The Nordic model and the EU: Implementation of Directive 96/71/EC – the Icelandic experience[1]

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1.1 Is there such a thing as one Nordic model?

A common characteristic of the Nordic countries is what is referred to as the Nordic labour market model. It is characterised by relatively strong trade unions, which organise between 55% and 86% of all wage-earners. Other shared characteristics include a mixture of centralised and local rounds of bargaining; a joint wage policy based on solidarity; well-established tripartite councils; a strong, respected obligation to keep the peace; the prominent role of the public conciliation board; incorporation of wage-earners' general rights and legal protection into legislation and labour market agreements; and, finally, the absence of a statutory minimum wage. In spite of these shared main features, the Nordic countries are different. Iceland is different in a number of ways: There is a very high level of organisation membership on the private labour market, where 86% of wage-earners are members of a trade union and 70% of employers belong to an employers' organisation; the scope of labour law is relatively small; labour market agreements become law and automatically become generally applicable (automatic extension, *erga omnes*) as regards minimum conditions which the Icelandic trade unions see as a tool in the fight against "social dumping"; wage formation is flexible; and, finally, there is relatively low job protection.

To this must be added that Iceland is a small country, remotely located, without any shared physical borders with other countries. Iceland is not a member of the European Union (EU), but does form part of the joint economic area through the agreement on the European Economic Area (EEA), so the country has relatively limited influence on developments in the EU. This poses other challenges for the Icelandic labour market, but also other opportunities on the labour market than in EU Member States, including the Nordic countries that are members of the EU.

The deviations mentioned here do not mean that the other Nordic are more or less identical. For example, both Norway and Finland have ways of implementing the *erga omnes* principle of labour market agreements, while the social partners in Denmark play a more extensive role in the implementation of EU law than is the case in the other Nordic countries, except Iceland.

Even if the labour market models of the Nordic countries are thus not identical, researchers find that they have enough resemblance to speak of one model with very strong shared features. The labour market model is closely connected to what is called the Nordic welfare system and actually forms an integral part of that system. These two systems supplement each other and together make up the Nordic model. This model gives a fine explanation of how the Nordic countries have succeeded in protecting their basic values during and after the economic crisis of recent decades and how they have all succeeded in minimising unemployment. (Simon Sturn 2013. *Are corporatist labour markets different? Labour market regimes and unemployment in OECD countries.* International Labour Review. Vol. 152. Bls. 237). When, however, labour market models and the implementation of EU legal acts are discussed, it should be taken into consideration

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that the Nordic EEA states (Iceland and Norway) hold a special position as regards the implementation of EU legal acts. Judgments in the Icelandic and Norwegian Supreme Courts clearly show that the courts of EEA states have the possibility – and permission – to assume broader authority in protecting their labour market models than is the case in the other Nordic countries, when it comes to EU legislation (see Chapter 2).

This is the backdrop against which an account is given below of the step-by-step implementation of Directive No. 96/71/EC in Iceland.

1.2 EEA law and national legislation

The interaction between Icelandic legislation and EEA legal acts is basically different from the interaction between EU law and the national legislation of EU Member States.
The main rule in EEA legislation on this matter is to be found in protocol 35 of the EEA Agreement, which states: "For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases." The EEA Court has interpreted the protocol to mean that an EEA rule which has been incorporated into national legislation takes priority over a conflicting provision in national legislation (cf., for example, case E-1/07).

The protocol was incorporated into Icelandic law as a rule of law interpretation; however, Article 3 of Act No. 2/1993 states the following: "Wherever relevant, laws and rules must be interpreted in accordance with the EEA Agreement and the rules based on said Agreement." In some cases, the Icelandic Supreme Court has addressed this law provision. The first time this was done was in 2003 (HRD 477/2002), when the Supreme Court stated that the rule of the EEA Agreement on a ban against specific taxation should be deemed to be a special rule taking priority over an older law provision which was in conflict with the special rule. In subsequent judgments, the Icelandic Supreme Court approached the subject differently; a judgment from January 2013 (HRD 10/2013) specifies the following:

> "Article 3 of Act No. 2/1993 states that, to the extent relevant, laws and rules should be interpreted in accordance with the EEA Agreement and the rules based on the said Agreement. The Supreme Court judgment of 9 December 2010, in case no. 79/2010, states that, in the nature of things, the interpretation of law, cf. Article 3 of Act No. 1/1993, is also a matter of the language of Icelandic laws reflecting as much a possible the significance given in and as much as possible corresponding to the joint rules to apply within the European Economic Area. However, this kind of law interpretation cannot lead to disregarding the working of Icelandic law, as it says in the judgment [underlined by me]."

