Case handler: Rūta Janeckaitė
Tel: (+32)(0)2 286 1862
rja@eftasurv.int

Brussels, 10 July 2015
Case No: 74557
Document No: 762926

EFTA SURVEILLANCE AUTHORITY

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

Dear Sir or Madam,

Subject: Complaint against Norway concerning posting of workers

1 Introduction and correspondence

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 services[1] ("Directive 96/71/EC").
2. In particular, the complaint concerned the judgment of the Norwegian Supreme Court of 5 March 2013[2], following up the judgment of the EFTA Court of 23 January 2012 in Case E-2/11 *STX Norway Offshore*[3].
3. In Case E-2/11 *STX Norway Offshore* the EFTA Court interpreted Article 36 EEA and Article 3 of Directive 96/71/EC. The complainant claimed that the interpretation of EEA law set out in the judgment of the Norwegian Supreme Court was not in line with certain aspects of the ruling handed down by the EFTA Court in Case E-2/11 *STX Norway Offshore*.
4. By a letter dated 21 January 2014 (Doc. No 694969), the Authority sent a request for information to Norway in the case. The Norwegian Government replied to the request on 3 March 2014 (Doc. No 701262).
5. On 16 and 17 October 2014, the case was discussed at the package meeting in Oslo[4].

2 Relevant national law

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

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

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

6. As established by the EFTA Court in Case E-2/11 *STX Norway Offshore*[5] 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.[6]) and the Posting Regulation (Regulation of 16 December 2005 No 1566 relating to posted workers).

7. 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"*.

8. 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.*"

9. 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)

   <...>

   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."[7]

10. 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.

11. The Tariff Board granted universal application to clauses contained within *Verkstedoverenskomsten* on the following matters:

    - The basic hourly wage;

---

[5] Paragraph 11.

[6] English translation used by the Directorate found at http://www.regjeringen.no/upload/AD/kampanjer/Tariffnemnda/Allmenngjoringsloven_sist_endret_2009_engelsk.pdf, checked on 2 July 2015. The Directorate is aware that the translation does not include some minor amendments to the Act made after 19 June 2009.

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

- 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.

12. 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

<...>

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."[8]

13. 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 Regulations[9]. Those provisions apply therefore continuously within the maritime construction industry from the entry into force of the Tariff Board Regulation 2008.

14. In the minutes of the Tariff Board meeting of 22 March 2013 (Minutes 1/2013)[10] the Tariff Boards refers to the judgment by the Norwegian Supreme Court and therefore "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"[11]. An analogous reference and conclusion were

---

[8] 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 2 July 2015.

[9] 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.

[10] Found at http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-12013.html?id=723110, checked on 2 July 2015.

[11] English translation made by the Directorate.

also made in the minutes of the Tariff Board meeting of 27 November 2014 (Minutes 4/2014)[12].

15. 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.

16. 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.

17. The minutes of the Tariff Board meeting of 24 April 2013 (Minutes 3/2013)[13] 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. 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.

---

[12] 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 2 July 2015.

[13] Found at http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-fra-tariffnemndas-mote-24-apri.html?id=725566, checked on 2 July 2015.

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."[14]

18. In its minutes of 27 November 2014 (Minutes 1/2014)[15] 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.

19. 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.

20. The justification provided for in the minutes of the Tariff Board meeting of 23 May 2013 (Minutes 4/2013)[16] concerning the continued application of the provisions regarding travel, board and lodging expenses is identical in its wording to the justification quoted in point 17.

21. 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.

22. As regards the justification for the continued application of the provisions at issue in its minutes of 27 November 2014 (Minutes 3/2014)[17] the Tariff Board refers to the assessment provided for in its decision of 23 May 2013 and states that the legal situation has not changed.

3 Relevant EEA law

[14] English translation made by the Directorate.

[15] 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 2 July 2015.

[16] Found at http://www.regjeringen.no/nb/dep/asd/kampanjer/tariffnemnda/vedtak/2013/protokoll-fra-tariffnemndas-mote-23-mai-.html?id=727795, checked on 2 July 2015.

[17] 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 2 July 2015.

23. 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.

<...>

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."

24. 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.""

4 The Directorate's assessment

4.1. Preliminary remarks

25. 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.

26. 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*[18].

27. 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.

28. The judgment of the Norwegian Supreme Court was delivered on 5 March 2013[19]. It dismissed the appeal and ordered the appellants to pay the costs.

