ESA | EFTA Surveillance Authority

Brussels 8 October 2025
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Ministry of Labour and Social Inclusion
Postboks 8019 Dep
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Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the implementation of the Revised Posting of Workers Directive

1 Introduction

The cross-border supply of services has prompted a growing number of companies to send their employees abroad temporarily to perform work in the territory of an EEA State other than that in which they are habitually employed.[1] Such employees, commonly referred to as *posted workers*, usually return to the EEA State from which they were sent once the work has been completed.[2]

Remaining employed by the sending company, posted workers are subject to the law applicable to their employment contract, which most often is the law of their home EEA State. For example, a Latvian construction company with a contract to build an office block in Oslo might send workers (Latvian or others) to Norway to deliver the project.[3] At the outset, those workers remain subject to Latvian law not only for the purpose of social security coordination and taxes but, also, labour law.

However, to guarantee that rights and working conditions for posted workers are protected throughout the EEA and to ensure a level-playing field, it was decided that EEA law should define a set of mandatory rules regarding the terms and conditions of employment to be granted to such workers.[4]

Concretely, the wish to promote transnational economic activity while at the same time ensuring a climate of fair competition and the rights of workers, led to the adoption of Directive 96/71/EC on posting of workers back in 1996.[5] Notably, its Article 3(1) determined that generally applicable rules of the *host* (or the *receiving*) state on matters such as remuneration, paid annual leave and rest periods shall be applied to posted workers. The result is that, in the example provided above, the workers shall receive pay and annual leave according to Norwegian rules, not those of the home EEA State (Latvia).

Directive 96/71/EC (hereinafter the "Revised PoW Directive") was subsequently amended by the adoption of Directive (EU) 2018/957 ("the amending Directive" or "Directive

[1] See preamble 3 to Directive 96/71/EC.
[2] See preamble 9 to Directive 2018/957.
[3] Example sourced from a blog post on the website of Bruegel.
[4] See the European Commission's website dedicated to the topic of posted workers.
[5] Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services. Incorporated into Annex XVIII of the EEA Agreement by Decision of the EEA Joint Committee No 37/98, entering into force on 1 July 1999.

2018/957").[6] The amendments include *inter alia* new provisions on long-term posting, reimbursement of expenditure on travel, board and lodging and, also, on monitoring, control and enforcement.

The amending Directive entered into force in the EEA EFTA States on 1 January 2023, with Norway notifying full implementation shortly thereafter.

After having examined the information and explanations received from the Norwegian Government, the Authority cannot conclude that Norway has sufficiently implemented the Revised PoW Directive, as amended by Directive 2018/957.

Notably, the sending company's right to extend the posting period, its obligation to reimburse the posted workers for expenses incurred due to the posting itself (from the home to the host EEA State) and the additional protection in case of fraudulent (non-genuine) posting, have not been adequately implemented into the Norwegian legal order.

2 Correspondence

On 6 January 2023, the Authority received a Form 1 from the Norwegian Government indicating full implementation of Directive 2018/957.[7]

By way of a letter dated 6 September 2023, the EFTA Surveillance Authority ("the Authority"), informed the Norwegian Government that it had decided to carry out a conformity assessment of Norway's implementation of the amending Directive. To facilitate this assessment, a Table of Correspondence ("ToC") was requested. [8]

On 6 October 2023, the Authority received the requested ToC.[9]

On that basis, the Authority undertook a first assessment which raised issues prompting it to request certain clarifications, by way of a letter dated 22 April 2024,.[10] The Norwegian Government responded on 24 June 2024.[11] The concerns raised by the Authority were, subsequently, discussed at the package meeting in Oslo in October 2024. Those discussions were summarised in the Authority's follow-up letter[12], to which Norway responded as requested shortly thereafter.[13]

3 Relevant EEA law

The preamble to Directive 2018/957 provides:

"[…]

[6] Directive (EU) 2018/957 of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Incorporated into Annex XVIII of the EEA Agreement by Decision of the EEA Joint Committee No 19/22, entering into force on 1 January 2023.
[7] Form 1 dated 6 January 2023, Doc No 1340831.
[8] Request for information from the Authority to the Norwegian Government of 6 September 2023 (Doc No 1395496).
[9] Letter from the Norwegian Government to the Authority of 6 October 2023 (Doc No 1403141).
[10] Request for further information from the Authority to the Norwegian Government of 22 April 2024 (Doc No 1437404).
[11] Letter from the Norwegian Government to the Authority of 24 June 2024 (Doc No 1466192).
[12] Follow-up letter to the package meeting in Norway dated 13 November 2024 (Doc No 1493449).
[13] Reply by the Norwegian Government to follow-up letter dated 11 December 2024 (Doc No 1505643).

