

Brussels, 10 May 2022
Case No: 84741
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Decision No: 068/23/COL

The Ministry of Labour and Social Inclusion
Postboks 8019
Dep 0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the implementation of Directive 2014/67/EU on enforcement of the Posting of Workers Directive

1 Introduction

1. By letter dated 6 February 2020,¹ 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 Directive 2014/67/EU *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*² (“Directive 2014/67” or “the Directive”).
2. After having examined the information received from the Norwegian Government, the Authority cannot conclude that Norway has sufficiently implemented Directive 2014/67.

2 Correspondence

3. On 29 November 2019, the Authority received a Form 1 from the Norwegian Government indicating full implementation of Directive 2014/67.³ On 31 January 2020, this case was opened in order to carry out a conformity assessment on Norway’s implementation of the Directive.
4. By letter dated 6 February 2020,⁴ the Authority invited the Norwegian Government to submit a Table of Correspondence (“ToC”) for the implementation of the Directive. On 6 March 2020, the Authority received the requested ToC from Norway.⁵
5. On 4 October 2021, the Authority sent a further request for information to Norway, as the review of the Toc had raised some issues.⁶ The Norwegian Government replied by letter dated 18 November 2021.⁷

¹ Doc No 1112555.

² Act referred to at point 30b of Annex XVIII and point 3 of Annex X to the EEA Agreement (*Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘IMI Regulation’)*), as adapted to the EEA Agreement by way of Protocol 1 thereto.

³ Doc No 1100848.

⁴ Doc No 1112555.

⁵ Doc No 1118762 / your ref. 20/458-.

⁶ Doc No 1230857.

⁷ Doc No 1249824 / your ref. 17/2608-.

3 Relevant national law

6. In the ToC, Norway listed the following acts as implementing acts of Directive 2014/67:

- Act relating to working environment, working hours and employment protection, etc. (“the Working Environment Act”)⁸;
- Act relating to general application of collective agreements etc. (“the General Application Act”)⁹;
- Regulation on Posted Workers¹⁰;
- Regulation on the Norwegian National Collection Agency (“the SI-regulation”);
- Act relating to mediation and procedure in civil disputes (“the Dispute Act”); and,
- Act relating to procedure in cases concerning the public administration (“the Public Administration Act”).

7. Section 1-1 of the Working Environment Act¹¹ sets out the objectives of the Act:

“The purpose of the Act is:

- a. to secure a working environment that provides a basis for a healthy and meaningful working situation, that affords full safety from harmful physical and mental influences and that has a standard of welfare at all times consistent with the level of technological and social development of society,*
- b. to ensure sound conditions of employment and equality of treatment at work,*
- c. to facilitate a satisfactory climate for expression in the undertaking,*
- d. to facilitate adaptations of the individual employee's working situation in relation to his or her capabilities and circumstances of life,*
- e. to provide a basis whereby the employer and the employees of undertakings may themselves safeguard and develop their working environment in cooperation with the employers' and employees' organisations and with the requisite guidance and supervision of the public authorities,*
- f. to foster inclusive working conditions.”*

8. Section 18-1 of the Working Environment Act provides the following:

“(1) The Labour Inspection Authority shall supervise compliance with the provisions of and pursuant to this Act. When supervision pursuant to this Act requires special expertise, the Labour Inspection Authority may appoint specialists to conduct controls, inspections, etc. on behalf of the Labour Inspection Authority. The Ministry may issue provisions concerning the Labour Inspection Authority's organisation and activities.

(2) The Ministry may decide that supervision of parts of the public administration and transport undertakings operated by the State shall be organised in a manner other than that which ensues from this Act. The Ministry may decide that a public body other than the Labour Inspection Authority shall supervise compliance with the provisions laid down in or pursuant to this Act.”

9. Section 18-5 of the Working Environment Act states the following on information sharing:

“(1) All persons subject to inspection pursuant to this Act shall, when so demanded by the Labour Inspection Authority and notwithstanding the duty of secrecy, provide information deemed necessary for performance of the inspection. The Labour Inspection Authority may decide the form in which the information shall be provided.

