Registered at the EFTA Court under N° E-2/24-12 on 19th day of April 2024

ESA | EFTA Surveillance Authority

Brussels, 19 April 2024
Case No: 91740
Document No: 1437640

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
Ewa Gromnicka, Marte Brathovde and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-2/24

Bygg & Industri Norge AS and Others

v

Staten v/Arbeids- og inkluderingsdepartementet

in which Oslo District Court (Oslo tingrett) requests the EFTA Court to give 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 Norwegian rules limiting the possibility of hiring in workers from temporary work agencies.

Table of Contents

1. INTRODUCTION, THE FACTS OF THE CASE AND OTHER ONGOING PROCEEDINGS

1. On 20 December 2022, the Norwegian Parliament (*Stortinget*) adopted amendments to the Norwegian Working Environment Act ("**the WEA**"), abolishing the general possibility of hiring workers from temporary work agencies when the work is of a temporary nature.[1] On the same day, the Norwegian Ministry of Labour and Social Inclusion ("**the Ministry**")[2] amended the regulation on temporary agency work ("**the Temporary Agency Work Regulation**"), prohibiting all hiring from temporary work agencies for construction work on construction sites in Oslo, Viken and former Vestfold.[3]

2. There are to ESA's knowledge two separate court proceedings pending before domestic courts concerning these amendments to the WEA and the Temporary Agency Work Regulation. In addition, ESA has opened an own initiative case looking into the same matters.

3. In the first court case – which is the present case – nine temporary work agencies established in Norway ("**the Plaintiffs**") are seeking damages for their losses due to the limitations in the possibility of using workers from temporary work agencies. The case is currently pending before Oslo District Court ("**the Referring Court**"). On 26 January 2024, the Referring Court made the present request ("**the Request**") for an advisory opinion to the EFTA Court ("**the Court**").

4. The Plaintiffs all provide temporary workers in Norway to undertakings which are established in Norway, whilst one of the temporary work agencies has non-Norwegian owners established in the EEA. Some of the Plaintiffs' employees are nationals of other EEA States, and some of them are not resident in Norway.[4]

5. The Referring Court is uncertain as to whether the Plaintiffs have documented a cross-border element in relation to Article 36 EEA of the Agreement on the

[1] The amendments entered into force on 1 April 2023. See further Section 3 on national law below.
[2] In Norwegian: *Arbeids- og inkluderingsdepartementet.*
[3] Section 4 of the regulation, see further Section 3 below. The county of Viken was dissolved with effect from 1 January 2024. ESA notes that the regulation was amended on 16 April 2024 to reflect the dissolution of the county of Viken. Section 4 therefore now prohibits all hiring from temporary work agencies for construction work on construction sites in Oslo, Vestfold and the former Viken counties Akershus, Østfold and Buskerud.
[4] See the Request for an advisory opinion, ("The Request"), p. 2.

European Economic Area ("**EEA**"). If so, the Referring Court is uncertain as to which legitimate interests may justify a restriction on the freedom to provide services pursuant to Article 36 EEA, and what criteria will be relevant when assessing whether such a restriction is appropriate and necessary to safeguard these legitimate interests.

6. Given that the case referred to the Court, the other case pending in domestic courts as well as ESA's own initiative case all concern the same amendments by which the Norwegian Government introduced restrictions on the use of temporary agency workers, ESA finds it useful by way of introduction to briefly set out also what these other proceedings concern.

7. In the second domestic court case, 29 temporary work agencies are seeking a temporary injunction temporarily setting aside the amendments to the WEA and the Temporary Agency Work Regulation. This would allow the continued use of temporary agency workers in the same way as before the amendments until a final judgment has been rendered on the main claim of the case.

8. Before Oslo District Court, the plaintiffs in that case raised that the rules in question constitute an unjustified restriction on Article 36 EEA. Oslo District Court ruled that the restrictions are justifiable in view of the aims pursued by the State.[5]

9. On 15 December 2023, Borgarting Court of Appeal rejected the appeal of the temporary work agencies and ruled that they could not invoke Article 36 EEA and the freedom to provide services, as there was no cross-border element in the case. It noted that the employees of the temporary work agencies were protected by the freedom of movement of workers pursuant to Article 28 EEA, and not the freedom to provide services, but did not assess the substance of the case under that provision. The Court of Appeal moreover noted that it is clear that the fact that a company has a parent company in another EEA State in itself constitutes a cross-

[5] Oslo District Court Judgement in Case TOSL-2023-89874, available at https://lovdata.no/dokument/TRSIV/avgjorelse/tosl-2023-89874?q=TOSL-2023-89874.

border element that is relevant to the freedom of establishment enshrined in Article 31 EEA, but did not assess the substance of the case under that provision either.[6]

10. On 26 March this year, the Interlocutory Appeals Committee of the Norwegian Supreme Court annulled the ruling of Borgarting Court of Appeal on the basis of a procedural error and sent the case back to the Court of Appeal.[7] Whilst stating that it could not see any errors in the Court of Appeals' interpretation of Article 36 EEA, it noted that:

> "[…] *the court has an independent responsibility for the application of the law. It must, on its own initiative, examine and apply legal rules within the framework of the Disputes Act Section 11-2 first paragraph, cf. Section 11-3. In this case, this means that the Court of Appeal should have considered whether it is likely that the main claim could succeed in accordance with the provisions in the main part of the EEA Agreement Article 28 or Article 31, based on the basis for the claim – the actual circumstances – that the appellants have asserted. This applies regardless of whether the provisions have been invoked or not. It also applies regardless of whether the provisions – as the Court of Appeal puts it – 'will involve a different legal and factual approach'*."[8]

11. In addition to the domestic court proceedings, the Internal Market Affairs Directorate ("**the Directorate**") of the EFTA Surveillance Authority ("**ESA**") on 25 January 2023 opened an own initiative case in order to examine the amendments. This was done following a complaint received from an Estonian temporary work agency on 12 January 2023 and subsequent complaints from two Norwegian temporary work agencies and a Norwegian employers' organisation for small and medium undertakings. There are several references to the own initiative case in the Request, both by the Referring Court itself and the parties to the proceedings.[9]

12. ESA's own initiative case, which examines the issues raised in the complaints received, assesses in particular whether the removal of the possibility to use temporary agency workers when the work is of a temporary nature and the prohibition on the use of temporary agency workers in the construction sector in Oslo, Viken and former Vestfold are compatible with Directive 2008/104/EC on

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[6] Borgarting Court of Appeal Judgement in Case LB-2023-138986, available at https://lovdata.no/dokument/LBSIV/avgjorelse/lb-2023-138986?q=LB-2023-138986.

