dere har jo ikke noen rutiner for å varsle departementet om avgjørelser (. . .) men du sto under vurderingen mellom en femmedlemsrett og EFTA, vurderte du da at dette faktsik var en sak som du burde informere oppover om, eller som vi i systemet bør informere opp om. Fernsjø: Nei. Det gjorde jeg ikke. Jeg tenker at det tilligger et uavhengig rettsmedlem i Trygderetten å ta stilling til om en sak skal vurderes fremlagt for EFTA-domstolen eller ikke. Og så tilligger det meg, som Trygderettens

leder å vurdere om retten skal settes med fem eller ikke. Og det er jo ikke sånn at Departementet blir kontaktet når Trygderetten vurderer å sette rett med fem. Det skjer ikke. Altså, departementet informerer via direktoratet.

(...)

Nils T Bjørke (Senterpartiet): Du jo sa jo at dere ikke informerte departementet. Dere er jo en underliggende etat i forhold til departementet, sånn som jeg oppfatter det. Og Huitfeldt nevnte tidligere i dag at når det var [inaudible] saker så fikk hun det på sitt bord fra Trygderetten. Er det en endret praksis i fra tidligere?

Fernsjø: Det er ikke endret praksis. Hvis hun har fått det på sitt bord så antar jeg at hun har fått det fra direktoratet. Jeg spør nå. Jeg har ikke hørt Huitfeldt. Men Trygderetten orinterer ikke departementet. Vi er en underliggende etat, men vi er uavhengige. Og vi avsier kjennelser og avjørelser på linje med en domstol. Og det ligger ikke i systemet at vi skal varsle departementet.

(Eva Kristin Hansen, Rapporteur, Labor Party) Did the National Insurance Court at any time contact the Ministry about these issues?

Fernsjø: We did not. And that... The National Insurance Court issues individual rulings and we hand them to the parties. And the parties decide what to do next. And NAV is considering what to do with their practice next. And as a matter of fact, it is NAV that has the contact with the Ministry about what will happen next. We do not notify the ministry or the directorate. We do not.

(...)

Svein Harberg (The Conservative Party): You said that you do not have any routines for notifying the Ministry of decisions (...) but you were deciding between a five-member court and EFTA, did you then consider that this fact was a matter that you should inform upwards about, or which "we in the system" should inform the higher-ups about.

Fernsjø: No. I did not do that. I think that it is up to an independent panel member in the National Insurance Court to decide whether a case should be considered submitted to the EFTA Court or not. And then it is up to me, as the president of the National Insurance Court, to assess whether the court should be set with five [members] or not. And it is not the case that the Ministry is contacted when the National Insurance Court considers forming a panel of five [members]. It is not going to happen. That is, the ministry is informed by the directorate.

(...)

Nils T Bjørke (The Center Party): You said that you did not inform the ministry. You are an underlying agency in relation to the ministry, as I perceive it. And Huitfeldt [a former minister of Labor] mentioned earlier today that when there were [inaudible] cases, she received on her desk from the National Security Court. Has there been a change in practice, compared to earlier?

Fernsjø: There is no change in practice. If she received them on her desk, I guess she's received them from the directorate. I'm asking now. I have not listened to Huitfeldt. But the National Insurance Court does not inform the ministry. We are an underlying agency, but we are independent. And we issue rulings and rulings in line with a court. And it is not in the system that we have to notify the ministry.

Testimony by the President of the National Insurance Court, Trine Fernsjø, in a hearing held by the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, January 9th, 2020.
https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/Videoarkiv/Arkiv-TV-sendinger/?mb
/2020/H264-full/Hoeringssal1/01/09/Hoeringssal1-20200109-183544.mp4&msid=256&dateid=
10004380 (retrieved February 19th 2020).

A.27 Question to the President of the National Insurance Court concerning what happened after the NAV changed its practice and why no cases were referred to the EFTA Court at the January 2019 Public Hearing in the Parliament's Standing Committee on Scrutiny and Constitutional Affairs

After her testimony before the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, the NIC president was asked what the NIC's view on the sudden policy change was and why she never referred any case to the EFTA Court. To this, she responded that the NIC was satisfied with the policy change and that there was no longer any need to send a case to the EFTA Court:

> Eva Kristin Hansen , (Saksordfører, Arbeiderpartiet): Av litt sånn nysgjerrighet også: hvordan reagerte dere da dere skjønnte at når dere sa "OK, nå må vi dra inn EFTA-Domstolen her" og så fikk man etter hvert denne endringen av praksis. For da bled et jo sånn at den oppfattelsen av praksis som Trygderetten hadde kommet fram til viste seg å være riktig. Hva tenkte dere om det, når det skjedde?
>
> Fernsjø: Vi var jo ikke noe involvert i den kontakten som var mellom direktoratet og departmentet om spørsmålet om den praksisomleggingen. Så vi ble jo da informert av NAVs klageinnstans om utfallet av det og da fikk vi bare beskjed om at praksis skulle legges om i tråd med vår praksis og det er klart at da synes vi det var bra.
>
> (. . .)
>
> Hanne Dyveke Søttar (Fremskrittspartiet): - Jeg sitter her og tenker hardt, spesielt det her med fem-rett contra EFTA. Ble.. Jeg klarer ikke å få med meg.. For saken ble jo ikke sendt til EFTA? Ble den praksisendringen likevel gjort, men ikke av en fempersonsrett? Si gjerne litt om det. For jeg klarer

ikke å huske at den ble sendt dit.

Fernsjø: det er helt riktig. Den kom ikke så langt. Det som skjedde var at tre enkeltretter vurderte å forelegge spørsmålet for EFTA-domstolen. De vurderte å spørre EFTA-domstolen om forholdet mellom folketrygdloven og artikkel 21, ikke sant? Og det de da gjorde, de som styrte de tre rettene, det var at de måtte sende spørsmålet til partene, her altså NAVs klageinstans og den private part og spørre 'nå har vi tenkt til å gjøre dette. Hva synes dere om det? Hvilke spørsmål ville dere gjerne stille?' og så skulle NAVs klageinnstans sikkert ta det med direktoratet som skulle ta med departementet. Vi ble i hvert fall kontaktet og bedt om at den fristen for å komme med en uttalelse til det brevet ble forlenget og det innvilget vi. Og så var det denne kontakten mellom departementet og direktoratet som da førte til avklaringen om at praksis ble lagt om. Så disse sakene, de ble aldri sendt til EFTA-domstolen. Vi henviste rett og slett de sakene tilbake til NAV, fordi de ba om å få dem tilbake for å vurdere dem selv. Så det var resultatet.

