THE ATTORNEY GENERAL (CIVIL AFFAIRS)

ORIGINAL

To the EFTA Court

Oslo, 10 January 2011

WRITTEN OBSERVATIONS

BY

THE NORWEGIAN GOVERNMENT

represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs) and Janne Tysnes Kaasin, adviser, Ministry of Foreign Affairs, acting as agents, submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, in

Case E-12/10

EFTA Surveillance Authority

v

The Republic of Iceland

* * * * *

1. INTRODUCTION

1. By application of 17 August 2010 (the Application) the EFTA Surveillance Authority (the Authority) is seeking a declaration that by maintaining in force Articles 5 and 7 of Act No. 45/2007 (the Posting Act) the Republic of Iceland has breached Article 3 of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services[1] and Article 36 EEA.

2. The government of Iceland rejects the allegations in its statement of defence of 2 November 2010 (the Statement of Defence) and submits that the application should be dismissed.

3. The Norwegian regulation of workers' rights in the event of illness or accidents and insurance for work related accidents differs from contested rules and the case is as such not directly relevant for the Norwegian government.

4. However, the parties' submissions concerning one of the contested rules, Article 5 of the Posting Act, focus on the interpretation of Directive 96/71/EC and in particular Article 3(1)(c) and the notion of "minimum rates of pay". This concerns an issue of utmost importance in terms of protecting workers and securing loyal competition in the context of posting of workers, both of which constitute fundamental aims of Norwegian labour law and policy.

5. Furthermore, a Norwegian Court of Appeal will imminently refer several questions to the EFTA Court concerning Article 3 of Directive 96/71/EC and Article 36 EEA in the context of a decision declaring provisions in a collective agreement universally applicable.

6. Against this background the Norwegian government herewith respectfully submits its observations in the case. While supporting the Icelandic submissions concerning the compatibility of Articles 5 and 7 of the Posting Act with EEA law, the following observations will focus on issues of general application pertaining to Article 3(1) of Directive 96/71/EC. In this context the Norwegian government will address some of the submissions which the parties have made concerning Article 5 of the Posting Act.

7. The Norwegian government also finds it purposeful to provide preliminary observations concerning the relationship between Regulation 1408/71/EEC and Directive 96/71/EC.

[1] Cf point 30 of Annex VIII of the EEA Agreement.

2. FACTUAL AND LEGAL BACKGROUND

8. The Norwegian government shall hereinafter briefly set out the relevant legal framework in Iceland, based on the description provided in the submission by the Icelandic government.

9. The main legal framework seems to be laid down in Act No. 19/1979 respecting Labourers' right to Advance Notice of Termination of Employment and to Wages on Account of Absence through Illness and Accidents (the Labourers' Right Act). Article 5 provides that all workers having been employed by the selfsame employer for a period of at least one year shall retain entitlement to one months' of wages in case of absence from work due to illness or accidents, while Article 6 states that in the first years of work for the selfsame employer workers shall retain right to their wages in the event of illness or accidents for two days for each month of service.

10. The Icelandic government explains, referring inter alia to the travaux préparatoires, that the abovementioned provisions constituted a political compromise according to which the legislature on the one hand imposed limits on pay rises negotiated in collective agreements, while on the other hand codifying minimum requirements, found in collective agreements, concerning the right to retain wages in the event of illness or accidents.

11. The Labourers' Right Act was shortly thereafter supplemented by Act No. 55/1980 on Working Terms and Pension Insurance Rights (the Working Terms Act). Article 1 of that act provides as follows:

"Wages, and other working terms agreed between the social partners shall be considered minimum terms, independent of sex, nationality or term of appointment, for all wage earners in the relevant occupation within the area covered by the collective agreement. Contracts made between individual wage earners and employers on poorer working terms than those specified in the general collective agreement shall be void."

12. The minimum requirements stipulated in the relevant collective agreements, herein the right to retain wages in the event of illness, are thus made universally applicable. It appears from the Icelandic submissions, herein the table of collective agreements set out in Annex B2 point 11.3, that Article 1 of the Working Terms Act may provide rights that are more beneficial than what follows from the Labourers' Right Act.

