Case No: 77290
Document No: 864545
Decision No: 104/18/COL

EFTA SURVEILLANCE AUTHORITY

# REASONED OPINION

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Article 36 of the EEA Agreement by maintaining in force the requirement to submit to the Norwegian authorities specified information on all contracts concluded between Norwegian based recipients of services and providers of services from other EEA States with a value of at least a certain amount expressed in NOK at the latest within 14 days of commencement of the work in Norway ("the reporting obligation")**

## 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 laid down in the Tax Assessment Act[1], which applies when contracts are awarded to non-Norwegian contractors.

2. In particular, the complaints concerned the requirement to submit to the Norwegian authorities specified information on all contracts concluded between Norwegian based recipients of services and providers of services from other EEA States with a value of at least a certain amount expressed in NOK[2] at the latest within 14 days of commencement of the work in Norway ("the reporting obligation"). The reporting obligation applies to Norwegian entities awarding the contract, as well as to the non-Norwegian contractors. No such reporting obligation exists where a contract is awarded to a Norwegian contractor.

3. Following a protracted exchange of views between the Authority and the Norwegian Government, on 15 December 2017, the Norwegian Parliament adopted amendments to the reporting obligation, which entered into force on 1 January 2018. These amendments limited certain aspects of the reporting obligation, but at the same time extended it in other respects. Having re-examined the reporting obligation as amended, the Authority considers that it continues to restrict the freedom of providers of services from other EEA States and recipients of services in Norway in a manner, which, in the absence of convincing evidence from Norway to the contrary, cannot be considered as justified.

4. In this reasoned opinion, the Authority therefore maintains the assessment, which it presented in the letter of formal notice of 15 December 2016, concluding 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 Article 36 EEA.

5. As will be explained further, the reporting obligation constitutes an obstacle to the freedom to provide services within the meaning of Article 36 EEA. Therefore, it is for the Norwegian Government to show that the measure not only pursues an objective in the public interest, but is also appropriate to ensuring the attainment of that objective, and does not go beyond what is necessary to attain the objective pursued.

6. However, the justification provided by Norway does not prove that the reporting obligation complies with the principle of proportionality nor that it is adequate with regard to the aims sought. First, it is based on a false premise that, because Norway does not participate in the EU administrative cooperation in the field of taxation, it can seek an appropriate level of overview of non-resident tax payers only by national means, without resorting to international cooperation. Second, Norway refers to allegedly different levels of compliance of resident and non-resident service providers without analysing the concrete reasons for such differences. Instead, it states generally that foreign service providers lack incentives to comply with their obligations. This, however, amounts to the general presumption that a service provider from another

[1] *Lov om ligningsforvaltning (ligningsloven)*, LOV-1980-06-13-24. As will be explained further, as of 1 January 2017, the Tax Assessment Act was replaced by the Norwegian Tax Administration Act. However, this transition did not change the material rules concerning the reporting obligation.

[2] NOK 10 000. As of 1 January 2018, the amount was increased to NOK 20 000.

EEA State will seek to avoid its obligations under the Norwegian law, which is contrary to EEA law. Third, instead of ensuring the same overview of resident and non-resident tax payers, as is claimed by Norway, the reporting obligation can be seen as subjecting the latter to a stricter level of enforcement than the former. Finally, the information about the presence of a foreign activity in Norway is received by the national institutions through a number of various channels. The Norwegian Government does not explain why those other channels cannot be used as a basis of ensuring compliance with the national tax legislation.

7. The Norwegian Government has conceded that the reporting obligation does constitute a restriction on the provision of services[3], but argues that it is justified and, therefore, compliant with EEA law.

## 2 Correspondence

8. 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.

9. 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).

10. The case was discussed at the package meeting of 12-13 November 2015 in Oslo[4]. Further information regarding the imposition of penalties was provided by Norway by letter dated 8 January 2016 (ref. 15/1761 SL HLY/KR, Doc. No 787241).

11. On 13 January 2016 (Doc. No 771934), the Authority's Internal Market Affairs Directorate sent a Pre-Article 31 letter to Norway.

12. 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) in which it stated, in essence, that it was allowed to impose the reporting obligation without infringing its obligations under EEA law. However, it undertook a review of the legislation establishing the reporting obligation with the aim of balancing the objective of maintaining sufficient fiscal supervision *etc.* against the burdens imposed on the parties.

13. 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 intended to propose legislative amendments to the Parliament during the first Parliamentary session in 2017.

14. The case was discussed at the package meeting of 27-28 October 2016 in Oslo[5].

15. On 15 December 2016 (Doc. No 819456), the Authority issued a letter of formal notice to Norway in which it considered that the reporting obligation went beyond the

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[3] See the Norwegian Government's reply to the request for information of 20 August 2015 (ref. 15/1761 SL HLY/KR, Doc. No 770239 and 770241), page 3. Moreover, in the replies to the Pre-Article 31 letter and to the letter of formal notice, the Norwegian Government did not object the Authority's conclusion that the reporting obligation constitutes a restriction on the provision of services.

[4] See the follow-up letter to the package meeting of 2015 (Doc. No 781498 in Case No 77692).

[5] See the follow-up letter to the package meeting of 2016 (Doc. No 824382 in Case No 79432).

aim of ensuring fiscal supervision, preventing tax evasion and ensuring effective tax collection and, therefore, Norway was in breach of Article 36 EEA.

16. The case was again discussed with the Norwegian Government at a meeting which took place in Brussels on 6 February 2017.

17. After the extension of the deadline, Norway replied to the letter of formal notice on 24 March 2017 (ref. 15/1761 SL RSL/KR, Doc. No 849873, 849875 and 849877). In its reply, the Norwegian Government presented extensive argument against the Authority's conclusions and maintained that the reporting obligation is compliant with EEA law. The reply did not mention that the scope of the reporting obligation might be reduced.

18. The case was further discussed at the package meeting of 26-27 October 2017 in Oslo[6].

19. On 8 November 2017 (ref. 15/1761, Doc. No 881710), the Norwegian Government sent a letter to the Authority stating that it hoped that the amendments of the reporting obligation scheduled to be assessed by the Parliament in December 2017, would ensure that the rules are proportionate, also in the view of the Authority.

20. By letter of 17 November 2017 (Doc. No 881934), the Authority welcomed the national developments regarding the reporting obligation. However, it also maintained doubts as to whether these would sufficiently resolve the underlying concerns and invited a more detailed response in this respect from Norway.

21. On 15 December 2017, the Parliament adopted amendments to the reporting obligation[7].

22. On 19 December 2017 (15/1761 SL HLY/KR, Doc. No 889950 and 889952), the Norwegian Government informed the Authority about the adoption of the amendments and referred to the "*central preparatory works*" of the amendments, *i. e.* Innst. 4 L (2017-2018) chapter 9.9 and Prop. 1 LS (2017-2018) chapter 21. The preparatory works, however, did not assess the proportionality of the restriction to the free movement of services, including whether there are no less restrictive means to reach the public interest objective sought by the Norwegian Government. Rather, they focused on the reduction of the administrative burden without assessing alternative means.

23. The case was discussed at the package meeting of 25-26 October 2018 in Oslo[8]. At the meeting the Norwegian Government stated that the primary purpose of the amendments to the reporting obligation was not to comply with EEA law, but to reduce the administrative burden, *i. e.* to make it easier to comply with the reporting obligation. Moreover, it claimed that the assessment of the proportionality of the reporting obligation provided in the reply to the letter of formal notice is equally valid to the reporting obligation after the adoption of the amendments.

## 3 Relevant national law

### 3.1 The rules on reporting obligation in force before 1 January 2017

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[6] See the revised follow-up letter to the package meeting of 2017 (Doc. No 878916 in Case No 80900).

[7] "*Lov 19 desember 2017 nr. 128 om endringer i lov 27. mai 2016 nr. 14 om skatteforvaltning (skatteforvaltningsloven)*" and "*Lov 19 desember 2017 nr. 123 om endringer i lov 17. juni 2005 nr. 67 om betaling og innkreving av skatte- og avgiftskrav (skattebetalingsloven)*".