Eva Kristin Hansen, (Rapporteur, Labor Party): Out of a bit of curiosity as well: how did you react when you realized that when you said 'OK, now we have to go to the EFTA Court here' and then you eventually got this change in practice. Because then it turned out that the perception of practice that the National Insurance Court had arrived at turned out to be correct. What did you think of it when it happened?

Fernsjø: We were not involved in the contact between the directorate and the ministry about the question of that practice change. So we were then informed by NAV's appeal body about the outcome and then we were only told that the practice should be changed in line with our practice and it is obvious that then we think this was good.

(. . .)

Hanne Dyveke Søttar (Progress Party): - I sit here and think hard, especially

concerning five-member contra EFTA. Was .. I cannot comprehend this.. Because the case was not sent to EFTA? Was practice changed anyway, but not by a five-person panel? Feel free to say a little about it. Because I can not remember that it was sent there.

Fernsjø: that's exactly right. It did not get that far. What happened was that three individual panels considered submitting the question to the EFTA Court. They considered asking the EFTA Court about the relationship between the National Insurance Act and Article 21, right? And what they then did, those who governed the three panels, was that they had to send the question to the parties, here NAV's appeal body and the private party and ask 'now we intend to do this. What do you think about it? What questions would you like to ask? 'And then NAV's appeal body would probably take it to the directorate that would take the ministry. At least we were contacted and asked that the deadline for making a statement to that letter was extended and we granted it. And then it was this contact between the ministry and the directorate that then led to the clarification that the practice was changed. So these cases, they were never sent to the EFTA Court. We simply referred those cases back to NAV, because they asked to have them back to assess them themselves. So that was the result.

Testimony by the President of the National Insurance Court, Trine Fernsjø, in a hearing held by the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, January 9th, 2020.

https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/Videoarkiv/Arkiv-TV-sendinger/?mb
/2020/H264-full/Hoeringssal1/01/09/Hoeringssal1-20200109-183544.mp4&msid=256&dateid=
10004380 (retrieved February 19th 2020).

A.28 Op-Eds by former EFTA Court President Carl Baudenbacher concerning Norway's strategy towards the EFTA Court

Former president of the EFTA Court has intervened in Norwegian public debate through several op-eds criticizing Norway's longstanding strategy of safe-guarding its "room for maneuver" vis-a-vis the EFTA Court.

On November 13th, 2019, the online procurement-focused newspaper anbud365.no published an op-ed (in English), in which Baudenbacher argued that

> [f]or many years, possibly even decades, the Norwegian welfare ministry NAV has misinterpreted Norwegian social security law that was based on EEA law. This happened under the label of systematically exploiting an alleged "room for manoeuvre" of the Norwegian State when adopting and applying Norwegian law incorporated from EEA law. The "room for manoeuvre" dogma was in 2008 invented by the current head of the Norwegian Government's legal service, Regjeringsadvokat (RA) Fredrik Sejersted. The dogma also spread to the courts.
>
> (...)
>
> "Room for manoeuvre" must be seen in a broader context. It can only be fully exploited if cases are dealt without the interference of the EFTA Court, which means in domestic courts. RA has thus from the outset called on Norwegian courts not to refer cases to the EFTA Court for a preliminary ruling. If, despite this, references were made, Norwegian courts were required in politically sensitive cases to refuse to follow the EFTA Court's ruling.

Baudenbacher (2019*a*).

In another op-ed, published in Norwegian in the leading tabloid, *VG*, Baudenbacher argued that the NAV scandal was the "result of 20 years resistance against the EEA [agreement], ESA, and the EFTA-Court":

NAV-skandalen er ikke kommet ut av det blå. Den er resultatet av tyve års motstand mot EØS, ESA og EFTA-domstolen, ofte høyrøstet, fra deler av norsk akademia og forvaltning, med den nåværende regjeringsadvokat Fredrik Sejersted som foregangsmann. EØS-avtalen og de to EFTA-institusjonene – ESA og EFTA-domstolen – ble nedgradert praktisk talt fra begynnelsen av. NAV har håndtert de svakeste og mest utsatte slik Sejersteds "handlingsromsteori" forutsetter. Selvfølgelig har ikke Sejersted åpent oppfordret til lovbrudd. Men hans forfatterskap om nødvendigheten av systematisk å utvide "handlingsrommet" ved å bevege seg i lovens yttergrense godtar uttrykkelig at myndighetene kan ende opp med lovbrudd og bli felt av domstolene. Det foreligger i siste instans et politisk ansvar her; men jurister som gir slike råd, har et faglig og etisk ansvar.

(...)

Politikerne kan ikke nå komme og si at de vasker sine hender. Alt tidlig etter EØS trådte i kraft, ble norske domstoler og særlig Høyesterett systematisk bedt av regjeringsadvokaten om ikke å henvise saker til EFTA-domstolen. Fredrik Sejersted og hans våpenfeller fornærmet stadig EFTA-domstolen som "mer katolsk enn paven". Allerede i 2007 hadde Sejersted i et avisintervju etter rettsforhandlingene i en sak truet med at hvis EFTA-domstol gikk imot den norske regjeringen, ville dommen ikke bli etterlevet.

The NAV scandal has not come out of the blue. It is the result of twenty years of opposition to the EEA, ESA and the EFTA Court, often loudly, from parts of Norwegian academia and administration, with the current government lawyer Fredrik Sejersted as pioneer. The EEA Agreement and the two EFTA institutions - ESA and the EFTA Court - were downgraded practically from the outset. NAV has dealt with the weakest and most vulnerable as Sejersted's "room for maneuver theory" presupposes. Of course, Sejersted has not openly called for crime. But his authorship on the need to systematically expand the "room for maneuver" by moving to the outer limits of the law explicitly accepts

that the authorities may end up breaking the law and be sentenced by the courts. Ultimately, there is a political responsibility here; but lawyers who give such advice have a professional and ethical responsibility.

(...)