13. Turning finally to the contested acts, the Norwegian government notes that Article 5 of the Posting Act lays down, in accordance with its heading, provisions concerning "entitlement to wages in the event of illness and accidents". These provisions appears to essentially duplicate (and refer to) Articles 5 and 6 of the Labourers' Right Act. The raison d'être of Article 5 of the Posting Act is thus to ensure that foreign posted workers obtain the same rights to retain minimum wages in the event of illness or accidents as national workers enjoy by virtue of Article 5 and 6 of the Labourers' Right Act.

14. As for the content of Article 7 of the Posting Act, reference is – in accordance with the focus of the Norwegian government in this case – made to the Icelandic Statement of Defence.

3. THE RELATIONSHIP BETWEEN REGULATION 1408/71/EEC AND DIRECTIVE 96/71/EC

15. The Norwegian government notes at the outset that the parties to the proceedings disagree as to whether Article 5 of the Posting Act falls within the scope of Regulation 1408/71/EEC.

16. The scope of Regulation 1408/71/EEC is defined by Article 4(1), which provides that the regulation shall apply to "all legislation concerning the following branches of social security: a) sickness and maternity benefits..." Article 1 litra (j), second paragraph, clarifies that the term "legislation", within the meaning of the Regulation, "excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope".

17. The Authority submits that wages in the event of illness or accidents constitute "sickness benefits" within the meaning of Article 4(1) of the regulation, while the Icelandic government rejects this assertion on two grounds. The Icelandic government argues first of all that Article 5 of the Posting Act does not constitute "legislation", but implementation of provisions in collective agreements (statement of defence, paras 60-61). Secondly, the Icelandic government submits that wages in the event of illness or accidents do not constitute "sickness benefits" within the meaning of the regulation, but represent an integral element of the workers' minimum pay (statement of defence, paras 62-69).

18. The Norwegian government shall not add to the arguments already put forward by the Icelandic government as to the proper classification of Article 5 of the Posting Act, but will instead comment on the legal consequences flowing from the two parties' views and the relationship between Regulation 1408/71/EEC and Directive 96/71/EC.

19. It may be recalled that Regulation 1408/71/EEC and Directive 96/71/EC constitute inter alia coordinating legislation which lay down conditions for determining the national legislation applicable to the relevant subject matter.

20. The Court of Justice (the Court) has accordingly held that the provisions of Title II of Regulation 1408/71/EEC constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation.[2]

21. Article 14(1)(a), which forms part of Title II of Regulation 1408/71/EEC, states that the legislation of the *home* Member State shall apply to posted workers, i.e. a person employed in the territory of a Member State by a undertaking to which he is normally attached who is posted by that undertaking to territory of another Member State to perform work there for that undertaking, provided that the anticipated work does not exceed 12 months.

[2] E.g. Case C-202/97 *Fitzwilliam* [2000] ECR I-883, para 20.

22. Article 3 of Directive 96/71/EC stipulates in contrast that the legislation of the *host* Member State shall apply unless the home state legislation provides for more favorable conditions for the posted workers.

23. Since Regulation 1408/71 and Directive 96/71/EC thus impose conflicting coordination of the Member States' legislation, it follows that they cannot apply simultaneously.

24. Recital 21 of Directive 96/71 states to this end that Regulation 1408/71 "lays down the provisions applicable with regard to social security benefits and contributions". Benefits and contributions falling within the scope of Regulation 1408/71/EEC are therefore not only excluded from the scope of Article 3(1) of the Directive, as the Authority claims, but fall outside the scope of the directive in its entirety.

25. Apart from the clear statement to this effect in Recital 21 of Directive 96/71/EC, overlapping application could paradoxically pose the risk that Directive 96/71/EC, insofar as social security legislation falls outside Article 3(1)(c), prevented host Member States from applying their social security legislation where this is required for the protection of workers by Regulation 1408/71/EEC, e.g. in situations where more than 12 months posting may be anticipated.

26. The Commission has accordingly "stressed that *the Directive's scope* does not extend to social security; the provisions applicable with regard to benefits and social security are those laid down by Council Regulation (EEC) No 1408/71 of 14 June 1971".[3]

27. In summary, if Article 5 of the Posting Act is deemed to constitute social security legislation for the purposes of the regulation, the compatibility of that act must be reviewed exclusively with reference to Regulation 1408/71, in particular Articles 13(2)(a) and 14(1), and, if appropriate, the EEA agreement.

28. However, recalling the rules of procedure and noting that the Authority has not based its application on an infringement of Regulation 1408/71, no submissions are called for in this event and the application should be dismissed as far as concerns Article 5 of the Posting Act.

