ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 19 April 2024

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

represented by Ida Thue, advocate at the Office of the Attorney General for Civil Affairs, submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court

> **Case E-2/24 Bygg & Industri Norge AS and others v the Norwegian State, represented by the Ministry of Labour and Social Inclusion (Staten v/Arbeids- og inkluderingsdepartementet)**

in which Oslo tingrett (Oslo District Court) has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Article 36 of the EEA Agreement.

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1 INTRODUCTION

(1) Oslo District Court has, by application dated 26 January 2024, requested the EFTA Court to give an advisory opinion on the interpretation of EEA Article 36 on the freedom to provide services.

(2) The plaintiffs in the main proceedings are temporary work agencies established in Norway that hire out workers in Norway to other undertakings established in Norway. They submit that two amendments to the rules on hiring in of temporary agency workers in the Norwegian Working Environment Act are contrary to Article 36 EEA.

(3) First, the general possibility to hire in workers from temporary work agencies for work of a temporary nature was abolished. However, the other possibilities for hiring in workers for temporary needs, such as replacements for other workers, were not amended. Second, the

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hiring in from temporary work agencies for construction work in Oslo and surrounding areas was prohibited.

(4) Oslo District Court has decided to refer the following questions to the EFTA 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?*
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> *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?*
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> *3. Which criteria will be relevant in the determination of whether the 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?"*

(5) The Government considers that the contested measures do not constitute restrictions on the freedom to provide services and, in any event, are justified on grounds of general interest.

2 BACKGROUND INFORMATION

2.1 The Norwegian labour market

(6) The Norwegian labour market is based on the principle of open-ended (permanent), direct employment. This form of employment relationship is considered to have clear advantages both for workers and businesses. It provides workers with predictability for future work and income and gives businesses incentives for investing in workers' skills, which has a positive effect on productivity, adaptability, and competitiveness.

(7) The Norwegian labour market is in general characterised by a high level of organisation for workers and employers, widespread collective bargaining, codetermination at the workplace and a well-functioning cooperation between social partners.

(8) Regulation of temporary agency work has been based on the premise that hiring in of temporary agency workers is a supplement to ordinary employment. The temporary work agency acts mostly as an intermediary in the labour market, since the work is carried out at another enterprise, which becomes a third party with great influence in the labour relation. In Norway, there has been a development where some user undertakings in some industries more or less permanently depend on hiring temporary agency workers. This corresponds poorly with the objective of the regulation and the Norwegian labour market model.

(9) While there is a high degree of consensus that the Norwegian model based on permanent and direct employment, organised working life and broad public welfare schemes must be maintained, there are often different approaches to questions relating to non-standard forms of work, and how to strike the balance between flexibility and security. This is at the core of labour law policy and is a matter of dispute in all countries. In Norway, trade unions and employers' organizations, as well as political parties, often disagree on how fixed-term work and temporary agency work shall be regulated.

(10) This can be illustrated by the legislation on fixed-term work in the Working Environment Act. In 2015, under the conservative Solberg government, the Norwegian Parliament adopted a provision that permitted fixed-term contracts for a maximum of 12 months for up to 15 % of the workforce in the enterprise.[1] That provision was abolished in 2022 shortly after the social democratic Støre government took over.[2]

2.2 Developments in temporary agency work prior to the adoption of the contested measures

(11) Until 2000, temporary agency work was as a main rule prohibited, except in the office sector. From 2000, the hiring-in from temporary work agencies was permitted to the same extent as fixed-term work. One of these options was to hire in temporary agency workers for "work of a temporary nature".

(12) In 2000, around 0,5 per cent of the wage-earners in Norway were employed in temporary work agencies. In 2022, the proportion had increased to around 1,7–1,9 per cent.

(13) The Ministry of Labour and Social Inclusion has commissioned long-term research on the use of temporary agency work and other forms of non-standard work since 2014. This has led to increased knowledge about the use of temporary agency work in different industries and about transitions from atypical work to permanent employment. A separate report was commissioned in 2019 on compliance. The amendments to the Working Environment Act in 2019 were evaluated in 2022, and a regular statistic on quarterly basis on employment in temporary work agencies has been established.

(14) A major finding from surveys and research is that hiring in from temporary work agencies varies substantially between different sectors and industries. It has been particularly high in the construction industry. Many of the temporary agency workers in the construction industry are unskilled workers or skilled craftsmen. The share of temporary agency workers in these groups was estimated at over 10 per cent of total employment in the period from 2012 to 2019, and around 6–7 per cent in the period 2020–2022.

(15) The hiring in of temporary agency workers in the construction industry has been highest in Oslo and the surrounding areas. The industry-organisation for temporary work agencies estimated in 2017 that the share in Oslo was twice as high as the rest of the country. In a

[1] Section 14-9(1) f of the Working Environment Act. The provision entered into force on 1 July 2019.
[2] The amendment entered into force on 1 July 2022.

trade union survey from 2019 of some of the largest construction sites in the Oslo area, the average share of temporary agency work was estimated to be 35 per cent.[3]

(16) Foreign workers who work in Norway have a higher risk of being exposed to underpayment and other forms of exploitation. Many of them do not speak Norwegian and are not aware of their rights under Norwegian labour law. They are to a much lesser degree unionised. Unskilled workers are particularly vulnerable.

(17) In a survey from 2019[4], employers in user undertakings were asked about their reasons for using temporary agency work. Their answers indicated that 23–36 per cent did not comply with the requirement that the work must be of a temporary nature, nor did they have any agreements with the workers' representative on the use of temporary agency work.

(18) In the same survey, interviews were conducted to find out whether the temporary agency workers themselves follow up on possible breaches of the rules on temporary agency work. Many workers were reluctant to raise such questions in fear of losing future assignments, and when they did, it was usually with the support of a trade union.

(19) The authors of the survey found that this in practice made it possible for user undertakings to hire in temporary agency workers to a greater extent than what was legally permitted.

(20) Several contracting authorities monitor their contractors' use of temporary agency work. In a survey from Statsbygg carried out in autumn 2020, only half of the contractors could provide a legal basis for the hiring-in of temporary agency workers. Statsbygg's experience was also that such controls required significant resources and specialist expertise.

(21) The situation of temporary agency workers is not comparable to that of workers in ordinary companies, who as a main rule have permanent and full-time jobs.

(22) In the period 2015–2019, the average regular working time for temporary agency workers was just over 60 per cent of a full-time-position. This was the main source of income for around three-quarters of the temporary agency workers.[5] Furthermore, temporary agency workers only had an average of six months per year with pay from their agency.