Politicians cannot now come and say that they are washing their hands. Ever after the EEA came into force, Norwegian courts and especially the Supreme Court were systematically asked by the Attorney General not to refer cases to the EFTA Court. Fredrik Sejersted and his comrades-in-arms constantly insulted the EFTA Court as "more Catholic than the pope". Already in 2007, Sejersted had in a newspaper interview after the court proceedings in a case threatened that if the EFTA Court went against the Norwegian government, the ruling would not be complied with (Our translation).

Baudenbacher (2019*c*)

A.29 Op-Eds by Norway's attorney general Fredrik Sejersted

Norway's Government Attorney Fredrik Sejersted also intervened in the public debate through op-eds, in part responding to the criticism from Baudenbacher (TRAX, A.28). Sejersted argued that Norwegian noncompliance with EEA law was explained by a "lack of awareness and investigation."

In a response to Baudenbacher published in the leading tabloid, *VG*, on November 4th, 2019, Sejersted argued that:

Utgangspunktet for Baudenbachers kritikk er at norske myndigheter generelt, og jeg spesielt, gjennom mer enn 20 år skal ha drevet systematisk kritikk av EØS-avtalen og EFTA-institusjonene. Intet er mer usant. Norge er generelt langt fremme hva gjelder lojal etterlevelse av EU/EØS-retten. Og selv har jeg alltid vært en uttalt tilhenger av EØS og EFTA-organene. I Europautredningen som jeg ledet, NOU 2012:2 Utenfor og innenfor, fremhevet vi EFTA-domstolens betydning. Samtidig hadde vi også kritiske merknader til hvordan

den under Baudenbachers ledelse hadde utviklet seg.

Videre påstår Baudenbacher at jeg står bak en teori om "handlingsrom" som er illojal mot EØS-avtalen, og fører til systematiske brudd, som nå senest i NAV-saken. Igjen er dette helt galt. Kjernen i teorien om handlingsrom er at norske myndigheter – som i alle andre EU/EØS-land – bør utforske hvilke muligheter som foreligger for å ivareta nasjonale interesser. Det jeg og flere andre har stått for, er at vi som jurister på faglig grunnlag må bistå norske myndigheter, herunder regjering og storting, i å forstå de krav EØS-retten stiller, slik at man kan ivareta nasjonale hensyn – alltid innenfor rammene av lojal etterlevelse av EØS-retten.

(...)

Dette er klassiske eksempler på bruk av "handlingsrom", og det samme er en rekke andre saker gjennom årene, som har gjort at Stortinget har kunnet beholde viktige ordninger som differensiert arbeidsgiveravgift, statlig støtte til distrikts, miljø- og klimatiltak, en restriktiv alkohol- og tobakkspolitikk, tiltak mot sosial dumping og mye annet. Så er det ikke slik at EØS-retten alltid gir klare svar – snarere tvert imot. Det betyr nødvendigvis at norske myndigheter også taper saker der det nasjonale handlingsrommet utforskes. Det er ikke noe illojalt i dette.

Det som til nå har kommet frem i NAV-saken har intet med dette å gjøre. Det gjelder anvendelsen av et komplekst regelverk, der det snarere er manglende bevissthet og utredning som kan ha vært problemet. I den prosessen som nå pågår med å avklare og rydde opp i EØS-retten på dette feltet har Regjeringsadvokaten bistått som juridisk rådgiver. Det er en skam å misbruke denne saken til å ri gamle kjepphester.

The starting point for Baudenbacher's criticism is that the Norwegian authorities in general, and I in particular, have for more than 20 years systematically criticized the EEA agreement and the EFTA institutions. Nothing is more

untrue. Norway is generally far ahead in terms of loyal compliance with EU / EEA law. And I myself have always been a staunch supporter of the EEA and the EFTA bodies. In the European Inquiry that I led, NOU 2012: 2 Outside and inside, we emphasized the importance of the EFTA Court. At the same time, we also had critical remarks about how it had developed under Baudenbacher's leadership.

Furthermore, Baudenbacher claims that I am behind a theory of "room for maneuver" which is disloyal to the EEA agreement, and leads to systematic breaches, as most recently in the NAV case. Again, this is completely wrong. The core of the theory of room for maneuver is that the Norwegian authorities - as in all other EU / EEA countries - should explore the possibilities that exist for safeguarding national interests. What I and several others have stood for is that we as lawyers on a professional basis must assist the Norwegian authorities, including the government and the Storting, in understanding the requirements of EEA law, so that national considerations can be safeguarded - always within the framework of loyal compliance with EEA law.

(...)

These are classic examples of the use of " room for maneuver ", and the same is a number of other issues over the years, which have enabled the Storting to retain important schemes such as differentiated employer contributions, state support for districts, environmental and climate measures, a restrictive alcohol and tobacco policy, measures against social dumping and much more. Then it is not the case that EEA law always gives clear answers - on the contrary. This necessarily means that the Norwegian authorities also lose cases where the national room for maneuver is explored. There is nothing disloyal about this.

What has emerged so far in the NAV case has nothing to do with this. This applies to the application of a complex set of rules, where it is rather a lack of awareness and investigation that may have been the problem. In the process

that is now underway to clarify and clean up EEA law in this field, the Government Advocate has assisted as a legal adviser. It's a shame to abuse this case to ride old fads (Our translation).

Sejersted (2019*b*).

Sejersted has also publicly defended keeping his advice to the government prior to the October 2019 press conference confidential. In an op-ed published on December 30th, 2019 in the leading Norwegian newspaper, *Aftenposten*, he explained that:

> Når Regjeringsadvokaten gir råd til regjering og forvaltning, er det omfattet av samme taushetsplikt som generelt gjelder for forholdet mellom advokat og klient. Derfor kommenteres dette aldri utad. Siden det allerede er beskrevet i detalj i den rapporten som Navs internrevisjon la frem i midten av desember, kan det imidlertid bekreftes at RA ble koblet inn i saken nå i høst, ved en forespørsel fra NAV i slutten av september 2019, om deres praksis var forenlig med EØS-retten. 21. oktober avga vi vår interne vurdering. Noen få dager etter gikk NAV og ASD ut med at praksis hadde vært i strid med EØS-reglene.
>
> Gjennom årene har RA på oppdrag fra de ansvarlige norske myndigheter også ført rettssaker om ulike sider ved trygd og EØS, både for norske og internasjonale domstoler. Ikke i noen av disse sakene ble vi klar over den EØS-stridige praksisen knyttet til mottak av sykepenger, arbeidsavklaringspenger og pleiepenger ved midlertidige opphold i andre EØS-stater som nå senere har kommet frem. Det er altså ikke slik at Regjeringsadvokatembetet har vært klar over at det foregikk EØS-brudd, og holdt tett om det. Og det er selvsagt heller ikke slik at vi har rådgitt forvaltningen om å bruke et "handlingsrom" til å bryte EØS-avtalen.
>
> NAV-saken er alvorlig og må tas på alvor. Det er for tiden mange som jobber med å avdekke hva som er gått galt og hvordan det kan rettes opp, både internt i forvaltningen, i regi av Stortingets kontroll- og konstitusjonskomité, og gjennom granskingsutvalgets arbeid. I disse prosessene må alle gode krefter trekke sammen. Men da må vi også unngå avsporinger.

