Case No: 63734
Event No: 521127
Dec. No: 320/09/COL

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY 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

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area, in particular Articles 36 and 109 thereof,

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,

Having regard to 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* (hereafter referred to as "Directive 96/71")

as adapted to the EEA Agreement by Protocol 1 thereto,

Whereas, on 6 December 2007, the Authority received a complaint against Norway concerning the Norwegian 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*, imposition of minimum wage and minimum working time,

Whereas, by letter of 12 December 2007, the Authority informed the Norwegian Government about the complaint,

Whereas, by letter of 16 April 2008, the Authority requested information from the Norwegian Government, which was submitted by letter of 28 May 2008,

Whereas, the issues raised by the complaint were discussed with representatives of the Norwegian Government in the course of the package meeting in Norway on 21 November 2008,

Whereas, by letter of 22 December 2008, the complainant argued 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 new restrictions on service providers contrary to Article 36 of the EEA Agreement,

Whereas the issue of whether the enforcement provisions contained in Regulation 166/2008 are compatible with Article 36 EEA and/or Directive 96/71 raises different legal considerations as compared to the General Application Act, the Authority decided to pursue that issue separately in Case No. 66513, and it is therefore not within the scope of the present decision,

Whereas the General Application Act provides for a procedure whereby provisions on wages and working conditions in collective agreements can be made generally binding on all employers within a particular sector/industry or part of an industry. A decision to this effect is made by a Tariff Board, an administrative committee set up by the Act to decide on such matters,

Whereas, the Tariff Board adopts its decisions in the form of a Regulation according to which terms and conditions set out in a collective agreement are made generally applicable,

Whereas a Regulation issued on the basis of the General Application Act is applicable to all undertakings within the relevant area. Posted workers are not mentioned in Article 1 of the Act as a specific category of workers deemed under the Act to merit specific protection under the Act. However, the Act is applied to posted workers by virtue of Article 2 of Regulation No 1566/2005 concerning posted workers,

Whereas the present decision is limited to the examination of the compatibility of the relevant provisions in the General Application Act with Directive 96/71/EC and Article 36 EEA. The decision, therefore, does not examine whether individual decisions of the Tariff Board are compatible with EEA law,

Whereas the EEA States are required under Article 3(1)(c) of Directive 96/71 to ensure 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 Member State where the work is carried out,

Whereas, according to the Directive, the EEA States can, when prescribing minimum rates of pay and other issues covered by Article 3(1) subparagraphs (a)-(g) of Directive 96/71, make use of either law, regulation or administrative provision according to Article 3(1), and/or collective agreements which have been declared universally applicable in accordance with Article 3(8) of the Directive, as a method to achieve this aim,

Whereas Article 3(1)(c) of Directive 96/71 does not prevent Norway from having in place a legislative framework under which minimum rates of pay may differ according to the geographical area and/or the profession or industry concerned, on condition that these requirements apply on an equal basis to undertakings established in Norway and other EEA States,

Whereas Directive 96/71, in particular its Article 3, does not in any way regulate the *level* of minimum rates of pay. In *Laval,* the Court of Justice stated that: "*[d]irective 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law.*"[1] Therefore, it is up to each EEA State to decide, within the means foreseen under the Directive and in compliance with the EEA Agreement, what is to be the minimum level of pay in that State,

Whereas, in making that determination, the State is not under any obligation to confine itself to the minimum level which is considered necessary for subsistence in that State or have as a benchmark minimum rates provided for with regard to social benefits such as unemployment or invalidity benefits. Similarly, the State is not under any obligation under EEA law to have the minimum wage levels in other EEA States as a benchmark when determining a minimum wage level on the basis of its national law,

Whereas provisions on the working week fall within Article 3(1)(a) of Directive 96/71,

Whereas the same legal considerations apply to the Tariff Board's decisions with regard to provisions on working time, as are applied to minimum rates of pay,

Whereas, the Authority must, therefore, conclude that decisions 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,

Whereas the Authority considers that it is also compatible with Article 36 EEA that the General Application Act permits laying down different rules regarding the working week than the general minimum in the Working Environment Act,

Whereas the complainant maintains that the General Application Act is based on a policy objective, the protection of Norwegian undertakings, described in its preparatory works, which cannot be held legitimate under Article 36 of the EEA Agreement,

Whereas Article 1(1) of the General Application Act provides workers posted to Norway certain legal guarantees with regard to wages, working time and other related employments rights, based on provisions in collective agreements. In that way the Act aims to guarantee foreign workers comparable terms of employment to Norwegian workers under collective agreements. The Court of Justice has recognised the protection of workers as an overriding requirement in the general interest,[2]

Whereas the Court of Justice has ruled that the objective of preventing unfair competition by undertakings paying their workers less than the minimum wage may be taken into consideration as an overriding requirement capable of justifying a restriction on the freedom to provide services. It has also indicated that there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection on the other,

Whereas, the Authority considers that General Application Act pursues an objective recognised in the case law of the Court of Justice as legitimate under EEA law,

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[1] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60.
[2] See *e.g.* Joined Cases C -369/96 and C-376/96 *Arblade* [1999] ECR I-8453 and Joined Cases C-49/98,C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831.

Whereas with regard to the determination of the aim of a legislative act by reference to preparatory documents the Court of Justice has stated that, whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive,

Whereas it has to be examined whether the rules, viewed objectively, promote the protection of posted workers. In that respect it is necessary to check whether the rules confer a genuine benefit on the workers concerned, which significantly added to their social protection,

Whereas, in principle, regulations pursuant to the General Application Act are adopted when it has been demonstrated that workers from other EEA States are subject in their home State to less favourable minimum protection, including lower pay, than applicable under the relevant collective agreement. Following the adoption of a regulation they are ensured of the same level of minimum protection as applicable in the relevant geographical area and/or the profession or industry concerned in Norway. Consequently, the Act confers on them a genuine benefit,

Whereas, it follows from the above, that in general such a system as set up by the General Application Act pursues a legitimate aim capable of justifying a restriction on the freedom to provide services under Article 36 EEA. Moreover, in the Authority's view, the provisions of the General Application Act are suitable and proportionate for achieving that aim,

Whereas, the complainant submits that the discretionary powers vested in the Tariff Board entails legal uncertainty for undertakings offering services in Norway, because they do not have a realistic chance of foreseeing whether a collective agreement will be given general application or not. This will discourage them from entering into of long term agreements,

Whereas, any service provider from another EEA State can prior to commencing services in Norway determine whether a regulation pursuant to the General Application Act has been put into place regarding the particular industry. Once a service provider from another EEA State has started providing services he, like any other employer in Norway, has to take into account that regulatory changes, such as the ones enacted on the basis of the General Application Act, can have an impact on the costs of providing the services,

Whereas, by letter dated 20 May 2009 the Authority informed the complainant of its intention to close the case,

Whereas, the complainant replied by a letter of 29 June 2009, where he restated his arguments with regard to the General Application Act,

Whereas, for the reasons set out above, the Authority is of the view that the General Application Act is compatible with both Article 36 EEA and Directive 96/71,

Whereas 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, 15 July 2009,

For the EFTA Surveillance Authority


Signed version

Per Sanderud
President

Kurt Jaeger
College Member