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Brussels, 27 September 2018
Case No: 74557
Document No: 926939

EFTA SURVEILLANCE
AUTHORITY

Ministry of Labour and Social Affairs
Postboks 8019 Dep
NO 0030 Oslo

Dear Sir/Madam,

Subject: Reply to Norway's letter of 20 June 2018

The Authority recalls that in its letter of 20 January 2017 (Doc No 836998), the Norwegian Government stated that the Authority's letter of formal notice provided a basis for finding solutions to the design of provisions on travel, board and lodging in conformity with Directive 96/71/EC. The Government also explained that those solutions had to be established by the social partners, in conformity with the Norwegian system of wage formation, but that the Government was confident that this process would be successful and produce adequate compromises. By way of response to the Authority's enquiry of 24 May 2018 (Doc No 914749), the Norwegian Government, however, in its letter of 20 June 2018 (Doc No 919088/your ref. 13/3362), explains that in April 2018, wage negotiations were concluded between the social partners, without there being any amendments to the provisions on compensation for travel, board and lodging, relevant for this case.

In paragraphs 9 and 10 of its letter of 20 June 2018, the Norwegian Government makes reference to the expected revision of Directive 96/71/EC and states that some of the amendments will clearly affect the questions raised in this case and that the legal situation seems to be changing. It is stipulated in the letter that the Norwegian Government assumes that the revision of the Directive will have implications on the legal framework for future decisions on the general application of collective agreement, with regard to rules on compensation for travel, board and lodging expenses. Furthermore, it is stated that the Government supposes that the revision of Directive 96/71/EC will also have implications for the Authority on the further follow-up of this specific case.

In light of this, the Authority finds it necessary to submit the following comments with regard to the revision of Directive 96/71/EC.

On 21 June 2018, the Council adopted a revised Directive on the posting of workers, amending Directive 96/71/EC ("the revised Directive").¹ The transposition period for the implementation of the revised Directive in the EU Member States is two years.²

Although the concept of "*minimum rates of pay*" in point (c) of Article 3(1), first subparagraph, of Directive 96/71/EC has now been replaced with the term "*remuneration*", it is clear that compensation for travel, board and lodging expenses does not fall under that new term, as such expenses have now been added as a separate item to the list of mandatory rules for minimum protection, see Article 3(1), first subparagraph, point (i) of the revised Directive.

However, it follows clearly from Article 3(1), second subparagraph, of the revised Directive, that point (i) of Article 3(1), first subparagraph, shall apply exclusively to

¹ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 *amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.*

² See Article 3 of the amending Directive.

travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the host Member State, or where they are temporarily sent by their employer from that regular place of work in the host Member State to another place of work.³ This means that Article 3(1) of the revised Directive only covers reimbursement of expenditure for travel, board and lodging which takes place within the host Member State and only in those circumstances mentioned in Article 3(1), second subparagraph. Accordingly, reimbursement of travel expenses on commencement and completion of the assignment of a posted worker and for a reasonable number of journeys to the home Member State, which is the subject of this case, is not covered by Article 3(1) of the revised Directive.

In that context, reference is also made to Article 3(7) of the revised Directive, which now states that allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. Moreover, the same provision also stipulates that the employer shall reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship. Accordingly, the reimbursement of such expenditure on travel, board and lodging, i.e. other than those which are covered by point (i) of Article 3(1), first subparagraph, of the revised Directive, is governed by the laws and/or practices of the workers' home Member State.⁴

It should also be noted that the public policy derogation in Article 3(10) of Directive 96/71/EC remains unaltered in the revised Directive.

In light of this, it appears clear that the adoption of the revised Directive only reinforces the Authority's position in this case.

Lastly, the Authority reiterates its conclusion in the letter of formal notice of 25 October 2016 (Doc No 775382), stating that, by maintaining in force and applying with respect to undertakings posting workers in the maritime construction industry, for construction sites in Norway and for cleaning enterprises, provisions requiring the employer to cover necessary travel expenses on commencement and completion of the assignment of a worker and for a reasonable number of journeys home and to pay for board and lodging, Norway has failed to fulfil its obligations arising from Article 3(1) of Directive 96/71/EC, read in conjunction with Article 3(10) thereof. Continued general application of the said provisions on travel, board and lodging of the relevant collective agreements entails that Norway remains in breach of Directive 96/71/EC.

In its letter of 20 June 2018, the Norwegian Government stated that the Tariff Board must ensure that its decisions are in line with EEA law. To that end, the Authority is ready to provide guidance on compliance with Directive 96/71/EC to the Tariff Board.

Yours faithfully,

Gunnar Thor Petursson
Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gunnar Thor Petursson.

³ See also recital 8 in the preamble to the revised Directive.

⁴ See also recital 19 in the preamble to the revised Directive. It should be noted, however, that Article 3, paragraph 1a, of the revised Directive provides that when the posting exceeds 12 months (or 18 months on a motivated notification), all the conditions of employment of the host Member State apply.