[7] In Norwegian: *Høyesteretts ankeutvalg*. See Case HR-2024-581-U, available at https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2024-581-u.

[8] *Ibidem*, paragraph 15.

[9] See, *inter alia*, on pp. 6 and 8.

temporary agency work ("**the Temporary Agency Work Directive**" or "**the Directive**")[10] and Article 36 EEA on the freedom to provide services.

13. On 10 February 2023, ESA sent a request for information to the Norwegian Government ("**the RQI**"), asking several questions pertaining to the amendments to the WEA and the Temporary Agency Work Regulation.[11] The Norwegian Government replied to the RQI ("**the Reply to the RQI**") on 5 May 2023.[12]

14. After having assessed the Norwegian Government's Reply to the RQI, ESA on 19 July 2023 issued a letter of formal notice to Norway concerning the restrictions on the use of temporary agency workers in Norway ("**the LFN**"), whereby it concluded that Norway, by maintaining in force national provisions such as Section 14-12(1), cf. Section 9(2), of the WEA and Section 11(1) of the Civil Service Act, which prevent the use of temporary agency workers when the work is of a temporary nature, and Section 4 of the Temporary Agency Work Regulation, which prohibits all use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold, is in breach of Article 4(1) of the Temporary Agency Work Directive and Article 36 EEA.[13]

15. The Norwegian Government replied to that letter on 19 October 2023 ("**the Reply to the LFN**"), maintaining that the contested measures are compatible with the requirements of EEA law.[14]

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[10] Incorporated into the EEA Agreement by Joint Committee Decision No 149/2012 of 13 July 2012 at point 32k of Annex XVIII (Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work) as adapted to the EEA Agreement by Protocol 1 thereto, with entry into force and compliance date of 1 May 2013.

[11] The RQI is available on ESA's website at https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Request%20for%20information%20-%20Own%20initiative%20case%20concerning%20restrictions%20on%20the%20use%20of%20temporary%20agency%20workers%20in%20Nor.pdf.

[12] The Reply to the RQI is publicly available on the Norwegian Government's website at https://www.regjeringen.no/contentassets/e910c0d912284297aee61d97d7d0daea/svaret-til-esa.pdf.

[13] The LFN is available on ESA's website at https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Letter%20of%20formal%20notice%20-%20Own%20initiative%20case%20concerning%20restrictions%20on%20the%20use%20of%20temporary%20agency%20workers%20in%20Nor.pdf.

[14] The Reply to the LFN is available on the Norwegian Government's website at https://www.regjeringen.no/contentassets/3140794a705d42d791059c22e72e1519/combinepdf.pdf

16. The dialogue between ESA and the Norwegian Government has continued also after the Norwegian Government 's the Reply to the LFN. The case was, *inter alia*, discussed at ESA's annual package meeting in Norway in October 2023.

2. EEA LAW

17. Article 28 EEA provides:

> "*1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
> *(a) to accept offers of employment actually made;*
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
> *4. The provisions of this Article shall not apply to employment in the public service.*
> *5. Annex V contains specific provisions on the free movement of workers.*"

18. Article 31 EEA provides:

> *"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
> *2. Annexes VIII to XI contain specific provisions on the right of establishment."*

19. Article 36 EEA provides:

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

20. The relevant recitals to the Temporary Agency Work Directive read:

> *"*[…]
> *(9)* […] *the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the*

December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.

(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

[…]

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.

(18) The improvement in the minimum protection for temporary agency workers should be accompanied by a review of any restrictions or prohibitions which may have been imposed on temporary agency work. These may be justified only on grounds of the general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented. […]

(22) This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[…]"

21. Article 1(1) on the scope of the Directive states:

> *"This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction."*

22. Article 2 on the aim of the Directive stipulates:

> *"The purpose of this 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."*

23. Article 3(1) of the Directive contains definitions and provides, in relevant parts:

> *"For the purposes of this Directive:*
>
> […]
>
> *(b) 'temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships*

with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

(c) temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

(d) 'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;

(e) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;

[…]*"*

24. Article 3(2) of the Directive reads:

> *"*[…]
> [EEA] *States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency."*

25. Article 4 of the Directive on review of restrictions and prohibitions provides:

> *"1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.*
>
> *2. By 5 December 2011,* [EEA] *States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.*
>
> *3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.*
>
> *4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.*
>
> *5. The* [EEA] *States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."*

26. Article 5(1) lays down the principle of equal treatment and provides 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.

27. Article 5(2)-(4) provides for the possibility for the EEA States to derogate from the principle of equal treatment in certain circumstances and subject to certain conditions.

28. Article 5(5) of the Directive provides:

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

29. Article 6(1) of the Directive provides that temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

30. Article 9 of the Directive on minimum requirements reads:

> *"1. This Directive is without prejudice to the* [EEA] *States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.*
>
> *2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This is without prejudice to the rights of [EEA] States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are respected."*

3. NATIONAL LAW

31. The use of temporary agency work in Norway is restricted through provisions in Chapter 14 of the WEA, titled "Appointment, etc."[15] and the Temporary Agency Work Regulation.[16]

32. Section 14-9 WEA, titled "Permanent and temporary appointment" provides, in relevant parts:

> *"(1) An employee shall be appointed permanently. For the purposes of this Act, a permanent appointment shall mean that the appointment is continuous and not time-limited, that the provisions of the Act concerning termination of employment shall apply and that the employee is ensured predictability of employment in the form of a clearly specified amount of paid working hours.*
>
> *(2) Temporary appointment may nevertheless be agreed upon*
> *a. when the work is of a temporary nature*
> *b. for work as a temporary replacement for another person or persons*
> *c. for work as a trainee*
> *d. with participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service*