[8] See the follow-up letter to the package meeting of 2018 (Doc. No 1038310 in Case No 81410).

24. The reporting obligation was established by the Norwegian Tax Assessment Act[9] ("the old TAA") and the Regulation on Third Party Reporting Obligations[10].

25. In particular, under Section 5-6 of the old TAA and the detailed provisions implementing and specifying the obligations laid down in Section 5-6 of the old TAA, which are found 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 had to be submitted to the Norwegian Central Office - Foreign Tax Affairs ("COFTA") at the latest within 14 days of commencement of the work in Norway.

26. The obligation to report rested upon (1) the Norwegian entity (principal) that had 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 might rest upon several entities, and they were all jointly and severally liable for carrying out the reporting.

27. The reporting obligation required information to be provided on (1) the contract, (2) the non-Norwegian contractor and (3) the employees assigned to work in Norway under the contract.

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

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

    - on a site that was under the principal's control in Norway, or

    - on the Norwegian continental shelf.

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

30. The reporting was either filed electronically or in paper format using a specific form (RF-1199).

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

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

33. Detailed provisions for the application of fines and penalties were laid down in the Regulation on penalties for late filing and inadequate or incorrect compliance with the

[9] *Lov om ligningsforvaltning (ligningsloven)*, LOV-1980-06-13-24.
[10] *Samleforskrift om tredjeparters opplysningsplikt*, FOR-2013-09-17-1092.

obligation in Section 5-6 paragraphs 1 and 2 of the Tax Assessment Act cf. No 3[11] ("the Regulation on penalties").

34. Based on the Regulation on penalties, the penalty for late filing was 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).

35. Section 5 of the Regulation on penalties stated that enforcement fines and penalties were not to be imposed cumulatively for the same period of time.

36. Moreover, penalties for non-compliance could only be imposed once for each breach of the regulations. This implied that if a penalty was imposed on any of the entities, and the penalty was paid by that entity (or any other entities), other entities with a reporting obligation could not be sanctioned (Section 2 paragraph 3 sentence 1 of the Regulation on penalties). However, all the entities concerned were jointly and severally liable for the proper payment of the penalty.

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

38. Section 4, second and third sentences, of the Regulation on penalties contained provisions regarding the mitigation of imposed penalties. Penalties might be reduced or withdrawn if the entity proved that it could not be blamed for the breach of the reporting obligation. Penalties should be withdrawn if the entity proved that the concerned contractor or employee had filed a timely tax return and the relevant tax obligations were fully met at the time the deficient reporting was discovered. According to the Norwegian Government, the objective of the provisions regarding mitigation was to prevent imposition of penalties in cases where such a response would be unreasonable and cases where there was no or limited risk of tax evasion.

### 3.2 The changes to the rules which entered into force on 1 January 2017

39. As of 1 January 2017, a new Norwegian Tax Administration Act[12] ("the TAA") came into force. However, this transition did not change the material rules in question, and Section 7-6 of the TAA contained exactly the same wording as the repealed provision in Section 5-6 of the old TAA referred to in the letter of formal notice.

40. The rules set out in Sections 5-6-1 to 5-6-6 of the Regulation on third party reporting were replaced by Sections 7-6-1 to 7-6-6 of the new Regulation implementing and specifying the obligations laid down in the TAA ("the RTAA")[13]. The order of the sections changed, but the material rules remained the same[14].

41. As regards sanctions for non-fulfilment of the reporting obligation, these were established in Sections 14-1 and 14-7 of the TAA in a more general manner compared to the provisions on sanctions described in the old TAA, whilst the Regulation on penalties applied to any kind of reporting, including the reporting obligation.

[11] *Forskrift om gebyr ved for sent levert, mangelfull eller uriktig oppgave etter ligningsloven § 5-6 nr. 1 og 2, jf. nr. 3,* FOR-1994-07-14-725.
[12] *Lov om skatteforvaltning (skatteforvaltningsloven)*, LOV-2016-05-27-14.
[13] *Forskrift til skatteforvaltningsloven (skatteforvaltningsforskriften)*, FOR-2016-11-23-1360.
[14] One exception being Section 7-6-4 of the RTAA replacing Section 5-6-6 of the Regulation on third party reporting under which the obligation to provide information according to Section 7-6 of the TAA did not apply not only where the contract was worth less than NOK 10 000, but also, additionally, where the work would be carried out in Svalbard.

42. However, the provision providing for joint and several liability for the foreign contractor's taxes and national insurance contributions in case of non-compliance with the reporting obligation was maintained (Section 16-51 of the Tax Payment Act[15]).

### 3.3 The amendments to the reporting obligation which entered into force on 1 January 2018

43. On 15 December 2017, the Parliament adopted amendments to the reporting obligation, which entered into force on 1 January 2018.

44. As a result of these amendments, the reporting obligation, first, is now limited within a contract chain, *i. e.* no longer are all entities within a contract chain responsible for reporting, but rather several of them (two steps down and one step up in a chain). Second, the non-Norwegian contractor now only has to report his own employees. Third, the joint and several liability for the foreign contractor's taxes and national insurance contributions was repealed.

45. At the same time, the scope of the reporting obligation was extended and now it applies to all contracts, not only to those that are performed on a site for building and assembly work in Norway, on a site that was under the Norwegian entity's control in Norway or on the Norwegian continental shelf.

46. Section 7-6 of the TAA, as currently in force, reads:

*"§ 7-6. Contractors and employees*

*(1) Businesses and public bodies which award a natural person domiciled abroad or a company resident abroad an assignment in Norway or on its continental shelf, shall provide information about the assignment and any subcontracts. The duty includes information about the main principal in the contract chain, own principal, as well as contractors limited to two steps down the contract chain. The contractor is obliged to provide information about its own employees who are used to perform the assignment.*

*(2) The information shall be provided as soon as the contract has been concluded and no later than 14 days after the work has commenced. Information about the termination of work must be provided no later than 14 days after the termination.*

*(3) The Ministry may decide that the duty to provide information pursuant to the first paragraph shall also apply to assignments to certain groups of contractors who are not domiciled or resident abroad."*[16]

47. Moreover, the RTAA increased the threshold from which the reporting obligation arises from 10 000 NOK to 20 000 NOK. The relevant sections of the regulation read now:

"*§ 7-6. Contractors and employees*

*§ 7-6-1. Reporting obligation for the principal and the contractor*

*(1) The principal shall provide the following information:*

*a) own name and Norwegian organisation number. If the principal does not have a Norwegian organisation number, information about any address in Norway shall be provided, as well as the address and registration number in the home country. Information about the contact person on the assignment shall also be provided.*

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[15] *Lov om betaling og innkreving av skate- og avgiftskrav (skattebetalingsloven)*, LOV-2005-06-17-67.
[16] Unofficial translation by the Authority.

