COMPLAINT UNDER ARTICLE 107 TFEU AND ARTICLE 45 TFEU CONCERNING
UNLAWFUL STATE AID TO KORMAL

COMPLAINANT: The Swedish Building Workers’ Union
Svenska Byggnadsarbetareförbundet
Reg. No 802000-4936,
hereinafter "Byggnads"
SE-106 32 Stockholm
SWEDEN
Contact person: Chefsjurist Mattias Landgren

REPRESENTED BY: Advokat Ulf Öberg, Member of the Swedish Bar Association
Advokat Ida Otken Eriksson, Member of the Danish Bar and Law Society
Jur. kand., MJur Martin Mörk

Advokatsfirman Öberg & Associés AB
Box 2098
SE-103 13 Stockholm
SWEDEN

TELEPHONE: +46 8 545 12 550
E-mail addresses: info@obergassocies.eu (in case of emergency)
ulf.oberg@obergassocies.eu
ida.otken-eriksson@obergassocies.eu
martin.mork@obergassocies.eu
Fax: +46 8 545 12 559

A Power of Attorney is enclosed (enclosure 1).

ALLEGED BENEFICIARIES: Kormal Spolka Z00
Reg. No 500409-1368
ul. Zielna 39
00-108 Warszawa
POLAND

MEMBER STATE
GRANTING THE AID: The Kingdom of Sweden
I – SUMMARY OF THE COMPLAINT

Byggnads submits that the Swedish authorities’ exemption of the Polish construction company Kormal from the obligation to pay Swedish social security contributions for its posted Polish workers in Sweden constitute unlawful State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”).

According to Swedish law, employers in Sweden are under an obligation to pay statutory social security contributions to the Swedish State on behalf of their employees. The social security contributions amount to 31.42 % of the employees’ gross salary and consist of charges for pensions, health insurance and other social benefits. The charges are paid by the employer on top of the gross salary.

However, in Swedish law, a foreign employer who posts workers to Sweden for work not exceeding one year is exempt from the obligation to pay social fees.

This exemption creates an economic advantage for employers posting workers in Sweden in cases where the workers in question are subject to a system in which social security contributions are largely deducted from the salary of the employee.

One of the employers enjoying this advantage is Kormal, whose Polish workers belong to the Polish social security system. Under Polish law, Kormal is obliged to deduct from the salaries of their employees an amount calculated as 21.46 % of the gross salary, representing the total amount of social security contributions to be paid by the employee in Poland.

It is clear that the Swedish legislation providing for the exemption is per se in conformity with Regulation No 883/2004.¹ Nevertheless, the fact that national legislation may be in

conformity with secondary legislation such as Regulation No 1408/71\(^2\) or Regulation No 883/2004, does not have the effect of removing that legislation or measures taken pursuant to it from the scope of the provisions of the EU Treaties (Case C-158/96 Kohll [1998] ECR I-1931, paragraph 25, Case C-372/04 Watts [2006] ECR I-4325, paragraph 47 and Case C-211/08 Commission v Spain [2010] ECR I-0000, paragraph 45).

By exempting Kormal from the obligation to pay Swedish social security contributions on top of the workers gross salary, Sweden grants Kormal an exemption from the costs normally borne by companies in Kormal’s sector in Sweden. The measure thus constitutes an advantage for Kormal within the meaning of article 107.1 TFEU. As social security contributions are payable to the state, the aid is derived from state resources. Furthermore, the fact that Kormal is able to operate with significantly lower costs for their employees than their competitors severely restricts competition. Finally, the measure has an effect on interstate trade. By the advantage granted to it in Sweden, Kormal is able to lower its costs in both Poland and Germany.

In addition to constituting an unlawful aid, the exemption of Kormal from the duty to pay Swedish social contributions constitutes a breach of Sweden's Treaty obligations to protect the rights and interests of the Polish workers.

As a host Member State, Sweden is under a strict EU law duty to ensure that the Polish workers of Kormal enjoy the same level of welfare protection as that of Swedish workers in the same sector. According to the case law of the Court of Justice, this obligation is not fulfilled unless the workers in question enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment (Case C-165/98 Mazzoleni and ISA [2001] ECR I–2189, paragraph 35).

By exempting Kormal from the obligation to pay Swedish social security contributions on top of the workers’ gross salary, Sweden has allowed for a situation in which the position of Kormal’s Polish workers, in terms of remuneration and social security contributions, significantly deviates from the position of their Swedish colleagues. Notwithstanding the difference in the levels of social security contributions, the Polish workers will in effect receive 21.46% less in gross salary than their Swedish counterparts.

This constitutes a breach of the principle of equal pay for equal work stated in Article 45 TFEU and in 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 (OJ 1997 L 18, p. 1). It also constitutes a breach of the principles underlying Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, p. 1), namely that the coordination of social security systems should be to the benefit and not to the detriment of workers. As the contested measure is not taken in the interest of workers, it could neither be deemed necessary nor proportionate in relation to this aim.