This means, quite simply, that EEA rules do not take precedence over Icelandic law and it also means that, when implementing EEA law, Iceland reserves the right to have more flexibility than EU Member States.

The Norwegian Supreme Court has taken a view which is not very different from this. A case from 2000, (HR-2000-49-B) dealt with the provisions of Norwegian road traffic legislation on damages; however, in an advisory statement from the EEA Court, these provisions were deemed to partially infringe EEA law as well as three specific EU Directives, which Norway felt it had implemented. In its conclusion, the Norwegian Supreme Court states that: "…. Norwegian law is governed by a so-called presumption principle, which means that an Act should be interpreted in line with our international law obligations to the extent possible, thereby also in line with the three EEA Directives. In this case, the provision concerned could hardly be understood in different ways. If the provision were to be disregarded, this would mean going beyond a reasonable interpretation of the provision; this would in practice mean that the non-implemented Directives would be given direct effect with priority over formal law. It would constitute a problem for legal persons if they could not act on the basis of Norwegian law...". This is the same conclusion as in the Icelandic Supreme Court, i.e. that EEA law does not have priority over national legislation.

In a subsequent judgment from March 2013 (HR-2013-0469-A), the Norwegian Supreme Court dealt "with the significance of what in the judgment is called "the Norwegian working life model", and whether this model and specific parts of it (the *erga omnes* effect of labour market agreements in accordance with a specific decision) enjoyed protection under the provisions of Article 3.10 of Directive No. 96/71/EC on the posting of workers; the mentioned Article deals with exceptions from the rules of the Directive on the basis of the provisions of basic principles of law (public policy provision) and states the following: "This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions, ..." The Norwegian Supreme Court concluded that this could be the case and the judgment states the following (item 161): "The question is whether provisions of significance to stability of such a basic structure of society can be deemed to concern "public policy" in the sense of the Directive. Based on the statement given by the Department in Ot.prp. No. 88 (2008–2009), the answer to this question is largely affirmative in my view."

In the same judgment, the Norwegian Supreme Court also utilised its latitude to deviate from the advisory statements of the EEA Court, but the judgment states the following (item 94):

" .... that the Supreme Court shall not take the statement from the EFTA Court as a basis without review, but has the authority and duty to independently decide whether and to which extent this should be done. Against this background, I cannot see that the Supreme Court would formally be deprived of the right to base its decision on a different viewpoint."

This relation between EEA law and the national legislation of the individual country, reflected in the judgments from the Supreme Courts of Iceland and Norway, is completely different from the relation between EU law and the legislation of the individual Member State, and thus also from the rules that apply in Denmark, Sweden and Finland by virtue of their membership of the EU. The European Court of Justice made it clear long ago that EU law takes priority over Member State legislation (Costa v. ENEL, Case No. 6/64), and that EU rules may have direct legal effect in national legislation without having been implemented. Furthermore, it cannot be disregarded that the EU's competence in the social field was markedly enhanced through the Amsterdam Treaty in 1997 (which is not binding on the EEA countries), nor should the development in EU law be disregarded which means that, because of the principle of harmonisation, EU Directives may gain an "indirect horizontal effect".

It is thus my conclusion that both Iceland and Norway have more latitude than the other Nordic countries, when it comes to protecting their various labour market models, and thus the Nordic labour market model, in light of the development of EU law, which the EEA countries see as a threat to their labour market models. This view does not involve a position on whether Iceland's situation is better outside the EU than it would be inside. This is an open question, which will not be answered until the question can be clarified in the membership negotiations with the EU which have presently been put on hold.

