



**REPORT FOR THE HEARING**  
in Case E-3/05

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

**EFTA Surveillance Authority**

and

**The Kingdom of Norway**

seeking a declaration that the Kingdom of Norway has, by maintaining in force a residence requirement for granting a regional supplement to Norwegian family allowances, failed to fulfil its obligations pursuant to Article 73 of the Act referred to at point 1 of Annex VI to the EEA Agreement (Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, hereinafter referred to as “Regulation 1408/71”), as adapted to the EEA Agreement by Protocol 1 thereto; alternatively by maintaining the same requirement, failed to fulfil its obligation pursuant to Article 7(2) of the Act referred to at Point 2 of Annex V (Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, hereinafter referred to as “Regulation 1612/68”), as adapted to the EEA Agreement by Protocol 1 thereto.

**I Introduction**

1. The case at hand concerns a regional supplement to Norwegian family allowances known as the “Finnmarkstillegg” (hereinafter “the Finnmark supplement”). The Finnmark supplement is granted to the parent or other provider of a child if both the provider and the child reside in the county of Finnmark or one of seven municipalities in the county of Troms in the adjacent area south of Finnmark (hereinafter referred to as “the designated area”). For the 2005 budget year the Finnmark supplement amounted to NOK 3840 per child per year.

2. As described by the Government of Norway, the Finnmark supplement was one of many measures introduced in the late 1980’s in order to reverse the

negative trend of e.g. lack of employment, failing business, lack of qualified personnel and decreasing population figures that prevailed in the designated area. The Finnmark supplement was initiated along with other specific measures such as inter alia various tax exemptions and tax reductions, reduction in electricity consumption charges and release from back payment of loans from the State Educational Loan Fund.

3. The EFTA Surveillance Authority (hereinafter “ESA”) claims before the Court that the residence requirement for the granting of the Finnmark supplement infringes Article 73 of Regulation No 1408/71 and alternatively Article 7(2) of Regulation No 1612/68.

4. The Government of Norway does not dispute that the Finnmark supplement constitutes a family benefit within the meaning of Regulation 1408/71 but claims that Norway neither fails to fulfil its obligations under Article 73 of that Regulation nor under Article 7(2) of Regulation No 1612/68, and that the disputed measure is in any event justified on grounds of promoting sustainable settlement.

## **II Legal background**

### *EEA law*

5. Article 28 of the EEA Agreement reads:

*1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

*2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

*3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*

*(a) to accept offers of employment actually made;*

*(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*

*(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*

*(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*

4. *The provisions of this Article shall not apply to employment in the public service.*

5. *Annex V contains specific provisions on the free movement of workers.*

6. Article 29 EEA reads:

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

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

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

7. Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community is listed in Annex V to the EEA Agreement.

8. Article 7(2) of Regulation 1612/68 stipulates that a migrant worker “*shall enjoy the same social and tax advantages as national workers.*”

9. Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community is listed in Annex VI to the EEA Agreement.

10. Article 4 defines the material scope of Regulation 1408/71. Article 4(1) (h) reads:

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

...

*(h) family benefits.*

11. Article 1 of Regulation 1408/71 contains definitions. Article 1(u)(i) reads:

*The term family benefits means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth or adoption allowances referred to in Annex II;*

12. Article 1(j) of Regulation 1408/71 reads:

*Legislation means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches or schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4 (2a).*

13. Article 5 of Regulation 1408/71 reads:

*The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2),..... in declarations to be notified and published in accordance with Article 97.*

14. In point 1(h) in Norway's declaration<sup>1</sup>, provided for pursuant to Article 5 of Regulation 1408/71, the Act of 8 March 2002 No 4 on Family Allowances (*Lov om barnetrygd*) is listed as one of the legislations and schemes referred to in Article 4(1) and (2) of Regulation 1408/71.

15. Article 13 of Regulation 1408/71 states in paragraph 2(a):

*2. Subject to Articles 14 to 17:*

*(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another member State;*

16. Article 73 of Regulation 1408/71 reads:

*An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.*

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<sup>1</sup> OJ C 127 29.5.2003 p. 36.

### *National law*

17. Section 2 (1) in combination with Section 4 of Act of 8 March 2002 No 4 on Family Allowances (*Lov om barnetrygd*) (hereinafter referred to as “the Family Allowances Act”) reads:

*Parents living together with their child below the age of 18 are entitled to family allowances if they reside in Norway.*

18. Section 10 of the Family Allowances Act reads:

*Family allowances are paid at rates fixed by the Parliament in its decision on the yearly budget.*

The Finnmark supplement is granted pursuant to Section 2(1) of the Family Allowances Act. It is decided by Stortinget (the Parliament) in the fiscal budget each year if the supplement is to be pursued. It was first introduced in 1988 and from that time, the yearly Norwegian budgets, including the budget for 2005, have contained inter alia the rates for the Finnmark supplement.

