Federal Republic of Germany

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Written Observations

In Case E-2/24

concerning the request referred to the EFTA Court by the Oslo District Court (*Oslo tingrett*, Norway) by Decision of 26 January 2024, in the case pending before it between

Bygg Industri Norge AS and Others

and

the Norwegian Government, represented by the Ministry of Labour and Social Inclusion,

we submit the following observations on behalf of the Federal Republic of Germany, as evidenced in the authorisation attached:

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A. INTRODUCTION

1 The request referred by the *Oslo tingrett* (Norway) concerns the legality of restrictions to the activities of temporary work agencies in Norway with regard to the freedom to provide services according to Article 36 of the Agreement on the European Economic Area (EEA Agreement).

2 The request has been made in proceedings between ten different temporary work agencies established in Norway on the one hand, and the Norwegian State, represented by the Ministry of Labour and Social Inclusion, on the other hand. The plaintiffs, which are established in Norway, are claiming compensation for an alleged infringement of Article 36 of the EEA Agreement due to amendments to the Norwegian legislative provisions on the hiring-in of workers.

3 The legal framework, the facts of the main proceedings and the three referred questions are set out in the request referred by the *Oslo tingrett* on 26 January 2024.

4 With its questions, the *Oslo tingrett* is essentially seeking to ascertain, firstly, whether the freedom to provide services applies to the restriction of the activities of temporary work agencies established in Norway with regard to their business activities in that same EEA state. Secondly, the referring court asks what can constitute legitimate objectives for restrictions on the freedom to provide services in the form of prohibitions and limitations on the hiring-in of workers. Thirdly, the referring court asks to determine the criteria that would render such restrictions suitable and necessary.

B. LEGAL ASSESSMENT

I. First Question

5 With its first question, the referring court asks whether the fact that a temporary work agency from an EEA State which hires out workers to an undertaking established in the same EEA State also employs workers from other EEA States constitutes a cross-border element and therefore falls within the ambit of the freedom to provide services according to Article 36 of the EEA Agreement.

6 While the hiring-out of workers is to be considered a service,[1] the Federal Government takes the view that the necessary cross-border element, which is required for the provisions on the freedom to provide services to be applicable, is missing in this case.

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[1] Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239, para. 9.

7 The applicability of Article 56 TFEU and Article 36 of the EEA Agreement depends on whether the service relationship between the service provider and the service recipient involves an actual cross-border movement. Accordingly, the Court of Justice of the European Union (CJEU) has ruled that the "provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State".[2]

8 The typical case of a cross-border element is characterised by the fact that the provider and the recipient of a service are located in different Member States. Since the CJEU applies a broad interpretation of this criterion, the term also covers services referred to as "correspondence services", i.e. services where neither the provider nor the recipient of the service are crossing a border, but only the service itself is provided across borders, e.g. in the case of a lawyer providing legal advice over the phone for someone residing in another state. Similarly to the free movement of goods, it is then only the "product" itself that crosses the border. Similarly, the freedom of movement applies to situations such as in the *ITC*-case[3]: In that decision brought forward by the plaintiffs in the original proceedings, the recipient and the provider of the service were established in the same Member State, but the service itself, in that case the recruitment of a worker for the purpose of an employment to be executed in another Member State, *de facto* took place in that other state.

9 These types of cases have to be distinguished from cases such as the ones at hand. Here, the service is provided between persons or enterprises established in the same EEA State, whilst only one element (some of the workers employed by the agency) of the service provided (i.e. the hiring-out of workers) originates in another EEA State or EU Member State.[4] Whether or not a cross-border element is present cannot depend on the origin of this element required by the service provider in order to be able to offer its services in the first place. The fact that the service provider has obtained workers (or goods/services) from another EEA state in order to be able to offer its service cannot play a role with regard to the service provider's own freedom to provide services. The system of fundamental freedoms clearly suggests that the focus must lie on the service to be provided and not on the conditions that the service provider must create for itself in order to be able to offer this service in the first place.

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2 Judgment of the CJEU of 22 December 2010, *Omalet*, C-245/09 EU:C:2010:808, para. 12 and the case-law cited there.

3 Judgment of the CJEU of 11 January 2007, ITC, C-208/05, EU:C:2007:16.

4 *Holoubek* in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 4th ed. 2019, Article 57 para. 24.

