

Brussels, 25 October 2016
Case No: 74557
Document No: 775382
Decision No: 191/16/COL

Ministry of Labour and Social Affairs
Postboks 8019 Dep,
0030 Oslo,
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning posting of workers

1 Introduction

1. On 5 December 2013, the EFTA Surveillance Authority (“the Authority”) received a complaint by the Confederation of Norwegian Enterprise, made under Article 109(4) of the EEA Agreement (“EEA”) and concerning alleged failure by Norway to comply with Article 36 EEA on freedom to provide services and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services¹ (“Directive 96/71/EC”).
2. In Case E-2/11 *STX Norway Offshore*², the EFTA Court interpreted Article 36 EEA and Article 3 of Directive 96/71/EC. The complainant claimed that the interpretation and application of EEA law by the Norwegian State was not in line with certain aspects of the ruling handed down by the EFTA Court in Case E-2/11 *STX Norway Offshore*.
3. Moreover, on 5 February 2015, the Authority received a complaint from a Polish service provider claiming that Norway infringed Article 36 EEA and Directive 96/71/EC by requiring an enterprise providing services in Norway in the construction sector to compensate to the posted workers the board and lodging expenses and to include in the employment contracts provisions regarding board and lodging. The complainant claims that if he has to pay the board and lodging expenses, he cannot compete with Norwegian companies, because the requirement to pay these expenses makes his costs by about 40 to 50 % higher than the costs of the local companies.

2 Correspondence

4. By letter dated 21 January 2014 (Doc. No 694969), the Authority sent a request for information to Norway. The Norwegian Government replied to the request on 3 March 2014 (ref. 13/3362, Doc. No 701262).

¹ 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 provision of services), as adapted to the EEA Agreement by Protocol 1 thereto.

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

5. On 16 and 17 October 2014, the issue was discussed at the package meeting in Oslo³.
6. On 10 July 2015 (Doc. No 762926), the Authority's Internal Market Affairs Directorate sent a Pre-Article 31 letter to Norway in which it concluded that by maintaining in force and applying with respect to undertakings posting workers in the maritime construction industry, for construction sites in Norway and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a worker and for a reasonable number of journeys home and to pay for board and lodging, such as provisions in certain Tariff Board Regulations, Norway has failed to fulfil its obligation arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) thereof.
7. After the extension of the deadline, the Norwegian Government replied to the Pre-Article 31 letter by letter of 28 September 2015 (ref. 13/3362, Doc. No 774351).
8. The issue was again discussed at the package meeting of 12 and 13 November 2015 in Oslo⁴ and at the meetings in Brussels on 21 September 2015, 19 February 2016 and 27 June 2016.

3 Relevant national law

9. Directive 96/71/EC is implemented in Norwegian law through the combined effect of the Working Environment Act (Act of 17 June 2005 No 62 relating to working environment, working hours and employment protection etc.), the General Application Act (Act of 4 June 1993 No 58 relating to general application of collective agreements etc.⁵) and the Posting Regulation (Regulation of 16 December 2005 No 1566 relating to posted workers).
10. According to Section 5 paragraph 1 of the General Application Act, the Tariff Board is an autonomous government entity which may *“decide that a nationwide collective agreement shall apply in whole or in part to all employees who perform work of the kind covered by the agreement, within an industry or part of an industry, with the limitations provided by or pursuant to section 1-7 of the Working Environment Act”*.
11. The General Application Act was amended with effect from 1 January 2010. The provision relating to the purpose of the Act was clarified and is now worded as follows (Section 1):
“The purpose of the Act is to ensure foreign employees’ terms of wages and employment which are equivalent to those of Norwegian employees, and to prevent distortion of competition detrimental to the Norwegian labour market.”
12. The Posting Regulation provides in Section 2:
“Regardless of which country’s law otherwise regulates the employment relationship, the following provisions concerning terms and conditions of employment shall apply to posted workers:
a) Chapter 4 <...> of the Act of 17 June 2005 No 62 relating to working environment, working hours and employment protection, etc. (Working Environment Act)

³ See the follow-up letter to the package meeting (Doc. No 726564 in Case No 75236).

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

⁵ English translation used by the Authority found at

http://www.regjeringen.no/upload/AD/kampanjer/Tariffnemnda/Allmenngjoringsloven_sist_endret_2009_engelsk.pdf, checked on 19 November 2015. The Authority is aware that the translation does not include some minor amendments to the Act made after 19 June 2009.

<...>

If the employment relationship for a posted worker falls under the scope of a decision pursuant to the Act of 4 June 1993 No 58 relating to universal application of collective agreements etc., the provisions that have been given universal application and that concern pay or terms of wages and employment pursuant to the first paragraph shall apply to the employment relationship.

The provisions of the first and second paragraphs shall only apply if the posted worker is not subject to more favourable terms and conditions of employment by agreement or pursuant to that country's law that otherwise applies to the employment relationship.”⁶

13. On 6 October 2008, the Tariff Board issued a formal decision by way of regulation (“the Tariff Board Regulation 2008”) to make parts of the Engineering Industry Agreement (“*Verkstedoverenskomsten*”) universally applicable within the maritime construction industry. The Tariff Board Regulation 2008 entered into force on 1 December 2008.
14. The Tariff Board granted universal application to clauses contained within *Verkstedoverenskomsten* on the following matters:
 - The basic hourly wage;
 - Normal working hours which are not permitted to exceed on average 37.5 hours per week;
 - Overtime supplements;
 - A shift-working supplement;
 - A supplement for work assignments requiring overnight stays away from home;
 - Compensation for expenses in connection with work assignments requiring overnight stays away from home, *i. e.* travel, board and lodging and home visits.
15. The Tariff Board Regulation 2008 was worded as follows:

“Regulations of 6 October 2008 concerning partial general application of the Engineering Industry Agreement in the maritime construction industry

Issued by the Tariff Board pursuant to § 3 of Act of 4 June 1993 No. 58 relating to general application of wage agreements, etc.