(4) More than 20 years after its adoption, it has become necessary to assess whether Directive 96/71/EC of the European Parliament and of the Council still strikes the right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other. To ensure that the rules are applied uniformly and to bring about genuine social convergence, alongside the revision of Directive 96/71/EC, priority should be given to the implementation and enforcement of Directive 2014/67/EU of the European Parliament and of the Council

"[…]

(8) Posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, should receive at least the same allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State. The same should apply as regards the expenditure incurred by posted workers required to travel to and from their regular place of work in the host Member State. Double payment of travel, board and lodging expenses should be avoided.

(9) Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out. That period should be extended where the service provider submits a motivated notification.

(10) Ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties. However, the rules ensuring such protection for workers cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services, including in cases where a posting exceeds 12 or, where applicable, 18 months. Any provision applicable to posted workers in the context of a posting exceeding 12 or, where applicable, 18 months must thus be compatible with that freedom. In accordance with settled case law, restrictions to the freedom to provide services are permissible only if they are justified by overriding reasons in the public interest and if they are proportionate and necessary.

(11) Where a posting exceeds 12 or, where applicable, 18 months, the additional set of terms and conditions of employment to be guaranteed by the undertaking posting workers to the territory of another Member State should also cover workers who are posted to replace other posted workers performing the same task at the same place, to ensure that such replacements are not used to circumvent the otherwise applicable rules.

[…]

(19) Allowances specific to posting often serve several purposes. Insofar as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging, they should not be considered to be part of remuneration. It is for Member States, in accordance with their national law and/or practice, to set rules with regard to the reimbursement of such expenditure. The employer should reimburse posted workers for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

(20) In view of the relevance of allowances specific to posting, uncertainty as to which elements of such allowances are allocated to the reimbursement of expenditure incurred on account of the posting should be avoided. The entire allowance should be considered to be paid in reimbursement of expenditure unless the terms and conditions of employment resulting from the law, regulation or administrative provision, collective agreements, arbitration awards or contractual agreements that apply to the employment relationship determine which elements of the allowance are allocated to the reimbursement of expenditure incurred on account of the posting and which are part of remuneration.

[…]

(22) Directive 2014/67/EU lays down a number of provisions to ensure that rules on the posting of workers are enforced and are respected by all undertakings. Article 4 of that Directive provides for factual elements that may be taken into account in the overall assessment of the specific situations in order to identify genuine posting situations and to prevent abuse and circumvention of the rules.

[…]

(25) With a view to tackling abuses in subcontracting situations and in order to protect the rights of posted workers, Member States should take appropriate measures, in accordance with Article 12 of Directive 2014/67/EU, to ensure subcontracting liability.

(26) In order to ensure that Directive 96/71/EC is correctly applied, coordination between the Member States' competent authorities and/or bodies and cooperation at Union level on combating fraud relating to the posting of workers should be strengthened.

Article 1(2) point (b) of the Directive adds a new paragraph 1a to Article 3 PWD concerning long-term posting. It reads:

"1a. Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:
— by law, regulation or administrative provision, and/or
—by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8.

The first subparagraph of this paragraph shall not apply to the following matters:
(a)procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;
(b) supplementary occupational retirement pension schemes.

Where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months."

[…]"

Article 1(2) point (c) of the Directive amends Article 3(7) PWD, as follows:

"7. Paragraphs 1 to 6 shall not prevent the 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 remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure."

Article 1(4) of the Directive replaces Article 5 PWD, henceforth entitled "monitoring, control and enforcement" as follows:

Monitoring, control and enforcement

"The Member State to whose territory the worker is posted and the Member State from which the worker is posted shall be responsible for the monitoring, control and enforcement of the obligations laid down in this Directive and in Directive 2014/67/EU and shall take appropriate measures in the event of failure to comply with this Directive.

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Member States shall in particular ensure that adequate procedures are available to workers and/or workers' representatives for the enforcement of obligations under this Directive.

Where, following an overall assessment made pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive, that Member State shall ensure that the worker benefits from relevant law and practice.

Member States shall ensure that this Article does not lead to the worker concerned being subject to less favourable conditions than those applicable to posted workers."

4 Relevant national law

Section 1-7 of the Working Environment Act[14] is entitled "posted employees" and reads as follows:

"(1) A posted employee means herein an employee who for a limited period works in a country other than that with which the employment is normally associated.

[14] Act related to the working environment, working hours and employment protection (*Arbeidsmiljøloven*), LOV-2005-06-17-62, available online in English on Lovdata.

(2) Posting of an employee shall be deemed to take place when a foreign undertaking in connection with the provision of services:
a. by agreement with a recipient of services in Norway, posts an employee to Norway for its own account, at its own risk and under its own management, or
b. if an employee is posted to a place of business or undertaking in Norway that belongs to the same group, or
c. in the capacity of temporary employment undertaking or another undertaking that makes employees available, posts employees to an undertaking in Norway.