10 Applied to the present case, this means it is irrelevant that the temporary work agencies have hired foreign workers from other EEA States in order to be able to provide their services to their customers. In order to assess whether there is a cross-border element that opens up the scope of application of the freedom to provide services, it is necessary to ascertain whether the service provider or service recipient or the service itself crosses the border. None of these is the case here. In that vein, it has to be recalled that the service provided by the applicants is not the work executed by workforce that may originate from other states, but the hiring-out of workers, a service provided in Norway by Norwegian enterprises and therefore without a cross-border element present.[5]

11 Furthermore, the distinction between the freedom to provide services and the freedom of movement for workers would erode if the freedom to provide services became applicable solely due to the fact that a rule applies to foreign EU nationals employed in the country in question and thereby also applies to the domestic service provider as their employer. According to the system of the fundamental freedoms, it is only the freedom to provide services that applies to national rules on the cross-border posting of workers, whereas the freedom of movement for workers applies to rules on the employment of EU foreigners by domestic employers. This does not constitute a gap in protection for domestic employers, as employers are also entitled to invoke the freedom of movement for workers of the EU/EEA workers engaged by them[6].

12 However, in this case the freedom of movement for workers of EU/EEA foreign nationals who are employed by Norwegian temporary work agencies has not been restricted. There is no restriction on the freedom of movement for workers if a rule applies equally to the employment of domestic or to the employment of foreign workers, if the rule cannot by its nature have a greater impact on workers who are nationals of other Member States than on domestic workers and if the rule does not prevent the access of EU/EEA workers to the labour market or at least makes it less attractive in a specific way[7]. Accordingly, the CJEU denies the existence of a restriction of the freedom of movement for workers in the case of general working and employment rules

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5 In that regard, the present case has to be distinguished for instance from the situation in *Webb* (Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239), where a cross-border-element was present because the hiring-out of workers was provided in the Netherlands by a company incorporated under English law, the manager of which was a resident of the United Kingdom.

6 See the established case-law of the CJEU, Judgment of 7 May 1998, *Clean Car Autoservice*, EU:C:1998:2055, paras. 20 and 25; Judgment of 11 January 2007, *ITC*, C-208/05, EU:C:2007:16, para. 23; Judgment of 13 December 2012, *Caves Krier Frères*, C-379/11, EU:C:2012:798, para. 28.

7 *Brechmann* in: Calliess/Ruffert (eds.), EUV/AEUV commentary, 6th ed. 2022, Article 45 para. 51.

of the Member States, provided that access of workers to the labour market is not restricted.[8]

II. Second Question

13 Should the Court come to the conclusion that the freedom to provide services is indeed applicable, the Federal Government presents its point of view on the second and third question.

14 With its second question, the referring court asks 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.

15 The provisions in Articles 36 to 39 of the EEA Agreement governing the freedom to provide services in the EEA generally correspond to the provisions in Articles 56–58 TFEU. Consequently, it is accepted that the freedom to provide services as enshrined in Article 36 of the EEA Agreement can be restricted, *inter alia*, for "overriding reasons relating to the public interest".[9]

16 Before discussing legitimate objectives in further detail, the Federal Government would like to point out that the Member States are generally understood to retain a particularly wide margin of discretion when it comes to regulating and restricting the use of temporary agency work, which goes even beyond that applied to other services. This broad discretion exists also with regard to the choice to pursue a specific sociopolitical objective.

17 This discretion has been also recognised by the EU legislator in the Temporary Agency Work Directive. Article 4 (1) of the Temporary Agency Work Directive, which applies to both national and cross-border assignments, assumes that prohibitions or restrictions on the use of temporary workers are justified at least on grounds of general interest. Examples for such general interests listed by Article 4(1) of the Temporary Agency Work Directive include the protection of temporary agency workers, the requirements

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[8] Examples include national regulations according to which no compensation on termination of employment has to be granted in the event that the employee terminates the employment contract (see Judgment of the CJEU of 27 January 2000, *Graf*, C-190/98, EU:C:2000:49) or according to which only five years of previous employment with other (domestic or foreign) employers are taken into account when granting additional holidays (see Judgment of the CJEU of 13 March 2019, *EurothermenResort Bad Schallerbach*, C-437/17, EU:C:2019:193).

