JUDGMENT OF THE COURT

23 January 2012[*]

(Freedom to provide services – Directive 96/71/EC – Posting of workers – Minimum rates of pay – Maximum working hours – Remuneration for work assignments requiring overnight stay – Compensation for expenses)

In Case E-2/11,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Borgarting lagmannsrett (Borgarting Court of Appeal) in the case of

STX Norway Offshore AS and Others

and

The Norwegian State, represented by the Tariff Board,

concerning the compatibility with EEA law of terms and conditions of employment provided for in a collective agreement declared universally applicable within the maritime construction industry and concerning the interpretation of Article 36 of the EEA Agreement and Article 3 of the act referred to at point 30 of Annex XVIII to the EEA Agreement, i.e. 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,

THE COURT,

composed of Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur) Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

[*] Language of the request: Norwegian.

- the Appellants, represented by Kurt Weltzien, advokat with the Confederation of Norwegian Enterprises, Ingvald Falch and Peter Dyrberg, advokats, Advokatfirmaet Schjødt AS, Oslo, and Tarjei Thorkildsen, advokat at the law firm BAHR, Oslo;
- the Defendant, represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs);
- the Belgian Government, represented by Liesbet Van den Broeck and Marie Jacobs, Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;
- the Icelandic Government, represented by Dr Matthías G. Pálsson, Legal Counsel, acting as Agent, and Hanna Sigríður Gunnsteinsdóttir, Head of Department of Standards of Living and Labour Market, Ministry of Welfare, acting as Co-Agent;
- the Norwegian Government, represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs), acting as agent;
- the Polish Government, represented by Maciej Szpunar, Undersecretary of State, Ministry of Foreign Affairs, acting as Agent;
- the Swedish Government, represented by Anna Falk, Director, and Charlotta Meyer-Seitz, Deputy Director, Ministry for Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Fiona M. Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Johan Enegren, Legal Service, acting as Agent;

having regard to the Report for the Hearing,

having heard oral argument of the Appellants, represented by Peter Dyrberg and Ingvald Falch, the Defendant and the Norwegian Government, represented by Pål Wennerås, the Swedish Government, represented by Anna Falk, ESA, represented by Gjermund Mathisen, and the Commission, represented by Johan Enegren, at the hearing on 12 October 2011,

gives the following

Judgment

I Facts and Procedure

1 By a letter of 9 February 2011, Borgarting lagmannsrett ("Court of Appeal") made a request for an Advisory Opinion, registered at the Court on the same day,

in a case pending before it between, on the one hand, STX Norway Offshore AS and eight other companies active in the maritime construction industry, and, on the other hand, the Norwegian State, represented by the Tariff Board.

2 The case concerns the interpretation of Directive 96/71/EC ("the Directive") on the posting of workers. In essence, the Court of Appeal seeks guidance whether the terms and conditions of employment in a collective agreement which has been declared universally applicable and thus is mandatory within the industry concerned are compatible with EEA law in the context of the posting of workers.

3 The case arises from an action against the Norwegian State, represented by the Tariff Board, brought by STX Norway Offshore and eight other companies in the maritime construction industry which claim that the Regulation issued by the Tariff Board giving universal application to various clauses in a collective agreement is invalid and, in addition, seek compensation in this regard.

4 According to the request, the Tariff Board issued a formal decision on 6 October 2008 by way of regulation ("the Tariff Board Regulation") to make parts of the Engineering Industry Agreement ("Verkstedoverenskomsten" or "VO") universally applicable within the maritime construction industry. The Tariff Board Regulation, which entered into force on 1 December 2008, was issued on the basis of the Verkstedoverenskomsten 2008-2010 between the Confederation of Norwegian Enterprise and the Federation of Norwegian Industries with the Norwegian Confederation of Trade Unions and the Norwegian United Federation of Trade Unions. The VO may be extended such that it has universal application in the engineering and associated industries if a request is made by one of the parties to the Agreement. In the present case, the matter was brought before the Tariff Board as a result of a petition filed by the Norwegian Confederation of Trade Unions.

5 The Tariff Board granted universal application to clauses contained within the VO on the following matters:

- The basic hourly wage (Clause 3.1)
- Normal working hours which are not permitted to exceed on average 37.5 hours per week (Clause 2.1.2)
- Overtime supplements (Clause 6.1)
- A shift-working supplement (Clause 6.3)
- A 20% supplement for work assignments requiring overnight stays away from home (Clause 7.3)
- Compensation for expenses in connection with work assignments requiring overnight stays away from home i.e. travel, board and lodging and home visits (Clause 7.3)

6 On 24 March 2009, STX Norway Offshore and eight other companies in the maritime construction industry brought an action against the Norwegian State, represented by the Tariff Board. By a judgment of 29 January 2010, Oslo tingrett (Oslo District Court) held that the Tariff Board Regulation was compatible with

the Directive and Article 36 of the EEA Agreement ("EEA"). On 2 March 2010, that judgment was appealed to the Borgarting Court of Appeal, which, in turn, requested an Advisory Opinion on 9 February 2011.

7 The following questions were referred to the Court:

1. *Does Directive 96/71/EC, including its Article 3(1) first subparagraph (a) and/or (c), see second subparagraph, permit an EEA State to secure workers posted to its territory from another EEA State, the following terms and conditions of employment, which, in the EEA State where the work is being performed, have been established through nationwide collective agreements that have been declared universally applicable in accordance with Article 3(8) of the Directive:*

a) *maximum normal working hours,*

b) *additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site; and*

c) *compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site?*

What bearing, if any, does the proportion of employees covered by the relevant collective agreement, before it was declared universally applicable, have on the answers to the above questions?