Finally, a measure constituting State Aid within the meaning of article 107(1) TFEU cannot be deemed to conform with the internal market pursuant to article 107(2) or (3) TFEU should it violate other fundamental provisions of the Treaty.

II – BRIEF DESCRIPTION OF THE COMPLAINANT

Byggnads is a Swedish trade union organising construction workers engaged in 32 different trades, including woodworking, concrete and cement working, construction machinery handling, bricklaying, stone working, floor laying and road building.

Byggnads has approximately 112 000 members, out of which roughly 100 000 are of working age. A number of Byggnads’ members are from other EU Member States than Sweden.
In addition to safeguarding the interests of their members in the labour market and society at large, Byggnads actively works to promote societal development in conformity with the values of political, social and economic democracy.

Byggnads is a member of the The Building and Wood Workers International (BWI), the European Federation of Building and Wood Workers (EFBWW) and the Nordic Federation of Building and Wood Workers (NBTF). Byggnads is furthermore the fifth largest member of Landsorganisationen i Sverige (LO), i.e. the Swedish Confederation of Trade Unions.

The identity of the complainant may be revealed to the public.

Considering the risk of sanctions or other reprisals, the identities of Byggnads’ Polish members relevant to this complaint will not be revealed to the Commission at this stage.

III — BRIEF DESCRIPTION OF THE BENEFICIARY OF THE UNLAWFUL STATE AID AND OF THE FACTUAL BACKGROUND

Kormal is a Polish building and construction company founded in May 1989. The company offers its services in the Polish, German and Swedish markets.

According to its website (www.kormal.pl), Kormal employs more than 450 qualified workers with professional experience in both specialized and general building and construction ventures.

Kormal is bound by a collective agreement with Byggnads by means of a local “tie-in agreement” ("hängavtal") entered into on 29 October 2004 with the local section of Byggnads in Norrköping (Bygg 9:an) (enclosure 2).

During 2010, Kormal was engaged in the construction of a bridge in the Gothenburg region as a sub-contractor to the Danish construction company E. Pihl & Søn A.S.
The local section of Byggnads in Gothenburg entered into a wage agreement for the work in question ("löneöverenskommelse") with Kormal in February 2010 (enclosure 3). According to the wage agreement, the wage to be paid ("förhjästningsväge") was 160 SEK/hour.

27 of Kormal's workers of Polish nationality joined the local section of Byggnads in Gothenburg.

The local section of Byggnads in Göteborg requested so-called dispute settlement negotiations ("tvisteförhandling") with Kormal in reference to alleged breaches of the collective agreement. During those negotiations, it was revealed that Kormal deducts 21.47% from each workers gross salary. Kormal informed Byggnads that the deduction was made pursuant to Polish law and corresponds to Polish social security contributions.

IV - INFORMATION REGARDING THE STATE AID MEASURE

Social security contributions according to Swedish law

According to Swedish law, all employers in Sweden pay statutory social security fees ("arbetsgivaravgifter") on behalf of their employees, consisting of charges for pensions, health insurance and other social benefits. Employers also pay a payroll contribution fee. The social security fees are regulated in Chapters 1 and 2 of the Act (2000:980) on Social Security Fees (socialavgiftslagen), the Act (1994:1920) on a General Fee on Salaries (lag om allmän löneavgift), and Chapter 9 of The Tax Payment Act (1997:483) (skattebetalningslagen).

During 2010 (the year of relevance to this complaint), the total social security contributions (including the payroll contribution fee) amounted to 31.42% of the employees' monthly gross salary including benefits:
Retirement pension 10.21
Survivor’s pension 1.70
Health insurance 5.95
Occupational injury insurance 0.68
Parental insurance 2.20
Unemployment insurance 4.65
Payroll contribution 6.03

Total statutory employer contribution 31.42 %

Social security contributions are made on top of wage and salary payments and are payable for any employee or contractor who has earned SEK 1,000 or more during the fiscal year (Chapter 2 section 14 of the Act (2000:980) on Social Security Fees).

As a general rule, social security contributions shall be paid for those who work in Sweden (Chapter 2 section 4 of the Act (2000:980) on Social Security Fees). Foreign employers without a permanent establishment in Sweden but with locally hired employees are also obliged to pay Swedish social security contributions on behalf of those employees, unless there is an agreement to the effect that the employee should pay his/her own social fees (Chapter 2 section 8 of the Act (2000:980) on Social Security Fees).

However, a foreign employer who posts a worker to Sweden for work not exceeding one year is exempt from the obligation to pay Swedish social security contributions (Chapter 1 section 8 of the Act (2000:980) on Social Security Fees and Chapter 2 section 9 of the Act (1999:799) on Social Insurance – this Act has as of 1 January 2011 been replaced by the Act (2010:1281) on Social Insurance (socialförsäkringsbalken), but the same exemption follows from Chapter 6 section 4 of the new Act).
Social security contributions according to Polish law

Two Polish acts regulate social security contributions:

(i) The Act on the Social Security System of October 13th, 1998 (Ustawa o systemie ubezpieczeń społecznych) hereinafter referred to as “the Social Security Act”

and

(ii) The Act on Healthcare Benefits Financed from Public Funds of August 27th, 2004 (Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych) hereinafter referred to as “the Healthcare Act”.