[9] As is the case with Article 56 TFEU: See Judgment of the CJEU of 3 December 2014, *de Clercq*, C-315/13, EU:C:2014:2408, paras. 62 et seq.; Judgment of the CJEU of 11 March 2010, *Attanasio Group*, C-384/08, EU:C:2010:133, paras. 46, 50; see to that effect already Judgement of the CJEU of 3 December 1974, *van Binsbergen*, C-33/74, EU:C:1974:131, para. 10 et seq. and Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239, para. 19.

of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented. In its report on the application of the Temporary Agency Work Directive 2008/104/EC of 21 March 2014 – COM(2014) 176 – the EU Commission correctly added that other grounds of general interest can also justify restrictive measures, provided that they are based on legitimate grounds and proportionate in relation to their objective(s).

18 With regard to the freedom to provide services in the context of hiring out workers, the CJEU in the *Webb* case has ruled as follows:

> "(…) it is permissible for Member States, and amounts for them to a *legitimate choice of policy pursued in the public interest*, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licenses where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded."[10]

19 The Federal Government considers that several legitimate objectives exist 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. In particular, the Federal Government takes the view that the prevention of a permanently divided workforce as well as the protection of the hiring company's core workforce from *de facto* pressure on job security and working conditions form constitutive parts of the protection of workers and a functioning labour market. Therefore, they serve to safeguard legitimate general interests.

20 The Federal Government would also like to counter the EFTA Authority's view that the promotion of direct employment cannot constitute a legitimate justification for restrictions of temporary agency work. Temporary agency work relationships establish a split employer position. For that reason, they represent a deviation from the typical, two-sided standard employment relationship, which the EU legislator also considered to be in general a desirable form of employment (see Art. 6 para. 1 to 3 of the Temporary Agency Work Directive).

21 Moreover, the CJEU has recognised that alongside the objective of flexibility sought by undertakings, the Temporary Agency Work Directive also seeks to secure the protection of workers.[11] For that reason, the regulation of temporary agency work by means of the Directive cannot be considered as a legislative decision in favour of the

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[10] Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239, para. 19, emphasis added.

[11] See Judgment of the CJEU of 14 October 2020, *KG*, C-681/18, EU:C:2020:823, paras. 40-43, 50.

inadmissibility of restrictions of temporary agency work; rather, the Directive allows for restrictions, if these are justified on grounds of general interest under Article 4 (1) of the Directive. In addition, the CJEU has also pointed out that the Directive wants to promote permanent employment and to facilitate transitions from a temporary to an indefinite employment contract.[12] In the view of the Federal Government, adhering to the two-sided employment contract as the general form of employment for both regulatory as well as general systematic reasons of employment law thus constitutes a valid general interest to maintain the two-sided standard employment relationship as the standard form, or at least to prioritise it over atypical, three-sided employment relationships.

22 Another overriding reason relating to the public interest lies in the restoration of a dysfunctional sector-specific part of the labour market where temporary work is particularly prevalent, not least because this also improves occupational health and safety and thus also protects the health of temporary agency workers.

III. Third Question

23 With its third question, the referring court asks which criteria are relevant in the determination of whether the hiring-in of workers will be suitable and necessary in order to safeguard legitimate objectives. The referring court would also like to know if any significance should 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 The Federal Government would like to recall the above-mentioned[13] wide margin of discretion of the Member States when it comes to regulating and restricting the use of temporary agency work in particular. This applies both to the decision on the pursuit of specific sociopolitical objectives as well as the choice of suitable measures to achieve these objectives. In the case of temporary agency work, this margin of discretion is particularly wide.

25 With regard to the Member States' regulatory discretion, the CJEU has recognised in its settled case-law that the hiring-out of workers constitutes "a particularly sensitive area from an occupational and social point of view", which may be subjected to far-reaching regulations in order to safeguard the lawful interests of the affected workforce

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[12] Ibid., para. 51.
[13] See above, para. 16.

as well as “good relations on the labour market”.[14] In that vein, the CJEU has acknowledged the implications of temporary agency work on the (national) labour markets, even with regard to cross-border scenarios.[15]

26 With regard to EU secondary law, the EU legislator decided not to apply the central Directive on the freedom to provide services[16] to the services of temporary work agencies (see Article 2 (2) (e) of the Services Directive). In doing so, the EU legislator has expressed that the regulations on temporary agency work shall not be measured against the strict requirements of the Services Directive, but merely have to meet the general requirements of the European Treaties and the Temporary Agency Work Directive. Recital 12 of the Temporary Agency Work Directive additionally highlights the Member States’ broad scope of discretion with regard to labour policy by stating that the Directive respects the diversity of labour markets and industrial relations. The Member States’ broad scope of discretion for policy-making with regard to the extent to which they liberalise temporary work or subject it to strict regulations is also reflected by Article 4 (4) of the Directive, whereby the Directive does not impose any requirements on Member States (cf. wording “without prejudice”) with regard to registration, licensing, certification, financial guarantees or monitoring of temporary work agencies.

