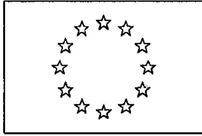

EUROPEAN COMMISSION

ORIGINAL

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11 day of January 2011

Brussels, 10.1.2011
SJ.J(2010)4965 JE/nd

TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the Commission of the European Communities, represented by Johan Enegren, with an address for service at the office of Antonio Aresu, also a member of its Legal Service, at the Batiment BECH, 5, rue A. Weicker, L-2721 Luxembourg, in

Case E-12/10

EFTA Surveillance Authority

v

The Republic of Iceland

in which the EFTA Surveillance Authority is seeking a declaration from the EFTA Court that, by maintaining in force Articles 5 and 7 of Act No. 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of 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 December1996 concerning the posting of workers in the framework of the provision of services, as adapted to the EEA Agreement by Protocol 1 thereto.

The Commission has the honour to submit the following written observations:

I FACTS AND PROCEDURE

Background

1. The EFTA Surveillance Authority has initiated infringement proceedings against the Republic of Iceland on the grounds that Iceland has not complied with its obligations under Article 36 of the EEA Agreement and Article 3 of Directive 96/71/EC by including in the national legislation transposing the Directive terms and conditions which go beyond the minimum requirements laid down in Article 3(1) (a)-(g) of the Directive.

The national provisions

2. According to Article 4 of Act. No. 45/2007 ("the Posting Act"), payments that relate specifically to the employment shall be calculated as part of the posted worker's minimum wages. According to Article 5 of the Posting Act, posted workers shall be entitled to receive wages in the event of illness and accidents while they are working in Iceland in connection with the provision of services, without prejudice to more advantageous entitlements that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

3. Article 7 of the Posting Act provides that the a posted worker who works in Iceland for a period of two continuous weeks or longer shall be insured, while at work, against death, permanent injury and the temporary loss of working capacity. This provision is without prejudice to more advantageous insurance that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

The administrative procedure

4. After an initial exchange of information the EFTA Surveillance Authority sent a letter of formal notice to Iceland dated 11 March 2009 to which the Icelandic Government did not reply. The Authority then sent a reasoned opinion to Iceland on 25 November 2009. In response the Icelandic Government stated that it had decided

to submit proposals for amending legislation to take into account the observations of the Authority with regard to provisions of the Posting Act other than Articles 5 and 7. The Icelandic Government disputed the conclusions of the Authority with regard to the non-conformity of these provisions with EEA law.

5. The EFTA Surveillance Authority lodged the present action on 18 August 2010.

The action before the EFTA Court

6. In the view of the EFTA Surveillance Authority Article 5 of the Posting Act is not within the scope of Article 3(1) (c) of Directive 96/71, since the latter provision does not cover sick leave and, in any event, does not form part of the minimum rates of pay under Icelandic labour law. The Authority considers it inherent in the concept of "minimum rates of pay" that it constitutes remuneration for work actually performed by the posted worker under his employment contract. The Authority further notes that right to sickness pay, unlike remuneration for work carried out, arises only on condition that the worker falls ill and for that reason is unable to fulfil his duties under the employment contract. In regard to the possibility to impose terms and conditions beyond those laid down in Article 3(1) (a) – (g) on ground public policy, as provided for in Article 3(10), the Authority considers, in line with the case law of the European Court of Justice, that public policy exception must be interpreted strictly and that the Icelandic Government has not demonstrated that non-compliance with Article 5 would constitute a genuine and sufficiently serious threat to fundamental interests of the Icelandic society.

7. The Icelandic Government maintains that the entitlement to wages in case of illness or accident is included in the term "minimum rates of pay" in Article 3(1) (c) of Directive 96/71 and is inherent in this concept according to Icelandic labour law. The entitlement is one of the elements included in minimum wages as laid down in collective agreements negotiated by the social partners. These agreements subsequently were made universally applicable by legislation. The entitlement was negotiated inter alia as a counterpart for reduced pay increases and is paid in return for the worker fulfilling his or her obligations under the employment contract and is fundamentally different from social security rights regulated by law without regard to participation in the labour market or individual contributions. In relation to the impositions of conditions on the grounds of public policy, the Icelandic government considers that the entitlement to the maintenance of wages during sickness or

accidents is imperative in order to preserve the value of minimum wages on the Icelandic labour market and maintain the balance of rights and obligations negotiated between social partners.

8. The EFTA Surveillance Authority considers that the requirements of Article 7 of the Posting Act do not come within the scope of any of the mandatory terms and conditions laid down in Article 3 (1) of Directive 96/71 and maintains, in accordance with the case law of the Court of Justice, that Member States are not entitled to impose terms and conditions beyond those listed in Article 3(1) (a) – (g) on the basis of Article 3(7) of the Directive. In regard to the imposition of the requirements under Article 7 on grounds of public policy, the arguments of the Authority are the same as for Article 5 of the Posting Act.