### **III Procedure**

#### *Pre-litigation procedure*

19. By a letter of 28 April 1999, ESA informed the Government of Norway that it had received a complaint of 8 April 1999 against the Government of Norway. The complaint, which was forwarded from the European Commission, was from a person working in Finnmark but residing in Finland with her child. Through her employment in Norway she was entitled to, and granted, the Norwegian family allowances in respect of her child. Her application for the Finnmark supplement was, however, turned down because she did not reside in the designated area. By a letter of 11 June 1999 ESA reiterated its invitation to the Government of Norway to submit observations.

20. The Government of Norway replied to ESA by a letter of 17 June 1999 and by a fax of 26 August 1999.

21. On 23 October 2000, ESA issued a letter of formal notice stating that the Finnmark supplement should be classified as a family benefit according to Regulation 1408/71. It held that Article 73 of the Regulation obliged Norway to lift the regional residence requirement and grant the Finnmark supplement to EEA workers employed in the designated area but residing in another EEA State with their children, as if they were residing at the place of employment.

22. By a letter of 18 December 2000 the Government of Norway replied to the letter of formal notice and expressed the view that the practice regarding the Finnmark supplement is in accordance with Article 73 of Regulation 1408/71 and Article 7 (2) of Regulation 1612/68. The Government of Norway argued that Article 73 of Regulation 1408/71 is to be interpreted to the effect that the migrant worker and the relevant members of his family are considered as if they were residing in the territory of the State of employment as such, and not specifically at the place of employment. The Government also submitted that the rules governing the Finnmark supplement apply equally to all nationals of EEA States, including Norwegians. In the Government's view, Article 73 was not designed to ensure better rights than those accorded to the State's own nationals.

23. ESA issued a supplementary letter of formal notice on the 18 December 2003. In addition to restating its argumentation based on Regulation 1408/71, it submitted that even if Regulation 1408/71 was not applicable, the Finnmark supplement would be incompatible with Article 7(2) of Regulation 1612/68 as it was indirectly discriminatory and could not be objectively justified.

24. By a letter of 2 April 2004 the Government of Norway replied to the supplementary letter of formal notice. It reiterated its previously stated arguments concerning Regulation 1408/71 and added that the Finnmark supplement did not breach Article 7(2) of Regulation 1612/68 since it was non-discriminatory. It stated moreover that the supplement has its basis in regional policy considerations and that its purpose is to promote sustainable settlement in the designated area and to stimulate business and industry.

25. On 14 July 2004, ESA issued a reasoned opinion maintaining the position expressed in the first and the supplementary letter of formal notice.

26. The Government of Norway replied by a letter of 13 December 2004, in which it reiterated its views and arguments laid out in previous correspondence.

#### *Procedure before the Court*

27. Since measures had not been taken to comply with the reasoned opinion, ESA filed an application commencing this action, which was registered at the Court on 12 April 2005.

#### **IV Forms of order sought by the parties**

28. The EFTA Surveillance Authority claims that the Court should:

- (i) *declare that by applying a requirement of residence in the county of Finnmark or in seven specified municipalities in*

*the county of Troms for the entitlement of the Finnmark supplement to the family allowances, the Kingdom of Norway has failed to fulfil its obligation pursuant to Article 73 of the Act referred to at point 1 of Annex VI to the EEA Agreement (Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community), as adapted to the EEA Agreement by Protocol 1 thereto;*

- (ii) in the alternative, declare that by applying the said residence requirement, the Kingdom of Norway has failed to fulfil its obligation pursuant to Article 7(2) of the Act referred to at Point 2 of Annex V (Council Regulation EEC No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community), as adapted to the EEA Agreement by Protocol 1 thereto;*
- (iii) order the Kingdom of Norway to bear the costs.*

29. The Kingdom of Norway contends that the Court should:

- (i) dismiss the application as unfounded;*
- (ii) order the EFTA Surveillance Authority to bear the costs.*

## **V Written procedure**

30. Written arguments have been received from the parties:

- the EFTA Surveillance Authority represented by Niels Fenger, Director, and Arne Torsten Andersen, Officer, in the Department of Legal & Executive Affairs, acting as Agents;
- the Government of Norway, represented by Karin Fløistad, Advocate, Attorney General for Civil Affairs and Ingeborg Djupvik, Adviser, Ministry of Foreign Affairs, acting as Agents.

31. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by Denis Martin and Nicola Yerrell, Members of its Legal Service, acting as Agents;

- the United Kingdom, represented by Clare Jackson of the Treasury Solicitor's Department, acting as Agent, and by Eleanor Sharpston QC.

## VI Summary of the pleas in law and arguments

### *The EFTA Surveillance Authority*

32. The Application is based on the plea that the Kingdom of Norway has failed to fulfil its obligations pursuant to Article 73 of Regulation No 1408/71 and alternatively under Article 7(2) of Regulation No 1612/68 by maintaining in force a residence requirement for granting the Finnmark supplement. ESA claims that according to both regulations, requirements of residence, for the entitlement of family benefits and social advantages respectively, shall be lifted in favour of workers who have exercised their freedom to take up employment in another EEA State than their State of residence. ESA is thereby of the opinion that EEA law requires Norway to grant the Finnmark supplement to nationals of EEA States who are employed in the designated area, even though they reside in another EEA State with their child.