Chapter I. Introductory provisions

§ 1. The basis for general application

These regulations are laid down on the basis of the Engineering Industry Agreement 2008-2010 between the Confederation of Norwegian Enterprise and the Federation of Norwegian Industries on the one side and the Norwegian Confederation of Trade Unions and the Norwegian United Federation of Trade Unions on the other side.

§ 2. Scope and the responsibility for implementation

These regulations shall apply to skilled and unskilled workers who perform production, assembly and installation work in the maritime construction industry

<...>

⁶ English translation taken from Case E-2/11 *STX Norway Offshore*, cited above, paragraph 14.

Chapter II. Terms of wages and employment

§ 3. Provisions concerning wages

Employees who perform production, assembly and installation work in the maritime construction industry, cf. § 2, shall receive as a minimum the following hourly pay:

a) NOK 126.67 to skilled workers

b) NOK 120.90 to unskilled workers.

In the case of work requiring overnight stays away from home, with the exception of employees taken on at the work site, the following hourly supplement shall be paid:

a) NOK 25.32 to skilled workers

b) NOK 24.18 to unskilled workers.

<...>

§ 5. Working hours

Normal working hours must not exceed 37.5 hours a week.

<...>

§ 6. Overtime pay

A supplement shall be paid for work exceeding normal working hours equal to 50 % of the hourly rate. For work exceeding normal working hours between 21.00 hours and 06.00 hours and on Sundays and public holidays, a supplement equal to 100 per cent of the hourly rate shall be paid.

§ 7. Travelling, board and lodging expenses

In the case of work requiring overnight stays away from home, the employer shall, according to further agreement, cover necessary travelling expenses on commencement and completion of the assignment and for a reasonable number of journeys home.

Before the employer posts the employee to an assignment away from home, an agreement shall be made concerning board and lodging arrangements. The employer shall as a main rule pay for board and lodging, but a fixed subsistence rate, payment as per account rendered or the like may be agreed.

<...>

Chapter III. Derogations from the Act, etc.

§ 10. Derogations from the Act

These regulations shall not apply if as a whole the employee is covered by more favourable terms of wages and employment pursuant to agreement or pursuant to the national law that otherwise applies to the employment.

<...>

Chapter IV. Entry into force, etc.

§ 12. Entry into force and expiry

These regulations shall enter into force on 1 December 2008.

These regulations shall cease to apply one month after the Engineering Industry Agreement between the Norwegian Confederation of Trade Unions and the Confederation of Norwegian Enterprise 2008-2010 is replaced by a new collective

agreement or if the Tariff Board makes a new decision concerning general application of the collective agreement.”⁷

16. The Tariff Board Regulation 2008 was replaced by Regulation No 1764 of 20 December 2010, which in its turn was replaced by Regulation No 381 of 22 March 2013, and the latter Regulation was replaced by Regulation No 1829 of 27 November 2014. However, the provisions regarding travel, board and lodging expenses and other provisions referred to above are, in essence, identical in all the Regulations⁸. Those provisions apply therefore continuously within the maritime construction industry from the entry into force of the Tariff Board Regulation 2008.
17. In the minutes of the Tariff Board meeting of 22 March 2013 (Minutes 1/2013)⁹ the Tariff Board “*finds that the provisions of the Regulation on overtime supplements, working hours, overtime pay and compensation for expenses in connection with work assignments requiring overnight stays away from home are in conformity with Article 36 EEA and the directive on the posting of workers*”¹⁰. An analogous reference and conclusion were also contained in the minutes of the Tariff Board meeting of 27 November 2014 (Minutes 4/2014)¹¹.
18. Moreover, on 24 April 2013, the Tariff Board decided on the universal application of collective agreements for construction sites in Norway. The original Regulation to give universal application to collective agreements for construction sites in Norway was adopted on 21 November 2006 and contained identical provisions regarding travel, board and lodging expenses, as the universally applicable provisions in the maritime construction industry.
19. The Regulation of 21 November 2006 was replaced by Regulation No 1121 of 6 October 2008, which in its turn was replaced by Regulation No 1763 of 20 December 2010, followed by Regulation No 426 of 24 April 2013 and Regulation No 1482 of 27 November 2014. However, the provisions regarding travel, board and lodging expenses are identical in all the Regulations. Those provisions apply therefore continuously for construction sites in Norway from the entry into force of the Tariff Board Regulation of 21 November 2006.
20. The minutes of the Tariff Board meeting of 24 April 2013 (Minutes 3/2013)¹² read:

“The Tariff Board considers that the continuation of the provision of travel, board and lodging, ref. Regulation § 6, is needed to meet the general purpose of the General Application Act. If the workers have to cover such expenses themselves, they will in practice not achieve the stipulated minimum wage.

The Tariff Board has considered the provision for coverage of expenses for travel, board and lodging during accommodation outside home specifically in relation to the EEA Agreement and the Posting Directive (Directive 96/71/EC), and has concluded that EEA law does not preclude the general application of coverage of such expenses.

