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Cases No: 77290, 77291 and 78800
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EFTA SURVEILLANCE AUTHORITY

Ministry of Finance
P.O. Box 8008 Dep,
NO-0030 Oslo,
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the reporting obligation when contracts are awarded to non-Norwegian contractors

1 Introduction

1. By letters dated 4 May 2015 (Doc. No 755789 and 755790) and 15 March 2016 (Doc. No 797069), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had received complaints against Norway concerning the reporting obligation when contracts are awarded to non-Norwegian contractors.
2. In particular, Norway requires to report to the Norwegian tax authorities information related to all contracts worth at least NOK 10 000 awarded to non-Norwegian contractors at the latest within 14 days of commencement of the work in Norway ("the reporting obligation").
3. In the present letter of formal notice, the Authority considers that the reporting obligation goes beyond what is required by the overriding reasons related to the public interest referred to by the Norwegian Government and, therefore, is in breach of the Services Directive[1] or, in the alternative, Article 36 EEA.
4. Although the Norwegian Government admitted that the reporting obligation constituted a restriction on the provision of services, it nevertheless argues that the reporting obligation is justified and, therefore, compliant with EEA law. It undertook, however, a review of the legislation establishing the reporting obligation with the aim to reduce its scope. On 11 October 2016, the Norwegian Government published a discussion paper proposing several amendments to the reporting obligation[2].
5. The Authority notes that the amendments suggested by Norway in the discussion paper reflect the willingness on the part of the Norwegian Government to take steps to solve the issue at hand. However, the amendments are not yet in force and therefore it

[1] Act referred to at point 1 of Annex X to the EEA Agreement (*Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*), as adapted to the EEA Agreement by Protocol 1 thereto.
[2] The discussion paper and other relevant documents may be found here: https://www.regjeringen.no/no/dokumenter/horing—forslag-om-endring-av-reglene-om- rapportering-av-utenlandske-oppdragstakere-og-arbeidstakere-til-sentralskattekontoret-for- utenlandssaker/id2515389/ [checked on 13 October 2016].

is not clear what will be the exact content of the reporting obligation and whether the suggested reduction of the obligation would be sufficient to resolve the concerns raised under EEA law.

2 Correspondence

6. By letter of 9 June 2015 (Doc. No 759389), the Authority requested information from the Norwegian Government regarding the applicable Norwegian rules and the justification for these rules.
7. After an extension of the deadline, the Norwegian Government responded to the request for information by letter of 20 August 2015 (ref. 15/1761 SL HLY/KR, Doc. No 770239 and 770241).
8. The case was discussed at the package meeting of 12-13 November 2015 in Oslo[3]. Further information regarding the imposition of penalties was provided by letter dated 8 January 2016 (ref. 15/1761 SL HLY/KR, Doc. No 787241).
9. On 13 January 2016 (Doc. No 771934), the Authority's Internal Market Affairs Directorate sent a Pre-Article 31 letter to Norway. The Directorate's preliminary conclusion was that by maintaining in force such national provisions, as the provisions establishing the reporting obligation, which went beyond the aim to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection, Norway failed to comply with its obligations under Article 16(1), Article 16(2)(b) and Article 19(a), in conjunction with Article 16(2)(g), of the Services Directive or, in the alternative, with its obligations under Article 36 EEA.
10. The Norwegian Government replied to the Pre-Article 31 letter by letter of 19 February 2016 (ref. 15/1761 SL/KR, Doc. No 793881 and 793882).
11. By letter of 12 October 2016 (ref. 15/1761 SL HLY/KR, Doc. No 822109), the Norwegian Government informed the Authority that on 11 October 2016, it published a discussion paper proposing several amendments to the reporting obligation. Based on the assessment of the observations from the public hearing, the Norwegian Government intends to propose legislative amendments to the Parliament during the first Parliamentary session in 2017.
12. The case was discussed at the package meeting of 27-28 October 2016 in Oslo[4].

3 Relevant national law

13. The reporting obligation is established by the Norwegian Tax Assessment Act[5] ("the TAA") and the Regulation on Third Party Reporting Obligations[6]. No such reporting obligation exists where a contract is awarded to a Norwegian contractor.
14. In particular, under Section 5-6 of the TAA and the detailed provisions of Section 5-6 of the TAA laid down in Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations, certain information regarding non-Norwegian contractors and employees shall be submitted to the Norwegian Central Office - Foreign Tax Affairs ("COFTA") at the latest within 14 days of commencement of the work in Norway.