33. ESA submits that the Finnmark supplement is a family benefit which falls within the scope of Regulation 1408/71. In ESA's view both of two alternative conditions for the application of the Regulation to the supplement are fulfilled. First, it is an integrated part of the general family allowances granted under the Family Allowances Act which is listed in Norway's declaration pursuant to Article 5 of the Regulation. Second, it fulfils the substantive conditions for being a family benefit in Article 4 of the Regulation, namely that the benefit must follow from "legislation"<sup>2</sup> and that it must relate to a benefit listed in Article 4.<sup>3</sup>

34. As regards the purpose and effect of Article 73, ESA quotes case law of the Court of Justice of the European Communities.<sup>4</sup> ESA draws from the quoted case law that Article 73 precludes an EEA State from making the entitlement to, or the amount of, a given benefit dependent on residence. This is because the provision replaces residence with the place of work as the only legally relevant factor. ESA concludes that the Finnmark supplement does not fulfil this.

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<sup>2</sup> ESA refers inter alia to Case 300/84 *van Roosmalen* [1986] ECR 3097, para 28 and joined Cases 82 and 103/86 *Laborero and Sabato* [1987] ECR 3401, para 23

<sup>3</sup> As concerns the expression "to meet family expenses" in Article 1(u)(i) of Regulation 1408/71, ESA refers inter alia to Case C-85/96 *Martínes Sala* [1998] ECR I-2691, para 28.

<sup>4</sup> ESA quotes Case C-255/99 *Humer* [2002] ECR I-1205, para 39 and Case C-333/00 *Maaheimo* [2002] ECR I-10087, para 34 and Case 104/80 *Beeck* [1981] ECR 503, para 7. In relation to Case C-333/00 *Maaheimo*, ESA also refers inter alia to Case C-321/93 *Imbernon Martínez* [1995] ECR I-2821, para 21; Case C-266/95 *Merino García* [1997] ECR I-3279, para 28; Case 228/88 *Bronzino* [1990] ECR I-531. ESA also refers to Article 13(1) of Regulation 1408/71 and in that regard to Case C-2/89 *Kitz van Heijningen* [1990] ECR I-1755, paras 20 and 21 and Case 101/83 *Brusse* [1984] ECR 2223, para 30.

35. ESA contests that it is relevant for the interpretation of Regulation 1408/71 in general, and Article 73 in particular, whether migrant workers from other EEA States would be given a preferential treatment compared to national workers (also referred to as “reverse discrimination”) if they were granted the Finnmark supplement. In that regard ESA points out, first, that Article 73 is not only meant to ensure non-discrimination but also to coordinate divergent national legislation in order to prevent more than one national legislative system from being applicable and the complications which may result from such a situation. Second, ESA points out that Regulation 1408/71 only applies where there is a cross-border element involved. Therefore such reverse discrimination would result from Norwegian law and fall outside the scope of the Regulation.<sup>5</sup> A provision which refers to residence in a particular part of a Contracting Party, cannot be justified by the fact that domestic nationals are also disadvantaged by it.<sup>6</sup>

36. ESA also contests that Article 73 of Regulation 1408/71 should be understood as referring to benefits applicable in the State of employment as such and not to the benefit applicable in the place of employment. In ESA’s view it follows *a contrario* from Article 4(2b) of Regulation 1408/71 that the Regulation applies to regional measures and benefits. Thus, in order to invest the provisions of the Regulation with any effect as to regional benefits, the word “State” in Article 73 must, according to ESA, be read as the region of employment if a special regional rate is applied there.<sup>7</sup> ESA also reiterates in this regard that Article 73 is to be understood to the effect that the actual place of residence is to be replaced with the actual place of work and that the obligation under Article 73 to waive all residence requirements is absolute.

37. ESA then turns to its reasoning concerning Regulation 1612/68 and submits at the outset that a particular benefit or advantage may fall within the scope of both Regulation 1408/71 and Regulation 1612/68<sup>8</sup> and that Article 42(2) of Regulation 1612/68 has been construed to the effect that Regulation 1408/71 is given “*relative precedence*”.<sup>9</sup>

38. ESA submits that the Finnmark supplement clearly falls under the concept of social advantage within the meaning of Article 7(2) of Regulation 1612/68. In that regard, ESA points out that the Court of Justice of the European

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<sup>5</sup> ESA refers to inter alia Case C-144/96 *Cirotti* [1997] ECR I-5349, paras 32 and 33.

<sup>6</sup> ESA refers to the Opinion of Advocate General Stix-Hackl in Case C-388/01 *Commission v Italian Republic* [2003] ECR I-721, para 33.

