



ROYAL NORWEGIAN MINISTRY OF  
EDUCATION AND RESEARCH

EFTA Surveillance Authority  
Rue Belliard 35  
B-1040 Brussels  
BELGIUM

Your ref

Our ref

Date

17/4898-

1 July 2020

## Reasoned Opinion of 1 April 2020 - reply from the Norwegian Government

### 1 Introduction

The Norwegian Ministry of Education and Research refers to the Reasoned Opinion of 1 April 2020 from the EFTA Surveillance Authority.

The Authority concludes that by requiring that migrant and frontier workers, and their family members, comply with requirements such as those laid down in Section 31-5 of the Study Financing Regulation, in order to be eligible for study financing abroad, Norway has failed to fulfil its obligations arising from Article 28 of the EEA Agreement and from Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. The EFTA Surveillance Authority requires Norway to take the measures necessary to comply with the reasoned opinion within three months of its receipt, i.e. by 1 July 2020.

The Norwegian Government is of the opinion that Section 31-5 of the Study Financing Regulation is in accordance with EEA law.

Our assessment is that the objective of providing society and the labour market with competent workers is an overriding reason relating to the public interest capable of justifying a restriction, that the measures are appropriate for attaining that objective, and they do not go beyond what is necessary to attain the legitimate objective sought by the Norwegian Government.

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In this letter, the Norwegian Government will make some introductory remarks on the Regulation and of the aim of the support scheme. We will also include some information of the number of recipients of support, of students who settle in Norway after the education abroad, and rejections under the scheme. Then, the Government will comment on the legal basis and the Norwegian requirements.

Thereafter, the Government will comment on the proportionality assessment of the system of requirements and discretionary assessment set out in Section 31-5 of the Study Financing Regulation, including some general remarks on the elements and level of connection, and on the issue of requiring the connection for the applicant him- or herself.

The Government will also elaborate further on the different criteria under Section 31-5 first paragraph, and the discretionary assessment under the second paragraph. Finally, the Government will comment on alternative measures.

### **1.1 The Norwegian student support scheme for studies abroad**

The prerequisite for eligibility for student finance for studies abroad, is that the applicant is a Norwegian citizen, or has the right to equal treatment with Norwegian citizens under Section 2-3 of the Study Financing Regulation. In addition to this, the applicant has to fulfil one of the requirements in Section 31-5 first paragraph, or have a similar connection to Norway, under Section 31-5 second paragraph. If the applicant fulfils one of the requirements under Section 31-5, the applicant will be eligible for support. The requirements under Section 31-5 are the same for Norwegian nationals and for EEA workers or family members of an EEA worker with the right to equal treatment with Norwegian nationals.

Section 31-5 first paragraph of the Study Financing Regulation sets out certain criteria in which the applicant is automatically deemed to have a sufficient degree of connection to Norway. In cases where these *a priori* criteria are not met, a more holistic review of the applicant's connection to Norway is carried out, pursuant to second paragraph of Section 31-5.

The Norwegian Government's long held opinion is that the Norwegian society and labour market benefits from students' international experiences. The candidates provide the labour market with valuable competence, both by language proficiency and cultural understanding. By international standards, Norway has a generous system of student financing, both for studies in Norway and abroad. The students receive support for living costs at the same level as in Norway, grants and loans are provided for travels, and tuition fees are covered full or in part by a combination of grants and loans. Facilitation of studies abroad through subsidies by public finance is an important educational policy in Norway. In the academic year of 2018-2019, eight per cent of the overall recipients of student finance pursued a degree at an educational institution outside of Norway.

The objective of this policy, which is also expressed in Section 1 of the Student Finance Act, is that the public funding should lead to the provision of workers of competence to the Norwegian labour market. This presupposes that the students seek employment in Norway after completion of the education abroad, either shortly after the studies, or after a period of work abroad. Thus, it is important to ensure that the recipients of support will make use of their education on the Norwegian employment market after completing the education.

EEA citizens who have the right to equal treatment with Norwegian nationals, and who study abroad, are equally important to the Norwegian society and labour market. It is of utmost importance to the Norwegian Government to emphasize that there is no intention of excluding EEA citizens from the student financing. These students will give an equally important contribution to the Norwegian labour market as Norwegian nationals.

## **1.2 Return share and rejections under the scheme**

Most students who receive funding for their education abroad, return to Norway to work after the education, or they work for a period of time abroad before their return. Research shows that four years after graduation, about 80 per cent of all recipients who have pursued a full degree abroad, has returned to Norway<sup>1</sup>. The share seems to be stable over time<sup>2</sup>. The research also discloses that there is a significantly higher probability that students who pursue a full degree abroad will establish themselves abroad after the education, compared to students in Norway and students who study abroad as part of their education in Norway.

This share includes EEA citizens who have received student financing for education abroad. The State Educational Loan Fund (NSELF) has examined the return share for this group in particular. Figure 1 shows the final year of support for the recipients, and how many of the recipients who have a registered address in Norway four to five years later. In 2015, 115 EEA citizens ended their education and received their repayment schedule. In 2020, 100 of them had a registered address in Norway. This results in a return share of 87 per cent. The recipients received support under the prior residence requirement (“two out of five years”).

To show the variations over time, we have included the same data for recipients who received their last support in the period 2011-2014. Note that there are few recipients, and small variations in numbers therefore have a relatively large impact on the percentage.

Figure: Number of recipients, number of return to Norway, share of return to Norway after four to five years. EEA citizens who have received support for studies abroad.

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<sup>1</sup> Jannecke Wiers-Jenssen: Utbytte av utdanning fra utlandet. Overgang fra utdanning til arbeid blant nordmenn med høyere den. NIFU STEP Rapport 3/2005.

