JUDGMENT OF THE COURT
20 November 2024*

(*Fundamental freedoms – Article 28 EEA –Article 31 EEA – Article 36 EEA– Directive 2008/104/EC – Temporary work agencies – Internal situation – Restriction – Justification*)

In Case E-2/24,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in the case between

Bygg & Industri Norge AS and Others

and

The Norwegian State, represented by the Ministry of Labour and Social Inclusion,

concerning the interpretation of Article 36 of the Agreement on the European Economic Area,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Bygg & Industri Norge AS and Others ("Bygg & Industri Norge"), represented by Nicolay Skarning and Jan Magne Langseth, advocates;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Norwegian Government, represented by Ida Thue, acting as Agent;

- the German Government, represented by Dr Nikolaus Scheffel, acting as Agent;

- the EFTA Surveillance Authority ("ESA"), represented by Ewa Gromnicka, Marte Brathovde and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Lorna Armati, Mislav Mataija and Gero Meessen, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of Bygg & Industri Norge, represented by Nicolay Skarning and Jan Magne Langseth; the Norwegian Government, represented by Ida Thue; ESA, represented by Ewa Gromnicka and Marte Brathovde; and the Commission, represented by Mislav Mataija, at the hearing on 19 June 2024,

gives the following

J U D G M E N T

I LEGAL BACKGROUND

EEA law

1 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> > *(a) to accept offers of employment actually made;*
> >
> > *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
> >
> > *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing*

the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

2 Article 31 EEA reads:

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.

3 Article 33 EEA reads:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

4 Article 34 EEA reads:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

5 Article 36 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*
>
> *2. Annexes IX to XI contain specific provisions on the freedom to provide services.*

6 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9; Norwegian EEA Supplement 2016 No 64, p. 138) ("Directive 2008/104") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 149/2012 of 13 July 2012 (OJ 2012 L 309, p. 34; Norwegian EEA Supplement 2012 No 63, p. 39) and is referred to at point 32k of Annex XVIII (Health and safety at work, labour law, and equal treatment for men and women) to the EEA Agreement. Constitutional requirements indicated by Iceland and Liechtenstein were fulfilled by 4 March 2013, and the decision entered into force on 1 May 2013.

7 Recitals 10, 11, 12 and 15 of Directive 2008/104 read:

> *(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.*
>
> *(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.*
>
> *(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.*
>
> *(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.*

8 Article 4(1) of Directive 2008/104, entitled "Review of restrictions or prohibitions", reads:

> *Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the*

protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

9 Article 5(5) of Directive 2008/104, entitled “The principle of equal treatment”, reads:

Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.

10 Article 6 of Directive 2008/104, entitled “Access to employment, collective facilities and vocational training”, reads, in extract:

1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.

This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers.

...

11 Article 9 of Directive 2008/104, entitled “Minimum requirements”, reads:

1. This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This is without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive,

provided always that the minimum requirements laid down in this Directive are respected.

National law

12 According to the referring court, the general rule in Norwegian labour law is that employees are hired on a permanent basis directly by the employer, in accordance with Section 14-9 of Act No 62 of 17 June 2005 relating to the working environment, working hours and employment protection, etc. (*lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven))* ("the WEA"). Other forms of attachment, such as temporary employment and the use of temporary agency workers may be used, subject to certain conditions.

13 Rules on hiring in workers from temporary work agencies are laid down in Section 14-12 of the WEA. By Act No 99 of 20 December 2022, the first paragraph of Section 14-12 of the WEA was amended. Following that amendment, under the first paragraph of Section 14-12, hiring in workers from temporary work agencies is permitted to the extent that temporary employment may be agreed pursuant to letters (b) to (e) of the second paragraph of Section 14-9 of the WEA. According to the referring court, this means that it is possible to conclude agreements to hire in workers from temporary work agencies:

> (b) for work as a temporary replacement for another person or persons;
>
> (c) for traineeships;
>
> (d) for participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Administration; and
>
> (e) for athletes, trainers, referees and other leaders within organised sports.

14 Section 14-12 of the WEA further provides that, in undertakings bound by a collective agreement with a trade union with the right of nomination (i.e. at least 10 000 members), the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired in may enter into a written agreement concerning the hiring in of workers for limited periods notwithstanding the provisions laid down in letters (b) to (e) of the second paragraph of Section 14-9 of the WEA.

15 The entry into force of the amendments to the first paragraph of Section 14-12 of the WEA is suspended until further notice for "hiring in of replacements in agricultural undertakings" or "hiring in for short-term events" pursuant to Sections 4 and 5 of the Norwegian Regulation No 290 of 20 December 2022 on transitional rules in relation to amendments to the Working Environment Act (*forskrift 20. desember 2022 nr. 290 Overgangsregler til lov om endringer i arbeidsmiljøloven m.m. (inn- og utleie fra bemanningsforetak)* ("the Transitional Regulation").

16 According to letter (a) of the first paragraph of Section 3 of the Norwegian Regulation No 3 of 11 January 2013 on hiring in workers from temporary work agencies (*forskrift 11. januar 2013 nr. 33 om innleie fra bemanningsforetak*) ("the Regulation on temporary agency work"), to ensure proper operation of health and care services, the time-limited hiring in of health personnel is permitted when the work is of a temporary nature. The time-limited hiring in of "workers with special expertise who are to provide advisory and consulting services in a clearly limited project" is permitted too, pursuant to letter (b) of the first paragraph of Section 3 of that regulation.

17 Section 4 of the Regulation on temporary agency work lays down a prohibition on hiring in temporary agency workers for construction work in Oslo, Viken and former Vestfold:

> *Hiring in from temporary work agencies for construction work on construction sites in Oslo, Viken and former Vestfold is not permitted.*
>
> *'Construction work' shall be understood to mean:*
>
> 1. *erection of buildings;*
> 2. *furnishing, decoration and installation work;*
> 3. *assembly and dismantling of pre-fabricated components;*
> 4. *demolition, dismantling, reconstruction and refurbishments;*
> 5. *redevelopment and maintenance other than routine or minor work;*
> 6. *digging, blasting and other ground work relating to the construction site; and*
> 7. *other work performed in connection with construction work.*
>
> *'Construction site' shall mean any workplace where temporary or variable construction work of a certain magnitude is performed.*

II FACTS AND PROCEDURE

18 The plaintiffs in the main proceedings are temporary work agencies established in Norway. One of those agencies has non-Norwegian owners established in the European Economic Area. All the plaintiffs hire out workers in Norway to undertakings which are established in Norway. Some of the plaintiffs' employees are nationals of other EEA States, and some of them are not resident in Norway.