29. As mentioned above, 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*.

30. In particular, first, in its judgment of 5 March 2013 the Norwegian Supreme Court expressly disagreed[20] with the interpretation of the EFTA Court in Case E-2/11 *STX Norway Offshore*, according to which national provisions (such as, for example, providing for the supplement on top of the basic hourly wage for work assignments requiring overnight stays away from home (examined under Question 1(b) in Case E-2/11 *STX Norway Offshore*) which may be considered falling under Article 3(1) first subparagraph point (c) of Directive 96/71/EC) must nevertheless be verified as to their compatibility with the freedom to provide services.

31. Second, 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. However, in its judgment of 5 March 2013 the Norwegian

---

[18] Case E-2/11 *STX Norway Offshore*, cited above.

[19] Cited above, footnote 2.

[20] See paragraph 100 of the judgment of the Supreme Court.

Supreme Court provided that the compensation for travel expenses was also to be considered as an element of the minimum rates of pay.

32. Nevertheless, the conclusions by the Supreme Court as regards the issues referred to in points 30 and 31 above were formulated as being not a *"final opinion"*[21] of the Court.

33. Therefore, the Supreme Court did examine, as explicitly required by the EFTA Court in Case E-2/11 *STX Norway Offshore*, the compatibility of the supplement on top of the basic hourly wage for work assignments requiring overnight stays away from home with regard to Article 36 EEA and found the supplement for overnight stay compatible with that Article[22].

34. In the same vein, although the Norwegian Supreme Court considered compensation for travel, board and lodging expenses as an element of the minimum rates of pay under Article 3(1) first subparagraph point (c) of Directive 96/71/EC, it nevertheless examined the justification of the compensation at issue on public policy provisions under Article 3(10) of the Directive, as required by the EFTA Court, and found it justified on public policy grounds[23].

35. In this respect the Authority's Internal Market Affairs Directorate ("the Directorate") notes that although according to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") the EFTA Court has jurisdiction to give *advisory* opinions, the homogeneity objective of the EEA Agreement as expressed, *inter alia*, in Article 1 EEA and in the fourth and fifteenth recitals of the Preamble to the EEA Agreement, and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities oblige EEA States to arrive at as uniform an interpretation as possible of the provisions of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in the EEA Agreement.

36. Otherwise the coherence of EEA law and the reciprocity of the rights of EEA/EFTA and EU nationals and economic operators in the EU and EFTA pillars of the EEA could not be achieved. It must be noted that reciprocity in this context is emphasized both by the EFTA Court[24] and by the Court of Justice of the European Union ("the Court of Justice")[25].

37. According to settled case law, Article 34 SCA establishes a special means of judicial cooperation between the EFTA Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them[26]. This system of cooperation is intended primarily as a means of ensuring a homogenous interpretation of the EEA Agreement[27].

---

[21] See paragraphs 103 (as regards the applicability of Article 36 EEA) and 155 (as regards the compensation for travel, board and lodging expenses) of the judgment of the Supreme Court.

[22] See paragraphs 103-117 of the judgment of the Supreme Court. The present letter does not concern the supplement on top of the basic hourly wage for work assignments requiring overnight stays away from home. As has been already noted, the Supreme Court examined the compatibility of the supplement at issue with regard to Article 36 EEA, as required in Case E-2/11 *STX Norway Offshore*.

[23] See paragraphs 155-176 of the judgment of the Supreme Court.

[24] See Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 116; Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 57 and 58; Case E-14/11 *DB Schenker I* [2012] EFTA Ct. Rep. 1178, paragraph 118; Case E-3/12 *Jonsson* [2013] EFTA Ct. Rep. 136, paragraph 60; Case E-12/13 *ESA* v *Iceland* [2014] EFTA Ct. Rep. 58, paragraph 68.

[25] See Opinion of Advocate General Kokott of 21 March 2013 in Case C-431/11 *UK* v *Council*, EU:C:2013:187, paragraph 42; and judgment in *UK* v *Council*, C-431/11, EU:C:2013:589, paragraph 55.

[26] See Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 61, and case law cited.

[27] See Case E-10/12 *Harðarson* [2013] EFTA Ct. Rep. 204, paragraph 38.

38. The judicial cooperation under Article 34 SCA, as well as under Article 267 the Treaty on the Functioning of the European Union ("TFEU"), not only enables a national court to request opinions or rulings on the questions which are necessary to enable it to give judgment, and receive answers which will be of use[28], but also gives a possibility to the States and other parties concerned to submit observations. The interpretation of EEA law therefore is raised to the level where all the parties concerned may participate and contribute instead of leaving the interpretation solely for the national level. The Court of Justice has stated that Article 267 TFEU is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community[29].

39. Therefore, it is important that questions regarding the interpretation of the EEA Agreement are referred to the EFTA Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity. Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured[30].

40. Moreover, access to justice and effective judicial protection are essential elements in the EEA legal framework. This can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement[31].