[3] See the follow-up letter to the package meeting (Doc. No 781498 in Case No 77692).
[4] See the follow-up letter to the package meeting (Doc. No 824382 in Case No 79432).
[5] LOV-1980-06-13-24.
[6] FOR-2013-09-17-1092.

15. The obligation to report rests upon (1) the Norwegian entity (principal) that has awarded the contract to the non-Norwegian contractor, (2) any entity in the contract-chain above the principal, as well as (3) the non-Norwegian contractor itself. Thus the obligation to report one and the same contract may rest upon several entities, and they are all jointly and severally liable for carrying out the reporting.

16. The reporting obligation implies the reporting on (1) the contract, (2) the non-Norwegian contractor and (3) the employees assigned to work in Norway under the contract.

17. The reporting obligation encompasses the provision of information on all contracts and subcontracts awarded to an undertaking resident abroad or a person resident abroad, provided that the contract is performed:

    - on a site for building and assembly work in Norway, or

    - on a site that is under the client's control in Norway, or

    - on the Norwegian continental shelf.

18. As far as the principal entity and entities above are concerned, the reporting obligation implies providing information on the contract, the non-resident contractor and employees assigned to work in Norway under the contract. The non-resident contractor is, however, only obliged to provide information on the employees, and the contractor itself (Section 5-6 paragraph 1 sentence 3 of the TAA).

19. The reporting is either filed electronically or in paper format using a form called RF-1199.

20. Non-compliance or late-filing of the RF-1199 form is sanctioned by enforcement fines (Section 10-6 of the TAA) and penalties (Section 10-8 of the TAA). According to Section 10-6 paragraph 3 of the TAA the enforcement fines can be collected from the board members as well as from the entity itself. In addition, providing the tax authorities with incomplete or incorrect information can be sanctioned by fines or imprisonment (Section 12-1 of the TAA).

21. The principal may also risk liability for the foreign contractor's taxes and national insurance contributions. According to Section 10-7 of the TAA, subject to certain conditions (for example, gross negligence), the principal may be held liable for direct and indirect taxes that the foreign contractor has failed to pay.

22. Detailed provisions for the application of fines and penalties are laid down in the Regulation on penalties for late filing and inadequate or incorrect compliance with the obligation in Section 5-6 paragraphs 1 and 2 of the Tax Assessment Act cf. No 3[7] ("the Regulation on penalties").

23. Based on this Regulation, the penalty for late filing is currently NOK 150 per day per contract (capped at NOK 75 000 per contract), and NOK 30 per day per employee (capped at NOK 15 000 per employee).

24. Section 5 of the Regulation on penalties states that enforcement fines and penalties may not be imposed cumulatively for the same period of time.

25. Moreover, penalties for non-compliance may only be imposed once for each breach of the regulations. This implies that if a penalty is imposed on any of the entities, and the penalty is paid by that entity (or any other entities), other entities with a reporting obligation cannot be sanctioned (Section 2 paragraph 3 sentence 1 of the Regulation

[7] FOR-1994-07-14-725.

on penalties). However, all the entities concerned are jointly and severally liable for the proper payment of the penalty.

26. Penalties may not be imposed on an entity if any of the other entities has fulfilled the reporting obligation within the time limit (Section 4 sentence 1 of the Regulation on penalties).

27. Section 4 sentence 2 and sentence 3 of the Regulation on penalties contain provisions regarding mitigation of imposed penalties. Penalties may be reduced or withdrawn if the entity proves that it cannot be blamed for the breach of the reporting obligation. Penalties shall be withdrawn if the entity proves that the concerned contractor or employee has filed a timely tax return and the relevant tax obligations are fully met at the time the deficient reporting is discovered. According to the Norwegian Government, the objective of the provisions regarding mitigation is to prevent imposition of penalties in cases where such a response would be unreasonable and cases where there is no or limited risk of tax evasion.

4 Relevant EEA law

28. According to Article 36 EEA there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EU Member States and EFTA States who are established in an EU Member State or an EFTA State other than that of the person for whom the services are intended.

29. Article 2 of the Services Directive defines the scope of the Directive. Its paragraph 3 reads as follows:

"*This Directive shall not apply to the field of taxation.*"

30. Article 16 of the Services Directive, entitled "*Freedom to provide services*", states:

"*1. <…> Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:*

non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

<…>

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

<…>

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirement with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements. <…>".