29. If, on the other hand, Article 5 of the Posting Act falls outside of the scope of Regulation 1408/71, it is next necessary to consider whether it is compatible with Directive 96/71/EC and, where appropriate, Article 36 EEA.[4]

30. The Norwegian government will in the following submit observations concerning Article 5 of the Posting Act and Directive 96/71/EC.

4. Directive 96/71/EC

4.1 Preliminary observations concerning Article 3(1) and Member State discretion

31. As regards Article 5 of the Posting Act, it should be emphasised at the outset that the Authority's application is solely concerned with the question as to whether wages in the event of illness or accidents constitute "pay" for the purposes of Article 3(1)(c). The

[3] COM (2003) 458, page 5 (emphasis added).
[4] Case C-341/05 *Laval* [2007] ECR I-11767, para 61.

Authority does not dispute, on the other hand, the Icelandic methods of implementation of that right. It appears therefore to be common ground that Article 5 of the Posting Act fix a rate of pay, if indeed that is deemed to be the proper classification, according to one of the procedures laid down in the first and second indents of the first subparagraph of Article 3(1) and in the second subparagraph of Article 3(8).[5]

32. It is noteworthy that adherence to these procedures ensures compliance with the principle of equal treatment as well as legal certainty, both of which promote the main aims of the directive according to recital (5) and (6), i.e. protection of workers as well as preventing unfair competition.

33. Turning to the interpretation of Article 3(1) and the matters referred to in the first subparagraph (a)-(g), the Norwegian government notes that the Authority warns at the outset against giving "the EEA States [...] freedom to interpret Article 3(1) so widely that employment rights with, at best, a tenous link to the ones listed there could come with[in] the scope of the Article" (the Application, para 26). The Authority emphasizes in this regard that the Court has rejected that Article 3(7) of the Directive can justify higher standards than those provided for in Article 3(1), and the Authority considers that it would be "inconsistent" if the scope of Article 3(1) was construed "too widely".

34. While it is not clear whether the Authority simply cautions against a very expansive interpretation of Article 3(1) or pleads in favour of a narrow interpretation of Article 3(1), the Norwegian government finds that the tenor of the argument in any event is at odds with the Court's case law.

35. It may be recalled that the Court has held that the "provision of manpower is particularly sensitive matter from the occupational and social point of view", which "directly affects both relations on the labour market and the lawful interests of the workforce concerned".[6] The Court has since consistently held that Community law does not preclude Member States from extending their legislation, or collective agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established...".[7]

36. More particularly, the Court has on several occasions ruled that "Community law does not preclude a Member State from requiring an undertaking established in another Member States which provides services in the territory of the first Member State to pay its workers the minimum remuneration laid down by the national rules of that State".[8] Such rules pursue, as the Court has noted, objectives of public interest, namely the protection of workers and preventing unfair competition.[9]

37. The tenor of that case law reveals that the Court, owing to the "particularly sensitive matter" concerned, has awarded the Member States a margin of discretion as concerns

[5] See e.g. Case C-346/06 *Rüffert* [2008] ECR I-1989, paras 23-30.
[6] Case 279/80 *Webb* [1981] ECR 3305, para 18.
[7] Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, para 18.
[8] Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21.
[9] Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paras 36 and 41-42.

the extension of its labour law and in particular rules concerning minimum remuneration to workers temporarily employed on their territory.

38. The Authority's application could be understood as suggesting that Directive 96/71/EC has significantly altered the legal situation flowing from that case law, whereas the Court in fact has explicitly stated, in the context of minimum remuneration, that "that case law is enshrined in Article 3(1)(c) of Directive 96/71".[10]

39. Thus, it follows from the preamble (6) and (13) that the aim of the directive, in the interests of the employers and their personnel, is to *coordinate* the Member States' laws by laying down a nucleus of mandatory rules for minimum protection in Article 3. The Court accordingly acknowledged in *Laval* that "Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection" and "[t]hat content may accordingly be freely defined by the Member States".[11]

40. This applies a fortiori to Article 3(1)(c) and the concept of minimum rates of pay". Unlike the other core rights listed in Article 3(1), the second subparagraph explicitly provides that "the concept of minimum rates of pay...is defined by the national law and/or practice of the Member State to whose territory the worker is posted".

