

Luxembourg, 19 April 2016

PRESS RELEASE 03/2016

Judgment of the Court in Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*

BOYCOTT AIMED AT PROCURING ACCEPTANCE OF A COLLECTIVE AGREEMENT – ASSESSMENT UNDER ARTICLES 31, 53 AND 54 EEA

In a judgment delivered today, the Court answered questions referred to it by the Supreme Court of Norway (*Norges Høyesterett*) on the interpretation of Articles 31, 53 and 54 EEA.

The case concerned a notification of a boycott by the Norwegian Transport Workers' Union ("the union") directed at Holship Norge AS ("Holship"), a Norwegian forwarding agent, in order to procure acceptance of the Framework Agreement on a Fixed Pay Scheme for Dockworkers ("the Framework Agreement"). The Framework Agreement applies to thirteen ports in Norway, including the port of Drammen. Pursuant to the Framework Agreement, the Administration Office for Dock Work in Drammen ("the AO") is established, a non-profit and *sui generis* entity whose board consists of three representatives of the employers and two representatives of the employees. The Framework Agreement contains a priority clause, whereby unloading and loading operations of ships must be carried out by dockworkers employed by the AO, unless the AO lacks capacity to take on the assignment.

Since Holship is not a party to the Framework Agreement, it uses its own employees to carry out its unloading and loading operations in Drammen. In order to compel Holship to affiliate to the Framework Agreement, the union gave Holship notice of a boycott and sought a court order declaring that it is lawful. Drammen District Court, and subsequently Borgarting Court of Appeal, found the boycott to be lawful, since it was deemed to fall outside the scope of Articles 53 and 54 EEA and to be consistent with Article 31 EEA. Holship challenged the judgment of the Court of Appeal before the Supreme Court of Norway, which decided to make a reference to the Court.

The first set of questions concerning the interpretation of Articles 53 and 54 EEA

The Court held that the exemption of collective agreements from EEA competition rules does not cover a clause whereby a port user is obliged to give priority to another company's workers over its own employees, or the use of a boycott in order to procure acceptance of the collective agreement containing that clause.

The Court held that a collective agreement falls outside the scope of the EEA competition rules if it has been entered into following collective bargaining between employers and employees, and if it pursues the objective of improving conditions of work and employment. In the present case, although the first requirement is fulfilled, the second is not. As regards that second requirement, the Court found that the aggregate effect of two clauses of the Framework Agreement, the priority clause and the clause establishing the AO, is to guarantee AO's workers permanent employment and a certain wage. Their effect is thus to protect only the limited group of workers employed by the AO to the detriment of Holship's workers, who are barred from performing similar work. Moreover, the boycott, notified by the union should also to be attributed to the AO, since the boycott seeks to compel Holship to observe the terms of the Framework Agreement. Moreover, the union participates in the management of the AO and thus has an interest to preserve AO's market position, thereby combining a business objective with its core tasks as a trade union. In light of these considerations, the Court found that the AO system goes beyond the improvement of conditions of work and employment.

For an entity such as the AO to be regarded as an undertaking within the meaning of Articles 53 and 54 EEA, it must be engaged in an economic activity. The provision of stevedore services is an economic activity, since it consists in the offering of a service on a market where the AO, actually or potentially, competes with other providers. It is for the referring court to assess whether this provision of stevedoring services is attributable to the AO.

Articles 53 and 54 EEA apply to conduct which may have an appreciable effect on trade between EEA States, be it direct or indirect, actual or potential. It is for the referring court to determine whether this is the case.

The Court held that Articles 53 and 54 EEA may apply separately or jointly to a system such as the AO.

As regards Article 54 EEA, the Court found that the referring court must determine whether the relevant geographic market is limited to the port of Drammen. Should it consider that the AO holds a dominant position, it would need to determine whether that position covers a substantial part of the EEA territory. A single port may be regarded as a substantial part of the EEA territory. However, should the referring court find that the port of Drammen cannot be regarded as a substantial part of the EEA, it would have to take into account identical or corresponding AO systems which may exist in other ports. As for the question of abuse, the referring court has to assess whether the AO obliges purchasers to obtain all or most of their requirements for stevedoring services from it, charges disproportionate prices, or refrains from the use of modern technology.

As regards Article 53 EEA, the Court held that it is for the referring court to assess whether the thirteen AOs are parties to an agreement or a concerted practice within the meaning of that provision.

The second set of questions concerning the interpretation of Article 31 EEA

Noting that Holship is owned by a Danish company, the Court held further that a boycott that aims at procuring acceptance of a collective agreement which includes a priority clause such as the one at issue constitutes a restriction on the freedom of establishment. Holship's affiliation to the Framework Agreement would compel it to give priority to the AO's workers over its own employees, and to pay the rates set by the AO. Moreover, the boycott is inextricably linked to the Framework Agreement. In this context, it is of no significance whether Holship's needs for unloading and loading services are very limited or sporadic.

Restrictions on the freedom of establishment may be justified either by Article 33 EEA or by overriding reasons of general interest, such as the protection of workers. Those justifications must be interpreted in the light of fundamental rights. In the present case, the AO system protects a limited group of workers to the detriment of other workers. Although the right to take collective action covers situations where workers support other workers, there is nothing indicating that the boycott aims at improving the working conditions of Holship's employees. Moreover, the boycott may have violated Holship's negative right to freedom of association, and possibly that of its employees. It is therefore of no significance for the assessment of the restriction of the freedom of establishment that Holship applies another collective agreement to its employees. It is for the referring court to determine, having regard to all the facts and circumstance before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.