41. Furthermore, although Article 34 SCA does not contain an obligation to refer to the EFTA Court, the provisions of this Article could be compared to second paragraph of Article 267 TFEU according to which any court of an EU Member State may request the Court of Justice to give a ruling. The importance of the exercise of this right by the national courts has been stressed in the established case law of the Court of Justice concerning, *inter alia*, the incompatibility with EU law of national provisions preventing national courts from referring to the Court of Justice in the context of interlocutory procedures for the review of the constitutionality of a national law[32].

42. Finally, the system of judicial cooperation would be rendered ineffective and the homogeneity objective would be undermined, if the national courts, in particular, the Supreme Courts, disregarded the Advisory Opinions received, instead of posing further questions, if necessary.

43. It has to be noted that according to Article 31 SCA if the Authority considers that an EEA/EFTA State has failed to fulfil an obligation under the EEA Agreement or under SCA, it may launch infringement proceedings against that EEA/EFTA State and bring the matter before the EFTA Court. It is not excluded that the non-fulfilment by an EEA State of its obligations under the EEA Agreement might be the result of non-compliance by its national law with an interpretation of EEA law provided for in, *inter alia*, a judgment of the Court of Justice or the EFTA Court.

44. In this respect reference is made to Article 6 EEA and the homogeneity objective, as well as to Article 3(2) SCA, according to which the EFTA Court and the Authority, in the interpretation and application of the EEA Agreement, are to pay due account to the

---

[28] See, to this effect, for example, judgment in *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 27 and case law cited; judgment in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 38; judgment in *Rohm Semiconductor*, C-666/13, EU:C:2014:2388, paragraph 38.

[29] Judgment in *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 2.

[30] See Case E-3/12 *Jonsson*, cited above, paragraph 60, and case law cited.

[31] Case E-11/12 *Koch*, cited above, paragraph 117, and case law cited.

[32] See judgment in *Melki*, C-188/10 and C-189/10, EU:C:2010:363; judgment in *Križan*, C-416/10, EU:C:2013:8; judgment in *A*, C-112/13, EU:C:2014:2195.

principles laid down by the relevant rulings by the Court of Justice given after the date of signature of the EEA Agreement.

45. Accordingly, although the national courts of the EEA States have discretion on whether or not to make a reference, they should exercise that discretion in a way which is consistent with the obligations of that State under EEA law. Where a reference is not made on a point of EEA law, and where the interpretation of that law is not clear, the State risks making an incorrect interpretation on the substance of that point of law. Such a misinterpretation would amount to a breach of the State's substantive obligations under EEA law.

46. An EEA State's failure to fulfil its obligations under EEA law may be established under Article 31 SCA whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution such as the Supreme Court[33]. Hence, the Authority may initiate proceedings under Article 31 SCA against the EEA States for an infringement of EEA law attributable to national courts.

47. The Directorate takes the preliminary view in the present case that Norway has failed to fulfil its obligations under EEA law, as, *inter alia*, interpreted in established case law by the Court of Justice and the EFTA Court and proceeds therefore further to the statement of its reasons.

4.2. The compensation for travel, board and lodging expenses

48. As mentioned above, in its judgment of 5 March 2013 the Norwegian Supreme Court provided that the 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*, hereinafter "the compensation for travel, board and lodging expenses") was to be considered as an element of the minimum rates of pay.

49. Nevertheless, the conclusion is not a *"final opinion"*[34] of the Court. Therefore, the Norwegian Supreme Court examined the justification of the compensation at issue on public policy provisions under Article 3(10) of the Directive, as required by the EFTA Court in Case E-2/11 *STX Norway Offshore*, and found it justified on public policy grounds[35].

50. 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, the Supreme Court did not reject the possibility 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, as may be seen from paragraphs 136-155 of the judgment, the Supreme Court found that 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). This is because the Supreme Court found that the compensation for travel, board and lodging is compatible with Article 3(10) of the Directive (see paragraphs 155-176 of the judgment).

---

[33] See judgment in *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 29 and case law cited; and judgment in *Commission* v *Spain*, C-154/08, EU:C:2009:695, paragraph 125.

[34] See paragraph 155 of the judgment of the Supreme Court.

[35] See paragraphs 155-176 of the judgment of the Supreme Court.

51. As shown in points 13-22 of this letter, in March-May 2013 and November 2014, the Tariff Board based its decisions as to the universal application of 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, on the interpretation provided for by the Supreme Court. In particular, as cited in point 17, the Tariff Board considered that the Supreme Court's analysis as regards the compensation for travel, board and lodging expenses was of a general nature and was not limited solely to the universal application of the Engineering Industry Agreement in the maritime construction industry, but rather concerned also other generally applicable collective agreements with similar schemes.