19 The plaintiffs claim that recent amendments to Norwegian legislation on hiring in workers from temporary work agencies are contrary to Article 36 EEA.

20 In December 2022, the Norwegian Parliament (*Stortinget*) adopted rules limiting the possibility to hire in workers from temporary work agencies. The amendments abolished the general possibility to hire in workers when the work is of a temporary nature. However, it is still possible to hire in temporary workers in a selected number of situations, such as replacement workers or by agreement between the employer and the employees' elected representatives in accordance with Norwegian law.

21 In January 2023, a regulation was adopted which prohibited hiring in from temporary work agencies for construction work in the counties of Oslo, Viken and the former Vestfold.

22 The legislative and regulatory amendments mentioned above entered into force on 1 April 2023, with transitional schemes in place until 1 July 2023. The plaintiffs claim that their ability to hire out workers has been limited by those rules and, as a result, they have suffered financial losses. Thus, the plaintiffs have brought an action before the referring court seeking compensation from the Norwegian State for an alleged infringement of EEA law.

23 Against this background, Oslo District Court decided to refer the following questions to the Court:

> *1. Does the fact that a temporary work agency from an EEA State that hires out workers to undertakings in the same EEA State has employees who are nationals of other EEA States have any implications for the determination of whether there is a cross-border element under the rules on the freedom to provide services, ref. Article 36 of the EEA Agreement?*
>
> *2. What can constitute legitimate objectives for restrictions on the freedom to provide services under Article 36 of the EEA Agreement in the form of prohibitions and limitations on the hiring-in of workers?*
>
> *3. Which criteria will be relevant in the determination of whether the [restriction of] hiring-in of workers will be suitable and necessary in order to safeguard legitimate objectives? In that context, should any significance be attached to the fact that the restriction constitutes a geographical and sector-specific prohibition on the hiring-in of workers from temporary work agencies?*

24 On 30 April 2024, the Court adopted measures of organisation of procedure pursuant to Articles 56(1) and 57(3)(a) and (b) of the Rules of Procedure, inviting those participating in the proceedings before the Court to respond to questions concerning the applicability of Articles 28 and 31 EEA and the compatibility of measures such as those at issue in the main proceedings with those articles.

25 On 22, 23 and 24 May 2024, responses to the measures of organisation of procedure were received from Bygg & Industri Norge, the Norwegian Government, the German Government, ESA and the Commission.

26 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

Preliminary remarks

27 By its first question, the referring court enquires whether the fact that a temporary work agency from an EEA State that hires out workers to undertakings in the same EEA State has employees who are nationals of other EEA States has implications for the determination of whether Article 36 EEA is applicable. By its second question, it asks what can constitute legitimate objectives for restrictions on the freedom to provide services under Article 36 EEA in the form of prohibitions and limitations on the hiring in of workers. By its third question, the referring court asks which criteria will be relevant in the determination of whether a restriction on the hiring in of workers will be suitable and necessary in order to safeguard legitimate objectives. In that context, the referring court asks whether any significance should be attached to the fact that the restriction concerned constitutes a geographical and sector-specific prohibition on the hiring in of workers from temporary work agencies. The Court considers it appropriate to address these questions together.

28 Although the questions referred do not explicitly mention Directive 2008/104, it follows from the request, which includes references to that directive given the particular subject-matter of the main proceedings, as well as the written observations of the parties and their oral submissions at the hearing, that Directive 2008/104 is considered to be of relevance to the assessment of the measures at issue in the main proceedings.

29 Furthermore, although the referring court only refers questions relating to the freedom to provide services under Article 36 EEA, it follows from the submissions of some of the parties that the free movement of workers under Article 28 EEA and the freedom of establishment under Article 31 EEA are considered to be of relevance to the assessment of the measures at issue in the main proceedings. In particular, Bygg & Industri Norge state that they invoke Articles 28 and 31 EEA in parallel with Article 36 EEA as a basis for their claim in the main proceedings.

30 The Court recalls that, under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment. The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see the judgment of 15 July 2021 in *Eyjólfur Orri Sverrisson*, E-11/20, paragraph 33).

31 The Court observes that proceedings under Article 34 SCA are based on a clear separation of functions between national courts or tribunals and the Court. Any assessment of the facts of the case is a matter for the national court or tribunal, which must assume responsibility for the subsequent judicial decision, and it is that court or

tribunal which has the task of interpreting the provisions of national law at issue and ultimately determining their compatibility with EEA law. However, in order to give the national court or tribunal a useful answer, the Court may, in the spirit of cooperation with national courts and tribunals, provide it with all the guidance that it deems necessary (see the judgment of 16 July 2020 in *Tak – Malbik*, E-7/19, paragraph 45, and the judgment of 28 September 2012 in *Irish Bank*, E-18/11, paragraph 56).

32 It is established case law that the Court may extract, from all the factors provided by the referring court, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute in the main proceedings. Thus, although the referring court has limited its questions to the interpretation of Article 36 EEA, it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the national court with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it, whether or not reference is made thereto in a question referred to the Court for an advisory opinion (see the judgment of 13 May 2020 in *Campbell*, E-4/19, paragraphs 44 and 45).

33 In the circumstances of the present case, and in order to realise the cooperation under Article 34 SCA, the Court finds it appropriate to examine the questions referred in the light of Directive 2008/104 and Articles 28, 31 and 36 EEA.

Directive 2008/104 on temporary agency work

34 Some of the parties participating in the case have argued that Article 4(1) of Directive 2008/104 is of significance for the dispute in the main proceedings. Article 4(1) provides that prohibitions or restrictions on the use of temporary agency work shall be justified on grounds of general interests relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly, and abuses are prevented.

