EUROPEAN COMMISSION

Brussels, 19 April 2024

sj.a(2024)3260134

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

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in Case E-2/24

Bygg & Industri Norge AS and others

in which the *Oslo tingrett* (Oslo District Court), Norway, 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 concerning the interpretation of Article 36 of the EEA Agreement

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I. INTRODUCTION

1. This request for an Advisory Opinion of the EFTA Court concerns the interpretation of the free movement rules in the EEA Agreement.

2. The request is made in the course of proceedings in which a number of temporary work agencies claim compensation is due to them as a result of the negative effects of Norwegian rules that violate EEA law.

3. The Commission takes note of the background to the case as set out by the national court at section 2 of the request for an Advisory Opinion.

4. The Commission also takes note of the ongoing infringement proceedings concerning the same Norwegian rules as are at stake in the cases pending before the national court. While the letter of formal notice and the reply thereto are in the public domain, the Commission nevertheless considers it essential to have the views of the Norwegian government on the specific questions referred and will therefore refrain from commenting on the content of those exchanges beyond what flows directly from the request for an Advisory Opinion.

5. By way of context, the Commission notes the existence of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327 of 5.12.2008, p. 7), incorporated into the EEA Agreement without any specific adaptations by Joint Committee Decision No 149/2012 (OJ L 309, 8.11.2012, p. 34). While there is no suggestion that that act can be applied in the present case, the Commission will explain below the general relevance of that act in circumstances such as those at hand. ([1])

II. FACTS, LEGAL FRAMEWORK AND THE QUESTIONS ASKED

6. The facts have been set out by the national court. The Commission has nothing to add in relation to the account given in the request for an Advisory Opinion.

([1]) The national court notes, correctly, that the CJEU has held that Article 4(1) of the Temporary Agency Work Directive "*does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of [that provision]*" (judgment of 17 March 2015, AKT, C-533/13, EU:C:2015:173, para. 32).

7. The Commission notes that the relevant EEA law reproduced by the national court is limited to Article 36 EEA on the freedom to provide services, and Article 4(1) of the Temporary Agency Work Directive. As well as citing more extensively from that directive, the Commission will refer, in addition, to Article 31 EEA on the freedom of establishment.

8. The national court describes the doubts it has in relation to the interpretation of EEA law, noting, in particular, doubts as to the existence of a cross-border element; reliance on the free movement provisions in the EEA Agreement presupposes the existence of such an element. Assuming that a cross-border element is demonstrated, the national court also expresses doubts as to which legitimate interests may be invoked in order to justify a restriction on free movement, and how to assess the proportionality of such a restriction.

9. The *Oslo tingrett* therefore refers 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 isa cross-border element under the rules on the freedom to provide services, ref. Article 36 of the EEA Agreement?

    2. What can constitute legitimate objectives for restrictions on the freedom to provide services under Article 36 of the EEA Agreement in the form of prohibitions and limitations on the hiring-in of workers?

    3. Which criteria will be relevant in the determination of whether the 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?

III. ANALYSIS

10. By its questions, which can be described together, the national court asks, in essence, whether the plaintiffs can rely on EEA law to found their claim and if so,

what elements may be referred to when assessing whether the Norwegian rules on temporary work agencies are in breach of the fundamentals freedoms enshrined in the EEA Agreement. More specifically, the national court seeks to ascertain what might constitute an overriding reason relating to the public interest and whether, when assessing the proportionality of the rules, any significance should be attached to the geographical or sectoral scope of a national rule.

11. The Commission will first assess the existence of a cross-border element, as a pre-condition for being able to rely on rules derived from EEA law (section III.1). Second, the Commission will consider what a national court must have regard to when determining whether national measures restricting free movement are in line with EEA law (section III.2).

III.1. First question: existence of a cross-border element

12. By its first question, the national court is asking, in essence, whether the case before it displays a cross-border element for the purposes of applying the free movement rules contained in the EEA Agreement, specifically the freedom to provide services enshrined in Article 36 EEA.