<sup>2</sup> NIFU Rapport 2019:32 Betydningen av utdanning fra utlandet for tidlig karriere

Year of last support	2011	2012	2013	2014	2015
Number of recipients	78	71	83	79	115
Number of recipients who have a registered address in Norway four to five years after year of last support	53	53	67	71	100
Percentage of return	68	75	81	90	87

In order to assess whether the aim of the student support has been achieved, it is useful to take into account the share of recipients of financial support who return to Norway. The Norwegian Government has not set a fixed target for the level of returning students. The return level is considered relevant information in assessing whether the requirements of connection to Norway has the intended effect, namely to ensure that a significant share of recipients return to Norway to work here. The return level is considered relevant information as regards the effect of the requirements, but has not resulted in more restrictive requirements in the application of the discretionary assessment.

Information from NSELF shows that rejections under the requirements of connection, mainly is given to Norwegian nationals with weak attachment to Norway. This is in accordance with the objective of the policy at hand.

Since the academic year of 2015-2016, after the amendments to the regulation, applications for student financing has been denied in about 30 cases. According to information from the NSELF, 24 of these cases were applications from Norwegian nationals. The applicants are in most cases born and raised abroad (EEA country or other), and most have spent some vacations in Norway. Some have knowledge of the Norwegian language.

Six of the cases regard EEA nationals (including three with dual citizenship). They are all born and raised in another EEA country. One EEA national had worked in a café in Norway for a shorter period of time prior to the education abroad. The NSELF informed him of the requirements, but the applicant did not provide further information on his connection to Norway. Two EEA nationals were asked to provide further information on their connection to Norway, and withdrew their applications. Three EEA nationals (with dual citizenships) stated that they had spent summer holidays in Norway, and two of the applicants could document some proficiency in Norwegian.

## 2 Legal basis

The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments.<sup>3</sup>

It falls to the national authorities not only to establish that the national measure at issue is proportionate to the objective pursued but also to indicate the evidence capable of substantiating that conclusion.

The CJEU has ruled that the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective pursued to be attained under the same conditions. Nevertheless, the national authorities must at least show why it opted for the measures.<sup>4</sup>

The case-law of the CJEU regarding eligibility for student financing from the country of work, to EEA workers and their family member, has concerned requirements of a connection of a specific kind, and most often over a certain period of time. The Court concluded that the requirements were justified by objective considerations, and that the requirements were appropriate for attaining the objective. However, the Court concluded that the requirements went beyond what was necessary in order to attain that objective, because they were “*too exclusive in nature*”<sup>5</sup>.

In C-542/09 *Commission v Netherlands* the CJEU stated that a requirement of residence for three out of the last six years was too exclusive because it prioritised “*an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State*”<sup>6</sup>. In C-20/12 *Giersch and Others*, the Court stated that the residence requirement favoured “*an element which was not necessarily the sole representative element of the actual degree of attachment between the party concerned and that Member State*”<sup>7</sup>. Additionally, the Court referred to the judgment in C-542/09, and stated that the Netherlands “*had not convincingly explained why the objective pursued could not be attained, in a less restrictive fashion, either by a more flexible rule than the ‘three out of six years’ rule or by taking into account other elements which represent a similar degree of attachment*”<sup>8</sup>.

The decisions in *Verruga* and *Aubriet* also concerned absolute requirements of periods of employment. In *Aubriet* the CJEU stated that taking into account only the requirement of work for five of the last seven years was “*not sufficient to make full assessment of the significance of that cross-border worker’s connection*” to that Member State.<sup>9</sup> The decisions

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<sup>3</sup> C-542/09 *Commission v Netherlands* para. 81 and case law cited

<sup>4</sup> C-542/09 *Commission v Netherlands* para. 85-86 and case law cited

<sup>5</sup> C-542/09 *Commission v Netherlands* para. 86, C-20/12 *Giersch and Others* para. 76

<sup>6</sup> C-542/09 *Commission v Netherlands* para. 86

<sup>7</sup> C-20/12 *Giersch and Others* para. 76

<sup>8</sup> C-20/12 *Giersch and Others* para. 73

<sup>9</sup> C-410/18 *Aubriet*, para. 45

lead to the conclusion that the requirements must include elements which may represent a person's genuine attachment to the member state and these elements make it more likely that the applicant will seek employment in that state after the education.

### 3 The Norwegian requirements

The requirements of the Study Financing Regulation are substantially different from the requirements seen in the above mentioned case-law from the CJEU, most importantly because the Norwegian requirements allow all relevant elements which may represent a person's attachment to Norway, to be considered, as all cases in which the applicant does not fulfil one of the alternatives in the first paragraph, any other element or combination of elements of connection shall be considered under the second paragraph.

The alternatives of Section 31-5 first paragraph will not be “*the sole element*” applied “*to the exclusion of all other representative elements*”, because any other element of connection will be taken into consideration under the second paragraph. The Court has emphasised that a rule which is neither flexible nor take into account other elements which represent a sufficient degree of attachment is disproportionate.<sup>10</sup> The Norwegian rule is on the contrary both flexible and it takes into account several elements which represent a sufficient degree of attachment to Norway.

It is clear that periods of residence, schooling/studying, language proficiency and family are elements which are likely to influence the decision on where to work after the education. But they do not exclude other elements of connection.