*b) name of the contractor and its Norwegian organisation number. If the contractor does not have a Norwegian organisation number, information about any address in Norway, as well as the address and registration number in the home country, shall be provided.*

*If the contractor is self-employed, information about the Norwegian national identity number or D-number and foreign identity number shall also be provided. If no Norwegian national identity number or D-number has been assigned, the date of birth, gender and nationality shall be provided.*

*c) the start and end time of the assignment, the place where the assignment is to be performed, the contract type, the contract amount and the contract number.*

*d) any own principal, as well as its Norwegian organisation number and contract number. Information about the name of any main principal, its Norwegian organisation number and main contract number shall also be provided.*

*The main principal means the principal in a contract chain who first provides an assignment to a foreign contractor.*

*(2) The contractor shall provide the following information:*

*a) own name and Norwegian organisation number. If the contractor does not have a Norwegian organisation number, information about any address in Norway, as well as the address and registration number in the home country, shall be provided. Information about the contact person on the assignment shall also be provided.*

*b) the principal's name, address in Norway and abroad, Norwegian organisation number or, if not assigned, a foreign registration number. Information about the contract number on the assignment shall also be provided.*

*c) own employee's name, date of birth, Norwegian national identity number or D-number, foreign identity number and address in Norway and abroad. If an employee does not have a Norwegian national identity number or a D-number, information about the employee's gender and nationality shall be provided.*

*d) own employee's first and last working day on the assignment, as well as workplace.*

*§ 7-6-2. Documentation of name, date of birth and citizenship*

*When information about a person who does not have a Norwegian national identity number or a D-number shall be provided, the name, date of birth and citizenship must be documented by copy of an identification document. The identification document shall have a photograph of the person and contain information about name, date of birth, gender and citizenship.*

*§ 7-6-3. Agreement on who shall provide information*

*An agreement may be entered into between principals in several steps of the contract chain that information may be provided by one of them. Such an agreement does not exempt from enforcement fines or non-compliance penalties which may be imposed pursuant to Sections 14-1 and 14-7 of the Tax Administration Act.*

*§ 7-6-4. Exemption from the reporting obligation*

*The obligation to provide information pursuant to Section 7-6 of the Tax Administration Act does not apply*

*a) upon the award of assignments where the agreed consideration is less than NOK 20 000*

*b) upon the award of cabotage assignments*

*c) to assignments to be carried out in Svalbard.*

*§ 7-6-5 Deadline*

*(1) Information about the contractor etc. shall be provided as soon as the contract has been concluded and no later than 14 days after the work has commenced.*

*(2) Employee information shall be provided no later than 14 days after the employee's first working day on the assignment. Information about the last working day for employees shall be provided no later than 14 days after the last working day.*

*(3) If changes occur after the information is provided, corrected information shall be provided within 14 days after the change occurred.*

*(4) The Tax Office may accept other deadlines by agreement with the person subject to the reporting obligation.*

*§ 7-6-6 Method of delivery*

*The information shall be provided to the Tax Office. The Tax Office may accept that the information is provided in a manner other than by using a fixed form.*"[17]

# 4 Relevant EEA law

48. 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.

# 5 The Authority's Assessment

## 5.1 The existence of a restriction of the freedom to provide services

49. 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].

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[17] Unofficial translation by the Authority.

[18] Judgments of 9 November 2006, *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraph 28, of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 18 and the case law cited therein and of 13

50. 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 in incomparable situations depending on whether they resort to the services of resident or non-resident tax payers[20].

51. As regards the restrictions in this case it is necessary to distinguish between two categories of persons/entities:

    - *Service providers established in another EEA State than Norway*. Under the reporting obligation these entities are required to provide a certain amount of information about each contract awarding an assignment in Norway or on its continental shelf as soon as the contract has been concluded and no later than 14 days after the work has commenced, such as its identity and the identity of the person awarding the contract, the contract number, the information about its employees, including the start and the end of the work on the assignment of each employee, which shall be provided no later than 14 days after the employee's first and last working day on the assignment, as well as any changes thereof. Failure to comply with those requirements is subject to fines and penalties under Sections 14-1 and 14-7 of the TAA.

    The formalities implied by the reporting obligation at issue are such as to impede and render less attractive the supply of services on the territory of Norway or on the continental shelf by service providers established in another EEA State. That obligation thus constitutes an obstacle to the freedom to provide services within the meaning of Article 36 EEA[21].

    - *Service recipients established in Norway seeking to contract with a provider established in an EEA State other than Norway*. Such Norwegian service recipients are obliged to report each contract awarding an assignment in Norway or on its continental shelf to a non-Norwegian contractor as soon as the contract has been concluded and no later than 14 days after the work has commenced, such as their identity and the identity of the service provider, the start and the end of the assignment, the place where the assignment is to be performed, the contract type, the contract amount, the contract number, as well as information about contractors in the contract chain. Failure to comply with those requirements is subject to fines and penalties under Sections 14-1 and 14-7 of the TAA.

    The rules imposing such obligations are liable to make it less attractive, for potential recipients of services established in Norway, to solicit services furnished by service providers established in other EEA States and, accordingly, to dissuade those recipients from having recourse to service providers resident in other EEA States[22]. From this angle, too, it must be concluded that the reporting obligation restricts the freedom of service provision as prohibited by Article 36 EEA.

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November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 37 and the case law cited therein, and Case E-02/11 *STX Norway Offshore AS* [2012] EFTA Ct Rep. 4, paragraph 75.

[19] Judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 19 and the case law cited therein and of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 38 and the case law cited therein. See to this effect also Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct Rep. 320.

[20] See judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraphs 32 and 33 and of 19 June 2014, *Strojírny Prostějov* C-53/13 and C-80/13, EU:C:2014:2011, paragraph 40.

[21] See, for example, judgment of 19 December 2012, *Commission* v *Belgium*, C-577/10, EU:C:2010:814, paragraphs 39 and 40.

[22] See, for example, judgments of 3 December 2014, *De Clercq*, C-315/13, EU:C:2014:2408, paragraphs 55-59 and of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 39.

52. It is therefore incumbent on Norway to justify the reporting obligation, which constitutes an exception to the principle of the free movement of services under Article 36 of the EEA Agreement[23].

53. As such, it should be noted that there is no dispute between the Authority and the Norwegian Government regarding the existence of the restriction. Rather, the disagreement relates to the justification of the reporting obligation, *i. e.* to the question as to whether, given its restrictive effects, the obligation may be considered to be a proportionate measure for attaining the objectives for which it was conceived.

## 5.2 Justifications and proportionality

54. In its reply of 24 March 2017 to the letter of formal notice, the Norwegian Government presented extensive argument with a view to justifying the reporting obligation. Before providing its assessment of these arguments, the Authority will summarise the main points advanced by the Norwegian Government in support of the compatibility of the reporting obligation with Article 36 EEA.

### *5.2.1 The reply of the Norwegian Government to the letter of formal notice*

55. First, as regards the grounds for justifying the reporting obligation, Norway, primarily invoked[24] the effectiveness of fiscal supervision and tax collection which has been recognised by the Court of Justice of the European Union ("the Court of Justice") as an overriding reason of public interest capable of justifying restrictions to the freedom to provide services[25]. In that context it specifically cited the judgment of 15 May 1997, *Futura*, C-250/95, paragraph 31, which stated that "*A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely*". In addition, the Norwegian Government indicated that the reporting obligation also served to prevent tax fraud.

56. Second, Norway referred[26] to the differences in the regulatory framework within the EEA and the EU as regards administrative cooperation in the field of taxation and stated that, on that basis, within the EEA, other restrictions than between the EU Member States may be justified. In this respect the Norwegian Government referred to the judgment of the Court of Justice of 28 October 2010, *Rimbaud*, C-72/09, paragraphs 46-56[27], which was followed up in later cases.

57. Third, Norway provided[28] detailed information concerning the historical reasons for introducing the reporting obligation and discussed the sources of information available to the Norwegian authorities as regards residents compared to non-residents, as well as

[23] Judgment of 23 January 2014 *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 33 and the case law cited therein.
[24] Part 3.2.1 "*The aims pursued – overview*" of the reply.
[25] Judgments of 15 May 1997, *Futura*, C-250/95, EU:C:1997:239, paragraph 31, of 28 October 2010, *Rimbaud*, C-72/09, EU:C:2010:645, paragraph 33 and of 19 December 2012, *Commission* v *Belgium*, C-577/10, EU:C:2010:814, paragraph 44.
[26] Parts 3.2.1 "*The aims pursued – overview*" and 3.3.5 "*Why the extent of the reporting obligation is suitable and necessary*" of the reply.
[27] Judgment of 28 October 2010, *Rimbaud*, C-72/09, EU:C:2010:645, paragraphs 46-56.
[28] Parts 3.2.2 "*The historic background*" and 3.2.3 "*The situation today*" of the reply.

the lack of incentives for the latter to submit certain information to the authorities and the need for ensuring more effective tax supervision of foreign businesses on temporary assignments in Norway. In particular, it provided statistical information for the income years 2012-2015 from which it appears that the proportion of non-resident contractors who failed to file any information about wages to their employees was much higher compared to resident employers. For the income year 2014, 78.39 percent of non-resident contractors filed a tax return, of which only 39.8 percent within due time and without extra notice. By way of comparison, 94 percent of other companies filed a tax return.