(3) Posting of an employee is also deemed to take place when a Norwegian undertaking in connection with the provision of services posts an employee to another country within the EEA area.

(4) The Ministry may in regulations provide rules concerning which pay and working conditions provided or authorised by statute shall apply to posted employees and provisions necessary for ensuring compliance, including provisions concerning cooperation with the responsible authorities of other EEA member states, protection and compensation in the event of retaliation from the employer, criteria for determining whether a posting is genuine, remuneration for accommodation and documentation requirements.

(5) In connection with cooperation between EEA member states in accordance with regulations issued pursuant to section 1-7, fourth paragraph, and section 18-11, fifth paragraph, of the Working Environment Act, information may be provided to the responsible authorities of another EEA member state regardless of any statutory duty of confidentiality."

On 6 January 2023, the Norwegian Government notified the Authority of the national measures adopted to implement Directive 2018/957 into the national legal order, namely the national Regulation of 28 October 2022 No. 1895, amending Regulation of 16 December 2005 No. 1566 on posted workers ("the national regulation (on posted workers)").[15]

Following those amendments, a new Section 3b entitled "terms and conditions of employment in case of long-term posting" was added to the national regulation. It reads:

"In addition to the terms and conditions of employment pursuant to Section 3, all Norwegian rules on terms and conditions shall apply to posted workers in the framework of the provision of services, where the effective duration of a posting exceeds 12 months (…).

The period referred to in the first subparagraph may be extended by 6 months, if the employer (…) submits a written notification to the Labour Inspection Authority (…) The notification shall contain the reason for why the period must be extended and which employees are concerned."

The amendments also introduced a new Section 3a entitled "calculation of allowances specific to the posting" to the national regulation. It reads:

"In the calculation of a posted worker's remuneration, allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

Where it does not appear from the employment contract what elements of the allowance according to the first subparagraph are part of remuneration and which are paid in

[15] Forskrift om endring i forskrift om utsendte arbeidstakere, *FOR-2022-10-28-1895*. The informal translations in this section are undertaken by the Authority.

reimbursement of expenditure actually incurred, then the entire allowance shall be considered to be paid in reimbursement of expenditure."

Section 3 of the national regulation on posted workers is entitled "terms and conditions of employment" and reads as follows:

"Whatever the law otherwise applicable to the employment relationship, and regardless of the duration of posting, the following provisions apply to a posted worker:

a. *act relating to the working environment, working hours and employment protection (Working Environment Act), chapter 10, 11, 13 (…)*
b. *act relating to holidays*
c. *act on labour market*
d. *act on equality and anti-discrimination*
e. *provisions on remuneration, terms and conditions of employment established by the regulation on general application of collective agreements based on the act relating to general application of collective agreements, to the extent that the posted worker's employment relationship fall within the scope of the regulation.*

The provisions of the first paragraph only apply if the posted worker is not covered by more favourable terms and conditions of employment pursuant to agreement or the law otherwise applicable to the employment relationship.

[…]"

Section 5 of the national regulation is entitled "information and cooperation" and reads as follows:

"The Labour Inspection Authority shall, in its cooperation capacity, provide information on which terms and conditions of employment apply to a posted worker. The Labour Inspection Authority shall also be able to refer to employers' associations and trade unions if provisions of a generally applicable collective agreement apply, c.f. Section 3 first paragraph letter e).

The Labour Inspection Authority cooperates with the competent authorities of other EEA States on the enforcement of the provisions on terms and conditions of employment that apply to posted workers. The Labour Inspection Authority responds to requests for information and conducts the examinations and controls which are necessary to follow up such requests."

Chapter 18 of the Working Environment Act, referred to by the Norwegian Government in its correspondence with the Authority, is entitled "regulatory supervision of the Act". It establishes, *inter alia*, the Labour Inspection Authority's competence to enforce compliance with the Act and related instruments such as the Regulation on posted workers.

Section 12 of the national regulation on posted workers reads:

"When a Norwegian enterprise posts a worker to another country within the EEA, the employer shall ensure that the worker is covered by the host state's terms and conditions of employment provided with a view to implement Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. This does not apply if the worker if covered by more favourable terms and conditions of employment by agreement or pursuant to the national law which otherwise apply to the employment relationship."

5 The Authority's assessment

5.1 Implementation of Directives in EEA law

It follows from Article 7 of the EEA Agreement that the EEA States have the choice of form and method when implementing directives into their legal order.[16] However, the EFTA Court has held that provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty and that EEA States must ensure full application of directives not only in fact but also in law.[17]

5.2 Article 1(2) (b) of Directive 2018/957 / Art. 3(1a) Revised PoW Directive: long-term posting, including its extension

5.2.1 The Revised PoW Directive's provisions on long-term posting, including its extension

Article 1(2) (b) of Directive 2018/957 added two new paragraphs to Article 3. While Article 3(1b) Revised PoW Directive deals with temporary agency workers, the new paragraph 1a concerns the terms and conditions of employment applicable to postings exceeding 12 (or 18) months, also referred to as long-term posting. It is Norway's implementation of the latter which is at issue.