When the Attorney General gives advice to the government and the administration, it is covered by the same duty of confidentiality that generally applies to the relationship between lawyer and client. Therefore, this is never commented on externally. However, since it is already described in detail in the report presented by Nav's internal audit in mid-December, it can be confirmed that RA was involved in the case this autumn, by a request from NAV at the end of September 2019, whether their practice was compatible with EEA law. On October 21, we submitted our internal assessment. A few days later, NAV and ASD stated that the practice had been in breach of the EEA rules.

Over the years, the Attorney General has, on behalf of the responsible Norwegian authorities, also conducted lawsuits on various aspects of social security and the EEA, both before Norwegian and international courts. In none of these cases did we become aware of the EEA - inconsistent practice related to the receipt of sickness benefits, work assessment benefits and care benefits for temporary stays in other EEA states that have now emerged. It is thus not the case that the Office of the Attorney General has been aware that there was an EEA breach, and kept quiet about it. Of course, it is also not the case that we have advised the administration to use a "room for maneuver" to violate the EEA agreement.

The NAV case is serious and must be taken seriously. There are currently many who are working to uncover what has gone wrong and how it can be rectified, both internally in the administration, under the auspices of the Parliament's control and constitution committee, and through the work of the investigation committee. In these processes, all good forces must contract. But then we must also avoid derailments.

Sejersted (2019*a*).

A.30 Request by Minister of Labor Anniken Hauglie to be summoned to Parliament

On October 28th, 2019, Minister of Labor Anniken hauglie requested to be summoned to Parliament to "explain how the EU Social Security Regulation 883/2004 Article 21 has been practiced since the new regulation entered into force in 2012 (our translation)" (**?**).

Anmodning om å redegjøre for praktiseringen av EUs trygdeforordning 883/2004 artikkel 21

Brev | Dato: 28.10.2019

Mottager: Stortinget

Vår referanse: 18/3946-20

Arbeids- og sosialminister Anniken Hauglies anmodning til Stortinget om å redegjøre for praktiseringen av EUs trygdeforordning 883/2004 artikkel 21.

Jeg viser til Stortingets forretningsorden § 45, og anmoder Stortingets presidentskap om å samtykke til at jeg kommer til Stortinget for å redegjøre for hvordan EUs trygdeforordning 883/2004 artikkel 21 er blitt praktisert etter at den nye forordningen trådte i kraft i 2012.

Med hilsen

Anniken Hauglie

Figure A4: Request by Anniken Hauglie to be summoned to Parliament

A.31 White Paper No. 5 (2012-2013)

In White Paper No. 5 (2012-2013), titled "The EEA Agreement and Norway's other agreements with the EU", the Norwegian government linked the rise in labor immigration

to Norway to the increasing importance of avoiding so-called exports of Norway's generous social welfare benefits:

> Participation in working life brings with it entitlement to many welfare benefits, both for individual employees and for their family members. These apply equally to foreign and Norwegian workers.
>
> Under the EEA Agreement, the general rule is that social security benefits are to be paid irrespective of where the person who is a member of the social security scheme or his/her family members are resident. Entitlements under Norway's National Insurance Scheme are adapted to the high salary levels and cost of living in Norway, and the payments are therefore very generous when used abroad. For people resident in Norway the benefits are generally designed to make it more attractive to work than to collect benefits. This incentive is undermined if the benefits are paid out in countries where the cost of living is lower. However, the recorded export of benefits amounts to only a small proportion of the total expenditure channelled through the Norwegian Labour and Welfare Administration. Nevertheless, with the rise in labour immigration to Norway and the increased mobility of people between Norway and other EEA countries, the proportion of benefits that are exported is growing. The possibility that benefits will be exported is assessed when the various schemes are developed. The Government is monitoring the situation closely to ensure that benefit schemes are not abused.
>
> In 2009, the Government appointed the Welfare and Migration Committee, chaired by Professor Grete Brochman, to assess the elements in the Norwegian welfare model that influence and are influenced by increasing migration. The committee presented its recommendations in June 2011 in Official Norwegian Report NOU 2011: 7 Welfare and Migration. As part of the follow-up to the committee's recommendations, the Ministry of Labour has initiated an internal process with a view to carrying out a comprehensive review of current rules for membership of the Norwegian National Insurance Scheme and the

> export of benefits received under the scheme. This will involve an assessment of the existing rules for the various pension schemes, such as the retirement pension and the disability pension, as well as for temporary benefits, such as sickness benefits and unemployment benefits and other forms of cash payment under the National Insurance Scheme. The review will also look at rules for exporting benefits to other EEA countries, countries with which Norway has a social security agreement and countries with which it has no such agreement. The purpose of this work is to provide a basis for achieving the best possible understanding of the problems associated with increased mobility across national borders and the legal options open to Norway, and to identify areas where adjustments are needed.

Norwegian Ministry of Foreign Affairs (2012, 39)

A.32 The Sundvolden Platform

The Sundvolden platform of coalition government formed by the Conservative Party and the Progress Party in October 7 contained the follow provision:

> The government will: (...) Consider measures that will limit and bring to a halt the export of social security benefits, but that remain within the framework of Norway's binding international agreements.