<sup>7</sup> In support of the view that Article 73 of Regulation 1408/71 should not be interpreted restrictively ESA refers to Case C-321/93 *Imbernon Martínez* paras 23 and 27. ESA also refers to how Article 13 of Regulation 1408/71 has been interpreted and in that regard to Case C-2/89 *Kits van Heijningen* para 21, and Case C-34/98 *Commission v France* [2000] ECR I-995, para 41.

<sup>8</sup> ESA refers inter alia to Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, para 21 and Case C-310/91 *Schmid* [1993] ECR I-3011, para 17.

<sup>9</sup> Opinion of Advocate General Alber in Case C-35/97 *Commission v France* [1998] ECR I-5325, para 14.

Communities has applied a broad concept of “social advantage”<sup>10</sup> and inter alia applied it to family allowances.<sup>11</sup>

39. ESA claims that the residence requirement related to the Finnmark supplement constitutes indirect discrimination with regard to EEA workers residing in another EEA State with their children, which is prohibited under Article 7(2) of Regulation 1612/68 unless the measure could be considered as objectively justified and proportionate to its aim.<sup>12</sup>

40. As regards the discriminatory nature of the residence requirement, ESA submits that according to a long standing case law, a condition of residence for entitlement to a social advantage must be regarded as indirectly discriminatory since it is intrinsically liable to affect migrant workers more than national workers, and since there is a consequent risk that it will place the migrant worker at a particular disadvantage. In this respect, it makes no difference, in ESA’s view, that the residence requirement concerned applies irrespective of nationality.<sup>13</sup> ESA maintains that the judgment of the Court of Justice of the European Communities in the *Hoeckx* case<sup>14</sup> does not prove otherwise.<sup>15</sup>

41. ESA also submits that the argument from the Government of Norway – that granting the Finnmark supplement to EEA workers would put national workers not residing in the designated area at a disadvantage – is equally irrelevant under Regulation 1612/68 as under Regulation 1408/71.<sup>16</sup>

42. Finally, as to possible reasons for justifications of the measure, ESA does not object that the aim of promoting sustainable settlement is, in abstract, a legitimate aim<sup>17</sup> as long as the measure is proportionate to its aim.<sup>18</sup> In that regard ESA submits that it is for Norway to show that the measure is suitable for securing the attainment of the objective it pursues, and that it does not go beyond

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<sup>10</sup> ESA refers to Case 249/83 *Hoeckx* [1985] ECR 973, para 20.

<sup>11</sup> As examples, ESA refers to Case C-185/96 *Commission v Greece* [1998] ECR I-6601, and Case 65/81 *Reina* [1982] ECR 33.

<sup>12</sup> As examples, ESA refers to Case C-237/94 *O’Flynn* [1996] ECR I-2617, para 17; Case C-279/89 *Commission v United Kingdom* [1992] ECR I-5785; Case C-400/02 *Merida* [2004] ECR I-8471.

<sup>13</sup> ESA refers inter alia to Case C-57/96 *Meints* [1997] ECR I-6689, paras 45 and 46; Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899; Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paras 9 and 10.

<sup>14</sup> Case 249/83 *Hoeckx*, para 25.

<sup>15</sup> ESA refers in that respect to the Opinion of Advocate General Darmon in Case 249/83 *Hoeckx*, para 10.

<sup>16</sup> ESA refers to Case C-281/98 *Angonese* [2000] ECR I-4139, para 41.

<sup>17</sup> ESA refers inter alia to Case C-300/01 *Salzmann* [2003] ECR I-4899, para 44.

<sup>18</sup> ESA refers inter alia to case C-57/96 *Meints*, para 44; Case C-35/97 *Commission v France*, para 38; Case C-138/02 *Collins* [2004] ECR I-2703, para 66 and to Case E-4/00 *Brändle* [2000-2001] EFTA Court Report 125, para 27.

what is necessary in order to attain that objective.<sup>19</sup> In ESA's view, Norway has not succeeded in doing so and submits that the contested residence requirement is disproportionate to the aims pursued.

43. ESA argues that even though the Finnmark supplement, as such, might be suitable for promoting sustainable settlement, and stimulate business and industry in a certain region, business and industry should benefit from commuting workers being attracted to the area. In ESA's view, a residence requirement is not necessary as long as there is a requirement that the beneficiary be employed in the area. As regards the aim of promoting sustainable settlement, ESA refers to alternative measures that, in its view, are less restrictive, such as the subvention of day-care of children attending day-care facilities in the designated area.

44. In its Reply, ESA affirms its position and elaborates further upon specific issues. As concerns the subject matter of the case, ESA stresses that it does not seek to challenge the Finnmark supplement as such or the content of the social security system, and that the case only concerns whether the circle of beneficiaries has to be extended to migrant workers and their families covered by Regulation 1408/71 and Regulation 1612/68.