58. Fourth, the reply stated[29] that all non-resident contractors operating in Norway are obliged to register in the National Coordinated Register ("the NCR") irrespective of whether or not there is an obligation to report for tax purposes according to Section 7-6 of the TAA. The registration in that register is necessary to enroll the entity in the tax roll (to assign a tax identification number). Consequently, registration in the NCR is not at all to be seen as a purpose behind the reporting rules.

59. Fifth, the Norwegian Government referred[30] to the case law of the EFTA Court[31] and the Court of Justice[32] in order to assert, *inter alia*, that in applying the necessity test the level of protection chosen by the state must be respected. More particularly, this test does not prohibit a system that is easily managed and supervised by the authorities. The reply to the letter of formal notice stated that Norway has chosen and pursues a high level of effectiveness of fiscal supervision and tax collection.

60. Sixth, the Norwegian Government challenged[33] the Authority's assertion, expressed in paragraphs 39, 40 and 42 of the letter of formal notice, that there is no direct link between the reporting obligation and the ultimate tax liability of the foreign contractor in Norway and stated that this argument was based on a misapprehension of the starting point of the Norwegian system of tax liability. In particular, according to Norwegian tax legislation, all activities performed in Norway or at the continental shelf are taxable from day one and the tax treaties do not change this fact, but rather relieve the problem of possible double taxation. For these reasons, the Norwegian Government claims that it is important, in the interests of fiscal supervision and effective tax collection, to receive information at an early stage in order to be able to assess which contracts will result in taxation. In that regard, there is indeed a direct link between the reporting obligation and the taxation purposes it is meant to safeguard.

61. Seventh, in addressing the suitability and necessity of the reporting obligation, the Norwegian Government pointed to[34] certain international trends, *inter alia* within the framework of the OECD, showing the importance of third party reporting in a modern

[29] See Part 3.2.4 "*As to the Authority's submission that other aims are pursued*" of the reply.
[30] Part 3.3.1 "*As to the law*" of the reply.
[31] Case E-03/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 58, Case E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, paragraph 80 and Case E-17/14 *ESA* v *Liechtenstein* [2015] EFTA Ct. Rep. 164, paragraph 42.
[32] Judgments of 8 July 2010, *Sjöberg and Gerdin*, C-447/08 and C-448/08, EU:C:2010:415, paragraph 38, of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, paragraph 38 and of 24 February 2015, *Sopora*, C-512/13, EU:C:2015:108, paragraph 33.
[33] Part 3.3.2 "*As to the Authority's submission that the reporting obligation is applicable irrespective of whether the income from the foreign contract or employee is subject to tax in Norway and irrespective of the duration of the contract*" of the reply.
[34] Part 3.3.3 "*Why it is suitable and necessary to impose the reporting obligation on a third party*" of the reply.

tax system and stressed the importance of international cooperation between tax authorities.

62. As regards the reporting obligation in particular, Norway submitted that the tax authorities cannot count solely on receiving information from foreign entities for two reasons. First, due to the fact that foreign entities / employees are present in Norway only for a limited period of time, they will generally leave few traces of their presence in Norway. Second, the statistical data shows that the non-compliance of foreign entities / employees is much higher than for resident service providers. The Norwegian Government considers it to be essential to have an overview of non-resident taxpayers similar to that which exists for resident taxpayers. Since the service recipient is responsible towards the tax authorities, he has the incentive to ensure that the obligations are fulfilled. Without such responsibility on the service recipient, there is a reason to believe that the incentive to inform about the obligation will decrease, and the extent of non-compliance will increase.

63. Moreover, the service recipient should have all the relevant information and is therefore in the best position to provide the relevant information to the tax authorities. At the same time, although a foreign service provider may have a taxable presence in Norway (through a permanent establishment within the tax treaty meaning), it often does not have an administration capable of fulfilling its obligations towards the Norwegian authorities. The Norwegian Government concludes that the reporting obligation does not go beyond the aim of ensuring the interests of fiscal supervision and effective tax collection and that the restrictive effects are proportionate in cases where the tax payer has no permanent residence in Norway. Its application is to be regarded as both suitable and necessary within the EEA context.

64. Eighth, the Norwegian Government acknowledged[35] that the reporting obligation does not relieve the contractor from his ordinary obligation to file a tax return and a statement of income. The upfront reporting serves as a means to detect possible tax payers and to enable the authorities to assess whether the service provider is liable to taxation in Norway. The Norwegian Government observes that the service provider's tax return and statement of income serve, *inter alia* as a means to determine the correct amount of tax due.

65. The purpose of the reporting obligation is, therefore, to detect and evaluate any taxation rights according to a relevant tax treaty (if any) and to make sure that the employer withholding tax and the social security tax is reported monthly and paid timely (bi-monthly), in accordance with Norwegian law. Hence, the requirement that the contract should be reported within 14 days after the work in Norway has commenced. The tax authorities, rather than the taxpayer himself, are qualified to make the assessment of taxability. It is the responsibility of any tax authority to ensure a correct allocation and assessment of taxes between the States.

66. Ninth, the reply discussed[36] the proportionality of the extent of the reporting obligation. In particular, the Norwegian Government claimed that it is common to include in the contractual provisions which entity handles the reporting obligation. Further, where all entities which use labour to perform business activities in Norway are, as a general rule, required to register in the "EE-Register", the obligation to report employees under Section 7-6 of the TAA is used, as regards foreign companies, as a substitute for this requirement. Finally, the Norwegian Government confirmed that

[35] Part 3.3.4 "*As to the Authority's submission that the reporting obligations apply irrespective of whether the taxes were correctly paid by the service provider and / or the employees*" of the reply.

[36] Part 3.3.5 "*Why the extent of the reporting obligation is suitable and necessary*" of the reply.

although the foreign service providers subject to the reporting obligation do not have to register in the EE-Register, they nevertheless are obliged to register in the NCR. This obligation is applicable to both Norwegian and foreign entities, but will not in itself give the information necessary to serve the purposes of correct tax assessment. As the experience of the tax authorities shows, foreign entities often fail to register in the Register of Business Enterprises and the NCR. Norway asserts that third party reporting is, therefore, required.

67. Tenth, the Norwegian Government stated[37] that the sanctions for the breach of the reporting obligation do not go further than ensuring the effectiveness of the reporting obligation and referred in this respect to the judgments of 23 November 1999, *Arblade*, C-369/96 and C-376/96[38], 6 November 2003, *Gambeli*, C-243/01[39] and 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04[40].

68. Finally, the Norwegian Government argued[41], in essence, that the Norwegian practice is in compliance with the principles set out in the judgment of the Court of Justice of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13[42].

69. In particular, Norway explained the national provisions concerning the obligation of an entity to register in the Register of Business Enterprises, which is connected to the NCR, and stressed that the registration assessment criteria do not coincide with the criteria for assessing whether the income of the foreign entity is taxable in Norway nor the criteria to constitute a "*permanent establishment*" as defined in Article 5 of the OECD Model tax convention. If a foreign entity is considered to have a presence of a more permanent character in Norway, so that the registration in the Register of Business Enterprises is triggered, such an entity (a branch) will be treated equally to a Norwegian resident entity and there will be no reporting obligation with respect to the contracts between the foreign entity and Norwegian service recipients. All income deriving from such contracts is then to be included in the branch's accounting and tax report. However, with regard to temporary activity in Norway (*i. e.* activity not constituting a branch as described above) the Norwegian Government reiterated that foreign entities often fail to comply with their obligation to register in the Register of Business Enterprises and the NCR. Therefore, obtaining a complete tax roll solely based on information from these registries is not possible. Moreover, such foreign entities would normally only have operational personnel in Norway and administrative tasks are typically performed at the entity's main office abroad. Therefore, a tax treaty "*permanent establishment*" is not in a position to fulfil any reporting obligations with regard to any other contracts the foreign company may enter into.