(23) In 2019, a definition of permanent employment was added to the Working Environment Act.[6] One of the objectives was to prevent a widespread practice where workers employed by temporary work agencies had permanently work contracts, but without a guaranteed salary or a minimum amount of work ("a zero-hour contract"). The new provision did not, however, give employees the right to a full-time position or salary between assignments.

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[3] Engelstad, E. (2019). *Slutt med mobilen i handa? Egenbemanning, udnerentreprise og innleie i byggenæringa i Oslo og Akershus høsten 2019*.

[4] Svalund, J. et. al., *Arbeidstakeres håndheving av regler for midlertidige ansettelser og innleie*, Fafo-rapport 2019:38.

[5] Strøm. M & Wentzel, M. *Innleie og forutsigbarhet for arbeid. En evaluering av endringene i arbeidsmiljølov*en 2019. ISF-rapport 5:22.

[6] Section 14-9(1) of the Working Environment Act.

(24) After the amendment, average working hours for temporary agency workers have declined. There has been an increase in the use of contracts with working hours below 10 per cent and between 10 and 20 per cent. Consequently, zero-hour contracts seem to have been replaced by small part-time contracts.

(25) There are no overall figures or estimates on organisation among temporary agency workers. Available information indicates that the unionization rate is low. Collective agreements are rare. This is probably related to the fact that many of the persons employed by temporary work agencies only work there for a short period of time. There is no collective agreement for the temporary agency sector, but some temporary work agencies are bound by collective agreements in the sector of their user undertakings.

(26) There has been a very significant decline in union density and collective bargaining coverage in the construction sector. Collective bargaining coverage went down from 50 to 40 per cent in the period 2001–2018. Since most temporary agency workers are not organised, the high level of temporary agency workers in the construction sector also affects industrial relations in the user undertakings.

(27) The Labour Inspection Authority has reported that foreign workers have an increased risk of injuries and accidents. In the period 2011–2016, workers from Central and Eastern Europe had 3,2 times higher risk of occupational injury death. Short employment relationships and non-standard forms of work increased the risk, and lack of competence and training was often an underlying cause of accidents. Temporary agency workers often do not receive the same safety training as workers in the user undertakings. The threshold for reporting errors and problems was also higher for temporary agency workers.[7]

(28) Information from several sources indicates that temporary agency workers are in a more precarious situation on the Norwegian labour market than workers with direct, fixed-term contracts. They are less likely to find permanent employment in user undertakings or be organised in a trade union. They are less familiar with the rules on safety representatives and working environment committees. A higher share report that the perceived risk of sustaining injuries at the workplace is medium to high, and that mistakes on the job would entail a risk for their own life or health, or the life or health of others.

3 NORWEGIAN LAW ON TEMPORARY AGENCY WORK

3.1 The former provision on the hiring in for "work of a temporary nature"

(29) The former provision on the hiring in of temporary agency workers for "work of a temporary nature" in Section 14-12(1), cf. Section 14-9 (2) (a) of the Working Environment Act, did not define the term "temporary nature". Both differences from the kind of the work ordinarily performed in the undertaking and marked differences in the amount of work were relevant.[8]

[7] Arbeidstilsynet (2018) *Risiko for arbeidsskadedødsfall i det landbaserte arbeidslivet. En sammenligning av norske og utenlandske arbeidstakere*

[8] See Prop. 39 L (2014–2015) p. 118.

The fact that the work was organised as a project was not sufficient, particularly if the same expertise was requested in several projects. Projects that required special expertise that the undertaking did not have, or projects that were larger than usual, could involve "work of a temporary nature" depending on the circumstances.[9]

(30) From 1 July 2020, the Labour Inspection Authority has had the power to control and enforce the rules on the hiring in from temporary work agencies. However, the Authority has found it difficult to control whether the requirements for the use of temporary agency work are met, in particular "work of a temporary nature", as described in a report dated 16. February 2023:

> *"A complete review of the basis for all hiring of labour requires, firstly, considerable and detailed knowledge of the relevant industry, the specific business and also of the specific assessments made in each individual case of hiring. In addition, it requires that the enterprises themselves have sufficient overview so that they can provide us with the necessary information about their hiring. If the enterprise has not had, or at the time of the audit has, a system where they have assessed or can document the legality of each individual agency worker, we have not had an adequate opportunity to make an assessment of whether there is/has been a legal basis for all agency workers they have or have had. In some cases, we have concluded that there is more use of agency labour than there is a legal basis for, but we have not been able to point precisely to, for example, a specific number of employees or specific agency workers."* (office translation)

(31) Section 14-9 (2) (a) of the Working Environment Act on the use of fixed-term work contracts for "work of a temporary nature" has given rise to many cases before the Norwegian courts, and parties often disagree as to whether the requirement is fulfilled.

3.2 The contested provisions

(32) In December 2022, the provision on the use of temporary agency workers "for work of a temporary nature" in Section 14-12(1), cf. Section 14-9 (2) (a) of the Working Environment Act, was abolished.

(33) The measure is intended to limit the use of temporary agency work that displaces direct and permanent employment, thereby ensuring a high level of protection for workers and that the labour market functions properly, and abuses are prevented.[10]

(34) Section 4 of the Regulation on temporary agency work forbids the hiring in of temporary workers for construction work in the region of Oslo, Viken and the former Vestfold.

(35) The prohibition is based on the need to ensure a well-functioning labour market within the sector. The objective is to prevent temporary agency work from displacing permanent and direct positions in the user enterprises, thereby protecting the right of workers, facilitating the use of collective agreements, and strengthening the recruitment to the industry through

[9] See Ot.prp. nr. 49 (2004–2005) page 214.
[10] See Prop. 131 L (2021–2022) p. 63.

the apprenticeship schemes and the use of skilled workers. As the construction industry is a particularly accident-prone industry, the measure may also be justified by health and safety requirements.[11]

3.3 The current rules on the hiring-in of temporary agency workers

(36) Section 14-9(1) of the Norwegian Working Environment Act provides that workers shall as a main rule be employed on a permanent basis.

(37) Section 14-12(1) contains a limitative list of the situations in which the hiring in of temporary agency workers is permitted, see. Section 14-9(2) b to e. This means that temporary agency workers may be hired in for:

- work as a temporary replacement for another person or persons
- for traineeships
- for participation in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Administration
- for athletes, trainers, referees and other leaders within organised sports

(38) The possibility of hiring in workers as a temporary replacement for another person is the most frequently option. The Labour Inspection Authority has reported that this provision has not been difficult to control and enforce.

