REPORT FOR THE HEARING

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.

I Introduction

1. By letter of 26 January 2024, registered at the Court on the same day, Oslo District Court requested an advisory opinion in the case pending before it between Bygg & Industri Norge AS and Others and the Norwegian State, represented by the Ministry of Labour and Social Inclusion (*Staten v/Arbeids- og inkluderingsdepartementet*).

2. The case before Oslo District Court concerns the compatibility with the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") of certain national rules limiting the possibility of hiring in workers from temporary work agencies.

II Legal background

EEA law

3. 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.

4. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work ("the Directive") (OJ 2008 L 327, p. 9; Norwegian EEA Supplement 2016 No 64, p. 138) 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 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.

5. Article 4(1) of the Directive 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.

National law[1]

6. 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.

7. Rules on hiring in workers from temporary work agencies are laid down in Section 14-12 of the WEA. 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.

[1] All translations of national law are unofficial.

8. Section 14-12 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 may enter into a written agreement concerning the hiring 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.

9. According to letter (a) of the first paragraph of Section 3 of Regulation No 3 of 11 January 2013 on hiring in workers from temporary work agencies (*forskrift 11. januar 2013 nr. 3 om innleie fra bemanningsforetak*) ("the Regulation on temporary agency work"), to ensure proper operation of health and care services the time-limited hiring of health personnel is permitted, when the work is of a temporary nature. The time-limited hiring 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.

10. Section 4 of the Regulation on temporary agency work lays down a prohibition on hiring in temporary 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.*

III Facts and procedure

11. Bygg & Industri Norge AS and Others are temporary work agencies established in Norway. One of those agencies has non-Norwegian owners established in the EEA. All 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.

12. The plaintiffs claim that recent amendments to Norwegian legislation on hiring in workers from temporary work agencies are contrary to Article 36 of the EEA Agreement on the freedom to provide services.

13. 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 number of situations, such as replacement workers or by agreement between the employer and the undertaking's elected representatives in accordance with Norwegian law.

14. 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.

15. 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 loss.

16. 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?**

17. 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.

18. On 22, 23 and 24 May 2024, responses to the measures of organisation of procedure were received from Bygg & Industri Norge AS and Others, the Norwegian Government, the German Government, the EFTA Surveillance Authority and the European Commission.

IV Written observations

19. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

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

- 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.

V Proposed answers submitted

Bygg & Industri Norge AS and Others

20. Bygg & Industri Norge AS and Others propose that the questions referred should be answered as follows:

> *The fact 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 the agencies to receive services from undertakings established in other EEA States and the fact that other temporary-work agencies are prevented from entering the Norwegian market to provide their services to both national and non-national EEA-based undertakings, constitute cross-border elements which allow for the application of the fundamental freedoms of the EEA Agreement.*
>
> *The aim of increasing permanent and direct employment, and thus in effect reducing the usage of temporary agency workers, is not a legitimate objective in itself which may justify a derogation from a fundamental EEA freedom in the form of an absolute ban on the provision of temporary labour services from temporary-work agencies or by severely limiting the right to provide temporary labour services for work of a temporary nature. Thus, that aim cannot constitute a ground of general interest or an overriding reason in the public interest*

capable of justifying a restriction on the freedom to provide services pursuant to Article 36 EEA nor any other fundamental freedom in the EEA Agreement.

The measures taken by the Norwegian Government, both the changes to the Working Environment Act and the Regulation on the hiring-in of workers, are neither suitable, consistent or necessary to attain the objectives pursued, and, therefore constitute an unjustifiable derogation from the free movement of services under Article 36 EEA and other fundamental freedoms enshrined in the EEA Agreement. The Government has not substantiated that temporary agency work results in the negative consequences the Government assumes, and in any case, they have not demonstrated that the implemented measures actually have the intended effects. Theoretical considerations or unsubstantiated facts supposedly demonstrating the need for the far-reaching scope of the prohibitions are irrelevant to considering whether the measures are proportionate. The geographical and sector-specific prohibition on the hiring-in of workers cannot in any case be considered suitable, consistent, or necessary and is therefore contrary to Article 36 EEA and other fundamental freedoms enshrined in the EEA Agreement.