Section 31-5 first and second paragraph cannot be assessed independently. The objective alternatives of the first paragraph have several functions. They shall establish a level of connection which in all cases shall be considered sufficient. They shall also ensure legal certainty and predictability for the applicants. An applicant will easily be able to understand whether his or her connection to Norway is sufficient under the objective criteria, or if it will be necessary to provide more information under the discretionary assessment. Alternatives which leaves no doubt on whether the student is eligible for support, also limit the need for a discretionary assessment. It is clear from the regulation in which cases a discretionary assessment is needed.

It would neither be possible nor useful to establish an exhaustive list of objective criteria which represent all possible variations of sufficient connections to a country. Current EEA law does not require that an exhaustive list is established. The CJEU has stated that exhaustive criteria prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State. In our opinion, this leads to the conclusion that an element of discretion is

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<sup>10</sup> C-20/12 *Giersch and Others* para. 73

necessary, to ensure that a “*full assessment of the significance*” of the applicant’s connection is considered.<sup>11</sup>

The CJEU has also stated that the “*principle of non-discrimination and the principle of proportionality cannot be interpreted as requiring*” an assessment on “*a case-by-case basis by a public authority responsible for a standardised mass procedure*”.<sup>12</sup> In our opinion, this means that it is not necessarily required to perform a discretionary assessment in each individual case, but that there is some room for adopting and applying objective criteria.

The Norwegian elements are implemented to make sure that a “*full assessment of the significance*” of the applicant’s connection to Norway is considered. There is not one sole element which is considered, but several. In fact, all possible elements are considered under the discretionary assessment. The “*actual degree of attachment*” between the applicant and Norway is therefore considered in each case. Thus, since the elements in themselves are appropriate for attaining the objective of the student support scheme, and the rule is not exclusive in the meaning there is not one sole element deciding the students’ attachment to the Norwegian society, the Norwegian Government is of the opinion that the Norwegian student support scheme is in accordance with EEA law. Nonetheless, the Norwegian Government will make some comments on the different requirements below.

## **4 The proportionality assessment**

### **4.1 General comments**

The Norwegian Government agrees with the Authority that the objective of the Study Financing Act of ensuring that competence is available to the Norwegian society and labour market constitutes an overriding reason capable of justifying a restriction. It is moreover clear that the criteria set out in Section 31-5 are appropriate for attaining this objective. Thus, the Norwegian Government will not comment specifically on this.

However, the Authority holds that the requirements laid down in Section 31-5 go beyond what is necessary in order to attain the legitimate objective sought by the Norwegian Government.

The Authority states that Norway would have needed to show why it opted for the requirements such as the ones in Section 31-5 of the Study Financing Regulation, to the exclusion of all other elements indicating a certain degree of attachment to Norway. In that regard, it must be examined whether only the requirements chosen by Norway are capable of ensuring, with reasonable probability, that the recipients of financial support for studies will return to settle in Norway and make themselves available to the Norwegian labour market, or whether other criteria exist which would also ensure this in a less restrictive manner, with regard to free movement of workers.

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<sup>11</sup> C-410/18 *Aubriet*, para. 45

<sup>12</sup> C-410 *Aubriet*, para 42

In this regard, it should be noted that the proportionality assessment is a question of whether the conditions go beyond what is necessary in order to attain the legitimate objective sought. CJEU has stated that it is legitimate to set conditions to ensure that a significant share of the students return to the Norwegian labour market.<sup>13</sup> To ensure this legitimate objective, the students must demonstrate a sufficient degree of integration in the Norwegian society, which makes it likely that the student will be able to and will want to work in Norway.

Consequently, when assessing the necessity of the requirements, it must be taken into account that the student has to demonstrate an attachment to the Norwegian society that is strong enough to make it reasonably likely that he or she will return to the Norwegian labour market. If a too strict proportionality assessment is applied, conditions which are necessary to demonstrate a sufficient attachment to the Norwegian society, would be wrongfully rejected as disproportionate. In such cases, where a too strict necessity assessment leads to the conclusion that conditions are only lawful when they require a very low degree of attachment to the Norwegian society, students who are not likely to return to the Norwegian labour market will meet the conditions and receive financing. Hence, the conditions will no longer be able to attain the objective sought.

#### **4.1.1 Regarding requirements of connection for the applicant her-/himself**

The Authority states that since the right to equal treatment in respect of social advantages is derived from the worker, the requirements for connection to Norway should relate to the situation of the worker and not to that of the family member. Provisions that put additional requirements of connection on family members, such as laid down in points c) and e) of Section 31-5 first paragraph, can therefore not be proportionate.

Because of the legitimate objective of the Norwegian scheme on student financing of providing the Norwegian society and labour market with workers of competence, it is necessary to ensure that the applicant him- or herself has a sufficient attachment to Norway. It is the applicant's own connection to the Norwegian society which will influence the decision on where to live and work after the education. All of the requirements are therefore related to the applicant. The fact that the applicant has a family member who lives in Norway (point c)) or family member who is a frontier worker (point e)), is not to be viewed as requirements, but as facts showing that the applicant has an attachment to Norway that constitutes some of several relevant elements for sufficient attachment to Norway.

The above should not be confused with the fact that it is clear from Section 2-3, that both EEA citizens and their family members can be applicants under Section 31-5, and thus can be eligible for support under all of the requirements of Section 31-5, not just points c) and e).