35 However, in order to ascertain the exact meaning of Article 4(1) of Directive 2008/104, that article needs to be read as a whole, taking into account its context. Thus, firstly, Article 4(2) and (3) provides that EEA States shall, after consulting the social partners, or, if the prohibitions or restrictions on the use of temporary agency workers are laid down by collective agreements, the social partners which negotiated them, review any prohibitions or restrictions on the use of temporary agency work "in order to verify whether they are justified on the grounds mentioned in paragraph 1" (compare the judgment of 17 March 2015 in *AKT*, C-533/13, EU:C:2015:173, paragraphs 24 and 26).

36 Secondly, pursuant to Article 4(5), the EFTA States were required to inform ESA of the results of the review. It follows that, by imposing upon the competent authorities of the EFTA States the obligation to review their national legal framework, in order to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified on grounds of general interest, and the obligation to inform ESA of the results of that review, Article 4(1), read in conjunction with the other paragraphs of that article, is addressed solely to the competent authorities of the EFTA States. Such obligations

cannot be performed by the national courts. Depending upon the result of that review, which had to be completed by the same date as that laid down in Article 11(1) for the transposition of Directive 2008/104, the EEA States, which are required to comply in full with their obligations under Article 4(1) of that directive, could have been obliged to amend their national legislation on temporary agency work (compare the judgment in *AKT*, C-533/13, cited above, paragraphs 27 to 29).

37 However, the fact remains that the EEA States are, to that end, free either to remove any prohibitions and restrictions which could not be justified under that provision or, where applicable, to adapt them in order to render them compliant, where appropriate, with that provision. It follows that, when considered in its context, Article 4(1) must be understood as restricting the scope of the legislative framework open to the EEA States in relation to prohibitions or restrictions on the use of temporary agency workers and not as requiring any specific legislation to be adopted in that regard (compare the judgment in *AKT*, C-533/13, cited above, paragraphs 30 and 31).

38 Therefore, Article 4(1) of Directive 2008/104 does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of that provision (compare the judgment in *AKT*, C-533/13, cited above, paragraph 32).

39 Thus, Article 4(1) of Directive 2008/104 is not of direct significance for the resolution of the dispute at issue in the main proceedings.

The applicability of Articles 28, 31 and 36 EEA

40 In order to answer the questions referred from the national court, it is necessary to ascertain whether Articles 28, 31 and 36 EEA are applicable to circumstances such as those at issue in the main proceedings.

41 In this respect, it must be observed that, in an action brought by ESA for failure to fulfil obligations under Article 31 SCA, the Court may assess observance by an EFTA State of one of the fundamental freedoms laid down by the EEA Agreement. That fact cannot in itself allow the conclusion that that freedom may be relied on by an individual in a case which is confined in all respects within a single EEA State. In an action brought by ESA for failure to fulfil obligations the Court ascertains whether the national measure challenged by ESA is, in general, capable of deterring operators from other EEA States from making use of the freedom in question. However, the Court's function in proceedings for an advisory opinion is, by contrast, to help the referring court to resolve the specific dispute pending before that court, which presupposes that that freedom is shown to be applicable to that dispute (compare the judgment of 15 November 2016 in *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 49).

42 In order to determine whether national legislation falls within the scope of one or more of the fundamental freedoms guaranteed by the EEA Agreement, it is clear from established case law that the purpose of the legislation concerned must be taken into

consideration. In addition, a measure in dispute will in principle be examined only in relation to one of the freedoms if it appears, in the circumstances of the case, that one is entirely secondary in relation to the other and may be considered together with it. Furthermore, the Court takes account of the facts of the individual case in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or another of those provisions (see the judgment of 21 March 2024 in *LDL*, E-5/23, paragraph 45 and case law cited).

43 In determining whether an undertaking operates under the freedom of establishment or merely under the freedom to provide services, the referring court needs to consider the duration, regularity, periodical nature or continuity of the plaintiffs' activity in Norway. A person may, while still remaining within the scope of application of the freedom to provide services, equip himself with some infrastructure in the host EEA State, including an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of performing the service in question. That situation must, however, be distinguished from that of a person who pursues a professional activity on a stable and continuous basis in another State where he holds himself out from an established professional base, to amongst others, nationals of that State. Such a person comes under the provisions on the freedom of establishment and not those on the freedom to provide services (see the judgment of 3 August 2016 in *B and B*, Joined Cases E-26/15 and E-27/15, paragraph 101 and case law cited).

44 Yet, in the light of the fact that the questions referred specifically mention Article 36 EEA, and to give the referring court as complete and as useful a reply as possible, the Court finds it appropriate to examine whether Article 36 EEA could be deemed applicable to circumstances such as those at issue in the main proceedings.

Article 36 EEA

45 Article 36(1) EEA provides that, within the framework of the provisions of the EEA Agreement, there shall be no restrictions on the freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended. In this respect, it should be recalled that it follows from the wording of Article 36(1) EEA that it does not apply to a situation which is confined in all respects within a single EEA State (see, to that effect, the judgment of 16 November 2018 in *Kristoffersen*, E-8/17, paragraph 67 and case law cited, and compare the judgment in *Ullens de Schooten*, C-268/15, cited above, paragraph 47).

46 Bygg & Industri Norge submit that there is a cross-border element in the present case, which allows for the application of Article 36 EEA based, inter alia, on the grounds that temporary work agencies from Norway or another EEA State provide their services in Norway by means of utilising employees who are nationals of other EEA States, alongside the right of those agencies to receive services from undertakings established in other EEA States.

47 The Norwegian Government submits that given that the temporary work agencies and the user undertakings to which they provide their services are both located within Norway, there is no cross-border element in relation to the freedom to provide services under Article 36 EEA.

48 ESA submits that a cross-border element is present in relation to Article 36 EEA in situations such as those at issue in the main proceedings, where a temporary work agency from an EEA State that hires labour to undertakings in the same EEA State has employees who are nationals of other EEA States.

49 The Commission submits that Article 36 EEA is not applicable to circumstances such as those in the main proceedings, given that the services performed by the plaintiffs in the main proceedings are carried out in Norway for Norwegian undertakings.