41. There are accordingly no grounds for asserting that the nucleus of mandatory rules in Article 3 should be interpreted narrowly; to the contrary, it is evident that the Member States have been given a margin of discretion to define their content, in particular as concern the concept of minimum rates of pay.

42. This does not detract from the fact that the directive also entails harmonization of the Member States laws. The Member States have first of all a limited possibility to guarantee posted workers conditions of employment falling outside the matters referred to in Article 3(1). Article 3(10) first subparagraph provides that such conditions may only be justified in so far as they constitute "public policy provisions", a notion which must be interpreted strictly.[12]

43. Secondly, the Court has rejected that Article 3(7) of the directive allows the Member States to provide for a higher level of protection than the minimum standards referred to in Article 3(1). Thus, as regards the matters referred to in Article 3(1), first subparagraph (a) to (g), the Court has ruled that "Directive 96/71 expressly lays down the degree of protection... which the... [host] State is entitled to require those [posting] undertakings to observe".[13] The directive thus provides for total harmonization as concerns the level of protection applicable to the matters falling within Article 3(1), i.e. providing a roof as well as a floor.

44. However, it would be erroneous to derive from these facts that also the *content* of the matters referred to in Article 3(1), first subparagraph (a) to (g), should be narrowly construed. If so, Directive 96/71 *would* in effect "harmonise the material content of those mandatory rules for minimum protection" and that content may accordingly *not* "be freely defined by the Member States" – in direct contradiction to the statements made by the Grand Chamber in *Laval*.

---

[10] Case C-341/02 *Commission v Germany* [2005] ECR I-2733, para 25.
[11] Case C-341/05 *Laval* [2007] ECR I-11767, para 60.
[12] Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, para 30.
[13] Ibid, para 80; and Case C-346/06 *Rüffert* [2008] ECR I-1989, para 33.

45. Since the Court's strict interpretation of Article 3(7) was provided in the very same judgment, it is all the more clear that the Court considered that the Member States' discretion to define the *content* of the matters listed in Article 3(1) a separate issue from the Member States' possibility to, within the scope of those matters, impose *higher standards* that the minimum protection provided for in that provision.

46. To the contrary, the preceeding acknowledgement in *Laval* of the Member States' discretion to define the content of the matters listed in Article 3(1) seems to be precisely the reason why the Court subsequently in that judgment rejected that the Member States *also* should have discretion to prescribe standards within those matters that were higher than those provided for by the directive. Such an interpretation would amount, as the Court noted, to depriving the directive of its effectiveness.

47. In summary, the relevant legal sources - the case law preceding Directive 96/71, the intent of the Community legislature, the wording of Article 3(1), and subsequent case law - all militate in favour of the conclusion that the Member States enjoy a margin of discretion to define the content of the matters listed in Article 3(1), first subparagraph (a)-(g) and in particular as concerns litra (c) and the notion of "minimum rates of pay".

48. The Commission has likewise acknowledged that "it is for the host Member State to define the concept of a minimum wage".[14]

49. This is not to say that Article 3(1)(c) and the "concept of minimum rates of pay" do not impose any boundaries for the Member States exercise of discretion, which is dealt with in the following section.

4.2 Article 3(1)(c) and the concept of "minimum rates of pay"

50. Article 3(1)(c) allows and, as the case may be, imposes a duty on the host Member State to ensure posted workers:

> *"the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pensions"*

51. The wording and structure of this provision acknowledges that the concept of pay includes several constituent elements, reflecting inter alia the conditions under which the work is carried out.

52. This follows from the plural "minimum *rates* of pay" and the inclusion of "overtime rates". Furthermore, the word "including" necessarily implies that minimum rates of pay reflecting other distinct working conditions than overtime is included in the concept of pay. The fact that the Community legislature found it necessary to expressly exclude "supplementary occupation retirement pensions" likewise implies that the concept of "pay" and its constitutive elements was recognized as having a broad meaning.

53. It may be added for the sake of clarification, given the parties' comments, that Commission *v Germany*[15] did not relate to the host Member States' right to define

[14] Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provisions of services, SEC(2006)439, p. 16.
[15] Case C-341/02 *Commission v Germany* [2005] ECR I-2733.

minimum rates of pay. The case concerned Article 3(7) and revolved around the conditions under which the host Member State had to recognize pay provided to posted workers by the posting undertakings as constituent element of the minimum wage when comparing that remuneration with the minimum wage prescribed by German law.