The CJEU stated in *Giersch and Others* that “a sufficient attachment of the student in question with the Grand Duchy such as to make it possible to conclude that” a reasonable

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<sup>13</sup> C-238/15 Verruga para 60-64



probability exists that the recipients of that aid will return to settle in Luxembourg and make themselves available to the labour market of that Member State, “*may also be derived from the fact that that student resides alone or with his parents in a Member State which borders upon the Grand Duchy of Luxembourg and that, for a significant period of time, his parents have worked in Luxembourg and live near to that Member State*”<sup>14</sup> (emphasis added). It therefore follows from the case-law that the attachment of family members can be seen as relevant in the assessment of whether the applicant him- or herself has a “*sufficient attachment*” to Norway. The Norwegian Government is therefore of the opinion that it is legitimate to require a connection for the applicant him- or herself, because it is the applicant's connection to Norway which is appropriate for securing the attainment of the legitimate objective.

#### **4.1.2 Prior residence for a consecutive period of two of the last five years – point a)**

Under Section 31-5 first paragraph point a), the applicant has the right to student financing if he or she has lived in Norway for a continuous period of two of the last five years prior to the education.

This alternative is applicable to applicants who are inter alia migrant workers and their family members. A frontier worker will also be eligible for support in relation to this alternative if the frontier worker has been a resident in Norway for two years within the five years prior to the education. However, since this is often not the case, the Norwegian Government found it useful to adopt a specific alternative for frontier workers and their family members, to make it clear that they are eligible for support if they have a certain connection to Norway. These alternatives are described further below.

The Authority states, in relation to this alternative, that the CJEU has ruled that a requirement of prior residence for migrant workers for three out of the last six years is disproportionate.

Norway agrees that the CJEU in C-542/09 *Commission v Netherlands*, concluded that the ‘three out of six years’ rule went beyond what was necessary in order to attain the objective pursued. However, the Court held that by requiring specific periods of residence in the territory of the Member State concerned, the ‘three out of six years’ rule prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State.<sup>15</sup>

In C-20/12 *Giersch and Others*, the Court referred to the judgment in C-542/09, where the Court considered that the Netherlands “*had not convincingly explained why the objective pursued could not be attained, in a less restrictive fashion, either by a more flexible rule than the ‘three out of six years’ rule or by taking into account other elements which represent a similar degree of attachment*”<sup>16</sup>.

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<sup>14</sup> C-20/12 *Giersch and Others* para. 77-78, C-238/15 *Verruga* para. 61

<sup>15</sup> C-542/09 *Commission v Netherlands* para. 86

<sup>16</sup> C-20/12 *Giersch and Others* para. 73

It follows from the case-law that periods of residence are considered appropriate for attaining the objective of providing society and the labour market with competent workers.<sup>17</sup> Furthermore, in the case-law referred to only one element was regarded, namely a requirement of residence for three out of the last six years and a general condition to be a resident. Thus, in our opinion, this leads to the conclusion that requirements where only one possible element of attachment is relevant, often will be considered too exclusive, because one element is not necessarily the sole element representative of the actual degree of attachment. It is therefore necessary to take into account other elements which may represent a similar degree of attachment. A requirement of prior residence is thus not in itself disproportionate, only when it is the sole element.

The Norwegian Government finds it reasonable to assume that a person who has lived in Norway for two years within the last five years prior to the education, has a strong enough connection to Norway to make it reasonably likely that he or she will return to Norway after the education. A shorter period of residence, e.g. one year, will in general result in a weaker connection to the society. In the opinion of Norway, a shorter period of residence will make it less likely that the applicant will return to Norway to work after the education, and therefore not be sufficiently able to attain the objective of the scheme. Studies abroad will regularly have a duration of two or three years. If a person studies abroad for considerably longer than the period of residence, the connection to Norway is more likely to be reduced over time, if the student has lived in Norway for only one year prior to the years abroad.

The alternative of a continuous period of residence of two of the last five years, is similar to the requirement as it read before the regulation was amended in 2015. A significant difference is however that the residence element no longer is the “*sole element representative of the actual degree of attachment between the party concerned and that Member State.*”<sup>18</sup> This alternative does therefore not go beyond what is necessary in order to attain the objective.

#### **4.1.3 Schooling or studies in Norway for a total period of three years – point b)**

Under Section 31-5 first paragraph point b), the applicant has the right to student financing if he or she has attended school or studied in Norway for a total period of three years.

This alternative is applicable to applicants who are inter alia migrant workers and their family members, or even frontier workers or their family members, see above under section 4.1.2.

The Authority recalls that the CJEU in C-542/09 *Commission v Netherlands* has ruled that a requirement of prior residence for migrant workers for three out of the last six years is disproportionate. Furthermore, the Authority is of the opinion that the requirement of schooling or studying in Norway could be seen as a disguised requirement of prior residence.

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<sup>17</sup> C-542/09 *Commission v Netherlands*, para. 79, C-20/12 *Giersch and Others*, para. 68, and C-238/15 *Verruga*, para. 58.

<sup>18</sup> C-542/09 *Commission v Netherlands* para. 86

The Norwegian Government's assessment of the residence requirement is mainly the same as above. Furthermore, Norway has had no intention of disguising a requirement of residence in this or other alternatives. As underlined in section 3 of this letter, the alternatives of points a) to e) in the first paragraph of Section 31-5, have several functions. They shall establish a level of connection which in all cases shall be considered sufficient and ensure legal certainty and predictability for the applicants. It is clear that periods of schooling or studying are likely to influence the decision on where to work after the education.

As mentioned above, residence requirements are seen as appropriate by the CJEU. The Authority also agrees with Norway that periods of schooling or studying and residence requirements are considered appropriate for attaining the objective of providing society and the labour market with competent workers.<sup>19</sup>

Norway is of the opinion that there is an essential difference between the residence requirement in case C-542/09, the 'three out of the last six years' rule, and the Norwegian alternative requirement of attending school or studying in Norway for a total period of three years. The Norwegian regulation does not require a three year period during the last six years, but it requires three years in total throughout the applicant's life. In addition, the period of three years does not have to be continuous.