[15] In Norwegian: *Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv*.
[16] Regulation 11 January 2013 on temporary agency work. In Norwegian: *Forskrift 11. januar 2013 nr. 33 om innleie fra bemanningsforetak.*

e. with athletes, trainers, referees and other leaders within organised sports […]*"*[17]

33. Section 14-12 WEA is titled "*Hiring workers from undertakings whose object is to hire out labour (temporary-work agencies)".* The provision stipulates, in relevant parts:

> *"(1) Hiring workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, second paragraph (b) to (e).*
>
> *(2) In undertakings bound by a collective pay agreement concluded with trade unions with the right of nomination pursuant to the Labour Disputes Act, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired may enter into a written agreement concerning the hiring of workers for limited periods notwithstanding the provisions laid down in the first paragraph. In response to an enquiry from the Norwegian Labour Inspection Authority, the undertaking and the temporary work agency shall provide documentation that the hirer undertaking is bound by a collective agreement Concluded with trade unions with the right of nomination and that an agreement has been entered into with the employees' elected representatives as referred to in the first sentence.*
>
> *(3) Any temporary worker who has been hired continuously according to this section for more than three years has the right to permanent employment with the lessor so that the rules on termination of employment apply. In the calculation, no deduction shall be made for the temporary worker's absence.*
>
> […]
>
> *(5) The Ministry may by regulation prohibit the hiring of certain groups of workers or in certain sectors when so indicated by important social considerations.*
>
> *(6) The Ministry may by regulation issue rules on the time-limited hiring of health personnel to ensure proper operation of the health and care service, and the time-limited hiring of special expertise, which deviate from the provision of the first paragraph."*

34. Section 14-12(1) was amended on 20 December 2022, with entry into force on 1 April 2023.[18] The amendment entails that the reference to item (a) of Section 14-9(2), which concerns the situation when the work is of a temporary nature, was removed.[19] The use of temporary agency workers is thus now only allowed in the situations covered by items (b)-(e) of Section 14-9(2) of the WEA.

35. This amendment entails that Section 14-12(1) WEA now only allows for the use of temporary agency workers in Norway in the following situations: (b) for work as a substitute for another person, (c) for work as a trainee, (d) with participants in labour

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[17] Official translation of the WEA into English, available at https://lovdata.no/dokument/NLE/lov/2005-06-17-62.

[18] In Norwegian: *Lov 20. desember 2022 nr. 99 om endringer i arbeidsmiljøloven m.m. (inn- og utleie fra bemanningsforetak)*.

[19] Before the amendment, Section 14-12(1) WEA read: "*Hiring workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, second paragraph (a) to (e)."*

market schemes under the auspices of or in cooperation with the Labour and Welfare Administration and (e) with athletes, sports coaches, referees and other leaders in organised sport. It follows that the typical situations of using temporary agency workers for seasonal work, for production peaks or for short-term projects where there is a need for qualified labour not normally available in the undertaking are no longer allowed.[20]

36. Coinciding with the amendments to Section 14-12(1) WEA, the Ministry on 20 December 2022 amended the Temporary Agency Work Regulation, also with entry into force on 1 April 2023.[21]

37. Section 3(1) of the Temporary Agency Work Regulation, which is adopted on the basis of Section 14-12(6) WEA, now reads:

> *"The use of workers from temporary work agencies is allowed despite the requirements in the Working Environment Act Section 14-12 in the case of:*
> *a. Hiring of health care personnel in order to ensure proper operations of health care services. […]*
> *b. Hiring of employees with special expertise that shall provide advisory- and consultancy services in clearly limited projects."*[22]

38. Moreover, Section 4 of the Temporary Agency Work Regulation, adopted on the basis of Section 14-12(5) WEA, introduced a prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold. Following amendments on 16 April 2024, it provides:

> "*Hiring in from temporary work agencies for construction work on construction sites in Oslo, Akershus, Østfold, Buskerud and Vestfold is not permitted.*
> *'Construction work' shall be understood to mean:*
> *1. erection of buildings;*
> *2. furnishing, decoration and installation work;*
> *3. assembly and dismantling of pre-fabricated components;*
> *4. demolition, dismantling, reconstruction and refurbishment,*
> *5.redevelopment and maintenance, other than routine or minor work;*
> *6. digging, blasting and other ground work relating to the construction site; and*
> *7. other work performed in connection with construction work.*
> *'Construction site' shall mean any workplace where temporary or variable construction work of a certain magnitude is performed*."[23]

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[20] Except for in the case of advisory and consulting services for a clearly defined project, see Section 3(1)(b) of the regulation on temporary agency work.
[21] In Norwegian: *Forskrift 20. desember 2022 nr. 2355 om endring i forskrift om innleie fra bemanningsforetak*.
[22] Translation by ESA.
[23] Translation by ESA. As noted in footnote 3 above, the regulation was amended on 16 April 2024 to reflect the dissolution of the county of Viken which took effect on 1 January 2024.

39. On 20 December 2022, the Ministry also adopted a regulation on transitional rules in relation to the amendments to the WEA.[24] In accordance with Section 4 of that regulation, the entry into force of the amendment to Section 14-12(1) WEA is suspended until further notice with regard to the use of temporary agency workers as substitutes in the agricultural sector. Furthermore, following an amendment to that regulation, Section 5 now also provides for the suspension of the entry into force of the amendment to Section 14-12(1) WEA with regard to the use of temporary agency workers for events.[25] To ESA's understanding, the entry into force of these amendments is still pending.[26]

40. For the sake of good order, ESA notes that similar changes limiting the possibility of using temporary agency workers has been extended to also apply for employment in the Civil Service. Section 11(1) of the Civil Service Act was amended to this effect on 20 December 2022, with entry into force on 1 April 2023.[27]

4. THE QUESTIONS REFERRED

41. The Referring Court has asked the EFTA Court the following questions:

1. Does the fact that a temporary work agency from an EEA State that hires out workers to undertakings in the same EEA State has employees who are nationals of other EEA States have any implications for the determination of whether there is a cross-border element under the rules on the freedom to provide services, ref. Article 36 of the EEA Agreement?