According to those Acts, social security contributions are financed in part by the employee and in part by the employer. The part financed by the employee is deducted from the employee’s gross salary, whereas the part financed by the employer is paid by the employer on top of the gross salary.

Both parts of the social security contributions are collected by the employer and remitted to ZUS (the Social Security Agency), which is the public authority responsible for the administration of social security benefits in Poland.

A Polish employer in the construction sector pays the following fees on top of the salary of the employees (the basis of calculation is the gross salary of the employee).
Old age .................................................9.76
Disability insurance .........................4.5
Accidents at work (construction) ...........2.0

Total employer contribution approx. 16.26%

The rate pertaining to the contribution for insurance against accidents at work varies between different industry sectors depending on the average number of accidents in the respective sector. The rate thus varies from 0.67% for the banking and finance sector to 3.33% for the mining sector (according to the Regulation of the Minister for Labour and Social Policy of November 29th, 2002). Furthermore, the rate may be raised or lowered for individual employers by the application of an individual multiplication factor decided by ZUS. The individual multiplication factor depends on the employer’s history of work related accidents.

The normal rate for the construction sector is 2%, but the individual multiplication factor can vary from 0.5 to 1.5. Based on the assumption that there were neither more nor less work related accidents in Kormal than in other Polish construction companies, Byggnads assumes that the normal rate of 2% applies to Kormal.

In addition, a Polish employer may also have to contribute to the Labor Fund (2.45 %), to the Fund for the Guaranteed Employees’ Benefits (0.10 %), to the Fund for the Rehabilitation of the Disabled and to the Fund for Bridge Pensions (1.5 %). These contributions are regulated by specific legislative acts. The rates to be paid to the Labor Fund and the Fund for the Guaranteed Employees’ Benefits are decided each year in the national budget. Bridge pensions are paid for employees who have not attained retirement age and who work under special conditions (e.g. determined by the forces of nature) or whose work otherwise is of a “particular character” (i.e. of particular responsibility or demanding a particular ability). Employers with more than 25 employees have to contribute to the Fund for the Rehabilitation of the Disabled. However, should at least 6 % of the workforce be disabled, the employer is
exempt from paying the contribution. The fewer disabled employees that work for the employer, the higher the amount of the contribution to be paid.

The old age and disability contributions are capped. In 2010 the maximum salary base for calculation was PLN 94.380 (approx. EUR 23.600).

A Polish employee pays the following social security contributions (the basis of calculation is the gross salary of the employee, except the contribution to the healthcare insurance, see below):

<table>
<thead>
<tr>
<th>Contribution</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old age</td>
<td>9.76</td>
</tr>
<tr>
<td>Disability insurance</td>
<td>1.5</td>
</tr>
<tr>
<td>Sickness insurance</td>
<td>2.45</td>
</tr>
<tr>
<td>Healthcare insurance</td>
<td>9.0</td>
</tr>
</tbody>
</table>

**Total employee contribution 21.47 %**

The contribution to the Healthcare insurance (9 %) is calculated on the gross employee remuneration minus the social security contributions paid by the employee. The actual reduction of the employees' gross salary is thus 21.47 %. Moreover, the contribution to the Healthcare insurance is deductible from the income tax paid by the employee, but only up to 7.75 %. Remaining 1.25 % is paid by the employee and cannot be deducted from the income tax paid by the employee.

In summary, the gross amount of salary of a Polish employee is decreased with at least 21.47 % (aggregate amount of social security contributions due from the employee out of which 34.12 % are tax deductible healthcare contributions).
This means that a Polish worker *de facto* pays a very large part of the social contributions due to his employment himself or herself, whereas under Swedish law, these social contributions are paid by the employer on top of the salary.

*The coordination of social security contributions in European union law*

According to the first recital of the preamble to Regulation No 883/2004, the rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving the standard of living and the conditions of employment.

According to the fifth recital to Regulation No 883/2004, it is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislations for the persons concerned. Indeed, as stated in the eight recital to the Regulation, the general principle of equal treatment is of particular importance for workers not residing in the Member State of their employment, including frontier workers.

Under the so-called Single State Rule in Article 11(1) of the Regulation, persons to whom the Regulation applies shall be subject to the legislation of a single Member State only. Under Article 11(3) a), and subject to Articles 12 to 16, a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State.

The purpose of the Single State Rule is to avoid any plurality or purposeless overlapping of contributions and liabilities which would result from the simultaneous or alternate application of several legislative systems, and, moreover, to prevent those concerned, in the absence of legislation applying to them, from remaining without protection in the matter of social security. The provision does not authorise a national insurance institution either expressly or
by implication to reduce the benefits which are due to a worker or those entitled under him under national legislation alone (Case 50/75 Massonet [1975] ECR 1473).

