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Brussels, 21 November 2018
Case No: 74557
Document No: 1038679

EFTA SURVEILLANCE
AUTHORITY

Dear Madam/Sir,

Subject: Complaint against Norway concerning posting of workers

1 Introduction

On 29 November 2013, you submitted a complaint to the EFTA Surveillance Authority (“the Authority”) against the Norwegian Government. The complaint alleged that Norway failed to comply with Article 36 of the EEA Agreement on the freedom to provide services and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services¹ (“Directive 96/71/EC”). It was claimed that the interpretation and application of Article 36 of the EEA Agreement and Article 3 of Directive 96/71/EC by the Norwegian Supreme Court in a judgment of 5 March 2013² was not in line with certain aspects of the ruling handed down by the EFTA Court in Case E-2/11 *STX Norway Offshore*³.

2 The Authority’s action and Norway’s reaction

By letter dated 21 January 2014,⁴ the Authority sent a request for information to Norway. The Norwegian Government replied by letter of 3 March 2014.⁵ The case was discussed at the package meeting in Oslo in October 2014.

On 10 July 2015, the Authority’s Internal Market Affairs Directorate (“the Directorate”) sent a Pre-Article 31 letter to Norway in which it concluded that by requiring employers of posted workers in certain sectors to cover necessary travel expenses on commencement and completion of the assignment of a posted worker and for a reasonable number of journeys home and to pay for board and lodging, Norway was in breach of Articles 3(1) and 3(10) of Directive 96/71/EC.⁶ The Norwegian Government replied to the Pre-Article 31 letter by letter of 28 September 2015.⁷

The case was discussed with Norway at the package meeting in November 2015, at several meetings in Brussels from September 2015 to June 2016 and at the package meeting in October 2016.

A letter of formal notice was sent to Norway on 25 October 2016.⁸ In the letter, the Authority concluded that, by maintaining in force and applying with respect to undertakings posting workers from another EEA State in the maritime construction

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

² Ref.: HR-2013-0496-A, Case No 2012/1447.

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

⁴ Doc No 694969.

⁵ Doc No 701262.

⁶ Doc No 762926

⁷ Doc No 774351

⁸ Doc No 775382.

industry, for construction sites and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a (posted) worker and for a reasonable number of journeys home and to pay for board and lodging (during the whole posting period), Norway had failed to fulfil its obligations arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) of the Directive.⁹

By letter dated 20 January 2017,¹⁰ the Norwegian Government replied to the letter of formal notice, stating *inter alia* that it provided a basis for finding solutions to the case, but that the responsibility to find a solution lay with the social partners.

By letter of 24 May 2018,¹¹ the Authority requested the Norwegian Government to inform them of the results of the negotiations between the social partners. Norway replied by letter dated 20 June 2018,¹² stating that the negotiations had been concluded on 8 April 2018, without amendments to the provisions on compensation for travel, board and lodging. The Norwegian Government further noted that it was for the Tariff Board to decide on the general applicability of the relevant provisions on compensation for travel, board and lodging and that the Tariff Board was expected to decide on the requests for general applicability during the autumn of 2018. In the letter, the Norwegian Government also made a reference to the expected revision of Directive 96/71/EC and stated that some of the amendments would clearly affect the questions raised in this case and that the legal situation seemed to be changing.

By letter dated 27 September 2018, the Authority reiterated its conclusions in the letter of formal notice of 25 October 2016 and stated that the adoption of Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (“the revised Directive”) reinforced the Authority’s position in the case.¹³ The Authority noted that although compensation for travel, board and lodging had been added to the list of mandatory rules for minimum protection in Article 3(1), first subparagraph, point (i) of the revised Directive, it followed clearly from the second subparagraph of Article 3(1) that point (i) of Article 3(1), first subparagraph, should apply exclusively to posted workers required to travel within the host State. More specifically, the obligation to compensate for travel, board and lodging only applied to expenditure incurred by posted workers where they would be required to travel to and from their regular place of work in the host State, or where they would be temporarily sent by their employer from that regular place of work in the host State to another place of work.¹⁴

The case was discussed at the package meeting in Oslo on 25 October 2018, where the Norwegian Government informed the Authority that, on 11 October 2018, the Norwegian Tariff Board had adopted decisions granting continued partial general applicability to the collective agreements in the maritime construction industry¹⁵, for construction sites¹⁶ and

⁹ Your complaint also concerned the issue of whether national provisions (such as those on supplements for work assignments requiring overnight stays away from home), which would be considered as falling within the scope of Article 3(1) of the Directive, also had to be assessed as to their compatibility with Article 36 EEA on the freedom to provide services. However, the Authority did not consider that there were sufficient grounds for initiating infringement proceedings in relation to that issue.

¹⁰ Doc No 836998.

¹¹ Doc No 914749.

¹² Doc No 919088.

¹³ It should be noted that the compliance date for Directive 2018/957/EU in the EU Member States is 30 July 2020 and the preparation for the incorporation of the Directive into the EEA Agreement has started.

¹⁴ See also recital 8 in the preamble to the revised Directive.

¹⁵ <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11-oktober-2018-om-fortsatt-delvis-allmenngjoring-av-industrioverenskomsten.pdf>

¹⁶ <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11-oktober-2018-om-fortsatt-allmenngjoring-av-tariffavtale-for-byggeplasser-i-norge-2018--2020.pdf>

for cleaning enterprises¹⁷, while at the same time amending the provisions on compensation for travel, board and lodging, so that they only applied to travel within Norway. It is stated in the grounds of the Tariff Board's decisions that the amendments to the provisions on travel, board and lodging should be understood as no longer requiring employers to cover costs of travels between the home State and Norway but that coverage of costs for travel, board and lodging should continue to apply to travel within Norway.¹⁸ At the package meeting in Oslo, the representatives of the Norwegian Government confirmed their view that the relevant provisions, as amended, should be understood as only requiring compensation for travel, board and lodging in relation to travel within Norway and thus not requiring coverage of board and lodging expenses during the whole posting period.

The Tariff Board decisions on the general applicability of collective agreements take the form of Regulations. The Regulations at issue here enter into force on 1 December 2018 and extend the previous Regulations on the partial general applicability of the relevant collective agreements.

3 Assessment

As described above, the Norwegian Tariff Board has now adopted decisions which amend the provisions on travel, board and lodging in the collective agreements applicable to this case so that they only apply to travel within Norway. In light of the grounds of the Tariff Board's decisions and the views expressed by the representatives of the Norwegian Government, the Directorate understands the amended provisions as only requiring the employer of posted workers to cover costs for travel, board and lodging in relation to travel within Norway and not in relation to travel between the home State and Norway or board and lodging expenses during the whole posting period.

These amendments entail that the provisions on travel, board and lodging appear to be in line with the revised Directive on the posting of workers, which includes compensation for travel, board and lodging in the list of mandatory requirements for minimum protection of posted workers, but only with regard to travel within the host EEA State.

The amendments also entail that, once they are in Norway, workers posted to Norway have equivalent rights to those of Norwegian workers, with respect to compensation for travel, board and lodging.

Lastly, these amendments appear to solve the issues raised by the Authority in the letter of formal notice, as Norway, as of 1 December 2018, no longer imposes an obligation on employers of workers posted from another EEA State to cover costs for travel in relation to travel between the home State and Norway and board and lodging during the whole posting period.

In light of the above, the Directorate intends to propose that the Authority close the case. The Authority may, however, revert to the matter should any relevant developments occur in EEA or EU law.

¹⁷ <https://www.nemndene.no/contentassets/4812adaa4fbf4774a6477b2d51d5488e/tariffnemndas-vedtak-av-11.-oktober-2018-om-fortsatt-allmenngjoring-av-tariffavtale-for-renholdsbedrifter.pdf>

¹⁸ The unofficial translation of the Directorate.

Before the Directorate makes such a proposal, you are invited to submit your observations on the above assessment and to present any new information by *12 December 2018*.

Yours faithfully,

Gabrielle Somers
Acting Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gabrielle Somers.