9. The Iceland Governments maintains that the insurance cover requirements laid down in Article 7 of the Posting Act are to be considered as rules of national tort and insurance law and, as such, outside the scope of Directive 96/71. In the event that the EFTA Court were to find that the requirements fall within the scope of the Directive, they are justified on the basis of public policy, as provided for in Article 3(10) of the Directive, since they are rooted in imperative provisions of national legislation and collective agreements.

II EEA LAW

10. According to Article 36 of the EEA Agreement there shall be no restriction on freedom to provide services within the EEA in respect of national of EU Member States and EFTA States who are established in an EU Member State or an EFTA State other than that of the person for whom the service is intended.

11. Article 3(1) 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 (act referred to at point 30 of Annex XVIII to the EEA Agreement) provides that Member States shall ensure, whatever the law applicable to the employment relationship; that undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters:

"(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination."

Article 3(7) of the Directive provides inter alia that paragraph 1 (a) – (g) shall not prevent the application of terms and conditions of employment which are more favourable to workers.

According to Article 3(10) the Directive Member States may apply terms and conditions of employment on matters other than those laid down in Article 3(1) (a) – (g) if such terms and conditions have been imposed on grounds of public policy.

III. OBSERVATIONS

General

12. According to Recital (13) of Directive 96/71 the laws of the Member States should be coordinated in order to lay down a nucleus of mandatory rules for minimum protection ("the hard core") to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided. However, this does not entail a harmonisation of the material content of the mandatory rules which thus may be freely defined by the Member States on condition that the content complies with the Treaty and the general principles of EU law.[1]

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[1] Judgment of 18 December 2007 in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60.

13. For the purposes of defining the nucleus of mandatory rules for minimum protection, Article 3(1) of the Directive sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.[2]

14. With regard to the material content of the "hard core" of minimum protection rules, the Commission indicated in its original proposal for a directive on the posting of workers that the directive is not a labour law instrument but a proposal concerning international private law closely related to the freedom to provide services. In drawing up the list contained in Article 3(1) the Commission applied three criteria: the rules ought to be mandatory or compulsory in all, or the majority of, the Member States; the rules ought to apply to all workers habitually employed in the same place occupation and industry; and the designation and application of the mandatory rules should be compatible with the temporary nature of the performance of work in the host country.[3]

15. Article 3(1) paragraph 2 of the Directives provides that the concept "minimum rates of pay" referred to in paragraph 1(c) shall be defined by the national law and/or practice of the Member Stats to whose territory the worker is posted.

16. In relation to the method for comparing the minimum rate of pay according to Article 3(1)(c) and the pay a worker receives under the terms of the employment relationship, the Council and the Commission at the time of the adoption of the Directive made the following statement to the Council minutes: ""When comparing the remuneration specified in point (c) of the first subparagraph of paragraph 1 with that which should be paid by virtue of the law applicable to the employment relationship, account should be taken, where remuneration is not determined by the hour, of the relationship between the remuneration and the number of hours to be worked and of any other relevant factors."[4] This means, for example, that when the remuneration received by the posted worker is determined on a monthly basis, a pro

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2 Judgment of 19 June 2008 in Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323, paragraph 26.

3 See COM(91)230 final of 1.8.1991, page 15, points 24 – 25.

4 Statement no. 9, Council document 10048/96 ADD 1.

rata adjustment has to be made on the basis of the number of hours worked during the month.

17. The criteria for determining the constituent elements of the minimum rate of pay have been defined by the Court of Justice as follows: allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.[5]

18. The Court of Justice has furthermore clarified that an automatic indexation of the rates of pay other than the minimum wage does not fall within the matters referred to in Article 3(1) (a) – (g).[6]

19. The parameters for exercising the right to impose employment terms and conditions going beyond the nucleus of mandatory rules listed in Article 3(1) (a) – (g) on the grounds of public policy have been laid down by the Court of Justice in Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323 in the following terms.

> *"50. Thus the Court has already had occasion to observe that, while the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions (see, to that effect, Case C-36/02 Omega [2004] ECR I-9609, paragraph 30). It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see Case C-54/99 Église de scientologie [2000] ECR I-1335, paragraph 17).*
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> *51. It has to be remembered that the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (see, to that effect,*

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[5] Judgment of 14 April 2005 in Case 341/02 *Commission v. Germany* [2005] ECR I-2733, paragraph 39.

[6] Case C-319/06 *Commission v. Luxembourg*, paragraph 47.

Case C-254/05 Commission v Belgium [2007] ECR I-4269, paragraph 36, and the case-law cited).

52. Therefore, in order to enable the Court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the application to workers posted to Luxembourg of the rule concerning automatic adjustment of rates of pay to the cost of living is capable of contributing to the achievement of that objective.