This alternative element of connection was new when the regulation was amended in 2015. The Norwegian Government was of the opinion that if an applicant has attended school or studied in Norway for a certain period of time, it would be more likely that the applicant had a connection to Norway which would make it more likely that he or she would work in Norway after the education.

The Government wanted to ensure that persons who have not lived in Norway during two of the last five years, nevertheless could be able to show a sufficient connection to Norway, considering other relevant elements. The regulation places no relevance to when the schooling or studying took place. Because of this, the alternative of a period of schooling or studying requires a longer duration than residence within the last five years. It is reasonable to assume that when the period is further back in time, the attachment to Norway will be somewhat weaker. In the opinion of Norway, a shorter duration would not in itself attain the objective. This alternative does therefore not go beyond what is necessary in order to attain the objective.

Persons who have attended school in Norway for a shorter period of time, may also have a strong enough connection to Norway to want to establish themselves in Norway after education abroad. The objective of the discretionary assessment in the second paragraph is to ensure that applicants with similar attachment to Norway will be eligible for support.

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<sup>19</sup> RDO para. 76 and case law cited

The Authority claims that the alternative of schooling or studying in Norway could be seen as a disguised requirement of proficiency in the Norwegian language.<sup>20</sup> The requirement of proficiency in the Norwegian language, is further elaborated on below, under point c).

However, Norway would like to point out that we believe that applicants who fulfil the alternative of residence or of schooling/studying must be assumed to have some proficiency in the Norwegian language. This is also mentioned in the public consultation of the proposal from 2015: *“For most of the proposed criteria, it is likely that the applicant is proficient in Norwegian, for example if the applicant has attended school in Norway for three years. For other situations, it is important to set conditions regarding language proficiency”*<sup>21</sup>. This shows that the Norwegian authorities have not intended to hide this. Please bear in mind, also here, that the requirements set in point b) is only one of several alternatives of showing an attachment to Norway sufficient to make it reasonably likely that the applicant will seek employment in Norway.

#### **4.1.4 Family member residing in Norway and Norwegian language proficiency – point c)**

Under Section 31-5 first paragraph point c), the applicant has the right to student financing if he or she has a family member (a child, a partner or a parent) residing in Norway while the applicant is studying abroad. If the applicant’s basis for the right to study financing is derived from a migrant or frontier worker, see Section 2-3 second paragraph, the family member that constitutes the relevant attachment to Norway must be another individual than the person from which the right to student support is derived. The applicant must either live together with the family member in Norway before the education starts or must have lived with the family member for at least two years in Norway or abroad. The applicant must, moreover, be proficient in the Norwegian language.

The alternative of family ties to Norway was added to the regulation when the requirements was amended in 2015. The Norwegian Government’s opinion is that it is more likely that a person will work in Norway after the education abroad, if the person has close family members who live in Norway. If a person lives or has lived together with close family for a certain period of time, and that family member lives in Norway during the applicant’s education abroad, this will probably make it more likely for the student to seek employment in Norway after the education. If a person has other family members in Norway, this will be taken into consideration under the second paragraph.

The Norwegian Government would like to clarify that the alternative way of showing sufficient attachment to Norway as shown in point c), in the same way as the alternatives in point a) and b), is applicable to both migrant workers and their family members. For example, a worker will be eligible after this alternative if the worker has a family member (a child, a

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<sup>20</sup> RDO para. 46

<sup>21</sup> [https://www.regjeringen.no/globalassets/upload/kd/hoeringsdok/2014/14\\_4761/hoeringsnotat.pdf](https://www.regjeringen.no/globalassets/upload/kd/hoeringsdok/2014/14_4761/hoeringsnotat.pdf) page 64

partner or a parent which the worker lives together with or has lived with for two years) residing in Norway while the applicant is studying abroad.

The Authority states that since the right to equal treatment in respect of social advantages is derived from the worker, the requirements for connection to Norway should relate to the situation of the worker and not to that of the family member. Provisions that put additional requirements of connection on family members, such as laid down in points c) of Section 31-5 first paragraph, can therefore not be proportionate.

Norway agrees that the grant of funding for studies to a child of an EEA worker constitutes a social advantage for the worker, and thus, the child himself may rely on that provision in order to obtain that funding. However, it follows from C-20/12 *Giersch and Others* that it is possible to require additional requirements of the student in question. The Court states in *Giersch and Others* that a “sufficient attachment of the student” can be “*derived from the fact that that student resides alone or with his parent in a Member State which borders upon the Member State in question, and that for a significant period of time, the students’ parents have worked in the Member State in question and live near to that Member State*” (emphasis added).<sup>22</sup> This was also followed up in the *Verruga* judgment.<sup>23</sup> Therefore, additional requirements of connection to the Member State on a family member, are not automatically disproportionate.

The Authority claims that the language proficiency requirement serves only as a ground for exclusion of certain students, mainly to the detriment of nationals of other EEA states and their family members, because studies abroad rarely will be pursued in the Norwegian language.<sup>24</sup> It has been established that language requirements are considered appropriate for attaining the objective of the support scheme, and this is the reason why this element is taken into account when assessing an applicant's attachment to Norway. It is not relevant that studies abroad rarely requires proficiency in the Norwegian language, and it is not used as a ground for exclusion of certain students.

The Norwegian language is not widely used, and it can be difficult to learn. The Norwegian labour market is not particularly international. Language proficiency will be important for both integration in society and in working life in Norway, and is acknowledged as a factor that influences where a student would want to work after completing the education. Therefore, we believe it is important to emphasize language skills as a factor that can indicate how likely it is that a person will work in Norway after graduation.