54. The Court noted, contrary to the Commission's submission, that Germany was entitled to disregard for the purpose of Article 3(7) allowances and supplements provided to posted workers when such "allowances and supplements... *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 workers is posted*, and which alter the relationship between the service provided and by the worker... and the consideration which he receives in return...".[16] However, since Germany partially had failed to adhere to these conditions, the Court found that Article 3(7) of Directive 96/71/EC has been infringed.

55. In other words, the judgment and its interpretation of Article 3(7), if anything, affirms the host Member States' competence under Article 3(1), first subparagraph (c) and the second subparagraph to define the constituent elements of its minimum wage in accordance with national law and/or practice, and thereby provide the benchmark for the comparative assessments under Article 3(7).

56. After these preliminary observations, it is next necessary to address the Authority's assertions that the concept of "pay" must be understood as remuneration for work "actually performed" by the posted worker under his employment contract, and that wages that arise "only on condition that a certain event takes place", e.g. the worker falls sick, fall outside the notion of pay within the meaning of Article 3(1)(c) (the Application, para 24-25).

57. The Norwegian government agrees with the Authority insofar as "remuneration for work" constitutes the core of the concept of pay. However, the attempt to further define this concept with reference to notions as to whether work is "actually performed" or "arise only on the condition that a certain event takes place" seems liable to obscuring the notion of "pay" rather than promoting any clarification.

58. Furthermore, the Authority's negative definition of "pay" through these two "conditions" lacks any legal justification, while posing a clear risk of undermining the Member States discretion to define the content of "pay" in accordance with Article 3(1) second subparagraph. This is presumably also precisely the reason why the Court consistently has avoided to attempt to define the notion of pay in Article 3(1)(c) and instead focused on whether "allowances and supplements... are defined as being constituent elements of the minimum wage by the legislation or national practice" of the host Member State.[17]

59. Since a fundamental principle of Directive 96/71/EC is to ensure equal treatment between workers, some guidance may nevertheless be derived from the definition of "pay" in Article 157(2) TFEU (Article 141(2) EC) (Article 69(2) EEA) concerning equal pay for male and female workers:

[16] Ibid, para 39.
[17] Ibid.

"For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or kind, which the worker receives directly or indirectly, in respect of his employment, from his employer"

60. That definition has, in accordance with settled case law, been further defined as follows:

"a concept which comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis."[18]

61. The Norwegian government acknowledges that the concept of "pay" must not necessarily have the same meaning under Article 141(2) EC and Directive 96/71/EC, and the Community courts will likely be hesitant to usurp the Member States discretion under Article 3(1) second subparagraph by closely linking the two concepts.

62. The *core* of the Community legislature's and the Community courts' definition of pay in the context of Article 141(2) appears, however, of general application and readily transposable to Directive 96/71/EC, namely that "pay" means "consideration... which the workers receives... in respect of his employment, from his employer".

63. The Court has in the context of Directive 96/71/EC similarly referred to "the consideration which he [the posted worker] receives in return [for the service provided],[19] which seems reminiscent of the abovementioned holistic concept of "pay".

64. The Commission has accordingly acknowledged that the definition of the minimum wage may vary in the different Member States and that the Member States have considerable discretion to determine its constituent elements:

"This definition may wary from one Member State to another: e.g. minimum wage rates relating to a particular period of time – monthly or hourly – or to productivity, a single agreement-based rate for all employees in a given industry or different minimum wage rates applicable to occupation skills and jobs as laid down in collective agreements. Member States may also determine the various allowances and bonuses which are included in the minimum wage applicable within limits such as those set out in the Court's jurisprudence."[20]

65. The Council and the Commission has moreover stated in the the travaux préparatoires to Directive 96/71/EC that Article 3(1) first subparagraph (b) and (c) "covered contributions to national social fund benefit schemes governed by collective agreements or legislative provisions, and benefits covered by these schemes, provided that they did not come within the sphere of social security.[21] In the latter case, provided that the subject is governed by Regulation 1408/71/EEC, the measures fall – as mentioned in point 3 above – outside the directive altogether.

---

[18] E.g. Case C-191/03 *North Western Health Board v Margareth McKenna* [2005] ECR I-7631, para 29.
[19] Case C-341/02 *Commission v Germany* [2005] ECR I-2733, para 39.
[20] See Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SEC (2006) 439, p. 16-17.
[21] Ibid, para 16.