⁸ LOV-2005-06-17-62 – lov om arbeidsmiljø, arbeidstid og stillingsvern m.v. (arbeidsmiljøloven).

⁹ LOV-1993-06-04-58 – lov om allmenngjøring av tariffavtaler m.v. (allmenngjøringsloven).

¹⁰ FOR-2005-12-16-1566 – forskrift om utsendte arbeidstakere.

¹¹ Official English translation available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>

(2) Information as referred to in the first paragraph may also be demanded by other public inspection authorities notwithstanding the duty of secrecy that otherwise applies. The duty to provide information shall only apply to information that is necessary for the inspection authority's performance of its duties pursuant to statute."

10. Section 18-6 of the Working Environment Act on orders and other individual decisions reads:

"(1) The Labour Inspection Authority shall issue orders and make such individual decisions as are necessary for the implementation of the provisions of and pursuant to section 1-7, chapter 2, section 2 A-6, chapter 3 to chapter 11 and sections 14-1 a, 14-5 to 14-8, section 14-9, second paragraph, (f), second sentence and second paragraph, final sentence, section 14-12, first to third paragraph, section 14-12 a, first paragraph, section 14-12 b, first paragraph, section 14-15 fifth paragraph and sections 15-2, 15-15, 18-5 and 18-8. This shall however not apply to section 10-2, second to fourth paragraph, and section 10-6, tenth paragraph.

(2) Orders shall be issued in writing, and time limits shall be set for their effectuation. In the event of immediate danger the Labour Inspection Authority may demand that necessary measures be implemented immediately. Orders shall contain information regarding the right of appeal, the time limit for appeals, and the appeal procedure, as well as regarding the right to examine the case documents, cf. section 27 of the Public Administration Act.

[...]"

11. Section 11 of the General Application Act states:

"The Labour Inspection Authority supervises that pay and working conditions that result from decisions on general application are complied with. The Labour Inspection Authority also monitors that the main contractors' obligations as per § 12 are respected.

The Labour Inspection Authority renders orders and individual decisions that are necessary for the implementation of decisions on general application and the obligations deriving from § 12. Hereunder, the Authority can order that the employer shall fulfil its obligation to provide fixed salary and any other compensation in accordance with such a decision. The Working Environment Act § 18-6 first, second, sixth, seventh and eighth sub-paragraph as well as §§ 18-7, 18-8 and 18-10 are applied correspondingly to inspections under this Act, and when implementing the duty to provide information in the third subparagraph first sentence. Possible main contractors shall also be notified of orders and individual decisions.

Anyone that is subject to supervision according to this provision shall, where the Labour Inspection Authority requires and without being hindered by confidentiality obligations, provide information that is considered necessary for the exercise of the supervision. Such information shall also be submitted when the Public Roads Administration requires it in the course of an inspection directed towards an entity that carries out road transport. The Public Roads Administration may, without being hindered by confidentiality obligations, pass on information obtained on the basis of the above sentence second point to the Labour Inspection Authority for the use of the Labour Inspection Authority's monitoring as per this paragraph.

The Labour Inspection Authority may require information as per third paragraph from other official supervisory authorities without being hindered by confidentiality obligations that are otherwise applicable. The Labour Inspection Authority may report infringements to the police.

[...]"

Anyone subject to monitoring requirements as per the first paragraph shall, where required by the main contractor's trade union representatives and without being hindered by confidentiality obligations, submit information relating to pay and working conditions for workers in entities that perform work that is subject to decisions on

general application. Trade union representatives from entities forming part of the generally applicable collective agreement may request access to information.

The trade union representative has a confidentiality obligation on the information given under the fifth paragraph. The confidentiality obligation does not apply towards the supervisory authorities, cf. first and fourth paragraph. Trade union representatives may only use the right to access to information to investigate whether a decision related to general application is respected.

The Ministry may set further rules in Regulations on the right to access to information, confidentiality obligations and the potential use of advisors.¹²

12. Sections 5 to 7 of the Regulation on posted workers provide the following:

“§ 5 Information and cooperation

The Directorate of the Labour Inspection Authority shall, in the capacity as a cooperation body, provide information on which working and recruitment conditions apply for the posted worker. The Directorate shall also be able to refer to employer and employer organisations in cases where provisions in a generally applicable collective agreement are applicable, cf. § 1, litra e.