The Sundvolden Platform (2013, 6)

A.33 Translations of excerpts of Norwegian language news coverage

This section includes translations of experts of the Norwegian language news coverage that we use in the article:

The online newspaper **?** provides a recording of the October 28th, 2019 press conference and a report of what was announced which is illustrative of how the policy change was initial presented to the public:

> Alle som siden 2012 har mottatt sykepenger, arbeidsavklaringspenger og pleiepenger og mistet retten til disse kun fordi de har oppholdt seg i EU/EØS-land, kan ha krav på kompensasjon dersom de har hatt et økonomisk tap.
>
> Det viser en ny gjennomgang av praksis i NAV.
>
> Personer som mottar disse ytelsene, må ikke lenger søke NAV om å reise til et annet EU/EØS-land ved midlertidige opphold. Praksisendringen kommer etter at NAV har gjort en ny juridisk vurdering av hvordan EØS sin trygdeforordning fra 2012 skal tolkes.
>
> *Anyone who since 2012 has received sickness benefits, work clearance benefits and care benefits and lost the right to these only because they have resided in EU / EEA countries, may be entitled to compensation if they have had a financial loss.*
>
> *This is the result of a recent review of practice by the NAV.*
>
> *Persons who receive these benefits no longer need to apply to NAV to travel to another EU / EEA country for temporary stays. The change in practice comes after NAV has made a new legal assessment of how the EEA's social security regulation from 2012 is to be interpreted* (Our translation).

An article in the leading tabloid, *VG*, titled "Six Years With Alerts, 78 Incorrectly Judged" reports instances in which the Norwegian authorities were alerted about their obligations under EEA law, such as after the Norwegian intervention in the *Tolley* case before the European Court of Justice (**?**):

> I FEBRUAR 2017, to år etter at britiske Linda Tolley møter i retten første gang, faller dommen i hennes sak.
>
> Linda er død, men ektemannen er til stede i den europeiske domstolen.
>
> Linda Tolley fikk innvilget økonomisk støtte fra britiske myndigheter i 2002, men ble fratatt ytelsene i 2007, fordi hun flyttet til Spania.

Storbritannia krevde penger tilbake, noe Tolley klagde på. Saken ble behandlet i den britiske domstolen, og senere anket til EU-domstolen.

Når en sak behandles i EU, får andre land i EU og EØS muligheten til å fremme sine synspunkter. Norge er et av få land som fatter interesse for Tolley-saken.

Norske myndigheter bestemmer seg for å sende et skriftlig innlegg til domstolen, hvor de langt på vei støtter britiske myndigheter.

Men Storbritannia taper, og Norge får ikke gjennomslag for sitt syn.

Dommen havner hos Anniken Hauglie (H), som blir arbeids- og sosialminister i 2015.

Gjennom dommen får departementet klar beskjed om at britiske myndigheter ikke kan stille krav om opphold eller bosted i Storbritannia for å motta trygd. Fordi Norge er medlem av EØS, gjelder de samme reglene her.

Likevel fremmer departementet senere samme år to lovforslag som begrenser retten til å beholde arbeidsavklaringspenger (AAP) og pleiepenger i utlandet.

In FEBRUARY 2017, two years after British Linda Tolley appears in court for the first time, the verdict in her case is rendered.

Linda is dead, but her husband is present in the European Court of Justice.

Linda Tolley was granted financial support from the British authorities in 2002, but was deprived of benefits in 2007 because she moved to Spain.

Britain demanded money back, something Tolley complained about. The case was heard in the British court, and later appealed to the European Court of Justice.

When a case is processed in the EU, other countries in the EU and the EEA are given the opportunity to promote their views. Norway is one of the few countries that take an interest in the Tolley case.

The Norwegian authorities decide to send a written submission to the court, where they largely support the British authorities.

But Britain loses, and Norway does not receive support for its view.

The verdict ends up with Anniken Hauglie (H), who will be Minister of Labor and Social Affairs in 2015.

The ruling gives the ministry a clear message that the British authorities cannot require residence or residence in the United Kingdom in order to receive social security. Because Norway is a member of the EEA, the same rules apply here.

Nevertheless, the Ministry later in the same year submitted two bills that limited the right to retain work clearance allowance (AAP) and care allowance abroad (Our translation).

An article published by the national public broadcaster, NRK, on January 6th 2020, reports that 2400 people were affected by the noncompliance with EEA law and 78 of these were wrongfully sentenced under criminal law (NRK, 2020*a*):

Trygdeskandalen sprakk høsten 2019. Da kom det frem at Nav har praktisert reglene for å ta med seg trygdeytelser til EU- og EØS-land når man er bosatt i Norge feil.

Dette regelverket hadde blitt praktisert feil siden 2012.

Rundt 2400 personer har blitt rammet av feilpraktiseringen, og til nå har det altså blitt avdekket av 78 personer antas å ha fått feilaktig fellende dom på grunn av Navs feilpraktisering.

Flere av disse har sonet straff i fengsel.

The social security scandal erupted in the autumn of 2019. It then became clear that Nav has practiced the rules for bringing social security benefits to EU and EEA countries when you live in Norway incorrectly.

These regulations had been practiced incorrectly since 2012.

> *Around 2400 people have been affected by the incorrect practice, and so far it has been discovered that 78 people are believed to have received a wrongful conviction due to Nav's incorrect practice.*
>
> *Several of these have served prison sentences* (Our translation).

An article published by the national public broadcaster, NRK, published on October 31th, 2019, reports on the role of NIC under the headline "Dette er dommerne som sa stop (*These are the judges who said halt*)" (NRK, 2020*b*):

> I disse avgjørelsene fra Trygderetten er det spesielt tre dommernavn som går igjen: Øyvind Bø, Constance Holtermann og Åse Ulvin.
>
> Gjennomgående har de tre vurdert at Nav har feiltolket loven – uten at etaten har tatt hensyn til de nye tolkningene.
>
> – Nav har således lagt feil lovforståelse til grunn når de har krevet at X måtte oppholde seg i Norge for å oppebære sykepenger, skriver trygderettsdommer Åse Ulvin og Øyvind Bø i den ene dommen fra mars 2018.
>
> NRK har vært i kontakt med de tre dommerne, som ikke vil kommentere kjennelsene.
>
> Øyvind Bø er rettsmedlem i Trygderetten, og har nærmere syv års erfaring fra EFTA-sekretariatet i Brussel, der han arbeidet med nettopp den type saker som nå er avdekket. Han har også fartstid som advokat for Langseth Advokatfirma og Haugaland tingrett.
>
> Før Constance Holtermann ble trygdedommer i Trygderetten, har hun blant annet vært juridisk utreder i Høyesterett, spesialrådgiver i Miljøverndepartementet og sekretariatsleder for trygdelovutvalget.
>
> Åse Ulvin er tidligere direktør i Forbrukertvistutvalget og hun har jobbet som rådgiver og underdirektør i Justisdepartementet. Hun har også vært underdirektør i UDI, politifullmektig og dommerfullmektig i namsretten.
>
> (...)