⁷ English translation found at

http://www.regjeringen.no/upload/AID/publikasjoner/lover_og_regler/2008/Regulations_of_6_October_2008_Agreement_maritime_construction.pdf, checked on 19 November 2015.

⁸ Except the provisions concerning the minimum hourly pay which was adjusted in the subsequent Regulations. However, the present letter does not concern the minimum hourly pay.

⁹ Found at <http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-12013.html?id=723110>, checked on 19 November 2015.

¹⁰ English translation made by the Authority.

¹¹ Found at <https://www.regjeringen.no/nb/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/tariffnemnda/vedtak/2014/protokoll-42014/id2356513/>, checked on 19 November 2015.

¹² Found at <http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-fra-tariffnemndas-mote-24-apri.html?id=725566>, checked on 19 November 2015.

The Tariff Board has in its legal assessment put great emphasis on the Supreme Court's judgment in the Shipyard case (Rt. 2013 p. 258), where the Supreme Court concluded that the general application of the provisions in the Engineering Industry Agreement on coverage of expenses for travel, board and lodging were in accordance with EEA law. In the Tariff Board's view, the Supreme Court's assessment on this point in the Shipyard case is legally clarifying also in the present case, even if it applies to a different agreement.

The Supreme Court held that if the posted worker does not receive coverage for the costs of the dispatch, it means that the employee de facto does not achieve the minimum wage in accordance with the Directive, and therefore the objectives of the collective agreements are not fulfilled. The Supreme Court built its decision primarily on the fact that the provisions on travel, board and lodging can be justified by considerations of public policy, ref. the Posting Directive Article 3(10).

The Tariff Board believes that the Supreme Court's judgment in the Shipyard case provides a clear basis to conclude that the general application of the provisions for coverage of expenses for travel, board and lodging during accommodation outside home is in compliance with EEA law also in other tariff areas than the Engineering Industry Agreement/the Industrial Agreement. The Supreme Court put much emphasis on the fact that loss of general application of cost recovery in the shipbuilding industry would be significant for other generally applicable collective agreements with similar schemes.

When it comes to the issue of whether coverage of costs can be justified by considerations of public policy, the Supreme Court's reasoning is general in the sense that it was shown which consequences the loss of general application of coverage of costs can have for the Norwegian labour- and wage-bargaining model as such. That the shipbuilding industry is a wage leading industry was a supporting argument for the Supreme Court in this context, however, was not decisive. The argument was not solely limited to the general application of the specific agreement in question. In the judgment of the Supreme Court, general application was discussed as a method to prevent social dumping, and the general application institute as a tool to ensure stability in the Norwegian labour market model.

On these grounds, the Tariff Board finds that it is compatible with EEA law to make generally applicable provisions for the reimbursement of expenses for travel, board and lodging during accommodation outside home, and this is necessary to achieve the purpose of the General Application Act.¹³

21. In its minutes of 27 November 2014 (Minutes 1/2014)¹⁴ the Tariff Board refers to the assessment provided for in its decision of 24 April 2013 as regards the justification of the continued application of the provisions regarding travel, board and lodging expenses and states that the legal situation has not changed.
22. Finally, on 23 May 2013, the Tariff Board decided on the universal application of collective agreements for cleaning enterprises. The original Regulation to give universal application to collective agreements for cleaning enterprises was adopted on 21 June 2011 and contained identical provisions regarding travel, board and lodging expenses, as the universally applicable provisions in the maritime construction industry and for the construction sites in Norway.

¹³ English translation made by the Authority.

¹⁴ Found at <https://www.regjeringen.no/nb/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/tariffnemnda/vedtak/2014/Protokoll-12014/id2342632/>, checked on 19 November 2015.

23. The justification contained in the minutes of the Tariff Board meeting of 23 May 2013 (Minutes 4/2013)¹⁵ concerning the continued application of the provisions regarding travel, board and lodging expenses is identical in its wording to the justification quoted in paragraph 20.
24. Regulation No 530 of 23 May 2013 was replaced by Regulation No 1483 of 27 November 2014. However, the provisions on travel, board and lodging expenses are identical in all three Regulations, *i. e.* Regulation of 21 June 2011, Regulation No 530 of 23 May 2013 and Regulation No 1483 of 27 November 2014. Those provisions apply therefore continuously for cleaning enterprises from the entry into force of the Tariff Board Regulation of 21 June 2011.
25. As regards the justification for the continued application of the provisions at issue in its minutes of 27 November 2014 (Minutes 3/2014)¹⁶ the Tariff Board refers to the assessment made in its decision of 23 May 2013 and states that the legal situation has not changed.

4 Relevant EEA law

26. Article 3 of Directive 96/71/EC reads:

“Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or*
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:*

<...>

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

<...>

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

<...>

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) when the length of the posting does not exceed one month.

<...>

¹⁵ Found at <http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-fra-tariffnemndas-mote-23-mai-.html?id=727795>, checked on 19 November 2015.

¹⁶ Found at <https://www.regjeringen.no/nb/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/tariffnemnda/vedtak/2014/Protokoll-32014/id2342634/>, checked on 19 November 2015.

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

<...>

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,
- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex."

27. When Directive 96/71/EC was adopted, Declaration No 10 on Article 3(10) of Directive 96/71/EC ("Declaration No 10") was recorded in the minutes of the Council of the European Union as follows:

"The Council and the Commission stated:

"the expression "public policy provisions" should be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions."

