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Brussels, 21 December 2012  
Case No: 64849  
Event No: 657599

EFTA SURVEILLANCE  
AUTHORITY

Ministry of Labour  
Postboks 8019 Dep  
N-0030 Oslo  
Norway

Dear Sir or Madam,

**Subject: Closure of a case concerning labour clauses in public procurement against Norway**

On 11 June 2008, the Authority opened an own-initiative case against Norway with regard to Act No. 69 of 16 July 1999 on Public Procurement, and the implementing Regulation No. 112/2008 on pay and working conditions in public contracts (“Regulation No. 112/2008”).

On 15 July 2009, a letter of formal notice was issued to Norway, followed by a reasoned opinion delivered on 29 June 2011, in which the Authority concluded that by maintaining in force Article 5(1) of Regulation No. 112/2008, Norway does not comply with Article 36 of the EEA Agreement and the Posting of Workers Directive 96/71/EC (“Directive 96/71”) as interpreted by the Court of Justice in the *Rüffert* case (C-346/06).

Taking into consideration the development of this case since its opening in June 2008, in particular the amendments adopted to Regulation No. 112/2008 together with the increase in the number of universally applicable agreements, the scope of the infringement has significantly been reduced. The Authority considers it therefore appropriate, at the present stage, not to proceed further with this case.

This decision is, however, without prejudice to any future decision by the Authority to open a new case on this issue or on a related issue. Such a decision could be taken, for example, in the light of new information concerning the implementation, interpretation or application of the national measures under consideration, receipt of a new complaint, or developments in EEA or EU law.

The decision to close the case is attached to this letter for your information (Event No 653338).

Yours faithfully,



Bernhard Zaglmayer  
Deputy Director  
Internal Market Affairs Directorate

Enclosure: Decision to close the case

Case No: 64849  
Event No: 653338  
Dec. No: 510/12/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 19 December 2012

closing an own-initiative case against Norway concerning  
labour clauses in public procurement

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

On 11 June 2008, the Authority opened an own-initiative case against Norway with regard to Act No. 69 of 16 July 1999 on Public Procurement, and the implementing Regulation No. 112/2008 on pay and working conditions in public contracts (“Regulation No. 112/2008”).

Article 5(1) of Regulation No. 112/2008 stipulated that public procurement authorities were required to insert in their contracts a provision stating that workers hired by contractors received pay and working conditions no less favourable than provided for under the applicable nationwide collective agreement, or what was otherwise normal for the relevant place and profession. The requirements laid down in the Regulation apply equally to Norwegian contractors as to contractors established in other EEA States taking part in public procurement proceedings in Norway.

Public procurement procedures in the EEA are subject to the fundamental principles of the EEA Agreement, including the principle of freedom of establishment and the principle of freedom to provide services.

On 15 July 2009, a letter of formal notice was issued to Norway, followed by a reasoned opinion delivered on 29 June 2011, in which the Authority concluded that by maintaining in force Article 5(1) of Regulation No. 112/2008, Norway does not comply with Article 36 of the EEA Agreement and the Posting of Workers Directive 96/71/EC (“Directive 96/71”)<sup>1</sup> as interpreted by the Court of Justice in the *Rüffert* case (C-346/06).<sup>2</sup> In that case

<sup>1</sup> Act referred to at point 30 of Annex XVIII to the EEA Agreement (*Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*) as adapted to the EEA Agreement by Protocol 1 thereto.

<sup>2</sup> Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989.

the Court held that that a national measure could not be considered to be justified by the objective of ensuring the protection of workers since the pay provisions laid down by the collective agreement in question applied only to a part of the construction sector falling within the geographical area of that agreement since, in addition to the fact that the collective agreement had not been declared universally applicable under national law, that legislation applied solely to public contracts and not to private contracts.<sup>3</sup>

In its reply to the reasoned opinion dated 15 November 2011, the Norwegian Government informed the Authority that amendments had been made to Regulation No. 112/2008. The Regulation now refers in Article 5(2) specifically to pay and working conditions stemming from regulations that declare collective agreements universally applicable in the meaning of the General Application Act.<sup>4</sup> With regard to sectors, not covered by such agreements, the Regulation refers in Article 5(3) to minimum rates of pay, including overtime, working time, and compensation for travel, board and lodging, stemming from nationwide collective agreements for the relevant sector. The reference to working conditions "*common to the place and occupation concerned*" was repealed. The Regulation as amended furthermore stipulates that contracting authorities have to make it clear in the call for tender and in the relevant contract documents that contractors must comply with the applicable working conditions.

As stated above, the Regulation in Article 5(3) still includes a reference to collective agreements which have not been declared universally applicable under Norwegian law. As a result, the Norwegian authorities may impose in the context of a public contract, depending on the sector, working conditions on workers posted from abroad which are not the same as those applicable to other workers employed in the concerned sector in Norway.

However, according to information received from Norway, the construction sector, the maritime construction industry, agriculture and horticulture, and the cleaning sector are covered by universally applicable agreements. Accordingly, in major sectors in Norway, in particular in the construction sector, workers posted from other EEA States in accordance with the Posting of Workers Directive are covered by the same rules as all workers in Norway.

By email dated 24 May 2012, the Authority invited the Norwegian Government to provide information about efforts made in order to ensure more transparency with regard to applicable working conditions referred to in Article 5(3) of the Regulation. Norway replied by email of 12 July 2012 stating that the Agency for Public Management and eGovernment (Difi) had been entrusted with the task on finding ways to include information about collective agreements in electronic procurement tools, model contract clauses, guidelines etc. The work was ongoing but had the aim of establishing improved standards in terms of providing access to information about applicable working conditions. Norway furthermore pointed out that the Labour Inspectorate Authority would be granted powers to monitor compliance by public procurement authorities with their obligations arising from Regulation No. 112/2008.

Taking into consideration the development of this case since its opening in June 2008, in particular the amendments adopted to Regulation No. 112/2008 together with the increase in the number of universally applicable agreements, the scope of the infringement has

<sup>3</sup> Case C-346/06 *Rüffert*, cited above, paragraphs 38-39.

<sup>4</sup> Further information concerning the scope of this Act is found in the Authority's Case No. 63734: Complaint against Norway concerning the Act on the general application of collective agreements.

significantly been reduced. The Authority considers it therefore appropriate, at the present stage, not to proceed further with this case.

The Authority's decision to close the case is without prejudice to any future decision by the Authority to open a new case on this issue or on a related issue. Such a decision could be taken, for example, in the light of new information concerning the implementation, interpretation or application of the national measures under consideration, receipt of a complaint, or developments in EEA or EU law.

HAS ADOPTED THIS DECISION:

The own initiative case against Norway concerning labour clauses in public procurement, is hereby closed.

Done at Brussels, 19 December 2012

For the EFTA Surveillance Authority



Oda Helen Sletnes  
President



Sabine Monauni-Tömördy  
College Member