The Directorate of the Labour Inspection Authority cooperates with the competent authorities in other EEA States on the enforcement of the rules on working and recruitment conditions that are applicable to posted workers. The Directorate of the Labour Inspection Authority responds to requests for information and undertakes the investigation and control necessary to comply with the requests.

§ 6 Mutual information assistance regarding resolutions and decisions

Following a request from the competent authority in another EEA State the Labour Inspection Authority shall notify of its decision in line with § 18-11 the Working Environment Act. The request can be dismissed if it has incomplete information or if it is evident that there is no correlation between the request and the decision that shall be rendered on its basis. Where a request is dismissed the Labour Inspection Authority shall as soon as possible give information of the dismissal and the reasons for it, to the competent authority that sent the request.

The entity that the decision is directed towards shall be notified as soon as possible, the latest within one month following the receipt of the decision. The documentation following the request shall also be delivered, along with the decision. In these circumstances, § 27 of the Administrative Act applies, to the possible extent.

The Labour Inspection Authority shall notify to the authority that has requested the notification of when the notification will be sent to the entity.

The Labour Inspection Authority may request the competent authorities in other EEA States to notify of decisions rendered under the Working Environment Act § 18-7 (compulsory fine) and § 18-10 (violation fee) for violations of working and employment conditions according to § 3 and § 3B of this Regulation, and for violations of requirements for documentation according to § 4 of this Regulation.

§ 7 Mutual assistance for collection of unpaid claims

The Official Debt Collection Centre shall be informed as soon as possible and latest within one month from the receipt of the request for the collection of claims in accordance with § 18-11 of the Working Environment Act. The notification shall contain the documentation that accompanied the request.

The Official Debt Collection Centre shall notify the competent authority that has requested the debt collection when it has been commenced and if the claim is partially or fully fulfilled.

The Official Debt Collection Centre may dismiss a request for collection of debt if the request has incomplete information or is evident that there is no correlation between

¹² Unofficial translation of the Authority.

the request and the decision that shall be rendered on its basis. A request for debt collection can also be dismissed in cases where:

- a. the overall amount that shall be collected does not exceed 350 euros, or;*
- b. the cost of carrying out the enforcement is disproportionate when compared to the amount to be collected or if it would bring considerable difficulties to carry out the enforcement*
- c. fundamental human rights under Norwegian law would not be respected.*

If a request shall be dismissed, the Official Debt Collection Centre shall as soon as possible inform of the dismissal and the grounds for it, to the competent authority that has sent the request.”¹³

4 Relevant EEA law

13. Article 7 of the EEA Agreement provides that EEA States are to make acts incorporated into the EEA Agreement part of their internal legal order. With regard to directives, the choice of form and method of implementation shall be left to the authorities of the EEA States.

14. The preamble to Directive 2014/67 provides:

[...]

(27) In order to ensure better and more uniform application of Directive 96/71/EC as well as its enforcement in practice and to reduce, as far as possible, differences in the level of application and enforcement across the Union, Member States should ensure that effective and adequate inspections are carried out on their territory, thus contributing, inter alia, to the fight against undeclared work in the context of posting, also taking into account other legal initiatives to address this issue better.

[...]

(41) The adoption of common rules which provide mutual assistance and support for enforcement measures and the associated costs, as well as the adoption of uniform requirements for the notification of decisions relating to administrative penalties and/or fines imposed for the non-respect of Directive 96/71/EC, as well as of this Directive, should resolve a number of practical cross-border enforcement problems and guarantee better communication and better enforcement of such decisions emanating from another Member State.[...]

15. Article 7 of the Directive on the role of the EEA States in the framework of administrative cooperation stipulates:

[...]

2. The [EEA] State of establishment of the service provider shall continue to monitor, control and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another [EEA] State.

3. The [EEA] State of establishment of the service provider shall assist the [EEA] State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and this Directive. That responsibility shall not in any way reduce the possibilities of the [EEA] State to which the posting takes place to monitor, control or take any necessary supervisory or enforcement measures in accordance with this Directive and Directive 96/71/EC.