With regard to the new provisions on long-term posting contained in Article 3(1a) Revised PoW Directive, let it first be recalled that posting is temporary in nature, as posted workers usually return to the home EEA State after completion of the work for which they were posted (c.f. also the explanations and examples provided above under the introduction) .[18] During the posting, the workers are entitled to the terms and conditions of the host EEA State in accordance with the list in Article 3(1) Revised PoW Directive (such as maximum work periods, paid annual leave and remuneration), but not more. As such, posted workers are not entitled to the full catalogue of terms and conditions of employment applicable pursuant to the law of the host State.

On the other hand, the longer a posting lasts, the stronger becomes the link between the labour market of the host EEA State and the worker concerned.[19] This view led to the insertion of the new provision henceforth contained in Article 3(1a) Revised PoW Directive. Its first subparagraph provides as a main rule that if the duration of a posting exceeds 12 months, EEA States shall ensure that undertakings which post workers to their territory guarantee those workers *all* terms and conditions of employment that are mandatorily applicable to workers in the EEA State where the work is carried out. In other words, in case of long-term posting, the posted worker shall be treated as if he was a regular worker, fully integrated into the national labour market of the host EEA State.

That provision, the Authority observes, appears *prima facie* to have been successfully transposed into Norwegian law by Section 3b first subparagraph of the national regulation on posted workers.

However, the third subparagraph of Article 3(1a) Revised PoW Directive, provides for an exemption to that main rule. More precisely, this provision establishes a right to have the

[16] See Case E-15/12 *Jan Anfinn Wahl v. Iceland*, [2013] EFTA Ct. Rep. 534, paragraph 49 and Case E-12/13 *EFTA Surveillance Authority v Iceland*, [2014] EFTA Ct. Rep. 58, paragraph 67

[17] See *Wahl*, cited above, paragraphs 50-51 and 56. See also *EFTA Surveillance Authority v Iceland*, cited above, paragraph 70.

[18] See preamble 9 to Directive 2018/957.

[19] *Idem*.

posting period extended from 12 to 18 months, with the effect that the obligation to respect the full catalogue of the host EEA State's employment regulations is deferred to a later moment in time. The provision determines that, so long as the service provider submits a motivated notification, the receiving EEA State *"shall"* extend the posting period.

5.2.2 The Authority's assessment of Norway's implementation of the rules on long-term posting and in particular the right to obtain extension of the posting period

In the ToC, the Norwegian Government referred to Section 3b of the national regulation on posted workers as the relevant implementing measure for the Revised PoW Directive's rule on extension of the posting period upon the submission of a motivated notification.

Recalling that Article 3(1a) Revised PoW Directive requires that the posting period "shall" be extended provided that a motivated notification is submitted, the Authority requested Norway to explain why Section 3b of the national regulation merely stated that the posting period *"may"* be extended.

In its letter of 24 June 2024, the Norwegian Government confirmed its understanding that the provision at issue establish a right to extension of the posting period on the condition that a motivated notification has been submitted within the time limit. It was explained that the use of the term "may" was simply to indicate that the extension of the posting period was an option the posting undertaking can choose to make use of. The provision was mainly directed to the posting undertaking, not to the national Labour Inspection Authority. Thus, Norway added, the wording "may" should not be read as leaving the national Labour Inspection Authority with a margin of discretion to decline extension after having received a correct notification.

At the package meeting that followed, the Norwegian Government maintained that the provision at issues was sufficiently implemented into national law and added that information about the right to extension of the posting period was also available on the website of the national Labour Inspection Authority.

While the Authority has taken due note of the explanations provided by the Norwegian Government, it cannot conclude that the right of extension of the posting limit has been sufficiently transposed into national law.

First, the Authority would emphasise that the wording of the national provision purporting to transpose the right to extension diverges fundamentally from that of the Revised PoW Directive. The latter provides that the extension period "shall" be extended upon the submission of a motivated notification to that effect. That is, and as the Norwegian Government agrees, the revised PoW Directive establishes an unequivocal right of extension.

On the other hand, the national provision set out in Section 3b of the regulation on posted workers merely stipulates that the posting period "may" be extended following a motivated notification. As such, the Authority contends, the national provision suggests that the granting of an extension falls to the discretion of the national competent authority, who may or may not grant it.

Secondly, the Authority has considered whether statements in relevant preparatory works can alleviate the discrepancy between the wording of the Revised PoW Directive and Section 3b of the national regulation (c.f. the above), to the extent that the right to extension can nevertheless be considered as sufficiently transposed into national law.