(39) Furthermore, Section 14-12(2) gives undertakings the option of entering into an agreement with workers' representatives locally on hiring in from temporary work agencies, provided that the undertaking is bound by a collective agreement with a trade union with the right of nomination (that is to say with more than 10 000 members), and the elected representatives represent a majority of the employees in the category of workers affected by the hiring in. Such agreements can regulate the hiring in of workers for limited periods in other situations than those mentioned in Section 14-12(1).

(40) There are further rules on the hiring in of temporary agency workers in the Regulation on temporary agency work. Section 3 of the Regulation permits the time-limited hiring in of:

- health personnel to ensure proper operation of the health and care service when the work is of a temporary nature.
- workers with special expertise who are to provide advisory and consulting services in a clearly limited project.

(41) As regards the hiring in of replacements in agricultural undertakings and the hiring in for short-term events the amendment to Section 14-12(1) of the Working Environment Act have

[11] See Prop. 131 L (2021–2022) p. 62–63.

been suspended until further notice, see Sections 4 and 5 of the Regulation on transitional rules in relation to amendments to the Working Environment.

(42) The consequences of unlawful hiring of workers from temporary work agencies are set out in Section 14-14(1) of the Working Environment Act. The hired employee can ask the court to decide that he/she is permanently employed by the user undertaking. In special cases, the court may nevertheless, if the user undertaking so demands, decide that the hired employee does not have a permanent employment relationship if, after weighing the interests of the parties, it finds that this would be clearly unreasonable.

3.4 The current rules on the hiring-in of workers from production companies

(43) Section 14-13(1) of the Working Environment Act provides that hiring workers from undertakings other than those whose object is to hire out labour shall be permitted when the hired employee is permanently employed by the lessor. So that an undertaking may be said not to have the object of hiring out labour, hiring out must take place within the main areas of activity of the lessor and not more than 50 per cent of the permanent employees of the lessor must be engaged in the hiring activity.

(44) In contrast to workers that are hired from temporary work agencies, workers in production companies are directly and permanent employed by those companies. The possibility to hire out workers from production companies is typically used in the event of a temporary surplus of labour, and such hiring-out is often an alternative to layoff or dismissal.

3.5 Developments subsequent to the adoption of the contested measures

(45) Statistics and surveys indicate that there has been a significant increase in transitions from temporary agency work to permanent positions in ordinary production companies after the new regulation came into force, particularly in the construction sector, both in Oslo and the area around Oslo, and in the rest of the country.

(46) Surveys also indicate that the option of entering into agreements on the hiring in of workers under Section 14-12(2) of the Working Environment Act is being used to a greater extent.

(47) The same goes for the option of hiring in workers from production companies under Section 14-13 of the Working Environment Act.

(48) These developments correspond well with the objectives of the contested amendments.

(49) There has been a reduction of persons employed by temporary work agencies from around 60 000 persons in the last quarter of 2022 to around 49 000 in the last quarter of 2023. The temporary agency sector is affected by economic fluctuations, typically in the markets of the user undertakings. In any event, the numbers show that there is still a market for temporary agency work in Norway.

4 RELEVANT EEA LAW

4.1 Article 36 EEA

(50) Article 36(1) of the EEA Agreement reads as follows:

> *"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."*

4.2 Directive 2008/104/EC on temporary agency work

(51) The Directive on Temporary Agency Work was adopted to supplement the regulatory framework established by Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.[12]

(52) The legal basis of the Directive is Article 137(1) and (2) EC on minimum requirements for gradual implementation relating, inter alia, to working conditions.[13]

(53) Recitals 10 and 12 state that 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, and that the Directive establishes a protective framework for those workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

(54) Article 2 provides that the purpose of the Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

(55) Article 4(1) provides that prohibitions or restrictions on the use of temporary agency work must be justified on grounds of public 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. The wording of Article 4(1) is based on an amendment from the European Parliament.[14] In its justification, the European Parliament stated that the amendment "puts beyond doubt that restrictions

[12] See Case C-681/18 *KG*, para. 39.
[13] Now TFEU Article 153.
[14] See the Commission's amended proposal (COM(2002) 701, p. 3, in relation to amendment No 34.

and prohibitions on the use of temporary agency can be maintained and/or introduced in certain circumstances."[15]

(56) Article 4(1) is addressed only to the Member States and does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions which are not justified on grounds of general interest.[16]

5 TEMPORARY AGENCY WORK IN OTHER EEA STATES

(57) There have been, and still are, considerable differences between the EEA States as to how temporary agency work is regulated in national law.

(58) The judgment in Case C-279/80 *Webb*, and the opinion of the Advocate General, contain information on the national law on temporary agency work in the Member States at that time, in 1981.[17]

(59) Temporary agency work was prohibited in Italy. In Luxembourg and Greece there were no restrictions. In Denmark, temporary agency work was only permitted in commerce and in office work. In Belgium, the use of temporary agency work was prohibited in the building sector. Several states also had restrictions on the duration of the hiring out of labour.

(60) In the Netherlands, a licence could be refused if there was reason to fear that temporary agency work might prejudice good relations on the labour market, or if by reason of that fact, the interests of the workers concerned were inadequately safeguarded. Those interests were defined by standard provisions. Temporary work was forbidden in the building and metallurgical industry. The hiring out temporary staff was limited to three months without special authorisation, based on the objective of restricting such employment to work which is itself strictly of a temporary nature. Finally, a licence could be refused where temporary agency work would supplant regular employment based on contracts with undertakings, or where it would have the effect of depriving permanent employees of their work.

(61) In the United Kingdom, a licence could be refused on grounds pertaining to the person of the applicant or for reasons connected with the management of the undertaking, or in the case of unsuitable premises.

(62) More than 30 years later, the Commission's report on the application of the Temporary Agency Work Directive[18] confirmed that there were still considerable differences in how temporary agency work was regulated in the Member States.

(63) It is not surprising that those differences were connected to different prioritisations in the field of employment policy, particularly in relation to the level of labour market flexibility:

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[15] See the European Parliament's report 23 October 2022 (A5-0356/2002) p. 24.
[16] See Case C-533/13 *AKT*, para. 32.
[17] See p. 3311–3312 of the judgment, and p. 3334 of the opinion.
[18] COM(2014) 176.