13. The national court asks this question because the free movement rules do not apply to a situation which is confined in all respects within a single Member State. ([2]) It is therefore relevant to inquire as to whether they are applicable to the persons seeking the protection of Union law in the main proceedings.

14. The plaintiffs in the main proceedings operate as temporary work agencies, that is, undertakings that offer a service of providing personnel to another undertaking. They do so from Norway, for clients (i.e. the undertakings looking to "hire" personnel) in Norway. Their action in the main proceedings is based on the limitations that new Norwegian rules – applicable as from 1 July 2023 – place on their ability to provide that service.

15. It is true that the CJEU has already held that it is irrelevant that the restriction on a provider of services is imposed by the Member State of origin: it is apparent from

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([2]) See, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, para. 47 and the case-law cited. See, to similar effect, judgment of 25 January 2024, *A Ltd v Finanzmarktaufsicht*, E-2/23, para. 36.

the case law of the Court that the freedom to provide services covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. ([3]) However, the Court has also held that a cross-border situation cannot be presumed to exist on the sole ground that EU citizens from other Member States may avail themselves of such service opportunities. ([4]) This must be all the more true when they are not the recipient of those services, but where the object of those services is the "hiring out" of workers who are nationals of other EEA States.

16. On that basis, the Commission does not find the circumstance – upon which the national court places some emphasis – that the workers provided to the client undertakings by the plaintiffs are "largely" nationals of other EEA States to be sufficient to establish a cross-border element. Contrary to what the plaintiffs appear to have argued before the national court with reference to the *ITC* judgment, it is not obvious or "logical" that their situation comes within the scope of the free movement provisions. Indeed, that judgment concerns a quite different situation and is not an "illustration" of the existence of a cross-border element in the circumstances of the main proceedings. ([5]) In *ITC*, the Court found that a private-sector recruitment agency established in Germany could rely on the rules governing the free movement of workers against the German authorities in a situation in which the job that was found for the person seeking employment was in another Member State, i.e. Article 45 TFEU applied to a worker who moved from Germany to another Member State to take up employment there. ([6]) While it may be true that many of the temporary agency workers travelled to Norway in order to find work there, that factor is to be distinguished from the provision of services by plaintiff agencies.

17. However, the national court also notes that one of the plaintiff agencies "*has non-Norwegian owners established in the EEA*". If the owners are natural persons from an EEA State (i.e. nationals of an EEA State), then by setting up the plaintiff agency

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([3]) See judgment of 3 December 2020, *BONVER Win*, C-311/19, EU:C:2020:981, para. 20.

([4]) *Ibid.*, para. 24).

([5]) See request for an Advisory Opinion, page 8 of the English version, last paragraph before the presentation of the view of the Norwegian State.

([6]) Judgment of 11 January 2007, *ITC*, C-208/05, EU:C:2007:16, paras 29-30.

in Norway, they have exercised their right of establishment. The same is true if the owners are legal persons incorporated pursuant to the laws of an EEA State.

18. On that basis, the Commission is of the view that a cross-border element appears in any event to be present in the circumstances of the main proceedings brought by that particular agency.

19. It is sufficient, for the purposes of establishing jurisdiction, that an answer from the EFTA Court is needed to resolve the dispute in at least one of the actions pending before it.

20. In light of the foregoing considerations, the Commission finds it appropriate to answer the first question as follows:

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

III.2. Second and third questions: restrictions must be justified and proportionate

III.2.1. Preliminary considerations

21. By its second question, the national court asks an abstract question concerning the possible objectives that might be invoked by an EEA State to justify a restriction to the freedom to provide services. Two sets of preliminary remarks appear appropriate, first, in relation to which freedom is applicable in the situation pending before the national court, and second, in relation to the manner in which the question of the national court is phrased.

a) Identification of applicable fundamental freedom

22. Although the national court asks the EFTA Court to examine the national legislation concerned in the light of the rules of the EEA Agreement on the freedom to provide services, the Commission is of the view, for the reasons set out in relation to the first question, that that freedom is not applicable in the circumstances of the

present case. Indeed, the services performed by the plaintiff agencies (the "hiring out" of workers) are carried out in Norway for Norwegian undertakings.