31. Article 19 of the Services Directive, which features in Chapter IV, Section 2, thereof, relating to rights of recipients of services in the context of the free movement of services, is entitled "*Prohibited restrictions*". This article provides that:

"*Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:*

(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;

<…>."

5 The Authority's assessment

5.1 Application of the Services Directive

5.1.1 The scope of the Services Directive

32. The Norwegian Government argues that the reporting obligation pursues aims connected with taxation. In particular, it claims that the purpose of the national provisions at issue is to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection. According to the Norwegian Government, the reporting obligation contributes to correct taxation in Norway and a correct allocation of tax between Norway where the service is provided and the State where the contractor is resident.

33. According to Article 2 paragraph 3 of the Services Directive, taxation does not fall within the scope of the Directive. The Norwegian Government claims therefore that the Services Directive is not applicable.

34. The Norwegian Government states that it is the case even if the TAA and the Regulation on Third Party Reporting Obligations do not regulate the contractor's tax liability in Norway as such. This is because any tax system must have procedural rules regulating assessment and collection of taxes that ensure the effectiveness of regulations regarding tax liability.

35. The Authority notes that even if Article 2 paragraph 3 of the Services Directive encompasses, in general, administrative requirements necessary for the enforcement of tax laws[8], the limitations of the Services Directive's scope have to be interpreted strictly[9].

36. This means that EEA States cannot simply state that any national provision is justified on the grounds connected with taxation in order for this provision to fall outside the scope of the Services Directive.

[8] Handbook on the implementation of the Services Directive, point 2.1.3.
[9] See, for example, judgment in *Hiebler* C-293/14, EU:C:2015:472, paragraphs 31-45.

37. National legislation of an EEA State could be justified on the grounds connected with taxation and could fall outside the scrutiny of the Services Directive only to the extent it indeed pursues aims connected with taxation and does not impose restrictions on the cross border provision of services which go beyond what is strictly necessary to achieve the intended purpose[10].

38. However, in the view of the Authority, this is not the case as regards the reporting obligation for three main reasons.

39. First, the information at issue must be reported to COFTA irrespective of whether the foreign contractor or employees are subject to tax in Norway and irrespective of the duration of the contract.

40. Therefore, as there is no direct link to the payment of taxes, Norway cannot claim that the reporting obligation is exclusively connected with taxation.

41. The Norwegian Government states that even small contracts and contracts of short duration might be liable to taxes in Norway. Moreover, small contracts and contracts of short duration may be relevant for the tax authorities because a number of such contracts combined together may result in tax liability.

42. The Authority considers however that its argument in paragraph 39 is not altered, as it concerns in particular the contracts which *are not liable to tax* in Norway despite of their value and/or duration.

43. The Norwegian Government has moreover admitted that the reporting obligation is also necessary to ensure that other obligations, such as the obligation for all service providers to register in the National Coordinated Register, are complied with.

44. Second, the reporting obligation rests not only on the foreign contractor who might become liable to taxation in Norway, but also on the Norwegian entity (principal and any entity in the contract chain above the principal) who has awarded the contract to a non-Norwegian contractor and whose situation as regards taxation does not change just because of the award of the contract.

45. The Norwegian Government claims that the information from the Norwegian entity is necessary to verify the information submitted by the non-Norwegian contractor. In this respect it cites two OECD reports[11] describing third party information and reports as an important tool to verify the information reported by taxpayers.

46. The Authority notes however that the OECD reports do not deal with the issue of free movement of services within the internal market whereby EEA States have an obligation to restrain from discriminating service providers from other EEA States and to abolish all restrictions for the provision of services across borders. The present letter of formal notice does not concern the way the national tax authorities function and collect information in general but rather the issue whether, while exercising their functions, they deter Norwegian recipients from receiving services provided by non-Norwegian contractors and also deter non-Norwegian contractors from providing services in Norway.

47. Therefore, although the Norwegian tax authorities are, of course, permitted to resort to such a verification tool as third party reporting, they have to respect the general

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[10] See, by analogy, judgment in *Hiebler* C-293/14, cited above, paragraph 33.