> *"All Member States have made specific choices in terms of employment policy, for instance, by favouring labour market flexibility to variable degrees. Such choices have an influence on the role and place of temporary agency work in their respective labour markets."*[19]

(64) Most of the Member States provided only very general justifications for restrictions:

> *"On the whole and with few exceptions, Member States provided only very general ustifications for restrictive provisions in force, even when the Commission asked for complementary information on the reasons why national authorities considered that prohibitions and restrictions that remain applicable were justified on grounds of general interest."*[20]

(65) A number of Member States referred to "the protection of temporary agency workers" as a justification for prohibitions and restrictions. This was one of the justifications relied on by Germany in relation to restrictions in the construction industry.[21]

(66) Several Member States referred to "requirements of health and safety at work", sometimes in combination with other justifications listed in Article 4(1) of the Directive.[22]

(67) Various Member States referred to referred to 'the need to ensure that the labour market functions properly' to justify limitative list of reasons for using agency workers, limitations on the number or proportion of agency workers who may be used in a user undertaking or the obligation for the employer to negotiate with a workers' organisation before using agency workers.[23]

(68) The need to ensure that abuses were prevented was invoked as a ground of justification in relation to measures as diverse as rules on the nature of the tasks that may be assigned to agency workers, the possibility for national collective agreements to set quantitative limits on the use of fixed-term contracts for agency work, or the need, in certain cases for the user undertaking to obtain the consent of its union delegation before using agency workers.[24]

(69) It is noteworthy that several Member States explained various restrictive measures by the need to protect permanent employment and to avoid a situation in which permanent positions might be filled by workers employed on a temporary basis:

> *"In particular, they have used this justification to limit the duration of assignments and to explain the existence of a list of permissible reasons for using temporary agency*

[19] Ibid p. 10.
[20] Ibid p. 10.
[21] Ibid p. 10.
[22] Ibid p. 11.
[23] Ibid p. 11
[24] Ibid p. 11

work, such as, for instance, the replacement of an absent worker, a temporary increase in the volume of work, or the performance of exceptional or seasonal tasks."[25]

(70) The Commission noted that although a few restrictions and prohibitions had been removed, "the review has not so far led to major changes in the extent of the restrictive measures". At the time of the report, the review was still work in progress in several Member States.[26]

(71) Germany has for many years had a prohibition on the use of temporary agency work in the construction sector[27], and recently also introduced a prohibition in the core business of the meat industry (the slaughtering, cutting and processing of meat).[28]

6 QUESTION 1: THE REQUIREMENT OF A CROSS-BORDER ELEMENT

(72) By its first question, the referring court asks, in essence, whether the fact that a temporary work agency has employees from other EEA States can constitute a relevant cross-border element in relation to Article 36 of the EEA Agreement on the freedom to provide services.

(73) It follows from the judgment in Case C-279/80 *Webb* that the activity of temporary work agencies comes within the scope of the freedom to provide services. The persons employed by the agencies may in certain circumstances come withing the scope of the free movement of workers, but this does not prevent the agencies from being undertakings engaged in the provision of services. The ECJ considered that the special nature of the services provided by temporary work agencies does not remove them from the ambit of the rules on the freedom to supply services.[29]

(74) It is settled case law that the freedom to provides services cannot be applied to activities which are confined in all respects within a single Member State.[30] A cross-border situation cannot be presumed to exist on the sole ground that persons from other EEA States may avail themselves of such service opportunities. A mere assertion by a service provider that some of its customers come from EEA State is not sufficient to establish the existence of a cross-border situation in relation to the freedom to provide services.[31]

(75) The requirement of a cross-border element must not be confused with the question of whether the EFTA Court has jurisdiction to answer a question. Both the CJEU and the EFTA have considered themselves competent to give preliminary rulings in disputes concerning purely internal situations provided that the national legislation was capable of producing

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[25] Ibid p. 12.
[26] Ibid. 12.
[27] See e.g. Case C-493/99 *Commission v. Germany*.
[28] See https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/Forschungsberichte/fb-633-gsa-fleisch-arbeitnehmerrechte.pdf?__blob=publicationFile&v=1%3C/a%3E and Drucksache 19/21978 (bundestag.de)
[29] Case 279/80 *Webb*, para. 9–11.
[30] See Case 52/79 *Debauve* para. 9
[31] See Case C-311/19 *BONWER WIN*, paras. 24–25.

effects which were not confined to that state.[32] Such effects are, however, not sufficient to meet the requirement of a relevant cross-border element.

(76) Four different cross-border situations have been accepted in relation to Article 36 EEA:[33]

1. The service provider crosses the border to offer the service.

2. The service recipient crosses the border to receive the service.[34]

3. Both the service provider and the service recipient cross the border to another EEA State, where the service is provided.[35]

4. The service provider offers a service to a recipient established in another EEA State without crossing a border, but the service crosses a border.[36]

(77) These four situations concern the relationship between the service provider and the service recipient. That is the relationship protected by Article 36 EEA.

(78) If the service provider and the service recipient are established in the same State and the service is also provided in that same State, there is no cross-border element in relation to the freedom to provide services under Article 36 EEA.[37]

(79) The nationality of the persons that are employed by the service provider is not relevant for the assessment of whether there is a cross-border situation in relation to the freedom to provide services. Article 36 EEA only gives rights to service providers and service recipients. The rights of workers are covered by other provisions (Article 28 EEA).

(80) The plaintiffs have argued that the present case is comparable to Case C-208/05 *ITC*. That case concerned a German private-sector recruitment agency (the service provider) who had found a job (the service) for a Mr Halacz (the service recipient) with a company established in the Netherlands.[38] The German Bundesagentur für Arbeid refused to pay the fee for that service because Mr Halacz was not employed in Germany.[39] The ECJ found that such rules "gives rise to a restriction on the freedom to provide services based on the place where that service is provided".[40] The cross-border element in that case was therefore connected to the service (the job found for Mr Halacz), which was in another Member State (the Netherlands).

(81) In the present case, the service (the hiring out of labour) is provided in the same state where both the service provider (the temporary work agencies) and the services recipients (the user

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[32] See Joined Cases C-159/12 to C-161/12 *Venturini and Others*, paras. 25–26, and Case E-9/14 *Kaufman*, para. 31.
[33] See the opinion of the Advocate General in Case C-311/19 *BONWER WIN*, para. 47.
[34] See Joined Cases 286/82 and 26/83 *Luisi and Carbone*, para. 10.
[35] See Case C-154/89 *Commission v France*, paras. 9–10.
[36] See Case C-384/93 *Alpine Investments*, paras. 20–22.
[37] See e.g. Case C-245/09 *Omalet*, paras. 12–14 and Case C-97/98 *Jägerskiö*ld, paras. 42–43.
[38] Case C-208/05 *ITC,* paras. 11–13.
[39] Ibid paras. 14–15.
[40] Ibid para. 57.

undertakings) are established. Consequently, there is no cross-border element in relation to the freedom to provide services.[41]

(82) The referring court states that the temporary work agencies in question employ nationals who come to Norway from other EEA States and considers that there is some doubt as to whether the present case is comparable to the case of a recruitment company that assists with recruiting a national who comes to Norway from another EEA State.