23. However, as indicated in the context of the observations on the first question, the Commission is of the view that one of the plaintiff agencies appears to have exercised its right to establishment, pursuant to the EEA Agreement, and that the questions of the national court may therefore usefully be considered in the light of that freedom.

24. This requires, however, that the questions be reformulated in light of the freedom of establishment, and not of the freedom to provide services. The Commission considers that such a reformulation would be appropriate. First, in its case law, the Court of Justice has frequently assessed questions from the point of view of a different fundamental freedom than the one identified by the referring court. For example, in *Xella*, the Court answered the questions referred from the point of view of freedom of establishment, even though the referring court only asked the Court to examine the national legislation concerned in the light of the rules of the TFEU on the free movement of capital. ([7]) Indeed, it has been consistently held that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Union law to which the national court did not refer in its question. ([8]) The Commission suggests that there is no reason for the EFTA Court not to take the same approach.

25. Moreover, the facts described in the request for an Advisory Opinion concern, essentially, restrictions on the freedom of the plaintiffs to pursue an economic activity on a permanent basis in Norway, said to be adversely affected by the legislation at issue. Such questions appear quite naturally to be most closely connected to the freedom of establishment.

26. On that basis, the Commission will consider the questions asked from the perspective of the freedom of establishment and Article 31 EEA.

b) Reformulation of the question referred

([7]) Judgment of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, para. 41.

([8]) See, for example, judgment of 12 October 2004, *Wolff & Müller*, C-60/03, para. 24.

27. According to the settled case law of both the Court of Justice and the EFTA Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling/advisory opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. ([9])

28. It follows that questions referred by the national courts of EEA States enjoy a presumption of relevance and that the Court of Justice or the EFTA Court, as the case may be, may refuse to rule on those questions only where it is quite obvious that the interpretation that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to those questions. ([10])

29. While the second question, as posed, is speculative and too open ended for the EFTA Court to usefully reply, to the extent that the information in the request for an Advisory Opinion makes extensive reference to the objectives actually invoked by Norway in defence of its rules on temporary work agencies, the Commission is of the view that the question may usefully be reformulated as asking, in essence, whether the objectives Norway invokes can be considered as legitimate grounds to justify a restriction on the use of temporary agency work. Indeed, the concern of the national court appears to be to ascertain whether Article 36 EEA – or, as adapted, Article 31 EEA – prohibits rules such as those at hand for reasons linked to the objectives pursued by those rules.

30. By its third question, the national court seeks, in essence, to understand which criteria should be applied when determining whether the hiring-out of workers is suitable and necessary to the attainment of the objectives referred to.

31. Both the Court of Justice and the EFTA Court have consistently held that a restriction on the freedom of establishment is permissible only if, in the first place, it

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([9]) See, for the EFTA Court, judgment of 25 January 2024, *A Ltd v Finanzmarktaufsicht*, E-2/23, para. 36; and for the CJEU, judgment of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paras 55 and 56.

([10]) *Ibid.*.

is justified by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it. ([11]) The second and third questions of the national court appear designed to ascertain what that means in the circumstances of the cases pending before it.

32. As noted above, the reply of the EFTA Court must be useful to the national court in resolving the dispute before it. ([12]) The Commission therefore suggests that a reformulation would be appropriate and understands the questions of the national court in the following terms:

> Can the grounds of general interest invoked by Norway, relating, in particular to the protection of temporary agency workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and that abuses are prevented, be considered as constituting overriding reasons relating to the general interest able, in principle, to justify restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work?
>
> When assessing whether restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work, such as those in force in Norway concerning the hiring-in of workers, are suitable and necessary for the attainment of the stated objectives, which criteria will be relevant and should any significance be attached to any geographical or sectoral limitation on the scope of the restriction?