53. However, in this case the Grand Duchy of Luxembourg merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations, without adducing any evidence to enable the necessity for and proportionality of the measures adopted to be evaluated."

Compatibility of Article 5 of the Posting Act with Directive 96/71

20. The following features of the national legislation at issue appear to be important when examining whether it is compatible with the nucleus of mandatory provisions under the Directive:

a) the legislation provides for the acquisition of entitlements which increase over time depending on the length of the employment relationship (points 14 – 15 of the application and point 17 of the defence) for a hypothetical event – future illness or accidents – to be paid in return for the worker fulfilling his or her obligation under the employment contract (point 31 of the defence);

b) the legislation allows for certain absences or non-presence from work, due to illness or accident or other factors (point 42 of the defence);

c) the determination of the amount of hourly/monthly wages due appears to take into account the possibility of absence from work and the potential or acquired right to sickness pay (point 43 of the defence);

d) the legislation applies without prejudice to more advantageous entitlements under employment contract.

21. The entitlements provided for in Article 5 of the Posting Act, being calculated on the basis of and in return for a worker's fulfilment of his or her obligations under the employment contract, do not in all respects appear to relate directly to work performed and thus alter the relationship between the service provided by the

worker, on the one hand, and the consideration which he receives in return, on the other. Consequently, in accordance with the criteria applied by the Court of Justice, the entitlements in question do not seem to qualify as constituent elements of the notion of minimum rates of pay.

22. According to Article 3(10) of the Directive a Member State may impose terms and conditions of employment beyond those laid down in Article 3(1) (a) – (g) of the Directive on the grounds of public policy. The justification advanced by the Icelandic government for the imposition on a foreign service provider of an obligation to pay wages in the event of illness, i e the preservation of the value of minimum wages in the labour market and the maintenance of the balance of the rights and obligations of the social partners (point 76 of the defence), does not, in the view of the Commission, meet the test laid down by the Court of Justice that a failure to impose this requirement would constitute a genuine and sufficiently serious threat to a fundamental interest of society.[7]

Compatibility of Article 7 of the Posting Act with Directive 96/71

23. The obligation for a foreign service provider to insure a worker posted to Iceland for a period of two continuous weeks or longer against death, permanent injury and the temporary loss of working capacity, unless the worker has more advantageous insurance cover in the Member State of establishment, does not as such feature among the mandatory terms and conditions listed in Article 3(1) (a) – (g) of the Directive.

24. It is furthermore questionable if the notion of "health, safety and hygiene at work" in Article 3(1) (e) may be interpreted as covering a civil liability obligation, since this provision has always been understood as referring to the requirements laid down in the framework Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work as well as in the individual directives covering areas listed in the annex to Directive 89/391.

25. As the Icelandic government points out, tort and insurance law are outside the ambit of EEA law (point 98 of the defence). However, the Commission would observe that

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[7] Case C-319/06 *Commission v. Luxembourg*, paragraph 50, and the case law cited there.

it is settled case law that Member States must exercise their national competence consistently with EU law.[8]

26. In *Laval* the Court of Justice found that the obligation to pay insurance premiums for inter alia compensation for accidents at work and financial assistance for survivors in the event of the death of the worker is a matter not specifically referred to in Article 3(1) (a) – (g).[9]

27. Unlike the situation in *Laval*, the requirement for foreign service providers to pay insurance premiums for workers posted to Iceland has been laid down in legislation. Therefore, it remains to be examined whether the requirement may be imposed on grounds of public policy under Article 3(10) of the Directive. From the facts of the case it is not clear to the Commission whether the requirement confers a genuine benefit on the posted workers concerned which significantly adds to their social protection or whether the requirement is proportionate to the public interest pursued, as maintained by the Icelandic government.[10] In any event, in the view of the Commission the requirement does not appear to meet the criteria for a public policy exception laid down by the Court of Justice in Case C-319/06 *Commission v. Luxembourg* (see point 21 of the observations).

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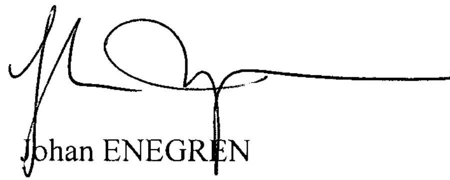
8 See *Laval*, paragraph 87 and the case law cited there.

9 C-341/05 *Laval*, paragraphs 83 and 22.

10 See judgment of 25 October 2001 in joined Cases C-49/98? C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte e a* [2001] ECR I-07831, paragraph 53.

IV. CONCLUSION

28. For the reasons set out above, the Commission would support the declaration sought by the EFTA Surveillance Authority from the EFTA Court insofar as it refers to the failure of Iceland to fulfil its obligations arising from Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement (Directive 96/71/EC).



Johan ENEGREN

Agent of the Commission