(83) In the example mentioned by the referring court, the service itself (the person recruited by the recruitment company for the undertaking) crosses a border. That is not the case for the services provided by the plaintiffs in the present case. The persons employed by temporary work agencies are employed by the agencies before the service (the hiring out of labour) is provided. The service is provided in Norway and does not cross a border.

(84) Since the service provided by the plaintiffs in the main proceeding does not cross a border (the hiring out of labour happens in Norway) the present case must be distinguished from the situation where a recruitment company provides a service in the form of a person who comes to Norway from another State.

(85) That finding is borne out by the Posted Workers Directive (Directive 96/71/EC) which applies to transnational services. The directive covers situations where an undertaking established in an EEA State posts workers to the territory of another Member State to carry out work there for a limited time.[42] In those situations the service crosses a border, and consequently, there is a transnational aspect that falls within the ambit of Article 36 EEA. The cross-border aspect is linked to the posting of the worker from an undertaking established in one EEA State to the territory of another EEA State.

(86) The nationality or residence of the worker is immaterial under the Posted Workers Directive. The definition of a posted worker under Article 2(1) of the Directive is a "worker who, for a limited time carries out his work in the territory of a Member State other than the State in which he normally works". Consequently, it is not the nationality or residence of the worker, but the fact that he/she is being sent to another State than the one where he usually works that constitutes the transnational (cross-border) aspect of the service.

(87) It follows from the above that 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.

(88) The same goes for the nationality of the owners of the plaintiffs in the main proceedings. While the nationality of the parent company is relevant under the freedom of establishment, the location of the ownership has no impact on the situation of the service provider. Hence,

[41] This was also the opinion of the Norwegian Supreme Court's Appeals Committee in a case concerning a request for interim measures from other Norwegian temporary work agencies, see HR-2024-581-U para. 13.
[42] See Article 1(1) and Article 2(1) of the Posted Workers Directive.

the fact that some of the plaintiffs have parent companies established in other EEA States is immaterial for the assessment of a cross-border situation under Article 36 EEA.[43]

7 THE CONTESTED MEASURES DO NOT CONSTITUTE RESTRICTIONS

(89) At the time of the reference, the Government did not dispute that the contested provisions constituted restrictions on the freedom to provide services.[44]

(90) However, based on a closer assessment of the case-law on Article 36 EEA, the Government has come to the conclusion that prohibitions and restrictions on the hiring in of temporary agency workers, such as those at issue in the main proceedings, cannot be regarded as a restriction on the freedom to provide services.

(91) At the outset, it should be noted that in *Webb*, the restriction consisted in the requirement of a licence for the provision of temporary agency workers under Netherlands law.[45] The ECJ did not seem to consider the Netherlands prohibitions and restrictions on temporary agency work as separate restrictions on the freedom to provide services.[46] That was also the opinion of the Advocate General:

> *"A national measure which is not discriminatory may be described as an obstacle to that freedom when it constitutes a particular hindrance to the supply of services between Member States (as in the case of a duty to obtain a licence, which subjects a supplier of services to costs or inconvenience when he provides services in a Member State other than his own, and when the licence duplicates one already held by the same supplier in another Member State). A mere difference between national laws governing the circumstances in which services of a particular kind may be supplied, having its origin in differences between the labour markets in all or part of those states, does not necessarily constitute a hindrance of that kind."*[47]

(92) In subsequent case-law, the application of the host Member State's national rules to service providers has been considered liable to prohibit, impede or render less attractive the provision of services "to the extent that it involves expenses and additional administrative and economic burdens".[48]

(93) Prohibitions and restrictions on temporary agency work do not give rise to expenses or additional administrative or economic burdens for service providers from other EEA States.

(94) The concept of restriction covers measures which affect access to the market for service providers from other EEA States, but national rules do not constitute a restriction solely by

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[43] See Case C-566/15 *Erzberger*, para. 29–30, on the parallel situation of workers employed by a subsidiary with a parent company established in a Member State other than that of the subsidiary.
[44] Order for reference page 9.
[45] Case C-279/80 *Webb* paras. 19-20.
[46] See para. 19.
[47] Opinion page 3336.
[48] See e.g. Case C-165/98 *Mazzoleni and ISA*, para. 24.

virtue of the fact that other States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory.[49]

(95) A restriction exists if service providers from other EEA States are deprived of the opportunity of gaining access to the market of the host State under conditions of normal and effective competition.[50]

(96) However, national prohibitions and restrictions on the use of temporary agency work do not deprive temporary work agencies from other EEA States of the opportunity of gaining access to the market of that State under conditions of normal and effective competition.

(97) The Government is indeed not aware of any case-law where prohibitions or restrictions on temporary agency work are regarded as restrictions on the freedom to provide services.

(98) In Case C-533/13 *AKT,* the Advocate General claimed that "restrictions on the freedom of temporary employment undertakings to provide services are already prohibited by Article 56 TEU", but the case-law he referred to did not concern national prohibitions or restrictions on the use of temporary agency work, but other rules concerning temporary work agencies.[51]

(99) Case C-493/99 *Commission v. Germany* concerned exceptions to the German prohibition on temporary agency work the building sector.[52] The Commission did not, however, argue that the prohibition as such constituted a restriction on the freedom to provide services.[53]

(100) Based on the above, the Government respectfully submits that national provisions such as those at issue in the present case cannot be regarded as restrictions under Article 36 EEA.

8 QUESTION 2: LEGITIMATE OBJECTIVES

(101) By its second question, the referring court asks what can constitute legitimate objectives for restrictions on the freedom to provide services in the form of prohibitions and restrictions on the hiring-in of workers.

(102) If the EFTA Court considers that national prohibitions and restrictions on the hiring in of temporary agency workers constitute restrictions on the freedom to provide services, the grounds of general interest in Article 4(1) of the Temporary Agency Work Directive are legitimate objectives capable of justifying such restrictions.