[11] "*Tax Administration 2015 - Comparative information on OECD and other advanced and emerging economies*" (see http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/tax-administration-2015_tax_admin-2015-en#.WCBapel0yUk) and "*Withholding & Information Reporting Regimes for Small/Medium-sized Businesses & Self-employed Taxpayers*" (see http://www.oecd.org/tax/administration/48449751.pdf).

principles of EEA law and not hinder the free provision of services through such verification process.

48. If the reporting obligation was only necessary for taxation purposes, the main part of the reporting obligation would rest on the non-Norwegian contractor. The scope of the information required from the Norwegian recipient, however, goes beyond what is requested from the non-Norwegian contractor. The Norwegian recipient has to provide information on the contract, the non-Norwegian contractor and employees assigned to work in Norway under the contract whereas the non-Norwegian contractor is only obliged to provide information on the employees.

49. It is moreover not clear why the obligation to report applies to all entities in the contract-chain above the principal meaning that the same information must be submitted to tax authorities by several entities.

50. Therefore, it is not correct to state that the reporting obligation resting on the recipient of services serves only as a verification tool. It would rather seem to be a disguised deterrence from using services provided by non-Norwegian contractors.

51. The Norwegian Government also refers to withholding tax regimes where taxes are imposed on recipients, and not the entity with the withholding obligation, which have been accepted by the Court of Justice of the European Union ("the Court of Justice") on several occasions[12] and claims that a withholding tax system would be even more burdensome for the entities and the contractors, as well as the tax authorities.

52. That does not, however, detract from the fact that the reporting obligation goes beyond what is necessary in order to attain the objectives connected with taxation. Moreover, it could be noted that in its judgment in *Commission* v *Belgium* C-433/04[13], the Court of Justice held that the withholding tax regime applied by Belgium to service providers who were not established and registered in Belgium was contrary to the freedom to provide services.

53. Finally, the information must be submitted to COFTA regardless of whether the taxes were correctly payed by the contractor and/or the employees. Penalties are withdrawn only if it is proved that the concerned contractor or employee has filed a timely tax return and the relevant tax obligations are fully met at the time the deficient reporting is discovered. It seems, therefore, that the reporting obligation is a separate independent obligation from the obligation to pay taxes and goes beyond what is necessary in pursuit of fiscal supervision, prevention of tax evasion and effective tax collection. The fact that the reporting obligation goes beyond what is required by fiscal supervision is also demonstrated by the fact that, as also mentioned by the Norwegian Government, the reporting obligation does not relieve the contractor concerned from the "*ordinary*" obligations to file a tax return, statement of wages and advance tax deduction, *etc.*, in arrears.

54. The Authority considers that in order to claim that the reporting obligation is only necessary to ensure correct payment of taxes there should be a direct link between the reporting obligation and the obligation to pay taxes. For example, a non-Norwegian service provider should not be sanctioned for non-reporting, if the national tax authorities possess information that the taxes were paid in due time. However, as admitted also by the Norwegian Government, the reporting obligation is a separate independent obligation, non-compliance with which may result in penalties irrespective of whether the taxes were paid.

[12] Judgments in *FKP Scorpio Konzertproduktionen* C-290/04, EU:C:2006:630, paragraph 36; *Strojírny Prostějov* C-53/13 and C-80/13, EU:C:2014:2011, paragraph 47.
[13] Judgment in *Commission* v *Belgium* C-433/04, EU:C:2006:702.

55. It must therefore be concluded that provisions such as Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations establishing the reporting obligation go beyond the aim to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection and, for this reason, fall within the scope of the Services Directive.

56. It is necessary therefore to assess whether such national provisions, as they go beyond the aim to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection, are compatible with the Services Directive.

5.1.2 Breach of Articles 16 and 19 of the Services Directive

57. The national legislation imposes obligations both on the recipient of services and the service provider.

58. As regards the recipient of services, the Directive provides at Article 19(a) that EEA States cannot impose obligations on service recipients to make a declaration or to obtain an authorisation when wishing to receive services from providers established in another EEA State. It has to be noted in this respect that the reporting obligation under Norwegian law rests on the recipient of services only in the case of the use of a service from another EEA State.

59. No possibility for justification is provided for with regard to the "*prohibited*" restrictions listed in Article 19 of the Services Directive.

60. Therefore, the national legislation imposing the reporting obligation on the recipient of services is in breach of Article 19(a) of the Services Directive.