On that point, it is recalled that the ECJ has recognised the legal tradition that is well established and common to the Nordic countries, according to which preparatory works constitutes an important support to interpreting legislation.[20]

Specifically, the Authority has assessed statements in the Consultation memo produced by the Norwegian Government itself, accompanying the draft legislative amendments seeking to implement Directive 2018/957 into national law.[21]

Primarily, the Authority finds that while statements in preparatory works are – generally - pertinent sources of interpretation *inter alia* where a legislative provision contains ambiguous wording, they are of much less relevance in a case such as the one at issue where the wording of the national provision is explicit and irreconcilable with that of the Revised PoW Directive. Such insufficient transposition cannot be repaired by statements in national preparatory works.

At any rate, the Authority holds that the relevant statements in said Consultation memo are mostly of a nature so as to even further accentuate the impression that the national provision leaves discretion to the competent authority. Namely, the Consultation memo expresses that (emphasis added)[22]:

> *"It follows from Article 1(2) that the service provide may extend the period (…) The term "notification" goes against undertaking any detailed assessment or requiring any qualification or condition in order to extend the period to 18 months. The notification shall indeed be motivated, but this can hardly/probably not be understood to the effect that the authorities may revie the motives. The ministry understands the Directive to the effect that it will be sufficient to submit a notification providing necessary information (…)"*

With reference to all the above, the Authority concludes that Norway has not demonstrated that it has correctly transposed the provision in the third subparagraph of Article 3(1a) Revised PoW Directive, as amended by Article 1(2) (b) of Directive 2018/957.

5.3 Article 1(2) (c) of Directive 2018/957 / Article 3(7) (2) Revised PoW Directive: reimbursement of travel, board and lodging expenses incurred on account of the posting itself

5.3.1 The Revised PoW Directive's provisions on posting allowances and reimbursement of expenses

By way of introduction, it appears useful to set out by recalling that as prescribed by Article 3(1) (c) Revised PoW Directive, posted workers shall benefit from the "remuneration" applicable to local workers in the host EEA State, echoing the principle of equal pay for equal work at the same workplace.[23]

The Authority notes that during the legislative discussions leading up to the adoption of Directive 2018/957, both the European Parliament and the Council also insisted on introducing amendments and clarifications on what constitutes remuneration and on the precise status of allowances paid on the top of salaries. The sensitivity of the issue of allowances may be explained, to a certain extent, by the phenomenon of posting

[20] Case C-478/99 *EC v Sweden*), para. 14.
[21] Consultation memo of 6 July 2020 on the implementation of Directive 2018/957 concerning amendments to the Posting of Workers Directive, *Høringsnotat av 6 juli om gjennomføring av Direktiv (EU) 2018/957 om endringer i utsendingsdirektivet*).
[22] *Idem*, page 29.
[23] *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement*, Van Nuffel and Afanasjeva, p. 290.

undertakings seeking to increase their competitive advantage by paying lower social contributions and/or taxes and, for that purpose, preferring to pay their workers relatively low salaries supplemented with high allowances.[24]

On that background, Article 1(2) (c) of Directive 2018/957 contained several provisions relating to *inter alia* posting allowances, henceforth set out in Article 3(7) Revised PoW Directive and briefly presented in the following.

Article 3(7) (2) first sentence Revised PoW Directive states that allowances specific to the posting are to be considered as part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting (e.g. expenditure on travel, board and lodging).

Further, following an amendment introduced by the Council, a provision was adopted according to which posting allowances are presumed to be compensation for expenditure actually incurred. Indeed, pursuant to Article 3(7) (3) Revised PoW Directive, for an allowance to be considered part of remuneration, this must clearly result from the terms and conditions applicable to the employment relationship. If the parts of the allowance constituting either reimbursement or remuneration are not defined in the applicable legislation, collective agreement or contractual arrangements, the entire allowance will be considered to be paid in reimbursement.

Turning to the issue of reimbursement of expenses more specifically, a distinction is made between expenditure incurred by the worker *during the posting assignment* on the one hand and expenses related to *the displacement* from the usual place of work in the home EEA State to the working place in the host EEA State.

As regards the first situation, the nucleus of protective rights was expanded with the adoption of Directive 2018/957. Thus, Article 3(1) (i) Revised PoW Directive provides that a posted worker who, during the posting assignments, is required to travel to and from the regular place of work in the host EEA State, is entitled to reimbursement of expenses in accordance with the law of that state. The Authority does not take issue with Norway's transposition of this provision.

Concerning the second situation, it is recalled that the posting of workers is commonly understood to be undertaken at the initiative and in the interest of the employer. It was therefore considered logic that the employer supports the additional costs linked with the displacement from the usual place of work in the home EEA State to the working place in the host EEA State. For that reason, Directive 2018/957 introduced a provision according to which the employer must reimburse the posted worker for travel, board and lodging expenditure in accordance with the national law and/or practice applicable to the employment relationship, which is, in general, the home EEA State's law and/or practice, c.f. Article 3(7) (2) last sentence Revised PoW Directive.[25]

Thus, while expressing the principle according to which such expenses must be supported by the employer, the Revised PoW Directive leaves it to the national law and/or the practice (including collective agreements at any level) of the home EEA State to regulate the issue.[26]

[24] *Idem*, p. 290-291.
[25] Practical guide on posting, European Commission, 2019, point 2.20.
[26] *Idem*, point 3.6.