4. Where there are facts that indicate possible irregularities, a[n] [EEA] State shall, on its own initiative, communicate to the [EEA] State concerned any relevant information without undue delay [...]

¹³ Unofficial translation of the Authority.

16. Article 10 of Directive 2014/67 on inspections reads:

“1. [EEA] States shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, taking into account the relevant provisions of this Directive and thus guarantee their proper application and enforcement. Notwithstanding the possibility of conducting random checks, inspections shall be based primarily on a risk assessment by the competent authorities. The risk assessment may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such a risk assessment, the carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers may in particular be taken into account.

2. [EEA] States shall ensure that inspections and controls of compliance under this Article are not discriminatory and/or disproportionate, whilst taking into account the relevant provisions of this Directive [...]”

17. The Directive was incorporated in the EEA Agreement by Joint Committee Decision No 215/2018 of 26 October 2018. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Act expired on 1 January 2020.

5 The Authority’s assessment

5.1 Implementation of directives in EEA law

18. 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.¹⁴ 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.¹⁵

5.2 Article 7(2)-(3) of Directive 2014/67

19. Article 7 of Directive 2014/67 describes the role of the EEA States in the framework of administrative cooperation. Article 7(1) states that the inspection of terms and conditions to be complied with is the responsibility of the authorities of the host EEA State, while Article 7(2)-(3) provides that the EEA State of establishment of the service provider shall continue to monitor, control and take the necessary supervisory or enforcement measures (paragraph 2) and shall assist the EEA State to which the posting takes place to ensure compliance (paragraph 3).

20. In the ToC submitted by Norway, the Norwegian Government referred to Section 18-1 of the Working Environment Act and Section 11 of the General Application Act as the implementing measure for Article 7(1) of the Directive. With regard to Article 7(2) of the Directive, the Norwegian Government referred to Sections 1-1 and 18-1 of the Working Environment Act. As regards Article 7(3) of the Directive, reference was made to Sections 5-7 of the Regulation on Posted Workers.

¹⁴ 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.

¹⁵ See *Wahl*, cited above, paragraphs 50-51 and 56. See also *EFTA Surveillance Authority v Iceland*, cited above, paragraph 70.

21. Section 1-1 of the Working Environment Act lists the purpose of the Act, whereas Section 18-1 of the same Act and Section 11 of the General Application Act lay down the obligations on the Labour Inspection Authority in relation to monitoring compliance with those acts. None of those provisions, however, concern cross-border cooperation of the competent authorities and thus do not describe the different roles and obligations of the Labour Inspection Authority depending on whether Norway is the host EEA State or the State of establishment in the context of posting of workers.
22. Section 5(2) of the Regulation on Posted Workers contains a general provision on cross-border cooperation, but merely describes the situation where the Labour Inspection Authority shall respond to requests from other States. Sections 6 and 7 of the Regulation on Posted Workers contain detailed provisions on administrative cooperation, but they only apply to requests for recovery of administrative penalties/fines and notification of decisions imposing such penalties/fines.
23. The Norwegian Government was therefore invited to explain how the notified implementing measures ensure a sufficient implementation of the above provisions of the Directive. In its letter of 18 November 2021, the Norwegian Government provided the following reply:

“As regards the different roles of the Labour Inspection in cooperation matters we generally refer to the explanation given above to the first question.