Furthermore, Article 11(1) prohibits a Member State other than the one in whose territory a worker is employed from applying its social security legislation to such a worker, where that would lead to an increase in the charges borne by workers or their employers without any supplementary protection by way of social security (Cases 19/67 Van der Vecht [1967] ECR 345).

However, Article 12(1) derogates from Article 11, in so far as it states that “A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.”

In applying Article 14(1) in regulation No 1408/71 (that was replaced by Article 12(1) in Regulation No 883/2004) to posted workers, the Court has held that the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established, and that this institution therefore cannot make the workers in question subject to its own social security system (Case C-202/97 FTS [2000] ECR I-883, paragraph 55 and Case C-2/05 Kiere [2006] ECR I-1079).

In other words, it is clear that the Swedish legislation is per se in conformity with Regulation No 883/2004. Nevertheless, the fact that national legislation may be in conformity with Regulation No 1408/71 or Regulation No 883/2004, does not have the effect of removing that legislation from the scope of the provisions of the EU Treaties (Case C-158/96 Kohll [1998]

It follows from the hierarchy of norms in the EU legal order that a measure taken pursuant to secondary legislation must be deemed unlawful, should that measure be found to violate primary norms of EU law.

It should furthermore be stressed that according to the case-law of the Court, the host Member State’s obligation of ensuring the same level of welfare protection for the employees of Kormal as that applicable in its territory to workers in the same sector may only be regarded as fulfilled if all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment (Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 35).

V—GROUNDS OF COMPLAINT

Byggnads submits that the exemption of Kormal from the duty to pay Swedish social security contributions for their Polish posted workers constitute State aid within the meaning of Article 107(1) of the Treaty. Indeed, the measure confers an advantage on Kormal, which is derived from State resources. The measure also affects competition and is liable to affect trade between Member States.

Advantage

The first requirement for the applicability of Article 107(1) TFEU is that the measure must confer an advantage on certain specific undertakings. Kormal receives an economic advantage by avoiding costs, which it normally would have to bear. By not having to pay Swedish Social
fees on top of the salary paid to its employees, Kormal enjoys a significant advantage in the form of lower costs for its work force.

Indeed, any measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (Case C-200/97 Ecotrade [1998] ECR I-7907, paragraph 34). By providing to certain undertakings the advantage of exempting them from Swedish social security contributions, the system set up by the Swedish legislation in conformity with Regulation No 883/2004 relieves them of some of their costs and confers on them a financial advantage which improve their competitive position as regards social security contributions (see Case C-75/97 Belgium v Commission [1999] ECR I-3671, paragraphs 24 and 25).

State or through State resources

The second requirement for Article 107 TFEU to be applicable is that the aid must be granted by the State or through state resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. In the present case, the use of state resources takes the form of revenue forgone by the public authorities. The exemption of Kormal from the payment of Swedish social security contributions reduces the revenue accruing to the State (see Case C-387/92 Banco Exterior de España [1994] ECR I-877, paragraph 14).

Distortion of competition and effect on trade

The third and fourth conditions for the applicability of Article 107(1) TFEU require that the aid distorts or threatens to distort competition and that it is liable to affect trade between Member States.
Byggnads recalls that when aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in trade between Member States, the latter must be regarded as affected by that aid (see, in particular, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11; Case C-53/00 Ferring [2001] ECR I-9067, paragraph 21; and Case C-372/97 Italy v Commission, [2004] ECR I-3679, paragraph 52).

The fact that Kormal is able to operate with significantly lower costs for their employees than their competitors who fail to qualify for the exemption is liable to severely distort competition in the construction sector.

As for the impediment to interstate trade, it suffices to note that Kormal is involved in trade between Member States. Aid granted by a Member State to an undertaking may help to maintain or increase activity in the Member State, with the result that other undertakings have less of a chance to penetrate the market of the Member State concerned – in this case Sweden.

Furthermore, the exemption of Kormal places the undertaking in a stronger position in relation to its competitors in Poland as well as in Germany.

*Selectiveness*

Finally, a measure must be specific or selective in order to qualify as State aid under Article 107 TFEU. The requirement entails that the measure must favour “certain undertakings or the production of certain goods”.

In order to determine whether a measure is selective, it should be examined whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison to others which are in a comparable legal and factual situation (Case C-487/06 P British Aggregates v Commission [2008] ECR I-10515, paragraph 82).
Byggnads submits that Kormal and Swedish construction undertakings are in comparable legal and factual situations insofar as they carry out work in Sweden. Whereas Swedish construction undertakings need to pay burdensome social security fees, Kormal is only required to pay a limited amount on top of the employees' gross salary as most of the social security contributions are deducted from the salary of the employee. The exemption makes it significantly less costly for Kormal to have workers carrying out work on Swedish construction sites than for their Swedish competitors.

According to the case-law of the Court, aid in the form of an aid programme may concern a whole economic sector and still be covered by Article 107(1) TFEU (Case 248/84 Germany v Commission [1987] ECR 4013, paragraph 18). The selectivity criterion may be fulfilled even as regards measures that apply to all sectors of the economy (see in particular Commission Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions implemented by Spain C45/07, ex NN 51/07, ex CP 9/07, 2011/S/EC, OJ 2011, 7/48).