33. It is on that basis that the following observations are made.

III.2.2. Whether there is a restriction on the freedom of establishment

34. According to settled case law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom within the meaning of Article 31 EEA. ([13])

([11]) Judgment of 6 October 2020, *Commission v Hungary*, C-66/18, EU:C:2020:792, paras 178 and 179. See also, to the same effect, judgment of 16 November 2018, *Kristoffersen*, E-8/17, para. 114.

([12]) See, to that effect, judgment of 25 January 2024, *A Ltd v Finanzmarktaufsicht*, E-2/23, para. 34.

([13]) Judgment of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, para. 58.

35. It is evident from the request for an Advisory Opinion that the parties are in agreement that the national rules under examination "*must be deemed to be restrictions*". While it is true that this agreement is recorded subject to the proviso that "*the plaintiffs may rely on the freedom to provide services under Article 36 of the EEA Agreement*", the Commission submits that the very same reasons which must have led to that understanding would also apply in relation to the freedom of establishment and Article 31 EEA.

36. Indeed, by the Norwegian government's own admission, the purpose of the rules is to render more difficult recourse to services of the type offered by the plaintiff agencies, therefore significantly reducing the attractiveness of establishing oneself as a temporary work agency in Norway.

III.2.3. As to the objectives that may be invoked to justify a restriction

37. As noted above, the second question may usefully be reformulated as asking, in essence, whether objectives such as those invoked by the Norwegian government when adopting the rules under examination in the main proceedings, that is facilitating permanent and direct employment and reducing the use of temporary agency workers, constitute overriding reasons relating to the public interest.

38. The national court does not indicate which objectives it considers were being pursued when the contested measures were adopted. It confines itself to noting that "*there is doubt about which legitimate expectations can justify [such rules]*". However, it also appears to refer to the letter of formal notice sent by ESA to Norway as a record of the respective positions of those parties.

39. The Commission notes, at the outset, that a restriction on the freedom of establishment is permissible only if, in the first place, it is justified by an overriding reason in the public interest. The Commission also recalls that it is for the EEA State concerned to demonstrate that that condition is met. ([14])

40. That said, the Commission acknowledges that the letter of formal notice itself, and the reply to that communication, provide enough information to allow it to make the

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([14]) Judgment of 6 October 2020, *Commission v Hungary*, C-66/18, EU:C:2020:792, paras 178 and 179. See also, to the same effect, judgment of 16 November 2018, *Kristoffersen*, E-8/17, para. 114.

following observations, it being understood that it is for the national court to ascertain the precise objectives being pursued by Norway because it is only in light of the specific objective being pursued that any further analysis can take place.

41. The Commission is therefore of the view that in order to decide whether a specific public interest objective can justify a specific restriction to free movement, a specific, i.e. case by case, assessment will always be necessary. Indeed, while the case law of both the Court of Justice and the EFTA Court has acknowledged that certain objectives qualify as overriding reasons relating to the public interest, that does not mean that they can be invoked in any and every situation.

42. On the basis of the information available, including from the letter of formal notice and reply thereto, Norway appears to argue that the measures in question were adopted with a view to facilitating permanent and direct employment and ensuring that the use of temporary agency workers "*is not too widespread* ". ([15])

43. The objective that workers are permanently hired directly by the user undertaking instead of through a temporary agency has not as such been recognised by the Court of Justice or the EFTA Court as constituting an overriding reason relating to the public interest capable of justifying restrictions to the freedom of establishment in the form of restrictions or prohibitions on the use of temporary agency workers.

44. While the organisation of its labour market remains a matter for the EEA State in question, it must pursue its objectives in that respect in full compliance with EEA law. That certainly includes the principles governing the freedom of establishment. The Commission is of the view that, in the circumstances of the present case, it also includes the Temporary Work Agency Directive, which should therefore be taken into account when carrying out the assessment referred to in paragraph 41 above.

