ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
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Complaint against Norway concerning posting of workers – reply from the Norwegian Government

1. Introduction

1. Reference is made to the EFTA Surveillance Authority's letter of 10 July 2015, in which the Authority refers to a complaint by the Confederation of Norwegian Enterprise (NHO) concerning alleged failure by Norwegian authorities to comply with Article 36 EEA and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The complaint alleges in particular that the judgment of the Norwegian Supreme Court of 5 March 2013 does not conform with the interpretation of certain aspects of EEA law provided for in the EFTA Court's advisory opinion in case E-2/11 STX Norway Offshore.

2. Further, reference is made to the EFTA Surveillance Authority's letter of 21 January 2014 in which the Authority asked the Norwegian Government to respond to six questions concerning Article 36 EEA and Directive 96/71/EC, and in particular how different notions and conditions are interpreted in the aftermath of the Supreme Court's judgment.

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3. The Government responded to these questions in letter of 3 March 2014, in essence by referring to the Supreme Court's interpretation, and stating that the notions and conditions are employed consonant with the terms of the judgment.

4. In letter of 10 July 2015 the Internal Market Affairs Directorate (hereinafter "the Directorate") has submitted its preliminary view on the complaint. The Norwegian Government is invited to submit its observations before 25 September 2015 (according to the Directorate's letter of 13 August 2015 in which the time limit was extended).

2. Observations

2.1 Introductory comments to the assessment

5. In its preliminary remarks, the Directorate elaborates on the advisory opinion procedure and the relationship between the European Courts and national courts. The Government shares the view that the advisory opinion procedure is an important tool to ensure uniform interpretation of the EEA Agreement and achieve the objective of a homogenous internal market. With reference to paragraphs 41-45 of the Directorate´s letter, the Government would like to reiterate that the advisory opinion procedure in the EEA differs in certain respects from the preliminary reference procedure in the EU. First, Article 34 SCA does not contain any obligation to refer to the EFTA Court, and no sanctions may be derived from the decision of a national court not to ask for an advisory opinion. Second, the opinion of the EFTA Court is advisory. Nonetheless, as also underlined by the Norwegian Supreme Court, advisory opinions from the EFTA Court shall be given significant weight when interpreting EEA law.

6. With reference to our letter of 3 March, we would like to emphasise that the basis for the Norwegian Government is that the Supreme Court has delivered a binding judgment, based on a very thorough legal proceeding. We will nevertheless provide some remarks to the Directorate`s assessment regarding the interpretation of Article 3 of Directive 96/71/EC.

2.2 Comments on the Directorate's assessment on Article 3(1)(c) of the Directive

7. In paragraphs 54 – 69 of the letter the Directorate deals with the question on whether the concept of minimum rates of pay in Article 3(1)(c) of Directive 96/71/EC may include compensation for expenses for travel, board and lodging laid down in the collective agreements in question which are declared universally applicable, namely in the maritime construction industry, in the construction industry and in the cleaning sector.

8. The conclusion is in the negative, and, as we understand it, the main reason for this is that the Directorate views Article 3 (1) c in light of Article 3(7) second subparagraph of the Directive. Further, the Directorate refers to case law of the European Court of Justice, in particular C-396/13 *Sähköalojen ammattiliitto.*

9. However, in the Government's view, also enshrined in our written observations in C-396/13, the question on whether Article 3(1)(c) of Directive 96/71/EC may include compensation for travel, board and lodging concerns the host state's regulatory competence.

This should be distinguished from the question on the method of calculating the wage actually paid by the service provider. It's our view that Article 3(7) concerns the latter.

10. It follows from the wording of Article 3(1), in particular the second subparagraph of this provision, that it is for the host state to decide on the content of the concept of minimum rates of pay. We also believe that the scope and objectives of the Directive support our understanding of the Directive. As recognised in C-341/05 Laval, paragraphs 73 – 77, the Directive shall balance the aim of free movement of services with the aims of ensuring a climate of fair competition and protection of workers.

11. As we see it, the factual situation in the case law referred to by the Directorate, indicates that the Court dealt with the matter of calculation of the wage, i.e. which elements of remuneration the service provider is entitled to deduct from the host state minimum wage, according to Article 3(7) second subparagraph. The subsequent case law from the European Court of Justice on the interpretation of Article 3(1) (c) has in our opinion not led to a final clarification on the question regarding the regulatory competence of the host state.

