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Ministry of Labour and Social Affairs
Postboks 8019 Dep,
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Dear Sir/Madam,

Subject: Request for Information – Norway’s expulsion practice concerning EEA nationals who commit minor criminal offences

On 1 September 2021, the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) opened an own-initiative case in order to investigate whether Norway’s expulsion practice for petty crimes based on Circular GI-02/2013 (or “the Circular”)¹ is compatible with Article 27 of Directive 2004/38/EC² *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (“Directive 2004/38” or “the Directive”). The case was opened following two enquiries received by the Directorate into Norway’s practices in this area.

The Directorate recalls that the Authority has previously scrutinised Norway’s expulsion practice from the standpoint of Directive 2004/38 in Case 77287. That case was closed in 2019. However, Circular GI-02/2013 was not assessed in the context of that case. Therefore, the Directorate finds it necessary to examine again Norway’s practice in this field, in particular concerning the Circular.

According to Circular GI-02/2013, the Directorate of Immigration (“UDI”) is entitled to issue expulsion decisions in accordance with Section 122(1) of the Norwegian Immigration Act when EEA nationals commit acts in breach of Sections 257 and 391a of the Norwegian Criminal Code from 1902 (now, apparently, Sections 321 (theft) and 323 (minor theft) of the 2005 Criminal Code). The Circular also provides for criteria to assess whether there is a risk that the individual might reoffend, for example if they are homeless or lack means of subsistence.

It seems clear from the enquiries received that the Circular is applied and enforced by the immigration authorities and the national courts. The result seems to be that EEA nationals have been made subject to expulsion decisions accompanied by re-entry bans because they committed a minor criminal offence. [REDACTED]

[REDACTED]

¹ *Instruks om justering av utvisningspraksis for utlendinger som er straffet for overtredelse av straffeloven § 257 og § 391a*, adopted by the Justis- og beredskapsdepartementet (18 June 2013).

² Act referred to at point 1 of Annex V to the EEA Agreement (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as adapted to the EEA Agreement by protocol 1 thereto.

The Directorate notes that expulsion is the most restrictive measure which can be taken against EEA nationals who have exercised their free movement and residence rights under Directive 2004/38, as noted by the EFTA Court in its recent judgment in Case E-2/20 *The Norwegian Government v L*.³ Thus, any limitations on EEA nationals who have exercised their right to move and/or reside in the host State must be consistent with Article 27 of the Directive.⁴

Article 27 of Directive 2004/38 provides that the EEA States may restrict the freedom of movement of EEA nationals and their family members on grounds of public policy, public security or public health. Several requirements must also be fulfilled when determining whether to expel an EEA national, as stated by the EFTA Court in *The Norwegian Government v L*. In that judgment, the Court described the conditions of Article 27 of the Directive *inter alia* as follows:⁵

“The Court observes that the assessment under Article 27 of the Directive must be based exclusively on the personal conduct of the individual concerned. An expulsion is justified only if, and for as long as, the continued presence of the person concerned amounts to a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see Jan Anfinn Wahl, cited above, paragraphs 84 and 85, and case law cited). Consequently, an EEA State must demonstrate, first, that the EEA national’s personal conduct in committing the offences constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society; second, that the expulsion of the individual is necessary in order to safeguard that interest; and, third, that the measure is proportionate in view of the overall consequences on the individual being expelled and the impact on his family members.”

In light of the above and in order for the Directorate to examine and assess the case, the Norwegian Government is invited to provide the following information:

1. What is the relevant legal framework in Norway when the immigration authorities decide whether to expel an EEA national because of a minor criminal offence?
2. What is the purpose of Circular GI-02/2013 and why was it adopted? Please also explain the Circular’s connection with Circulars RS 2010-022 and RS 2010-024.
3. Please explain the scope of Circular GI-02/2013 in relation to both EEA nationals and third-country national family members of EEA nationals.
4. What is the threshold for expelling an EEA national on the basis of the Circular and how is this applied in the practice of the immigration authorities/national courts?
5. Is the Directorate’s understanding that the immigration authorities have previously expelled EEA nationals because of single minor criminal offence correct?
6. If question 5 is answered in the affirmative, please explain how the requirements of Article 27 of Directive 2004/38 are fulfilled in such circumstances.
7. What public policy or public security issue does the Norwegian Government seek to protect when an EEA national is expelled because of a minor criminal offence?

³ Judgment of the EFTA Court from 21 April 2021 in Case E-2/20 *The Norwegian Government v L*, not yet reported, paragraph 30.

⁴ *Ibid*, paragraph 30.

⁵ *Ibid*, paragraph 32.

8. Does the Norwegian Government consider that an EEA national who commits a criminal offence in breach of Sections 321 or 323 of the Criminal Code constitutes a genuine, present and sufficiently serious threat to fundamental interest of society?
9. Are there any cases before Norwegian courts where the Circular or related issues have been dealt with? If so, please provide the Directorate with copies of the judgments.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *21 October 2021*.

Yours faithfully,

Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gabrielle Somers.