As ESA has specifically addressed the situation where Norway is the state of establishment, it should be noted however that this situation is less practical. The Labour Inspection reports to rarely receive information or inquiries concerning postings from Norway to other EEA states. To illustrate, the Labour Inspection Authority's call-centre (Svartjenesten) has received no inquiries related to postings from Norway during the last four years.”
24. As mentioned, Section 18-1 of the Working Environment Act and Section 11 of the General Application Act set out the obligations on the Labour Inspection Authority in relation to monitoring compliance with those acts. Although not stated specifically in the provisions, the Authority assumes that these provisions also apply to posted workers and to the situations where Norway is the host EEA State (to which the posting takes place). These provisions therefore, at least to a large extent, correspond to the responsibilities of the authorities of the host EEA State prescribed in Article 7(1) of Directive 2014/67.
25. As regards, however, the fact that the implementing provisions for Article 7(2)-(3) of the Directive only deal with the situation where Norway is the host EEA State, the Norwegian Government referred to the argumentation concerning Article 6 of the Directive. However, the Authority notes that, while Article 6(2) mainly covers cooperation between EEA States in the form of requesting information, Article 7(2)-(3) rather deals with obligations on the host EEA State in relation to surveillance and ensuring compliance. Moreover, although the situation where Norway is the EEA State of establishment is less practical, as pointed out by the Norwegian Government, the Authority observes that Norway must nevertheless have rules in place which cover such situations.
26. Consequently, it appears that there are no rules in place in Norway which stipulate that Norway, as the EEA State of establishment, shall continue to monitor, control and take the necessary supervisory or enforcement measures with respect to workers posted to other EEA States, as required by Article 7(2), or that it shall assist the host EEA State to ensure compliance with the applicable conditions, as required by Article 7(3) of the Directive.

27. The Authority must therefore conclude that Norway has not fully demonstrated that its implementation of Article 7(2)-(3) of Directive 2014/67 is sufficient.

5.3 Article 10 of Directive 2014/67 - inspections

28. Article 10(1) of the Directive provides that the competent authorities shall carry out effective and adequate inspections on their territory, which shall be based primarily on a risk assessment. Article 10(2) further stipulates that EEA States shall ensure that those inspections are not discriminatory and/or disproportionate.

29. No implementation was notified by the Norwegian Government for Article 10(2) of the Directive in the ToC, with the explanation that the “*Labour Inspection Authority supervises compliance with pay- and working conditions as well as health and safety requirements, regardless of where the company is established and regardless of whether the workers are employed or posted in Norway.*”

30. In the Authority’s request for information, the Norwegian Government was invited to provide further explanations as to why no implementation was notified for Article 10(2) of the Directive.

31. In its reply, the Norwegian Government stated, *inter alia*:

“Furthermore, the Labour Inspection is bound by general principles of administrative law, involving that any case processing is subject to principles of non-discrimination and proportionality. Proven violation of the principles may result in invalidity. Further, anyone subject to an administrative decision by the Labour Inspection has the right to appeal to the superior authority (the Ministry).”

32. The Norwegian Government has thus maintained that the Labour Inspection Authority is bound by general principles of administrative law, including the principles of non-discrimination and proportionality, and therefore no implementation of Article 10(2) was necessary.

33. The Authority observes, however, that the principles of non-discrimination and proportionality in national administrative law do not necessarily correspond entirely to those same principles in EEA law. The principle of non-discrimination in EEA law is mainly focused on non-discrimination on grounds of nationality,¹⁶ which is not necessarily the case for the principle in national administrative law. Moreover, the principle of proportionality in EEA law in this context entails that the inspections have to be suitable for achieving the objectives pursued without restricting the cross-border provision of services any more than necessary.¹⁷ This does not necessarily follow from the principle of proportionality in national administrative law. Norway’s reference to general principles of administrative law as a sufficient basis for not implementing Article 10(2) of the Directive into its national law, is therefore not convincing.

34. The Authority therefore takes the view that Norway has failed to demonstrate that the implementation of Article 10(2) of Directive 2014/67 is sufficient.

6 Conclusion

35. Accordingly, as its information presently stands, the Authority must conclude that, by failing to implement Articles 7(2)-(3) and 10(2) of Directive 2014/67, Norway has failed

¹⁶ See e.g. Article 4 of the EEA Agreement.

¹⁷ See Case C-113/89 *Rush Portuguesa*, EU:C:1990:142, paragraph 17; Case C-445/03 *Commission v Luxembourg*, EU:C:2004:655, paragraph 40; and Case C-244/04 *Commission v Germany*, EU:C:2006:49, paragraph 36.

to fulfil its obligations arising under the Directive and under Article 7 of the EEA Agreement.

36. 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.
37. 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

For Arne Røksund
President

Stefan Barriga
Responsible College Member

Árni Páll Árnason
College Member

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This document has been electronically authenticated by Stefan Barriga, Melpo-Menie Josephides.