### *5.2.2 Justification grounds*

70. The Authority acknowledges that the Norwegian Government is entitled to invoke the grounds relating to the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud in order to justify the reporting obligation[43].

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[37] In Part 3.3.6 "*Regarding sanctions against breach of the reporting obligation*" of the reply.

[38] Judgment of 23 November 1999, *Arblade*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 38.

[39] Judgment of 6 November 2003, *Gambeli*, C-243/01, EU:C:2003:597.

[40] Judgment of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 38.

[41] Parts 4.1 "*General rules and obligations to establish a branch in Norway*" and 4.2 "*Why the existence of a PE does not exempt the service recipient from the reporting obligation*" of the reply.

[42] Judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13, EU:C:2014:2011.

71. However, according to settled case law, it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that it not only pursues an objective in the public interest, but is also appropriate to ensuring the attainment of that objective, and does not go beyond what is necessary to attain the objective pursued. The reasons which may be invoked by an EEA State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments[44].

72. As will be set out in some detail below, the Authority does not, however, consider that the arguments presented by Norway demonstrate that the system of preventive control, as embodied by the reporting obligation, is a proportionate or adequate measure in relation to the attainment of the objectives invoked by the Norwegian Government.

73. This is not affected by the fact that in its justification of the national measures, the Norwegian Government stresses that it has chosen a high level of effectiveness of fiscal supervision and tax collection.

74. Admittedly, according to the case law of the EFTA Court and the Court of Justice mainly in the field of public health and gaming and betting, which is also referred to by the Norwegian Government[45], an EEA State enjoys discretion in determining the level of protection it wishes to pursue[46]. Therefore, less strict rules chosen by another EEA State do not *per se* mean that the Norwegian reporting obligation is disproportionate.

75. However, this case law cannot be interpreted to the effect that any restrictions on free movement may be justified for the sole reason that the EEA State concerned has chosen a high level of protection. In other words, it does not release an EEA State from the burden of demonstrating that the national measures are indeed proportionate[47]. The margin of discretion of an EEA State to set a level of protection, therefore, exists within the framework of the principle of proportionality, which requires the measures adopted to be appropriate to secure the attainment of the objective that they pursue in a consistent and systematic manner and to not go beyond what is necessary in order to attain it[48].

76. The case law concerning the margin of discretion of EEA States to set a level of protection establishes that less strict rules chosen by another EEA State or even,

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[43] See, for example, judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 36 and the case law cited therein and of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13, EU:C:2014:2011, paragraphs 46 and 55 and the case law cited therein, and Joined Cases E-03/13 and E-20/13 *Olsen and Olsen* [2014] EFTA Ct Rep. 400, paragraph 221 and the case law cited therein.

[44] Judgments of 23 January 2014 *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 33 and of 23 December 2015 *Scotch Whisky Association*, C-333/14, EU:C:2015:845, paragraph 99 and the case law cited therein, and Case E-02/11 *STX Norway Offshore AS* [2012] EFTA Ct Rep. 4, paragraph 99.

[45] From the cases referred to in this respect by the Norwegian Government two concern the field of public health (Cases E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330 and E-17/14 *ESA* v *Liechtenstein* [2015] EFTA Ct. Rep. 164) and three – gaming and betting (Case E-03/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, the judgments of 8 July 2010, *Sjöberg and Gerdin*, C-447/08 and C-448/08, EU:C:2010:415 and 14 October 2004, *Omega*, C-36/02, EU:C:2004:614).

[46] See, for example, judgment of 2 December 2010 *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 58.

[47] See, for example, the judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraph 37 where it is stated that "*[it] follows from well-established case-law that* ***the need for, and proportionality of, provisions*** *adopted by a Member State* ***are not excluded*** *merely because that State has chosen a system of protection different from that adopted by another Member State* <...>" (our emphasis).

[48] See also, for example, the assessment of the proportionality of the national measure in the judgment of 2 December 2010 *Ker-Optika*, C-108/09, EU:C:2010:725, paragraphs 57-75.

subsequently, the same EEA State[49] do not *per se* mean that the rules at issue are disproportionate. Equally, less strict rules in another EEA State cannot be held to be proportionate only because the rules assessed and considered to be proportionate by the Court of Justice in other instances were stricter. Therefore, the appropriateness of a measure to achieve the aim pursued or its proportionality must be assessed solely in the light of the specific objectives pursued[50].

77. Consequently, it cannot be argued that, just because a measure which is considered by Norway to be stricter than the reporting obligation, such as the Dutch withholding system, which was at issue in the judgment of 18 October 2012, *X NV*, C-498/10[51], was found to be proportionate by the Court of Justice, this necessarily implies that the Norwegian system must also be proportionate.

78. Moreover, even if we compare the Norwegian and the Dutch systems and concede that the latter is stricter, in its judgment of 18 October 2012, *X NV*, C-498/10, the Court of Justice attached importance to the arguments concerning the reduction of the administrative burden for the service provider, *i. e.* that otherwise he would have to submit a tax return in a foreign language and to familiarize himself with a tax system in an EEA State other than that in which he is established[52]. By contrast, the Norwegian system requires not only that the contracts concluded between Norwegian entities and non-Norwegian contractors be reported, but this, moreover, relieves neither of them of any other obligations, such as submitting tax returns and statements of income[53].

### *5.2.3 The scope of the proportionality test under EEA law in view of the fact that EEA States do not take part in the EU administrative cooperation in the field of taxation*

79. In its justification of the national measures, Norway emphasises the fact that the EEA States do not take part in the EU administrative cooperation in the field of taxation.

80. It is true that in its judgment of 28 October 2010, *Rimbaud*, C-72/09[54], the Court of Justice found a restriction of the free movement of capital under the EEA Agreement to be proportionate with regard to the aims sought, due to the lack of administrative cooperation in the field of taxation under the EEA Agreement, whereas in its judgment of 11 October 2007, *ELISA*, C-451/05[55] the same type of measure was considered disproportionate under the Treaty on the Functioning of the European Union in a situation involving EU Member States only.

81. However, the judgment *Rimbaud* confirms rather than disproves the Authority's view that the reporting obligation goes beyond what is required by the overriding reasons referred to by the Norwegian Government.

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[49] See judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraph 38.
[50] Judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraph 38.
[51] Judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635. See Part 3.3.3.3 "*The third party obligation is suitable and necessary*", p. 15 of the reply to the letter of formal notice.
[52] Judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraphs 50 and 52. The issue of the reduce of the administrative burden was considered as an important factor also in the judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 52.
[53] See Part 3.3.4 "*As to the Authority's submission that the reporting obligations apply irrespective of whether the taxes were correctly paid by the service provider and / or the employees*", p. 16 of the reply to the letter of formal notice.
[54] Judgment of 28 October 2010, *Rimbaud*, C-72/09, EU:C:2010:645.
[55] See judgment of 11 October 2007, *ELISA*, C-451/05, EU:C:2007:594.

82. In particular, the national legislation at issue in the main proceedings giving rise to the judgments of 11 October 2007, *ELISA*, C-451/05 and 28 October 2010, *Rimbaud*, C-72/09 made the grant of the tax advantage conditional on, *inter alia*, the existence of a convention on administrative assistance between the EU Member State and another State. The Court of Justice concluded in the judgment *Rimbaud* that where the legislation of an EU Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a non-EU EEA State, it is in principle legitimate for the EU Member State to refuse to grant that advantage if it proves impossible to obtain such information from that country[56].

83. In the view of the Authority, the assessment of the Court of Justice would have been different, if the national legislation had refused the grant of the tax advantage despite the existence of a convention on administrative assistance between the EU Member State and the non-EU EEA State.