50 The Court observes that there are, in principle, four possible cross-border situations in which the freedom to provide services applies. First, the situation where the service provider crosses the border in order to offer the services. Second, the situation where the service recipient crosses the border in order to receive the services. Third, situations where both service provider and recipient cross a border and the service is subsequently provided. Fourth, situations where the service itself crosses the border (compare the opinion of 3 September 2020 of Advocate General Szpunar in *BONVER WIN*, C-311/19, EU:C:2020:640, point 47 and case law cited).

51 It follows from the request that the parties before the referring court are established in Norway and hire out workers in Norway to undertakings which are established in Norway.

52 In this respect, it must be observed that Article 36 EEA does not apply to situations where all the relevant facts are confined within a single EEA State. Thus, in a situation where the service provider and the service recipient are both established in the same EEA State and all of the relevant facts take place within that EEA State there is not any link to the situations envisaged by Article 36 EEA, so that provision does not apply (compare the judgment of 22 December 2010 in *Omalet*, C-245/09, EU:C:2010:808, paragraphs 12 to 14).

53 The fact that a service provider may employ workers from another EEA State is not, by itself, capable of altering that conclusion. With regard to the arguments of the plaintiffs and ESA at the hearing, the Court notes that it has not been presented with information suggesting that the activities of selecting and recruiting temporary agency workers from other EEA States form an integral part of the service offered by the plaintiffs in such a way as to constitute a relevant cross-border element under Article 36 EEA.

54 However, in their written observations submitted to the Court, Bygg & Industri Norge have submitted that a recruitment agency, established in Poland, which exclusively provides its services to Norwegian undertakings has applied to join the action before the referring court subsequent to the request for an advisory opinion being sent to the Court. Bygg & Industri Norge submit that due to the restrictions at issue in the present

case, that recruitment agency is, in effect, barred from providing its services.

55 At the hearing, the Norwegian Government explained that the application of this Polish recruitment agency to be joined as a party to the main proceedings will not be decided by the referring court until that court has resumed the proceedings, after the Court has delivered its advisory opinion.

56 A recruitment agency established in Poland, providing its services to temporary work agencies in Norway comes within the scope of Article 36 EEA. However, the information contained in the request for an advisory opinion and the information submitted by the parties in the case is not sufficient for the Court to assess whether in circumstances such as those of the main proceedings, the measures at issue constitute a restriction on the freedom to provide services vis-à-vis such a recruitment agency.

57 In that regard, it is apparent from settled case law that national legislation which is applicable to all operators exercising their activity on national territory, the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom, does not contravene the prohibition laid down in Article 36 EEA (compare the judgment of 27 April 2022 in *Airbnb Ireland*, C-674/20, EU:C:2022:303, paragraph 42).

58 In those circumstances, it must be for the referring court to determine whether the measures at issue restrict the freedom to provide services guaranteed by Article 36 EEA vis-à-vis the recruitment agency established in Poland or whether any restrictive effects are too uncertain and indirect.

59 In that respect, it should be recalled that the EEA Agreement treats restrictions imposed on providers of services and restrictions imposed on recipients of services in the same manner. Therefore, once the situation falls within the scope of Article 36 EEA, both the recipient and the provider of a service may rely on that article (compare the judgment of 3 December 2020 in *BONVER WIN*, C-311/19, EU:C:2020:981, paragraph 21).

60 Accordingly, it is for the referring court to determine whether the measures at issue in the main proceedings constitute a restriction on the freedom to provide services under Article 36 EEA in relation to a recruitment agency, established in one EEA State and providing its services to temporary work agencies established in another EEA State, and in relation to those temporary work agencies receiving its services, or whether any restrictive effects are too uncertain and indirect.

Article 28 EEA

61 It follows from Article 28(2) EEA that the freedom of movement for workers shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment. It is settled case law that all of the provisions of the EEA

Agreement relating to freedom of movement for persons have the purpose of facilitating the pursuit by EEA nationals of occupational activities of all kinds throughout the EEA and preclude measures which might place EEA nationals at a disadvantage when they wish to pursue an economic activity in the territory of another EEA State (see the judgment of 4 July 2023 in *RS*, E-11/22, paragraph 29).

62 According to the request, all of the plaintiffs in the main proceedings hire out workers in Norway to undertakings which are established in Norway. Some of the plaintiffs' employees are nationals of other EEA States, and some of them are not resident in Norway.

63 Bygg & Industri Norge submit that the corollary right of the employer to invoke Article 28 EEA is a necessary prerequisite to ensure the effectiveness of the freedom of movement for workers. They further state that many of the temporary agency workers employed by them reside outside of Norway and travel to Norway to work for those agencies.

64 The Norwegian Government submits that the interpretation of Article 28 EEA is not relevant to the present case. The measures at issue in the main proceedings do not concern requirements for employment in temporary work agencies but regulate the provision of services from temporary work agencies. Such measures do not come within the scope of Article 28 EEA.

65 ESA submits that for temporary work agencies with workers that are nationals of other EEA States, Article 28 EEA will be the relevant provision. However, ESA emphasises that which fundamental freedom is relevant in each individual instance is, ultimately, for the referring court to ascertain. ESA has also submitted that the measures at issue are at least indirectly discriminatory towards workers from other EEA States, referring to the preparatory works to the amendments which introduced the measures at issue, where it was noted that around 55 per cent of the temporary agency workers affected by the prohibition had immigration backgrounds, mainly from Eastern Europe.

66 The Commission submits that the logic of the case law of the European Court of Justice relating to the right of employers to invoke the provision of EU law equivalent to Article 28 EEA is not present in the circumstances of the main proceedings. That case law dealt with national provisions which directly restricted the ability of employers to hire workers. However, the Commission notes that, as regards the possibility of indirect discrimination, the referring court does not address that point in its request for an advisory opinion and therefore there is insufficient information to conclude on that point.

67 It is clearly evident from the circumstances of the present case that none of the parties in the main proceedings are workers within the meaning of Article 28 EEA. Nevertheless, the Court observes that the rules governing freedom of movement for workers could easily be frustrated if EEA States were able to circumvent prohibitions under those rules merely by imposing on employers obligations or conditions with regard to a worker employed by them, which, if imposed directly on the worker, would

constitute restrictions of the exercise of the worker's right to freedom of movement under Article 28 EEA (compare the judgment of 15 June 2023 in *Thermalhotel Fontana*, C-411/22, EU:C:2023:490, paragraph 41 and case law cited).