61. As regards the provider of the services, Article 16(2)(g) refers to Article 19 of the Directive. Restrictions listed in Article 19 also impact on service providers wishing to provide a service to customers in another EEA State. These requirements, although not imposed directly on the provider but rather on his (possible) clients, deter potential recipients from using service providers from other EEA States or in certain cases even make it impossible for them to do so.

62. Moreover, Article 16(2)(b) of the Directive does not allow EEA States to restrict the freedom to provide services by imposing an obligation on a provider established in another EEA State to obtain an authorisation from their competent authorities, except when it is necessary for reasons of public policy, public security, public health or the protection of the environment (see Article 16(3) of the Directive). Furthermore, in accordance with Article 16(1), such a restriction must be non-discriminatory, necessary and proportionate to the objective sought (see Article 16(1)(a) - (c))[14]. Finally, in accordance with Article 16(3), an EEA State shall not be prevented from applying, in accordance with EEA law, its rules on employment conditions.

63. However, none of those justification grounds have been referred to by the Norwegian Government in the case at issue.

64. In any case, the reporting obligation for the service provider does not comply with the requirements of Article 16(1)(a) and is discriminatory, *i. e.* only non-Norwegian service providers are obliged to report employees used to carry out an assignment under each contract concluded with a Norwegian recipient, and the non-Norwegian contractor on whom this obligation is imposed will almost invariably be a person established outside Norway. According to Article 16(1)(a) any measure directly or

[14] Case E-6/15 *ESA* v *Norway* [2015] EFTA Ct. Rep. 484, paragraph 51.

indirectly discriminatory must be considered contrary to the Services Directive. Consequently, the restriction imposed by the Norwegian measure cannot be justified under Article 16(3).

65. The Norwegian Government argues that the provisions concerning reporting obligations are not directly discriminatory. A non-Norwegian contractor under these provisions should be understood as a non-Norwegian resident for tax purposes, which should not be confused with a contractor established outside Norway.

66. The Norwegian Government explains that if a contractor is a natural person, the country of residence, according to Norwegian tax legislation, depends on the length of his or her stay in Norway (see Section 2-1 paragraphs 2 to 8 of the Tax Act). If the contractor is a legal person, the country of residence, according to Norwegian tax legislation and case law, will be determined on the basis of several circumstances. Whether the company is lead from Norway and, in particular, whether the board carries out its activity in Norway is decisive in making this assessment. Formal circumstances, such as the place of establishment, incorporation or registration, may also in certain situations have an impact on such assessment (*i. e.* where a company that is established under Norwegian company law claims migration abroad). The Norwegian Government therefore argues that the reporting obligation in Section 5-6 of the TAA does not depend on whether the contractor is a Norwegian national or a legal person established or registered in Norway.

67. The Authority understands from this explanation that in certain circumstances a legal or natural person established or registered outside of Norway can be considered as a Norwegian resident for tax purposes. This would mean that it would fall outside the scope of the reporting obligation even though it is based outside of Norway.

68. However, the fact that a person established outside Norway in certain cases will not be subject to the obligation to report a contract does not remove the difference in treatment accorded to Norwegian and foreign nationals. The cases where a person established outside Norway will not be subject to the reporting obligation will be very rare and most of the contracts with the service providers established outside Norway will still have to be reported to COFTA.

69. Therefore, the national legislation imposing the reporting obligation on the service provider is in breach of Article 19(a) and Article 16(1), Article 16(2)(b) and Article 19(a), in conjunction with Article 16(2)(g), of the Services Directive.

70. It follows therefore that by maintaining in force provisions such as Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations, whereby it is required to report to the Norwegian tax authorities information related to all contracts worth at least NOK 10 000 awarded to non-Norwegian contractors, in so far as they go beyond the aim to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection, Norway has failed to comply with its obligations under Article 19(a) and Article 16(1), Article 16(2)(b) and Article 19(a), in conjunction with Article 16(2)(g), of the Services Directive.

5.2 Restriction of the freedom to provide services

5.2.1 The existence of a restriction

71. Even if it were considered that the Norwegian provisions establishing the reporting obligation, or a part of them, fell outside the scope of the Services Directive, it has to be assessed whether they are allowed under Article 36 EEA.

72. The Norwegian Government claims that the case law of the Court of Justice and of the EFTA Court has accepted different treatment of resident and non-resident tax payers, as they might not be in comparable situations[15].