5.3.2 The Authority's assessment of Norway's implementation of the obligation to reimburse expenses on account of the posting, in accordance with national law and/or practice.

In the ToC, the Norwegian Government referred to Section 3a of the national regulation on posted workers as the relevant implementing measure for the Revised PoW Directive's rule on reimbursement of expenses on account of the posting.

The Authority observes that with the adoption of Section 3a of the national regulation, the provisions contained in Article 1(2) (c) of Directive 2018/957 relating to *inter alia* posting allowances and briefly presented above under point 5.3.1, were enacted in essentially the same words in a specific, express provision of national law. That is, except for the specific rule on reimbursement of expenses incurred on account of the posting. Thus, all but the following provision were explicitly transposed into in the national regulation on posted workers:

"The employer shall (…) reimburse the posted worker for such expenditure [on travel, board and lodging] in accordance with the national law and/or practice applicable to the employment relationship."

During its correspondence with the Authority, the Norwegian government offered several, distinct explanations and arguments in support of not having explicitly reflected the reimbursement rule in the national implementing law, contrary to all the other provisions in Article 3(7) Revised PoW Directive.

The Authority is not satisfied by any of the arguments offered, as explained in the following.

First, the Norwegian government set out by noting that the national regulation on posted workers is structured so that it states which national rules apply to workers who are posted to Norway. It goes on to argue that "[i]t follows implicitly of this that other terms and conditions are regulated by law or practice of the home state. Thus, it is considered redundant to be redundant to transpose the sentence in question into the [national] Regulation."[27] However, the Authority cannot accept that a specific right for posted workers to receive reimbursement for expenses, explicitly provided for by a piece of secondary EEA law, be considered transposed based on such logic.

Secondly, the Norwegian government noted that several EEA States have a similar approach to how this provision should be transposed.[28] On that point, the Authority is well aware that the national legislation of numerous EEA States does not include or does not clearly specify that the reimbursement of travel, board and lodging expenditure is done in accordance with the national law and/or practice of the home EEA State.[29] However, the Authority would emphasise that descriptions of how other EEA States have approached the matter carries no normative weight whatsoever and, as such, are not considered to be pertinent elements in this regard.[30]

On that point, the Authority notes that in the Staff Working Document accompanying the report referred to by Norway, reference is made to an EU level trade union having emphasised that the reimbursement of expenditure incurred on account of the posting is

[27] Letter from the Norwegian Government to the Authority of 24 June 2024. p.2.
[28] *Idem*, with further references to the Report from the Commission on the application and implementation of Directive (EU) 2018/957, COM(2024) 320 final.
[29] COM(2024) 320 final, p. 8-9.
[30] *Idem*, p.3, where it is emphasised the report and the accompanying staff working document *"do not provide and exhaustive account of all national implementation measures nor prejudge any position the Commission might take in any future legal proceedings*.

an important improvement for posted workers and that its correct transposition is of utmost importance.

Third, as regards the obligation to reimburse the posted workers for expenses incurred on account of the posting itself in accordance with the law and/or practice of the home EEA State, the Norwegian government referred to the fact that posting *from* Norway was regulated in Section 12 of the national Regulation on posted workers. This provision, Norway explained, states that the employer is obliged to ensure that the posted worker's terms and conditions are in accordance with the PoW Directive. Thus, again, it was considered redundant to regulate this matter in the national regulation on posted workers as well.[31]

The Authority observes that the provision in Section 12 of the national Regulation, referred to by Norway and entitled "posting from Norway", stipulates that employers sending workers from Norway shall ensure that the posted worker is covered by the terms and conditions of employment *of the host EEA State* in accordance with the PoW Directive. It does not refer at all to the rules of the home EEA State. Thus, it appears clear to the Authority that a posted worked could not, based on that national provision, turn to his employer with a request for reimbursement in accordance with Norwegian law where Norway is the home EEA State, as foreseen by Article 3(7) (2) last sentence Revised PoW Directive.