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

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

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[24] Regulation 20 December 2022 No 2301 on transitional rules in relation to the amendments to the Working Environment Act etc. In Norwegian: *Forskrift 20. desember 2022 nr. 2301 om overgangsregler til lov om endringer i arbeidsmiljøloven m.m. (inn- og utleie fra bemanningsforetak)*.
[25] Regulation 3 March 2023 No 290 on amendments to Regulation 20 December 2022 No 2301 concerning transitional rules in relation to the amendments to the Working Environment Act etc. In Norwegian: *Forskrift 3. mars 2023 nr. 290 om endring i forskrift 20. desember 2022 nr. 2301 om overgangsregler til lov om endringer i arbeidsmiljøloven m.m. (inn- og utleie fra bemanningsforetak)*.
[26] See also the Request, p. 4.
[27] Act 16 June 2017 No 67 on civil service, etc. In Norwegian: *Lov 16. juni 2017 nr. 67 om statens ansatte mv (statsansatteloven).* This also forms part of ESA's LFN referred to at paragraph 14 above.

5. LEGAL ANALYSIS

5.1 Introduction

42. The questions raised by the Referring Court in the present case focus on Article 36 EEA. It is clear that the scope of the case, as set out also in the Request, goes beyond the wording of the questions raised by the Referring Court. As noted in Section 1 of these written observations, there is at least one other case pending before Norwegian courts concerning the restrictions introduced, and the matter is being considered in infringement proceedings initiated by ESA against Norway.

43. The Surveillance and Court Agreement ("**the SCA**") foresees two possible ways in which questions concerning the correct interpretation of EEA law can arise before the Court – through the advisory opinion procedure set out in Article 34 SCA, and the direct action procedure pursuant to Article 31 SCA. The amendments to the WEA and the Temporary Agency Work Regulation abolishing the general possibility of hiring workers from temporary work agencies when the work is of a temporary nature and prohibiting all hiring from temporary work agencies for construction work on construction sites in Oslo, Viken and former Vestfold, are currently being considered under both procedures.

44. Together, Articles 31 and 34 SCA form complementary mechanisms through which compliance with EEA law in the EEA EFTA States can be obtained. The architecture of the EEA Agreement provides for individuals, businesses, the EEA EFTA States, ESA and the Court to facilitate the achievement of the objectives of the EEA Agreement.[28]

45. On the one hand, Article 31 SCA empowers ESA to monitor the application of the provisions of the EEA Agreement and the SCA. It moreover empowers ESA to conduct infringement proceedings if the States fail to fulfil their obligations under

[28] As recognised in Recital 8 to the EEA Agreement, individuals play an important role in the EEA through the exercise of the rights conferred on them by the Agreement and through the judicial defence of these rights. At the same, time Recital 15 to the EEA Agreement and Recital 3 to the SCA recall that the objective of the parties, in full deference to the independence of the courts, is to arrive at, and maintain, a uniform interpretation and application of the EEA Agreement and secondary legislation to arrive at an equal treatment of individuals, economic operators are regards the four freedoms and the conditions of competition.

the EEA Agreement or the SCA, and, in case of non-compliance with a reasoned opinion, to bring the matter to the EFTA Court.

46. On the other hand, Article 34 SCA empowers the Court to give advisory opinions on the interpretation of the EEA Agreement. It does so by establishing a cooperation between the Court and national courts and tribunals, whereby the Court provides assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law.[29]

47. It is settled case law that the procedure provided for by Article 34 SCA is a "*specially established means of judicial co-operation between the Court and national courts, with the aim of providing the national courts with the necessary elements of EEA law to decide the cases before them*".[30] National courts of the EEA States are an integral part of the system of judicial protection established by the EEA Agreement, and when applying the EEA law they act as European Courts.[31]

48. As the Court has stated, in the case of advisory opinions, as opposed to direct actions before the Court, the sole task of this Court is to interpret provisions of EEA law:

> *"It is not the role of this Court in such cases to interpret provisions of national law or to ascertain to what extent provisions of EEA law have been transposed into national law. Nor is this Court in any way bound by findings or decisions by national courts of law."*[32]

49. It is for the national court to determine, in light of the particular circumstances of the case, both the need for an advisory opinion in order to enable it to deliver judgment, and the relevance of the questions that it submits. Consequently, where the questions referred concern the interpretation of the EEA Agreement, the Court is in principle bound to give a ruling as questions concerning EEA law enjoy presumption of relevance.

50. In the present situation, where the case pending before the Court concerns issues which are also being addressed in other domestic court proceedings, and in

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[29] See, e.g., Case E-8/19 *Scanteam*, paragraph 41.
[30] E-10/04 *Piazza*, paragraph 21.
[31] Compare with CJEU Opinion 1/09 on *the Unified Patent Legislation System*, EU:C:2011:123, paragraphs 66 and 85.
[32] E-2/95 *Eidesund*, paragraph 14.

infringement proceedings initiated by ESA, the case should not be viewed in isolation. The proceedings are complementary, and the implications of the amendments to the WEA and the Temporary Agency Work Regulation must be considered as a whole. As the common denominator in all these proceedings is the underlying question of whether it is permissible, under EEA law, to restrict the use of temporary agency workers in the manner that the Norwegian Government has done, ESA submits that the Court should take this into account when replying to the questions from the Referring Court. This will enable the Court to give as useful answers as possible for the purposes of the present proceedings, as well as possibly for all the relevant ongoing proceedings concerning the same national rules and their compatibility with EEA law.