1.3 Implementation of Directive 96/71/EC in Iceland

1.3.1 Original implementation through Act No. 54/2001

Work was carried out in 1999 and 2000 on the coming into effect of the Directive; the Icelandic Trade Union Congress (ASÍ) participated in all stages of this preparation. When a Parliamentary Bill on posting of workers was introduced in 2001, ASÍ criticised the contents of the Bill for not making a sufficient effort to protect the Icelandic labour market. ASÍ's statement on the Bill includes the following:

> "In this country, the main rule is that agreed wages and other working conditions for wage-earners according to labour market agreements are minimum conditions which the individual wage-earner cannot renounce. As will be known, this is specified in Article 1 of Act No. 55/1980. This Act applies to all wage-earners working in Iceland, no matter whether the wage payer is Icelandic or foreign and whether the person belongs in Iceland, in the EEA, or elsewhere."

Against this background, ASÍ proposed that all provisions of Icelandic labour market agreements would apply to wages and other conditions to the extent they have an *erga omnes* effect in accordance with Act No. 55/1980, and in light of the fact that there is a ban on treating people differently because of nationality, posted workers must be paid the same wages as others in the Icelandic labour market, i.e. the market wages in force at any given time. This view did not prevail, and relatively simple legislation on posted workers was adopted, where the only reference was to the most important statutory rules on minimum conditions, working environment, etc.

1.3.2 Agreement on foreigners in the Icelandic labour market, 2004

In the years that followed, a large number of foreign workers came to Iceland, mainly in connection with large CHP plants and expansion in the building sector. A number of cases on infringement of foreign workers' rights came up, including cases on posted workers. As a result, ASÍ and the Central Employer Federation (SA) adopted an agreement in 2004 on foreign workers in the Icelandic labour market (http://www.asi.is/%C3%BEinn-rettur/foreign-workers/english/). In this agreement, the social partners declared as their joint project the preservation of the existing arrangements in the labour market, and stated as a joint project that they work to ensure that enterprises using foreign labour for production or services pay wages and comply with working conditions that are in accordance with applicable labour market agreements and laws in Iceland. The agreement contains provisions concerning information to trade union representatives and a consultation committee of the two parties to the agreement, the task of which would be to resolve conflicts in individual cases. Subsequently, the authorities amended Act No. 55/1980 on wage-earners' working conditions to ensure that agreements between the social partners on the handling of conflicts in regard to wage-earners' wages and conditions of employment in the Icelandic labour market are in accordance with the provisions of the Act and that labour market agreements would have the same validity as agreements on wages and working conditions, i.e. they would have the same *erga omnes* effect for the whole labour market as collective agreements.

1.3.3 Preparation and adoption of Act No. 45/2007.

The lessons learned from the implementation of the agreement in 2004, as well as growing pressure on the Icelandic labour market model in subsequent years, prompted the Minister for Social Affairs to establish a working group with the social partners to review the situation for foreigners in the Icelandic labour market. Among the proposals from the working group was a revision of Act No. 54/2001, which had originally implemented Directive No. 96/71/EC. The working group felt it was important to strengthen the basis of the existing labour market system as regards foreign companies posting their employees temporarily in Iceland in connection with the performance of services on the basis of the EEA Agreement. Subsequently, new package legislation was passed in the form of Act No. 45/2007, which contained a number of basic changes.

In the new legislation, it is assumed that foreign companies domiciled in another country within the EEA and wishing to perform services in Iceland on the basis of the EEA Agreement for more than ten working days within a period of twelve months are to submit specific information to the Labour Directorate (Vinnumálastofnun) concerning their activities in Iceland not later than eight days after the commencement of each service provision period. Companies posting their employees in the country to perform services for four weeks or less within a twelve-month period form an exception to the above-mentioned duty to give