45. Regarding the relationship between Regulation 1408/71 and Regulation 1612/68, ESA acknowledges that a judgment declaring that both Regulations have been breached would be compatible with the case law of the Court of Justice of the European Communities<sup>20</sup> and leaves it to the discretion of the Court to evaluate whether that should be done. ESA also expresses the opinion that Regulation 1612/68 does not apply to a national measure which falls within the ambit of Regulation 1408/71, but does respect the entire set of rules contained in Regulation 1408/71.

46. As concerns the interpretation of Article 73 of Regulation 1408/71, ESA contests the argument of the Government of Norway that regional residence requirements relate to the content of the benefit, and should therefore be distinguished from national residence requirements and fall outside the *lex loci laboris* principle contained in Article 73 of Regulation 1408/71. In that regard, ESA elaborates on its arguments on the interpretation of Article 73.

47. ESA reiterates inter alia that Article 73 applies to regional family benefits and states that a regional residence requirement affects, per se, migrant workers falling under Article 73 of Regulation 1408/71, more than national workers, and

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<sup>19</sup> ESA refers inter alia to Case C-270/02 *Commission v Italian Republic* [2004] ECR I-1559, para 22.

<sup>20</sup> ESA refers to Case C-326/90 *Commission v Belgium* [1992] ECR I-5517; Case C-185/96 *Commission v Greece* [1998] ECR I-6601, and Case C-111/91 *Commission v Luxembourg*, para 21.

will per definition deny migrant workers regional benefits.<sup>21</sup> Article 73 would, thus, in ESA's view be void of any meaning as concerns regional benefits if it did not automatically lift regional residence requirements for families of EEA workers residing in another EEA State.

48. ESA also recalls that the aims of Regulation 1408/71 go beyond ensuring non-discrimination, and maintains that the coordination aim, seeking to avoid conflict or absence of applicable law, might equally well be harmed by conflicting choice of law rules on a regional level.<sup>22</sup> In this respect ESA recalls inter alia that Regulation 1408/71 establishes a complete set of conflict rules<sup>23</sup> that insists on using only one common logic to determine which national law should apply, namely the place of work,<sup>24</sup> and that Article 73 of the Regulation is to be construed to the effect that the migrant worker's family resides where he works.

49. Furthermore, in the opinion of ESA, it follows *a contrario* from Article 4(2b) of Regulation 1408/71 that as the Contracting Parties have not listed the Finnmark supplement in Annex II, Section III of the Regulation, Article 73 must be applied in its entirety to the supplement.<sup>25</sup>

50. In the event that the Court should disagree with ESA that Article 73 prohibits regional residence requirements without opening for justifications, ESA submits that the resident requirement related to the Finnmark supplement is indirectly discriminatory and non-justified.<sup>26</sup>

51. As regards the issue of justification, ESA refers to the statement of the Government of Norway that it has not been able to find alternative measures which can be allocated at a minimum administrative and financial costs, and emphasises that it is established case law that an EEA State cannot rely on economic considerations in order to justify an indirectly discriminatory measure such as a residence requirement.<sup>27</sup> ESA also refers to the judgment of the Court in *Fokus Bank*, where it held that when a national measure "*at least in part*" pursues

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<sup>21</sup> In ESA's view this would go against the intention of Article 73 to ensure that workers are not deterred from exercising their right to freedom of movement. ESA refers inter alia to Case C-543/03 *Dodl*, judgment of 7 June 2005, not yet reported, paras 45-46.

<sup>22</sup> ESA refers to the pending Case C-286/03 *Hosse* OJ No C 226, 20.09.2003, p. 5, as an illustration of this.

<sup>23</sup> ESA refers to Case C-372/02 *Adenez-Vega* [2004] ECR I-10761, para 18.

<sup>24</sup> ESA argues that Case C-228/88 *Bronzino* [1990] ECR I-531 illustrates that Article 73 goes beyond a general prohibition against discrimination on the basis of nationality and refers particularly to para 12 of the judgment in that regard.

<sup>25</sup> ESA argues that case law of the Court of Justice of the European Communities shows that the derogation from the application of social security legislation of one state and the principle of waiving of residence clauses has been interpreted strictly and refers in that respect inter alia to Case C-215/99 *Jauch* [2001] ECR I-1901 and Case C-160/02 *Skalka* [2004] ECR I-5613.

<sup>26</sup> ESA refers inter alia to Case C-299/01 *Commission v Luxembourg*; Case C-266/95 *Merino Garcia*, paras 32-35; Case C-124/99 *Borawitz* [2000] ECR I-7293, paras 25-29; Case C-111/91 *Commission v Luxembourg* paras 9 and 10; Case C-326/90 *Commission v Belgium* and Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paras 19 and 20.

