Brussels, 21st of November 2016

Posting of Workers Directive – Unacceptable Interpretation by EFTA Authority

Dear Ms Agnes Jongerius

Dear Ms Elisabeth Morin-Chartier

Dear Ms Terry Reintke

Dear Ms Rinaronja Kari

Dear Ms Christel Schaldemose

The EFTA Surveillance Authority (ESA) has recently sent a letter of formal notice to Norway concerning posting of workers (http://www.eftasurv.int/media/esa-docs/physical/Letter-of-formal-notice---Complaint-against-Norway-concerning-posting-of-workers---1.pdf).

The Posting of Workers Directive 96/71 is legally binding on Norway as a member of the European Economic Area (one out of three EFTA countries). The EFTA Court also follows the decisions of the CJEU. Therefore, the pending case is highly relevant to the European Parliament as an EU legislator currently reviewing the Directive.

The EFTA Surveillance authority (ESA) considers that the Norwegian law extending the collective agreements in the shipyard sector and the construction and cleaning industries, which requires employers to cover expenses related to travels, board and lodging (in addition to minimum wages), is in breach of the Directive. This interpretation is extremely surprising and disappointing as the Norwegian Supreme Court in 2013 ruled otherwise. The Norwegian Supreme Court based its argumentation on the principle that posted workers should receive at least the Norwegian minimum pay rates according to collective agreements in the relevant sectors and that deductions as mentioned above would substantially reduce their wages received. The same would be the case in all European countries that have such provisions. IndustriAll Europe represents workers in sectors that, to an increasingly degree, make use of external service providers and posted workers, and we fear that this interpretation of the Directive will fuel low wage competition, increase the substitution of organised workers and impair the purpose of the Directive. In Norway, the ESA's position will also affect the more recently extended collective agreements in the transport sector, the fish processing industry and for electricians. Only last week, the Norwegian Tariff Board halted its update of the minimum wage rates for cleaning workers for an indefinite time, regarding the ESA letter of formal notice.

We absolutely do not understand why ESA upholds this very restrictive interpretation of the Directive. Its reasoning is mainly founded on the Laval and Luxembourg cases. The letter of formal notice from ESA indicates a narrow interpretation, which contradicts the proposed revision of the Posting of Workers Directive and does not fully reflect or comprehend the situation of posted workers.

We kindly ask you to take this into consideration, to ensure that the revised Posting of Workers Directive guarantees that employers are obliged to cover expenses related to travels, board and lodging for posted workers. In this discussion, we underline that:

- Posted workers are posted for a limited period and have already lodging costs in their home country (either a rent to pay or a mortgage loan to service).
- Posted Workers are employed on behalf of their companies; The Posting of Workers Directive is based on the principle “freedom of services”. Therefore, it is normal that the companies must cover the expenses relating to travel, board and lodging.
- If expenses related to travel, board and lodging were to be deducted from the pay received by posted workers, they would earn substantially less than the domestic workers, which would not allow posted workers to enjoy decent living conditions in their host countries.
- Even in a domestic context, it is entirely normal that employers cover expenses related to travel, board and lodging for their workers. We have abundant documentation to prove this.
- Allowing companies to deduct expenses related to travel, board and lodging from the wages of the posted workers is a gigantic legal loophole, which would allow for abuse and social dumping.

The ETUC has, in their suggestion for amendment number 4, proposed an amendment to Article 3 clarifying that expenses in relation to travel, board and lodging should be borne the employer. In amendment number 8, they suggest that these allowances not be deducted from the remuneration. We share the view that these amendments would cover the concerns raised in this letter.

We kindly ask you to take these elements in your ongoing discussions.

Best regards,

Benoît Gérits,
Deputy General Secretary