84. This view is confirmed by the judgment of the Court of Justice of 19 July 2012, *A Oy*, C-48/11[57], which indicates that where it is necessary to ascertain whether the conditions for granting a tax advantage have been met, account must be taken of bilateral agreements on mutual assistance, such as in this case between Norway and Finland, providing for information mechanisms which are as effective as that provided for by the EU legislation on administrative cooperation in the field of taxation[58].

85. Therefore, even if Norway is allowed to ensure the effectiveness of tax supervision and tax collection of third-country service providers by the means it finds appropriate, as regards providers of services from other EEA States by contrast, it has an obligation to assess whether the measures applied are proportionate with regard to the aims sought, including examining whether less restrictive measures are not available. In this regard, account should be taken of all possibilities allowing the national institutions to ensure the compliance, including, for example, the cooperation under bilateral treaties with other EEA States.

86. In other words, the Authority considers that the proportionality assessment of a national measure restricting the right to free movement of services should be made taking into account all the possibilities available to the national authorities, including the instruments of international cooperation. Indeed the Norwegian Government, in its reply to the Authority’s letter of formal notice[59], acknowledged the need for international cooperation between tax authorities in this context and stated that Norway is one of the first countries to implement new tools to exchange information for tax purposes between tax authorities of different states.

87. The Norwegian Government, however, gives no account as to whether the requisite information pertaining to providers of services from other EEA States may be obtained through cooperation with other EEA States and why an appropriate level of overview of non-resident tax payers in its view can only be ensured by national means, without resorting to the available international instruments on (tax) cooperation.

88. In addition, the Norwegian Government only generally states, in essence, that, in view of the EU administrative cooperation in the field of taxation, the situation in Norway should be distinguished from the situation in the EU Member States. It does not explain, however, how in practice the administrative cooperation within the EU

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[56] Judgment of 28 October 2010, *Rimbaud*, C-72/09, EU:C:2010:645, paragraph 44.
[57] Judgment of 19 July 2012, *A Oy*, C-48/11, EU:C:2012:485.
[58] Paragraph 37.
[59] See Part 3.3.3.2 of the reply.

ensures that the EU Member States possess the same level of information about foreign activity on their territory, as is sought by Norway by the reporting obligation[60].

89. It follows from the above that, in the absence of any details on the availability of alternative means to obtain the information required by the Norwegian authorities, as well as an explanation of how the level of information sought by Norway could be ensured through the administrative cooperation within the EU, the reporting obligation must be regarded as being disproportionate with regard to providers of services from other EEA States.

#### *5.2.4 Different level of compliance of foreign service providers and the general presumption of fraud*

90. In its assessment of the reporting obligation, Norway accentuates, in general, that foreign service providers are more likely to avoid their tax and other obligations, as they lack incentives to submit certain information to the authorities compared to Norwegian residents[61]. Norway also submitted statistical data showing that the non-compliance of foreign entities / employees is much higher than for resident service providers and claimed that the extent of non-compliance by foreign service providers is well documented through statistics and other material[62]. This, according to the Norwegian Government, proves the need of third party reporting.

91. The reporting obligation is one of a range of the measures of third party reporting. It is intended to make sure that the tax authorities receive information about the presence of a foreign activity in Norway.

92. According to the Norwegian Government, as the Norwegian service recipient is responsible towards the tax authorities, it has the incentive to ensure that the obligations are fulfilled. Any other means of reporting (for example, reporting by the service provider itself, registering by the service provider in the NCR[63]) would not achieve the level of compliance, which is currently ensured by the reporting obligation.

93. However, it has to be noted at the outset that, as regards the statistical data submitted by Norway, this data compares tax residents with non-residents, regardless of whether the non-residents come from EEA countries or from third countries. There is no information on the proportion of non-compliance by, specifically, EEA companies / nationals. Nor does Norway provide any explanation as to the reasons why the non-compliance on the part of EEA companies / nationals is higher, if it is indeed higher. For example, the alleged non-compliance might be due to the lack of clear information in languages of other EEA States about the obligations of these companies / nationals. In other words, the arguments by the Norwegian Government only show a correlation between the fact that an entity is foreign and a lower level of compliance, but not the causation between those two facts.

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[60] See also in this respect Part 5.2.6 "*The nature of the information received through the reporting obligation and some other obligations incumbent on foreign provision of services*" of this reasoned opinion.

[61] See Parts 3.2.3 "*The situation today*", p. 6 and 3.3.3.3 "*The third party obligation is suitable and necessary*", p. 15 of the reply to the letter of formal notice.

[62] See Part 3.2.3 "*The situation today*" of the reply, p. 7.

[63] Please note that this reasoned opinion does not concern the issue whether the obligation for all non-resident contractors operating in Norway to register in the NCR complies with EEA law.

94. Moreover, as was noted above, Norway does not explain why it is not possible to obtain the required information via international cooperation, as well as (at least part of it) through the Internal Market Information System (“the IMI system”).

95. Further, the data submitted does not assess the volume of taxes which were not paid by foreign and Norwegian companies, but rather focuses on the non-compliance with the obligations to register and (or) to submit information to the national tax authorities. In other words, it is not clear whether, after the assessment under the tax treaties, the activities of EEA companies / nationals who failed to submit tax returns, would have resulted in their obligation to pay taxes in Norway and what amount would have been at issue, compared with the amount of taxes not paid by Norwegian companies. The Authority considers that the obligations to register and (or) to submit information to the national tax authorities, rather than paying taxes, cannot be considered as an aim in itself.

96. In particular, under the Norwegian tax system, all the activities performed in Norway or at the continental shelf are taxable from day one and, therefore, Norway considers that all these activities have to be reported to the tax authorities, including by the means of third party reporting.

97. However, such an approach seems to be excessive and does not recognize the context in which modern tax systems operate (treaties on the evasion of double taxation and other international instruments on tax cooperation), with the result that many contracts with respect to which the reporting obligation exists should finally result in no taxation in Norway.

98. In effect, Norway has concluded tax treaties with all EEA States[64] and the majority of these treaties is based on the OECD Model, which can help to find a common denominator which contracts in Norway, although “*taxable from day one*” according to the Norwegian legislation, should not normally result in the foreign contractor’s obligation to pay taxes in Norway.

99. Thus, the fact remains that the reporting obligation applies, *inter alia*, with respect to contracts which, according to tax treaties, are not taxable by Norway. In other words, the Norwegian rules embody the system of preventive control of service providers from other EEA States, which cannot be considered proportionate or adequate with regard to the aims sought by Norway even if it has chosen a high level of effectiveness of fiscal supervision and tax collection.

100. Finally, the data submitted, and the reporting obligation itself, concern the activities of foreign providers in Norway in general rather than certain sectors where the risk of non-compliance and (or) abuse is the highest. The argument that any activity of service providers from other EEA States in Norway poses a risk of non-compliance, so that a third party reporting is necessary, is manifestly inacceptable.

101. Therefore, the Authority takes the view that Norway has not submitted sufficient data to prove a substantial difference in tax compliance between service providers from other EEA States and Norwegian providers and to substantiate its statement that no other measures could achieve the level of compliance currently ensured by the reporting obligation.

102. Even if the statement of the Norwegian Government, to the effect that any other measure would not be capable of achieving the same level of compliance were correct, it would appear that the reporting obligation and the reasons underlying it are based on the general presumption that a service provider from another EEA State will seek to

[64] Norway concluded a tax information exchange, but no double taxation agreement with Liechtenstein.

avoid its tax and other obligations under the Norwegian law. Therefore, the Norwegian entity, by the threat of sanctions is, in essence, required by the tax authorities to make sure that this does not happen.

103. As was also explained in paragraph 94 of the letter of formal notice, according to established case law, a general presumption of fraud is not sufficient to justify a measure that compromises the objectives of the Treaty.