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[49] See Case C-565/08 *Commission v. Italy*, paras. 46 and 49–51 and Case C-468/20 Fastweb, paras. 85–86.
[50] Case C-565/08 *Commission v. Italy*, para. 51.
[51] Opinion para. 91 and footnote 40 with further references to Case C-397/10 *Commission v Belgium*, EU:C:2011:444, which concerned Belgian provisions that temporary work agencies must have as their only objective ("objet social exclusive") the hiring out of workers (para. 11) and a special legal form ("une forme ou un statut juridique particulier") (para. 17) and Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov and ACO Industries Tábor*, EU:C:2014:2011, which concerned withholding tax on income payable by temporary agency workers used by the plaintiff companies.
[52] Case C-493/99 *Commission v. Germany*.
[53] The hiring out of labour was allowed where it consisted in contracting out workers to a consortium of undertakings or where it took place between undertakings in the building industry (para. 14).

(103) The list in Article 4(1) is non-exhaustive, cf. "in particular", and includes 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 abuses are prevented.

(104) Furthermore, it is undisputed that the protection of workers is a legitimate objective.[54]

(105) The aim of increasing permanent and direct employment is yet another ground of general interest capable of justifying restrictions on the freedom to provide services.

(106) Recital 15 of the Temporary Agency Work Directive states that permanent and direct employment is the general form of employment.[55]

(107) In Case C-681/18 *KG*, the CJEU held that "it was the intention of the EU legislature to bring the conditions of temporary agency work closer to 'normal' employment relationships, especially since the EU legislature in recital 15 expressly stated that employment contracts for an indefinite term are the general form of employment". The Directive "therefore also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking, an objective reflected in particular in Article 6(1) and (2)".[56]

(108) The Directive seeks to ensure that temporary agency work at the same user undertaking does not becomes a permanent situation for a temporary agency worker.[57]

(109) In *KG*, the CJEU held that successive assignments of the same temporary agency worker to the same user undertaking "circumvent the very essence" of the Directive and amount to misuse, since they upset the balance struck by the Directive between flexibility for employers and security for workers by undermining the latter.[58] The Advocate General had suggested that there should be an exception for successive assignments of temporary agency workers with a permanent work contract.[59] The CJEU did not, however, adopt that line of reasoning.[60]

(110) Consequently, the Directive is built on the premise that employment with a temporary work agency, even permanent employment, cannot offer the same level of protection and security to workers as permanent and direct employment with a user undertaking.

(111) Temporary agency workers are indeed regarded as "atypical and precarious workers".[61]

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[54] See e.g. Case C-279/80 *Webb*, para. 19 and Case C-164/99 *Portugaia Construções*, para. 20.
[55] See recital 15 of the Temporary Agency Work Directive and recital 2 of the framework agreement on part-time work ("contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers"), and case law on the Directive on Fixed-Term Work, e.g. Case C-212/04 *Adeneler*, para. 61, and Case C-16/15 *Pérez López,* para. 48.
[56] Case C-681/18 *KG*, para. 51, see also para. 62.
[57] Ibid para. 60.
[58] Ibid, para. 70.
[59] See para. 72 of the opinion.
[60] Compare para. 70 of the judgment with para. 72 of the opinion.
[61] See Case C-649/22 *Randstad Empleo and Other*, para. 47, and Case C-426/20 *GD and ES*, para. 36.

(112) Based on the above, it is difficult to see how national measures to promote permanent and direct employment could be contrary to EEA law.

(113) In any event, national measures that are intended to increase the proportion of permanent and direct employment must be regarded as a justifiable means to achieve the legitimate objectives of protecting workers and ensuring that the labour market functions properly.

9 QUESTION 3: SUITABILITY AND NECESSITY

9.1 Introduction – a wide margin of appreciation

(114) By its third question, the referring court asks which criteria are relevant for the assessment of whether restrictions on the hiring-in of workers are suitable and necessary in order to safeguard legitimate objectives. The court also enquires whether 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.

(115) At the outset, it must be noted that EEA States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.[62]

(116) In the leading case on temporary work agencies, Case C-279/80 *Webb*, the ECJ held that the activity of temporary work agencies is "a particularly sensitive matter from the occupational and social point of view":

> *"It must be noted in this respect that the provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned. That is evident, moreover, in the legislation of some of the Member States in this matter, which is designed first to eliminate possible abuse and secondly to restrict the scope of such activities or even prohibit them altogether."*[63]

(117) The ECJ found that it was permissible and amounted to a legitimate choice of policy pursued in the public interest to maintain a system of licensing in order to be able to refuse licences 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.[64]

(118) If the EFTA Court considers that the Netherlands prohibitions and restrictions on temporary agency work in *Webb* were regarded by the ECJ as restrictions on the freedom to provide

[62] See Case 45/09, *Rosenbladt*, para. 41 and the case-law cited.
[63] Case C-279/80 *Webb*, para. 18
[64] Ibid para. 19.

services, it is in any event apparent from that judgment that the review of those provisions was very limited.

(119) The ECJ did not apply the proportionality test to those prohibitions and restrictions. It was sufficient that the national rules did not distinguish between temporary work agencies from the Netherlands and other Member States and that evidence and guarantees provided in the home State were taken into consideration. [65]

(120) Article 4(1) of the Temporary Agency Work Directive defines the legislative framework open to the EEA States as regards prohibitions or restrictions on the use of temporary agency work, but it does not require any specific legislation to be adopted.[66] The EEA States may maintain and introduce restrictions and prohibitions on the use of temporary agency work provided they are justified on grounds of public interest.

(121) There are no provisions in the Directive that require the EEA States to regulate fixed-term work and temporary agency work in the same way. Nor are there any provisions that require the EEA States to allow the use of temporary agency work in every situation where there is a temporary need for workers.

(122) Since the Directive does not list the cases in which temporary agency work is justified, the EEA States retain broad discretion ("une marge d'appréciation importante") to determine the situations in which temporary agency work should be permitted.[67] The EEA States may thus regulate different types of labour supply, including temporary agency work, and ensure the proper functioning of the labour market by means of methods chosen by them themselves.

(123) Bearing in mind the differences in how temporary agency work is regulated among the EEA States, and in the absence of harmonisation at EU level of the situations in which the use of temporary agency work is justified, it is for each EEA State to determine, in accordance with its own scale of values, what is required in order to ensure that the legitimate objectives in question are protected.

9.2 The burden of proof

(124) It is undisputed that is for an EEA State to prove that a restriction on the freedom to provide services can be justified on grounds of public interest.