66. Drawing the lines together, it appears that the outer boundaries of the concept of "pay" within the meaning of Article 3(1)(c) must be assessed with reference to whether the benefits represent consideration which the worker receives in respect of his employment, from his employer.

67. Turning briefly to the concrete assessment of Article 5 of the Posting Act, the Norwegian government notes that that provision makes the right to, and the amount of, wages in the event of illness entirely conditional on the work carried out by the posted worker.

68. The wages in question are in other words exclusively borne out of, and represent consideration for, the work carried out by the worker. It is therefore difficult to avoid the conclusion that such wages form an integral part of the workers pay.

4.3 Article 3(1) second subparagraph and pay "defined by the national law and/or practice"

69. The Authority submits next that "in any event as a matter of Icelandic law sickness pay is not defined as part of minimum rates of pay" (the Application, para 36 et seq).

70. The Authority refers in this regard to the (alleged) fact that neither Icelandic legislation nor collective agreements "define sickness pay as part of a minimum wage" or a "constituent element of minimum wages"; that the definition of pay in collective agreements is "habitually defined as remuneration for work performed"; and finally that provisions concerning minimum monthly wages and the right to continued wages in the event of illness is found in different sections of collective agreements.

71. The Norwegian government notes at the outset that the Authority neither refers to the legal grounds for making the recognition of constituent elements of the minimum wage in the host Member State conditional on that those elements has been "defined as part of minimum rates of pay" nor what such a "definition" entails. If the Authority's submission is based on Article 3(1) second subparagraph, the Norwegian government respectfully submits that that provision appears to have been misconstrued.

72. The purpose of that provision is as mentioned to underscore that Article 3(1)(c) does not define the notion of minimum rates of pay and that it is for the host Member State to define that concept in accordance with its national legislation and/or practice. In this context the reference to the Member States' right to "define" that content was clearly not intended to introduce a formalistic requirement making the recognition of the Member States' discretion conditional on whether it has employed the same notions as that found in the directive.

73. Such a formalistic approach would otherwise lead to the paradoxical result that Article 3(1) second subparagraph posed the risk of usurping the Member States' right to "define" the concept of minimum rates of pay. It is presumably common in the Member States that their legislation concerning different elements of the minimum wage do not employ notions as "constituent elements of minimum wages", "integral part of minimum wages", or "minimum rates of pay", which goes without saying as concerns "national practice", herein provisions in collective agreements. Any deduction as to the

nature of the wages in question based on the sections in which they appear in collective agreements, seems equally hazardous.

74. To the contrary, the logical corollary of the fact that minimum wages is a multifaceted concept which is made up of several constituent elements - as recognized by the Court, the Commission, and, as far the Norwegian governments understands, the Authority - is that there necessarily will exist a plurality of notions employed in national legislation and collective agreements, and that these elements may be found in different sections of the legislation and collective agreements.

75. Article 3(1) second subparagraph must rather be interpreted to the effect that if national law and/or practice, herein collective agreements, provides for consideration which the worker receives in respect of his employment, from his employer, this falls within the concept of "rates of pay" within the meaning of Article 3(1)(c).

76. Another matter, apart from the reservation for social security legislation falling exclusively within Regulation 1408/71/EEC, is that the national measures must constitute "minimum" rates of pay. However, since the Authority has not questioned the minimum character of the wages provided for in Article 5 of the Posting Act, the Norwegian government sees no reason to comment further on this issue.

77. Finally, albeit perhaps superfluous on the basis of the abovementioned observations, it is noteworthy that the Authority consistently refers to "sickness benefits", whereas Article 5 of the Posting Act in fact employs the notion of "*wages* in the event of illness and accidents". Furthermore, the Icelandic government explains that the entitlement to such wages is "inherently linked to the concept of minimum pay in Icelandic labour law" (Statement of Defence, paras 32 et seq and 50 et seq), which its legislative background further underpins.

4.4 The Charter of Fundamental Rights

78. In its application at para 84 the Authority refers to submissions by the Icelandic government earlier in the infringement procedure concerning inter alia Article 34 of the Charter of Fundamental Rights. The Authority notes that the legal relevance of the Charter is uncertain under the EEA agreement and that it is not necessary for the purposes of this case to examine this issue.