45. The Court of Justice has identified Article 4(1) as "*restricting the scope of the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers*". ([16]) In other words, when an EEA State adopts a measure restricting temporary agency work, it must do so within the confines of Article 4(1). This obligation weighs on an EEA State and constitutes

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([15]) See letter of formal notice, point 54, citing from Norway's letter of 5 May 2023.

([16]) Judgment of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173, para. 31.

a benchmark for assessing the compliance of a national measure with EEA law independently of whether the Directive can be invoked by an individual directly before a national court.

46. On that basis, the Commission finds it useful to consider more closely the purpose and content of the Directive.

47. The Temporary Agency Work Directive aims to reach a fair balance between, on the one hand, improving the protection of temporary agency workers, in particular by establishing the principle of equal treatment, while supporting on the other hand the positive role that agency work can play by providing sufficient flexibility in the labour market (recital 11 and Article 2). It is clear therefore that not only is agency work, in principle, and subject to possible restrictions, permitted, it is expressly recognised as having a legitimate place in the range of measures enacted by an EEA State to organise its labour market. Article 4 seeks to create a level playing field in that respect by requiring all EEA States to review any restrictions or prohibitions on the use of temporary agency work in order to verify that they are justified "*on the grounds mentioned in paragraph 1*". Those grounds relate "*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*". What is more, given the statement of the Court of Justice cited above at paragraph 45, it would appear that, while justified and proportionate restrictions on the use of temporary agency work may be adopted, any such measures must respect the spirit and purpose of the Directive. Indeed, to hold otherwise would deprive Article 4(1) of any practical effect by ultimately undermining the ad hoc harmonisation intended by that provision. ([17])

48. Thus, the Commission understands the Directive as leaving broad discretion to the EEA States when it comes to the choice of measures necessary to ensure the proper functioning of the labour market, provided that, when those measures constitute restrictions on temporary agency work, they respond to the limitations laid down in Article 4(1).

([17]) See, by analogy, judgment of 16 June 2015, *Rina Services*, C-593/13, EU:C:2015:399, para. 37.

49. The Commission is of the view that, in this context, it is difficult to assess the specific goals highlighted by Norway in isolation: it would appear, rather, that the over-arching objective is the proper functioning of the type of labour market that Norway wishes to support, which, in turn, requires an explanation of what such a labour market looks like and why certain measures are required to make such a market a reality. The Commission understands from the information available to it that Norway is in favour of a labour market that is composed predominantly of "*permanent employment in a two-party relationship between an employee and an employer*". ([18])

50. Recital 15 of the Directive states that employment contracts of an indefinite duration are the general form of employment relationship; however, it must be observed that employment by the user undertaking ("direct" employment") is not the only way to ensure permanent employment. Workers can also be permanently employed by a temporary work agency. Moreover, it appears that the Norwegian rules themselves may ensure that the legitimate objective of encouraging permanent employment could also be achieved by other means, and in particular by the fact that temporary agency workers are entitled, pursuant to Section 14-12(3) WEA, to permanent employment with the user undertaking after three years of employment relationship with that undertaking.

51. In light of this, there appears to be no necessary link between promoting direct employment and promoting permanent employment, not least because the workers in question are directly employed (by the temporary work agency) and are, by virtue of that relationship, entitled to benefit from the principle of equal treatment laid down in Article 5 of the Directive, which states that "*the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*".

52. On the basis of the information available at this stage of the proceedings, Norway has not explained why this provision does not serve their purpose or how their stated goal is linked to the proper functioning of the labour market.

([18]) See letter of formal notice, point 54, citing from Norway's letter of 5 May 2023.