As regards the present complaint, the Swedish exemption from social security contributions is selective as it is limited to one category of undertakings, namely undertakings posting workers to Sweden from Member States where social security contributions are deducted from the gross salary of the employees. Although it is not possible to present a complete overview of the number and nature of the undertakings that actually post workers to Sweden, there is no doubt that most of them are active in the construction sector. This was i.a. concluded in the Swedish report on measures to be taken following the ruling in the Laval case (SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen, s. 219). Byggnads also refer to the report presented by the European Foundation for the Improvement of Living and Working Conditions in 2010, Posted Workers in the European Union, p. 8.\(^3\)\(^4\)

\(^3\) Available at http://www.regeringen.se/sb/d/10654/a/117443
\(^4\) Available at http://www.eurofound.europa.eu/eiro/studies/tn0908038s/tn0908038s.htm
The Swedish exemption is thus *de facto* selective as regards Polish undertakings in the construction sector posting workers to Sweden.

It also follows from the case-law of the Court that a measure designed to give the undertakings of a particular industrial sector a partial reduction of the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system, must be regarded as aid (Case 173/73 Italy v Commission [1974] ECR 709, paragraph 33).

Byggnads does not consider that the selective nature of the Swedish exemption can be justified by “the nature or general scheme of the system”. Justification is only available for measures whose economic rationale makes them necessary to the functioning and effectiveness of the system in question (see by analogy the Commission notice on the application of the State aid rules to measures relating to direct business taxation, paragraph 23). According to the Commission notice, “certain exceptions to the tax rules are difficult to justify by the logic of a tax system. This is, for example, the case if non-resident companies are treated more favourably than resident ones …” (paragraph 26).

Byggnads does not question the fact that posted workers are covered by the social security systems of their home countries, or that the size of the actual social security contributions may vary depending on the social security systems in question. What Byggnads questions is the fact that the Swedish exemption fails to take account of the fundamental difference between social security systems in which the social security contributions are paid by the employer *on top* of the gross salary and systems in which the contributions are *deducted* from the employees’ gross salary. By not considering this fundamental difference, a direct competitive advantage is granted to non-resident undertakings such as Kormal. The advantage is of such a nature that it severely harms competition and cannot be justified by the nature or general scheme of the social welfare system.
Breach of Article 45 TFEU

In addition to constituting an unlawful aid, the exemption of Kormal from the duty to pay Swedish social contributions also constitutes a breach of Sweden's Treaty obligations to protect the rights and interests of the Polish workers.

As a host Member State, Sweden is under a strict EU law duty to ensure that the Polish workers of Kormal enjoy the same level of welfare protection as that of Swedish workers in the same sector and/or at the same workplace. According to the case law of the Court of Justice, this obligation is not fulfilled unless the workers in question enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment (see Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 35).

By exempting Kormal from the obligation to pay Swedish social security contributions on top of the workers’ gross salary, the Swedish authorities have allowed for a situation in which the position of Kormal’s Polish workers, in terms of remuneration and social security contributions, significantly deviates from the position of their Swedish colleagues. Notwithstanding the difference in the levels of social security contributions, the Polish workers will in effect receive 21.46% less in gross salary than their Swedish counterparts.

This constitutes a breach of the principle of equal pay for equal work in Article 45 TFEU and of 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 (OJ 1997 L 18, p. 1). It also infringes the principles underlying Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, p. 1) that the coordination of social security systems should be to the benefit and not to the detriment of workers. As Sweden's measure is not taken in the
interest of workers, it could neither be deemed necessary nor proportionate in relation to this aim.

A measure constituting State aid within the meaning of article 107(1) TFEU cannot be deemed to conform with the internal market pursuant to articles 45 and 108 TFEU should it violate other fundamental provisions of the Treaty. Although the procedure provided for in Articles 107 TFEU and 108 TFEU leaves a margin of discretion to the Commission for assessing the compatibility of an aid scheme with the requirements of the common market, it follows from the general scheme of the EU Treaties that that procedure must never produce a result which is contrary to the specific provisions of the Treaties (Case T-359/04 British Aggregates v Commission [2010] ECR I-0000, paragraphs 91-92 and the case-law cited therein).

VI – BYGGNADS STANDING TO BRING THE PRESENT COMPLAINT

According to the case-law of the European Court of Justice, a trade union may show that it is a party concerned within the meaning of Article 108(2) TFEU, by relying on its role in collective negotiations (Case C-319/07 P 3F v Commission [2009] ECR-5963). Thus, a trade union may be regarded as “concerned” within the meaning of Article 108(2) TFEU if it shows that its interests or those of its members may be affected by the granting of aid. The trade union must show, however, that the aid is likely to have a real effect on its situation or that of the members it represents (the 3F-judgment, paragraph 33).