79. Since the Icelandic government has not, in so far as the Norwegian government can see, invoked the Charter in its Statement of Defence, the Norwegian Government agrees that the EFTA Court need not address the issue in this case.

80. For the sake of completeness, however, the Norwegian government recalls that the Charter of Fundamental Rights has not been incorporated in the EEA agreement and therefore lacks any direct legal relevance for the interpretation of the EEA agreement or acts incorporated under the agreement.

5. Article 36 EEA

81. The Authority finally submits that Article 5 (and 7) of the Posting Act is incompatible with Article 36 EEA (the Application, paras 66 et seq). The reasoning is closely linked with its preceding analysis of whether the contested provisions are compatible with Directive 96/71/EC.

82. Leaving aside the concrete assessment under Article 36 EEA, the Norwegian government agrees with the Authority's methodology in so far as the contested measures are indeed deemed to fall outside of the scope of Article 3(1)(c) (and Regulation 1408/71). In this event it must subsequently be assessed whether the measures are compatible with Article 3(10), first subparagraph. That provision allows for, subject to "compliance with the Treaty", terms and conditions of employment on matters other than those referred to in Article 3(1) first subparagraph in the case of "public policy provisions".

83. The Norwegian government should like to add that the situation is different, however, if the contested measures, i.e. Article 5 of the Posting Act, should be deemed to fall within Article 3(1)(c).

84. It may be recalled that the Court stated as follows in *Laval* and *Rüffert*:

> "*As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71* ***expressly lays down the degree of protection*** *for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter state is* ***entitled to require*** *those undertakings to observe.*"[22]

85. Since Article 3(1) of Directive 96/71 not only confers rights but also duties on the host Member States, the Court added the logical corollary:

> "***the level of protection*** *which must be* ***guaranteed*** *to workers posted to their territory is* ***limited****, in principle, to that provided for in Article 3(1), first subparagraph (a) to (g) of Directive 96/71...*"[23]

86. Hence, for the purposes of the matters falling within the Article 3(1) first subparagraph (a) to (g), the Directive provides for total harmonization as concerns the level of protection which the Member States are entitled to require and which they likewise must guarantee posted workers.

87. Since the level of protection concerning the matters referred to in Article 3(1), first subparagraph (a) to (g) has thus been regulated in a harmonized manner at Community level by the directive, any national measure relating thereto must be assessed in the light of the provisions of the directive, and not Article 36 EEA.[24]

88. However, since the Authority has not submitted that Article 5 of the Posting Act is incompatible with Article 36 EEA in the event that the EFTA Court finds that that

---

[22] Case C-341/05 *Laval* [2007] ECR I-11767, para 80; and Case C-346/06 *Rüffert* [2008] ECR I-1989, para 33.
[23] Case C-341/05 *Laval*, ibid, para 81; Case C-346/06 *Rüffert*, ibid, para 34.
[24] See, to this effect, e.g. Case 37/92 *Vanacker and Lesage* [1993] ECR I 4947, para 9.

provision is compatible with Article 3(1)(c) of Directive 96/71/EC, it appears unnecessary to examine this issue in this case. Since this question most likely will be addressed in the mentioned imminent referral from a Norwegian Court of Appeal, the Norwegian government nevertheless finds it purposeful to make the EFTA Court aware of the issue.

* * * * *

Oslo, 10 January 2011

THE ATTORNEY GENERAL (CIVIL AFFAIRS)

Pål Wennerås
Agent

Janne Tysnes Kaasin
Agent

THE ATTORNEY GENERAL (CIVIL AFFAIRS)

Registered at the EFTA Court under N° E-12/10-29
.....12..... day of ...January..... 2011.....

The EFTA Court
Registry
L-1499 Luxembourg

Your reference	Our reference	Date
E-12/10-14	2010-0875 PW	10 January 2011

Case E-12/10, EFTA Surveillance Authority v The Republic of Iceland

Reference is made to the letter from the Registry of 9 November 2010. The Government hereby submits its written observations. The original together with six copies are enclosed.

Yours faithfully,

Pål Wennerås
Agent

TELEPHONE: + 47 22 99 02 00 - TELEFAX: + 47 22 99 02 50
POSTAL ADDRESS: P O BOX 8012 DEP, 0030 OSLO
OFFICE ADDRESS: PILESTREDET 19, OSLO