Det er flere som klør seg i hodet over hvordan trygderettsdommernes vurdering ikke har blitt tatt hensyn til av Nav – Ikdahl inkludert.

– Det er jo dette alle lurer på. Det kom dommer fra Trygderetten i både november og desember 2017 og januar 2018 som var tydelige på at jussen ble brukt feil. Nav har sittet på denne informasjonen lenge, og man kan stille seg spørsmål ved hvorfor det har tatt så lang tid før noen har handlet, sier professoren.

Trygderetten ble i 1967 etablert som et uavhengig organ for sikre riktige resultater i enkeltsaker. Det ble også forutsatt at deres praksis skulle veilede trygdeetaten juridisk.

På grunn av at det ikke er en vanlig domstol kan ikke vurderingene i Trygderetten kalles "rettspraksis", men kommer det flere avgjørelser i samme retning, er det vanlig at Nav legger dette til grunn for sine vurderinger, forklarer Ikdahl.

Likevel ser det altså ut til at de seks dommene fra 2017 til 2018 har hatt minimal innvirkning.

– I noen av de nyeste sakene fra Trygderetten kan man nok lese mellom linjene at de ønsker at Nav skal lytte. Det gikk så langt som at de i november 2017 varslet Nav om at de vurderte å be EFTA-domstolen om en uttalelse, men Nav snudde før dette skjedde, sier Ikdahl.

In these decisions from the National Insurance Court, there are three judge names in particular that are recurring: Øyvind Bø, Constance Holtermann and Åse Ulvin.

Throughout, the three have assessed that Nav has misinterpreted the law - without the agency having taken into account the new interpretations.

- Nav has thus based its misunderstanding on the law when they have demanded that X had to stay in Norway to receive sickness benefits, National Insurance Court judges Åse Ulvin and Øyvind Bø write in one judgment from March 2018.

NRK has been in contact with the three judges, who will not comment on the rulings.

Øyvind Bø is a member of the National Insurance Court, and has almost seven years of experience from the EFTA Secretariat in Brussels, where he worked with precisely the type of cases that have now been uncovered. He also has time as a lawyer for Langseth Advokatfirma and Haugaland District Court.

Before Constance Holtermann became a social security judge in the National Insurance Court, she has, among other things, been a legal investigator in the Supreme Court, a special adviser in the Ministry of the Environment and head of the secretariat for the Social Security Law Committee.

Åse Ulvin is a former director of the Consumer Disputes Committee and she has worked as an adviser and deputy director in the Ministry of Justice. She has also been deputy director of the UDI, assistant to the police and assistant to the judge in the Enforcement Court.

(...)

There are several who scratch their heads over how the National Insurance Court judges' assessment has not been taken into account by Nav - Ikdahl included.

- This is what everyone is wondering about. There were judgments from the National Insurance Court in both November and December 2017 and January 2018 which were clear that the law was used incorrectly. Nav has been sitting on this information for a long time, and one can ask oneself why it has taken so long before someone has acted, says the professor.

The National Insurance Court was established in 1967 as an independent body for ensuring correct results in individual cases. It was also assumed that their practice would guide the National Insurance Service legally.

Because it is not an ordinary court, the assessments in the National Insurance Court can not be called "case law", but if there are several decisions in the

same direction, it is common for Nav to use this as a basis for its assessments, Ikdahl explains.

Nevertheless, it appears that the six judgments from 2017 to 2018 have had a minimal impact.

- In some of the latest cases from the National Insurance Court, you can probably read between the lines that they want Nav to listen. It went so far as to notify Nav in November 2017 that they were considering asking the EFTA Court for a statement, but Nav turned around before this happened, Ikdahl says (our translation).

An article published in the tabloid *Dagbladet* on November 1th, 2019 reports that the European Surveillance Authority considered that Norway's residency requirement for social-benefit recipients had probably been in noncompliance with the EEA agreement since 1994 (**?**):

ESA-president Bente Angell-Hansen sier til Dagbladet at ESA nå undersøker feilen norske NAV har gjort, hvor NAV altså har feiltolket EØS-trygdereglene.

Flere advokater har spekulert i om feilen også kan gjelde før 2012.

Det tror også ESA, EØS-avtalens tilsynsorgan, at den gjør:

- Sånn vi ser det nå, tenker vi at dette har vært tilfelle helt siden Norge har blitt medlem av EØS-avtalen, sier ESA-president Bente Angell-Hansen til Dagbladet

ESA President Bente Angell-Hansen tells Dagbladet that ESA is now investigating the mistake Norwegian NAV has made, where NAV has thus misinterpreted the EEA social security rules.

Several lawyers have speculated whether the error could also involve the period before 2012.

ESA, the supervisory body of the EEA Agreement, also believes that it does:

- As we see it now, we think that this has been the case ever since Norway became a party to the EEA agreement, says ESA President Bente Angell-Hansen to Dagbladet (Our translation).

A.34 Excerpts of English language news coverage

This section contains excerpts we have used from the English-language news coverage.

An article published by the online newspaper *News in English* on December 13th 2019, the NAV director is reported to blame the scandal on "a collective misinterpretation" of EEA law (**?**):

> Vågeng admitted that NAV misinterpreted EU rules, which allow residents of EU and EEA countries to take welfare benefits including sick pay and unemployment benefits with them if they travel to other EU or EEA countries. NAV's insistence that such travel was not allowed led to court cases that also involved misinterpretation of the rules, and landed many defendants in prison. Vågeng attributed it all to "a collective misinterpretation," adding that "NAV takes it share of the responsibility."
>
> NAV's internal probe is just the first of many into what's shaped up as one of the biggest scandals in Norwegian history. Vågeng still, however, seems to have no intention of resigning her position, claiming instead that she wants to stay to "clean up" and help the state agency recover.

