

Case No: 66513  
Event No: 579462  
Dec. No: 47/11/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 2 March 2011

to close a case against Norway commenced following a receipt of a complaint against that State in the field of free movement of services

### 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 6 December 2007, the Authority received a complaint against Norway concerning the Act of 4 June 1993 No. 58 relating to General Application of Collective Agreements (*Lov om allmenngjøring av tariffavtaler m.v.*, hereafter “the General Application Act”), alleging that the Act was incompatible with Article 36 of the EEA Agreement as regards, *inter alia*, the imposition of minimum wage and minimum working time.

By letter of 22 December 2008, the complainant lodged an addendum to the complaint arguing that Regulation No. 166/2008 on the duty to provide information, to control and the right to receive information (*Forskrift om informasjons- og påseplikt og innsynsret*), adopted under the General Application Act, introduced restrictions on service providers contrary to Article 36 of the EEA Agreement.

The complaint pointed out that Regulation No. 166/2008 introduced new procedures, whereby private parties were entrusted with the task of checking whether their contracting partners complied with their obligations arising from regulations on pay and working conditions adopted under the General Application Act. Furthermore, employee representatives were provided with a right to request information about wage and working conditions prescribed by the same regulations.

In essence, the complaint maintained that the task of monitoring observance by undertakings with provisions on pay and working conditions should be the sole responsibility of the Labour Inspection Authority, and, where applicable, the Petroleum Safety Authority.

The issue concerning the compliance of the General Application Act with Article 36 EEA was pursued by the Authority separately in Case No. 63734, which was closed by a

College Decision on 15 July 2009. In its decision the Authority concluded that the system set up by the General Application Act pursues a legitimate aim, i.e. the protection of workers, capable of justifying a restriction on the freedom to provide services, and that its provisions are suitable and proportionate for achieving that aim. In the Authority's view, the Act also complies with Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

By its letter of 20 June 2009, the Authority invited the Norwegian Government to provide information about the scope of Regulation No. 166/2008 and its standing within the general framework of monitoring compliance by undertakings with rules and regulations on the Norwegian labour market.

The Norwegian Government provided the requested information in a letter of 17 August 2009. Further information was provided in a reply dated 20 January 2010 to the follow-up letter to the package meeting held in Oslo on 11 and 12 November 2009.

A rule of joint and several liability in respect of pay obligations arising from regulations adopted under the General Application Act entered into force on 1 January 2010. Due to the relationship between this provision and Regulation No. 166/2008, the Authority decided to include it in the assessment of the complaint.

#### *Enforcement by the Labour Inspection Authority*

According to Article 11(1) of the General Application Act, the Labour Inspection Authority is responsible for monitoring compliance with (1) pay and working conditions laid down in regulations adopted under the Act, (2) the duty to inform and check, and (3) the right to information.<sup>1</sup> For the purposes of ensuring compliance with these provisions, the Labour Inspection Authority has at its disposal the general means of enforcement provided under the Working Environment Act No. 62/2005.

#### *Joint and several liability*

Article 13 of the General Application Act states that suppliers of services and contractors who contract out part of their obligations shall be jointly and severally liable for payment of wages, overtime pay and accrued but unpaid holiday pay, laid down in regulations adopted under the Act.

#### *The duty to inform and check, and the right to information*

Regulation No. 166/2008, which is based on Article 12 of the General Application Act, aims to contribute to the task of securing compliance with pay and working conditions laid down in regulations adopted under the Act. For this purpose, Article 5 of the Regulation imposes a duty on buyers of services to inform their suppliers of their obligations arising from the relevant regulation adopted under the General Application Act. In addition, the supplier of services must according to Article 6(1) of the Regulation check that pay and working conditions provided by his subcontractors comply with the applicable regulation. In case the supplier has not brought in any subcontractors, the service buyer must inform the supplier and check his compliance, cf. Article 6(2) of the Regulation.

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<sup>1</sup> According to Article 11(4), the Petroleum Safety Authority has within its jurisdiction supervisory responsibility and authority corresponding to that referred to in the first, second and third subsections.

According to guidelines published with Regulation No. 166/2008, the duty to check can be fulfilled by various means, such as by providing information about the relevant regulation under the General Application Act, by making it a contractual obligation between the parties to comply with that regulation, and by making random collection of documents concerning wages and working conditions.

Article 11(5) of the General Application Act states that any party who is subject to supervision under the Act must, if so requested by employee representatives, disclose information about pay and working conditions applied in undertakings performing work covered by regulations adopted under the Act. The right to information is further clarified in Articles 7 to 10 of Regulation No. 166/2008.