(125) In Case C-254/05 *Commission v Belgium*, the ECJ stated that "the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive

[65] Ibid para. 20.
[66] Case C-533/13 *AKT*, para. 31. The English translation ("restricting the scope") is not quite faithful to the French original ("délimitant le cadre"). The German, Danish and Swedish translations are more precise ("den Rahmen festlegt"/"fastsætte rammerne»/«innehåller ramarna").
[67] Case C-232/20 *Daimler*, para 33, with reference to para. 37 of the Advocate General's opinion, which cites the opinion of the Advocate General in Case C-533/13 *AKT*, paras. 113–114.

measure adopted by that State, and precise evidence enabling its arguments to be substantiated."[68]

(126) In the English translation of the judgment, the word "éléments" in the French original ("des éléments précis permettant d'étayer son argumentation"), was translated as "evidence" ("precise evidence enabling its arguments to be substantiated"), although it is closer to the English word "information".[69] This is confirmed by several other language versions, such as the Danish, Swedish and German ("opplysninger", "uppgifter", "Angaben").

(127) Consequently, the EEA State must be able to present appropriate evidence or an analysis of the appropriateness and proportionality of the restrictive measure, and precise information enabling its arguments to be substantiated. In other words, if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality.[70]

(128) However, the EEA State is not required to produce studies or statistical surveys serving as the basis for the adoption of the restrictive measures.[71]

(129) In the context of restrictions on the use of temporary agency work, the ECJ has held that it is sufficient that "there is reason to fear" that hiring-in could harm legitimate objectives in the public interest such as good relations on the labour market or the interests of the workforce affected.[72]

9.3 Suitability

(130) The two limbs of the proportionality principle entails that a restrictive measure must be appropriate for securing the attainment of the objective pursued and not go beyond what it is necessary in order to attain it.[73]

(131) In this regard, it should be observed that, whilst it is true that a EEA State seeking to justify a restriction must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that it must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose.[74]

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[68] Case C-254/05 *Commission v Belgium*, para. 36.
[69] The word "élément" is defined as "information, donnée, fait, etc., nécessaire à la compréhension de quelque chose", see https://www.larousse.fr/dictionnaires/francais/%C3%A9l%C3%A9ment/28372
[70] See Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß,* para. 71.
[71] Ibid, para. 72, with further reference to the opinion of the Advocate General, para. 82.
[72] See Case C-279/80 *Webb*, para. 19.
[73] See e.g. Case C-110/05, *Commission v Italy*, para 59.
[74] See the opinion in case C-400/08, *Commission v. Spain*, para. 89.

(132) In the present case, there were clear indications that temporary agency work was used to a greater extent than permitted and was displacing permanent and direct employment in the user undertakings. Temporary agency workers were reluctant to pursue their rights in fear of losing future assignments, and the Labour Inspection Authority reported that controls were difficult due to the inherent nature of the provision on "work of a temporary nature".

(133) The contested provisions were suitable measures for turning this negative trend. Since the need for workers in user undertakings is unchanged, it was probable that the amendments would lead to an increase in permanent and direct employment.

(134) Statistics and surveys from the period after the provisions entered into force indicate that the contested measures have indeed had this effect. There has been a significant increase in transitions from temporary agency work to permanent positions in ordinary companies, particularly in the construction sector both in the Oslo area and in the rest of the country.

(135) The contested provisions also genuinely reflect a concern to attain the legitimate objectives in a consistent and systematic manner.

(136) The consistency test is a negative test, the purpose of which is to control for inconsistences of such importance that they are liable to call into question whether the restrictive national measure is genuinely concerned with the stated objective. This interpretation is confirmed by the facts of the Italian gambling case (*Gambelli)* in which the consistency requirement was first set out.[75] Legal theory[76] as well as Advocates General[77] have therefore referred to the requirement of consistency as a hypocrisy test.

(137) Since taking office, the Government has pursued a consistent policy of protecting labour rights and creating safe jobs in an organized working life. The Government's political platform ("Hurdalsplattformen") from 2021 states:

> *"For the Government, it is important to strengthen workers' rights in a changing working life. Full time and permanent employment shall be the main rule in Norwegian working life.Hiring and fixed-term contracts that displace permanent employment, as well as forms of affiliation where the purpose is to circumvent employer responsibility, create increased inequalities in working life and insecurity for people." (office translation)*

(138) The contested provisions are part of a balanced policy in which the hiring in of temporary agency worker is permitted in several situations where there is no reason to fear that such work will displace direct and permanent employment. The purpose is not to remove all use of temporary agency work, but to reserve it for certain situations and at an acceptable level. Restrictions on the use of temporary agency work are not inconsistent merely because an

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[75] Case C-243/01 *Gambelli and Others*, paras 67–69.

[76] See e.g. Spapens, T., Littler, A. and Fijnaut, C., *Crime, Addiction and the Regulation of Gambling*, Martinus Nijhoff Publishers, 2008, p. 86, and Straetmans, G., Common Market Law Review, No 41 (2004), issue 5, p. 1424.

[77] Opinion in Joined Cases C-316/07, C-358-360/07 and C-409-410/07, *Stoß and Others*, para 50.

EEA State permits the use of temporary agency work and other flexibility mechanisms such as fixed-term work in some situations.

(139) Fixed-term workers are directly employed in a two-party relationship and their situation is less precarious than that of temporary agency workers. Research indicates that fixed-term workers are more likely to find a permanent position in the user undertakings, and the share of fixed-term workers organised in trade unions is also higher. Allowing fixed-term contracts to a certain extent is consistent with the legitimate objectives pursued by the Government.

(140) Permanent employment in a temporary work agency cannot offer workers the same level of security as permanent employment in an ordinary company. This is a fundamental premise of the Temporary Agency Work Directive[78], and is also confirmed by research on temporary agency work on the Norwegian labour market.[79]

(141) The provision on the hiring in of health care personnel in Section 3 of the Regulation on temporary agency work shall ensure that the central and local government's statutory duty to provide the population with necessary health care is met. Lack of qualified personnel may for obvious reasons affect both the health and safety of patients. Temporary agency work is therefore allowed as a last resort, for example related to major outbreaks of disease or in the case of seasonal variations. If the need for personnel can be met in other ways such as direct permanent or temporary employment, reassignment of personnel, or use of part-time work, the hiring-in of temporary agency workers is not permitted.