51. For the sake of completeness, ESA notes that its views set out in the present written observations are in line with and coincide with ESA's position set out in the LFN concerning the same national rules and, to a large extent, the same questions.[33] ESA notes that the Norwegian Government in the same vein makes reference to its Reply to the LFN in its submissions before the Referring Court.[34]

52. ESA recalls that, in accordance with settled case law, the Court is not precluded from providing the Referring Court with all the elements of interpretation of EEA law which may be of assistance in adjudicating in the case pending before it, whether or not the Referring Court has referred to them in the wording of its questions.[35]

53. Therefore, under the circumstances of the present case, and in order to realise the purpose of cooperation under Article 34 SCA, ESA for the reasons set out above submits that the Court should examine the questions asked by the Referring Court also vis-à-vis the Temporary Work Agency Directive and its aims and objectives, specifically its Article 4. ESA furthermore submits that the questions raised by the Referring Court must be considered in the context of Article 28 EEA on the freedom of movement for workers and 31 EEA on the freedom of establishment, in particular

[33] See further paragraph 14 above.
[34] The Request, p. 9–10.
[35] See, e.g., Cases E-4/19 *Campbell*, paragraph 45 and E-16/20 *Q and Others*, paragraph 35.

if the Court finds that there is no cross-border element in relation to the freedom to provide services.[36]

54. ESA's submissions in the present written observations can be summarised as follows:

55. ESA first submits that the Temporary Agency Work Directive is applicable in the present case and that the national provisions at issue must be assessed also under Article 4(1) of that Directive, which does not require a cross-border element, see further Section 5.2 below.

56. ESA second, with regard to the first question from the Referring Court, submits that a cross-border element is present in relation to Article 36 EEA in a situation, such as in the present case, where a temporary work agency from an EEA State that hires labour to undertakings in the same EEA State has employees who are nationals of other EEA States. ESA moreover submits that a cross-border element in any event exists in relation to both Articles 28 and 31 EEA, see further Section 5.3 below.

57. ESA third submits, with regard to the second question from the Referring Court, that Article 4(1) of the Temporary Agency Work Directive and/or Articles 36, 31 and 28 of the EEA Agreement should be interpreted as precluding measures, such as the ones at issue in the present case, which prevent the use of temporary agency workers when the work is of a temporary nature and prohibit the use of all temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold, with the aim of reducing the scope and the role of temporary agency work overall, in order to increase permanent and direct employment, because they do not pursue a legitimate aim, see further Section 5.4 below.

58. ESA fourth submits, with regard to the third question from the Referring Court, that the measures at issue in the present case are not proportionate because the Norwegian Government has failed to demonstrate that the measures are suitable to achieving the objective pursued and that they genuinely reflect a concern to attain that aim in a consistent and systematic manner, and moreover, that the Norwegian

[36] ESA notes that, in accordance with the decision of the Interlocutory Appeals Committee of the Supreme Court, also the Referring Court is able to rely on Articles 28 and 31 EEA, even though they have not been raised by the parties to the case.

Government has failed to demonstrate that the measures are necessary and proportionate to attain the aim pursued, and that aims in any event could have been replaced by equally useful but less restrictive measures, see further Section 5.5 below.

5.2 The applicability of the Temporary Agency Work Directive

59. ESA notes that the Temporary Agency Work Directive has not been invoked by the parties to the present proceedings before the national court. ESA assumes that this is due to the CJEU's ruling in *AKT*, in which, according to the Request, the CJEU held that Article 4(1) of the Temporary Agency Work Directive "*may not be relied on by private parties before national courts.*"[37] However, in ESA's view, a distinction must be made between *AKT* and the present case. Whilst *AKT* concerned solely private parties,[38] the present case also involves a State.

60. The statements of the CJEU in *AKT* must be understood in the context of the specific facts of that case. That case concerned a claim by a private party that the national court should disregard a provision in a collective agreement which formed the basis of a claim for penalties, on the basis of that provision being in violation of Article 4 of the Temporary Agency Work Directive.[39] *AKT* cannot therefore be understood as establishing a general principle concerning the applicability of Article 4 of the Directive in a case such as the present, between private parties and a State.

61. Notably, the CJEU in *AKT also* held that Article 4(1) of the Directive restricts the scope of the legislative framework open to EEA States in relation to restrictions on the use of temporary agency work.[40] It furthermore imposes upon the competent authorities of the EEA States an obligation to review their national legal framework, in order to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified on grounds of general interest.[41]

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[37] See the Request, p. 5.
[38] Case C-533/13 *AKT*, EU:C:2015:173. The *AKT* case was a dispute between a trade union, an employers' association and a user undertaking, see paragraph 2 of that judgement.
[39] Case C-533/13 *AKT*, *inter alia* at paragraph 15.
[40] *Ibidem*, paragraph 31.
[41] *Ibidem*, paragraph 28.

62. This is not a one-off obligation. Consequently, the Norwegian Government *remains* under an obligation to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified. Such national legislation prohibiting or restricting the use of temporary work agencies needs to comply with Article 4(1).[42] That obligation cannot be disregarded in a case concerning *exactly* the extent to which, and if so, how, the State in question can restrict the use of temporary work agencies. ESA therefore submits that Article 4(1) of the Temporary Agency Work Directive, which is the main provision dealing with restrictions on the use of temporary agency workers, is applicable in the present case, and must be taken into account when assessing whether the Norwegian measures in question are justifiable, see further Section 5.4 below.

63. This is of particular importance should the Court find that there is no cross-border element in the case, as Article 4(1) of the Temporary Agency Work Directive does not presuppose the existence of a cross-border element.[43] Article 4(1) is applicable *both* to restrictions on the use of temporary agency workers in cross-border situations, where workers are posted from a temporary-work agency established in another EEA State to provide services temporarily in Norway, and when no cross-border element is present. Should the Court rule that there is no cross-border element present in the case, it can therefore still answer questions 2 and 3 from the Referring Court in the present case on the basis of the Temporary Agency Work Directive.

5.3 The existence of a cross-border element

64. By its first question, the Referring Court asks whether the fact that a temporary work agency from an EEA State that hires out workers to undertakings in the same EEA State has employees who are nationals of other EEA States have any implications for the determination of whether there is a cross-border element under the rules on the freedom to provide services in accordance with Article 36 EEA.

65. To ESA's understanding, the question must be understood in the context of the Referring Court's uncertainty as to whether "*the plaintiffs have documented a*

[42] See also Article 3 EEA.
[43] This is clear from the wording of the Directive, see, *inter alia*, Article 1 concerning its scope, as well as the definitions provided for in Article 3.

relevant cross-border element in relation to the freedom to provide services."[44] With the aim of providing the Referring Court with the necessary elements of EEA law to decide the case before it, as set out in detail in Section 5.1 above, ESA therefore understands the question to be *what factors are relevant in the assessment of whether a cross-border element is present in the present case*. ESA will at the same time address the existence of a cross-border element with regard to Articles 28 and 31 EEA, and stress that Article 4(1) of the Temporary Agency Work Directive in any event applies.