<sup>27</sup> ESA refers inter alia to Case C-109/04 *Kranemann* [2005] ECR I-2421, para 34.

an economic aim, it becomes irrelevant whether the measure might also pursue other goals.<sup>28</sup>

52. Moreover, ESA maintains that even though commuters do tend to play a lesser role in the local communities than residents do, it cannot justify the disputed residence requirement being applied to workers migrating from other EEA States. In that regard ESA states inter alia that only a very few people are likely to commute over very long distances and that a decision such as where to live will not be heavily influenced by the quite minor Finnmark supplement. Finally, in ESA's view the condition for the legality of the aim that the realisation thereof has no discriminatory effects, is not fulfilled.<sup>29</sup>

#### *The Kingdom of Norway*

53. The Government of Norway claims in its Defence that the application is unfounded as Norway has not failed to fulfil its obligations under Article 73 of Regulation 1408/71, or Article 7 (2) of Regulation 1612/68, by restricting the Finnmark supplement to the designated area. In any event, the Government claims that the Finnmark supplement is justified on grounds of promoting sustainable settlement.

54. At the outset, the Government of Norway states that it does not dispute before the Court that the Finnmark supplement is a family benefit within the meaning of Regulation 1408/71.

55. The Government of Norway stresses the factual background of the Finnmark supplement and the regional policy considerations behind the supplement and refers to its purpose to promote sustainable settlement in the designated area and to stimulate business and industry.

56. Next, the Government of Norway turns to the alleged errors in law. It refers to the purpose and effect of Article 29 EEA and Regulation 1408/71 to provide freedom of movement for workers. In that respect, it states that the Regulation does not seek to harmonise but only to co-ordinate the national social security systems.<sup>30</sup> Moreover, that the Regulation does not affect the freedom of the EEA States to determine the rules of their own social security system, but requires that the States accord equal treatment to national workers and workers from other EEA States.

57. The Government of Norway submits that the Finnmark supplement does not have the effect of putting EEA workers at a disadvantage as compared to national workers. According to the Government the question in this case is

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<sup>28</sup> ESA refers to Case E-1/04 *Fokus Bank* [2004] EFTA Court Report p. 11 para 33.

<sup>29</sup> As concerns the requirement that there are no discriminatory effects ESA refers inter alia to Case C-300/01 *Salzmann* [2003] ECR I-4899, paras 42 and 45-47; Case 65/81 *Reina* [1982] ECR 33 and Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459 para 26.

<sup>30</sup> The Government of Norway refers to Case C-227/89 *Rönfeldt* [1991] ECR I-323.

whether Regulation 1408/71 can be understood to restrict a regional benefit such as the Finnmark supplement, and thus, whether Regulation 1408/71 has a direct impact on the very content of a benefit. It points out that the very content of the Finnmark supplement is connected with bringing up children in the designated area and that both Norwegian and EEA workers who fulfil the condition are entitled to the Finnmark supplement. Workers who commute to the area are not entitled to it, regardless whether they are Norwegian workers or workers from another EEA State.

58. The Government of Norway contests that EEA workers who do not bring up children in the designated area are, by virtue of Regulation 1408/71, entitled to the Finnmark supplement. Such an understanding would, in its view, undermine the whole purpose of the regional benefit and in effect lead to the conclusion that Regulation 1408/71 prohibits a benefit with a strictly regional limitation. In its opinion, there is no base for such an understanding of the Regulations and such an understanding would mean that Regulation 1408/71 intervenes in the content and structure of the Norwegian social security system. It argues that the Regulation does not give EEA workers the right to be treated more favourably than prescribed by national law solely because they are EEA workers.

59. As regards the necessity of limiting the Finnmark supplement to those who reside in the designated area, the Government of Norway refers to the purpose of the supplement to encourage settlement in the designated area by compensating for particular negative features of the area. It points out that if the residence requirement would be removed, people would not be motivated to move to the area itself but could instead commute from areas within normal commuting distances, and thereby avoid the negative features of the area, while at the same time taking advantage of the Finnmark supplement.

60. The Government of Norway also submits that the wording of Article 73 clearly indicates that family members shall be treated as if they were residing in the territory of the State as such, and not specifically at the place of employment. In that regard, the Government underlines that Article 73 refers to “State” and not “workplace” or ”region”, and argues that the wording of Article 73 does not indicate that persons residing in another EEA State are entitled to more than the national benefit.

61. The Government of Norway contests that the case law of the Court of Justice of the European Communities supports the arguments of ESA. It also submits that the Finnmark supplement accords with the intention of Regulation 1408/71 to guarantee members of a family residing in an EEA State other than the State of employment the benefits provided for by the applicable legislation,<sup>31</sup> and to ensure that EEA workers are not deterred from exercising their right, as expressed in judgments of the same Court.

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<sup>31</sup> The Government of Norway refers inter alia to Case C-255/99 *Humer*.

62. As concerns Regulation 1612/68, the Government of Norway submits that the Regulation does not apply when the measure is in accordance with Regulation 1408/71. In any event, it submits that the requirement of equal treatment in Article 7 (2) of Regulation 1612/68 is fulfilled.