2. *If terms and conditions of employment in the EEA State where the work is performed, which are stipulated in a nationwide collective agreement declared universally applicable in accordance with Article 3(8), satisfy the requirements under Article 3(1) of Directive 96/71/EC, does the national court have to carry out a separate evaluation of whether these terms and conditions of employment satisfy the requirements under Article 36 EEA, including whether they can be justified by overriding requirements in the general interest?*

3. *If question 2 is answered in the affirmative:*

a) *Does Article 36 EEA permit that the stated grounds for a universal application decision, whereby certain terms and conditions of employment in a nationwide collective agreement are declared universally applicable to the industry concerned, are "to ensure that foreign workers enjoy equivalent pay and working conditions to Norwegian workers"?*

b) *Can it be presumed, with reservations for any evidence to the contrary which it is up to the private parties to present, that terms and conditions of employment that are compatible with Directive*

96/71/EC, see Article 3(1) read in the light of Article 3(8), safeguard the protection of workers and loyal competition?

c) *What is the effect, if any, on the answer to question 3(a) of the host State applying a system under which generally applicable terms and conditions of employment are set out in national laws and supplemented by terms and conditions of employments stipulated in nationwide collective agreements that can be declared universally applicable to the profession or industry concerned?*

II Legal background

EEA law

8 Article 36(1) EEA reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

9 Directive 96/71/EC was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 37/98 of 30 April 1998 amending Annex XVIII to the EEA Agreement. Article 3 of the Directive 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:*
>
> *(a) maximum work periods and minimum rest periods;*
> *(b) minimum paid annual holidays;*
> *(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
> *(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*
> *(e) health, safety and hygiene at work;*

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination.

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.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- *collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or*
- *collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,*

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings

and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

- are required to fulfil such obligations with the same effects.

...

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.

10 Article 4(3) of the Directive reads:

Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

National law

11 As stated by the referring court, the Directive 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), the Universal Application Act (Act of 4 June 1993 No 58 relating to universal application of wage agreements etc.) and the Posting Regulation (Regulation of 16 December 2005 No 1566 relating to posted workers).

12 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 in an industry or part of an industry, with the limitations that follow from and pursuant to the Working Environment Act Sections 1-7" (Universal Application Act Section 5, paragraph 1).

13 Following the adoption of the Tariff Board Regulation, the Universal 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 equality between foreign employees and Norwegian employees in terms of pay and working conditions, and to prevent distortion of competition to the disadvantage of the Norwegian labour market."

14 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 wage agreements etc., the provisions that have been given universal application and 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.*

15 The Tariff Board Regulation is worded as follows:

> *Regulation concerning partial universal application of the Engineering Industry Agreement to the maritime construction industry*
>
> *Issued by the Tariff Board on 6 October 2008 pursuant to Section 3 of Act of 4 June 1993 No 58 relating to the universal application of wage agreements etc.*
>
> *Chapter I Introductory provisions*
>
> *Section 1 The basis for universal application*
>
> *The regulation is issued on the basis of the Engineering Industry Agreement ("VO") 2008-2010 between the Confederation of Norwegian Enterprise and the Federation of Norwegian Industries, on the one hand, and the Norwegian Confederation of Trade Unions and the Norwegian United Federation of Trade Unions, on the other.*
>
> *Section 2 Scope and responsibility for implementation*
>
> *The regulation applies to skilled and unskilled workers who perform production, assembly and installation work in the maritime construction industry ...*
>
> *Chapter II Pay and working conditions*
>
> *Section 3 Pay provisions*

Employees who perform production, assembly and installation work in the maritime construction industry, see Section 2, shall receive a minimum hourly pay of:
a) NOK 126.67 in the case of skilled workers

b) NOK 120.90 in the case of unskilled workers.

With the exception of employees taken on at the work site, the following minimum supplements shall be paid for work requiring overnight stays away from home:
a) NOK 25.32 in the case of skilled workers
b) NOK 24.18 in the case of unskilled workers ...

Section 5 Working hours
Normal working hours must not exceed 37.5 hours per week ...

Section 6 Overtime pay
A supplement of 50% of the hourly rate shall be paid for work outside normal working hours. A supplement of 100% of the hourly rate shall be paid for work outside normal working hours carried out between 21.00 and 6.00 and on Sundays and public holidays.

Section 7 Travel, board and lodging expenses
In the case of work requiring overnight stays away from home, the employer shall, subject to further agreement, cover necessary travel expenses on commencement and completion of the assignment, and for a reasonable number of home visits.

Before the employer posts an employee to work away from home, board and lodging arrangements shall be agreed. As a rule, the employer shall cover board and lodging, but a fixed subsistence allowance, payment of the submission of receipts etc. may be agreed. ...

Chapter III Derogability etc.

Section 10 Derogability
The regulation is not applicable if the employee is covered, on the whole, by more favourable pay and working conditions by agreement or pursuant to that country's law that otherwise applies to the employment relationship ...

Chapter V Entry into force etc.

Section 12 Entry into force and expiry
The regulation shall cease to apply one month after the Engineering Industry Agreement between LO and NHO 2008-2010 is replaced by a new collective agreement or if the Tariff Board makes a new decision concerning universal application of the collective agreement.

16 The Regulation was given continued application by Regulation No 1764 of 20 December 2010.

III The questions referred

Considerations concerning the questions referred

17 By its first question, the referring court seeks to establish whether it is compatible with the Directive that an EEA State secures workers posted to its territory from another EEA State certain terms and conditions of employment established through nationwide collective agreements and declared universally applicable in the manner provided for in Article 3(8) of the Directive.

18 The terms and conditions contested in the main proceedings relate to maximum working hours, additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site, and compensation for travel, board and lodging expenses in the case of work assignments that require overnight stays away from home, with an exception for employees who are hired at the work site.

19 By its second question, the referring court seeks to ascertain whether it is required to carry out a separate evaluation whether the terms and conditions of employment subject to its request also satisfy the requirements of Article 36 EEA, including whether they can be justified by overriding requirements in the general interest, even if they are held to satisfy the requirements of Article 3(1) of the Directive. If that question is answered in the affirmative, the referring court essentially seeks to establish, by its third question, whether ensuring that foreign workers enjoy equivalent pay and working conditions to Norwegian workers may constitute a permissible justification in the context of Article 36 EEA for terms and conditions declared universally applicable under Article 3(8) of the Directive. The referring court also asks if it may be presumed that terms and conditions compatible with Article 3(1) of the Directive, read in light of Article 3(8), safeguard the protection of workers and ensure fair competition.

Preliminary remarks on Directive 96/71/EC

20 The Directive was adopted under Articles 57(2) and 66 of the Treaty establishing the European Community (“EC”), now Articles 53(1) and 62 of the Treaty on the Functioning of the European Union (“TFEU”). It implements the basic principles of Article 56 TFEU (ex Article 49 EC) as developed in the case-law of the Court of Justice of the European Union. According to the third recital in the preamble, the Directive is based upon the premise that the internal market offers a dynamic environment for the transnational provision of services, in which undertakings may post employees abroad temporarily to perform work in the territory of an EEA State other than the State in which they are habitually employed. At the same time, the Directive aims at promoting a “climate of fair competition and measures guaranteeing respect for the rights of workers” (see the fifth recital in the preamble).

21 To reconcile these objectives and to avoid problems with regard to the legislation applicable to transnational employment relationships, the Directive was adopted

with a view to laying down, in the interests of employers and their personnel, terms and conditions governing the employment relationship where an undertaking established in one EEA State posts workers on a temporary basis to the territory of another EEA State for the purposes of providing a service (see Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 58).

22 As noted in recitals seven and eight in the preamble, the Directive operates on the basic principles of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, which provides, as a general rule, for the free choice of law made by the parties (Article 3 of the Convention, and, for the purposes of Union law, Article 3 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, "the Rome Regulation"). In the absence of a choice, it follows from Article 6(2) of this Convention that a contract is, in general, governed by the law of the country in which the employee habitually carries out his work in the performance of the contract, even if he is temporarily employed in another country, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country. In the latter case the contract is governed by the law of that country (see, for comparison, Article 4 of the Rome Regulation).

23 The aims of the Directive reflected, inter alia, in Article 3(1) are to facilitate the free movement of services within the EEA while ensuring a climate of fair competition and respect for the rights of workers. The Directive seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, insofar as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host EEA State, by law, regulation or administrative provision or by collective agreement or arbitration award within the meaning of Article 3(8), which constitute mandatory rules for minimum protection (see, for comparison, *Laval un Partneri*, cited above, paragraph 74).

24 The Directive seeks to prevent a situation from arising in which, by applying to their workers the terms and conditions of employment in force in the home EEA State as regards those matters, undertakings established in other EEA States would compete unfairly against undertakings of the host EEA State in the framework of the transnational provision of services, if the level of social protection in the host EEA State is higher.

25 Secondly, the provision seeks to ensure that posted workers will have the rules of the EEA State for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that EEA State.

26 The consequence of affording such minimum protection – if the level of protection resulting from the terms and conditions of employment granted to posted workers in the home EEA State, as regards the matters referred to in

Article 3(1), first subparagraph, points (a) to (g) of the Directive, is lower than the level of minimum protection afforded in the host EEA State – is to enable those workers to enjoy better terms and conditions of employment in the host EEA State (compare *Laval un Partneri*, cited above, paragraphs 73 to 77).

27 Thus, the first subparagraph of Article 3(1) of the Directive provides that EEA States are to ensure that, whatever the law applicable to the employment relationship, undertakings providing transnational services guarantee posted workers the terms and conditions of employment, involving those matters covered by that article, which are established in the EEA State in which the work is carried out.

28 As regards the degree of protection for workers that host EEA States are entitled to require undertakings established in other EEA States to observe when they post workers to their territory, it must be kept in mind that the application of the terms and conditions covered by Article 3(1), first subparagraph, points (a) to (g), constitutes a derogation from the principle that the legislation of the EEA State of origin applies to such a situation (see the Opinion of Advocate General Mengozzi in *Laval un Partneri*, cited above, point 132).

29 The provisions in points (a) to (g) of the first subparagraph of Article 3(1) expressly define – through the matters referred to therein – the degree of protection for workers that host EEA States are entitled to require in this context. To this effect, Article 3(1) sets out an exhaustive list of the matters in respect of which a host EEA State may give priority to its own rules. The host state is therefore barred from extending the terms and conditions specified in the provisions cited, as any other interpretation would amount to depriving the Directive of its full effectiveness (see Case E-12/10 *ESA* v *Iceland*, judgment of 28 June 2011, not yet reported, paragraph 40 and the case-law cited).

30 This interpretation entails that the level of protection which must be guaranteed to workers posted to the territory of the host EEA State is limited, in principle, to the matters provided for in Article 3(1), first subparagraph, points (a) to (g) of the Directive. This applies, unless, pursuant to the law or collective agreements in the EEA State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (see *ESA* v *Iceland*, cited above, paragraph 41, and, for comparison, *Laval un Partneri*, cited above, paragraph 81).

31 However, the Directive does not harmonise the material content of those mandatory rules for minimum protection. Accordingly, the content of these rules may be freely defined by the EEA States, in compliance with the EEA Agreement and the general principles of EEA law (see *ESA* v *Iceland*, cited above, paragraph 45, and, for comparison, *Laval un Partneri*, cited above, paragraph 60, and the case-law cited).

32 As regards the definition of these mandatory rules for minimum protection under the Directive, it must be borne in mind that the need to ensure that EEA law is

fully applied requires EEA States not only to bring their legislation into conformity with EEA law but also to do so by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts (see, to that effect, with regard to directives, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 76, and Case C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraph 22).

33 For the purposes of the Directive, this obligation extends both in relation to foreign service providers and to posted workers. Article 4(3) of the Directive establishes that EEA States must take all appropriate measures to make information on terms and conditions of employment referred to in Article 3 of the Directive generally available.

34 Turning to the question of the referring court whether terms and conditions that are held to be compatible with the Directive must also be evaluated in light of Article 36 EEA, it must be kept in mind that the provisions of the Directive form part of secondary EU law adapted to the EEA Agreement by way of Protocol 1 thereto, which must be given, as far as possible, an interpretation which renders them consistent with the provisions of the EEA Agreement and the general principles of EEA law (see, for comparison, Case C-105/94 *Celestini* [1997] ECR I-2971, paragraph 32, and Joined Cases C-90/90 and C-91/90 *Neu and Others* [1991] ECR I-3617, paragraph 12).

35 Therefore, the questions submitted by the referring court regarding particular terms and conditions of employment will, where necessary, be examined jointly under the provisions of the Directive interpreted in the light of Article 36 EEA, and, where appropriate, under the latter provision itself (see, for comparison, *Laval un Partneri*, cited above, paragraph 61, and the case-law cited).

36 Accordingly, there is no need to provide a separate answer to the second question of the referring court concerning the compatibility of these terms and conditions of employment with Article 36 EEA. As the third question is based on the premise that a separate answer is given to the second question, there is no need to address that question.

Question 1(a): Maximum working hours

Observations submitted to the Court

37 According to the first and second indents of the first subparagraph of Article 3(1) of the Directive, the terms and conditions of employment covering the matters referred to in points (a) to (g) thereof to be observed in the transnational provision of services must have been established either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable pursuant to Article 3(8). Collective agreements and arbitration awards for the purposes of the latter provision are

those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

38 The parties to the main proceedings appear to agree, in principle, that the terms and conditions of employment contested in the main proceedings have been laid down in collective agreements declared universally applicable pursuant to the Norwegian Universal Application Act. In light of this, Norway appears to have made use of the possibility provided for in the second subparagraph of Article 3(8) of the Directive.

39 However, the parties disagree whether the terms and conditions listed in the Tariff Board Regulation, which stipulates in Section 5 that normal working hours may not exceed 37.5 hours per week and in Section 6 which supplements to the hourly rate must be paid for work outside normal working hours, are included within Article 3(1), first subparagraph, point (a), or alternatively, point (c) of the same subparagraph.

40 The Appellants argue that the national court's question whether host EEA States are permitted to oblige undertakings posting workers to that State to guarantee terms and conditions regarding maximum normal working hours should be understood as seeking to establish, in particular, whether Article 3(1) of the Directive permits EEA States to make maximum *normal* working hours applicable to foreign service providers.

41 In this regard, the Appellants submit that point (a) of the first subparagraph of Article 3(1) of the Directive does not seek to impose on foreign service providers the host EEA State's definition concerning ordinary working hours and overtime. Instead, a host EEA State may establish only the maximum work period, irrespective of whether the hours included within this period are considered ordinary working time or overtime, as such rules are intended to protect workers' health and not their pay. Therefore, in the Appellants' view, Norway is precluded from imposing on foreign service providers its regulations on what constitutes ordinary working time and overtime.

42 The Appellants argue also that point (c) of the first subparagraph of Article 3(1) does not permit the host EEA State to define the hours which constitute overtime as this provision concerns overtime rates. In the alternative, the Appellants observe that the Working Environment Act contains provisions on ordinary working time which set this at 40 hours per week. In their view, this constitutes the relevant minimum protection under the Directive interpreted in the light of Article 36 EEA. Accordingly, the Norwegian authorities are precluded from declaring alternative terms established in collective agreements applicable to foreign service providers without any reference to what is necessary for the protection of the relevant workers' health.

43 In the Defendant‘s view, it follows from the wording, objectives and context of point (c) of the first subparagraph of Article 3(1) of the Directive that the host EEA State's competence to define "minimum rates of pay, including overtime

rates" includes both the determination of the amounts of pay due and the definition of the working conditions under which the relevant minimum amount is due. Consequently, the determination of overtime work and the amount of pay which is due for such work, as set out in Sections 5 and 6 of the Tariff Board Regulation, falls within the scope of point (c) of the first subparagraph of Article 3(1).

44 In the alternative, the Defendant contends that Section 5 of the Tariff Board Regulation, which stipulates normal working hours and thus what is deemed overtime, is designed to and has the effect of laying down the maximum ordinary working hours per week. Any exceptions to this require extraordinary circumstances. Consequently, the Defendant considers Section 5 of the Tariff Board Regulation to fall not only within the scope of point (c) but also point (a) of the first subparagraph of Article 3(1) of the Directive.

45 Based on this alternative line of reasoning, the Defendant considers point (a) of the first subparagraph of Article 3(1) of the Directive not to preclude a Member State from extending to workers posted to its territory terms and conditions of employment applicable in the Member State where the work is carried out concerning maximum ordinary working hours laid down in a collective agreement and declared universally applicable within the meaning of Article 3(8).

46 The Governments of Belgium, Poland and Sweden essentially argue that the provisions in Article 3(1), first subparagraph, points (a) and (c), of the Directive do not prevent an EEA State from securing workers posted to its territory from another EEA State terms and conditions relating to maximum normal working hours contained in an universally applicable nationwide collective agreement. This view is shared by ESA and the Commission.