73. It is true that, in relation to direct taxes the Court of Justice and the EFTA Courts allow, in principle, a distinction between residents and non-residents; they consider that the situations of residents and non-residents are, as a rule, not comparable[16]. The Court of Justice has moreover held that, as regards the ability of the authorities of the Member State in whose territory services are supplied to check that the rules intended to ensure that the rights conferred by national law on workers in its territory are followed, there are, clearly, objective differences between business established in the Member State where the services are supplied and those established in other Member States posting workers to the first Member States to supply services there[17].

74. However, according to settled case law Article 36 EEA prohibits any restriction on the freedom to provide services, even if it applies without distinction to national providers of services and to those of other EEA States, which is liable to prohibit, impede or render less advantageous the activities of service providers from other EEA States who lawfully provide similar services in their EEA State of origin[18].

75. Furthermore, it is settled case law that Article 36 EEA confers rights not only on the provider of services but also on the recipient[19]. The Norwegian recipients of services cannot be considered as being not in comparable situations just because they resort to services of resident or non-resident tax payers[20].

76. Therefore, with regard to the existence of a restriction under Article 36 EEA, it follows unequivocally from the case law of the Court of Justice and the EFTA Court that provisions such as the ones at issue in the present case restrict the freedom to provide services. The restrictions in this case concern two categories of persons/entities: first, service providers who have to provide information to the tax authorities, as it renders more difficult the provision of services in Norway, and second, service recipients who have to perform specific reporting obligations if they want to use services of a non-Norwegian contractor, as it implies additional administrative burdens on them.

77. The Norwegian Government has admitted that the legislation laid down in Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations constitutes a restriction on the provision of services, prohibited in principle by the EEA Agreement.

78. It has to be established therefore whether the legislation at issue could be justified on overriding reasons relating to the public interest and whether such restriction is proportionate.

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[15] The Norwegian Government refers in this respect to, among others, judgments in *Schumacker* C-279/93, EU:C:1995:31, paragraph 33; *Wielocx* C-80/94, EU:C:1995:271, paragraphs 17-19; *Commission* v *Belgium* C-577/10, EU:C:2012:814, paragraph 48.

[16] Judgment in *Commission* v *Estonia*, C-39/10, EU:C:2012:282, paragraph 49 and the case law cited therein. See also to this effect Case E-26/13 *Gunnarsson*, cited above, paragraph 86.

[17] Judgment in *Commission* v *Belgium* C-577/10, cited above, paragraph 48.

[18] Judgment in *Commission* v *Belgium*, C-433/04, cited above, paragraph 28. Judgment in *SIAT*, C-318/10, EU:C:2012:415, paragraph 18 and the case law cited therein.

[19] Judgment in *SIAT*, C-318/10, cited above, paragraph 19 and the case law cited therein.

[20] See judgment in *SIAT*, cited before, paragraphs 32 and 33. See also judgment in *Strojírny Prostějov* C-53/13 and C-80/13, EU:C:2014:2011, paragraph 40.

5.2.2 Justifications and proportionality

79. It is clear from the case law that a restriction on the freedom to provide services is regarded as warranted only if it pursues a legitimate objective compatible with the EEA Agreement and is justified by overriding reasons relating to the public interest, in which case it must be suitable for securing the attainment of that objective and must not go beyond what is necessary in order to do so[21].

80. Norway argues that the provisions at issue could be justified on the basis of the need to ensure fiscal supervision, prevent tax evasion (fight against tax fraud) and ensure effective tax collection.

81. The Norwegian Government submitted various arguments, in its view, confirming that the reporting obligation is appropriate for attaining the objectives sought and that the objectives of the reporting obligation cannot be achieved by less restrictive measures.

82. In particular, the Norwegian Government claims, first, that, based on the information provided according to Section 5-6 of the TAA, the tax authorities are able to create and maintain an overview of non-resident taxpayers, similar to the one they have of resident taxpayers and that such an overview cannot be established on the basis of other existing information sources.

83. Second, according to Section 4 of the Coordinated Register Act[22], all non-resident contractors operating in Norway are obliged to register in the National Coordinated Register. By receiving information according to Section 5-6 of the TAA, the national authorities are in a position to send non-compliant contractors a reminder of this registration requirement.

84. Third, the possession, by the tax authorities, of an overview at an early point in time enables them to supervise whether obligations that are to be performed prior to or at the same time as the contract is performed (such as the contractor's obligation to withhold tax from wages, worker's obligation to get a personal identity number and a tax withholding card) are fulfilled.