68 Therefore, in order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers (compare the judgment of 16 April 2013 in *Las*, C-202/11, EU:C:2013:239, paragraph 18 and case law cited).

69 Moreover, it must be recalled that it is settled case law that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result (see the judgment in *RS*, E-11/22, cited above, paragraph 31).

70 A provision of national law, even if it applies to all workers regardless of nationality, must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other EEA States more than national workers and if there is a consequent risk that it will place the worker from a different EEA State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued (see the judgment of 3 May 2006 in *ESA* v *Norway*, E-3/05, paragraph 56 and case law cited, and compare the judgment of 15 June 2023 in *Ministero dell'Istruzione, dell'Università e della Ricerca (Classements spéciaux)*, C-132/22, EU:C:2023:489, paragraph 29 and case law cited).

71 In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other EEA States but not of nationals of the State in question (compare the judgment in *Ministero dell'Istruzione, dell'Università e della Ricerca (Classements spéciaux)*, C-132/22, cited above, paragraph 30 and case law cited). Nor is it necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect (see the judgment in *ESA* v *Norway*, E-3/05, cited above, paragraph 56 and case law cited).

72 However, in order for a difference in treatment between workers based on their employment arrangement to be regarded as indirectly discriminatory within the meaning of Article 28 EEA, when the national legislation adversely affects all workers, both Norwegians and nationals of other EEA States, it must, by its very nature, be liable to have a greater effect on workers who are nationals of other EEA States (compare the judgment of 13 March 2019 in *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach*, C-437/17, EU:C:2019:193, paragraphs 26 to 30).

73 Although ESA has pointed out the possibility of the existence of indirect discrimination in the circumstances at issue in the main proceedings, there is, as noted by the Commission, insufficient information in the case file that would allow the Court to conclude that measures such as those at issue in the main proceedings, which apply to

all workers regardless of nationality, are intrinsically liable to affect workers who are nationals of other EEA States more than national workers.

74 Therefore, it is for the referring court to determine whether the measures at issue in the main proceedings are indirectly discriminatory by being intrinsically liable to affect workers who are nationals of other EEA States more than workers of Norwegian nationality. Should that be the case, the measures at issue constitute a restriction on Article 28 EEA, which would need to be justified in order to be compatible with that article. In which case, the considerations set out below regarding Article 31 EEA are equally applicable in the context of Article 28 EEA.

Article 31 EEA

The concept of establishment

75 Article 31(1) EEA provides that within the provisions of the EEA Agreement there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 34, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

76 According to settled case law, the right of establishment is intended to enable an EEA national to participate, on a stable and continuous basis, in the economic life of an EEA State other than his State of origin and to profit from that participation, thus contributing to the economic well-being of the EEA (see the judgment of 19 April 2016 in *Holship*, E-14/15, paragraph 109).

77 The freedom of establishment under Article 31 EEA, read in conjunction with Article 34 EEA, entails the right for companies, formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a subsidiary established there (see the judgment in *Holship*, E-14/15, cited above, paragraph 110).

78 Freedom of establishment thus covers, in particular, the situation where a company established in an EEA State creates a subsidiary in another EEA State. The same is true, in accordance with settled case law, where such a company or a national of an EEA State acquires a holding in the capital of a company established in another EEA State allowing it or him or her to exert a definite influence on the company's decisions and to determine its activities (compare the judgment of 22 September 2022 in *Admiral Gaming Network*, Joined Cases C-475/20 to C-482/20, EU:C:2022:714, paragraph 37 and case law cited).

79 As follows from the facts set out in the request, one of the temporary work agencies, which is among the plaintiffs in the main proceedings, has non-Norwegian owners established in the European Economic Area. Bygg & Industri Norge have explained that one of the plaintiffs in the main proceedings is a subsidiary of a Danish parent undertaking.

80 In such circumstances, where an undertaking established in one EEA State has established or acquired a subsidiary in another EEA State to pursue its activities there, Article 31 EEA must be considered applicable.

81 The Norwegian Government has argued that since the subsidiary in question was already established in Norway at the time when the measures at issue in the main proceedings came into force, it cannot rely on the freedom of establishment in relation to those measures.

82 However, that argument must be rejected. The freedom of establishment guaranteed by Article 31 EEA guarantees the right to participate, on a stable and continuous basis, in the economic life of the EEA State in which establishment is effected. This is, in particular, evident from the wording of Article 31(1) EEA which explicitly refers both to the right to "take up" and "pursue" activities in the host EEA State.

83 The concept of "establishment" within the meaning of the EEA Agreement provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host EEA State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that EEA State and the pursuit of genuine economic activity there (compare the judgment of 2 September 2021 in *Institut des Experts en Automobiles*, C-502/20, EU:C:2021:678, paragraph 32 and case law cited).

84 Accordingly, the imposition of new conditions for the exercise of an activity imposed on existing economic operators already established in the EEA State in question may render the exercise of the freedom of establishment guaranteed by Article 31 EEA less attractive or even impossible (compare the judgment of 20 December 2017 in *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 36). Thus, the freedom of establishment covers not only initial market entry, but also ongoing business operations.

85 If Article 31 EEA were only applicable to restrictions introduced prior to establishment first being effected in an EEA State and that EEA State were subsequently free to introduce any restrictions once an economic operator were established, the freedom of establishment could be easily circumvented.

86 Accordingly, it must be examined whether measures such as those at issue in the main proceedings restrict the freedom of establishment guaranteed under Article 31 EEA.

Existence of a restriction on the freedom of establishment

87 Article 31 EEA prohibits all restrictions on the freedom of establishment within the

European Economic Area. It is settled case law that the concept of a "restriction" within the meaning of Article 31 EEA covers measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality (see the judgment in *Holship*, E-14/15, cited above, paragraph 115, and compare the judgment of 21 December 2016 in *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 48).

88 Thus, the concept covers, in particular, measures taken by an EEA State which, although applicable without distinction, affect access to the market for undertakings from other EEA States and thereby hinder intra-EEA trade (compare the judgment in *AGET Iraklis*, C-201/15, cited above, paragraph 49).