In the case at hand, the effects of exempting Kormal from paying Swedish social security contributions on top of the salaries is liable to undermine the principle of equal pay for equal work in Article 45 TFEU, the social policy objectives referred to in inter alia the first paragraph of Article 151 TFEU and Article 158(1) TFEU as well as in Article 28 of the Charter of fundamental rights of the European Union.
Byggnads has negotiated equal pay for equal work for its Polish members. Still due to the unlawful State aid measure in question the Polish workers in actuality receive 21.46 % less in salary than their Swedish counterparts. The aid thus has a severe impact on the rights and interests of Byggnads’ Polish members and Byggnads must be allowed to act on their behalf.

Indeed, as stated by the Court in the 3F v Commission judgment, this conclusion is supported by the fact that, since the union has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State aid and competition must be balanced, where appropriate, against the objectives pursued by social policy, which include, as is clear from Articles 45 TFEU and the first paragraph of 151 TFEU, inter alia the free movement of workers, equal pay for equal work, and improved living and working conditions.

The information provided is non-confidential and can be sent to the Member State in question.

Stockholm 29 March 2011

Ulf Öberg
Advokat

Ida Otken Eriksson
EU-advokat

Martin Mörk
Jur.kand. MJur
Enclosures:

1. Power of Attorney
2. Local “tie-in agreement” ("hängavtal") entered into on 29 October 2004
3. Wage agreement (”löneöverenskommelse”) entered into on 10 February 2010
POWER OF ATTORNEY

för each of

ADVOKAT ULF ÖBERG
ADVOKAT IDA OTKEN ERIKSSON¹
JUR. KAND/MJUR MARTIN MÖRK

at Advokatfirman Öberg & Associés AB (556707-2557) Stockholm

or the person whom the representative authorized by this power of attorney may nominate in his/her stead,

on behalf of The Swedish Building Workers’ Union (Svenska Byggnadsarbetareförbundet), reg. no 802000-4936, hereinafter ”Byggnads”,

to represent us at courts of law and before other authorities including the European Commission or otherwise, to institute legal proceedings and file complaints, to collect, receive and give receipts for money and documents accruing to us in all matters concerning:

a Complaint under Article 107 TFEU and Article 45 TFEU concerning unlawful State aid to Kormal.

Stockholm 28 March 2011

On behalf of Byggnads

¹ Member of the Danish Bar and Law Society, registered with the Swedish Bar Association.
Närvarande     Styrelsen  
Hans Tilly, Johan Lindholm, Torbjörn Hagelin, Torbjörn Johansson,  
Christian Bengtzelius, Roland Ljungdell, Lars Hildingsson, Magnus Cato,  
Mats Engström, Thomas Emanuellsön och Jim Sundelin.  

§ 2.  

Justeringsmän Till att justera dagens protokoll utsågs Lars Hildingsson och Jim Sundelin.  

§ 4.  

Firmateckning I anslutning till bestämmelserna i stadgarnas § 19 beslöt förbundsstyrelsen att Svenska Byggnadsarbetareförbundets firma ska tecknas av ordförande Hans Tilly, andre ordförande Johan Lindholm, förbundssekreterare Torbjörn Hagelin, avtalssekreterare Torbjörn Johansson två i förening.  

Dessutom tecknas firman av envar av ekonomichef Niklas Rengen, biträdande ekonomichef Leif Hjelm och personalchef Conny Lantz i förening med envar av ordförande Hans Tilly, andre ordförande Johan Lindholm, förbundssekreterare Torbjörn Hagelin, avtalssekreterare Torbjörn Johansson.  

Vid protokollet:  
Inger Dahlqvist  

Justeras:  
Hans Tilly  
Lars Hildingsson  
Jim Sundelin  

Rätt utdraget intygar:  

[Signatur]
Kollektivavtal

Byggnads- och Anläggningsavtalet

Kollektivavtal

**mellan** Przedsiębiorstwo Projektowania, Handlu i Usług Kormal Spolka Z.O.O
Regen 008104160
ul. Zielska 39
00-108 Warszawa

**och** Svenska Byggnadsarbetareförbundet (Byggnads)

§ 1 **Avtalets innehåll och omfattning**
Detta avtal har med iakttagande av nedan angivna ändringar och tillägg samma innebörd och omfattning som mellan Sveriges Byggindustrier och Byggnads vid varje tidpunkt gällande överenskommelse av kollektivavtals karaktär.

§ 2 **Löneformer**
Lön utgår i form av prestationslön (Byggnadsavtalet), ackordslön (Anläggningsavtalet) eller tidlön enligt särskild lönebilaga (Bilaga 1) till detta avtal.

§ 3 **Försäkringar m m**
Arbetsgivaren skall teckna försäkringar samt inbetalta premier och andra avgifter i den omfattning som det åligger honom enligt kollektivavtal och lag.

§ 4 **Anställning**
Parterna är ense om värdet i att arbetarna är fackligt organiserade.

§ 5 **Gransknings- och mätningsarbode**
Berörd lokalavdelning hos Byggnads äger rätt att fortlöpande granska löneförhållandena vid prestations-, ackords- och tidlönearbete.