12. In paragraph 68 of the letter the Directorate states that *if the interpretation and the arguments by the Supreme Court were adhered to, de facto result might be that the undertakings posting workers would be required to pay higher rates of pay than the minimum rates of pay.* In this respect, the Government recalls that all regulations on general application of collective agreements contain a derogation provision stating that the regulations shall not apply if, pursuant to agreement or to the national law, the worker is covered by terms of wages and employment that otherwise apply to the employment relationship, which, taken as a whole, are more favourable.[1] The aim of this provision is precisely to prevent that the service provider would be required to pay rates going beyond the minimum rates.

2.3 Comments on the assessment of Article 3(10) of the Directive

13. Paragraphs 70-90 of the Directorate's letter deals with the issue of whether compensation for travel, board and lodging may be justified under Article 3(10) of the Posting of workers Directive. The Directorate refers to various sources on the concept of public policy and asserts that it "has been narrowed down by case law to the extent that it is difficult to see how the EEA States can argue that any labour laws, however fundamental to the system of employment protection, satisfy this extraordinarily high standard." It is added that this concept should not be confused with the notion of "overriding reasons of public interests". It follows that the contested provisions are unlikely to qualify under Article 3(10) of Directive 96/71/EC.

14. The Government does not dispute that the concept of public policy in Article 3(10) of the Directive provides a high threshold, nor was that disputed in the case before the Supreme Court. The Directorate's interpretation seems very strict, however, and we would like to raise the question on whether this position is in line with the system laid down in the Directive and the EFTA Court's judgment in STX.

[1] Regulation No 1829 of 27 November 2014 § 9, Regulation No 1482 of 27 November 2014 § 8, Regulation No 1483 of 27 November § 7

15. The first indent of Article 3(10) provides that the Directive shall not preclude the Member States from applying "terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1". The wording of the Directive may therefore indicate that "terms and conditions of employment" may qualify under the concept of public policy. Furthermore, this concerns employment conditions which fall outside the scope of Article 3(1) of the Directive and as such, in accordance with recital (13) of the Directive, fall outside the "hard core" of employment conditions. Hence, in our opinion, it follows from the wording and system of the Directive that it should not be excluded a priori that "terms and conditions of employment" may qualify under the concept of public policy in Article 3(10).

16. Article 3(10) of the Directive presupposes a concrete assessment, having regard to all the relevant facts, of whether terms and conditions of employment may be justified under that provision. This is reflected in the case law of the Court of Justice and the EFTA Court, including the judgment in STX. It is recalled that the EFTA Court explicitly stated in paragraph 100 of that judgment that "the assessment of whether the compensation scheme in question may be justified on the basis of public policy provisions must be made by the national court, on the basis of all the facts before it..."

17. This is what the Supreme Court subsequently did, having regard to the extensive material put before it. Also the Supreme Court acknowledges that the concept of public policy in Article 3(10) of the Directive provides a high threshold. A comprehensive and quite complex factual assessment, based inter alia on several socio-economic papers, led the Supreme Court to conclude that the contested provisions were "of importance to maintain stability in the Norwegian labour market and wage leadership model" ("stabiliteten i den norske arbeidslivs- og frontfagsmodellen"). This referred inter alia to the risk of a ripple-effect which could undermine the very foundations of the domestic regulation of the labour market. That was the reason why the Supreme Court, fully aware of the high legal threshold provided by the concept of public policy, in that case found that the contested provisions could be justified under Article 3(10) of the Directive.

18. It is legitimate to question the far-reaching consequences identified in that judgment, but such an exercise would in our opinion, recalling paragraph 100 of the STX-judgment, have to be based on an assessment of all the relevant facts. If required, we can provide the Directorate with the written material upon which the Supreme Court based its decision,

19. The Government would at the same time like to underscore, consonant with what has been said above, that the factual assessment carried out in the STX-case was concrete and specific. It may obviously not necessarily hold true for other "terms and conditions of employment" nor does it prejudice future assessments based on relevant developments. The Government therefore foresees a close collaboration with the Directorate to make sure that domestic regulations conform with EEA law also in the future.

20. Finally, we would like to inform the Directorate that as part of the preparations for our reply, the Minister of Labour and Social Affairs has met with The Confederation of Norwegian Enterprise (NHO) and The Norwegian Confederation of Trade Unions (LO). The Minister has strongly requested the parties to take up dialogue on challenges connected to the Norwegian system of general application of wage agreements. The Minister also offered his assistance in facilitating this. It's the Ministry's impression that both NHO and LO had a positive attitude on this.

Yours sincerely,

for
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