53. Before turning to possible other objectives, one final comment is called for. While it is not clear from the information available whether Norway has claimed specifically to be pursuing an objective consisting in the reduction of recourse to temporary agency workers, the Commission finds it appropriate to note that such an objective would appear in any event to require some other underlying goal in order to constitute a measure linked to the proper functioning of the labour market. In other words, promoting less agency work could be the means to achieve a (legitimate) end: *we need to promote a reduction in temporary agency work <u>because</u> … .*

54. The letter of formal notice sent to Norway by ESA also indicates that Norway had invoked, generally, the "*interests protected by Article 4(1) of the Directive*" (point 62). While the objectives mentioned in that provision are undoubtedly legitimate, it should be recalled that a general and abstract reference to such aims is not sufficient to demonstrate that a national rule was actually adopted in pursuit of those aims. ([19])

55. Indeed, in light in particular of the existence of the Temporary Agency Work Directive, it seems difficult to reconcile the prohibition on having recourse to temporary agency workers in situations in which the nature of the work is temporary with the objective of protecting those workers. Nor is there any indication that such a rule is designed to respond to requirements of health and safety at work: indeed, its application across the board in all sectors tends rather to suggest that it is not tailored to specific health and safety concerns. The Commission is therefore of the view that only the need to ensure that the labour market functions properly, or a desire to prevent abuses, could potentially be invoked as possible overriding reasons relating to the public interest in the circumstances of the present case, dealing as it does with such a wide-ranging measure. The first of those concerns (the proper functioning of the labour market) appears to coincide with the more specific description of the objectives considered above, i.e. the desire to facilitate permanent and direct employment (and reduce the use of temporary agency workers) and the Commission respectfully refers the EFTA Court to the considerations already set out in that respect. The second of those concerns (the prevention of abuse) is capable, in principle, of constituting an overriding reason relating to the public interest,

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([19]) Judgment of 16 May 2017, *Netfonds*, E-8/16, para. 115.

provided of course that the rule under examination was actually adopted in pursuit of those aims.

56. Concerning the express prohibition on having recourse to temporary agency workers in the construction sector in the three geographically defined areas referred to in the request for an Advisory Opinion, it remains similarly unclear how the objectives listed in Article 4(1) of the Temporary Agency Work Directive, and to which Norway makes reference, are relevant to the measure in question. In this context, the Commission is of the view that the reference to the protection of workers may only be understood as an objective to the benefit of the workers in question i.e. as justification for a rule shielding temporary agency workers from perceived dangers/vulnerabilities in the construction sector. The other objectives call for the same analysis as in relation to the prohibition in relation to 'work of a temporary nature' (see above, in the previous paragraph).

III.2.4. As to whether the restriction is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it

57. With reference to the same case law cited at para 39 above, the Commission notes that a restriction on the freedom of establishment that is justified by an overriding reason in the public interest is permissible only if, in the second place, it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it. The Commission recalls, once again, that it is for the EEA State concerned to demonstrate that those conditions are met. More specifically, the reasons which may be invoked by an EEA State by way of justification for a restriction must be accompanied by an analysis of the appropriateness and proportionality of the measure and by specific evidence substantiating its arguments. ([20])

58. Again, the letter of formal notice and the reply thereto provide enough information to allow the Commission to make the following observations, it being understood that it is for the national court to ascertain the proportionality of the measures.

([20]) See, for example, judgment of 23 December 2015, *The Scotch Whisky Association*, C-333/14, EU:C:2015:845, para. 54.

59. First, in relation to the removal of the possibility to have recourse to temporary agency workers for 'work of a temporary nature', if the objective invoked by Norway (in particular of promoting employment contracts of indefinite duration) is found to be legitimate, it will be for the national court to assess whether Norway pursues that objective in a consistent and systematic manner. In carrying out that assessment, the national court should take into account 1) that there is no indication that agency workers do not have or cannot have such a contract, albeit with the agency rather than the user undertaking, and 2) whether, when the work is of a temporary nature, there is any inherent correlation between a prohibition on using agency workers and an increase in recruitment of permanent staff by the user undertaking. Neither the request for an Advisory Opinion, nor the exchanges between ESA and Norway point to the existence of any information or analysis in that respect. What is more, even if the rule in question were capable of achieving that objective, the Norwegian rules would have to be designed in a consistent manner: the Commission understands in this respect that, outside the context of temporary work agencies, fixed term contracts with the employers are possible, albeit under certain conditions.