För granskningsarbete och granskningsarvode gäller, i stället för Byggnadsavtalets regler i § 3 f5, Anläggningsavtalets regler i § 3 d3 med de tillägg och ändringar som regleras i granskningsöverenskommelse som biläggs detta avtal (Bilaga 2).

1 (2)
§ 6  Anmälan om ändrade företagsförhållanden m m
Om arbetsgivaren eller företaget ämnar bedriva verksamhet i annan form, registrerar, namnändrar eller överlåter sin rörelse, skall han senast fjorton (14) dagar före sådan ändring anmäla detta till Byggnads under i avtalet angiven adress.

§ 7  Giltighetstid och uppsägning
Detta avtal gäller från och med 2004-10-29 och tillsvidare med fjorton (14) dagars ömsesidig uppsägningstid. Uppsägning av detta avtal skall ske skriftligen av arbetstagargården under arbetsgivarens adress och av arbetsgivaren till Byggnads

Norrköping 2004-10-29

För
Svenska
Byggnadsarbetareförbundet

Lars Karlsson

För
Przedsiebiorstwo Projektowania,
Handlu i Uslug Kornal Spolka Z.O.O

Pawel Daczka
Löneöverenskommelse

mellan Kormal Spolka Z.O.O
Region 008104160
Ul. Zielna 39
00-108 Warszawa
och Svenska Byggnadsarbetareförbundet Avdelning 9
(Bygg 9:an Norrköping)

Tillämpningsområde
Företagets samtliga arbetsplatser som saknar förutsättningar för prestationslönn / ackord enligt §3 huvudavtalet (Bygg- och/eller Anläggningsavtalet) och som ligger inom Bygg 9:an Norrköping verksamhetsområde.

Löneöverenskommelse
För yrkesarbetare betalas per timme 115,00 kronor.

Giltighetstid
Tillsvidare med en ömsesidig uppsägningstid av 3 månader. Kommande avtalshöjningar skall beaktas.

Norrköping 2004-10-29

För
Bygg 9:an Norrköping

Lars Karlsson

För
Kormal Spolka Z.O.O

Paweł Dączmal
# Protokoll

Bilaga till kollektivavtal

<table>
<thead>
<tr>
<th>Datum</th>
<th>2004-10-29</th>
</tr>
</thead>
<tbody>
<tr>
<td>Närvarande</td>
<td>Kormal Spolka Z.O.O</td>
</tr>
<tr>
<td></td>
<td>Regon 008104160</td>
</tr>
<tr>
<td></td>
<td>Pawel Duezmal</td>
</tr>
<tr>
<td></td>
<td>Svenska Byggnadsarbetareförbundet Avdelning 9</td>
</tr>
<tr>
<td></td>
<td>Lars Karlsson</td>
</tr>
</tbody>
</table>

## Ärende

Upprättande av kollektivavtal

## Överenskommelse

Parterna enades om följande:

- Kollektivavtal tecknas enligt formulär A.
- Företagets verksamhetsområde utgör 8 villor i Norrköping med omnejd.
- Företagets anställda utgör 22 st.
- Om förändring sker skall förhandling upptas med MB-grupp/kontaktombud eller om sådan saknas den lokala avdelningen för bestämmande av turordningsområde. Förändringar kan göras under löpande avtalstid vid förändring av företagets verksamhetsområde.
- Första granskningsredovisningen sker på företaget 2004-12-20 .
- Granskningsunderlag inlevereras till avdelningen med 2 månaders intervall.
Härefter avslutades förhandlingen.

Justerat

Norrköping 2004-10-29

Svenska
Byggnadsarbetareförbundet
Avdelning 9

Kormal Spolka Z.O.O

Lars Karlsson

Paweł Duczmal
Överenskommelse

mellan Przedsiębiorstwo Projektowania, Handlu i Usług Kormal Spółka Z.O.O
Regon 008104160
ul. Zielna 39
00-108 Warszawa

och Svenska Byggnadsarbetareförbundet Avdelning 9 (Bygg 9:an Norrköping)

beträffande granskning av löneförhållanden vid prestationslönearbete (ackords-
eller resultatlönearbete) och tidlönearbete på arbetsplatser inom byggnads-
- och anläggningsavtalets tillämpningsområde. Överenskommelsen gäller samtliga
arbetsplatser och företag för vilka ifrågavarande företag handhar
löncadimensionen.

Enligt avtal mellan Sveriges Bygindustrier och Byggnads inom byggnads-
industrin beträffande gransknings- och mätningsarbete, äger berörd lokal-
avdelning hos Byggnads rätt att förloppande granska löneförhållanden vid
prestations- och tidlönearbete. I anslutning härtill överenskommes om följande:

1. Arbetsgivaren är skyldig att vid verksamhet utanför undertecknande
avdelnings verksamhetsområde anmäla arbete till berörd
lokalavdelning inom vars område arbetsplatsen är belägen och med
den senare avdelningen träffa överenskommelse om hur granskning
skall ske för berört arbete.