52. Therefore the situation now prevailing in Norway is that, based on the Tariff Board regulations, which are, in turn, based on (the reasoning in) the judgment of the Norwegian Supreme Court of 5 March 2013, 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.

53. However, in the Directorate'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.

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

54. 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 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.

55. 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 content[36].

56. Reference is made to Article 3(7) second subparagraph of Directive 96/71/EC according to which 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. 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/EC[37].

---

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

[37] Judgment in *Sähköalojen ammattiliitto*, cited above, paragraph 33.

57. 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 work[38].

58. 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 Directive[39].

59. 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.

60. 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 wage[40].

61. 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.

62. 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)); otherwise, home EEA State law would apply. Therefore, as regards the compensation referred to in point 60 of this letter, home EEA State law applies.

63. The conclusion that with respect to the compensation referred to in point 60 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"*[41] relying on Article 3(7) first subparagraph which foresees application of terms and conditions of employment which are more favourable to workers.

64. 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.

65. 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

---

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

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

[40] 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.

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

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]"*.

66. 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 subparagraph[42].

67. This conclusion is not altered by the Supreme Court's arguments, also relied on by the Tariff Board[43], 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[44]. 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.

68. On the contrary, depending on the home EEA State law, undertakings posting workers might be required to cover the same and/or different expenses (for example, to provide meal vouchers). Therefore, if the interpretation and the arguments by the Supreme Court 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.

69. The Directorate notes that in its written observations in Case C-396/13 *Sähköalojen ammattiliitto*[45], the Norwegian 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. However, the Court of Justice did not follow the Norwegian Government's line of argument[46].

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

70. 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.

71. 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.

---

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

[43] See point 17 of this letter.

[44] See paragraph 154 of the judgment of the Supreme Court.

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

[46] See judgment in *Sähköalojen ammattiliitto*, cited above, paragraphs 33 and 58-60.

72. The legal doctrine established by the case law of the Court of Justice and closely followed by the EFTA Court[47] generally provides that public policy provisions should be interpreted very narrowly and applied only in very exceptional cases. For example, 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/EC[48] which points to a very narrow interpretation of the justification. According to this Article, public policy grounds shall not be invoked to serve economic ends; measures taken on the grounds of public policy shall comply with the principle of proportionality and shall 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/EC[49] 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. <...>"

73. 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*[50] and *Commission* v *Luxembourg*[51], Cases E-12/10 *ESA* v *Iceland*[52] and E-2/11 *STX Norway Offshore*.

74. The Directorate 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 fields[53].

75. 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

---

[47] 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.

[48] 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.

[49] 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.

[50] Judgment in *Laval*, cited above.

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

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

[53] 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).

derogation from the fundamental principle of freedom to provide services on which the Directive is based and must be interpreted strictly[54].

76. 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 only if there is a genuine and sufficiently serious threat to a fundamental interest of society[55].

77. Moreover, the scope of the notion of public policy cannot be determined unilaterally by each EEA State without any control by the EEA institutions[56]. The reasons which may be invoked by an EEA State in order to justify a derogation from the principle of 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 substantiated[57].

78. 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 sufficient[58].

79. Therefore, as may be seen from the case law described in points 75-78 above, as well as from the examples of public policy provisions in Recital 41 of Directive 2006/123/EC and Declaration No 10[59], which might be relied on in support of an interpretation of Article 3(10) of Directive 96/71/EC[60], the concept of public policy has been narrowed down by the case law to the extent that it is difficult to see how EEA States can argue that any labour laws, however fundamental to the system of employment protection, satisfy this extraordinary high standard.

80. It is important to note that the concept of public policy should not be mixed up with the notion of overriding reasons relating to the public interest.

81. 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.

82. 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 reasons[61].

---

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

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

[56] 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.

[57] 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.

[58] Judgment in *Laval*, cited above, paragraph 84.

[59] Cited in point 24 of this letter.

[60] Judgment in *Commission* v *Luxembourg*, cited above, paragraph 32.

[61] 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".*

83. 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 grounds[62].

84. In this regard, the Directorate 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.

85. 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.

86. The Supreme Court's interpretation therefore 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 goes against the established case law and infringes Article 3(10) of the Directive.

87. Accordingly, 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.

88. 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, the provisions in question 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 State[63].

89. 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.

90. 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 Directorate takes the preliminary 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

---

[62] 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 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."*

[63] 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.

has failed to fulfil its obligations arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) thereof.

5 Conclusion by the Directorate

Accordingly, as its information presently stands, the Directorate takes the preliminary 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 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 light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by ***3 September 2015***. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate