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E-2/11-32

REPORT FOR THE HEARING
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 a case between

STX Norway Offshore AS and Others

and

The Norwegian State, represented by the Tariff Board,

on whether terms and conditions of employment as provided for by a collective agreement declared universally applicable within the maritime construction industry are compatible with EEA law 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.

I Facts and procedure

1. This case concerns a request for an Advisory Opinion on the interpretation of Directive 96/71/EC[1] ("Directive 96/71", or "the Directive") on the posting of workers sought by the Borgarting lagmannsrett ("Court of Appeal"). In essence, the Court of Appeal seeks guidance as to whether the terms and conditions of employment in a collective agreement which has been declared universally applicable and thus mandatory within the industry concerned are compatible with EEA Law.

2. 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

[1] 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, OJ 1997 L 18, p. 1.

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.

3. According to the request, on 6 October 2008, the Tariff Board issued a formal decision 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.

4. The Tariff Board granted universal application to clauses contained within the VO collective agreement covering the following matters:

- The basic hourly wage (Clause 3.1)
- Normal working hours which may not exceed on average 37.5 hours per week (Clause 2.1.2)
- Overtime supplements (Clause 6.1)
- Shift 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)

5. 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, claiming that the Tariff Board Regulation was invalid and demanding compensation. By its judgment of 29 January 2010, the Oslo tingrett (Oslo District Court) held that the Tariff Board Regulation was compatible with Directive 96/71/EC on the posting of workers 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.

II Questions

6. 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 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?

III Legal Background

EEA Law

7. 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.*

8. Article 56 of the Treaty on the Functioning of the European Union ("TFEU") (ex Article 49 EC) reads:

> *Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*
>
> *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.*

9. Article 3 of Directive 96/71 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. It 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.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1(b) and (c) in the cases referred to in Article 1(3)(a) and (b) on the grounds that the amount of work to be done is not significant.
Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as 'non-significant'.

...

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.*

9. Member States may provide that the undertakings referred to in Article 1(1) must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

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. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[2] ("the Working Time Directive", "Directive 2003/88") was incorporated into the EEA Agreement by Decision No 45/2004 of the EEA Joint Committee of 23 April 2004 amending Annex XVIII (Health and safety at work, labour law, and equal treatment for men and women) to the EEA Agreement. Articles 6 and 15 of that Directive read:

Article 6

Maximum weekly working time

Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.

Article 15

More favourable provisions

This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.

[2] OJ 2003 L 299, p. 9.

National Law

11. As stated by the referring court, Directive 96/71 is implemented in Norwegian law through the combined effect of the Working Environment Act (the 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 3, 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.

IV Written Observations

17. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- 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 BA-HR, Oslo;
- the Defendant, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs);
- the Belgian Government, represented by Liesbet Van den Broeck and Marie Jacobs, the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;

- the Polish Government, represented by Maciej Szpunar, Undersecretary of State, Ministry of Foreign Affairs, acting as Agent;
- the Government of Iceland, 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, Advocate, Office of the Attorney General (Civil Affairs);
- 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, represented by Xavier Lewis, Director, and Fiona M. Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission, represented by Johan Enegren, Legal Service, acting as Agent.

V Summary of the pleas in law and arguments submitted

18. In its written observations, the Norwegian Government refers to the observations submitted by the Defendant, represented by the Tariff Board, and submits that the questions referred should be answered in accordance with the observations and conclusions submitted by the Defendant. The Government of Iceland fully supports the arguments and pleadings put forward by the Defendant in the request for Advisory Opinion. However, in its observations, the Government of Iceland neither addresses the specific questions referred nor proposes answers to them.

VI The first question

19. By its first question, the national court asks whether Directive 96/71 permits an EEA host State to secure workers posted to its territory from another EEA State certain terms and conditions established through nationwide collective agreements and declared universally applicable as provided for in Article 3(8) of Directive 96/71. In this regard, the national court specifically asks about terms and conditions regarding (a) maximum 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.

The Appellants

Maximum working hours

20. The Appellants note that Norwegian law has, in accordance with Directive 2003/88, set maximum working hours per day and per week, as well as minimum rest periods. However, within this framework the Appellants note that Norwegian law distinguishes between *normal* working hours and *overtime.*

21. The Appellants note further that, in the Regulation at issue, the Tariff Board declared the VO's normal working hours of 37.5 hours per week universally applicable and not the statutory 40 hours per week. Consequently, the Appellants contend that Question 1(a) should be interpreted as seeking to establish whether Article 3(1) of the Directive permits Member States to make maximum *normal* working hours universally applicable.

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

23. The Appellants submit that Article 3(1)(c) of the Directive also does not permit the host State to define the hours which constitute overtime as it concerns overtime rates. In the alternative, the Appellants submit that the Working Environment Act contains provisions on ordinary working time and sets this at 40 hours per week. 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 universally applicable alternative terms established in collective agreements without any reference to what is necessary for the protection of the relevant workers' health.

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[3] Reference is made to Boemke, B., *Handbuch zum Arbeitnehmer-Entsendegesetz*, Saxonia Verlag, Dresden, 2008, p. 70 which refers to a ruling of the German Federal Labour Court of 19 May 2004.

Additional remuneration for work assignments requiring overnight stays (Question 1(b)) and compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home (Question 1(c))

24. As regards the issue of pay, the Appellants observe, first, 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"

25. According to the Appellants, the context in which this provision is located supports this view. Article 3(10) of the Directive concerns the host State's ability to impose on foreign service providers terms and conditions of employment other than those set out in Article 3(1) and imposes strict conditions, in particular that the measure must pursue public policy objectives. Public policy here is to be interpreted narrowly.[4] Consequently, it would be illogical if States could circumvent the strict conditions of Article 3(10) through a broad interpretation of pay in Article 3(1).

26. The Appellants observe that the first subparagraph of Article 3(7) of the Directive underlines the fact that the contractual terms and conditions of employment of posted workers may be more favourable than the minimum requirements of the host State provided for under Article 3(1).[5] In their view, Article 3(7) calls for a comparison between the minimum rates of pay that the host State may impose under Article 3(1) and the wage received by the posted worker under his employment contract or the law applicable thereto. However, such comparison is not possible if there is no common understanding of what constitutes "pay".

27. The Appellants observe that, according to case-law, the concept of minimum wage under Article 3(7) of the Directive does not include allowances for services in the employment contract that are extra to the work itself.[6] If these are allowances in name only, for example, a thirteenth month's salary, they will be included in the definition of

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4 Reference is made to Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 50, and the joint statement of the European Commission and the Council at the adoption of the Directive, Statement No 10, as cited in Commission Communication COM(2003) 458 final.

5 Reference is made to Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767, paragraph 80.

6 Reference is made to Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraphs 39 to 40.

pay. On the other hand, an allowance for working in harsh weather conditions, for example, is only acquired through the extra service of working in such conditions. Thus, pay for the purposes of Article 3(7) is pay without allowances proper. Were the notion of pay for the purposes of Article 3(1)(c) to include allowances proper, a foreign service provider might be required to pay greater remuneration than its competitors in the host State. This could arise, for example, where, under the employment contract or the law applicable thereto, the foreign service provider does not have the right to demand certain services from the worker but the host State includes an allowance for such services within its definition of minimum rates of pay.

28. The Appellants observe further that the second subparagraph of Article 3(7) of the Directive provides that allowances specific to the posting are to be considered part of the minimum wage unless they are paid in reimbursement of expenditure actually incurred. In their view, the inclusion of this provision in Article 3(7) indicates that "posting allowances" form part of the pay under the contract or the law applicable thereto to which the minimum pay of the host State has to be compared. The specific reference to posting allowances in Article 3(7) can be explained by the fact that the treatment of such deviates from the general rule that allowances proper are not be considered as pay.

29. In this connection, the Appellants observe that, if a host State could determine the allowances specific to a posting to its own territory, this would entail a risk that the allowances might be set at a level which is not objectively justifiable and seeks to exclude foreign service providers from making use of their freedom to provide services.

30. The Appellants contend that the two allowances at issue (additional remuneration for overnight stays away from home and compensation for travel, board and lodging expenses) are related to the inconvenience, or costs, caused by working in a place other than that where the worker was hired. The allowances, when made universally applicable, will almost certainly always apply to foreign service providers, but not necessarily to their domestic competitors and consequently their imposition appears discriminatory. The Appellants submit that the Directive, read in conjunction with Article 36 EEA, cannot be interpreted in a way that would allow host States to impose measures which effectively exclude foreign service providers from their market.

31. Furthermore, the Appellants contend, the allowances at issue are not posting allowances within the meaning of the Directive as they are not related to a cross-border movement. In their view, therefore, these do not constitute the allowances referred to in Article 3(7).

32. In the Appellants' view, the allowance referred to in Question 1(b) is clearly an allowance proper as it is related to the additional service provided by the worker (and compensates for the inconvenience caused by not working in the place of hiring). Consequently, this allowance does not fall within the notion of pay and Norway cannot include it in the minimum pay that foreign service providers have to provide to their workers.

33. As regards compensation for travel, board and lodging expenses, 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.

34. The Appellants consider the proportion of employees covered by the relevant collective agreement to be irrelevant. 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. This view is shared by the Defendant and all the parties submitting observations in the case.

35. The Appellants propose that the first question should be answered as follows:

> *Article 3(1) of 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, referred to at point 30 of Annex XVIII to the EEA Agreement, read in the light of Article 36 of the EEA Agreement, must be interpreted so as to preclude an EEA State from requiring an undertaking from another EEA State that has posted workers to the first State to comply with its rules concerning cost reimbursement such as compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, as well as allowances that do not constitute minimum rates of pay within the meaning of that provision, such allowances being those that alter the relationship between the service provided by the worker and the consideration which he receives in return, including additional remuneration for work assignments requiring overnight stays away from home.*
>
> *Article 3(1) of Directive 96/71/EC must be interpreted so as to preclude an EEA State from requiring an undertaking from another EEA State that has posted*

workers to the first State to comply with its rules regulating the distribution of ordinary working time and overtime within the maximum work periods.

The Defendant

Maximum working hours

36. The Defendant notes, first, that Sections 5 and 6 of the Tariff Board Regulation lay down the terms and conditions for the payment of overtime work. In effect, these are 50% and 100% supplements to the basic minimum hourly rate for work exceeding 37.5 hours per week. The Defendant asserts that Sections 5 and 6 fall within the host Member State's right to stipulate overtime rates, as explicitly provided for in point (c) of the first subparagraph of Article 3(1) of the Directive.

37. The Defendant recalls that in determining the scope of a provision of EU or EEA law, its wording, objective and context must all be taken into account.[7] According to the Defendant, it is inherent in the notion of "minimum rates of pay, including overtime rates" (Article 3(1)(c)) that workers' minimum remuneration may differ according to the conditions under which the relevant work is carried out. Supplements for overtime work are thus but one of several "minimum rates of pay". The Defendant asserts that the concept of "minimum rates of pay", as is the case with "overtime rates", is formed of two elements: the definition of the relevant working conditions and the determination of the minimum amount of pay for work carried out under the conditions concerned. As a consequence, these two elements must be considered together.

38. The Defendant contends that this understanding is underscored by reading point (c) of the first subparagraph in conjunction with the opening wording of Article 3(1) of the Directive which refers to "the terms and conditions of employment covering ... (c) the minimum rates of pay, including overtime rates". The reference to "terms and conditions" further clarifies that Member States may not only determine different categories of pay, but also the working conditions corresponding to those categories and hence the definition of overtime.

39. The Defendant makes reference to the Swedish and Danish language versions of point (c) of the first subparagraph of Article 3(1) of the Directive, which refer respectively to "minimilön, inbegripet övertidsersättning" and "mindsteløn, herunder overtidsbetaling", translated by the Defendant as "minimum wage, including overtime

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[7] Reference is made to Case C-280/04 *Jyske Finans A/S* [2005] ECR I-10683, paragraph 34, and Case C-116/10 *Feltgen and Bacino Charter Company*, judgment of 22 December 2010, not yet reported, paragraph 12.

pay".[8] It observes further that the Court of Justice of the European Union ("ECJ") has intermittently referred to "minimum rates of pay" and "minimum wages" both before Directive 96/71 entered into force[9] and in connection with point (c) of the first subparagraph of Article 3(1).[10]

40. Consequently, the Defendant contends that the notion of "minimum rates of pay, including overtime rates" is synonymous with "minimum wage, including overtime pay". In this connection, it notes that the second subparagraph of Article 3(1) of the Directive provides that "the concept of minimum rates of pay ... is defined by the national law and/or practice of the Member State to whose territory the worker is posted".

41. The Defendant emphasises that the system of the Directive is to coordinate the Member States' laws such that the host State lays down the terms and conditions concerning the matters falling within Article 3(1), whereas Article 3(7) provides that the Directive does not hinder the home State from establishing terms and conditions that are more favourable to workers.[11] Indeed, according to the Defendant, a divided competence to lay down minimum rates of pay, including overtime rates, would be incoherent if the terms and conditions of the minimum wages were set independently of each other and would also invite a race to the bottom. Additionally, the Defendant asserts that such a divided competence would lead to a situation where each Member State has as many minimum rates as there are Member States.

42. According to the Defendant, 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 Member 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 of pay is due. Consequently, the determination of overtime work and the amount of pay 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).

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8 Reference is made to Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 22, and to the settled principle that Community provisions must be interpreted and applied uniformly in light of the versions existing in all Community languages.

9 Reference is made to Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 40 to 41 with further references.

10 Reference is made to Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 61; *Laval*, cited above, paragraphs 57 and 70; Case C-346/06 *Rüffert* v *Land Niedersachsen* [2008] ECR I-1989, paragraph 25; and *Commission* v *Luxembourg*, cited above, paragraph 45.

11 Reference is made to *Laval*, cited above, paragraphs 79 to 81.

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

44. The Defendant contends that Section 5 of the Tariff Board Regulation, read in conjunction with Section 10-6(1) of the Working Environment Act,[12] has the aim and effect of protecting the health and safety of workers by laying down maximum ordinary working hours.

45. The Defendant notes that there is additional EU law concerning "maximum work periods" and refers to Article 6 of Directive 2003/88. The Defendant contends that by reading Article 3 of Directive 96/71 together with Articles 6 and 15 of Directive 2003/88 host Member States may ensure that posted workers are guaranteed terms and conditions concerning maximum work periods that are more favourable to the protection of workers than the absolute maximum of 48 working hours, including overtime. Consequently, according to the Defendant, Section 5 of the Tariff Board Regulation is a constituent element of the regulation of "maximum work periods" laid down by law and by collective agreement which has been declared universally applicable within the maritime engineering industry, and thus falls within the scope of point (a) of the first subparagraph of Article 3(1). It contends further that this view is shared by ESA.[13]

46. Based on this alternative line of reasoning, the Defendant states that it 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, which in the Member State where the work is carried out are laid down in a collective agreement which has been declared universally applicable within the meaning of Article 3(8), covering maximum ordinary working hours.

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[12] Reference is made to the Proposition to the Odelsting No 49 (2004-2005) p. 318 (in Norwegian) on the intention to maintain the effect of the previous Working Environment Act (1977), Section 49.1 fourth subparagraph.

[13] Reference is made to ESA Decision of 15 July 2009 to close a case against Norway commenced following receipt of a complaint against that State in the field of free movement of services (320/09/COL) which states: "*Whereas provisions on the working week fall within Article 3(1)(a) of Directive 96/71, [...] Whereas the Authority must, therefore, conclude that decision by the Tariff Board with regard to the definition of the working week, whether they refer to the definition provided for in the Working Environment Act, or the definition in the relevant collective agreement, comply with Article 3(1)(a) of Directive 96/71.*"

Additional remuneration for work assignments requiring overnight stays and compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home

47. The Defendant contends that by Questions 1(b) and (c), the referring court essentially asks whether supplements to the minimum basic hourly rate of pay, for work requiring overnight stays away from home, constitute "minimum rates of pay" within the meaning of point (c) of the first subparagraph of Article 3(1) of the Directive.

48. In this regard, the Defendant submits, first, 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. This follows from the use of the plural and the word "including". Indeed, the Defendant highlights that the notion of "minimum rates of pay" was potentially so wide that the Community legislature expressly excluded "supplementary occupation retirement pension schemes". Furthermore, the Defendant notes that the second subparagraph of Article 3(1) refers to the "concept" of minimum rates of pay defined according to national law and practice. This implies, according to the Defendant, that as a "concept" "rates of pay" is necessarily a notion which is not clearly delimited, and thus for each host State to define.

49. The Defendant highlights that while the ECJ has emphasised that Directive 96/71 does not harmonise the material content of the matters referred to in Article 3(1)(a) to (g), the minimum wage is the only matter which the Community legislature explicitly stated shall be defined in accordance with the host Member States' law and/or practice. The Defendant contends that as the material content of Article 3(1)(a) to (g) "may accordingly be freely defined by the [host] Member States ...", this applies *a fortiori* to the concept of "minimum rates of pay".[14]

50. The Defendant refers to the case-law which preceded the Directive under which host Member States are entitled to guarantee posted workers the minimum remuneration laid down by the national rules of that State[15] and which established that, as a

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[14] Reference is made to *Laval*, cited above, paragraph 60.

[15] Reference is made to Joined Cases 62/81 and 63/81 *Seco, Desquenne & Giral* v *Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; *Arblade and Others*, cited above, paragraph 33; Case C-165/98 *Mazzoleni, Inter Surveillance Assistance SARL and Others* [2001] ECR I-2189, paragraphs 28 to 29; Case C-164/99 *Portugaia Construções Ld[a]* [2002] ECR I-787, paragraph 21; and Case C-60/03 *Wolff & Müller GmbH & Co. KG* v *Pereira Félix* [2004] ECR I-9553, paragraphs 36 and 41 to 42.

consequence, it is for each host Member State to determine the minimum level of protection necessary in the public interest.[16] In the Defendant's view, that prerogative has been codified in point (c) of the first subparagraph of Article 3(1) of the Directive.[17]

51. It follows, the Defendant contends, that there are two conditions that the Member States must respect 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. As *Laval*[18] and *Rüffert*[19] illustrate, these conditions will in practice often overlap.

52. Having regard to the fact that average pay for work requiring overnight stays away from home is higher, in the Defendant's view, it is clear that the rates established in the Tariff Board Regulation constitute "minimum rates". The question which must be resolved is whether the supplements constitute "pay" within the meaning of point (c) of the first subparagraph of Article 3(1) of the Directive. In this regard, the Defendant notes that the ECJ has consistently held that Community law does not preclude a Member State from requiring a posting undertaking to pay its workers the minimum "remuneration" laid down in its national rules[20] and that that case-law, and the corresponding prerogative, is enshrined in Article 3(1)(c) of the Directive.[21] In the Defendant's view, the material scope of Article 3(1)(c) rests on the notions of "remuneration" and "pay" and, in that regard, the second subparagraph of Article 3(1) implies that these notions must be construed in a broad manner. Although the ECJ has not yet provided guidance on these concepts in the context of the posting of workers,[22] these two concepts have been defined elsewhere by the ECJ and the Community legislature.

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16 Reference is made *mutatis mutandi* to Joined Cases C-49/98, C-50/98, C-52/98, C-52/98 to C-54/98 and C-68/98 to C-72/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 58.

17 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 25, and Case C-244/04 *Commission* v *Germany*, cited above, paragraph 61.

18 Reference is made to *Laval*, cited above, paragraphs 24 to 26, 30 and 70 to71.

19 Reference is made to *Rüffert*, cited above, paragraphs 5 to 7 and 23 to 30.

20 Reference is made to *Seco*, cited above, paragraph 14; *Guiot*, cited above, paragraph 12; *Arblade and Others*, cited above, paragraph 33; *Mazzoleni*, cited above, paragraphs 28 and 29; *Portugaia Construções*, cited above, paragraph 21; and *Wolff & Müller*, cited above, paragraphs 36 and 41 to 42.

21 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 25, and Case C-244/04 *Commission* v *Germany*, cited above, paragraph 61.

22 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 39.

53. The Defendant refers to the ECJ case-law on "remuneration" for the purposes of Article 57 TFEU (ex Article 50 EC) which corresponds to Article 37 EEA.[23] The Defendant notes the ECJ's definition of "remuneration" in *Jundt*[24] closely resembles the definition of "pay" in Article 157(2) TFEU (ex Article 141(2) EC) and Article 69(2) EEA, concerning equal pay for male and female workers. The Defendant observes that, according to the ECJ's definition, the notions of "remuneration" and "pay" include any pecuniary consideration which a worker receives from his employer in return for the service provided, including reimbursement of expenses incurred on account of the service provided.[25] Furthermore, elements which fall outside the scope of these notions are essentially payments fulfilling a social function, typically concerning contributions to or benefits from social funds, and thus do not represent consideration for services provided.[26]

54. The Defendant contends that the wording and structure of point (c) of the first subparagraph of Article 3(1) of the Directive and the second subparagraph of that provision are consonant with those definitions. First, the Defendant submits that point (c) of the first subparagraph of Article 3(1) concerns "pay" and only makes a reservation with respect to "supplementary retirement pension schemes". It stresses by reference to the twelfth recital in the preamble to the Directive that, in fact, the Community legislature only intended to exclude social security schemes from the concept of "pay". Moreover, according to the travaux préparatoires, the concept of "minimum rates of pay" was meant to include "allowances" in general, save for social security benefits.[27] Further, the Defendant notes that the Council and Commission even stated that points (b) and (c) of the first subparagraph of Article 3(1) "covered contributions to national social fund benefit schemes governed by collective agreements or legislative provisions, and benefits covered by these schemes, provided that they did not come within the sphere of social security".[28]

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[23] Reference is made to Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 29, with further references.

[24] Reference is made to *Jundt*, cited above, paragraph 34, read in conjunction with paragraphs 2 and 11 of the judgment.

[25] Reference is made to Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 29.

[26] Reference is made to Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 18 and 19, and to the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-157/99 *Geraets-Smits and Peerbooms* v *Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, points 30 to 31.

[27] Reference is made to COM(1993) 225 final.

[28] Reference is made to Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SEC(2006) 439, pp. 16-17.

55. The Defendant contends that Member States may, therefore, 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. The Defendant asserts that this considerable discretion has been acknowledged by the European Commission.[29] Consequently, according to the Defendant, it is clear that "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 Member State's law and practice.

56. The Defendant considers, therefore, 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 such provisions may be declared universally applicable in accordance with point (c) of the first subparagraph and the second subparagraph of Article 3(1) of the Directive. In its view, such supplements are similar to "overtime rates" which are explicitly included in point (c) of the first subparagraph of Article 3(1). Furthermore, it notes that such supplements and reimbursement of expenses are regulated by the same paragraph of the collective agreement (§ 7.3) which, in its view, demonstrates the integral character of these supplements.

57. The Defendant asserts that the Appellants have an erroneous understanding of the relationship between Article 3(1) and Article 3(7) of the Directive, and, accordingly, are mistaken as to the legal context of Case C-341/02 *Commission* v *Germany*.[30] Contrary to the view taken by the Defendant, the Appellants appear to contend that whether a supplement "alters the relationship between the service provided by the worker ... and the consideration which he receives in return", or, in contrast, whether the supplement is provided for an "additional service", represents the legal test as to whether the supplement may be deemed a constituent element of the minimum wage within the meaning of point (c) of the first subparagraph of Article 3(1). On that basis, the Appellants argue that supplementary rates of pay for work requiring overnight stays away from home fall outside the concept of "minimum rates of pay" for the purposes of point (c) of the first subparagraph of Article 3(1) or, in the alternative, that, having regard to

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[29] Ibid, pp. 16-17 : "*This definition may vary from one Member State to another: e.g. minimum wage rates relating to a particular period of time — monthly - or hourly - or to productivity, a single agreement-based rate for all employees in a given industry or different minimum wage rates applicable to occupation skills and jobs as laid down in collective agreements. Member States may also determine the various allowances and bonuses which are included in the minimum wage applicable within limits such as those set out in the Court's jurisprudence.*"

[30] Reference is made to Case C-341/02 *Commission* v *Germany*, cited above.

Article 3(7), reimbursement of expenses falls in any event outside of the notion of "pay" within the meaning of point (c) of the first subparagraph of Article 3(1).

58. The Defendant notes that, on its reading of the Directive, Article 3(1) not only entitles the Member States to extend their minimum wage to posted workers, but also imposes a duty upon them to ensure that posted workers actually obtain this minimum wage. The second subparagraph of Article 3(7) clarifies, to that end, that when assessing the wages of posted workers account must be taken not only of their basic pay, but also allowances specific to the posting. In the Defendant's view, it is that latter point which was considered in *Commission* v *Germany*.[31]

59. According to the Defendant, *Commission* v *Germany* essentially clarifies that Article 3(7) of the Directive requires the host Member State to take into account allowances and supplements that the posted workers receive even if they are not defined as constituent elements of the host Member State's minimum wage. However, this must be done only in so far as such allowances and supplements represent remuneration for work carried out under the same conditions to which the host Member State's minimum wage legislation applies. Conversely, if the allowances and supplements that a posted worker receives are defined as constituent elements of the host Member State's law and/or practice, the question of whether the allowances and supplements "alter the balance ..." does not arise and the host Member State must recognise these benefits for the purposes of the comparison to be made under Article 3(7) without further ado.

60. As to the Appellants' alternative argument, the Defendant contends that Article 3(7) of the Directive does not preclude a host Member 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). In its view, 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. Such a 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.

61. The Defendant proposes that the first question be answered as follows:

> *Article 3(1), first subparagraph, (a) and (c), of Directive 96/71 does not preclude a Member State from extending to workers posted to its territory terms and*

[31] Ibid, paragraphs 7 to 12, 20 to 23, 28, 30, 39 and 40.

conditions of employment, which in the Member State where the work is carried out are laid down in a collective agreement which have been declared universally applicable within the meaning of paragraph 8, covering the following matters:

a) the definition of overtime work and maximum ordinary working hours
b) minimum rates of pay for, including compensation for expenses incurred on account of, work requiring overnight stays away from home.

The proportion of employees covered by the relevant collective agreement, before it was declared universally applicable within the meaning of Article 3(8), first subparagraph, of Directive 96/71, does not have any bearing on the answers to question 1 above.

The Belgian Government

Maximum working hours

62. The Belgian Government submits that it can be deduced from the wording of the Tariff Board Regulation that 37.5 hours per week on average constitutes the limit on weekly work from which derogation is prohibited in the sector concerned. Accordingly, this average of 37.5 hours per week corresponds in effect to the concept of "maximum work periods" within the meaning of Article 3(1)(a) of the Directive. As a consequence, the Belgian Government submits that clause 2.1.2. of the VO is compatible with Article 3(1)(a) and, therefore, applies to employees posted to Norway from another EEA Member State.

Additional remuneration for work assignments requiring overnight stays

63. On whether additional remuneration and compensation can be considered as elements of the minimum wage pursuant to Article 3(1)(c) of the Directive, the Belgian Government submits that, according to the second subparagraph of Article 3(1), deference is given to the definition of the minimum wage adopted by national law and/or practice of the Member State to whose territory the worker is posted. It argues that the deference by the Directive to national law and practice is related to the principle of fair competition and the requirement for measures guaranteeing respect for the rights of workers on which the Directive is based, mentioned in recital 5 in the preamble thereto and acknowledged in *Laval*.[32] Consequently, according to the Belgian Government, the second subparagraph of Article 3(1) of the Directive permits the concept of the minimum wage to vary among the Member States.

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[32] Reference is made to *Laval*, paragraph 60, and the case-law cited therein.

64. As regards the additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, the Belgian Government contends that this does indeed correspond to the concept of the minimum wage within the meaning of point (c) of the first subparagraph of Article 3(1) of the Directive.

Compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home

65. According to the Belgian Government, compensation for travel, board and lodging expenses in the cases of work assignments requiring overnight stay away from home corresponds to the allowances excluded from the concept of the minimum wage pursuant to the second subparagraph of Article 3(7) of the Directive, as it is paid in reimbursement of expenditure actually incurred on account of the posting. In this regard, the national provision cannot be regarded as implementing a mandatory rule for minimum protection within the meaning of point (c) of the first subparagraph of Article 3(1) of the Directive.

66. The Belgian Government proposes that the first question be answered as follows:

> *Article 3(1) first subparagraph (a) of Directive 96/71/EC authorises a Member State of the EEA to apply the maximum weekly working hours established by nationwide collective agreements declared universally applicable pursuant to Article 3(8) of the Directive in the country where the work is carried out, to workers posted to its territory from another Member State.*
> *Article 3(1) first subparagraph (c) and second subparagraph of Directive 96/71/EC authorises a Member State of the EEA to apply additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, established by nationwide collective agreements declared universally applicable pursuant to Article 3(8) of the Directive in the country where the work is carried out, to workers posted to its territory from another Member State, since this additional remuneration corresponds to the minimum wage within the meaning of the above Article 3(1) first subparagraph (c).*
> *Article 3(1) first subparagraph (c) and second subparagraph of Directive 96/71/EC does not authorise a Member State of the EEA to apply the rule of compensation for travel, board and lodging expenses for work assignments requiring overnight stays away from home, established by nationwide collective agreements declared universally applicable pursuant to Article 3(8) of the Directive in the country where the work is carried out, to workers posted to its territory from another Member State, given the fact that, pursuant to Article 3(7) subparagraph 2 of Directive 96/71/EC, such compensation corresponds, in the case of posting of employees, to allowances excluded from the concept of the minimum wage stipulated in the above Article 3(1) first subparagraph (c), since it*

is paid in reimbursement of expenditure actually incurred on account of the posting.

The proportion of employees covered by the relevant collective agreement before it was declared universally applicable, has no bearing on the answers to the above questions.

The Polish Government

Maximum working hours

67. The Polish Government points out that, according to the case-file, collective agreements stipulate maximum normal working hours (37.5 hours per week) and shorter working hours for particularly strenuous working arrangements. It notes that the VO contains a provision specifying maximum working hours which was given universal application by the Tariff Board Regulation.[33]

68. According to the Polish Government, it follows from those provisions that, as a general rule, working time in the maritime construction industry cannot exceed 37.5 hours per week both for national and posted workers. Even if a shorter maximum weekly working time is envisaged for some workers because of strenuous working conditions, in the Government's view, point (a) of the first subparagraph of Article 3(1) of the Directive does not preclude the possibility of applying more than one maximum working period to different groups of workers depending on the working conditions. There is no obligation to set one maximum working time applicable to all workers.

69. Moreover, the Polish Government argues further that Article 6 of Directive 2003/88 expressly obliges the Member States to take account of the need to protect the safety and health of workers when they adopt measures (including collective agreements) specifying maximum weekly working time.

70. According to the Polish Government, the fact that the Working Environment Act sets normal working hours at 40 hours per week does not influence the above considerations. In the absence of a universally applicable collective agreement, the provisions of the Working Environment Act would apply to posted workers. However, according to Article 3(8) of Directive 96/71, the host Member State may apply to posted workers terms and conditions of employment laid down by law, regulation or

[33] Reference is made to Clause 2.1.2 of the VO.

administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable.

71. As regards the argument concerning the influence of maximum working time on the definition of overtime, according to the Polish Government, this is always the case. By specifying working hours, an EEA State automatically defines overtime, even if not expressly so. This interdependence is reflected in point (c) of the first subparagraph of Article 3(1) of Directive 96/71 according to which EEA States should apply to posted workers national minimum rates of pay and overtime rates.

Additional remuneration for work assignments requiring overnight stays

72. The Polish Government contends that both the additional remuneration and the compensation referred to in Questions 1(b) and 1(c) should be analysed in the light of point (c) of the first subparagraph of Article 3(1) of the Directive. In its view, these elements of the collective agreement may be applied to posted workers in accordance with the Directive only if it is concluded that they are covered by the concept of minimum rates of pay as provided for in point (c) of the first subparagraph of Article 3(1).

73. In the view of the Polish Government, it is obvious that no other condition or term of employment mentioned in Article 3(1) of the Directive can be invoked in relation to these elements of the Tariff Board Regulation. It draws attention to the interpretation of the ECJ in which it reasoned that the Community legislature intended, by means of point (c) of the first subparagraph of Article 3(1) of the Directive, to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay.[34]

74. The Polish Government notes that, according to point (c) of the first subparagraph of Article 3(1) of the Directive, minimum rates of pay include overtime rates but not supplementary occupational retirement pension schemes. The second subparagraph of Article 3(1) states that the concept of minimum rates of pay is to be defined by the national law and/or practice of the Member State to whose territory the worker is posted. However, neither the Directive nor the case-law of the ECJ provides criteria determining the scope of discretion of Member States in relation to the concept of minimum rates of pay. According to the Government, case-law only refers to the elements of the minimum wage paid to a posted worker that should be taken into account when making a

[34] Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 47.

comparison with the minimum rate of pay in the host Member State, in accordance with Article 3(7) of the Directive.[35]

75. Further, the Polish Government notes that it appears to be the practice in Norway that the concept of the minimum rate of pay is determined through decisions of the Tariff Board that grant universal application to collective agreements. As a result, the minimum rates of pay differ depending on the sector, profession and type of work carried out. According to the case-file, moreover, the minimum rate of pay as determined by the Tariff Board Regulation includes minimum hourly pay, minimum supplements for work requiring overnight stays away from home, overtime pay, travel, board and lodging expenses.[36] Of these four elements, the minimum rate established for hourly pay and overtime pay did not give rise to any doubts before the Court of Appeal concerning their compatibility with EEA law.

76. The Polish Government notes that the additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home (the supplement) takes the form of a supplement to the minimum hourly pay in the amount of NOK 25.32 in the case of skilled workers and NOK 24.18 in the case of unskilled workers.

77. As a result, in the view of the Polish Government, the supplement forms a part of basic hourly wage paid to all workers employed in maritime construction sector under specific conditions, namely when the assignment requires an overnight stay. The Government observes that a similar bonus granted to workers in the construction industry in Germany, which together with the hourly pay made up the total hourly pay under the relevant collective agreement declared universally applicable, was accepted indirectly by the ECJ to constitute part of the minimum rate of pay for the purposes of Article 3(1) of the Directive. [37]

Compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home

78. The Polish Government notes that the Tariff Board Regulation does not specify the amount of compensation but simply obliges the employer (subject to further agreement) to pay it and to make the necessary arrangements before posting. In its view, the amount of compensation differs in each individual case depending, for example, on the place of

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[35] Reference is made by way of example to Case C-341/02 *Commission* v *Germany*.

[36] Reference is made to Sections 3, 6 and 7 of the Tariff Board Regulation.

[37] Reference is made to Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095.

posting and the duration of the work. Accordingly, this provision of the Regulation does not concern an element of the minimum rate of pay but identifies simply the party responsible for coverage of expenses and specifies what must be regarded as expenses (i.e. what the employer has to pay for when posting employees away from home).

79. Moreover, according to the Polish Government, as the provision envisages only the compensation of expenses, there is no gain to the worker and it cannot be assumed that the money paid constitutes remuneration for work rendered. It may even be the case that the employer covers at least some of these expenses (i.e. lodging and travel) directly and, as a result, the employee will not even temporarily be in possession of the compensation. Consequently, in the view of the Polish Government, the 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, is not covered by the concept of the minimum rates of pay within the meaning of Article 3(1)(c) of Directive 96/71.

80. The Polish Government observes that, according to Article 3(7) of the Directive, the provisions of paragraphs 1 to 6 of the same article may not prevent the application of terms and conditions of employment which are more favourable to workers. However, in its view, Article 3(7) cannot be interpreted as allowing the host EEA State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection referred to in Article 3(1). Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other EEA States who are posted to the territory of the host EEA State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.[38]

81. In the view of the Polish Government, it follows that EEA States may not rely on Article 3(7) of Directive 96/71 in order to impose additional requirements as regards the terms and conditions of work which go beyond Article 3(1).

82. The Polish Government proposes that the first question be answered as follows:

> *Article 3(1) first subparagraph (a) and (c) of Directive 96/71/EC permits an EEA State to secure workers posted to its territory from another EEA State maximum normal working hours and additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home,*

[38] Reference is made to *Laval*, cited above, paragraphs 79 to 81, and *Rüffert*, cited above, paragraphs 32 to 33.

with an exception for employees who are hired at the work site, which, in the EEA State where the work is performed, have been established through nationwide collective agreements that have been declared universally applicable in accordance with Article 3(8) of the Directive.

Article 3(1) first subparagraph (c) of Directive 96/71/EC does not permit an EEA State to secure workers posted to its territory from another EEA State, the 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, which, in the EEA State where the work is performed, have been established through nationwide collective agreements that have been declared universally applicable in accordance with Article 3(8) of the Directive.

The proportion of employees covered by the relevant collective agreement, before it was declared universally applicable, has no bearing on the answers to the above questions.

The Swedish Government

Maximum working hours

83. The Swedish Government submits that, according to the wording of Article 3(1)(c) of the Directive, the minimum rates of pay should include overtime rates. In order to assess when a worker is entitled to overtime rates of pay, it is necessary to know what his or her normal working hours are. In regulating the terms and conditions on maximum normal working hours, the worker is protected from being deprived of the overtime rates of pay he or she would otherwise be entitled to. Such terms may therefore be necessary to ensure that the minimum level of protection of the host State is upheld and included within the nucleus of mandatory rules for minimum protection provided for in Article 3(1) of the Directive. Moreover, the definition of what constitutes the maximum normal working hours may be a necessary prerequisite for deciding both the maximum work periods and minimum rest periods mentioned in Article 3(1)(a), thereby forming an integral part of either concept or of both. In the view of the Swedish Government, a different interpretation would deprive the Directive of its effectiveness in relation to fair competition and minimum protection.

Additional remuneration for work assignments requiring overnight stays

84. The Swedish Government considers that additional remunerations to the basic hourly wage for work assignments requiring overnight stays away from home also may be included in the concept of the minimum wage for the purposes of point (c) of the first

subparagraph of Article 3(1) of the Directive, as they appear to be included in the minimum wage as defined by the Member State to whose territory the worker is posted. It observes that, in accordance with the second subparagraph of Article 3(1), it is for the host Member State to define the concept of the minimum wage. In its view, therefore, the definition of the minimum wage may vary from one Member State to another and the Member States can determine the various allowances and bonuses which are included in the minimum wage applicable as long as it is in compliance with Union law.

85. The Swedish Government also notes that the second subparagraph of Article 3(7) of the Directive states that allowances specific to the posting must 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. Hence, in its view, with regard to Question 1(b), the Directive does not preclude a Member State from including in the minimum wage the specific allowances at issue in this case. In other words, if the allowance is paid in order to compensate for the inconvenience associated with the assignment in question and not in order to cover actual costs incurred by the posting, it is apt to be included within the nucleus of mandatory rules for minimum protection provided for in Article 3(1).

Compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home

86. The Swedish Government argues that, in accordance with the second subparagraph of Article 3(7) of the Directive, Member States do not appear to be permitted to include allowances compensating for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home in their concept of the minimum wage. In order to ensure the protection of posted workers, it is important to prevent such compensation provided by an employer from being calculated as part of the minimum wage with the effect that the actual amount of minimum wage at the disposal of a posted worker is below the minimum wage he or she is guaranteed under Directive 96/71.

87. However, in the view of the Swedish Government, Article 3(1) and (7) of the Directive must not be interpreted in such a way that precludes the posted worker’s right to compensation for costs, such as travel, board and lodging. If posted workers have to pay such costs that normally are an employer’s responsibility, their minimum wage would *de facto* be affected and, thus, the rules of the Directive would be circumvented.

88. In the light of those considerations, the Swedish Government respectfully submits that the questions referred by the Borgarting lagmannsrett should be answered as follows:

Question 1 a) and b)

Article 3(1) first subparagraph a) and c) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services do not prevent an EEA State to secure workers posted to its territory from another EEA State maximum normal working hours and 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 trough nationwide collective agreements that have been declared universally applicable in accordance with Article 3(8) of the Directive.

Question 1 c)

For the protection of posted workers, reimbursement of expenditure on travel, board and lodging should not be included when calculating the minimum wage, with the effect that the actual amount of minimum wage at disposal for a posted worker will be below the minimum wage he or she is guaranteed through Directive 96/71/EC. However, Articles 3(1) and 3(7) of the Directive must not be interpreted in a way that precludes the posted worker's right to compensation for costs, such as travel, board and lodging.

The proportion of employees covered by the relevant collective agreement before it was declared universally applicable has no bearing on the answers to the questions above.

The EFTA Surveillance Authority

Maximum working hours

89. ESA submits that there is naturally a connection between "maximum normal working hours" and "maximum work periods". It argues that normal working hours (in this case, set at 37.5 hours per week) cannot be defined in a collective agreement in ignorance of the legally permissible maximum work periods.

90. On the question of maximum work periods legally permissible, ESA refers to the Working Time Directive. ESA points out that the Working Time Directive lays down provisions for a maximum 48-hour working week (including overtime), rest periods and breaks and a minimum of four weeks paid leave per year, to protect workers from adverse health and safety risks. These provisions constitute minimum requirements that must be met.[39] Thus, in its view, any definition of "maximum normal working hours" has to take account of the limits on maximum work periods established in the Working Time Directive.

[39] Reference is made to Article 23 of the Working Time Directive.

91. ESA notes that the Working Time Directive has a clear purpose. It sets down minimum requirements in the field of working time to protect the health and safety of workers. Directive 96/71 pursues this overarching objective by applying it to the specific case of posted workers. In ESA's view, Article 3(1) of Directive 96/71 aims to protect the health and safety of posted workers by preventing them from being required to work hours that exceed the maximum working hours provided for by the host State legislation. In the absence of harmonisation, Member States are free to define - either by way of legislative provisions or collective agreements - what constitutes maximum work periods and minimum rest periods for the purposes of Directive 96/71.

92. ESA submits that considerations pertaining to maximum normal working hours are, naturally, relevant in this respect. In addition, in ESA's view, the fact that, as a consequence of this interpretation, overtime is defined does not appear incompatible with the Directive.

Additional remuneration for work assignments requiring overnight stays

93. ESA assumes Article 3(1)(c) of the Directive ("minimum rates of pay, including overtime rates") to be at issue in this sub-question. ESA notes that Section 3 of the Tariff Board Regulation makes generally binding the minimum hourly rates of pay and provisions on supplementary pay when work requires an overnight stay away from the home of the worker. Furthermore, Section 6 lays down provisions concerning overtime pay.

94. In this regard, ESA observes that, under Article 3(1)(c) of the Directive, EEA States are entitled to require that, whatever the law applicable to the employment relationship, the undertakings covered by that Directive guarantee to workers posted to their territory the terms and conditions of employment covering, *inter alia*, minimum rates of pay, which are laid down by the rules of the host EEA State. According to the second subparagraph of Article 3(1), the concept of "minimum rates of pay" referred to in Article 3(1)(c) is defined by the national law and/or practice of the EEA State to whose territory the worker is posted. Therefore, according to ESA, the definition of the concept of minimum rates of pay is, in principle, for the EEA States to determine and may vary from one EEA State to another.

95. ESA argues, moreover, that the second subparagraph of Article 3(7) of the Directive is also of relevance to this sub-question. In ESA's view, this provision is only indirectly pertinent to the questions raised by the referring court, as it addresses the separate question of what component elements of the minimum wage should be taken into

account when comparing the pay conditions of a posted worker with those enjoyed by the workers of the host State. Nevertheless, it considers it noteworthy that this provision states that allowances specific to the posting are to be considered to be part of the minimum wage (unless paid by way of reimbursement of expenditure actually incurred, which does not appear to be the case here).

96. ESA observes that the ECJ provided further guidance in this regard in Case C-341/02 *Commission* v *Germany* in which it held that allowances and supplements which (i) are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted and (ii) alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.[40]

97. Turning to current Norwegian practice, ESA notes that, according to the case-file, the Tariff Board, in all its decisions, has made the rate of pay for overtime work generally binding, and in four out of five cases made generally binding the provisions on shift-work premiums. However, provisions on an overnight allowance for work assignments requiring a stay away from home have reflected the provisions of the relevant collective agreement and appear to have been included in only some of the Tariff Board decisions.[41] ESA notes further that it appears that, as far back as October 2004 (the date of the Tariff Board's first decision concerning the universal application of collective agreements to certain onshore petroleum plants), this additional remuneration has generally been considered by the Tariff Board to be an ordinary supplement that is very important in relation to the actual wages of the employees concerned.[42]

98. ESA also notes that the provisions concerning supplementary pay when work requires an overnight stay away from home are an intrinsic part of Section 3 of the Tariff Board Regulation, which deals exclusively with minimum pay. ESA is of the view that this specific type of remuneration is essentially a supplement to compensate workers for the inconvenience of having to stay overnight away from home, in response to the requirements of work. It regards this supplement as directly related to the demands of the work and understands it to be calculated exclusively by reference to the number of hours worked away from home and payable either simply through inclusion in hourly rates or as

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[40] See Case C-341/02 *Commission* v *Germany*, cited above, paragraphs 27 to 29.

[41] Reference is made to the request for an Advisory Opinion, p. 9.

[42] Ibid, pp. 9-10.

a separate allowance in addition to the basic wage (depending on the terms of the relevant collective agreement).[43]

99. Given that background, according to ESA, there appear to be grounds for arguing that there is a practice in Norway of including supplementary remuneration for overnight stays away from home in the definition of minimum rates of pay.

100. ESA is also inclined to the view that, in line with the reasoning of the ECJ in Case C-341/02 *Commission* v *Germany*, it would appear that any supplementary allowance that is considered to be part of the minimum wage in the host State, and which does not alter the relationship between the service provided and the remuneration paid, may be covered by Article 3(1)(c) of the Directive.

Compensation for travel, board and lodging expenses in connection with overnight stays away from home

101. ESA notes that this question arises as a result of Section 7 of the Tariff Board Regulation, which provides that when work requires a stay away from home the employer must cover travel expenses in connection with the beginning and the completion of the assignment and a reasonable number of home visits in between. It provides further that board and lodging arrangements are to be agreed in advance, before the employee is posted. Finally, as a rule, it is for the employer to cover the board and lodging, but it may be agreed to pay the employee a subsistence allowance or reimbursement of his expenses on the submission of receipts.

102. According to ESA, this sub-question again concerns Article 3(1)(c) of the Directive and the definition of the concept of minimum rates of pay. As it observed in connection with supplements for overnight stays, Article 3(1)(c) has to be read in light of the second subparagraph of Article 3(1), which provides that the concept of "minimum rates of pay" referred to in Article 3(1)(c) is defined by the national law and/or practice of the EEA State to whose territory the worker is posted.

103. ESA stresses that, also in relation to compensation for travel, board and lodging expenses, the second subparagraph of Article 3(7) of the Directive on which the Appellants rely is of limited relevance to the question (in that it addresses the different question of what component elements of the minimum wage need to be taken into account in comparing the pay conditions of a posted worker with those enjoyed by the

[43] Ibid, section 2.3.2, final paragraph.

workers of the host State). However, in ESA's view, that provision is instructive in that it expressly states that allowances specific to the posting, such as travel, board and lodging expenses, must be considered part of the minimum wage. On its reading of Case C-341/02 *Commission v Germany*, these must not be reimbursement for expenses actually incurred.

104. On the question of national practice, ESA observes that the Tariff Board appears to have consistently granted universal application to provisions relating to travel, board and lodging in connection with work requiring overnight stays away from home.[44] Therefore, in light of Article 3(7) of the Directive and Case C-341/02 *Commission* v *Germany*, ESA suggests that the compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home could fall within the definition of "minimum rates of pay", on the condition that this is not paid by way of reimbursement (which is provided for in Section 7 of the Tariff Board Regulation).

105. ESA submits that the answer to the first question referred should be as follows:

1. *Directive 96/71/EC permits an EEA State to secure workers posted to its territory from another EEA State provisions relating to maximum normal working hours contained in a universally applicable nationwide collective agreement.*
2. *Whether Directive 96/71/EC permits an EEA State to secure workers posted to its territory from another EEA State provisions relating to additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home (except for employees who are hired at the work site) is to be determined in light of national law and/or practice, insofar as such additional remuneration is considered to be part of the minimum wage in the host state, and does not alter the relationship between the service provided and the remuneration paid. This is for the referring court to determine.*
3. *Whether Directive 96/71/EC permits an EEA State to secure workers posted to its territory from another EEA State provisions relating to compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home (except for employees who are hired at the work site) is to be determined in light of national law and/or practice, on the condition that such expenses are not reimbursement for expenses actually incurred. This is for the referring court to determine.*

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[44] Ibid, p. 10, second paragraph.

The European Commission

Maximum working hours

106. In line with the arguments put forward by the Norwegian Government, the Commission considers that it is generally compatible with Directive 96/71 to declare provisions of a collective agreement establishing maximum working hours to be universally applicable. Moreover, Directive 2003/88 on working time does not preclude determination of the maximum working time by way of a universally applicable collective agreement. Directive 2003/88 establishes a minimum standard but leaves a wide margin for further national legislation.

107. In addition, the Commission makes reference to its earlier report,[45] according to which the term "rest period" refers to any period which is not working time. According to that report, the term "maximum working time" is not limited to a definition of a certain work time at a stretch but can also include a weekly time limit.

108. The Commission submits that it is compatible with the Directive to define (maximum) normal working time by a collective agreement which is declared universally applicable and, consequently, to define in that manner the periods which qualify as overtime. In particular, the Commission argues that this contradicts neither Article 3(1)(c) of the Directive, which refers to "minimum rates of pay, including overtime rates", nor Article 3(1)(a) of the Directive concerning maximum work periods.

Additional remuneration for work assignments requiring overnight stays

109. The Commission notes that, according to the second subparagraph of Article 3(1) of Directive 96/71, for the purposes of the Directive, the concept of minimum rates of pay is defined by the national law and/or practice of the EEA State to whose territory the worker is posted.

110. The Commission submits that additional remuneration for certain type or times of work may be treated as an element of the minimum wage. However, on the Commission's analysis, according to case-law,[46] allowances and supplements cannot be treated as constituent elements of the minimum wage, when comparing the minimum rate

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[45] SEC(2006) 439, cited above, section 4.5.

[46] Case C-341/02 *Commission* v *Germany*, cited above, paragraphs 38 to 39.

of pay due under the provisions of the host State and the remuneration actually paid by employers established in another Member State, as this would alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives, on the other. Furthermore, if an employer requires a worker to carry out additional work or to work under particular conditions, the worker must be compensated for that additional service without its being taken into account for the purpose of calculating the minimum wage.[47]

111. In the view of the Commission, the link between this additional remuneration and the minimum rate of pay is not clear. On its view, if such remuneration is regarded as an allowance specific to the posting for the purposes of Article 3(7) of the Directive, it should normally be paid in the context of a posting from EEA State A to the relevant work site in EEA State B. However, the wording of Section 3 of the disputed regulation appears to indicate that the allowance is paid for working away from home once in the country of posting. If a worker is posted directly to the work site, which would appear to be the normal way to proceed in the case of a maritime construction site, on the Commission's interpretation of Section 3, that worker would not benefit from this additional allowance.

112. As by the nature of their activity posted workers are away from home 24 hours a day, according to the Commission, they would always be eligible for the maximum supplement if the calculation of the supplement is based exclusively on the number of hours worked away from home. In addition, such a worker would appear to qualify also for overtime payments provided for in Section 6 of the disputed regulation.

113. The Commission notes that, according to the Norwegian Government, the purpose of the supplement is to compensate for the additional inconvenience associated with the work. In this respect, the supplement appears to be comparable to bonuses for dirty, heavy or dangerous work and supplements or overtime pay for variations or changes in shift work. The Commission notes, however, that these two types of supplements have not been declared universally applicable.[48]

114. Having regard to the above considerations and pending further clarification of how the supplement in question could qualify as an element of the minimum rate of pay, the

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[47] Ibid, paragraph 40.

[48] Reference is made to the penultimate paragraph of point 2.3.3 of the request for an Advisory Opinion.

Commission concludes, at this stage, that the supplement does not appear to be covered by Article 3(1)(c) of Directive 96/71.

Compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home

115. The Commission observes that, according to Article 3(7) of Directive 96/71, allowances specific to the posting must 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. In its view, this wording does not appear to permit the reimbursement of expenditure actually incurred on account of the posting as part of the minimum wage. It contends, however, that allowances could be included for the purposes of Article 3(1)(c) if they are paid in the form of a flat rate, without any direct link to the specific expenditure incurred. It observes further that Article 3(7) also deals with the method to be applied for the purposes of comparing the minimum rate of pay due under the provisions of the host State and the remuneration actually paid by employers established in another Member State. At the same time, the provision relates to the definition of minimum wages as far as a definition is needed to compare the wages paid by the employer and the minimum wage.

116. Unlike the supplement for work assignments requiring overnight stays, in the Commission's view, the compensation for travel, board and lodging expenses covers the situation of a posting from State A to State B with respect to the posting situation itself. It argues, therefore, that the same reasoning should be applied to the "posting" situations within the Member State to which the worker has been posted in the same way as it would apply to national workers.

117. In the Commission's view, requiring such a clause to be respected ensures that, in practice, the wages actually paid do not fall short of the minimum wages of the host country. Otherwise, the expenditure on travel, board and lodging would reduce the compensation the worker receives for the time worked. Consequently, according to the Commission, such a clause ensures equal pay in practice.

118. Having regard to these factors, the Commission submits that declaring a provision in a collective agreement establishing compensation for travel, board and lodging expenses to be universally applicable may be considered to be compatible with Directive 96/71, provided such compensation is paid in the form of a flat-rate allowance.

119. The Commission proposes that the first question is answered as follows:

1. *Article 3(1)(a) and (c) of 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 is to be interpreted as permitting an EEA State to secure for workers posted to its territory from another EEA State the following terms and conditions which, in the EEA State where the work is being performed, have been established through nationwide collective agreements declared universally applicable in accordance with Article 3(8) of the Directive:*

   - maximum normal working hours;

   - compensation for travel, board and lodging expenses in the form of flat-rate allowances for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site.

2. *Article 3(1)(c) of Directive 96/71 is to be interpreted as not permitting an EEA State to secure for workers posted to its territory from another EEA State the following terms and conditions which in the EEA State where the work is being performed, have been established through nationwide collective agreements declared universally applicable in accordance with Article 3(8) of the Directive:*

   - additional remuneration to basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site.

VII The second question

120. By its second question, the national court asks, in essence, if the terms and conditions of employment provided for in the nationwide collective agreement satisfy the requirements of Article 3(1) of Directive 96/71, is it required to carry out a separate evaluation whether those terms and conditions of employment also satisfy the requirements of Article 36 EEA, including whether they can be justified by overriding requirements in the general interest.

The Appellants

121. The Appellants contend that national provisions concerning matters governed by Article 3(1) of the Directive cannot be immune to primary law and that host State regulation on maximum working periods, if overtly discriminatory on grounds of

nationality, is contrary to Article 36 EEA.[49] In that regard, the Appellants emphasise that the Directive seeks to coordinate rather than harmonise the relevant laws of the EEA States. Moreover, they assert that the host State measures must be "in compliance with the Treaty and the general principles of Community law".[50]

122. The Appellants contend that, if the Defendant is correct that national measures taken pursuant to Article 3(1) of the Directive must be considered exclusively on the basis of the Directive, the measures concerned would be left without scrutiny at the EEA level. On their analysis, although Article 3(1) lists the matters to which the State may give priority to its own laws,[51] the Directive does not provide for a review of the *content* of the national law at the EEA level. Therefore, according to the Appellants, review of the content of the measures taken by the host State under Article 3(1) of the Directive has to be made under primary EEA law and, consequently, the answer to the second question referred must be in the affirmative. They propose the following wording:

> *Article 3(1) of Directive 96/71/EC does not harmonise the material content of national rules on the matters listed in the provision. The content may be freely defined by the EEA States, in accordance with the EEA Agreement and the general principles of EEA law, included by Article 36 of the EEA Agreement. Under Article 36 of the EEA Agreement it is for the EEA State to prove that its rules pursue a legitimate objective and are suitable, necessary and proportionate to that end, and the fact that the rules concern matters under Article 3(1) of Directive 96/71/EC does not alter the burden of proof.*

The Defendant

123. The Defendant asserts that it follows from settled case-law that, where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not of the relevant Treaty articles.[52] The same applies *mutatis mutandis* to the EEA

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[49] Reference is made to Case C-490/04 *Commission* v *Germany*, paragraphs 17 to 19, and *Laval*, cited above, paragraph 60.

[50] Reference is made to *Laval*, cited above, paragraphs 60 and 80.

[51] Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 26.

[52] Reference is made to Case C-37/92 *Vanacker, Lesage and SA Baudoux combustibles* [1993] ECR I-4947, paragraph 9; Case C-324/99 *DaimlerChrysler AG* [2001] ECR I-9897, paragraph 32; Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 18; Case C-210/03 *Swedish Match* v *Secretary of State for Health* [2004] ECR I-11893, paragraphs 82 to 83; and Case C-132/08 *Lidl Magyarország Kereskedelmi bt* v *Nemzeti Hírközlesi Tanácsa*[2009] ECR I-3841, paragraph 42.

Agreement. The Defendant stresses the need to keep in mind that secondary legislation may constitute partial harmonisation.[53]

124. The Defendant acknowledges that the ECJ has held that facts falling within the scope of Directive 96/71/EC must be examined with regard to those provisions, and where appropriate, with regard to Article 49 EC (Article 36 EEA).[54] It observes that the matters governed by Articles 4 and 5 of the Directive are not regulated in a harmonised manner and, consequently, the ECJ has had recourse to the Treaty in cases concerning those provisions.[55] However, in its view, this is not the case with matters falling under Article 3(1)(a) to (g).[56] Article 3(1) and (8) regulates the scope of the nucleus of mandatory rules which the ECJ has interpreted as constituting exhaustive harmonisation. According to the Defendant, case-law has clarified that these provisions exhaustively regulate the procedures under which the Member States may fix the terms and conditions of employment under Article 3(1)(a) to (g). Failure to adhere to these conditions, which implement the principle of equal treatment, renders the national measures incompatible with both the Directive and Article 56 TFEU (ex Article 49 EC).[57]

125. According to the Defendant, although Article 3(7) of the Directive was originally considered to be a "minimum protection" clause, the ECJ found that such an interpretation would deprive the Directive of its effectiveness. Article 3(1)(a) to (g) of the Directive establishes an exhaustive list of the matters in respect of which EEA States may give priority to the host State's rules and accords the EEA States the right and duty to regulate these levels of protection.[58] Accordingly, in the view of the Defendant, the matters mentioned in Article 3(1)(a) to (g) must be considered to have been totally harmonised.[59] Consequently, any national provision must be assessed in the light of

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[53] Reference is made to Dougan, M., "Minimum Harmonisation and the Internal Market", 37 C.M.L.Rev. (2000), p. 853.

[54] Reference is made to *Laval*, cited above, paragraph 61.

[55] Reference is made to *Rüffert*, cited above, paragraphs 28 to 30, Case C-490/04 *Commission* v *Germany*, cited above, paragraphs 67 and 78, and Case C-515/08 *dos Santos Palhota and Others*, judgment of 7 October 2010, not yet reported, paragraph 25.

[56] Reference is made to the Opinion of Advocate General Cruz Villalón in *dos Santos Palhota and Others*, cited above, points 40 to 46; Case C-341/02 *Commission* v *Germany*, cited above, paragraph 25; Case C-244/04 *Commission* v *Germany*, cited above, paragraph 61; and *Laval*, cited above, paragraphs 57 to 58.

[57] Reference is made to *Laval*, cited above, paragraphs 70 to 71 read in conjunction with paragraphs 110 to 111, and *Rüffert*, cited above, paragraph 30 read in conjunction with paragraphs 39 to 40.

[58] Reference is made to *Laval*, cited above, paragraphs 80 to 81 and *Rüffert*, cited above, paragraphs 33 to 34.

[59] Reference is made to analysis of the concepts of minimum and total harmonisation, see, for example, Weatherill, S., "Beyond preemption? Shared competence and constitutional change in the European Community" in O'Keeffe, D., and Twomey, P., (eds) *Legal Issues of the Maastricht Treaty*, Wiley, 1994, and Dougan, M., cited above.

Article 3(1)(a) to (g) of the Directive and not Article 36 EEA.[60] Therefore, any national measure which is found to be incompatible with Article 3(1) and (8) of the Directive necessarily violates Article 36 EEA without the need for a separate evaluation and vice versa.[61]

126. As Article 3(1) and (8) of the Directive entitles the Member States to extend to posted workers their terms and conditions of employment governing matters covered by Article 3(1)(a) to (g) and render their application in such circumstances mandatory, in the Defendant's view, any finding of illegality under the Treaty provisions would have to rest on the basis that Article 3(1) and (8) of the Directive was adopted in violation of the Treaty. Since the Appellants have not raised any objections as to the validity of the Directive, which in any event would fall within the Union Courts' prerogative to review,[62] the Defendant sees no further reason to comment on the issue.

127. In conclusion, the following answer to the second question is proposed:

> *Terms and conditions of employment falling within the scope of the matters in Article 3(1), first subparagraph, (a)-(g), and (8) of Directive 96/71 shall be assessed in the light of those provisions, and not of Article 36 EEA.*

The Belgian Government

128. The Belgian Government notes that Article 36 EEA, which is equivalent to Article 56 TFEU, guarantees the freedom to provide services. It argues that Directive 96/71 contains the nucleus of protective laws that must be observed by service providers and that its restrictions on the freedom to provide services have been assessed by the European legislature as necessary and proportionate. Accordingly, in the view of the Belgian Government, provided that the requirements of the Directive are met, it is unnecessary to perform additional analysis to assess if the conditions of Article 36 EEA or Article 56 TFEU are also met. The Belgian Government hence proposes the following answer to Question 2:

> *If the terms and conditions of employment in the EEA Member State where the work is carried out, which are stipulated in a nationwide collective agreement*

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[60] Reference is made to *Vanacker and Lesage*, cited above, paragraph 9; *DaimlerChrysler*, cited above, paragraph 32; *Linhart and Biffl*, cited above, paragraph 18; *Swedish Match*, cited above, paragraphs 82 to 83; and *Lidl*, cited above, paragraph 42.

[61] The Defendant concedes that there is a caveat to this which results from Article 3(10) of the Directive. It argues, however, that this is of no consequence in the case at hand as the Defendant has not invoked that provision and the referring court has not queried its interpretation.

[62] Reference is made to Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20.

declared universally applicable pursuant to Article 3(8), satisfy the requirements of Article 3(1) of Directive 96/71/EC, the national court must not instigate a separate assessment to determine whether those terms and conditions of employment satisfy the requirements of Article 36 EEA, including whether it could be justified by overriding requirements of the public interest.

The Polish Government

129. As regards the second question, the Polish Government notes that the ECJ has ruled that, where an area has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty.[63] Accordingly, the need to refer to primary law only arises if the harmonisation of a particular area is not exhaustive.

130. The Polish Government takes the view that it follows unambiguously from ECJ case-law that both the list contained in Article 3(1) of Directive 96/71 and the methods of its implementation specified in that provision have exhaustive character. The EEA States may neither apply additional terms and conditions of employment to posted workers not mentioned in Article 3(1) nor use methods of their implementation other than law, regulation or administrative provision, and/or collective agreements or arbitration awards which have been declared universally applicable within the meaning of Article 3(8).[64]

131. Moreover, according to the Polish Government, the EEA States are obliged to ensure that workers posted to their territory are guaranteed the minimum protection. In its view, the only scope of discretion concerns the application of Article 3(8) of Directive 96/71, as EEA States may choose whether or not they wish to declare a specific collective agreement (arbitration award) universally applicable. However, if the decision to declare a collective agreement universally applicable is made, the EEA State must apply to posted workers those provisions which regulate matters listed in Article 3(1)(a) to (g) of Directive 96/71.

132. According to the Polish Government, it follows that Directive 96/71 harmonises in an exhaustive manner matters relating to the application of universally applicable collective agreements to posted workers. Consequently, in its view, if terms and

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[63] Reference is made to Case C-309/02 *Radlberger Getränkegesellschaft mbH & Co. and S. Spritz KG* [2004] ECR I-11763, paragraph 53 and the case-law cited therein.

[64] Reference is made to *Commission* v *Luxembourg*, cited above.

conditions of employment in the EEA State where the work is performed satisfy the requirements of Article 3(1) of Directive 96/71, the national court does not 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**.**

133. The Polish Government proposes the following answer to the second question:

> *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, the national court does not 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.*

The Swedish Government

134. According to the Swedish Government, there is no reason to carry out a separate evaluation under Article 36 EEA. It argues that, as a rule, where there is secondary EU/EEA legislation regulating the situation before the national court and the validity of that legislation has not been put into question, it is sufficient to ascertain that the national rules in question are in conformity with that secondary legislation, as the secondary legislation expresses the closer conditions for applying the primary law on which it is based. In this regard, the Swedish Government notes further that, since the explicit aim of the Directive is to ensure a balance between the freedom to provide cross-border services and the protection of workers, when the agreement at issue satisfies the requirements of Article 3(1) of Directive 96/71, there is no need for the national court to carry out such a separate evaluation.[65]

135. The Swedish Government proposes the following answer to the second question:

> *A national court does not have to carry out a separate evaluation of whether the terms and conditions of employment in the EEA State where the work is performed satisfy the requirements under Article 36 EEA, if these terms and conditions of employment satisfy the requirements under Article 3.1 of Directive 96/71/EC concerning the posting of workers in the framework of the provision of service.*

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[65] Reference is made to *Laval*, cited above, paragraph 80 *e contrario*.

The EFTA Surveillance Authority

136. ESA submits that the second question can be answered by considering the nature of Article 3 of the Directive. It contends that it is well-established in case-law that Article 36 EEA requires the abolition of any restriction on the freedom to provide services, which is liable to prohibit, impede or render less advantageous activities of a service provider established in another Member State, unless it pursues a legitimate objective and is suitable and proportionate.[66]

137. As for Article 3(1)(a) to (g) of Directive 96/71, in the view of ESA, this provision aims to coordinate the laws of the EEA States by establishing a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work there. They constitute a "hard core" of clearly defined protective rules to be observed by the service provider, irrespective of the duration of the worker's posting.[67]

138. ESA contends that this list is exhaustive. As a consequence, Article 3(1)(a) to (g) of the Directive must be interpreted as a list of permissible exceptions to the principle of free movement of services enshrined in Article 36 EEA. If an employment condition falls within the scope of Article 3(1)(a) to (g), in ESA's view, it constitutes a permitted exception and no supplementary examination of its compatibility with Article 36 EEA is necessary. Were such supplementary examination necessary, it would deprive Article 3(1) of the Directive of its very purpose, as the laws of the EEA States regarding the protection of posted workers would no longer be coordinated, but determined on a case-by-case basis, and dependent on the outcome of individual assessments under Article 36 EEA. In ESA's view, this could never have been the intention behind the drafting of Article 3(1) of the Directive.

139. ESA argues that if, on the other hand, a working condition is found to fall outside the scope of Article 3(1)(a) to (g) of the Directive, that will be considered a restriction on the freedom to provide services within the meaning of Article 36 EEA.[68] In such a scenario, the question then to be addressed is whether the restriction can be justified.[69]

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[66] Reference is made to Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Ct. Rep. 145, paragraph 28, and Case C-76/90 *Säger* v *Dennemeyer & Co. Ltd.* [1991] ECR I-4221, paragraph 12.

[67] Recitals 13 and 14 in the preamble to the Directive.

[68] Reference is made to *Laval*, cited above, paragraph 99.

[69] Reference is made on this point to public policy considerations under Article 3(10) of the Directive.

140. In that connection, ESA contends that, given that Directive 96/71 regulates the issue of minimum protection for posted workers in an exhaustive manner, any working conditions falling outside the scope of Article 3(1) of the Directive, and thereby constituting a restriction contrary to Article 36 EEA, cannot be justified on the basis of the protection of workers as an overriding requirement in the general interest. In its view, recourse cannot be made to overriding requirements in the general interest where there is secondary legislation that provides the measures necessary to ensure that interest is protected.[70]

141. In conclusion, ESA submits that Question 2 should be answered as follows:

> *If terms and conditions of employment included in a nationwide collective agreement declared universally applicable are found to satisfy the requirements of Article 3(1) of Directive 96/71/EC, these terms and conditions of employment do not require a separate assessment under Article 36 EEA.*

The European Commission

142. In the view of the European Commission, Article 3(1)(a) to (g) of the Directive lays down exhaustively the terms and conditions that may be imposed on foreign service providers with regard to the posting of workers.[71] Therefore, once it has been established that the national provisions are in conformity with Directive 96/71 there is no room for a separate evaluation of the compatibility of those provisions with Article 36 EEA.

143. The Commission submits that Question 2 should be answered as follows:

> *Since Article 3(1)(a) — (g) of the Directive lays down exhaustively the terms and conditions that may be imposed on foreign service providers with regard to posting of workers, a separate evaluation of the compatibility of those provisions with Article 36 EEA is not necessary.*

VIII The third question

144. The third question is based on the premise that the second question is answered in the affirmative. In that case, the national court asks, in essence, first, whether it is compatible with Article 36 EEA that a decision to declare certain terms and conditions of

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[70] Reference is made to Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 74.

[71] Reference is made to *Laval*, cited above, paragraphs 80 to 81.

employment in a nationwide collective agreement to be universally applicable in the industry concerned has the stated aim of ensuring that foreign workers enjoy equivalent pay and working conditions to Norwegian workers. Second, the national court asks whether it may be presumed, subject to the possibility for challengers to submit evidence to the contrary, that terms and conditions of employment that are compatible with Directive 96/71, that is, comply with Article 3(1) read in the light of Article 3(8), safeguard the protection of workers and fair competition. Third, the national court seeks to establish 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 employment laid down in nationwide collective agreements that can be declared universally applicable in the profession or industry concerned.

The Appellants

Question 3(a)

145. The Appellants contend that Article 36 EEA precludes a decision to declare certain terms and conditions of employment in a nationwide collective agreement universally applicable in the industry concerned where the stated aim of that decision is "to ensure that foreign workers enjoy equivalent pay and working conditions to Norwegian workers."

146. The Appellants assert that as Section 1 of the Universal Application Act is targeted against foreign service providers, it is clearly discriminatory. They contend further that the Norwegian system of making collective agreements universally applicable is entirely at odds with the system that the Directive presupposes.

147. The Appellants contend that the Directive presupposes a collective agreement which, first, is made universally applicable to all nationals and the application of which is then extended to posted workers, who would otherwise be subject only to their individual contract or the law applicable to that contract. In contrast, the Norwegian system is not designed to extend to posted workers collective agreements already declared universally applicable but designed to ensure collective agreements are universally applicable if and only if there are foreign workers in Norway. The Appellants contend that making collective agreements universally applicable simply because of the presence of foreign workers is incompatible with EEA law.

148. The Appellants contend that it is only the presence of foreign workers in Norway which can trigger the process by which a collective agreement is declared universally applicable. The fact that Norwegian workers will also be covered by the universally applicable collective agreement is, according to the Appellants, an "unintended consequence" of the system. In those circumstances, such a system, in their view, is unacceptable as a matter of EEA law.

149. Further, the Appellants contend that the competence of the authority responsible for making collective agreements universally applicable is not limited to the matters in Article 3(1) or 3(10) of the Directive but permits it to make the collective agreement universally applicable "in whole or in part" (Section 3 Universal Application Act) and, as a consequence, is problematic for the purposes of Article 36 EEA. This is because a foreign service provider has no security that the limits of the Directive will be respected and thus cannot determine *a priori* its future obligations.[72]

150. The Appellants consider that this question is simply a reiteration of that which faced the ECJ in *Portugaia Construções*.[73] In their view, ensuring that foreign workers enjoy equivalent pay and working conditions to Norwegian workers is an economic aim that cannot justify a restriction on the freedom to provide services.

Question 3(b)

151. The Appellants consider this question should be answered in the negative. They contend that it follows from the Directive and case-law that the Directive does not harmonise the material content of national provisions. Therefore, the fact that a national provision concerns an issue listed in Article 3(1) of the Directive does not confer on that provision a presumed compatibility with primary law, in this case Article 36 EEA, and ensure that the provision safeguards the protection of workers and fair competition. As a consequence, in the Appellants' view, the usual rules on the burden of proof in connection with restrictions contrary to Article 36 EEA apply and, therefore, it is for the State to show that the provisions at issue are justified for the purposes of Article 36 EEA.[74] Additionally, in their view, the circumstances of the present case warrant more

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[72] Ibid, paragraph 110.

[73] Reference is made to *Portugaia Construções Ld*ª, cited above, paragraphs 12 and 26.

[74] Reference is made to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 42. The Appellants also refer to the ruling of the Norwegian Supreme Court (Rt. 2009.839) following the judgment in Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1.

intense judicial scrutiny by the national court and not presumptions as to the compatibility of the national rules with EEA law.[75]

Question 3(c)

152. The Appellants assert that if the host State were to apply a system under which generally applicable terms and conditions of employment are set out in national laws and supplemented by terms and conditions of employment stipulated in nationwide collective agreements that could be declared universally applicable in the profession or industry concerned this would not affect its incompatibility with Article 36 EEA. The Appellants consider that this element would only serve to make the discriminatory and protectionist nature of the Norwegian system more apparent.

153. The Appellants propose the following answer to the third question:

> *Article 36 of the EEA Agreement must be interpreted so as to preclude a universal application decision such as the one at issue in the main proceedings, the basis of which is to ensure that foreign workers posted to the EEA State concerned enjoy equivalent pay and working conditions to national workers under national collective agreements while the situation of national workers outside national collective agreements cannot entail a universal application decision.*

The Defendant

154. While the Defendant considers that Question 3 need not be answered, as the second question should be answered in the negative, it submits observations in the alternative.

155. The Defendant observes, at the outset, that it is not disputed that terms and conditions pertaining to the nucleus of mandatory rules laid down in Article 3(1) of the Directive constitute restrictions on the free movement of services. However, in its view, the question is whether such restrictions are justified by mandatory requirements.

156. The Defendant notes that while the intention of the legislature may give an indication of the aim of a law, it is not conclusive, and that this principle applies to acts adopted by other authorities.[76] However, in its view, the decisive question is whether, when viewed objectively, the rules at issue promote overriding requirements of public

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[75] Reference is made to *Portugaia Construções Ldª*, cited above, paragraph 29.

[76] Reference is made to *Finalarte and Others*, cited above, paragraph 40.

interest, including *inter alia* the protection of workers and the prevention of unfair competition.[77]

157. The Defendant recalls that the ECJ held in *Laval* that the aim and effect of Article 3(1) and (8) is to ensure a climate of fair competition between national undertakings and undertakings which provide services in another Member State, and the protection of workers.[78] It follows, therefore, that national measures which lay down terms and conditions of employment in compliance with Article 3(1) and (8), promote the protection of workers and the prevention of unfair competition, and are consequently justified by overriding requirements of public interest.

158. Thus, the Defendant contends that Article 36 EEA does not preclude a Member State from extending, in accordance with Article 3(1) of the Directive, to workers posted to its territory terms and conditions of employment covering the matters provided for in points (a) to (g) of the first subparagraph which in the host Member State are laid down in a collective agreement which has been declared universally applicable within the meaning of Article 3(8).

159. The Defendant notes that the regulation of terms and conditions of employment in Norway rests on a two-pillar system: the Working Environment Act and the Universal Application Act. The relationship between the two Acts is regulated by the Posting Regulation, Section 2, second subparagraph. The combined aim and effect of these rules is to ensure that workers benefit from the minimum protection in the particular sector, and thereby ensure equal treatment.

160. According to the Defendant, the first and second indents of Article 3(1) of the Directive are based on the same rationale. Consequently, the Defendant stresses that minimum terms and conditions of employment covering the matters mentioned in points (a) to (g) of the first subparagraph shall be ensured to posted workers "as laid down by law, regulation or administrative provision, and/or by collective agreements which have been declared universally applicable within the meaning of paragraph 8". In its view, it follows from the wording and structure of Article 3(1), as confirmed by the ECJ, that Member States are entitled to supplement minimum protection provided by law with minimum protection contained in collective agreements, subject to the first subparagraph of Article 3(8) and the principle of equal treatment. Therefore, terms and conditions of

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[77] Reference is made to *Finalarte and Others*, cited above, paragraph 41, and *Wolff & Müller*, cited above, paragraphs 38 to 42.

[78] Reference is made to *Laval*, cited above, paragraphs 73 to 77.

employment laid down in a collective agreement declared universally applicable in accordance with Article 3(1) and (8) do not go beyond what is necessary to ensure the protection of workers and the prevention of unfair competition, regardless of whether such provisions supplement minimum terms and conditions laid down in law.

161. The Defendant contends that ESA reached the same conclusion in its Decision of 15 July 2009.[79] Consequently, in the Defendant's view, whether or not minimum terms and conditions of employment laid down by a collective agreement, which has been declared universally applicable in accordance with the second indent of Article 3(1) and the first subparagraph of Article 3(8) of the Directive, supplement minimum terms and conditions of employment laid down in law is of no relevance to the answer to Question 3(a).

162. If, contrary to the Defendant's submission, Question 2 is answered in the affirmative, it proposes, in the alternative, the following answer to the third question:

> *3a)-b). Article 36 EEA does not preclude a Member State from, in accordance with Article 3(1) of Directive 96/71, extending to workers posted to their territory terms and conditions of employment covering the matters in (a)-(g) which, in the Member State where the work is carried out, are laid down in a collective agreement which has been declared universally applicable within the meaning of paragraph 8.*
>
> *3c). Whether minimum terms and conditions of employment laid down by a collective agreement, which has been declared universally applicable in accordance with Article 3(1), second indent, and Article 3(8), first subparagraph, of Directive 96/71, supplement minimum terms and conditions of employment laid down in law, is of no relevance for the answer to question 3(a).*

The Belgian Government

163. The Belgian Government interprets the third question as seeking to establish whether Article 36 EEA permits a decision to declare terms and conditions of employment in a nationwide collective agreement universally applicable with a view to ensuring that foreign workers enjoy equal pay and working conditions with Norwegian workers.

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[79] Reference is made to ESA's Decision of 15 July 2009 to close a case against Norway commenced following a receipt of a complaint against that State in the field of free movement of services (320/09/COL), quoted at paragraph 299 of the Defendant's observations.

164. According to the Belgian Government, it follows from settled case-law of the ECJ that, where a regulatory instrument constituting a restriction on the freedom to provide services is applied to all persons or undertakings performing an activity in the territory of a host Member State, it can be justified where it serves overriding reasons relating to the public interest. This applies, insofar as the said interest is not safeguarded by the laws to which the service provider is subject in the Member State where it is established and to the extent the regulatory instrument is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary to achieve this goal.[80]

165. The Belgian Government observes that the objective pursued by the Tariff Board in declaring the VO universally applicable is to ensure the protection of foreign employees whose conditions of employment are in general less favourable than those of Norwegian employees and to combat social dumping. In its view, both objectives are accepted by the ECJ. Moreover, on its reading of the case-law, the ECJ has stressed that these two objectives led to the adoption of Directive 96/71/EC. Consequently, in the view of the Belgian Government, Article 36 EEA permits a collective agreement to be declared universally applicable with the aim of affording foreign employees the same pay and conditions of employment as domestic employees.

166. As to the question whether the terms and conditions of employment can be presumed to safeguard the protection of workers and fair competition if they are compatible with the Directive, the Belgian Government asserts that the provisions of the Directive constitute the nucleus of mandatory rules for minimum protection. Therefore, in its view, it can be presumed that terms and conditions of employment compatible with the Directive safeguard employee protection and a climate of fair competition. In addition, pursuant to Article 3(7) therein, the Directive does not prevent application of terms and conditions of employment which are more favourable to workers. If foreign employees do not benefit from the application of the law of the host State as regards matters where the law of the State of origin is more favourable, the law of the host State will not be applied.

167. As to the question whether the fact that a Member State sets out the generally applicable terms and conditions of employment in national laws which are supplemented by nationwide collective agreements that may be declared universally applicable is capable of influencing the answer to Question 3(a), the Belgian Government submits that Article 3(1) of Directive 96/71 concerns working conditions laid down by law, regulation

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[80] Reference is made to *Wolff & Müller*, cited above, paragraph 34.

or administrative provisions and/or by collective agreements or arbitration awards declared universally applicable. Consequently, in its view, the fact that these two types of standards coexist in Norwegian employment law is of no bearing to the answer to Question 3(a).

168. If Question 2 is answered in the affirmative, the Belgian Government proposes that the Court answer Questions 3(a) to 3(c) in the following manner:

> *3. a) Article 36 EEA permits that a Member State of the EEA declares nationwide collective agreements universally applicable with the aim of securing foreign workers the same pay and working conditions as domestic workers.*
>
> *3. b) It can be presumed that working conditions that are compatible with Article 3(1) of Directive 96/71/EC, read in light of Article 3(8) of the same Directive, safeguard employee protection and a climate of fair competition.*
>
> *3. c) The fact that the host State applies a system wherein working conditions are stipulated in law, and also in nationwide collective agreements that can be declared universally applicable in the profession or sector concerned, has no bearing on the answer to question 3(a).*

169. Having answered the second question in the negative, the Polish and Swedish Governments refrain from proposing an answer to the third question of the national court. The same applies to ESA and the Commission.

Páll Hreinsson
Judge-Rapporteur