66. At the outset, ESA notes that the restrictions on the use of temporary work agencies in the WEA and the Temporary Agency Work Regulation can affect the fundamental freedoms laid down in the EEA Agreement in various ways, depending on the concrete situation.

67. The CJEU and this Court have in this respect held, on numerous occasions, that it is enough that the rules in question are "*liable to hinder or render less attractive the exercise by European Union nationals of the fundamental freedoms*",[45] and that "*an interpretation of EEA law, such as that relating to the fundamental freedoms, may still be useful to the extent that the national legislation at issue is capable of producing effects which are not confined to one EEA State*".[46] The CJEU has even held that the *potential existence* of a cross-border element is sufficient to consider a restriction as covered by the fundamental freedoms.[47]

68. It is apparent through the different court cases pending in national courts, as well as ESA's own initiative case, that the Norwegian restrictions on the use of temporary work agencies are both liable to prevent or dissuade the use of the fundamental freedoms and are capable of producing effects not confined to Norway. In other words, the potential effect on the free movement is enough to establish cross-border element.[48] ESA notes that to establish a cross-border

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[44] The Request, p. 2.
[45] Case C-230/18 *PI*, EU:C:2019:383, paragraph 59, with further references.
[46] Case E-9/14 *Kaufmann*, paragraphs 31. See also Joined Cases C-159/12 to C-161/12 *Venturini*, EU:C:2013:791, paragraph 26.
[47] See, e.g., Case C-384/93 *Alpine Investments*, EU:C:1995:126, paragraph 22.
[48] In any case Prop. 131 L, p. 11 notes that the increase in the use of temporary agency workers was in particular due to the eastern enlargement of the EU in 2004, and that the growth was mainly driven by migrant workers from Eastern Europe. Also, one of the complainants in ESA's own initiative case is in fact an EEA temporary work agency posting workers to Norway.

element under Article 36 EEA it is sufficient that the restriction in question "*impedes market access for both providers and recipients of the services at stake.*"[49]

69. Furthermore, and contrary to the views of the Norwegian Government expressed in the Request, ESA submits that the existence of a cross-border element pursuant to Article 36 EEA can be established by the fact that some of the employees of the temporary work agencies are nationals of other EEA States, and that some of them are also resident in other EEA States.

70. It is moreover clear that a cross-border element exists with regard to Article 28 EEA and the freedom of movement of workers. As stated in the Request, some of the employees of the temporary work agencies in the present case are nationals of other EEA States, and some of them are also resident in other EEA States.[50] These workers can rely on Article 28 EEA. In addition to *the workers* being able to rely on Article 28 EEA, it is settled case law that also the *temporary work agencies*, as the employer, themselves can invoke Article 28 EEA.[51]

71. With regard to Article 31 EEA and the freedom of establishment, it is noted in the Request that one of the Plaintiffs has a parent company from another EEA State.[52] The CJEU has in this respect held that foreign ownership (an EEA parent company) is sufficient to establish a cross-border link in relation to the freedom of establishment, and a cross-border element is thus clearly present in relation to Article 31 EEA.[53] Since the national rules are liable to also hinder or make less attractive the exercise of those fundamental freedoms, that it is enough to establish the existence of a cross-border element.

72. For the sake of completeness, ESA notes that the Court can answer the second and third questions from the Referring Court even if it should find that there is no

[49] Case E-4/04 *Pedicel*, paragraph 49.
[50] The Request, p. 2.
[51] C-379/11 *Caves Krier Frères*, EU:C:2012:798, paragraph 28. See also Case C-350/96 *Clean Car Autoservice*, EU:C:1998:205, paragraphs 19 and 20 and Case C-208/05 *ITC*, EU:C:2007:16, paragraphs 22 and 23.
[52] The Request, p. 9.
[53] C-186/12 *Impacto Azul*, EU:C:2013:412, paragraph 20.

cross-border element in this specific case (*quod non*) and Article 4 of the Temporary Agency Work Directive could not be relied upon (*quod non*).[54]

5.4 The measures in question do not pursue a legitimate aim

73. By its second question, the Referring Court asks what can constitute legitimate objectives for restrictions on the freedom to provide services under Article 36 EEA in the form of prohibitions and limitations on the hiring-in of workers. For the reasons set out in Section 5.2 and 5.3 above, ESA will at the same time address the restrictions with regard to Article 4(1) of the Temporary Agency Directive and Articles 28 and 31 EEA.

74. ESA at the outset acknowledges that it is for Norway to decide on its labour market model, with widespread collective agreements, high rates of organisation and permanent employment as the main form of employment. However, when doing so, Norway must comply with EEA law, including the Temporary Agency Work Directive and the fundamental freedoms set out in the main part of the EEA Agreement.

75. Therefore, even though the States enjoy a wide margin of discretion in the field of employment, that discretion "*may not have the effect of undermining the rights granted to individuals by the Treaty provisions in which their fundamental freedoms is enshrined*".[55] Thus, a wide margin of appreciation, or the fact that the CJEU in *Webb* noted that the provision of manpower is a particularly sensitive matter from the occupational and social point of view[56] is not the same as a *carte blanche* for the State in question to impose the restrictions on the use of temporary agency workers aimed at reducing the role of temporary agency work overall on order to increase permanent and direct employment. The State must still be able to prove that the restriction in question is justifiable and proportionate.[57]

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[54] See Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómes*, EU:C:2010:300, paragraphs 39 and 40 and the case law cited and Joined Cases C-159/12 to 161/12 *Venturini*, EU:C:2013:791, paragraphs 25-28.

[55] See Case C-208/05 *ITC*, paragraph 40. See to the same effect, e.g., Case C-379/11 *Caves Krier Frères*, paragraph 52.

[56] Case C-279/80 *Webb*, EU:C:1981:314, paragraph 18, as referred to in the Reply to the LFN, p. 1-3.