104. In the field of taxation, in particular, a justification based on the fight against tax evasion is permissible only if it targets purely artificial contrivances, the aim of which is to circumvent tax law, and consequently, any general presumption of evasion is excluded. Accordingly, a general presumption of tax avoidance or evasion based on the fact that a service provider is based in another Member State is not sufficient to justify a tax measure that adversely affects the objectives of the Treaty[65].

105. The arguments submitted by the Norwegian Government cannot, therefore, alter the Authority's conclusion that, especially the part of the reporting obligation resting on the Norwegian entity goes beyond what is necessary with regard to the aims sought by the Norwegian Government.

### *5.2.5 The nature of the information received through the reporting obligation and some other obligations incumbent on foreign provision of services*

106. Norway claims that, rather than placing foreign providers at a disadvantage, the reporting obligation is intended to subject foreign contractors to the same level of information provision as Norwegian contractors[66]. In other words, it only seeks to ensure the same overview of resident and non-resident tax payers.

107. However, the fact remains that non-resident service providers are obliged both to register in the NCR *and* to provide information concerning each contract and the start and the end of the work on the assignment of each employee, as well as any changes thereof. This information is to be submitted no later than 14 days after the employee's first and last working day on the assignment. This is more burdensome, particularly in view of the cumulative effect of the obligation to provide information on subsequent contracts, than what is required of Norwegian service providers, who, although also obliged to register in the NCR, do not have to send information to the tax authorities about each contract within 14 days of commencement of the work. In the reply to the request of information[67] the Norwegian Government admitted that "*in some aspects the reporting obligation according to TAA § 5-6 is stricter than the one according to Regulation 2008/942 [concerning the registration of employees in the "EE-register"]. Firstly, the reporting obligation laid down in TAA § 5-6 arises for each contract the employee is working under, while information to the EE-register is given about the employment as such. Secondly, the reporting obligation according to TAA § 5-6 lies upon the principal, not only the employing contractor*".

108. The Authority welcomes the fact that there is no double obligation for a service provider from another EEA State to register the employees in the EE-Register, as well

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[65] Judgments of 28 October 2010, *Rimbaud*, C-72/09, EU:C:2010:645, paragraph 34 and the case law cited therein and of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 56 and the case law cited therein. See to this effect Joined Cases E-26/15 and E-27/15 *Criminal proceedings against B* [2016] EFTA Ct Rep. 740, paragraph 97.

[66] See the revised follow-up letter to the package meeting of 2017 (Doc. No 878916 in Case No 80900).

[67] Page 5 of the reply to the request for information.

as to report them under Section 7-6 of the TAA. However, as was discussed above, the reporting obligation is stricter than the EE-registration. The fact that a service provider from another EEA State does not have to register the employees in the EE-Register does not, therefore, in any way alleviate the restrictive effects of the reporting obligation on the freedom to provide services.

109. Therefore, instead of ensuring the same overview of resident and non-resident tax payers, the reporting obligation can be seen as subjecting non-resident service providers to a stricter level of enforcement than the residents. This is because the registration of Norwegian contractors in the NCR does not automatically mean that they are including information about all the contracts in their tax returns.

110. Moreover, Norway admitted[68] that neither the registration in the NCR nor the reporting obligation generates the information necessary for the purposes of correct tax assessment, so that it does not relieve the contractor from his ordinary obligations to file a tax return and a statement of income. It seems therefore that both obligations (*i. e.* to register in the NCR and to report under Section 7-6 of the TAA) serve the same end, which is to inform the national authorities about a foreign company's activity in Norway. This fact alone speaks against the proportionality and adequateness of the reporting obligation. Indeed, as the tax authorities only receive information through the reporting obligation about the fact that a person is acting in Norway, but not about income and deductions that are necessary to make a tax assessment, it seems that there is no need to require reporting with respect to the providers of services from other EEA States who, for example, have been registered in the NCR. This is all the more so, given the fact that, as was indicated above, contrary to tax withholding systems, the reporting obligation does not relieve any of the contractors of any administrative burden.

111. The Norwegian Government adds that there is no automatic de-registration from the register. Therefore, the NCR does not provide information on whether or not any activity has been carried out in Norway in the specific income year.

112. However, even if the information in the NCR is not complete for the purposes of correct tax assessment, neither does the reporting obligation ensure that the national authorities possess complete information. Moreover, in the view of the Authority, the NCR could well be used by the national authorities as a basis of gathering information necessary for checking the compliance with the national tax legislation.

113. Furthermore, it seems that the reporting obligation and the registration in the NCR are not the only means for Norway to obtain information about the presence of a foreign activity in Norway. Among the sources of information available to the Norwegian institutions are the tax deduction cards issued to employees, issuing of D-numbers, the obligation to report a move to Norway, if a person is intending to stay for more than six months, the use of the possibility for a foreign company to apply to the tax authorities for an assessment of whether this company (and its employees working in Norway) will be eligible for an exemption from taxes[69], HMS cards to be issued to the employees in the building and the cleaning sectors[70], registration in the VAT register, VAT reports, the administrative requirements and control measures necessary

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[68] See Parts 3.3.4 "*As to the Authority's submission that the reporting obligations apply irrespective of whether the taxes were correctly paid by the service provider and / or the employees*" and 3.3.5 "*Why the extent of the reporting obligation is suitable and necessary*" of the reply.

[69] See the follow-up letter to the package meeting of 2017, Part "*Free Movement of Workers*", Item 6 "*Own-initiative case and complaint concerning the issuance of tax cards to EEA nationals and their third-country national family members (Case Nos 80333 and 81012)*" (Doc. No 781498 in Case No 77692).

[70] *Ibid.*

in order to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC on posting of workers[71] and the Enforcement directive 2014/67/EU[72], provided that these are justified and proportionate in accordance with EEA law.

114. Finally, if the information possessed by the national authorities is not complete, the Authority does not see any reason why certain information (for example, pertaining to workers posted to perform an assignment in Norway) could not be checked through the IMI system, in particular because, as was observed above, the reporting obligation ultimately only generates information on whether any foreign activity is being performed in Norway, but not on the assessment of taxes. Moreover, it is doubtful whether the same level of information about the presence of foreign activity in Norway, as is sought by Norway by the reporting obligation, could indeed be obtained by the EU Member States through the EU administrative cooperation in the field of taxation. Besides, it is not clear whether the same level of information is ensured in Norway in the national context.

115. On a more general note, as was also stated by the Norwegian Government, through the reporting obligation the national tax authorities seek to make sure that they possess information about the presence of any foreign activity at the latest within 14 days of commencement of the work in Norway. By receiving this information, the national authorities are able to have an overview of the foreign persons or companies that will, in the future, have to fulfil their obligations, such as, for example, to register, to submit certain information to the tax authorities, to pay taxes.

116. In the reply to the Pre-Article 31 letter[73], the Norwegian Government stated that the reporting obligation is also used to remind non-resident contractors of their obligation to register in the NCR:

"*c) According to the Coordinated Register Act § 4, all non-resident contractors operating in Norway are obliged to register themselves in the National Coordinated Register. By receiving information according to TAA § 5-6, COFTA are suited to ascribe non-compliant contractors with a reminder of this mandatory registration requirement. Despite this extra notice, respectively 307 and 189 contractors did not meet the requirement in 2014 and 2015*".

117. In the view of the Authority, this proves that the Norwegian rules, which embody the system of preventive control of service providers from other EEA States, cannot be considered proportionate nor adequate with regard to the aims sought by Norway.

### *5.2.6 Service providers with respect to whom national authorities already possess information*

[71] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1, and EEA Supplement No 48, 19.11.1998, p. 261), incorporated at point 30 of Annex XVIII to the EEA Agreement by Decision of the EEA Joint Committee No 37/98 (OJ L 310, 19.11.1998, p. 25).

[72] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation") (OJ L 159, 28.5.2014, p. 11), incorporated at point 3 of Annex X and point 30b of Annex XVIII to the EEA Agreement by Decision of the EEA Joint Committee No 215/2018, not yet in force.

[73] Page 7 of the reply to the Pre-Article 31 letter.