2. Granskning av prestationslönearbete anses ha skett genom att
lokalavdelning endera:

- genomgått avlöningsunderlag i samband med teknisk mätning,
- upprättat mätningsräkning och fördelningslista på basis av
överlämnat mätningsunderlag,
- utfört avläsning och granskat utfallet av resultatlöne-
överenskommelse,
- på annat sätt granskat prestationslöneöverenskommelser, prestations-
löneuppgifter, fördelningslistor eller annat avlöningsunderlag.

3. Granskning av tidlönearbete anses ha skett genom att
lokalavdelningen granskat avlöningslistor eller redovisningslistor
eller annat underlag som legat till grund för utbetalning av lön.
4. För granskning av prestationslönearbete med månadvis löneutbetalning i förskott samt för granskning av tidlönearbete, översänder arbetsgivaren till lokalavdelningen varannan månad redovisning enligt typexempel, som bifogas denna överenskommelse, Bilaga 1a (timlön) /1b (månadslön).

Redovisning sker en vecka efter sista avlöningsdagen för ovan nämnda perioder.

5. Om arbete utföres enligt R- och S-avtalet skall arbetsgivaren dessutom översända prestationslöneöverenskommelser eller mätningarunderlag, som upprättats mellan arbetsgivare och arbetslag, senast fyra dagar efter det att dessa upprättats.

6. Utöver vad som anges i punkterna 2 - 5, äger lokalavdelning rätt att på arbetsplatsen eller på annat sätt som överenskommes, granska underlag avseende både prestations- och tidlönearbete.

7. Arbetsgivaren är skyldig att till lokalavdelningen inbetalta granskningsarvode för de med granskningsarbetea förenade kostnaderna. Granskningsarvodet uppgår till 1,5 procent av arbetarnas totala lönesumma för allt prestations- och tidlönearbete (= ackord, tidlön, bergrumsstillägg och kallortstillägg) under ifrågavarande granskningsperiod.

8. Vid prestationslönearbete utgår utöver granskningsarvode även mätningsarvode.

Avdrag för mättingsarvode skall av arbetsgivaren göras i samband med utbetalning av prestationslöneöverskott.


10. För ackordsarbete med månadvis löneutbetalning i förskott samt för tidlöne- och resultatlönearbete skall inbetalning av granskningsarvode ske senast 30 dagar efter mottagandet av granskningsräkning från lokalavdelningen.

11. För prestationslönearbete med månadvis löneutbetalning i förskott skall inbetalning av mättingsarvode ske samtidigt som utbetalning av prestationslöneöverskott efter mottagandet av räkning från lokalavdelning.

2 (3)
12. För ackordsarbete med antingen 14-dagarslönn eller månadvis löneutbetalning i efterskott skall inbetalning av gransknings- och mätningssvartote ske samtidigt som utbetalning av ackordsöverskott efter mottagandet av räkning från lokalavdelningen.

13. Arbetsgivaren är skyldig att i kontrolluppgift ange avdraget mätningssvartote.

Norrköping 2004-10-29

För
Bygg 9:an Norrköping

Lars Karlsson

För

Paweł Dęczmal
Protokoll

Förhandling

Arbetsgivarpart
Kormal Spolka ZOO

Org nr
500409-1368

Arbetstagarpact
Svenska Byggnadsarbetareförbundet Avdelning 12

Förhandlingsplats
I avdelningens lokaler Olof Palmes plats 1 Göteborg

Förhandlingsdag
2010-02-10

Närvarande
För Kormal Spolka ZOO
Tadeusz Iwanowski

För Svenska Byggnadsarbetareförbundet Avdelning 12
Roland Schüler
Jan-Erik Berg/protokollförare.

Härutöver deltog
Mikolaj Kosieradzk/tolk

Justerare
Jan-Erik Berg, Tadeusz Iwanowski

Ärende
Löneöverenskommelse objekt Marieholm Olsvroken förbindelse.

Förhandlingsframställan

Förhandlingen var begärd av arbetstagarorganisationen.

Faktiska omständigheter

Kormal Spolka ZOO är underentreprenör till Phil & Son på ny tågförbindelse Marieholm Olsvroken med 22 kollektivanställda. Första delen beräknas vara färdigt i september 2010. Företaget betalar idag 157:-/tim till de anställda.

Yrkanden

Avdelningen yrkade på att lönen bör ligga på 167,50/tim, avdelningen har utgått från jämförbar grupp som har objekt alldeles i närheten av Marieholm Olsvroken och liknande arbete.
Plädering
Parterna diskuterade om Kormal skulle ligga under ett bemanningsavtal, enligt företaget har man räknat och lämnat pris på utfört arbete. Parterna var överens att Kormal har en entreprenad.

Förhandlingsresultat
Parterna enades om följande:

- Att Kormal Spolka ZOO betalar 160:/-/tim till de anställda.
- Att parterna träffas och diskuterar en ny lönesättning på objektet runt månadsskiftet mars april.

Justerat

Ort Göteborg Datum 2010-03-11
Jan-Erik Berg

Ort Odensvik Datum 2010-01-22
Tadeusz Iwanowski