5 The Authority's assessment

28. In 2009-2013 the Tariff Board Regulation 2008 was subject to the national proceedings in Norway during which the applicants, *STX Norway Offshore* and eight other companies in the maritime construction industry, brought an action against the Norwegian State arguing that the Tariff Board Regulation 2008 was incompatible with Directive 96/71/EC and Article 36 EEA.

29. In the course of the national proceedings, on 9 February 2011, the Borgarting Court of Appeal requested an Advisory Opinion from the EFTA Court. The EFTA Court delivered its Advisory Opinion by judgment of 23 January 2012 in Case E-2/11 *STX Norway Offshore*¹⁷.

30. After receiving the Advisory Opinion from the EFTA Court, on 8 May 2012, the Borgarting Court of Appeal delivered a judgment where it dismissed the appeal by *STX Norway Offshore* and others. The judgment was further appealed to the Norwegian Supreme Court.

¹⁷ Case E-2/11 *STX Norway Offshore*, cited above.

31. The judgment of the Norwegian Supreme Court was delivered on 5 March 2013¹⁸. It dismissed the appeal and ordered the appellants to pay the costs.
32. In its complaint to the Authority, the Confederation of Norwegian Enterprise claimed that the interpretation of EEA law provided for in the judgment of the Norwegian Supreme Court was not in line with certain aspects of that by the EFTA Court in Case E-2/11 *STX Norway Offshore*.
33. In particular, as concerns the current letter of formal notice, according to the EFTA Court, compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home (examined under Question 1(c) in Case E-2/11 *STX Norway Offshore*) does not fall under the notion of the minimum rates of pay in Article 3(1) first subparagraph point (c) of Directive 96/71/EC.
34. During the package meeting of 16 and 17 October 2014 (see the reply from the Ministry to the follow-up letter of 25 November 2014 (Doc. No 730690 in Case No 75236)) the Norwegian Government explained that, in their understanding, it was not to be dismissed that the compensation for travel, board and lodging might be categorised under Article 3(1) first subparagraph point (c) of Directive 96/71/EC. However, it was not necessary to form a final opinion on whether the compensation for travel, board and lodging is to be categorised under Article 3(1) first subparagraph point (c), because the compensation for travel, board and lodging was compatible with Article 3(10) of the Directive (see paragraphs 155-176 of the judgment).
35. As shown in paragraphs 16-25 of this letter, in March-May 2013 and November 2014, the Tariff Board considered the provisions regarding the compensation for travel, board and lodging expenses in the maritime construction industry, for construction sites in Norway and for cleaning enterprises of a general nature and universally applicable.
36. Therefore the situation now prevailing in Norway based on the Tariff Board regulations is that undertakings posting workers in the maritime construction industry, for construction sites in Norway and for cleaning enterprises must provide to the posted workers the compensation for travel, board and lodging expenses.
37. However, in the Authority's view, such provisions as the provisions for compensation for travel, board and lodging expenses cannot, under Directive 96/71/EC, be declared universally applicable and imposed on undertakings posting workers, as they do not fall under Article 3(1) first subparagraph point (c) of the Directive nor can they be justified under Article 3(10) of the Directive on public policy grounds.

5.1 Whether the compensation for travel, board and lodging expenses falls under Article 3(1) first subparagraph point (c) of Directive 96/71/EC

38. Under Section 7 of the Tariff Board Regulation 2008 and the analogous provisions in the subsequent Regulations, as well as in the Tariff Board Regulations for construction sites in Norway and for cleaning enterprises, an employer is required to cover necessary travel expenses on commencement and completion of the assignment of a posted worker and for a reasonable number of journeys home. Before the employer posts an employee to an assignment away from home, an agreement has to be made concerning board and lodging arrangements. The employer must as a main rule pay for

¹⁸ Ref.: HR-2013-0496-A, Case No 2012/1447.

- board and lodging, but a fixed subsistence rate, payment as per account rendered or the like may be agreed.
39. In order to define the concept of “*the minimum rates of pay*” under Article 3(1) first subparagraph point (c) of Directive 96/71/EC and establish whether the compensation for travel, board and lodging expenses falls under this concept it is important to point out that although the Directive has not harmonised the material content of the mandatory rules for minimum protection, it nevertheless provides certain information concerning that content¹⁹.
 40. Reference is made to Article 3(7) second subparagraph of Directive 96/71/EC according to which allowances specific to the posting are to be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. That provision therefore makes clear, as regards allowances specific to the posting, the extent to which the elements of pay are regarded as being part of the minimum wage for the purposes of the terms and conditions of employment laid down in Article 3 of Directive 96/71/EC²⁰.
 41. In particular, that provision intends to rule out the possibility of taking into account, for the purposes of calculating minimum wage, benefits related to travel, board and lodging in a way that would deprive the workers concerned of the economic counter-value of their work²¹.
 42. Treating the compensation for travel, board and lodging expenses in the way that it falls under Article 3(1) first subparagraph point (c) of Directive 96/71/EC would therefore circumvent the purpose of Article 3(7) second subparagraph of the Directive²².
 43. Moreover, the non-inclusion of reimbursement of expenditure on travel, board and lodging into the concept of “*the minimum rates of pay*” does not mean that the employees concerned are barred from receiving benefits related to travel, board and lodging.
 44. As stated by the Court of Justice, where an employer requires a worker to work under particular conditions, compensation must be provided to the worker for that additional service without it being taken into account for the purpose of calculating the minimum wage²³.
 45. Article 3(7) second subparagraph of Directive 96/71/EC therefore provides the posted workers with an enhanced protection, in addition to that provided for in Article 3(1) first subparagraph point (c) of the Directive, *i. e.* the posted workers are guaranteed the full minimum wage under Article 3(1) first subparagraph point (c) *and*, as the case might be, benefits related to travel, board and lodging.
 46. However, Directive 96/71/EC is construed in the way that posted workers enjoy equal treatment with the workers in the host EEA State, but only in respect of those areas which are laid down in the Directive (Article 3(1) first subparagraph points (a)-(g));

¹⁹ Judgment in *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86, paragraph 31.