Findings of the Court

47 In response to the question of the national court whether terms and conditions on "maximum normal working hours", such as those described in its request, are compatible with the Directive, the Court finds it appropriate to address this issue in light of both points (a) and (c) of the first subparagraph of Article 3(1) of the Directive.

48 It follows from the wording of point (a) of the first subparagraph of Article 3(1) that EEA States are permitted to lay down terms and conditions on maximum working hours as mandatory rules of minimum protection, provided this is done by law, regulation or administrative provisions, or by arbitration awards or collective agreements that have been declared universally applicable as provided for in Article 3(8) of the Directive.

49 By their submissions in which they note that the Working Environment Act contains provisions on ordinary working time and sets this at 40 hours per week, the Appellants appear to argue that Article 3(1) of the Directive cannot apply to

the definition of maximum normal working hours established in Section 5 of the Tariff Board Regulation, on the basis that the mandatory rules for minimum protection are not laid out in the contested Regulation but in national legislation.

50 With regard to this argument, the Court notes that it follows from the first subparagraph of Article 3(1) of the Directive, which sets out the instruments which may establish terms and conditions regarding the matters covered in points (a) to (g) that, in order to qualify as a mandatory rule for minimum protection, collectively agreed terms and conditions regarding maximum working hours must be generally applicable in accordance with Article 3(8).

51 This requirement entails that the terms and conditions must be observed by all undertakings which are in a comparable situation in the geographical area and in the profession or industry concerned. Thus, agreements containing rules on working hours that deviate from the scheme laid down in national legislation and which do not apply to all undertakings in a comparable situation are, in principle, not compatible with the Directive.

52 In this connection, it must be recalled that it is not for the Court to rule on the interpretation of provisions of national law and that the Court must generally take account, under the division of jurisdiction between it and the national courts, of the factual and legislative context, as described in the request for an Advisory Opinion.

53 Therefore, it is for the national court to ascertain whether the arguments concerning the application of Norwegian law put forward by the Appellants before the Court are well founded. In this regard, the national court must verify whether the conditions of Article 3(8) of the Directive are met, that is, whether or not the collective agreement applies in a general and equal manner to all similar undertakings in the geographical area and in the profession or industry concerned.

54 Provided that the conditions laid down in Article 3(8) of the Directive referred to above are met and the general principles of EEA law are complied with, it follows from points (a) and (c) of the first subparagraph of Article 3(1) of the Directive that EEA States are free to set limits both for maximum and for normal working hours, as well as to adapt such limits in relation to specific professions or industries.

55 With regard to the latter aspect, the Court considers it evident that the protection of workers may call for more stringent rules with regard to some professions or industries than others, and that EEA States must be at liberty, within the limits of the general principles of EEA law, to adopt legislation or declare collective agreements or arbitration awards universally applicable in order to achieve the level of protection they consider necessary.

56 In relation to the question of rates of pay for work beyond maximum normal working hours, the Court notes that “overtime rates” are explicitly allowed for in

point (c) of the first paragraph of Article 3(1) of the Directive. Furthermore, the wording of point (a) of the first paragraph of Article 3(1) presupposes that there may be more than one maximum work period. Terms and conditions covering maximum work periods may thus result in several maximum levels contained in different legal provisions. Moreover, maximum levels may vary, not only between EEA States, but also within one EEA State.

57 However, the possibility for EEA States to intervene in terms of pay is limited under the Directive to matters concerning minimum rates of pay, as stated in point (c) of the first subparagraph of Article 3(1) of the Directive. Accordingly, the overtime rates of pay must be limited to minimum rates for work outside maximum normal working hours and set out in a clear and accessible manner, in accordance with requirements inherent in EEA law (see paragraphs 32 to 33 of this judgment).

58 Thus, in reply to Question 1(a) of the referring court, the Court holds that the term "maximum work periods and minimum rest periods" set out in point (a) of the first subparagraph of Article 3(1) of Directive 96/71/EC includes terms and conditions regarding "maximum normal working hours", such as those described in the request, provided that these terms and conditions apply in a general and equal manner to all similar undertakings in the geographical area and in the profession or industry concerned and, where these terms and conditions are laid down by collective agreement, that the conditions of Article 3(8) of the Directive are satisfied.

59 The Court also finds that provisions of national legislation or collective agreements declared universally applicable concerning remuneration paid in compensation for working outside normal working hours are compatible with the Directive, provided these fall within the notion of "the minimum rates of pay" set out in point (c) of the first subparagraph of Article 3(1) of the Directive.

60 Whether the terms and conditions contested in the main proceedings correspond, in fact, to "maximum normal working hours" and "minimum rates of pay" within the meaning of points (a) and (c) of the first subparagraph of Article 3(1) and satisfy the criteria of Article 3(8) of the Directive is for the national court to determine.

Question 1(b): Additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site

Observations submitted to the Court

61 The Appellants observe that the second subparagraph of Article 3(1) of the Directive gives host States the freedom, subject to the limits of Article 36 EEA, to establish minimum rates of pay. However, in their view, the notion of "rates of pay" referred to in point (c) of the first subparagraph of Article 3(1) relates to pay in the sense of consideration for the service provided under the employment

relationship and not reimbursement of costs. Moreover, the use of the term "minimum" indicates a defined level and not various components of a "remuneration package".