information, provided that the service consists of specialised assembly and set-up, inspection or repair of equipment. Furthermore, companies which normally have six or more employees posted in Iceland, performing services for more than four weeks within a twelve-month period, are to have a local, dedicated contact person who represents the company vis-à-vis the authorities and social partners. In addition, companies which receive services are obliged to ensure that the foreign companies with which they have concluded contracts have submitted the basic information required by law to the Labour Directorate (Vinnumálastofnun). This information includes the company's name, information about its domicile in its home country showing the name of the company's representative, the address in the home country, the nature of the services to be provided, their VAT number or other similar documentation of the company's activities in its home country, documenting that the company operates lawfully in its home country within the line of business concerned in accordance with that country's national legislation, and, finally, the name of the company receiving the service and the central business registration number of that company or similar identification. Furthermore, a list of all employees who will be working on the company's behalf in Iceland must be submitted, showing their name, birthday, address at home, citizenship, documentation of the persons' social security in their home country (E-101), the place they will be staying in Iceland and the planned length of stay, as well as a work certificate as required. If an employee is not a resident of the EEA, a valid work permit from the home country must be submitted together with conformation that the employees in Iceland have accident insurance, as defined in legislation. The Act also contains clear provisions on the right of posted workers to fixed pay in accordance with an employment contract (not minimum pay in accordance with a labour market agreement) in case of illness or accident, i.e. provisions which reflect the basic rights incorporated in labour market agreements on the private labour market. The Act also contains provisions on the inspection to be carried out by the Labour Directorate (Vinnumálastofnun), as well as on the duty to give information which rests upon both the company delivering and the company receiving the service concerned towards the Directorate, which includes the duty to submit contracts of employment, and, finally, a provision on authority to stop the work if compliance with the Act is not ensured.

In the preparation of the Act, ASÍ had substantial influence on the contents of the Act and accepted the ultimate outcome.

1.3.4 ESA's and Iceland's reactions

After the new Act was adopted, ESA, the EFTA Surveillance Authority, reviewed it and concluded in a reasoned statement that certain provisions infringe Article 36 of the EEA Agreement and Directive No. 96/71/EC, one of the reasons being that the Act contains requirements which are comparable to a prior authorization requirement for being allowed to start up an enterprise in the country. The following detailed comments were made:

1. A service provider must submit information to the Labour Directorate (Vinnumálastofnun) eight days before commencing the performance of the services concerned.
2. The Labour Directive must confirm in writing its receipt of the documents which the service provider is obliged to submit to the receiving company before provision of the service may start.
3. A company is not authorised to perform services in Iceland if it fails to inform the Labour Directive of its representative or replacement of the said representative.
4. The provisions of the Act on an employee's right to wages during illness and in case of an accident and on accident insurance in case of a fatality, permanent injury or temporary loss of working capacity, are not part of the working conditions assumed by the European Parliament and the Council's Directive No. 96/71/EC on the work of posted workers in connection with services, cf. Article 3 (3), letters a–g of the Directive.

Following consultation with the social partners, the Icelandic Parliament, Altinget, decided to accommodate some of ESA's comments. Act No. 45/2007 was subsequently amended; it is thus enough for information for companies posting workers in Iceland on the basis of Directive No. 96/71/EC to submit information the same day as the work in Iceland starts. The information rule on conformation of social security in the home country was simplified in that proof other than form E-101 may qualify and in that the Labour Directive is now obliged to confirm receipt of the documentation within two days. The obligation for companies was changed correspondingly. A special provision was added to the Act on per diem fines if companies do not rectify deficiencies as requested by Vinnumálastofnun. The primary reason given for these changes was a reference to the general rules on proportionality in the central administration, cf. Article 12 of the Public Administration Act, Act No. 37/1993.

Amendments to the provisions of the Act on workers' rights in connection with illness and accident – as requested by ESA, cf. item 4 above – were not adopted. A report on the proposed amendments to the Act contains the following comment: "*According to [ESA], these provisions constitute an obstacle to the free exchange of services on the basis of Article 36 in the Agreement on the European Economic Area, since the contents of the said provisions do not form part of the working conditions assumed by European Parliament and Council Directive No. 96/71/EC on posted workers in connection with services, cf. Article 3 (3), letters a–g of the Directive. However, it must be assumed that the mentioned provisions of the Act result in labour market agreement rights in the Icelandic labour market which form part of wage-earners' minimum conditions, which means that these provisions provide important protection of wage-earners working in this country. With the purpose of guaranteeing that foreign workers enjoy the minimum rights and conditions which apply in the Iceland labour market in the same way as others who work here, it has thus been considered important to maintain these provisions in legislation* [underlined by me]. *Furthermore, it is also deemed important that the contents of these provisions apply, unless the employee has achieved more favourable conditions in his or her employment contract with the company concerned, through a labour market agreement or by virtue of legislation in the state where the person normally works.*" In other words, Altinget has reserved the right for Iceland to protect an important part of the Icelandic labour market model; consequently, all wage-earners in Iceland must enjoy the same minimum rights, of which rights during illness and accident form an integral part. ESA's reaction was to file a case against Iceland before the EEA Court.