27 In addition, the CJEU qualified the explicit provision of Article 4 (1) to the effect that the Temporary Agency Work Directive does not lay down any substantive requirements regarding the permissible degree of regulation which could be subjected to *judicial review*. Rather, said Article has to be interpreted as a mere procedural provision which is directed at the Member States.[17]

28 These fundamental decisions of the EU legislator and the CJEU also have an effect on the interpretation of the possibility to restrict the freedom to provide services under Article 36 of the EEA Agreement.

29 With regard to the specific purpose of hiring in workers, temporary agency work can be particularly suitable to meet legitimate objectives if it is used for a transitional period, for example to cover peaks in demand or in special situations. However, as was

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[14] Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239, paras. 18/19, and more recently on restrictions of the freedom to provide services in the interest of worker and labour market protection, Judgment of the CJEU of 3 December 2014, *De Clercq and Others*, C-315/13, EU:C:2014:2408, para. 65.

[15] Judgment of the CJEU of 17 December 1981, *Webb*, C-279/80, EU:C:1981:239, para. 18.

[16] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereinafter: Services Directive).

[17] Judgment of the CJEU of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173, paras. 24-32.

established with regard to the second question, there are several legitimate reasons to restrict or even ban temporary agency work, such as the prevention of a divided workforce, the protection of the workforce overall as well as the proper functioning of the labour market.

30 Based on these standards, the specific conditions of a particular sector and/or a particular region can make restrictions or even bans on temporary agency work suitable and necessary to safeguard these overriding reasons relating to the public interest. If a sector is characterised by frequently changing employment relationships, e.g. because there is no fixed place of business and therefore no fixed workplace, the additional and excessive use of temporary agency work can make it almost impossible for the competent supervisory authorities to monitor and allocate individual employment relationships. This can lead to a situation where the orderly organisation of this part of the labour market and the social security of the respective workforce is jeopardised.

31 Such a situation also favours the illegal hiring out of workers, as the particular circumstances of the sector already make monitoring much more difficult. One effect may be, for example, that some of the workers actually working in this sector, namely the temporary agency workers, are excluded from the social protection of the collective labour agreements tailored to the work in this sector. This undermines the effective protection of the workforce in that industry in general.

32 Under such circumstances, a prohibition of temporary agency work in these industries is suitable and also necessary to safeguard the legitimate objective of protecting the functioning of the labour market and the interests of the workforce, since effective controls are vital to ensure workers' rights and to prevent abuse, with regard to both permanent and temporary agency workers. Less restrictive measures, such as the introduction of stricter substantive requirements for temporary work agencies would not compensate the deficits with regard to their effective control, which occur due to the specificities of certain industries described above. They are therefore to be considered unsuitable to safeguard these legitimate interests.

33 The same applies to the legitimate aim of restoring a dysfunctional sector-specific part of the labour market, which at the same time improves occupational health and safety and thus also protects the health of temporary agency workers. This is exacerbated if, for instance, it is difficult to assign (temporary) workers to those responsible for occupational health and safety in the sector, which in practice limits the effectiveness of any health and safety checks.

34 The objectives laid out above do not only constitute objectives of general interest in accordance with Article 4 (1) of the Temporary Agency Work Directive, but also overriding reasons relating to the public interest as required by Article 36 of the EEA Agreement. Where these legitimate as well as overriding objectives cannot be reached otherwise, restrictions on and prohibitions of the hiring-in of workers in certain industries are both suitable and necessary means to pursue them. They are thus justified, provided that they are applied indiscriminately both to national and to foreign undertakings. On that point, it suffices to say that the Norwegian regulations affect domestic temporary work agencies in the same way as foreign ones.

C. CONCLUSION

35 To conclude, the Federal Government takes the view that the referred questions are to be answered as follows:

> Due to the lack of a cross-border element, Art. 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.
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> 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.
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> 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.

Dr. Scheffel