62 The Defendant submits that point (c) of the first subparagraph of Article 3(1) of the Directive acknowledges that the concept of pay includes several constituent elements, reflecting, inter alia, the conditions under which the work is carried out. While the Court of Justice of the European Union has emphasised that the Directive does not harmonise the material content of the matters referred to in Article 3(1), first subparagraph, points (a) to (g), the minimum wage is the only matter which the legislature explicitly stated shall be defined in accordance with the host EEA States' law and/or practice. In that connection, given that case-law already establishes that the material content of Article 3(1), first subparagraph, points (a) to (g), may be freely defined by a host Member State, in the Defendant's view, this applies *a fortiori* to the concept of "minimum rates of pay".

63 The Defendant contends that there are two conditions that must be respected in this regard. First, the minimum wage must be laid down in accordance with the procedures provided for in Article 3(1) and (8) of the Directive and, second, the rates must be of a minimum character.

64 The Defendant submits further that Member States may include salaries and any other consideration which an employee receives in return for his services within the concept of minimum rates of pay, save for social security benefits and supplementary retirement pension schemes. It is clear that the term "minimum rates of pay" includes not only the basic minimum hourly rate, but also other supplements and allowances that form part of the minimum wage as specified by the host EEA State's law and practice.

65 In the Defendant's view, it follows that provisions in a nationwide collective agreement stipulating a supplementary minimum rate of pay, including reimbursement for travel, board and lodging, for work requiring overnight stays away from home, fall within the concept of "minimum rates of pay" and that, if declared universally applicable, such provisions may apply to posted workers in accordance with point (c) of the first subparagraph and the second subparagraph of Article 3(1) of the Directive.

66 The Governments of Belgium, Poland and Sweden and the Commission essentially agree with the Defendant that the provision does not prevent an EEA State from securing workers posted to its territory, from another EEA State, additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home as terms and conditions of employment which have been established in accordance with Article 3(8) of the Directive. ESA, on the other hand, argues that such additional remuneration may only be included within the concept of "minimum rates of pay" insofar as such additional remuneration is considered part of the minimum wage in the host State and does

not alter the relationship between the service provided and the remuneration paid. In ESA's view, this is for the referring court to determine.

Findings of the Court

67 By Question 1(b), the national court essentially seeks to establish whether the Directive permits an EEA State to secure workers posted to its territory from another EEA State additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site.

68 It is clear from recital 12 in the preamble to the Directive that EEA law does not preclude EEA States from applying their legislation, or collective labour agreements entered into by management and labour, relating to minimum wages to any person who is employed, even temporarily, within their territory, no matter in which EEA State the employer is established. The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, for comparison, *Laval un Partneri*, cited above, paragraph 57, and the case-law cited).

69 Pursuant to the first subparagraph of Article 3(1) of the Directive, posted workers are to be guaranteed terms and conditions of employment concerning the matters referred to under points (a) to (g) of that provision, which include, under point (c), minimum rates of pay.

70 As stated in the second subparagraph of Article 3(1), the concept of minimum rates of pay is a matter to be defined by the national law and/or practice of the EEA State to whose territory the worker is posted. In light of this and given the fact that the Directive does not harmonise the material content of the mandatory rules for minimum protection, that content may be freely defined by the EEA States, provided that it does not hinder the provision of services between the EEA States and is in compliance with the EEA Agreement and general principles of EEA law. This includes, for the purposes of the present case, Article 36 EEA (see paragraphs 34 to 35 of this judgment and, for comparison, *Laval un Partneri*, cited above, paragraph 68). Therefore, Question 1(b) must be examined with regard to the Directive interpreted in the light of Article 36 EEA, and, where appropriate, with regard to the latter provision itself.

71 Article 3(1), first subparagraph, point (c), of the Directive does not authorise a host EEA State to impose on undertakings which post workers to its territory its system for determining all wages. As this provision is intended to limit the possibility for EEA States to intervene as regards minimum rates of pay, an entitlement to remuneration for work assignments requiring overnight stay away from home which is not set at a minimum rate does not fall within the notion of "minimum rates of pay" within the meaning of point (c) of the first subparagraph of Article 3(1) of the Directive (see, to that effect, *ESA* v *Iceland*, cited above,

paragraph 47, and, for comparison, Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 47).

72 Accordingly, an entitlement to additional remuneration for work assignments requiring overnight stays away from home, such as the one at issue in the main proceedings, may be compatible with point (c) of the first subparagraph of Article 3(1) of the Directive, provided it corresponds to a rate which is regarded as the minimum rate of pay for such assignments. In accordance with Article 4(3) of the Directive, furthermore, such terms and conditions of employment must be expressly stated and rendered transparent for both the foreign service provider and the posted workers, and apply in a general and equal manner to all similar undertakings in the geographical area and in the profession or industry concerned, as noted at paragraphs 50 to 51 above.

73 In this assessment, the national court must take into account, however, that provisions of national law setting out mandatory rules for minimum protection must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for a firm taking advantage of its rights under the Directive and Article 36 EEA to determine the obligations with which it is required to comply with as regards minimum pay (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 43, and *Laval un Partneri*, cited above, paragraph 110). In this regard, it should be noted that clear and accessible provisions on minimum protection are also in the interest of workers.

74 In exercising the discretion accorded to them to define the content of mandatory rules for minimum protection for the purposes of Article 3(1) of the Directive, EEA States are obliged, furthermore, to respect the EEA Agreement, in particular, in the present case, Article 36 EEA. Therefore, even if the national court finds that the remuneration which forms the subject of Question 1(b) satisfies the specific requirements of the Directive with regard to minimum rates and other criteria, this question must also be examined with regard to the provisions of the Directive interpreted in the light of Article 36 EEA, and, where appropriate, with regard to the latter provision itself (see paragraphs 34 to 35 of this judgment).

75 According to settled case-law, Article 36 EEA requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another EEA State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other EEA States. Such a restriction is liable to prohibit, impede or render less attractive the activities of a provider of services established in another EEA State where he lawfully provides similar services (see, for comparison, *Arblade and Others*, cited above, paragraph 33, and the case-law cited).

76 In particular, EEA States may not make the provision of services in their territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the EEA

Agreement whose object is, precisely, to guarantee the freedom to provide services. In that regard, the application of the host EEA State's national rules to service providers is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional economic burdens (see, to that effect, Case C-165/98 *Mazzoleni and ISA* [2001] ECR I−2189, paragraphs 23 to 24, and the case-law cited).

77 The Appellants in the main proceedings have contended that the contested terms and conditions regarding additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home will certainly always apply to service providers established abroad but not necessarily to their domestic competitors. Therefore, such provisions impose on those employers an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host State. In their view, the Directive, read in conjunction with Article 36 EEA, cannot be interpreted in a way that allows host States to impose measures which would effectively exclude foreign service providers from their market.

78 It must therefore be examined whether terms and conditions on additional remuneration, such as the term referred to in Question 1(b), constitute a restriction on the freedom to provide services, and, if so, whether that restriction can be justified.

79 As correctly pointed out by the Appellants in the main proceedings, the contested terms and conditions regarding additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home are liable to make it less attractive, or more difficult, for foreign service providers to perform their services in Norway, and therefore constitute a restriction on the freedom to provide services within the meaning of Article 36 EEA.

80 Where such domestic legislation is applicable without distinction to all persons and undertakings operating in the territory of the EEA State in which the service is provided, the restriction may be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the EEA State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, for comparison, Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 34, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 19, and the case-law cited).

81 In that regard, it must be pointed out that the overriding reasons relating to the public interest already recognised in case-law include the social protection of workers (compare *Arblade and Others*, cited above, paragraph 36, and *Mazzoleni and ISA*, cited above, paragraph 27).

82 The Appellants contend that the real purpose pursued by the Universal Application Act, enabling the Tariff Board to declare collective agreements

universally applicable, and the decisions issued by the Tariff Board is to protect domestic employment opportunities, and not to protect workers as such.

83 According to settled case-law, measures forming a restriction on the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses (compare Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 39, and *Portugaia Construções*, cited above, paragraph 26).

84 It is for the national court to verify whether, on an objective view, the rules at issue in the main proceedings promote the protection of posted workers. In this respect, it is necessary for the national court to determine whether those rules confer a genuine benefit on the workers concerned which significantly adds to their social protection. In this context, the stated purpose of the rules may lead to a more careful assessment of the alleged benefits conferred on workers (see, for comparison, *Wolff & Müller*, paragraph 38, and *Portugaia Construções*, paragraphs 28 to 29, and the case-law cited).

85 The Court notes in this context that the Norwegian rules may reduce the job opportunities for workers from other EEA States to the extent that an employer may be deterred, due to the costs involved with the terms and conditions in question, from exercising its freedom to provide services by pursuing activities in Norway. In that case, the rules cannot be held to confer a genuine benefit on posted workers.

86 If the national court nevertheless considers that the rules at issue in the main proceedings in fact pursue the public interest objective of protecting workers employed by providers of services established outside Norway, it will have to go on to assess whether those rules are proportionate to the attainment of that objective having regard to the considerations mentioned in paragraph 84 of this judgment.

87 In doing so, the national court must balance the administrative and economic burdens that the rules impose on providers of services against the increased social protection that they confer on workers compared with that guaranteed by the law of the EEA State where their employer is established (see, for comparison, *Finalarte and Others*, cited above, paragraph 50).

88 Accordingly, the answer to Question 1(b) must be that Article 3(1), first subparagraph, point (c), of Directive 96/71/EC, as interpreted in light of Article 36 EEA, does, in principle, preclude an EEA State from requiring an undertaking established in another EEA State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State for work assignments requiring overnight stays away from home, unless the rules providing for such additional remuneration pursue a public interest objective and their application is not disproportionate. It is for the national authorities or, as the case may be, the courts of the host EEA State, to

determine whether those rules in fact pursue an objective in the public interest and do so by appropriate means.

Question 1(c): Compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site

Observations submitted to the Court

89 The Appellants consider that these allowances concern the reimbursement of costs. In their view, cost reimbursement by its very nature cannot constitute pay and provisions thereon do not fall within Article 3(1) of the Directive. The Appellants further argue that the imposition of these allowances appears discriminatory.

90 The Defendant contends that Article 3(7) of the Directive does not preclude a host State from including the reimbursement of expenses incurred on account of work requiring overnight stays away from home as part of its minimum wage for the purposes of point (c) of the first subparagraph of Article 3(1). Article 3(7) merely provides that such benefits may not be taken into account when calculating the minimum wage for the purposes of the comparison required under that provision. This view is supported by the fifth recital in the preamble to the Directive, which states that the Directive's objective is to ensure fair competition and the protection of workers.

91 The Governments of Belgium, Poland and Sweden disagree on the answer to Question 1(c). The Governments of Belgium and Poland argue that the Directive does not permit an EEA State to secure workers from another EEA State compensation for travel, board and lodging expenses for work assignments requiring an overnight stay away from home. The Government of Belgium argues that such compensation corresponds to allowances excluded from the concept of the minimum wage provided for in point (c) of the first subparagraph of Article 3(1) of the Directive, since it is paid in reimbursement of expenditure actually incurred on account of the posting.

92 The Government of Sweden submits that, whereas reimbursement of expenditure on travel, board and lodging should not be included when calculating the minimum wage, in order to ensure that the actual amount of minimum wage at a posted worker's disposal does not fall below the minimum wage he or she is guaranteed under the Directive, Article 3(1) and (7) of the Directive must not be interpreted such as to preclude a posted worker's right to compensation for costs, such as travel, board and lodging.

93 ESA submits that it is for the national court to determine, in light of national law and/or practice, whether the Directive permits an EEA State to secure workers posted to its territory terms and conditions regarding compensation for travel, board and lodging expenses in case of overnight stays away from home, on

condition that such expenses are not reimbursement for expenses actually incurred.

94 In the view of the Commission, point (c) of the first subparagraph of Article 3(1) of the Directive is to be interpreted as permitting an EEA State to secure for workers posted to its territory terms and conditions regarding compensation for travel, board and lodging expenses in case of overnight stays away from home, with an exception for employees who are hired at the work site, provided they are in the form of a flat-rate.

Findings of the Court

95 The question submitted by the national court is whether the Directive, in particular point (c) of the first subparagraph of Article 3(1), permits an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses for overnight stays away from home following an assignment, with an exception for employees who are hired at the work site, by way of nationwide collective agreements that have been declared universally applicable.

96 Under Section 7 of the Tariff Board Regulation, 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 home visits. Before the employer posts an employee to work away from home, board and lodging arrangements must be agreed. As a rule, the employer is required to cover board and lodging, but a fixed subsistence allowance, or payment on the submission of receipts etc. may be agreed.

97 It must be assumed that payments such as those specified in the national provision in question will relate to specific occasions of travel and that the costs will vary. Such payments cannot fall within the notion of pay within the meaning of Article 3(1) of the Directive, because of their nature as compensation of necessary expenditure related to the posting. Neither can they fall within any other of the matters listed exhaustively in Article 3(1).

98 According to the first indent of Article 3(10) of the Directive, EEA States may apply terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) to undertakings which post workers to their territory only in the case of public policy provisions. Such application must, moreover, be in compliance with the EEA Agreement, and non-discriminatory.

99 EEA States are, in principle, free to determine the requirements of public policy in the light of their needs. The notion of public policy, particularly when it is cited as a justification for a derogation from the fundamental principle of the freedom to provide services, must, however, be interpreted strictly (see *ESA* v *Iceland*, cited above, paragraph 56, and the case-law cited). Its scope cannot be determined unilaterally by each EEA State. 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. For example, an EEA State cannot rely on the public policy exception referred to in the first indent of Article 3(10) of the Directive in order to apply to undertakings posting workers on its territory a requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living (see, for comparison, *Commission* v *Luxembourg*, cited above, paragraph 55, and the case law cited).

100 The assessment of whether the compensation scheme in question may be justified on the basis of public policy provisions must be made by the national court, on the basis of all the facts before it and in light of the criteria set out in paragraphs 86 to 87 of this judgment.

101 The information which has been given to the Court does not indicate that the allowances in question are justified on public policy grounds.

102 In reply to the question of the national court, the Court finds that the Directive does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, unless this can be justified on the basis of public policy provisions.

Proportion of employees covered by collective agreement

Observations submitted to the Court

103 In relation to the question of the national court on what bearing, if any, the proportion of employees covered by the relevant collective agreement, before it was declared universally applicable, has on the answers to Questions 1(a), 1(b) and 1(c), the Appellants consider the proportion of employees covered by the relevant collective agreement immaterial. This view is shared by the Defendant and all the parties submitting observations in the case.

104 In this regard, the Appellants submit that there are no indications in the Directive that the scope of Article 3(1) is affected by the proportion of workers that are or have been covered by a collective agreement made universally applicable. They acknowledge that the second subparagraph of Article 3(8) provides that, in the absence of a system for declaring collective agreements universally applicable, States may base themselves on collective agreements, which are “generally applicable”. In their view, however, a system such as that described in the first subparagraph of Article 3(8) exists in Norway and has been applied in the present case.

Findings of the Court

105 According to Article 3(1) of the Directive, the minimum terms and conditions of employment which an EEA State must guarantee to posted workers may be laid down in law, regulation or administrative provision and/or by collective agreement or arbitration award which have been declared universally applicable. In the context of this choice there is no requirement that any specific proportion of employees is covered by the relevant collective agreement before it is declared universally applicable. Thus the Court concurs with the view expressed by the parties.

106 Therefore, in reply to the question of the national court, the Court finds that the proportion of employees covered by the relevant collective agreement, before it was declared universally applicable, has no bearing on the answers to Questions 1(a), 1(b) and 1(c).

107 In view of the answers given to the questions set out above, there is no need for the Court to answer the other questions referred.

IV Costs

108 The costs incurred by the Belgian, Icelandic, Norwegian, Polish and Swedish Governments, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Borgarting lagmannsrett, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by *Borgarting lagmannsrett* hereby gives the following Advisory Opinion:

1. **The term "maximum work periods and minimum rest periods" set out in point (a) of the first subparagraph of Article 3(1) of Directive 96/71/EC covers terms and conditions regarding "maximum normal working hours", such as those described in the request for an Advisory Opinion.**

2. **Article 3(1), first subparagraph, point (c), of Directive 96/71/EC, as interpreted in light of Article 36 EEA, does, in principle, preclude an EEA State from requiring an undertaking established in another EEA State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of**

that State for work assignments requiring overnight stays away from home, unless the rules providing for such additional remuneration pursue a public interest objective and their application is not disproportionate. It is for the national authorities or, as the case may be, the courts of the host EEA State, to determine whether those rules in fact pursue an objective in the public interest and do so by appropriate means.

3. **Directive 96/71/EC does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, unless this can be justified on the basis of public policy provisions.**

4. **The proportion of the employees covered by the relevant collective agreement, before it was declared universally applicable, has no bearing on the answers to Questions 1(a), 1(b) and 1(c).**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 23 January 2012.

Skúli Magnússon
Registrar

Per Christiansen
Acting President