²⁰ Judgment in *Sähköalojen ammattiliitto*, cited above, paragraph 33.

²¹ Opinion of Advocate General Wahl of 18 September 2014 in Case C-396/13 *Sähköalojen ammattiliitto*, EU:C:2014:2236, paragraph 112.

²² See judgment in *Sähköalojen ammattiliitto*, cited above, paragraphs 33 and 60 and opinion of Advocate General in Case C-396/13 *Sähköalojen ammattiliitto*, cited above, paragraph 111.

²³ Judgment in *Commission v Germany*, C-341/02, EU:C:2005:220, paragraph 40; judgment in *Isbir*, C-522/12, EU:C:2013:711, paragraph 39.

otherwise, home EEA State law would apply. Therefore, as regards the compensation referred to in paragraph 44 of this letter, home EEA State law applies.

47. The conclusion that with respect to the compensation referred to in paragraph 44 of this letter, home EEA State law applies, is furthermore supported by the case law of the Court of Justice whereby, *inter alia*, the host EEA State cannot impose terms and conditions of employment which go “*beyond the mandatory rules [in Article 3(1) first subparagraph] for minimum protection*”²⁴ relying on Article 3(7) first subparagraph which foresees application of terms and conditions of employment which are more favourable to workers.
48. Allowances could be covered by Article 3(1) first subparagraph point (c) of Directive 96/71/EC only if they are paid in the form of a flat rate, without any direct link to the specific expenditure incurred.
49. However, the compensation for travel, board and lodging expenses under the Tariff Board Regulation 2008 and the analogous provisions in the subsequent Regulations, as well as in the Tariff Board Regulations for construction sites in Norway and for cleaning enterprises is provided, as a rule, in the form of reimbursement of expenditure actually incurred on account of the posting. A fixed subsistence allowance instead of covering board and lodging expenses may only “*be agreed [by the employer and the employee]*”.
50. Such payments cannot therefore be deemed to be pay within the meaning of Article 3(1) first subparagraph point (c) of the Directive, because of their nature as compensation of necessary expenditure related to the posting. Neither can they fall within any other of the matters listed exhaustively in Article 3(1) first subparagraph²⁵.
51. This conclusion is not altered by the arguments, also relied on by the Tariff Board²⁶, to the effect that if the payment of compensation cannot be made generally applicable and the posted workers are *accordingly* left to pay the costs themselves, then *de facto* result will be that the workers will not obtain the minimum rates of pay. Such reasoning represents a misunderstanding of the system created by Directive 96/71/EC, according to which, as noted above, the host EEA State regulates the matters expressly listed in the Directive. In all other cases, the law of the home EEA State applies. Therefore, if the payment of compensation cannot be made generally applicable in the host EEA State under Directive 96/71/EC, it does not mean that the posted workers are *accordingly* left to pay the costs themselves.
52. On the contrary, depending on the home EEA State law, undertakings posting workers might be required to cover the same and/or different expenses. Therefore, if the interpretation and the arguments were adhered to, *de facto* result might be that the undertakings posting workers would be required to pay higher rates of pay than the minimum rates of pay.
53. The Norwegian Government, first, does not agree with the conclusion that the compensation for travel, board and lodging expenses does not fall under Article 3(1) first subparagraph point (c) of Directive 96/71/EC and argues in the reply to the Pre-Article 31 letter (ref. 13/3362, Doc. No 774351) that the question on whether Article 3(1) first subparagraph point (c) of the Directive may include compensation for travel, board and lodging concerns the host EEA State’s regulatory competence. This

²⁴ Judgment in *Laval*, C-341/05, EU:C:2007:809, paragraph 80; judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 33.

²⁵ See Case E-2/11 *STX Norway Offshore*, cited above, paragraph 97.

²⁶ See paragraph 20 of this letter.