89 Furthermore, it is sufficient for legislation to be regarded as a restriction on the freedom of establishment if it is capable of restricting the exercise of that freedom without there being any need to establish that the legislation in question has actually had the effect of leading some of the companies established in another EEA State to refrain from acquiring, creating or maintaining a subsidiary in the EEA State in question (see the judgment of 1 June 2022 in *PRA*, E-3/21, paragraph 36).

90 It follows from the request that the measures at issue concern the activities of temporary work agencies. The legislative amendments referred to in the request, which limit the possibility of hiring in workers from temporary work agencies, abolished the general possibility of hiring in workers when the work is of a temporary nature. Furthermore, a regulation was subsequently adopted which prohibited hiring in from temporary work agencies for construction work in a particular geographic area, namely Oslo, Viken and the former Vestfold.

91 Bygg & Industri Norge submit that since the measures at issue entered into force they have faced financial difficulties. All of the plaintiffs in the main proceedings have suffered substantial contract losses as a result of both the complete prohibition on hiring in from temporary work agencies in the construction sector, and the elimination of the option to hire workers for temporary work.

92 It appears from the circumstances of the present case, subject to the referring court's verification, that the activities of the temporary work agencies in the main proceedings consist in hiring out workers and that measures such as those at issue in the main proceedings severely limit the pursuit of such activities. The Court also observes that it appears that the express objective of the legislative amendments in question was to reduce the market of temporary work agencies.

93 Under such circumstances, it must be held that the measures at issue, which, first, restrict the possibility of temporary work agencies to hire out workers when the work is of a temporary nature, and, second, prohibit the hiring in from temporary work agencies for construction work in Oslo, Viken and the former Vestfold, are liable to hinder or make less attractive the exercise of the freedom of establishment guaranteed under Article 31 EEA. Therefore, measures such as those at issue in the main proceedings constitute a restriction on the freedom of establishment under Article 31

EEA.

Justification

94 It is settled case law that a restriction on the freedom of establishment may be justified either by Article 33 EEA or, if applicable without discrimination on grounds of nationality, by overriding reasons of general interest, provided that it is suitable to securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it (see the judgment in *Holship*, E-14/15, cited above, paragraph 121, and the judgment in *PRA*, E-3/21, cited above, paragraph 39).

95 It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a fundamental freedom guaranteed by the EEA Agreement, to show in each individual case that the measure is suitable to attain the objective relied upon and does not go beyond what is necessary to attain it. It must also be pointed out that reasons invoked by an EEA State as justification must be accompanied by appropriate evidence or by an analysis of the suitability and necessity of the measure adopted by that State and by specific evidence substantiating its arguments (see the judgment of 5 May 2021 in *N*, E-8/20, paragraph 95 and case law cited).

96 It must also be observed that mere generalisations concerning the capacity of a specific measure to achieve the objectives pursued are not enough to show that the aim of that measure is capable of justifying derogations from one of the fundamental freedoms of EEA law and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (see the judgment in *N*, E-8/20, cited above, paragraph 104 and case law cited).

97 In this respect, it should be noted that the fact that an EEA State has opted for a system of protection which differs from that adopted by another EEA State cannot affect the assessment of proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the EEA State concerned and the level of protection which they seek to ensure (see the judgment of 16 May 2017 in *Netfonds*, E-8/16, paragraph 131 and case law cited).

98 In that regard, an EEA State wishing to rely on an objective capable of justifying a restriction of a fundamental freedom must supply the court called on to rule on the compatibility of such a restriction with all the evidence of such a kind as to enable that court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality (compare the judgment of 30 April 2014 in *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 50 and case law cited)

99 Accordingly, the referring court must carry out a global assessment of the circumstances in which restrictive legislation, such as that at issue in the main proceedings, was adopted and implemented (compare the judgment in *Pfleger and Others*, C-390/12, cited above, paragraph 52).

Legitimate objectives

100 First, it must be examined whether there are legitimate objectives that may justify a restriction upon the freedom of establishment arising from measures such as those at issue in the main proceedings.

101 In the request for an advisory opinion, the referring court explains that the Norwegian Government argues that the restriction at issue can be justified by relying on objectives such as the protection of relations on the labour market and the lawful interests of the workforce concerned.

102 At the hearing, the Norwegian Government submitted that the overarching objective of the contested measures was to limit the use of temporary agency work that displaces permanent and direct employment but, importantly, that the underlying objectives are to protect workers, prevent abuses and preserve the functioning of the labour market and health and security of workers.

103 It is settled case law that these underlying objectives, the protection of workers, prevention of abuses, the functioning of the labour market and health and safety of workers, are legitimate objectives which may be relied on in order to justify a restriction on the freedom of establishment.

104 Therefore, the referring court must examine whether the measures may be characterised as a means of achieving the legitimate objectives of the protection of workers, prevention of abuses, the functioning of the labour market and health and safety of workers.

105 Insofar as the referring court concludes that the measures at issue may be justified by legitimate objectives, it must further examine whether those measures comply with the principle of proportionality under EEA law, which requires that such measures be suitable for ensuring, in a consistent and systematic manner, the attainment of the objectives pursued, and do not go beyond what is necessary for them to be attained (see the judgment in *Netfonds*, E-8/16, cited above, paragraphs 117 and 125 and case law cited).

Suitability

106 The referring court must assess whether the measures at issue in the main proceedings are suitable for achieving the intended objectives. In the context of this assessment, the referring court must consider whether the EEA State takes, facilitates or tolerates other measures which run counter to the objectives pursued by the measures at issue. Such inconsistencies may lead to the measures at issue being unsuitable for achieving the intended objectives (see the judgment of 30 May 2007 in *Ladbrokes*, E-3/06, paragraphs 50 and 51 and case law cited).

107 It is for the EEA State imposing a restriction to demonstrate that the measures it has adopted are suitable for attaining the stated objectives. Moreover, the national

legislation as a whole and the various relevant rules must genuinely reflect a concern to attain the aims pursued in a consistent and systematic manner (see the judgment in *N*, E-8/20, cited above, paragraph 93, and compare the judgment of 15 October 2015 in *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 76 and case law cited).