An article published by the online newspaper *News in English* on January 11th 2020, reports on the Director of Public Prosecutions reaction to the scandal (**?**):

> When other rulings against NAV's practice were also handed down in the spring of 2018, "we should have contacted riksadvokaten (Norway's state prosecutor)." Vågeng admitted. Neither she nor anyone else at NAV involved the prosecutor's office until October of last year, at which point the scandal was complete and thousands of NAV clients had been wrongly denied benefits or

> punished. NAV's political superiors at the ministry Hauglie heads were informed the year before, in the late autumn of 2018.
>
> Vågeng was responding at least in part to strong criticism from the just-retired Director General of Public Prosecutions Tor-Aksel Busch. He'd been among the first to testify on Thursday, and made it clear that "if we'd been notified about this earlier, we would have investigated thoroughly already in 2017. I'm quite surprised we weren't, I'm not going to hide that."

An article published by the online newspaper *News in English* on October 30th, 2019, tells the stories of one of the victims of the Norwegian noncompliance with EEA law (News in English, 2019) and about the government's promise to make amends:

> It didn't take Norwegian media outlets long to find and interview real victims of an unprecedented scandal that's still unfolding at Norway's state welfare agency NAV. As headlines like "I was viewed as a criminal" splashed over newspapers' front pages on Wednesday, and women wrongly convicted of welfare fraud cried on national newscasts, the painful aftermath of NAV's seven-year-long misintepretation of rules regarding sick pay and unemployment benefits is emerging in full force, and shaking the confidence Norwegians need to have in their welfare state.
>
> (...)
>
> One man, a now-61-year-old immigrant from Greece, remains under threat of deportation as well: Bergens Tidende (BT) reported how he came to Norway in 1982, started working, married a Norwegian and had children. He maintained his Greek citizenship, worked and paid taxes for many years until his health failed in 2008 and he started receiving the equivalent of workers' compensation. NAV wrongly charged him with fraudulently receiving NOK 452,676 in benefits over a two-year period, because he had traveled back to Greece to visit his elderly mother. "She was sick and needed help," he told BT.

> He was also wrongly convicted of welfare fraud and issued a 60-day jail term, albeit suspended but enough to jeopardize his residence status as an immigrant in Norway. Not only have all the charges against him exacerbated his heart condition and drained him financially, he also received an "advance notice of deportation" from state immigration agency UDI (Utlendingsdirektoratet). After nearly 40 years in Norway, his conviction for welfare fraud triggered a deportation case. "This case has ruined my life," he told BT, and he's not alone.
>
> (...)
>
> Hauglie has already said she'll launch an external investigation of how the EU/EØS rules could have been misinterpreted so seriously for so long. She has admitted that the trouble at NAV "is as close to a scandal as you can get," adding that it's "extremely serious" when people are wrongly charged, convicted and face large repayment demands from NAV.
>
> "I apologize to those affected and their families," Hauglie stated. "Everyone with a right to Norwegian welfare benefits must be able to rely on rules being practiced correctly. We will get to the bottom of what has happened, and learn from it for the future." She has also asked to be able to address Parliament, to account for the status of the situation at present.

An article published by the online newspaper, *The Local*, on January 10th 2020, reported on the Director of Public Prosecutions's criticism of the government for failing to act when "the alarm went off" (The Local, 2020):

> Former Director of Public Prosecutions criticizes government minister
>
> Busch's statements can be considered critical of Anniken Hauglie, the government minister in charge of labour and social issues.
>
> He stated that Hauglie's ministry did not understand the seriousness at the time Hauglie has said "the alarm went off" over the issue, i.e. August 30th last year.

"There was still an absence of inquiries to my old office," said the now-retired director of public prosecutions.

Busch also said he was surprised by the instructions from the Ministry of Labour and Social Affairs (Arbeids- og sosialdepartementet) not to look at cases retroactively.

A.35 2013 proposal to relax NAV policy blocked by the political leadership in the Ministry of Labor

The final report of the government-appointed inquiry describes a 2013 proposal by bureaucrats within the Ministry of Labor to relax the requirement that social-benefits recipients secure NAV approval before traveling abroad. The stated purpose was to free up resources in the NAV. However, this proposal was blocked from being discussed at the cabinet level by the political leadership in the Ministry of Labor:

> Direktoratet svarte på departementets spørsmål i brev av 7. november 2012. I brevet skrev direktoratet at det var "ulikheter i hvor restriktive NAV kontorene er i vurderingen av denne type saker". Deretter drøftet direktoratet fordeler og ulemper ved å oppheve kravet til forhåndsgodkjenning, med særlig vekt på en vurdering av i hvilken grad kravet til medvirkning i folketrygdloven § 8-8 tilstrekkelig ivaretar de hensyn som begrunner et krav om forhåndsgodkjennelse. Slik direktoratet så det, er det i perioder hvor et medlem ikke er i aktivitet, og heller ikke blir fulgt opp av verken Nav eller arbeidsgiver, uten betydning hvor vedkommende oppholder seg. Grensen for hvor lange utenlandsopphold som kan godtas uten forhåndsgodkjennelse, burde derfor settes med utgangspunkt i hvor lenge det er grunn til å tro at et utenlandsopphold er uproblematisk i relasjon til de øvrige vilkårene for å motta sykepenger. Direktoratet foreslo derfor at kravet til forhåndsgodkjenning ble fjernet for utenlandsopphold inntil tre uker.
>
> Departementet utarbeidet et forslag til lovproposisjon om blant annet en-

dringer i folketrygdloven § 8-9 om krav om opphold i Norge. Utkastet til proposisjon gir som vanlig en beskrivelse av gjeldende rett. Fremstillingen inneholder ingen drøftelse av EØS-rettslige regler, og gir ingen holdepunkter for at det er ulike regler for reise innenfor og utenfor EØS-området. Utkastet ble sendt på foreleggelse for berørte fagdepartementer i tillegg til enkelte forvaltningsorgan, herunder direktoratet. Direktoratet var enig i departementets forslag, ga noen tilbakemeldinger på konsekvensene av forslaget, og kom så med følgende forslag til presisering av lovteksten: "Et medlem kan også få sykepenger i en begrenset periode under opphold i utlandet *forutsatt at utenlandsoppholdet er forenlig med arbeidsgivers oppfølging av den sykmeldte på arbeidsplassen og at oppholdet* ikke vil forverre helsetilstanden, forlenge arbeidsuførheten eller hindre Arbeids- og velferdsetatens kontroll og oppfølging. *Det skal framsettes søknad dersom utenlandsoppholdet vil vare i mer enn tre uker.*" (direktoratets kursivering) Da departementet la frem samleproposisjonen for Stortinget våren 2013 var forslaget om å fjerne kravet til forhåndsgodkjenning tatt ut av proposisjonen. Det fremgår av departementets interne saksbehandling at forslaget ble tatt ut av politisk ledelse før proposisjonen ble oppmeldt til behandling i regjering.