63. Moreover, the Government of Norway submits that there is an objective justification for the residence requirement. It argues that the Finnmark supplement pursues a legitimate aim which is to promote sustainable settlement in certain sparsely populated parts of Norway.<sup>32</sup> In the view of the Government, the Finnmark supplement is, in combination with the other measures applied in the designated area, suitable for the attainment of this aim. In that regard it points out that the objective is to create a measure to support all families with children living in the designated area. Other measures, such as those supporting day-care centres or leisure activities, only reach a limited number of children.

64. The Government of Norway also emphasises that it is not possible to maintain a viable local community if it is not possible to motivate families with children to stay. Commuters do not have the same impact on the local community as residents, which is why the measures in the designated area are directed towards people who actually live there. It argues moreover, that the amount of the Finnmark supplement is a modest contribution to the families with children in the designated area and does not go beyond what is necessary to motivate people to settle in the area.

65. As concerns possible alternative measures, the Government of Norway submits that it has not been able to find measures that reach the target group to the same degree, and at the same time, can be allocated at a minimum of administrative and financial cost.

66. In its Rejoinder the Government of Norway affirms its position and elaborates further upon certain points. It contests that non-discriminatory, objectively justified benefits are contrary to Article 73 of Regulation 1408/71 and argues that both Regulation 1408/71 and Regulation 1612/68 call for an assessment of whether the measure is objectively justified and proportionate to its aim.<sup>33</sup>

67. In light of ESA's arguments in its Reply, the Government of Norway clarifies that it does not claim that all regional residence requirements fall outside the scope of Article 73 of Regulation 1408/71, but that regional residence requirements have to be distinguished from national residence requirements and that they have to be evaluated in terms of whether they are discriminatory and whether they are objectively justified.

68. Furthermore, in light of ESA's arguments in its reply, the Government of Norway expresses the view that there is no need to list the Finnmark supplement

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<sup>32</sup> The Government of Norway refers inter alia to Case C-300/01 *Salzmann*, para 44.

<sup>33</sup> The Government of Norway refers to Case C-124/99 *Borawitz*, paras 26-28.

as an exception to Regulation 1408/71, given that it is non-discriminatory and objectively justified.

69. As regards the alleged discriminatory effects of the Finnmark supplement the Government of Norway points out that ESA refers to cases of the Court of Justice of the European Communities that relate to national residence requirements and reiterates that such requirements have to be distinguished from regional residence requirements. Furthermore, the Government points out that the same Court has also found residence requirements to be non-discriminatory.<sup>34</sup> The Government contests ESA's arguments that the regional residence requirement is indirectly discriminatory. In its view, it is more likely to affect national workers to a greater extent than other EEA workers since it is more likely that commuting workers live in other parts of Norway than in other EEA States. Moreover, there is no discrimination since the situation of a parent raising a child in the designated area is not comparable to that of a worker who is not raising a child in the same area.<sup>35</sup> A comparable situation would, in its view, be between a commuting EEA worker and a commuting national worker.

70. In any event, the Government of Norway reiterates that the Finnmark supplement is objectively justified.<sup>36</sup> It points out inter alia that the EEA States have a wide margin of appreciation as concerns the level of protection, and states that the relatively moderate contribution, to cover extra costs of living in the region, can hardly be said to set the level of protection too high.

71. Finally the Government of Norway stresses that the range of beneficiaries, and the scope and content of the Finnmark supplement, are linked so that the range of beneficiaries cannot be extended to EEA workers with families residing outside the area without undermining the purpose of the supplement.

72. As concerns the scope of Regulation 1612/68, the Government of Norway states that it agrees with the observations submitted by the United Kingdom regarding the limited scope of Article 7(2).

#### *The Commission of the European Communities*

73. In the view of the Commission of the European Communities the Finnmark supplement falls within the material scope of Regulation 1408/71. As regards application of Article 73 of Regulation 1408/71, the Commission submits that the EEA States may, in principle, impose a regional residence requirement, subject to the overriding principle of equal treatment. The objective of

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<sup>34</sup> The Government of Norway refers to Case 182/83 *Fearon* [1984] ECR I-3677 and Case C-279/93 *Schumacker* [1995] ECR I-225.

<sup>35</sup> The Government of Norway states that it is settled case law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations and refers as an example thereof, inter alia, to Case C-279/93 *Schumacker*, paras 30 and 34.

<sup>36</sup> The Government of Norway refers to Case C-237/94 *O'Flynn* [1996] ECR I-2617, paras 18-20 and Case 182/83 *Fearon* [1984] ECR I-3677.

Regulation 1408/71 is to guarantee workers who are nationals of EEA States, and who move within the EEA, equality of treatment regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits.<sup>37</sup>

74. In the view of the Commission, the regional residence requirement for entitlement to the Finnmark supplement is inherently liable to affect migrant workers more than national workers, and there is a consequent risk that it will place them at a particular disadvantage.<sup>38</sup> In these circumstances, it must be regarded as discriminatory and therefore contrary to Article 73 of Regulation 1408/71, unless objectively justified.