#### *Assessment*

Directive 96/71 on the posting of workers applies to undertakings which, in the framework of the cross-border provision of services, post workers to the territory of an EEA State. It follows from the Directive that EEA States are entitled to ensure that undertakings guarantee posted workers a core of mandatory employment rights laid down in the host state. Conditions of work and employment include minimum rates of pay, working time provisions, minimum paid annual leave and measures in the field of health and safety. According to Article 5 of Directive 96/71, the EEA States are required to take appropriate measures in the event of failure by foreign service providers to comply with these provisions. The EEA States shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

According to the General Application Act, the Labour Inspection Authority bears the main responsibility for monitoring compliance with pay and working conditions laid down in regulations adopted under the Act. Notwithstanding the effective means of enforcement which the Labour Inspection has at its disposal under the Working Environment Act, neither Article 36 EEA nor Directive 96/71 preclude Norway from imposing certain monitoring duties on the private parties involved in the cross-border provision of services.

A reading of Article 13 of the General Application Act indicates that the rule of joint and several liability replicates in essence the substance of the liability rule subject to examination in *Wolff & Müller*.<sup>2</sup> In that judgment, the Court of Justice stated that Article 5 of Directive 96/71, interpreted in the light of Article 49 EC, does not in principle preclude a national system whereby, when subcontracting the conduct of building work to an undertaking established in another Member State, a building contractor established in the Member State concerned becomes liable for the obligation on that undertaking to pay the minimum wage to a worker employed by the latter. Further, that if entitlement to minimum rates of pay constitutes a feature of worker protection, which is one of the overriding reasons relating to the public interest which may justify a restriction on freedom to provide services, procedural arrangements ensuring observance of that right, such as the liability of the guarantor, must likewise be regarded as being such as to ensure that protection.

The rule in Article 13 of the General Application Act aims to improve the level of compliance with terms of employment laid down in regulations adopted under the Act, a framework which has been found by the Authority to be in line with Article 36 EEA and

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<sup>2</sup> Case C-60/03 *Wolff & Müller*, [2004] ECR I-9553.

Directive 96/71. The effect of this rule is that undertakings in the contract chain guarantee one for all and all for one that the workers employed by individual contractors anywhere in the contract chain receive their wages and working conditions prescribed by the applicable regulation. Therefore, from the point of the posted worker, Article 13 serves as an added guarantee that an employee will in fact receive the wages he is entitled to under the applicable regulation.

The duty imposed on main contractors laid down in Articles 5 and 6 of the Regulation to inform contractors and subcontractors of their obligations arising from regulations adopted under the General Application Act, and the subsequent duty to take certain steps to improve the likelihood that they comply with their obligations, aims to guarantee effective implementation of regulations adopted under the Act.

Furthermore, the duty to inform and check aims to prevent or reduce the risk whereby the main contractor, or any contractor in the contracting chain, will be held liable for unpaid wages owed by other employers in the contract chain. Consequently, this framework consisting of a liability in respect of unpaid wages and the duty to check compliance, results in having a constructive effect on the aim pursued by the General Application Act. From the point of view of ensuring compliance with minimum rates of pay, the liability rule and the duty to check must therefore be considered to constitute an appropriate measure in the meaning of Article 5 of Directive 96/71.

Article 11(5) of the General Application Act and Article 7 of Regulation No. 166/2008 provide employee representatives with a right to request information which indicates whether or not the respective employer is complying with his obligations arising from a regulation adopted under the General Application Act. This requirement aims to improve transparency with regard to wages and working conditions, and thus contributes to the objective of providing workers posted to Norway with the protection prescribed by Directive 96/71. The duty to disclose information of this kind to employee representatives does not hinder or make the provision of services less attractive within the meaning of Article 36 EEA. Accordingly, it does not constitute a restriction on the free movement of services.

By letter dated 18 October 2010 the Authority informed the complainant of its intention to close the case. At the request of the complainant, the deadline was extended to 1 December 2010.

In a letter dated 1 December 2009, the complainant restated his principal arguments with regard to the administrative burdens imposed by Regulation No. 166/2008 on private parties engaged in cross-border provision of services.

For the reasons set out above, the Authority is of the view that the Regulation No. 166/2008 and Article 13 of the General Application Act are compatible with Article 36 EEA and Directive 96/71.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The case arising from a complaint against Norway due to the alleged breach by that State of Article 36 of the EEA Agreement and the Act referred to at point 30 of Annex XVIII to

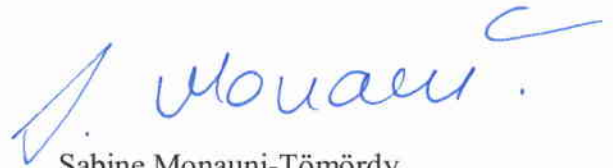
the EEA Agreement (*Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*) as adapted to the EEA Agreement by Protocol 1 thereto, is hereby closed.

Done at Brussels, 2 March 2011,

For the EFTA Surveillance Authority



Per Sanderud  
President



Sabine Monauni-Tömördy  
College Member