Level B1 under the Common European Framework of Reference for Languages requires the user to be able to understand the main points of clear standard input on familiar matters regularly encountered in work, school, leisure, etc., to deal with most situations likely to arise

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<sup>22</sup> C-20/12 *Giersch and Others*, para 78

<sup>23</sup> C-238/15 *Verruga*, para. 61

<sup>24</sup> RDO para. 50 and 63

while travelling in an area where the language is spoken, to produce simple connected text on topics that are familiar or of personal interest, and to describe experiences and events, dreams, hopes and ambitions and briefly give reasons and explanations for opinions and plans.<sup>25</sup>

The Norwegian Government is of the opinion that language proficiency below this level will make it less likely that a person who has not resided or studied in Norway will seek employment in Norway after the education abroad, and therefore not be able to attain the legitimate objective. This is because a lower level would not make the applicant able to use the Norwegian language in their day to day activities.

Section 31-5 first paragraph point c) does therefore not go beyond what is necessary in order to attain the objective.

#### **4.1.5 Frontier workers – point d)**

Under Section 31-5 first paragraph point d) of the Study Financing Regulation, an applicant who is a frontier worker is eligible for study support abroad if he or she has worked in Norway for at least five years and is proficient in the Norwegian language.

Frontier workers in Norway have the same rights to equal treatment as migrant workers in Norway. Because the frontier worker by definition is resident in another country, the residence alternative will rarely be applicable for frontier workers. As mentioned above, the Norwegian Government therefore found it useful to adopt a specific alternative for frontier workers and their family members, to make it clear that they are eligible for support if they have a certain connection to Norway.

The language requirement is addressed above under section 4.1.4, and the same arguments are relevant here.

The requirement in Section 31-5 first paragraph point d) has been amended with effect from august 2020. The length of time a frontier worker has to work in Norway before the worker is eligible for support, has been reduced from five years to two out of the last five years. We note that the Authority has concluded that this does not change the assessment of the proportionality of the requirements.

The Authority points to the judgment *Verruga* where the CJEU stated that requirements of work for the last five years went beyond what was necessary. In *Aubriet* the CJEU followed up on this and concluded that five of the last seven years, went beyond what was necessary. However, in *Verruga* the CJEU pointed to *Giersch and Others* and stated that the national legislation favoured “*an element which was not necessarily the sole representative element of the actual degree of attachment.*”<sup>26</sup> In *Aubriet* the CJUE stated that taking into account only the requirement of work for five of the last seven years was “*not sufficient to make full*

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<sup>25</sup> The Common European Framework of Reference for Languages, Common Reference levels, Global scale

<sup>26</sup> C-238/15 *Verruga*, para. 60

*assessment of the significance of that cross-border worker's connection*" to that Member State.<sup>27</sup> The case-law therefore indicates that the requirement in itself did not go beyond what was necessary, but that it is not sufficient to take into account only one element of connection to the society. Nonetheless, Norway has, as mentioned, reduced the requirement in point d) from five years to two out of the last five years.

Furthermore, Norway considers that two of the last five years does not go beyond what is necessary. The Court has accepted that a *"frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State"*<sup>28</sup>. The Court accepted that *"the financial aid could be made conditional on the frontier worker, [...], having worked in that Member State for a certain minimum period of time"*<sup>29</sup>. In the opinion of Norway, a lower level than two out of the last five years, e.g. one year, would not attain the legitimate objective.

The Authority also states that the cumulative effect of these conditions goes beyond what is necessary. For a worker who is a resident in Norway the requirement is that the applicant has lived in Norway for a continuous period of two of the last five years. The only additional requirement for a frontier worker is thus the language requirement. Considering that the CJEU has concluded that a frontier worker is not always integrated in the EEA State in the same way as a worker who is a resident and the only additional requirement for a frontier worker is the language requirement, Norway is of the opinion that the cumulative effect does not go beyond what is necessary.

#### **4.1.6 Family members of frontier workers – point e)**

Section 31-5 first paragraph point e) of the Study Financing Regulation provides that, if the applicant is a family member of a frontier worker, he is eligible for study support abroad if the frontier worker has worked in Norway for at least five years, the applicant has lived in another Nordic country during this period and is proficient in the Norwegian language.

The requirement of five years of work and the language requirement is addressed above.

The alternative in point e) for family members requires that the family member has lived in another Nordic country. The Authority's view that provisions which put additional requirements of connection on family members, such as laid down in point e) of Section 31-5 first paragraph, cannot be proportionate, are addressed above under point c) and general comments.

The CJEU has held that *"a sufficient attachment of the student [a child of a frontier worker] in question to the Grand Duchy of Luxembourg, such as to make it possible to conclude that there is a reasonable probability that he will return to settle in and make himself available to the labour market of that Member State, may also be derived from the fact that that student*

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<sup>27</sup> C-410/18 *Aubriet* , para. 45

<sup>28</sup> C-20/12 *Giersch and Others* para. 65

<sup>29</sup> C-20/12 *Giersch and Others* para. 80

*resides alone or with his parents in a Member State which borders upon the Grand Duchy of Luxembourg [the country of work] and that, for a significant period of time, his parents have worked in Luxembourg and live near to that Member State*<sup>30</sup> (emphasis added).

The Nordic countries are Member States “*which borders upon*” Norway. The Nordic countries also have close cultural and historical ties, and Nordic cooperation is one of the world’s most extensive forms of regional collaboration. The Norwegian Government is therefore of the opinion that residence in one of the Nordic countries will affect the student’s decision on where to settle after completing higher education. In our opinion, wording like e.g. “neighbouring country” or “country with strong historical and cultural ties to Norway” would cover the same area. To ensure the principles of transparency and predictability, we opted for the clearest wording.