75. The Commission agrees at first sight that the aim of the Finnmark supplement, *i.e.* to promote sustainable settlement and stimulate business and industry, could constitute a legitimate aim. However, it remains for Norway to prove that the use of a regional residence requirement is a proportionate means of achieving this objective. In particular, if the aim of the supplement is *inter alia* to stimulate business and industry, the Commission can see no reason why it should not also be granted to those simply working in the region.

76. As concerns Article 7(2) of Regulation 1612/68, the Commission points out that the notion “of social advantage” has been very broadly interpreted by the Court of Justice of the European Communities.<sup>39</sup> As concerns the question of whether the Finnmark supplement is discriminatory, the Commission states that it is well-established that it is immaterial whether it affects nationals of the State in question in other parts of the national territory, as well as nationals of other EEA States.<sup>40</sup> On the question of whether the supplement may be objectively justified, the Commission refers to its comments relating to Regulation 1408/71.

77. As regards the relationship between Regulation 1408/71 and Regulation 1612/68, the Commission states that the Court of Justice of the European Communities has clearly established that the same benefit may simultaneously fall within the scope of Regulation 1408/71 as a social security benefit, and Regulation 1612/68 as a social advantage.<sup>41</sup> The Commission therefore concludes that the Court should not limit any declaration it may make to only one of the two Regulations at issue.

### *The United Kingdom*

78. The United Kingdom submits that it agrees with ESA, that a particular benefit may fall within the scope both of Regulation 1408/71 and Regulation

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<sup>37</sup> The Commission refers *inter alia* to Case C-543/03 *Dodl*, para 47.

<sup>38</sup> The Commission refers by analogy to Case C-237/94 *O’Flynn*, para 20.

<sup>39</sup> The Commission refers *inter alia* to Case 207/78 *Even* [1979] ECR 2019.

<sup>40</sup> The Commission refers especially to Case C-388/01 *Commission v Italian Republic* [2003] ECR I-721.

<sup>41</sup> The Commission refers to C-111/91 *Commission v Luxembourg* [1993] ECR I-817.

1612/68<sup>42</sup> and that, by virtue of Article 42 of Regulation 1612/68, Regulation 1408/71 enjoys “relative precedence” in such circumstances.<sup>43</sup> Otherwise, the United Kingdom’s observations are restricted to Article 7(2) of Regulation 1612/68.

79. The United Kingdom first claims that ESA appears to proceed from a misapprehension as to the general exportability of “social advantages” falling within Article 7(2) of Regulation 1612/68. In the United Kingdom’s opinion, Article 7 of Regulation 1612/68 normally operates so as to give the migrant worker access to social advantages within the territory of the host Member State where he is both working and residing.<sup>44</sup> The Court of Justice of the European Communities has, according to the United Kingdom, allowed social advantages falling within Article 7(2) of Regulation 1612/68 to be exported only to very limited circumstances.<sup>45</sup> Therefore, the United Kingdom considers that there is a clear distinction between the position of workers who have indeed moved to the State of employment, and who must thus be given the full benefit and support available to national workers in order to integrate them in their new place of residence, and the position of workers commuting between their State of residence and place of employment.

80. Accordingly, whilst the fact of being a frontier worker does not preclude the application of Article 7(2) of Regulation 1612/68 in specific and appropriate circumstances, it does not follow from case law<sup>46</sup>, in the United Kingdom’s opinion, that all social advantages falling within Article 7(2) of Regulation 1612/68 are therefore automatically exportable to all frontier workers.

81. Finally, the United Kingdom draws the EFTA Court’s attention to a pending case C-286/03 *Silvia Hosse v Land Salzburg*<sup>47</sup> which, in its view, may become relevant for this case.

Thorgeir Örlygsson,  
Judge-Rapporteur

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<sup>42</sup> The United Kingdom refers to Case 111/91 *Commission v Luxembourg*, para 21 and Case C-310/91 *Hugo Schmidt v Belgian State*, para 17.

<sup>43</sup> The United Kingdom refers inter alia to the Opinion of Advocate General Alber in Case C-35/97 *Commission v France* [1998] ECR I-5355, para 14.

<sup>44</sup> The United Kingdom refers inter alia to Case 32/75 *Cristini* [1975] ECR I-1085, paras 12-19 and Case 63/76 *Inzirillo* [1976] ECR 2057, paras 20 and 21.

<sup>45</sup> The United Kingdom refers to Case C-57/96 *Meints* and Case C-33/99 *Fahmi* [2001] ECR I-2415, paras 44-51.

<sup>46</sup> The United Kingdom refers to Case C-35/97 *Commission v France* and Case C-337/97 *Meeusen* [1999] ECR I-3289.

<sup>47</sup> The Opinion of Advocate General Kokott was delivered on 20 October 2005.