The Norwegian Government

21. The Norwegian Government proposes that the questions referred should be answered as follows:

The nationality of the persons employed by a service provider is not relevant for the assessment of whether there is a cross-border situation in relation to the freedom to provide services under Article 36 EEA.

National prohibitions and restrictions on the hiring in of temporary agency workers, such as those at issue in the main proceedings, do not constitute a restriction on the freedom to provide services under Article 36 EEA.

The objective of increasing the proportion of permanent, direct employment is a legitimate objective capable of justifying restrictions on the freedom to provide services in the form of prohibitions and restrictions on the hiring-in of workers.

A restriction in the form of a geographical and sector-specific prohibition on the hiring-in of workers from temporary work agencies can be justified on grounds of general interest.

The German Government

22. The German Government proposes that the questions referred should be answered as follows:

Due to the lack of a cross-border element, Article 36 of the EEA Agreement does not apply to situations where the service of hiring out workers is provided by a

temporary work agency established in the same EEA State as the State where that service is provided, regardless of whether the employees of that agency are nationals of another EEA State.

The protection of good relations on the labour market, the lawful interests of the affected workforce, the restoration of a dysfunctional sector-specific part of the labour market where temporary agency work is particularly prevalent, and the promotion of two-sided employment relationships as the general form of employment constitute legitimate objectives for restrictions of 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.

Specific geographical and sector-specific conditions can make restrictions and prohibitions of the activities of temporary work agencies in a certain sector and/or region both suitable and necessary in order to safeguard legitimate overriding reasons relating to the public interest.

ESA

23. ESA proposes that the questions referred should be answered as follows:

1. *A cross-border element is present in relation to Article 36 EEA in a situation, such as in the present case, where a temporary work agency from an EEA State that hires out labour to undertakings in the same EEA State has employees who are nationals of other EEA States. Such cross-border element is also present for the purposes of the application of Articles 28 and 31 EEA.*

   In any case the Temporary Agency Work Directive does not require the presence of a cross-border element.

2. *Restrictions resulting from national legislation can only be justified by overriding reasons of public interest if it can be found, after an overall assessment of the circumstances surrounding the adoption and the implementation of that legislation, that the actual objectives pursued are legitimate.*

   Article 4(1) of the Temporary Agency Work Directive and Articles 36, 28 and 31 EEA preclude national legislation, such as that at issue in the main proceedings, which removes the general possibility of hiring workers from temporary work agencies when the work is of a temporary nature and prohibits all hiring of workers from temporary work agencies for construction work on construction sites in Oslo, Viken and former Vestfold, with the aim of reducing the scope and the role of temporary agency work overall in order to increase permanent and direct employment, because such legislation does not pursue a legitimate aim.

3. *In the determination of the proportionality of restrictions, such as in the present case, it has to be demonstrated that the restrictions genuinely reflect a concern to attain the invoked aim in a consistent and systematic manner, that they are*

suitable and necessary to achieving the legitimate aim pursued and that they are not capable of being replaced by an alternative measures that are equally useful but less restrictive to the fundamental freedoms of EEA law.

National legislation such as that at issue in the main proceedings is not suitable, consistent and/or necessary to safeguard the objective of reducing the scope and the role of temporary agency work overall in order to increase permanent and direct employment.

The Commission

24. The Commission proposes that the questions referred should be answered as follows:

1. *The fact that a temporary work agency from an EEA State hires out workers to undertakings in the same EEA State who are nationals of other EEA States is not in itself decisive when assessing whether there is a cross-border element in a dispute pending before a court of an EEA State. However, when the setting up of that agency involves the exercise of the right of establishment in another EEA State, then a cross-border element is clearly present.*

2. *At least the grounds of general interest relating, in particular to the protection of temporary agency workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and that abuses are prevented may be invoked by an EEA State in order to justify restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work, provided that the reference to those grounds is not general or abstract and that the national rule under examination was actually adopted in pursuit of those aims.*

3. *In order to assess whether restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work are suitable and necessary for the attainment of the stated objectives, it is for the referring court to ascertain whether the EEA State concerned has established that the national rule under examination is suitable for ensuring, in a consistent and systematic manner, the attainment of at least one of the stated objectives for each sector and geographic area to which it applies and does not go beyond what is necessary to achieve that objective.*

Páll Hreinsson
Judge-Rapporteur