85. Finally, the reporting obligation allows tax authorities to take note of the events giving rise to the tax for which the non-resident contractors and their workers are liable. The Norwegian Government relies, moreover, on, *inter alia*, the judgment of the Court of Justice in *Futura* stating that Members States may apply measures which enable the amount of both the income taxable in that State and the losses which can be carried forward to be ascertained clearly and precisely[23].

86. According to the Norwegian Government, it has deemed necessary to let parts of the reporting obligation rest upon the principal in addition to the contractor. In support thereof the Norwegian Government presented statistical data showing that a higher proportion of non-resident contractors failed to file information about wages to their employees and tax returns compared to resident employers. The Norwegian Government claims that the traditional function of third party reporting obligation is to supplement, not substitute, information given by the taxpayer, *i. e.* to verify information given by the taxpayer. It is moreover necessary to support the reporting obligation with regulations regarding sanctions in cases of breach in order to make them effective.

[21] Judgment in *SIAT*, C-318/10, cited above, paragraph 34 and the case law cited therein.
[22] LOV-1994-06-13-15.
[23] Judgment in *Futura* C-250/95, EU:C:1997:239, paragraph 31.

87. Admittedly, the need to ensure fiscal supervision, prevent tax evasion, ensure effective tax collection and the more general justification "*the fight against tax fraud*" could be considered as overriding reasons relating to the public interest capable of justifying a restriction on the freedom to provide services under Article 36 EEA[24].

88. As regards the objective to ensure tax control, as has been already noted, first, the information at issue must be reported to COFTA irrespective of whether the foreign contractor or employees are subject to tax in Norway and irrespective of the duration of the contract. The information must be reported even in cases where it is clear at the outset that tax liability in Norway will not arise. The obligation therefore clearly goes beyond its purpose[25].

89. Second, the reporting obligation rests not only on the foreign contractor who might become liable to tax to Norway, but also on the Norwegian entity (principal and any entity in the contract chain above the principal) who has awarded the contract to the non-Norwegian contractor. In some cases (concerning contract chains) it might be very difficult for a Norwegian entity to fulfil such an obligation. Such an obligation, together with the corresponding threat of fines and penalties and joint and several liability for the foreign contractor's taxes, therefore deters Norwegian entities from entering into contracts with non-Norwegian contractors.

90. In this respect, the reporting obligation at issue should be distinguished from a declaration by the recipient of services such as that examined by the Court of Justice in its judgment in *De Clercq*[26]. That declaration was necessary to ensure the monitoring of the (justifiable) obligation imposed by law of the host Member State on the foreign service provider, whereas in this case the main part of the reporting obligation lies upon the Norwegian recipient, *i. e.* the Norwegian recipient has to provide information on the contract, the non-resident contractor and employees assigned to work in Norway, and the non-resident contractor is only required to provide information about the employees.

91. The Norwegian Government claims that the part of the reporting obligation resting on the recipient of services is aimed at verifying the information given by the taxpayer. It has to be noted however that the scope of the reporting obligation does not confirm this claim. Compared with the declaration assessed in the *De Clercq* judgment, the Norwegian recipient has to provide information in all instances rather than only when the service provider has failed to do so. The scope of the information required from the Norwegian recipient moreover goes beyond what is requested from the service provider. It is not clear why the information, if it is indeed needed for the purposes of tax control[27], cannot be first collected from the service providers. It is moreover not

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[24] See, for example, judgments in *SIAT*, cited above, paragraph 36 and the case law cited therein; *Strojírny Prostějov* C-53/13 and C-80/13, cited above, paragraphs 46 and 55 and the case law cited therein.

[25] See in this respect judgment in *Commission* v *Belgium*, C-433/04, cited above, paragraphs 36 and 37 where the Court of Justice declared that an overriding reason of public interest relied on by the Belgian Government is not sufficient to justify the application of the national measure (the withholding obligation and joint liability) to all service providers not established and not registered in that State, while some of them are in principle not liable for taxes in Belgium. See also *Commission* v *Belgium* C-577/10, cited above, paragraph 54 where the Court of Justice established that the application of the declaration requirement at issue in the case was not restricted to cases where there was cause to ascertain that the tax and social security obligations were met and this served as one of the arguments against the proportionality of the national measure.

[26] Judgment in *De Clercq* C-315/13, EU:C:2014:2408.

