

## EFTA SURVEILLANCE AUTHORITY DECISION

of 19 December 2018

closing a complaint case arising from an alleged failure by Norway to comply with Article 3 of Directive 96/71/EC by maintaining in force provisions requiring the employer of posted workers to cover necessary travel expenses in relation to travel between the home State and Norway and to pay for board and lodging

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

#### **1 Introduction**

On 5 December 2013, the EFTA Surveillance Authority (“the Authority”) received a complaint from the Confederation of Norwegian Enterprises against the Norwegian Government. The complaint alleged that Norway failed to comply with Article 36 of the EEA Agreement on the freedom to provide services and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services<sup>1</sup> (“Directive 96/71/EC”). The complainant maintained that the interpretation and application of Article 36 of the EEA Agreement and Article 3 of Directive 96/71/EC by Norway was not in line with certain aspects of the ruling handed down by the EFTA Court in Case E-2/11 *STX Norway Offshore*<sup>2</sup>.

#### **2 The Authority’s action and Norway’s reaction**

By letter dated 21 January 2014,<sup>3</sup> the Authority sent a request for information to Norway. The Norwegian Government replied by letter of 3 March 2014.<sup>4</sup> The case was discussed at the package meeting in Oslo in October 2014.

On 10 July 2015, the Authority’s Internal Market Affairs Directorate (“the Directorate”) sent a Pre-Article 31 letter to Norway in which it concluded that, by requiring employers of posted workers in certain sectors to cover necessary travel expenses on commencement

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<sup>1</sup> Act referred to at point 30 of Annex XVIII to the EEA Agreement (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 provisions of services), as adapted to the EEA Agreement by Protocol 1 thereto.

<sup>2</sup> Case E-2/11 *STX Norway Offshore* [2012] EFTA Ct. Rep. 4.

<sup>3</sup> Doc No 694969.

<sup>4</sup> Doc No 701262.

and completion of the assignment of a posted worker and for a reasonable number of journeys home and to pay for board and lodging, Norway was in breach of Articles 3(1) and 3(10) of Directive 96/71/EC.<sup>5</sup> The Norwegian Government replied to the Pre-Article 31 letter by letter of 28 September 2015.<sup>6</sup>

The case was discussed with the Norwegian Government at the package meeting in November 2015, at several meetings in Brussels from September 2015 to June 2016 and at the package meeting in October 2016.

A letter of formal notice was sent to Norway on 25 October 2016.<sup>7</sup> In the letter, the Authority concluded that, by maintaining in force and applying with respect to undertakings posting workers from another EEA State in the maritime construction industry, for construction sites and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a (posted) worker and for a reasonable number of journeys home and to pay for board and lodging (during the whole posting period), Norway had failed to fulfil its obligations arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) of the Directive.

By letter dated 20 January 2017,<sup>8</sup> the Norwegian Government replied to the letter of formal notice, stating *inter alia* that it provided a basis for finding solutions to the case, but that the responsibility to find a solution lay with the social partners.

By letter of 24 May 2018,<sup>9</sup> the Authority requested the Norwegian Government to inform it of the results of the negotiations between the social partners. Norway replied by letter dated 20 June 2018,<sup>10</sup> stating that the negotiations had been concluded on 8 April 2018, without amendments to the provisions on compensation for travel, board and lodging. The Norwegian Government further noted that it was for the Tariff Board to decide on the general applicability of the relevant provisions on compensation for travel, board and lodging and that the Tariff Board was expected to decide on the requests for general applicability during the autumn of 2018. In the letter, the Norwegian Government also made a reference to the expected revision of Directive 96/71/EC and stated that some of the amendments would affect the questions raised in this case and that the legal situation seemed to be changing.

By letter dated 27 September 2018,<sup>11</sup> the Authority reiterated its conclusions in the letter of formal notice of 25 October 2016 and stated that the adoption of Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (“the revised Directive”) reinforced the Authority’s position in the case. The Authority noted that although compensation for travel, board and lodging had been added to the list of mandatory rules for minimum protection in Article 3(1), first subparagraph, point (i) of the revised Directive, it followed clearly from the second subparagraph of Article 3(1) that point (i) of Article 3(1), first subparagraph, should apply exclusively to posted workers required to travel within the host State. More specifically, the obligation to compensate for travel, board and lodging only applied to expenditure incurred by posted workers where they would be required to travel to and from their regular place of work within the host State, or where they would be temporarily

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<sup>5</sup> Doc No 762926.