[57] In other parts of the Reply to the LFN Norway seems to acknowledge this. It is *inter alia* stated on p. 2 that "*the EEA states are thus free to decide their national labour legislation, as long as it lies within the framework of primary law and complies with the minimum requirements laid down in secondary law.*"

76. To ESA's understanding, the background for the second question is that the Referring Court "*takes the view that there is some doubt as to which legitimate interests may justify such restrictions*".[58]

77. As regards, first, the question of whether the measures in question constitute *restrictions* under EEA law it is ESA's understanding that the parties to the present case agree that the rules at issue constitute restrictions on the freedom to provide services under Article 36 EEA.[59] ESA submits that the rules also constitute restrictions on the use of temporary agency workers under Article 4 of the Temporary Agency Work Directive, which was also expressed by the Norwegian Government in the preparatory works to the relevant amendments to the WEA.[60] ESA moreover submits that the rules constitute restrictions also on Articles 28 and 31 EEA, as they are liable to also hinder or make less attractive the exercise of those fundamental freedoms.[61] As regards Article 28 EEA, the measures also amount to indirect discrimination and have affected foreign workers disproportionately, many of whom have lost their jobs and had to leave Norway.[62]

78. With regard to the freedom to provide services laid down in Article 36 EEA, restrictions on such freedom may be justified on the grounds set out in Article 33 EEA, or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.[63] None of the grounds set out in Article 33 EEA are relevant in the present case, and the question is therefore whether any

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[58] The Request, p. 2.
[59] See, *inter alia*, the Request, p. 9.
[60] See Prop. 131 L (2021-2022), p. 61-63.
[61] See, e.g., Case E-14/15 *Holship*, paragraph 115.
[62] See the statements of the CJEU in Case C-132/22 *MIUR*, EU:C:2023:489, paragraph 29 where it held that "*a provision of national law, even if it applies to all workers regardless of nationality, must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued*". See also, as regards the effects of the Norwegian legislation, Prop. 131 L (2021-2022), p. 11, which states that in 2017 around 55% of temporary agency workers in Norway had immigration background, mainly from Eastern Europe, and that in 2021 non-resident temporary agency workers constituted around a third of those employed in temporary-work agencies. See also Norway's Reply to the RQI, p. 47 which stipulates that the growth in the use of temporary agency workers in construction was mainly driven by migrant workers from Eastern Europe.
[63] See Case E-8/17 *Kristoffersen*, paragraph 114.

overriding reason in the public interest can justify the measures. The same applies with respect to Article 28 and 31 EEA.

79. Moreover, as mentioned in Section 5.2 above, Article 4(1) of the Directive is a provision that deals specifically with prohibitions or restrictions on the use of temporary agency work and provides that they "*shall be justified only on the grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.*"

80. Article 4(1) of the Directive must be understood as confining the EEA States' scope for introducing prohibitions or restrictions on the use of temporary agency workers. The competent authorities of the EEA States must ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified in line with Article 4(1). They are also obliged to remove unjustified restrictions or adapt them in order to render them compliant with that provision.[64]

81. ESA by way of preliminary remark submits that Article 4(1) of the Temporary Agency Work Directive must be seen as a special provision concerning specifically prohibitions or restrictions on the use of temporary agency work. As the EEA States in accordance with Article 4(1) remain under an obligation to ensure that any potential prohibitions on the use of temporary agency work are justified, any assessment of whether a restriction pursues a legitimate aim under Articles 36, 28 and 31 EEA must also take into account the requirements under Article 4(1) of the Directive and its aims. When assessing whether a prohibition and/or restriction on the use of temporary agency work is justifiable, regard must be had to Article 4(1) of the Directive, and the purpose and overall objective of that Directive.[65] As regards the justification of the measures in question, it is settled case law that it is for the State responsible for a measure restricting a fundamental freedom of the EEA Agreement to prove that the measure can be justified.[66]

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[64] Case C-533/13 *AKT*, paragraphs 30-32.

[65] It is settled case law that meaning and scope of terms for which EEA law provides no definition must be determined by, *inter alia*, taking into account the context in which they occur and the purposes of the rules of which they are part, see, e.g., Case E-2/21 *Norep AS v Haugen Gruppen AS*, paragraph 31.

[66] See, e.g., Case E-1/06 *ESA v Norway*, paragraph 31 with further references.

82. The burden of proof is on the Norwegian Government to establish the true purpose of the contested national legislation. When assessing the intent of a national legislature under EEA law, "*any materials from which the legislative intent can be deduced must be taken into account when assessing that intent.*"[67] Therefore, only aims which can be inferred from the legislative stage as evidence of the legislative intent can be relied upon, and not aims that are only invoked at a later stage.[68] It is moreover not sufficient for the national measures to resort to a legitimate aim in the abstract. It must rather be assessed whether the measures at issue actually pursue the invoked aim,[69] and whether it is accompanied by precise evidence enabling its arguments to be substantiated.[70]

83. It is evident from the Norwegian Government's bill proposing the legislative amendments that the overriding aim of the restrictions in question is to reduce the use of temporary agency workers and thereby increase permanent and direct employment.[71] The legislative bill moreover confirms that the proposals were a follow up to the Government's political declaration *Hurdalsplattformen*, where it was held that the scope and role of the temporary agency work industry must be limited and that the proposals are intended to reduce the use of temporary agency workers as a form of work in the Norwegian labour market.[72] This also evident from the Norwegian Government's press release of 20 December 2022 in relation to the