Fourth and finally, during the package meeting which took place in October 2024, the Norwegian government introduced an argument rooted in the fact that any obligation to reimburse expenses incurred on account of being posted from Norway to another EEA State must, according to the wording of Article 3(7) (2) Revised PoW Directive, derive from "national law and/or practice". Norway explained that the relevant Norwegian law and practice, hereunder various collective agreements which had not been made universal, concerned situations taking place wholly within Norway, such as where the employer is established in Norway and the workers perform their work in Norway.[32]

In the interest of clarity, the Authority emphasises that it certainly agrees that any obligation to reimburse expenses related to *the displacement* from the usual place of work in the home EEA State to the working place in the host EEA State, must have a basis in national law and/or practice. That is, the Revised PoW Directive in no way seeks to harmonise national rules on reimbursement of such expenses. While expressing the principle according to which such expenses must be supported by the employer, the Revised PoW Directive thus leaves it to the national law and or the practice (including collective agreements at any level) of the home Member State to regulate the issue.[33]

On the other hand, *if* national law and/or practice of the host EEA State do provide for such reimbursement to take place, *today or in the future,* then such advantages must be extended to posted workers.

With reference to the explanations and arguments offered by the Norwegian government, the Authority recalls that, as observed by the EFTA Court, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive.[34] Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable

[31] Letter from the Norwegian Government to the Authority of 24 June 2024. p.2.
[32] Moreover, as agreed at the package meeting, Norway later submitted examples of how the reimbursement of expenses is regulated in collective agreements.
[33] Practical guide on posting, European Commission, 2019, point 3.6, c.f. also point 2.20.
[34] Case E-15/12 *Wahl*, para. 49.

binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.[35]

The Authority observes that the Norwegian government has not referred to *any transposition measure whatsoever* regarding the rule in question, namely that posted workers must be reimbursed for expenses incurred on account of the posting itself insofar as national law and/or practice requires so.

The Authority recalls that the obligation to ensure proper implementation, with due regard to the principle of legal certainty, is of particular importance where the directive in question confer rights and/or obligations on individuals and undertakings. In this case, the provision at issue provides posted workers with a *right* to request reimbursement (insofar as national law and practice so requires) and, as a necessary corollary, a financial obligation upon employers. It is recalled that the legal situation resulting from national implementing measures must be sufficiently precise and clear that individuals be made fully aware of their rights.[36]

With reference to all the above, the Authority concludes that Norway has not demonstrated that it has correctly transposed the provision in the last sentence of Article 3(7) (2) Revised PoW Directive, as amended by Article 1(2) (c) of Directive 2018/957.

5.4 Article 1(4) of Directive 2018/957 / Article 5 Revised PoW Directive: monitoring, control and enforcement including non-genuine posting

5.4.1 The Revised PoW Directive's provisions on monitoring, control and enforcement including non-genuine posting

Articles 3 and 5 of the original PoW Directive already provided that the EEA States had the obligation to ensure that the posting undertaking complied with certain terms and conditions of employment of the host EEA State.[37] Moreover, this responsibility was further clarified and strengthened with the Enforcement Directive, adopted by the European co-legislators and incorporated into the EEA Agreement in order to ensure that the rules on posting are applied correctly and uniformly.[38]

Moreover, most of the provisions contained in Article 1(4) of Directive 2018/957 merely validate rules which already followed from the Enforcement Directive. However, the amending Directive also introduced two new obligations on the EEA States, as presented in the following.[39]

Indeed, the Revised PoW Directive contains strengthened rules on access to information and fighting fraud and abuse in situations of non-genuine posting. Workers which are found not to be in a situation covered by the posting rules may, for example, be permanently employed in a host EEA State. That formed the background for the request made by the

[35] *Idem*, para 56.
[36] *Idem*, para. 71.
[37] As correctly noted by the Norwegian government itself in the consultation memo accompanying the draft legislative amendments seeking to implement Directive 2018/957 into national law, p. 37-38, *op.cit.*
[38] Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provisions of services ("the Enforcement Directive")/.
[39] As correctly noted by the Norwegian government itself in the Consultation memo of 6 July 2020 p. 38-39, *op.cit.*

European Parliament that a provision be added to ensure that workers that are not genuinely posted are not left without any protection.[40]

Article 4 of the Enforcement Directive already provided the EEA States with criteria for assessing whether the relationship between an undertaking and a worker is a genuine employment relationship. The European co-legislators eventually agreed that in a situation where after such an assessment by the host EEA State it is established that an undertaking is improperly or fraudulently creating the impression that a worker is posted in accordance with the posting rules, that EEA State shall ensure, first, that the workers benefit from "relevant law and practice", see Article 5(4) Revised PoW Directive. Secondly, as provided for by Article 5(5) Revised PoW Directive, the EEA States shall ensure that the worker, in such a situation, will not be subject to "less favourable conditions than those applicable to posted workers.[41]

The Authority holds that Norway has failed to transpose those two obligations into national law, as argued immediately below.

5.4.2 The Authority's assessment of Norway's implementation of the new obligations related to monitoring, control and enforcement, including non-genuine posting

In the ToC, the Norwegian Government stated that in its view, Article 1(4) of the amending Directive did not require new transposition measures. It was observed, first, that the two first subparagraphs of Article 5(5) Revised PoW Directive mainly reproduced obligations already following from the Enforcement Directive, which had been transposed into national law.

The Authority does not take issue with that assessment.

As regards the last two subparagraphs of Article 5(5) Revised PoW Directive, namely the obligations to ensure that the worker benefits from "relevant law and practice" in case of non-genuine posting and, secondly, that the worker concerned will not be subject to less favourable conditions than those applicable to posted workers, the Norwegian government also concluded that no new transposition measures were required.

Norway has offered several, distinct arguments in support of that view, which will be addressed in the following. The Authority is not satisfied by any of those arguments, as explained in the following.

First, as communicated in the ToC, Norway initially explained the lack of specific transposition measures with reference to the fact that the national, competent authorities have established administrative practice regarding how to determine whether a concrete situation amounts to posting or establishment in the domestic labour market, considering that this was in line with the provisions of Article 5(5) Revised PoW Directive.

Secondly, having been questioned by the Authority on that view, the Norwegian government argued that the right for posted workers to benefit from the relevant law and practice in the situation of improper or fraudulent behaviour of the undertaking was considered "already reflected and safeguarded" in the national regulation on posted workers and the Working Environment Act. Specifically, Norway referred to Sections 3, 3a and 3b of that regulation, as stating which rules/terms are applicable to posted workers.

[40] *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement*, Van Nuffel and Afanasjeva, p. 297.
[41] *Idem,* p. 298.

Moreover, Norway referred to Section 2 of that regulation having rules on how to determine whether a situation was posting of workers or not.[42]

As communicated to the representatives of the Norwegian government at the package meeting held in October 2024, the Authority cannot accept that argumentation. As emphasised in that meeting, the Authority observes that all the provisions referred to by Norway concern relevant Norwegian law and practice benefitting (actual) *posted workers*. That is, by their very wording and scope, they do not apply to situations of impropriety and fraudulence where the worker is in fact a *regular worker* established in the host EEA State (Norway) and *not a posted worker*.

Third, while the representatives of the Norwegian government, in said meeting, expressed some sympathy for the Authority's view, they stated that at any rate, it was obvious that all relevant law and practice would be applied if it was determined that a worker was regularly established in Norway. Thus, transposing such a provision by similar language appeared redundant. In further support of that view, the representatives of the government added that Norwegian courts and authorities had an independent obligation to apply relevant law.

As expressed at the package meeting, the Authority cannot accept that any general obligation to apply the relevant (national) law – a duty which is undisputed – could serve as an argument in support of *not* adopting specific transposing measures for the implementation of secondary EEA law. If so, that logic could be extended to any provision of secondary EEA law, making transposition measures in general redundant.

Observing that also on this point, no specific transposition measures have been identified, the Authority recalls that the obligation to ensure proper implementation, with due regard to the principle of legal certainty, is of particular importance where the directive in question confer rights and/or obligations on individuals and undertakings. This is the case for the rules provided for by the last two subparagraphs of Article 5(5) Revised PoW Directive.

Fourth and finally, in the ToC, the Norwegian Government introduced an argument related to the mandate and role of the national labour inspection authority in support of the view that no new transposition measures were necessary to implement the obligations provided for by the last two subparagraphs of Article 5(5) Revised PoW Directive.

That is, Norway observed that the national Labour Inspection Authority had a legal obligation to provide information on the rules applicable to posted workers (c.f. Section 5 of the national regulation on posting) and to monitor, control and enforce all provisions of the national regulation (c.f. Chapter 18 and Section 1-7 of the WEA). Further, with the aim of efficient monitoring and enforcement, the posting undertaking is required to provide certain documents regarding the posting (c.f. Section 4 of the national regulation). And, the Norwegian government continued, in order to conduct its tasks in that regard, the national labour inspection authority will need to determine whether a worker is posted or not and, as appropriate, whether the worker is entitled to more favourable conditions.

On that point, the Authority reiterates that the provisions contained in the last two subparagraphs of Article 5(5) Revised PoW Directive, establish specific rights to protect posted workers. The provisions at issue were adopted with the objective of ensuring that workers, in a situation of non-genuine posting, are not left without any protection. A reference to general information and enforcement obligations, as referred to by the Norwegian government, cannot in the Authority's view constitute sufficient transposition measures for such specific rights, adopted with a view to protecting a vulnerable group of workers.

[42] Letter from the Norwegian Government to the Authority of 24 June 2024, p.3 (Doc No 1466192).

With reference to all the above, the Authority concludes that Norway has not demonstrated that it has correctly transposed the provisions in the last two subparagraphs of Article 5(5) Revised PoW Directive, as amended by Article 1(4) of Directive 2018/957.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by failing to correctly implement Articles 3(1a), 3(7) (2) and 5(5) of the Revised PoW Directive, Norway has failed to fulfil its obligations under that Directive and under Article 7 of the EEA Agreement.

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

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

For the EFTA Surveillance Authority

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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.