(142) Section 14-12(2) of the Working Environment Act on local agreements on temporary agency work with the workers' representatives allows the hiring-in from temporary work agencies in situations where the interests of the workers in the user undertaking are safeguarded. These workers will normally not accept that temporary agency work is used in a way that displaces permanent and direct employment. Such agreements are similar to collective agreements in that they strike a balance between the interests of employers and workers.[80]

(143) Provisions that allow the social partners the possibility to derogate from requirements are common at the EU level.[81] This is one of the ways in which the social partners exercise their fundamental right to collective bargaining under Article 28 of the Charter of Fundamental Rights. Some provisions expressly state that the Member States may reserve the right to derogate from provisions in secondary law to social partners "at the appropriate level".[82]

(144) The requirement in Section 14-12(2) of the Working Environment Act that the undertaking must be bound by a collective agreement with a trade union with the right of nomination shall ensure that the provision is used only where there is a legitimate need for the hiring-in of temporary agency workers, and that workers representatives are not being pressurised to

[78] See Chapter 8 above.
[79] See Chapter 2.2 above.
[80] See e.g. Joined Cases C-297/10 and C-298/10, *Hennigs*, para. 65 and the case-law cited.
[81] See e.g. Article 17 of the Working Time Directive (Directive 2003/88/EC), Article 5(3) of the Temporary Agency Work Directive, and Article 14 of the Directive on Transparent and Predictable Working Conditions (Directive 2019/1152).
[82] See for example Article 5(3) of the Temporary Agency Work Directive.

enter into such agreements. It is assumed that undertakings that are bound by a collective agreement with a trade union with the right of nomination are serious and professional in following rules and in negotiating with workers' representatives. The requirement implies that the worker's representatives will have access to support and advise from trade unions when negotiating an agreement under Section 14-12(2).[83]

9.4 Necessity

(145) The requirement that the national measures must not go beyond what is necessary depends on whether the objectives may be achieved in an equally effective manner by measures that are less restrictive of freedom of movement.[84]

(146) In the absence of fully harmonising provisions at EU level, an EEA State may determine the degree of protection for legitimate objectives it pursues and the way in which that degree of protection is to be achieved.[85] Since that degree of protection may vary from one EEA State to the other, the EEA States must be allowed a margin of appreciation and, consequently, the fact that one State imposes less strict rules than another does not mean that the latter's rules are disproportionate.[86]

(147) The contested measures provisions must therefore be assessed solely by reference to the objectives pursued by the EEA State concerned and the level of protection which it seeks to ensure.[87]

(148) While it is for the EEA State which invokes an imperative requirement as justification for the hindrance to freedom of movement to demonstrate that its rules are necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the EEA State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.[88]

(149) The Government considers that the legitimate objectives in question could not be achieved in an equally effective manner by measures that were less restrictive.

(150) As regards the decision to repeal the option to use temporary agency work for "work of a temporary nature", measures relating to control and guidance would not be equally effective in preventing temporary agency work from displacing permanent and direct employment in the user undertakings. The Labour Inspection Authority had found it difficult to control the use of that provision, and the problems were related to the inherent nature of the provision.

(151) A quota scheme had been considered before, but had met objections relating to practice, enforcement, and sanctioning. There were also concerns that a quota could be perceived as

[83] See Prop. 73 L (2017–2018) p. 44.
[84] See e.g. Case E-14/15 *Holship*, para. 130.
[85] See e.g. Case C-110/05, *Commission v Italy*, para 61 and 65.
[86] Ibid, para. 65.
[87] See Case C-176/11 *HIT and HIT Larix*, para. 25 and the case-law cited.
[88] See Case C-110/05, *Commission v Italy*, para 66.

a norm and therefore lead to an increase in the use of temporary agency work that would displace permanent and direct employment.

(152) As regards the ban in the construction sector, a forceful measure was needed in order for companies in the construction industry in the Oslo area to change their personnel strategy and invest in their own employees, instead of depending on temporary agency work.

(153) Article 4(1) of the Temporary Agency Work Directive expressly mentions prohibitions on the use of temporary agency work as a possible measure capable of being justified on grounds of general interest. The same follows from *Webb*.

(154) There had been long-standing problems related to the use of temporary agency work in the construction sector, and other measures taken by the Government had not proven effective in solving those problems. The situation in the Oslo area was particularly serious.

(155) The Government considered alternative measures in the preparatory works but found that these measures would not be equally effective in achieving the legitimate objectives.[89]

(156) Finally, even if alternative measures could guarantee a certain level of protection, the EEA States cannot be denied the possibility of attaining legitimate objectives by the introduction of general and simple rules which will be easily understood and applied by the persons concerned and easily managed and supervised by the competent authorities.[90]

(157) Such general and simple rules are likely to bolster the effectiveness of restrictive measures.

(158) The case about the Italian trailers is an illustrative example.[91] Italy had enacted a general prohibition on motorcycles towing trailers for reasons of road safety. The Advocate General considered that a less restrictive measure would be to define the most risky roads (mountain crossings, motorways or even particularly heavily used public highways) for the purpose of laying down sectoral prohibitions or limitations.[92] The Court recognised that such a measure could guarantee "a certain level of road safety", but emphasised that Member States were entitled to introduce general and simple rules which can be easily managed and supervised, while adding that nothing allowed for a presumption that road safety could be ensured at the same level by a road traffic authorization subject to compliance with certain conditions.[93]

(159) The same point was made in the Josemans case. A regulation which entailed challenges in relation to monitoring and control was compared with the benefits of more general rules that were easily managed and supervised, and again nothing allowed for an assumption that the objective pursued could be achieved "to the extent envisaged" by rules that were not as easily managed and supervised.[94]

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[89] See Prop. 131 L (2021–2022) p. 29
[90] See Case C-110/05, *Commission v Italy*, para 67–68.
[91] Case C-110/05, *Commission v Italy*.
[92] (Second) opinion, para. 170.
[93] Judgment para 67–68.
[94] Case C-137/09, *Josemans*, paras 81–82.

(160) Statistics show that the contested measures have led to a significant increase in transitions from temporary agency work to permanent positions in ordinary companies, particularly in the construction sector both in the Oslo area and in the rest of the country. Nothing allows for a presumption that this could have been achieved to the same extent by the measures that are were not as easily managed and supervised as the contested measures.

10 ANSWER TO THE QUESTIONS

(161) Based on the foregoing considerations, the Norwegian State, represented by the Ministry of Labour and Social Inclusion, respectfully submits that the questions 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.

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Oslo, 19/04/2024

Ida Thue
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