118. In its proportionality assessment, Norway does not address the fact that certain foreign service providers are already known to the national authorities and, at least with regard to such providers, the necessary information could be received directly from them.

119. As was mentioned above, Norway argues that the Norwegian practice is compliant with the principles set out in the judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13[74].

120. The Authority acknowledges that the judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13 concerned registered branches. Moreover, the issue assessed in this judgment was an obligation to withhold tax, rather than a reporting obligation or a similar arrangement. The Authority has already explained (see paragraph 78 above) why the reporting obligation cannot be compared with an obligation to withhold tax.

121. For those reasons, the letter of formal notice referred to this judgment only by way of analogy.

122. On the other hand, in the view of the Authority, the judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13 makes it clear that a restriction of free movement of services cannot be justified where it makes no distinction between foreign service providers with respect to whom the national authorities have already received information (via, for example, their registration in the NCR) and foreign service providers with respect to whom such information is not yet available to the national institutions.

123. The explanations provided by the Norwegian Government, however, do not take this aspect into account and rather seek to point out that if a foreign entity has a more permanent character in Norway, so that the registration in the Register of Business Enterprises is triggered, there will be no reporting obligation with respect to the activities of such an entity (a branch). Whereas, as concerns the activity not constituting a branch, foreign entities would not be in a position to fulfil administrative tasks, as they would normally only have operational personnel in Norway.

124. This argument is again based on the premise that, because Norway does not take part in the EU administrative cooperation in the field of taxation, it is allowed to seek to ensure an appropriate level of overview of non-resident tax payers just by national means, without resorting to available international instruments on (tax) cooperation. However, the Authority has already explained why this argument is flawed and, therefore, not acceptable as a matter of EEA law.

### *5.2.7 The use of third party reporting as an internationally recognised instrument*

125. In its reply to the letter of formal notice, Norway further says that it has the right to resort to such an internationally recognised instrument as third party reporting.

126. The Authority believes, however, that the letter of formal notice has already addressed this argument. In particular, in paragraphs 46 and 47 of the letter of formal notice the Authority noted, in essence, that EEA States are, of course, permitted to resort to such an internationally used verification tool as third party reporting. However, in doing so they have to comply with EEA law, including refraining from

[74] Judgment of 19 June 2014, *Strojírny Prostějov*, C-53/13 and C-80/13, EU:C:2014:2011.

discriminating service providers from other EEA States and abolishing all restrictions on the provision of services across borders.

127. The Authority can moreover only welcome the use by Norway of third party reporting, such as reporting from employers and financial institutions, requesting of information from third parties in concrete cases, such as during the construction of the main airport in Oslo, as well as the increasing international exchange of third party information through mechanisms such as the Common Reporting Standard (CRS).

128. However, none of the examples of internationally recognised third party reporting cited by the Norwegian Government in its replies to the Pre-Article 31 letter and to the letter of formal notice concern situations similar to the reporting by resident entities of all the contracts awarded to non-resident contractors, as is required by the reporting obligation. Moreover, the examples of international cooperation given by the Norwegian Government confirm that even without taking part in the EU administrative cooperation in the field of taxation, Norway has a means of receiving information relevant to taxation through other international mechanisms.

129. In any case, the argument by the Norwegian Government does not release it from the obligation to prove the proportionality of the national measures. In other words, the right of EEA States to resort to third party reporting as such does not have a bearing on the proportionality assessment of the reporting obligation.

### *5.2.8 The scope of the information to be submitted by the Norwegian entity to the national tax authorities*

130. The Norwegian Government claims that the information, which has to be submitted by the Norwegian entity, is very limited. Moreover, as a consequence of the reporting obligation, the service recipient will normally inform the service provider about the rules and transfer this responsibility to him as part of their contractual relationship.

131. In that regard, suffice it to point out, first, that a restriction of a fundamental freedom is prohibited by the EEA Agreement even if it is of limited scope or minor importance[75].

132. Second, a possible transfer of the responsibility by the Norwegian entity to the foreign contractor does not alter the fact that the responsibility lies with the Norwegian service provider nor does it justify the restriction of free movement of services.

133. Therefore, the Authority does not consider these arguments to be relevant with regard to the proportionality assessment of the reporting obligation.

134. In addition, the Authority does not agree that the information which has to be submitted by the Norwegian entity should be considered as being very limited. As noted in paragraph 51, the Norwegian service recipient has to report the following information with respect to each contract awarding an assignment in Norway or on its continental shelf to a non-Norwegian contractor as soon as the contract has been concluded and no later than 14 days after the work has commenced: its identity and the identity of the service provider, the start and the end of the assignment, the place where the assignment is to be performed, the contract type, the contract amount, the contract number, as well as information about contractors in the contract chain.

[75] Judgment of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraph 30 and the case law cited therein, and Case E-14/15 *Holship Norge AS* [2016] EFTA Ct Rep. 240, paragraph 116.

135. This cannot be considered as being limited in the case of service recipients awarding many contracts to foreign service providers, as they have to provide this information with respect to each contract. The cumulative effect of the reporting obligation in each case can represent a considerable administrative burden. Neither can the extent of the reporting obligation be considered to be limited with respect to service recipients awarding contracts for the first time or occasionally, as they have to acquaint themselves with the applicable rules and procedures.

136. As to the foreign service providers, clearly, the information which has to be submitted by them cannot be considered as being limited. Not only do they have to provide a certain amount of information about the contract awarding them an assignment in Norway or on its continental shelf as soon as the contract has been concluded and no later than 14 days after the work has commenced. They also must provide information about the start and the end of the work on the assignment of each employee, which shall be provided no later than 14 days after the employee's first and last working day on the assignment, as well as any changes thereof. Depending on the contract, the amount of the information to be submitted and, in particular, the frequency thereof, is capable of constituting a considerable administrative burden for the service provider, which by far does not compare to the amount of the information submitted by Norwegian entities to the EE-Register.

137. As a result, the rules imposing such obligations are liable to dissuade service providers established in other EEA States from providing services in Norway, as well as potential recipients of services established in Norway from having recourse to service providers resident in other EEA States.

*5.2.9 The system of sanctions*

138. The Norwegian Government maintains that the sanctions for the breach of the reporting obligation do not go further than ensuring the effectiveness of the reporting obligation.

139. However, as the Authority is of the opinion that the reporting obligation goes beyond what is necessary to ensure the effectiveness of fiscal supervision and tax collection and to prevent tax fraud, the system of sanctions against the breach of the reporting obligation equally has to be considered as being contrary to EEA law, without there being any need to assess individual sanctions (see paragraph 97 of the letter of formal notice).

140. For this reason, the operative part of neither the letter of formal notice nor this reasoned opinion refer specifically to the Norwegian national provisions establishing sanctions for the non-compliance with the reporting obligation.

*5.2.10 Conclusion*

141. Therefore, as none of the arguments submitted by the Norwegian Government alter the Authority's assessment set out in the letter of formal notice, it follows that by maintaining in force provisions such as Section 7-6 of the TAA and Sections 7-6-1 to 7-6-6 of the RTAA, which require Norwegian based recipients of services and providers of services from other EEA States to submit to the Norwegian authorities specified information on all contracts concluded between them with a value of at least

NOK 20 000 within 14 days of the commencement of work in Norway, Norway has failed to comply with its obligations under Article 36 EEA.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that, by maintaining in force provisions such as Section 7-6 of the Tax Administration Act and Sections 7-6-1 to 7-6-6 of the Regulation implementing and specifying the obligations laid down in the Tax Administration Act, which require Norwegian based recipients of services and providers of services from other EEA States to submit to the Norwegian authorities specified information on all contracts concluded between them with a value of at least NOK 20 000 within 14 days of the commencement of work in Norway, Norway has failed to comply with its obligations under Article 36 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 5 December 2018

For the EFTA Surveillance Authority

| Bente Angell-Hansen<br>President | Frank J. Büchel<br>Responsible College Member | Högni Kristjánsson<br>College Member |
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Carsten Zatschler
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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*