60. Next, the national court will have to assess whether the measure goes beyond what is necessary. A key aspect of this assessment is whether the objective can be achieved in an equally effective manner through a rule that is less restrictive. The Commission observes, in this respect, that in relation to both the objective of promoting permanent direct employment and that of preventing abuses that may occur in the context of "hiring-in" temporary agency workers, successive "hiring" (through the agency) of the same worker by the same undertaking will lead to the creation of a direct contract between the worker in question and the user undertaking. In fact, the Commission understands that such a rule already exists. What is more, the measure in question appears to be based on the assumption that agency work is a means for user undertakings to avoid what would otherwise be the rules of the Norwegian labour market, i.e. a preference for permanent and direct employment by those undertakings. ([21]) However, as a matter of settled case law, it is not possible to base a restriction on the freedom of establishment on a

([21]) See, in particular, the reply to the letter of formal notice, at section 5.1.1 and 5.1.4.

presumption of unlawful behaviour. ([22]) The national court will be required to take these considerations into account when assessing the necessity of the measure and should, in that context, inquire as to the existence of any information or analysis confirming the existence of abuse. The Commission notes that the exchanges to date do not reveal any such evidence.

61. Second, in relation to the absolute ban on having recourse to temporary agency workers in the construction sector in defined geographical areas, if the objective invoked by Norway (in particular of promoting employment contracts of indefinite duration) is found to be legitimate, it will once again be for the national court to assess whether Norway pursues that objective in a consistent and systematic manner. In carrying out that assessment, the national court should take into account the fact that agency workers do appear to have such a contract, or at least are not excluded from having one, albeit with the agency rather than the user undertaking. What is more, if it finds that the rule in question is capable of achieving that objective, the national court will still have to check whether the Norwegian rules are designed in a consistent manner. As indicated above, the Commission understands that fixed term contracts with undertakings are possible, albeit under certain conditions. If the national court considers that the measure was adopted with a view to ensuring the protection of workers, it should take into account the fact that neither the request for an Advisory Opinion, nor the exchanges between ESA and Norway point to the existence of any information or analysis capable of establishing that the construction sector in the areas in question is particularly dangerous, such as to justify a measure protecting (by prohibiting) workers from entering that environment.

62. Next, as noted above, the national court will have to assess whether the measure goes beyond what is necessary. Again, a key aspect of this assessment is whether the objective can be achieved in an equally effective manner through a rule that is less restrictive. The Commission observes, in this respect, that concerning, as it does, an absolute ban, the measure appears to go beyond what is necessary. The

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([22]) See, to that effect, judgments of 19 December 2012, Commission v Belgium, C-577/10, EU:C:2012:814, para. 53; and of 11 March 2004, Hughes de Lasteyrie du Saillant, C-9/02, EU:C:2004:138, paras 50-52.

Commission is of the view that such a severe restriction would require particularly solid and convincing evidence that no other less restrictive measures were available.

III.2.5. Reformulation and proposed answer

63. On the basis of the foregoing considerations, the Commission suggests that the second and third questions should be reformulated, and answered as follows:

> At least the grounds of general interest relating, in particular to the protection of temporary agency workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and that abuses are prevented may be invoked by an EEA State in order to justify restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work, provided that the reference to those grounds is not general or abstract and that the national rule under examination was actually adopted in pursuit of those aims.
>
> In order to assess whether restrictions, within the meaning of Article 31 EEA, on the use of temporary agency work are suitable and necessary for the attainment of the stated objectives, it is for the referring court to ascertain whether the EEA State concerned has established that the national rule under examination is suitable for ensuring, in a consistent and systematic manner, the attainment of at least one the stated objectives for each sector and geographic area to which it applies and does not go beyond what is necessary to achieve that objective.

IV. CONCLUSION

64. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by *Oslo tingrett* should be answered as follows:

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

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

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

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