The Authority concludes that the cumulative effect of the conditions of a period of work, residence in a Nordic country and language requirements, although appropriate, goes beyond what is necessary in order to attain the legitimate objective sought by the Norwegian Government.

As mentioned above, the CJEU has accepted that the “*frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State*”<sup>31</sup>. Because of this, it is necessary to require that some more elements of connection are present, for the applicant to be eligible for support.

The second paragraph will be applied if the applicant has other elements of connection to Norway, or if none of the elements of point e) are strong enough to make the connection sufficient. Section 31-5 first paragraph point e) does therefore not, in the opinion of Norway, go beyond what is necessary in order to attain the objective.

## **4.2 The discretionary assessment**

Section 31-5 second paragraph provides that the applicant alternatively is eligible for study support abroad if he or she, based on an overall discretionary assessment, has a connection to Norway which is considered to be equivalent to the situations covered by the objective criteria in the first paragraph.

The Authority concludes that the assessment under Section 31-5 second paragraph also is too exclusionary, because it requires a connection to Norway which is equivalent to the situations covered by the objective criteria under the first paragraph.

It is the Norwegian Government’s opinion that the discretionary assessment in the second paragraph is not too exclusionary. Moreover, it does not require a disproportional level of attachment.

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<sup>30</sup> C-238/15 *Verruga* para. 61, C-20/12 *Giersch and Others* para.78

<sup>31</sup> C-20/12 *Giersch and Others* para. 65



As further described below, the discretionary assessment takes into account all elements that may demonstrate an attachment to the Norwegian society. Unlike the CJEU-cases mentioned above in section 2, where the CJEU rejected the conditions as too exclusionary, there is not one sole element deciding the students' attachment to the Norwegian society. In accordance with the CJEU case law, the discretionary assessment in the second paragraph, including all relevant elements, is suited to decide the actual degree of attachment between the applicant and Norway, and is not too exclusionary.

To avoid the exclusion of applicants with a similar connection to Norway, the second paragraph shall be applied in all cases where none of the alternatives in the first paragraph is fulfilled. Under the second paragraph, the applicant will be eligible for support if the applicant has a connection to Norway that after a discretionary assessment is considered similar to the connection under the first paragraph.

This assessment covers a range of different situations, from cases where one or more of the objective criteria are almost fulfilled, to cases where none of the elements of connection in the first paragraph are present. If the student almost fulfils the objective criteria, this will influence the assessment under the second paragraph. In such cases, few other elements of connection are necessary to be eligible for support. If the objective criteria are partly fulfilled, these circumstances combined could represent a sufficient connection. If none of the circumstances described in the objective criteria are present, it is necessary to show other elements of connection to Norway.

As mentioned, there are no limitations to which elements that are considered relevant. NSELF describes circumstances from actual cases such as summer vacations in Norway, Norwegian driving license, parents work for Norwegian company abroad, sister/brother/grandparents live in Norway, the family owns a holiday home in Norway, summer jobs in Norway, the student owns a Norwegian national costume etc.

The circumstances in the individual case may lead to the conclusion that the connection to Norway is similar to or even stronger than the situation under the objective criteria. If this is the case, it is in accordance with the objective of the support scheme to grant support.

Following the dialogue with the Authority, the Norwegian Government has amended the second paragraph to better the clarity of the provision and to reduce the ambiguities as far as possible without removing the discretionary assessment.

From august 2020, The Ministry has changed the wording in the first sentence of the second paragraph from "*tilsvarende tilknytning*" to "*tilstrekkelig tilknytning*". "*Tilsvarende*" translates as corresponding, equivalent or similar. "*Tilstrekkelig*" translates as sufficient, adequate or enough.

The purpose of this change is to clarify the relationship between the first and second paragraph, to make it clearer that it does not in any way negate other factors that may be relevant. The wording "*tilsvarende tilknytning*" could be misunderstood as requiring the exact

same connection as under the first paragraph. This is not the case. The Authority's position that the second paragraph is too strict due to it requiring an equivalent connection, takes the assumption of a narrow interpretation of the paragraph. On the contrary, the second paragraph in reality safeguards the rights of EEA nationals to receive study grant financing in cases where their connection is not typical with that of Norwegian nationals.

The inclusion of the reference to the purpose of the student support scheme makes it clear that the connection between the applicant and Norway must be of a nature which makes it probable that the recipients will return to Norway to work after they have finished their education.

The amendments clarifies that partly fulfilled criteria under the first paragraph may be combined with other factors to show a sufficient connection. Thus, the connection to Norway might be sufficient if one of the objective criteria are partly fulfilled and there are other factors present that show a connection to Norway. An example of this is if the applicant has lived in Norway one of the last five years and has been on holidays in Norway or lived in Norway in earlier periods. The connection to Norway might also be sufficient if the applicant partly fulfils several of the objective criteria, for example if the applicant has lived in Norway for one year and attended school in Norway for two years.

Finally, the amendments clarify that all factors that show a connection to Norway must be considered in the assessment, and examples of such factors are included in the paragraph.

To ensure that all factors which may show a connection to Norway are taken into account, there has to be a possibility for a discretionary assessment in each individual case. The Norwegian Government is of the opinion that the regulation meets the requirements of legal certainty, and that it does not leave too much discretion in the hands of the national authorities.