- should be distinguished, in its view, from the question of the method of calculating the wage actually paid by the service provider under Article 3(7) of Directive 96/71/EC.
54. The Authority notes that the same argument was submitted by the Norwegian Government in its written observations in Case C-396/13 *Sähköalojen ammattiliitto*²⁷, where the Government argued that expenditure on travel, board and lodging could fall under the notion of pay within the meaning of Article 3(1) first subparagraph point (c) of the Directive, even if such expenditure is paid in the form of reimbursement of expenditure actually incurred on account of the posting.
55. However, as noted also in point 69 of the Pre-Article 31 letter, the Court of Justice did not follow the Norwegian Government's line of argument.
56. In particular, in judgment in *Sähköalojen ammattiliitto*, paragraphs 32-34, the Court of Justice, first, recalled that, according to Article 3(1) first subparagraph of the Directive, the concept of minimum rates of pay is defined by the national law and (or) practice of the host EEA State. Second, it referred to Article 3(7) second paragraph of the Directive which "*makes clear, as regards allowances specific to the posting, the extent to which those elements of pay are regarded as being part of the minimum wage for the purposes of the terms and conditions of employment laid down in Article 3 of the directive*". Finally, it stated that, "*subject to the provisions made in [Article 3(7) second paragraph of the Directive]*", the law of the host EEA State defines what are the constituent elements of the minimum wage, but only in so far as that definition does not have the effect of impeding the freedom to provide services between EEA States.
57. The Authority emphasises that the considerations described in paragraph 56 of this letter were taken into account by the Court of Justice not only for the purposes of examining such elements of pay, as the coverage of the cost of accommodation and meal vouchers, but also for its analysis of Question 6 in judgment in *Sähköalojen ammattiliitto* in general²⁸.
58. Moreover, the Norwegian Government's argument, if accepted, would render Article 3(7) second paragraph of the Directive devoid of its purpose. If an EEA State were allowed to classify allowances specific to the posting paid in the form of reimbursement of expenditure actually incurred, such as compensation for travel, board and lodging expenses, as minimum rates of pay under Article 3(1) first subparagraph point (c) of Directive 96/71/EC, the question then arises how Article 3(7) second paragraph of the Directive should be interpreted? The reading of the Directive would be very selective, if, as proposed by the Norwegian Government, Article 3(7) second paragraph is considered as relevant only on the condition that an EEA State does not include such expenditure in the minimum rates of pay and a service provider seeks to include in the calculation of the minimum wage the reimbursement of expenditure actually paid to posted workers.
59. In any case, the Norwegian Government's argument is rejected by the EFTA Court, which, analysing exactly the question whether a host Member State can include such payments as the compensation for travel, board and lodging expenses in the minimum rates of pay, stated that such payments "*cannot fall within the notion of pay within the meaning of Article 3(1) of the Directive, because of their nature as compensation of*

²⁷ Written observations by the Kingdom of Norway in Case C-396/13 *Sähköalojen ammattiliitto*, paragraphs 51-54.

²⁸ See, for example, paragraphs 47, 49, and 56 of the judgment.

*necessary expenditure related to the posting. Neither can they fall within any other of the matters listed exhaustively in Article 3(1)*²⁹.

60. Second, the Norwegian Government recalls, as regards the argument in paragraph 52 of this letter³⁰, that all regulations on general application of collective agreements contain a derogation provision stating that the regulations do not apply if, pursuant to agreement or to the national law, the worker is covered by terms of wages and employment which otherwise apply to the employment relationship and which, taken as a whole, are more favourable. The aim of this provision, according to the Norwegian Government, is to prevent that the service provider is required to pay rates going beyond the minimum rates.
61. The Authority does not see however how this argument could alter what has been said in paragraph 52 of this letter. Reimbursement of expenditure actually incurred on account of the posting is not allowed, under Article 3(7) second paragraph of the Directive, to be included in the calculation of the minimum rates of pay. The Norwegian Government claims, however, that a host EEA State can include reimbursement of certain expenditure in the minimum rates of pay. If that were the case, the home EEA State law could, for example, require to provide board for posted workers and the host EEA State law - lodging expenses as a part of the minimum rates of pay. In such a case the expenditure incurred by the undertaking posting workers for the provision of board could not be included in the calculation of the minimum wage applicable under the host EEA State law. The result therefore would be that the undertaking would be required to pay both the lodging expenses as a part of the minimum rates of pay under the host EEA State law *and* the boarding, although it is not required by the host EEA State. It is not clear how the derogation provision in all regulations on general application of collective agreements would prevent such a result.

5.2 Whether the compensation for travel, board and lodging expenses is justified under Article 3(10) of Directive 96/71/EC on public policy grounds

62. Article 3(10) of the Directive allows host EEA States, in compliance with the EEA Agreement, to apply to national undertakings and to the undertakings from the other EEA States, on a basis of equality of treatment, terms and conditions of employment on matters other than those referred to in Article 3(1) first subparagraph points (a)-(g) of the Directive in the case of public policy provisions.
63. As shown above, the compensation for travel, board and lodging expenses cannot fall under Article 3(1) first subparagraph point (c) of Directive 96/71/EC. Therefore it must be verified, whether this compensation could be justified under Article 3(10) of the Directive.
64. The legal doctrine established by the case law of the Court of Justice and closely followed by the EFTA Court³¹ generally provides that public policy provisions should be interpreted very narrowly and applied only in very exceptional cases. For example,

²⁹ Case E-2/11 *STX Norway Offshore*, cited above, paragraph 97.

³⁰ Point 68 of the Pre-Article 31 letter.

³¹ The analysis of the EFTA Court's interpretation of public policy provisions in cases subsequent to Case E-2/11 *STX Norway Offshore* shows that there is no divergence from the established case law of the Court of Justice. See in this respect, for example, Case E-13/11 *Granville Establishment* [2012] EFTA Ct. Rep. 400, paragraph 49; Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraph 81 and seq.; Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraph 91.

as regards free movement of persons, the case law regarding justification of restrictions to the free movement right on public policy grounds is codified now in Article 27 of Directive 2004/38/EC³² which points to a very narrow interpretation of the justification. According to this Article, public policy grounds cannot be invoked to serve economic ends; measures taken on the grounds of public policy must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned; the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society *etc.* In the field of free movement of services the respective case law is defined in Recital 41 of Directive 2006/123/EC³³ which reads:

“The concept of “public policy”, as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. <...>”