The Directorate answered the Ministry's questions in a letter dated 7 November 2012. In the letter, the Directorate wrote that there were "differences in how restrictive the NAV offices are in assessing this type of case". The Directorate then discussed the advantages and disadvantages of abolishing the requirement for prior approval, with particular emphasis on an assessment of the extent to which the requirement for participation in section 8-8 of the National Insurance Act adequately addresses the considerations that justify a requirement for prior approval. As the directorate saw it, it is during periods when a member is not active, nor is he followed up by either Nav or the employer, regardless of where he or she resides. The limit for how long stays abroad can be accepted without prior approval should therefore be set on the basis of how long there is

reason to believe that a stay abroad is unproblematic in relation to the other conditions for receiving sickness benefits. The Directorate therefore proposed that the requirement for prior approval be removed for stays abroad for up to three weeks.

The Ministry prepared a proposal for a bill on, among other things, amendments to the National Insurance Act § 8-9 on requirements for residence in Norway. The draft proposition provides, as usual, a description of applicable law. The presentation contains no discussion of EEA law rules, and provides no evidence that there are different rules for travel within and outside the EEA area. The draft was sent for submission to the relevant line ministries in addition to some administrative bodies, including the directorate. The Directorate agreed with the Ministry's proposal, gave some feedback on the consequences of the proposal, and then made the following proposal to clarify the legal text: " A member can also receive sickness benefits for a limited period during a stay abroad provided that the stay abroad is compatible with the employer's follow-up of the person on sick leave at the workplace and that the stay *will not worsen health, prolong disability or hinder the Labor and Welfare Service's control and follow-up.* An application must be submitted if the stay abroad will last for more than three weeks. *" (Directorate's emphasis) When the ministry presented the collective bill to the Storting in the spring of 2013, the proposal to remove the requirement for prior approval was removed from the proposition. It appears from the ministry's internal case processing that the proposal was taken out of political leadership before the proposition was registered for consideration by the government* (Our translation).

Arnesen et al. (2020, 204)

References

Arnesen, Finn, Karin Fløistad, Asbjørn Strandbakken, Hanne Merete Jendal, Kristin Bugge Midthjell, Per Sanderud and Barbro Wærnes. 2020. *Blindsonen*.

Baudenbacher, Carl. 2019*a*. "Fosen and NAV – "room for manoeuvre"." *Anbud 365* .

URL: *https://www.anbud365.no/internasjonalt/eu/fosen-and-nav-room-for-manoeuvre/?fbclid=IwAR1N7D-X4-V8m4ovRNmQQTFPVXWIiIMxDMtWOmbu2rAcXmGFN7FA-KXNux0* *(retrieved April 17th, 2020)*

Baudenbacher, Carl. 2019*b*. *Judicial Independence*. Springer.

Baudenbacher, Carl. 2019*c*. "NAV-skandalen et resultat av 20 års motstand mot EØS, ESA og EFTA-domstolen." *VG* .

URL: *https://www.vg.no/nyheter/meninger/i/AdBJOE/nav-skandalen-et-resultat-av-20-aars-motstand-mot-eoes-esa-og-efta-domstolen?fbclid=IwAR3HjfgL7Yek5FlWm8xvXTE6l3AnRVbXbgpxxBJETL6GoaxpgxxyIaB5sA4* *(retrieved April 17th, 2020)*

Epp, Charles. 2010. *Making Rights Real*. University of Chicago Press.

Internrevisjonen. 2019. *Kartlegging av fakta i EØS-saken*.

Moravcsik, Andrew. 2014. "Transparency." *PS: Political Science and Politics* 47(1):48–53.

News in English. 2019. "Welfare scandal shakes a nation." *News in English* .

URL: *https://www.newsinenglish.no/2019/10/30/welfare-scandal-shakes-a-nation/* *(retrieved April 6th, 2020).*

Norwegian Ministry of Foreign Affairs. 2012. "The EEA Agreement and Norway's other agreements with the EU.". White Paper No. 5 (2012-2013.

URL: *https://www.regjeringen.no/contentassets/fc5aa7428fd04f23af2a251d1c8c6710/en-gb/pdfs/stm201220130005000engpdfs.pdf* *(retrieved February 18th, 2020)*

NRK. 2020*a*. "Nye tall." *NRK* .

URL: *https://www.nrk.no/norge/setteriksadvokaten_-78-personer-antas-feilaktig-domt-i-trygdeskandalen-1.14848873* *(retrieved December 21st, 2020)*

NRK. 2020*b*. "Trygdeskandalen." *NRK* .

URL: *https://www.https://www.nrk.no/norge/trygdeskandalen_-dette-er-dommerne-som-sa-stopp-1.14762994* *(retrieved December 21st, 2020)*

Sejersted, Fredrik. 2019*a*. "NAV-saken er alvorlig." *Aftenposten* .

URL: *https://www.aftenposten.no/meninger/debatt/i/K32194/nav-saken-er-alvorlig-men-man-maa-skille-mellom-myter-og-realitet-f* *(retrieved April 6th, 2020).*

Sejersted, Fredrik. 2019*b*. "Om lojalitet og etterlevelse." *VG* .

URL: *https://www.vg.no/nyheter/meninger/i/g7xrqk/om-lojalitet-og-etterlevelse* *(retrieved April 17th, 2020)*

The Local. 2020. "Six things to learn from Norway's NAV social security scandal hearings." *The Local* .

URL: *https://www.thelocal.no/20200110/six-things-to-know-from-norways-nav-social-security-scandal-hearings* *(retrieved April 6th, 2020)*

The Sundvolden Platform. 2013. "Political platform for a government formed by the Conservative Party and the Progress Party.".

URL: *PoliticalplatformforagovernmentformedbytheConservativePartyandtheProgressPar*
(retrieved April 6th, 2020)