108 It must be recalled that the reasons that may be invoked by an EEA State must be accompanied by an analysis of the suitability of the measures adopted and by specific evidence supporting the arguments relied on in that regard (see the judgment in *N*, E-8/20, cited above, paragraph 125 and case law cited).

109 In this respect, it must be observed that, as explained in the request, the measures at issue in the main proceedings are subject to some exceptions.

110 First, it is provided that, in undertakings bound by a collective agreement with a trade union with the right of nomination, i.e. at least 10 000 members, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired in may enter into a written agreement concerning the hiring in of workers for limited periods notwithstanding the provisions laid down in letters (b) to (e) of the second paragraph of Section 14-9 of the WEA.

111 Second, it is permitted to have time-limited hiring in of health personnel to ensure proper operation of health and care services, when the work is of a temporary nature.

112 Third, the time-limited hiring in of "workers with special expertise who are to provide advisory and consulting services in a clearly limited project" is permitted.

113 Fourth, the entry into force of the measures at issue is suspended until further notice for "hiring in of replacements in agricultural undertakings" or "hiring in for short-term events".

114 Bygg & Industri Norge have submitted that there is a lack of consistency in the design of the measures at issue because there are particular exceptions in place for health care workers, certain parts of the agricultural sector and special consultants. Bygg & Industri Norge argue that the exceptions that allow for hiring in from temporary work agencies in the healthcare sector while abolishing the general possibility of hiring in workers when the work is of a temporary nature and prohibiting hiring in from temporary work agencies in the construction sector are inconsistent with the aim of ensuring the functioning of the labour market by increasing permanent and direct employment.

115 The Norwegian Government submits however that the provisions of national law permitting temporary agency work, when the work is of a temporary nature for health care workers, are subject to other and stricter requirements. Those provisions are intended to be a last resort. If the demand for work can be met through other forms of work than temporary agency work, it cannot be used. Thus, the Norwegian Government considers that the regulation in that sector is not comparable to those applied in other sectors.

116 ESA submits that the exceptions from the removal of the option to use temporary agency workers when the work is of a temporary nature confirms the lack of consistency in the measure. For instance, as regards the exception allowing for the use of temporary agency workers for work of a temporary nature in the health care sector, ESA submits that it is not easily consistent with the aim of increasing permanent employment, since the need for labour in that sector is presumably quite constant, as opposed to, for instance, the tourism industry.

117 The Court observes that exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law (compare the judgment of 21 July 2011 in *Fuchs and Köhler*, Joined Cases C-159/10 and C-160/10, EU:C:2011:508, paragraph 86 and case law cited).

118 It is appropriate to take account, in particular, of the underlying rationale of those exceptions and the consequences which they actually have on the attainment of the objectives pursued (compare the judgment of 23 March 2023 in *Booky.fi*, C-662/21, EU:C:2023:239, paragraph 55).

119 In circumstances such as those of the main proceedings, it must be observed that if exceptions are of such a scope as to permit activities which are of a similar nature as those activities which the measures purport to restrict due to their allegedly harmful effects, such measures cannot be said to pursue the stated objectives in a sufficiently consistent manner.

120 It must, therefore, be assessed whether, given their scope, the exceptions laid down in the measures at issue are such as to hinder the attainment of the objectives relied on to justify the restriction at issue (compare the judgment of 7 September 2022 in *Boriss Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 76). The scope of such exceptions may not undermine the very coherence of the measures so that the objectives pursued cannot be attained (compare the judgment of 11 March 2021 in *Commission* v *Hungary (Marges bénéficiaires)*, C-400/19, EU:C:2021:194, paragraphs 51 and 52).

121 As noted by the Commission at the hearing, if there are important exceptions which cannot be explained in the light of the objectives pursued but seem rather to be motivated by economic considerations or administrative convenience, this must be taken into account.

122 It will be for the referring court to determine whether the measures at issue pursue the objectives relied on in a genuinely consistent and systematic manner.

123 In order for the measures at issue in the main proceedings to be regarded as being implemented in a consistent and systematic manner in the light of the objectives relied on, it must be established that the category of workers they exclude from their restrictive effects differs in a meaningful way from other categories of workers who are not excluded (compare the judgment of 24 February 2022 in *TGSS (Chômage des employés de maison)*, C-389/20, EU:C:2022:120, paragraph 62).

124 In particular, it must be assessed whether the categories of temporary agency workers excluded from the scope of the restrictions have the same characteristics and conditions of employment as those categories of temporary agency workers subject to the restrictions and hence are subject to the same risks. If the referring court were to find that those categories of temporary agency workers have similar characteristics, conditions of employment and are subject to the same risks, and yet, were treated differently under the measures at issue, that would be an indication that the measures at issue in the main proceedings are not implemented in a consistent and systematic manner (compare the judgment in *TGSS (Chômage des employés de maison)*, C-389/20, cited above, paragraph 64).

125 As to whether the measures at issue are, more generally, suitable to achieving the objectives pursued, Bygg & Industri Norge have submitted that there is no link between promoting direct employment and promoting permanent employment. In particular, Bygg & Industri Norge draw attention to the fact that the employees of the temporary work agencies at issue in the main proceedings were permanently employed by those agencies. Bygg & Industri Norge question why it is not sufficient that the workers in question are directly employed by the temporary work agency. Bygg & Industri Norge note that the measures at issue in the main proceedings apply to the workers permanently employed at the temporary work agencies participating in the main proceedings. Bygg & Industri Norge also note that similar rules such as those at issue in the main proceedings have not been imposed on fixed-term employment contracts in two-party employment relationships.

126 The Norwegian Government has submitted that it was consistent to regulate temporary agency work differently from fixed-term work, and that was simply because there were no corresponding problems with fixed-term work displacing direct permanent positions on the Norwegian labour market. The problem of displacement was confined to the use of temporary agency work.

127 ESA has submitted that it fails to see the necessary causal link between the measures at issue in the main proceedings and the aim of increasing permanent and direct employment. In ESA's view, this could just as much lead to more fixed-term employment, more part-time work, more overtime work, more self-employment, more subcontracting and more dismissals. Moreover, ESA fails to see the consistency in reducing the use of temporary agency workers with the aim of increasing permanent employment when the main rule in Norway is that also temporary agency workers have permanent employment contracts with temporary work agencies.