65. As regards, in particular, the public policy provisions in Article 3(10) of Directive 96/71/EC, both the Court of Justice and the EFTA Court have already had an occasion to interpret the concept of public policy in this Article in judgments in *Laval*³⁴ and *Commission v Luxembourg*³⁵, Cases E-12/10 *ESA v Iceland*³⁶ and E-2/11 *STX Norway Offshore*.
66. The Authority notes that the interpretation of the concept in Article 3(10) of Directive 96/71/EC does not differ from the general understanding of the concept as a justification of a restriction to a fundamental freedom enshrined in the EEA Agreement or TFEU. Both Courts moreover based their arguments on the case law from other fields³⁷.
67. The case law establishes that the public policy provision in Article 3(10) of Directive 96/71/EC constitutes an exception to the system put in place by that Directive and a derogation from the fundamental principle of freedom to provide services on which the Directive is based and must be interpreted strictly³⁸.
68. While the EEA States are still, in principle, free to determine the requirements of public policy in the light of national needs, the notion of public policy may be relied

³² Act referred to at point 3 of Annex VIII to the EEA Agreement (*Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*), as adapted to the EEA Agreement by Protocol 1 thereto.

³³ Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement by Protocol 1 thereto.

³⁴ Judgment in *Laval*, cited above.

³⁵ Judgment in *Commission v Luxembourg*, C-319/06, EU:C:2008:350.

³⁶ Case E-12/10 *ESA v Iceland* [2011] EFTA Ct. Rep. 117.

³⁷ The Court of Justice relied on judgment in *Omega*, C-36/02, EU:C:2004:614, paragraph 30 (free movement of services); judgment in *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 17 (free movement of capital) and judgment in *Commission v Belgium*, C-254/05, EU:C:2007:319, paragraph 36, and the case law cited (free movement of goods). The EFTA Court – on Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42 (free movement of capital) and Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42 (right of establishment).

³⁸ Judgment in *Commission v Luxembourg*, cited above, paragraph 49; Case E-12/10 *ESA v Iceland*, cited above, paragraph 56.

upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society³⁹.

69. Moreover, the scope of the notion of public policy cannot be determined unilaterally by each EEA State without any control by the EEA institutions⁴⁰. The reasons which may be invoked by an EEA State in order to justify a derogation from the freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated⁴¹.
70. Finally, if an EEA State wishes to take advantage of the derogation in Article 3(10) of the Directive, it must do it expressly and in advance. A mere *post hoc* assertion is not sufficient⁴².
71. Therefore, as may be seen from the case law described in paragraphs 67-70 above, as well as from the examples of public policy provisions in Recital 41 of Directive 2006/123/EC and Declaration No 10⁴³, which might be relied on in support of an interpretation of Article 3(10) of Directive 96/71/EC⁴⁴, the concept of public policy has been narrowed down by the case law to an extraordinarily high standard. For example, as regards labour law the Declaration No 10 referred by the Authority in Part 4 “*Relevant EEA law*” of this letter states that the expression “*public policy provisions*” may include the prohibition of forced labour.
72. It is important to note that the concept of public policy should not be confused with the notion of overriding reasons relating to the public interest.
73. According to established case law the latter are used primarily as a justification for the restrictions to free movement applied without any distinction to national and EEA subjects. The list of the overriding reasons relating to the public interest is not exhaustive and EEA States may rely, subject to the requirement of proportionality, on various reasons, in order to justify their restrictions.
74. As can be clearly seen from Article 4(8) of Directive 2006/123/EC defining the notion of “*overriding reasons relating to the public interest*”, public policy is listed just as one of such overriding reasons⁴⁵.
75. In its judgment the Supreme Court established that the alleged aims of ensuring the “*stability of the Norwegian labour market and wage leadership model*” and preventing social dumping constitute issues linked to public policy grounds⁴⁶.

³⁹ Judgment in *Commission v Luxembourg*, cited above, paragraph 50; Case E-12/10 *ESA v Iceland*, cited above, paragraph 56.

⁴⁰ Judgment in *Commission v Luxembourg*, cited above, paragraph 50; Case E-12/10 *ESA v Iceland*, cited above, paragraph 56; Case E-2/11 *STX Norway Offshore*, cited above, paragraph 99.

⁴¹ Judgment in *Commission v Luxembourg*, cited above, paragraph 51; Case E-12/10 *ESA v Iceland*, cited above, paragraph 57; Case E-2/11 *STX Norway Offshore*, cited above, paragraph 99.

⁴² Judgment in *Laval*, cited above, paragraph 84.

⁴³ Cited in paragraph 27 of this letter.

⁴⁴ Judgment in *Commission v Luxembourg*, cited above, paragraph 32.

⁴⁵ Article 4(8) of Directive 2006/123/EC, as adapted to the EEA Agreement, reads: “*overriding reasons relating to the public interest*” means, without prejudice to Article 6 of the EEA Agreement, reasons recognised as such in the rulings of the Court of Justice <...>, including the following grounds: **public policy**; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives”.