<sup>6</sup> Doc No 774351.

<sup>7</sup> Doc No 775382.

<sup>8</sup> Doc No 836998.

<sup>9</sup> Doc No 914749.

<sup>10</sup> Doc No 919088.

<sup>11</sup> Doc No 926939.

sent by their employer from their regular place of work in the host State to another place of work.<sup>12</sup>

The case was discussed at the package meeting in Oslo on 25 October 2018, where the Norwegian Government informed the Authority that, on 11 October 2018, the Norwegian Tariff Board had adopted Regulations granting continued general applicability to the relevant collective agreements, while at the same time amending the provisions on compensation for travel, board and lodging, so that they only applied to travel within Norway.<sup>13</sup>

By letter dated 23 November 2018,<sup>14</sup> the Norwegian Government provided the Authority with written information about the Tariff Board's Regulations, and the grounds on which they are based (*Protokoll*), concerning the maritime construction industry<sup>15</sup>, for construction sites<sup>16</sup> and for cleaning enterprises<sup>17</sup>. It is stated in the grounds of the Tariff Board's Regulations that the amendments to the provisions on travel, board and lodging should be understood as no longer requiring employers to cover costs of travel between the home State and Norway but that coverage of costs for travel, board and lodging should continue to apply to travel within Norway.<sup>18</sup>

On this basis, the Norwegian Government confirmed its understanding of the provisions regarding travel, board and lodging. In its letter of 23 November 2018, it stated in paragraph 7:

*“Read in conjunction with the more detailed reasoning in the protocols, the Government understands the amended Regulations as no longer requiring coverage of costs for travels from the home country/country of establishment to Norway. The same applies to coverage for costs for board and lodging.”*

The Regulations at issue here entered into force on 1 December 2018.

### 3 The Authority's assessment

As described above, the Norwegian Tariff Board has now adopted Regulations which amend the provisions on travel, board and lodging relevant to this case so that they only apply to travel within Norway. In light of the Tariff Board's Regulations and the views confirmed by the Norwegian Government, the Authority understands the amended provisions as only requiring the employer of posted workers to cover costs for travel, board and lodging in relation to travel within Norway and not in relation to travel between the home State and Norway or board and lodging expenses during the whole posting period.

These amendments entail that the provisions on travel, board and lodging appear to be in line with the revised Directive on the posting of workers, which will include compensation for travel, board and lodging in the list of mandatory requirements for minimum protection of posted workers, but only with regard to travel within the host EEA State.

<sup>12</sup> See also recital 8 in the preamble to the revised Directive.

<sup>13</sup> See Section 7 of the Regulation concerning the maritime construction industry (FOR-2018-10-11-1698); Section 6 of the Regulation concerning construction sites (FOR-2018-10-11-1684); and Section 5 of the Regulation concerning cleaning enterprises (FOR-2018-10-11-1697).

<sup>14</sup> Doc No 1039889.

<sup>15</sup> <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11.-oktober-2018-om-fortsatt-delvis-allmenngjoring-av-industrioverenskomsten.pdf>.

<sup>16</sup> <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11.-oktober-2018-om-fortsatt-allmenngjoring-av-tariffavtale-for-byggeplasser-i-norge-2018--2020.pdf>.

<sup>17</sup> <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11.-oktober-2018-om-fortsatt-allmenngjoring-av-tariffavtale-for-renholdsbedrifter.pdf>.

<sup>18</sup> The unofficial translation of the Authority.

The amendments also entail that, once they are in Norway, posted workers have equivalent rights to those of Norwegian workers, with respect to compensation for travel, board and lodging, in case they are required to travel within Norway.

Lastly, these amendments appear to solve the issues raised by the Authority in the letter of formal notice, as Norway no longer imposes an obligation on employers of workers posted from another EEA State to cover costs for travel in relation to travel between the home State and Norway and board and lodging during the whole posting period.

The Authority is thus of the view that the adopted amendments to the provisions on travel, board and lodging solve the infringement case initiated against Norway.

By letter of 21 November 2018,<sup>19</sup> the Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Directorate's assessment or present any new information by *12 December 2018*.

The complainant did not reply to that letter.

There are, therefore, no grounds for pursuing this case further.

#### HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with Article 3 of Directive 96/71/EC, is hereby closed.

For the EFTA Surveillance Authority

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Responsible College Member

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College Member

For Carsten Zatschler  
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*This document has been electronically authenticated by Bente Angell-Hansen, Catherine Howdle.*

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<sup>19</sup> Doc No 1038679.