## **5 Alternative measures**

The Authority points out that the Court in *C-20/12 Giersch and Others* noted that, where the aid granted consists in, for example, a loan, a system of financing which made the grant of that loan, or even the outstanding balance thereof, or its non-reimbursement, conditional on the student who receives it returning to that State after his studies abroad in order to work and reside there, could attain the objective pursued, without adversely affecting the children of migrant and frontier workers. In addition, the risk of duplication with equivalent financial aid paid in the EEA State in which the student resides, with or without his parents, could be avoided by taking that aid into account in the grant of the aid paid by the EEA State concerned. Without implying that these possibilities would be appropriate in the present case, the Authority is of the opinion that this indicates that there is some leeway for setting conditions which are less restrictive of free movement.

The CJEU has ruled that *"the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective*

*pursued to be attained under the same conditions*<sup>32</sup>. Nevertheless, the national authorities must “*at least show why it opted [for the requirements], to the exclusion of all other representative elements*”<sup>33</sup>.

Norway considers that the current Norwegian student support scheme for studies abroad is in accordance with EEA law, as demonstrated above. The Norwegian requirements are implemented to make sure that a “full assessment of the significance” of the applicant’s connection to Norway is considered. The actual degree of attachment is therefore considered in each case, and Section 31-5 is not too exclusionary. Nevertheless, the Government will comment on the possible leeway for setting alternative conditions for support for education abroad.

There are many considerations to take into account when designing a student support scheme, and the most important thing is that the scheme overall promotes the statutory and political aim of the scheme. In principle, a support scheme for education abroad can be designed to achieve the objective of the student support for education abroad in two ways:

- By requirements prior to the education, e.g. requirements which in some way supports students who are more likely to work in Norway
- By requirements after the education is completed, e.g. by providing incentives for the student to work in Norway after the education

The Norwegian Government has not considered to reform the student support scheme to introduce economic incentives for work in Norway after the studies. This would be a major change to the support scheme, and it would require thorough considerations of legal and political questions, as well as economic and administrative consequences.

In theory, economic incentives for working in Norway after graduation can be formulated in several ways, for example as a loan waiver scheme, subject to conditions that the recipient worked in Norway for a certain period of time after completing the education.

Common to all solutions is that the incentives must be of a certain strength to influence the recipient's choice of where to work after the education, since there are several other factors that will strongly influence this choice.

Students who, under the current scheme receive support from Norway for education abroad, have significant freedom to make their own choices when deciding where they want to work. This is an important part of a scheme intended to promote international student mobility. Mobility in education and training is an integral part of freedom of movement for persons and is also one of the main objectives of the European Union.<sup>34</sup>

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<sup>32</sup> C-542/09 *Commission v Netherlands* para. 85 and case law cited

<sup>33</sup> C-542/09 *Commission v Netherlands* para. 86 and case law cited

<sup>34</sup> C-542/09 *Commission v Netherlands* para. 71

A scheme that provides economic incentives to work in Norway after graduation will have negative financial consequences if one wants to work abroad after graduation. The Norwegian Government have no doubt that this will be seen as a weakening of the support scheme for education abroad. This will have an impact on the students' choices, and fewer will probably take their education abroad. With a return rate under current rules of about 80 per cent after four to five years, a weakening of the support scheme for all students seems like an unnecessary measure. A negative change of the support scheme for education abroad will go against the Norwegian Government's policy of a high proportion of student mobility.

In such a scheme, one must expect an increasing number of recipients who have a large loan in Norway to be repaid on Norwegian terms. Recipients residing in countries with lower income levels than in Norway may face challenges in paying off the student loan even though they are in a full-time job.

In addition to this, economic incentives which aim to influence an EEA worker's decision on where to work, would have to be in accordance with EEA law on the freedom of movement for workers.

## 6 Closing remarks

The Norwegian Government is of the opinion that the requirements of Section 31-5 is in accordance with EEA law. The aim of providing society and the labour market with competent workers is an overriding reason relating to the public interest capable of justifying a restriction on the free movement of workers, the measures are appropriate for attaining that objective, and they do not go beyond what is necessary to attain the legitimate objective sought by the Norwegian Government. The requirements of the Study Financing Regulation are substantially different from the case law from the CJEU, most importantly because all cases in which the applicant does not fulfil any of the alternatives in the first paragraph, any other element of connection shall be considered under the second paragraph. Thus, Norway did not opt for the criteria in Section 31-5 *“to the exclusion of all other elements.”* The Norwegian requirements are implemented to make sure that a *“full assessment of the significance”* of the applicant's connection to Norway is considered.<sup>35</sup> The rule is not exclusive in the meaning that there is not one sole element deciding the students' attachment to the Norwegian society. The *“actual degree of attachment”* between the applicant and Norway is therefore considered in each case.<sup>36</sup>

The Court has emphasised that a rule which is neither flexible nor take into account other elements which represent a sufficient degree of attachment is disproportionate.<sup>37</sup> The Norwegian rule is on the contrary both flexible and it takes into account several elements which represent a sufficient degree of attachment to Norway.

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<sup>35</sup> C-410/18 *Aubriet* , para. 45

<sup>36</sup> C-542/09 *Commission v Netherlands* para. 86

<sup>37</sup> C-20/12 *Giersch and Others* para. 73

The Norwegian Government holds the view that the requirements do not go beyond what is necessary to attain the objective sought. The students who meet the requirements have demonstrated a sufficiently strong attachment to the Norwegian society, so that it is likely that they will seek employment in Norway after completing the education abroad.

Yours sincerely

Hege Nygård  
Director General

Ellen Carine Smogeli  
Specialist Director

*This document is signed electronically and has therefore no handwritten signature*