⁴⁶ See paragraph 170 of the judgment of the Supreme Court, which states: “*Based on the Ministry’s general statements in the Proposition to the Odelsting no 88 (2008-2009) about the destabilising potential of*

76. In this regard, the Authority notes that in the Supreme Court’s analysis, the public policy concept is applied in a way which makes it close to being synonymous with overriding reasons relating to the public interest.
77. However, Article 3(10) of Directive 96/71/EC does not provide for an exception on grounds of overriding reasons relating to the public interest.
78. The interpretation to the effect that the alleged aims of ensuring the “*stability of the Norwegian labour market and wage leadership model*” and preventing social dumping constitute issues linked to public policy grounds therefore goes against the established case law and infringes Article 3(10) of the Directive.
79. Compensation for travel, board and lodging expenses cannot be justified under Article 3(10) of Directive 96/71/EC with the aim of ensuring the “*stability of the Norwegian labour market and wage leadership model*” and preventing social dumping, as these aims cannot be considered as related to public policy.
80. Moreover, as noted by Advocate General Wahl in his opinion in Case C-396/13 *Sähköalojen ammattiliitto*, to fall within the scope of the public policy exception, a given provision must be deemed so crucial as to require compliance therewith by all persons present on the national territory of that EEA State and all legal relationships within that State⁴⁷.
81. The Norwegian rules do not comply with this test, as the provisions relating to the compensation for travel, board and lodging expenses apply only in certain sectors of industry.
82. The Norwegian Government argues in the reply to the Pre-Article 31 letter (ref. 13/3362, Doc. No 774351) that the interpretation by the Authority of the concept of public policy in Article 3(10) of Directive 96/71/EC is not in line with the system laid down in the Directive and the EFTA Court’s judgment in Case E-2/11 *STX Norway Offshore*.
83. First, the Norwegian Government is of the opinion that the reference in Article 3(10) first indent of the Directive to “*terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1*” means that it should not be excluded *a priori* that “*terms and conditions of employment*” may qualify under the concept of public policy in Article 3(10) of the Directive.
84. Second, the Norwegian Government argues that, in accordance with, *inter alia*, the EFTA Court’s judgment in Case E-2/11 *STX Norway Offshore*, paragraph 100, where the EFTA Court stated that “*<the> assessment of whether the compensation scheme in question may be justified on the basis of public policy provisions must be made by the national court, on the basis of all the facts before it <...>*”, Article 3(10) of the Directive presupposes a concrete assessment, having regard to all the relevant facts, of

social dumping on the labour market model, and based on the socio-economic analyses submitted in the case, I find it to be adequately documented that a general application of the Engineering Industry Agreement’s rules relating to compensation payable for travel, board and lodging expenses are of importance to the stability of the Norwegian labour market and wage leadership model. It follows from my general starting point that we are accordingly looking at “public policy provisions” under section 3(10) [of Directive 96/71/EC]. In my assessment I attach considerable importance to the domino effect that a revocation of section 7 of the Regulation would have for other generally applied collective agreements with identical arrangements. If the reimbursement provisions are revoked, this would thus have consequences for a considerably larger number of posted workers than merely those employed in the maritime construction industry.”

⁴⁷ Opinion of Advocate General Wahl of 18 September 2014 in Case C-396/13 *Sähköalojen ammattiliitto*, cited above, paragraph 118, relying on judgment in *Commission v Luxembourg*, cited above, paragraphs 29-31, and case law cited.

whether terms and conditions of employment may be justified under that provision. This is, in the Norwegian Government's view, what the national court subsequently did, having regard to the extensive material put before it. Although the national court acknowledged that the concept of public policy in Article 3(10) of the Directive provides a high threshold, a comprehensive and quite complex factual assessment, based, *inter alia*, on several socio-economic papers, led the national court to conclude that the contested provisions were "*of importance to maintain stability in the Norwegian labour market and wage leadership model*" ("*stabiliteten i den norske arbeidslivs- og frontfagsmodellen*"). This referred, *inter alia*, to the risk of a ripple-effect which could undermine the very foundations of the domestic regulation of the labour market. That was the reason why the national court, fully aware of the high legal threshold provided by the concept of public policy, in that case found that the contested provisions could be justified under Article 3(10) of the Directive.

85. As regards the first argument the Authority notes that it has never maintained that "*terms and conditions of employment*" may in no circumstances fall under the concept of public policy in Article 3(10) of the Directive. On the contrary, as mentioned in paragraph 71 of this letter, the Declaration No 10 clearly states that the expression "*public policy provisions*" may include, for example, the prohibition of forced labour, which could indeed be considered as falling under the "*terms and conditions of employment*". The rules falling under the notion of public policy should however, as explained in paragraph 80 of this letter, not allow for any derogation and, by their nature and objective, should meet the imperative requirements of public interest.
86. As regards the second argument the Authority refers once more to paragraphs 64-81 of this letter explaining in detail why the "*stability of the Norwegian labour market and wage leadership model*" cannot be considered as public policy.
87. As the compensation for travel, board and lodging expenses cannot fall under Article 3(1) first subparagraph and cannot be justified under Article 3(10) of Directive 96/71/EC, the Authority takes the view that by maintaining in force and applying with respect to undertakings posting workers in the maritime construction industry, for construction sites in Norway and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a worker and for a reasonable number of journeys home and to pay for board and lodging, such as provisions in Section 7 of the Tariff Board Regulation No 1829 of 27 November 2014, Section 6 of Regulation No 1482 of 27 November 2014 and Section 5 of Regulation No 1483 of 27 November 2014, Norway has failed to fulfil its obligations arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) thereof.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force and applying with respect to undertakings posting workers in the maritime construction industry, for construction sites in Norway and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a worker and for a reasonable number of journeys home and to pay for board and lodging, such as provisions in Section 7 of the Tariff Board Regulation No 1829 of 27 November 2014, Section 6 of Regulation No 1482 of 27 November 2014 and Section 5 of Regulation No 1483 of 27 November 2014, Norway has failed to fulfil its obligation arising from Article 3(1) of the 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 provision of services*), as adapted to the EEA Agreement by Protocol 1 thereto, read in conjunction with Article 3(10) thereof.

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

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

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel on 25/10/2016