[27] See judgment in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 55 where the Court of Justice stated that even if an EEA State is allowed to ask service providers established in another EEA State, travelling to the first State to supply a service there, to provide it with certain specific information, that is on the condition that the provision of that information can be justified in the light of the objectives pursued.

explained why the obligation to report applies to all entities in the contract-chain above the principal meaning that the same information must be submitted to tax authorities by several entities.

92. It seems therefore that the reporting obligation is disproportionate with regard to the aims sought, because there are less restrictive ways to achieve its intended purposes.

93. Third, as mentioned in paragraph 53 of this letter, the information must be submitted to COFTA regardless of whether the taxes were correctly payed by the contractor and/or the employees. Penalties are withdrawn only if the entity proves that the concerned contractor or employee has filed a timely tax return and the relevant tax obligations are fully met at the time the deficient reporting is discovered. It has to be noted however that the recipient of services normally is not in a position to prove so whereas the information at issue is always at the possession of the tax authorities. It seems, therefore, that the reporting obligation goes beyond what is required by the tax control.

94. As regards the more general objective to fight against tax fraud, it has to be noted that according to settled case law a general presumption of fraud is not sufficient to justify a measure which compromises the objectives of the Treaty[28].

95. Admittedly, the statistical data presented by the Norwegian Government to the effect that a higher proportion of non-resident contractors failed to file information about wages to their employees and tax returns compared to resident employers could be used as an argument that the tax authorities need a verification tool concerning non-resident contractors liable to taxes in Norway. However, this arguments does not justify the amount of the information required from the Norwegian recipients and the requirement to report by each entity in a contract-chain. It cannot be claimed moreover that the higher proportion of non-resident contractors failing to submit tax returns is due to their incentives to avoid taxes.

96. As concerns less restrictive means and as an alternative to the reporting obligation, the Norwegian Government refers to the possible imposition of a withholding tax system. It seems to the Authority that another alternative could be reducing the scope of the reporting obligation, including in particular revoking the part of the reporting obligation resting on the recipient of services or limiting it to a strict minimum. It seems to the Authority that the information necessary for taxation purposes could and should first and foremost be collected from the service provider. It is moreover not necessary to use third party reporting in cases where the national tax authorities already have information about the service provider (for example, the service provider is registered in the National Coordinated Register)[29].

97. Finally, according to the case law of the Court of Justice, penalties involving national restrictive measures, which have been recognised as being contrary to EU law are as incompatible with EU law as the restrictions themselves. For this reason, a system of penalties intended to ensure compliance with national provisions which are contrary to EU provisions must be held to be contrary to EU law, without there being any need to examine whether or not they meet the tests of non-discrimination and proportionality[30].

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[28] Judgment in *Commission* v *Belgium*, C-577/10, cited above, paragraph 53 and the case law cited therein.

[29] See, by way of analogy, judgment in *Strojírny Prostějov* C-53/13 and C-80/13, cited above, where the national measure was declared unjustified, because it did not make any distinction between foreign service providers with a registered branch in the Member State and service providers without such a connection.

[30] Judgment in *Radiosistemi*, C-388/00 and C-429/00, EU:C:2002:390, paragraphs 78 and 79 and the case law cited therein.

98. It therefore follows, in the alternative, that by maintaining in force provisions such as Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations whereby it is required to report to the Norwegian tax authorities information related to all contracts worth at least NOK 10 000 awarded to non-Norwegian contractors, Norway has failed to comply with its obligations under Article 36 EEA.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force provisions such as Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations, whereby it is required to report to the Norwegian tax authorities information related to all contracts worth at least NOK 10 000 awarded to non-Norwegian contractors, which go beyond the aim to ensure fiscal supervision, prevent tax evasion and ensure effective tax collection, Norway has failed to fulfil its obligation arising from Article 19(a) and Article 16(1), Article 16(2)(b) and Article 19(a), in conjunction with Article 16(2)(g), of the Act referred to at point 1 of Annex X to the EEA Agreement (*Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*), as adapted to the EEA Agreement by Protocol 1 thereto.

In the alternative, by maintaining in force provisions such as Section 5-6 of the TAA and Sections 5-6-1 to 5-6-6 of the Regulation on Third Party Reporting Obligations, whereby it is required to report to the Norwegian tax authorities information related to all contracts worth at least NOK 10 000 awarded to non-Norwegian contractors, Norway has failed to comply with its obligations under Article 36 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel on 15/12/2016