128 In this respect, it must be observed that although recital 15 of Directive 2008/104 emphasises that employment contracts of an indefinite duration are the general form of employment relationship, it goes on to state that in the case of workers who have a permanent contract with their temporary work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in their user undertakings. As such, the Directive acknowledges that temporary agency workers with permanent contracts with their temporary work agency are not in the same situation as temporary agency workers without such permanent

contracts.

129 Directive 2008/104 is designed to reconcile the objective of flexibility sought by undertakings and the objective of security corresponding to the protection of workers. That twofold objective thus gives expression to the intention of the legislature to bring the conditions of temporary agency work closer to "normal" employment relationships, especially since, in recital 15 of Directive 2008/104, the legislature expressly stated that employment contracts for an indefinite term are the general form of employment. That directive aims to stimulate temporary agency workers' access to permanent employment at the user undertaking (compare the judgment of 22 June 2023 in *ALB FILS Kliniken*, C-427/21, EU:C:2023:505, paragraph 54 and case law cited). Further, under Article 5(5) of the Directive, EEA States must adopt measures to preserve the temporary nature of temporary agency work and prevent successive assignments of the same worker to the same user undertaking (compare the judgment of 14 October 2020 in *KG (Missions successives dans le cadre du travail intérimaire)*, C-681/18, EU:C:2020:823, paragraph 72).

130 It will be for the referring court to determine, in its assessment of the suitability of the measures at issue, whether, in including temporary agency workers who have permanent contracts with their temporary work agencies within the scope of the measures at issue, those measures pursue their objectives in a consistent and systematic manner.

131 As to the relevance of the geographical scope for the assessment of the suitability of the measures at issue, the referring court must assess whether there are meaningful differences in the situations of temporary agency workers with regard to the aims pursued and the risks they are subject to in the areas outside the scope of the geographical prohibition laid down in the measures at issue in comparison with the areas within their scope.

Necessity

132 Finally, the referring court must assess whether the measures at issue go beyond what is necessary to attain the legitimate objectives pursued. This implies that the chosen measures must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms guaranteed by the EEA Agreement (see the judgment in *N*, E-8/20, cited above, paragraph 94 and case law cited).

133 It must be recalled that the reasons that may be invoked by an EEA State in justification must be accompanied by an analysis of the necessity of the measures adopted and by specific evidence supporting the arguments relied on (see the judgment in *N*, E-8/20, cited above, paragraph 125 and case law cited).

134 As to whether there were less restrictive measures that could ensure the achievement of the objectives relied on, the Norwegian Government has explained that it had asked consultation bodies to come forward with suggestions for alternative measures, but

having considered each suggestion carefully, found that none of them would be as effective in hindering the use of temporary agency work in displacing direct and permanent employment as the measures at issue. In particular, the Norwegian Government refers to the difficulty of the national labour inspection authority in supervising the provision of work of a temporary nature.

135 In this respect, it must be noted that an alleged difficulty in supervising an activity and enforcing the applicable rules cannot, by itself, constitute sufficient justification for the necessity of a complete prohibition without such problems being of a particularly serious nature. It is settled case law that restrictions on freedom of movement cannot be based on a general presumption of unlawful behaviour (compare the judgment of 19 December 2012 in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53, and the judgment of 25 April 2024 in *Edil Work 2 and S.T.*, C-276/22, EU:C:2024:348, paragraph 48).

136 The Norwegian Government has, in particular, referred to the case law of the Court, according to which EEA States cannot be denied the possibility of attaining an objective by the introduction of general and simple rules which will be easily understood and applied by individuals and easily managed and supervised by the competent authorities (see the judgment in *LDL*, E-5/23, cited above, paragraph 93 and case law cited), in order to justify the prohibition at issue in the main proceedings. However, the Court observes that that case law cannot be relied on to prohibit an activity in its entirety merely on the grounds that doing so is simpler than regulating it and enforcing the applicable rules. If that were the case, the requirement of the necessity of the measure would easily be nullified.

137 As to the significance of the geographical and sector-specific nature of the prohibition, it must be ascertained whether the situations within and outside the scope of the measures at issue differ in a meaningful way. If the characteristics and risks involved in other areas or sectors are similar, yet are subject to less restrictive measures, that may be an indication that the particular geographic area and sector prohibition may be replaced by such less restrictive measures.

IV COSTS

138 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

1. **Article 4(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that, first, that provision is addressed only to the competent authorities of EEA States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified. Second, that provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1) of that directive.**

2. **It is for the referring court to determine whether the measures at issue in the main proceedings constitute a restriction on the freedom to provide services under Article 36 EEA in relation to a recruitment agency, established in one EEA State and providing its services to temporary work agencies established in another EEA State, and in relation to those temporary work agencies receiving its services, or whether any restrictive effects are too uncertain and indirect.**

3. **It is for the referring court to determine whether the measures at issue in the main proceedings are indirectly discriminatory by being intrinsically liable to affect workers who are nationals of other EEA States more than workers of Norwegian nationality. Should that be the case, the measures at issue constitute a restriction on Article 28 EEA, which would need to be justified in order to be compatible with that article.**

4. **In circumstances such as those at issue in the main proceedings, where the activities of a temporary work agency, which is the subsidiary of a parent undertaking established in another EEA State, are subject to restrictions under national legislation, there is a restriction of the freedom of establishment guaranteed by Article 31 EEA.**

5. **A restriction of Article 31 EEA in circumstances such as those of the main proceedings may, in principle, be justified by overriding reasons of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. It is for the referring court to identify the objectives actually pursued by the measures at issue in the main proceedings.**

6. **It is for the referring court to determine whether the measures at issue in the main proceedings comply with the principle of proportionality under EEA law. First, the referring court must examine whether those measures are suitable for ensuring, in a consistent and systematic manner, the attainment of the objectives pursued. Second, the referring court must determine whether the measures at issue go beyond what is necessary to attain the legitimate objectives pursued and whether they are capable of being replaced by alternative measures that are equally useful but less restrictive of the fundamental freedoms guaranteed by the EEA Agreement.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 20 November 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President