1.3.5 Judgment in case E-12/10 and Iceland's reaction

ESA based its lawsuit basically on the argument that the provision on the right to pay during illness and in case of accident was outside the minimum wage concept defined in Article 3(1) of the Directive and was not part of the total listing. Instead, it should form part of the provision on social security in Regulation No. 1408/71. Iceland based its defence primarily on the argument that provisions on wages during illness and in case of accident come under the minimum wage concept defined in Article 3(1) of the Directive and that provisions on accident insurance come under the provisions of national legislation on compensation and insurance; these provisions are not covered by the Directive and were thus warranted. Furthermore, the defence was based on the argument that both parts can be justified with reference to the exception in Article 3(10) of the Directive on basic principles of law (public policy). The EFTA Court found that Article 3(1) of Directive 1 contained an exhaustive list of the working and employment conditions which an EEA state may insist that companies domiciled in another EEA state must respect, when they post workers to work in its territory. The listing included "*minimum wage and overtime pay*". The Court found that the payment of wages in case of illness and accident according to Icelandic legislation would not come under the concept of minimum wage in the sense of the Directive, since the Directive assumes that wages in case of illness and accident are based on fixed pay, but not the minimum wage. Furthermore, the Court found that the provisions of the Act on compulsory accident insurance concern working conditions, but not national legislation regarding compensation and accident insurance, and that, consequently, the provisions were not covered by the total listing made in Article 3 (1) of the Directive. Finally, the Court concluded that the Icelandic rules on workers' right to wages in case of illness or accident could not be justified on the basis of

general principles of law, since Iceland had not demonstrated that such rules were necessary in order to meet a real, current threat to basic interests of Icelandic society.

Following close consultations with the social partners, Altinget decided to accept the judgment and its conclusion concerning compulsory accident insurance and thus removed the relevant provisions from Act No. 45/2007. The adaptation of the Act in regard to wages during illness and accident was minimised in the sense that reference is now made to labour market agreement wages instead of fixed wages, which is in accordance with the provisions of Article 1 of Act No. 55/1980.

1.4 Conclusion

It has been argued that, on the basis of the EEA agreement, Iceland and Norway are better able to oppose EU legislation than can be expected from the Nordic countries which are members of the EU. This could mean that Iceland's and Norway's position is better than that of the other Nordic countries when it comes to protecting the Nordic model – a model, which involves integrated interaction between the labour market and welfare models built up in these countries in recent decades.

It is in this light the Icelandic approach from the outset should be seen, which was that Directive No. 96/71/EC should be implemented in a relatively independent way and endeavours should be made to ensure that such implementation had the least possible influence on the legal and communicative rules in force in the Icelandic labour market. In line with the Nordic tradition, the social partners were key players in the process and had a close, strong relation to the authorities when things became heated. In this process, the level of accommodation was always as low as possible when it came to accommodating what was seen to be a clear, complete listing in Article 3 of the Directive, as well as to reasoned statements from ESA and the judgment of the EEA Court. Throughout the process, ASÍ's purpose was to ensure in the best way possible that conditions for workers posted in Iceland are the same as those generally in force in the Icelandic labour market. The process succeeded in making minimum implementation of the Directive in the national legislation that ranks higher than EEA rules. In the light of experience gained, implementation was subsequently resumed and recommendations were made regarding important obligations for the companies which post workers to Iceland, just as inspection was introduced to ensure the workers' rights are protected in accordance with Icelandic legislation and the labour market agreements which also constitute the minimum conditions for all wage-earners in Iceland.