[67] Case E-1/06 *ESA v Norway*, paragraph 33.
[68] ESA is unsure of whether the Norwegian Government seeks to contest this in the Reply to the LFN, p. 14, where it is stated that "*the CJEU never has set out a requirement that the State's justification for the restriction must be* ***published before the measure is adopted***" (emphasis by ESA). The point is not when the justification was *published*, but that it must have been *invoked* before the adoption as the objective of the restriction.
[69] See, e.g., Case E-8/16 *Netfonds Holdings*, paragraph 115 and Case E-14/15 *Holship*, paragraph 125.
[70] See, e.g., Case E-2/11 *STX*, paragraph 99 and Case E-5/23 *Criminal Proceedings against LDL*, paragraph 85.
[71] See Prop. 131 L (2021-2022), p. 63, where it is stated that the aim of the proposal to remove the option of using temporary agency workers for work of a temporary nature is to reduce the use of temporary agency workers which displaces permanent employment, and thereby to ensure that permanent and direct employment is the main form of employment on the Norwegian labour market. See also Prop. 131 L (2021-2022), p. 62, where it is stated that the aim of the proposal to prohibit all hiring from temporary work agencies for construction work on construction sites in Oslo, Viken and former Vestfold, is to encourage the use of permanent employment, thereby also facilitating [trade] Union memberships and the use of collective agreements in the construction industry. This seems to also be the position of the Norwegian Government in the present proceedings, see the Request, p. 9-10.
[72] Prop. 131 L (2021-2022) p. 5.

adoption of the restrictions, which states that the Government's aim is to reduce the use of temporary agency work.[73]

84. ESA moreover refers to the Norwegian Government 's Reply to the RQI which states, *inter alia*, that "[t]he ***principal objective*** *of the new regulations is to facilitate permanent employment in a two-party relationship between an employee and an employer to be used to the greatest extent possible.* […] *Thus, use of agency work must not be too widespread*."[74] The letter goes on to state that "[t]*hus, a desired consequence of the proposals will be that temporary agency work should be used to a lesser extent*."[75] As regards, in particular, the justification for removing the option to use temporary agency workers when the work is of a temporary nature, the reply to the RQI states that the overall purpose is to prevent the use of temporary agency work at the expense of permanent and direct employment in user undertakings.[76] In that context, the letter furthermore provides that:

> "[…] *enforcement measures are not enough to reduce the use of temporary agency work that displaces permanent and direct employment, and to limit the negative effects temporary agency hiring has on contract workers, the hiring agency's own employees and the labour market. The Ministry points out that there is a need for measures to limit the right to hire as such, and not only crack down on illegal hiring."*[77]

85. In the Reply to the LFN, Norway in addition to the aims set out in the paragraph above refers to other alternative objectives as justifications for the adopted measures, such as the protection of all workers in a broad sense,[78] protection of health and safety at work[79] and the prevention of abuse of the existing rules.[80]

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[73] See https://www.regjeringen.no/no/aktuelt/skjerpa-reglar-for-innleige/id2952383/.
[74] See the Reply to the RQI, p. 4. Emphasis by ESA.
[75] *Ibidem*, p. 18.
[76] *Ibidem*, p. 41.
[77] *Ibidem*, p. 44.
[78] Reply to the LFN, p. 15.
[79] *Ibidem*, p. 15-16 and the quoted Prop. 131 L (2021-2022) Chapter 3.6, p. 15. With regard to the prohibition on the use of temporary agency work in the construction industry it is pointed out that *"the percentage on the use of temporary agency workers is particularly high [and] it is thus intended to ensure that the requirements and safety at work are safeguarded particularly in this area* […]*", ibidem* p. 16.
[80] Reply to the LFN, p. 15-16 and the quoted Prop. 131 L (2021-2022), Chapter 6.4.4, p. 30 which states: *"The Ministry points out that the possibility to hire workers when the work is of a temporary*

86. With regard to such alternative objectives, ESA additionally notes that the relevant parts of the preparatory works pointed at by the Norwegian Government in the Reply to the LFN in fact do not concern the aims and objectives of the adopted legislation, but rather list general concerns that "*foreign workers have an increased risk of being exposed to injuries and accidents and it is assumed that short employment relationships and atypical forms of attachment contribute to increasing the risks".* It goes on to explain that hired workers do not receive the same safety training as those permanently employed directly in the company and that *"*[…] *they are more exposed to unfavourable working environment factors and they are monitored less closely in the area of the working environment"*.[81]

87. Those alternative objectives are listed without however assessing anywhere in the preparatory works whether the measures at issue actually pursue these subsidiary aims. With regard to the removal of the option to use temporary agency workers for work of a temporary nature, the legislative proposal merely makes a general reference to the general interests protected by Article 4(1) of the Directive.[82] As regards the prohibition in the construction sector, the reference in the legislative proposal to the protection of workers and a well-functioning labour market, as well as health and safety at work as possible justification grounds is made, without, however, explaining how those alternative objectives were relevant for the adopted measure.[83]

88. As for the prevention of abuse, the Norwegian Government in the preparatory works and the Reply to the LFN noted that *"the possibility to hire workers when the work is of a temporary nature depends on a broad discretionary assessment. The hiring access that the provision allows for can be misunderstood and misused and can generally make it possible to base a permanent staffing need on hiring."*[84] ESA in that context notes, as held by the Advocate General in *AKT*, that the *"*[…] *adoption of measures to prevent abuses in the conclusion of temporary employment*

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nature depends on a broad discretionary assessment. The hiring access that the provision allows for can be misunderstood and misused and can generally make it possible to base a permanent staffing need on hiring."

[81] See Prop. 131 L (2021-2022), Chapter 3.6 and the quoted comments from the Norwegian Labor Inspection Authority. See also the Reply to the RQI, p. 32.

[82] See Prop. 131 L (2021-2022), p. 64.

[83] *Ibidem*, p. 62-63.

[84] *Ibidem*, paragraph 6.4.4, page 30, as referred to in the Reply to the LFN, p. 16.

contracts cannot justify an almost general exclusion of that form of work, such as a prohibition on temporary work across an entire economic sector or the fixing of quotas for temporary contracts, in the absence of any other objective justification. Indeed, a measure that is intended to prevent abuses in the exercise of a right cannot be regarded as the equivalent of a renegotiation of the right in question."[85]

89. In the light of the assessment of the circumstances in which restrictive measures in question were adopted and implemented and on the basis of the evidence provided by the Norwegian Government ESA submit, ESA submits that the clear aim of the measures is indeed to reduce the use of temporary agency workers overall, also in temporary situations with the hope that this will lead to more permanent and direct employment rather than the alternative objectives referred to above.

90. With the objective of providing the Referring Court with the necessary elements of EEA law to decide the case before it, as set out in detail in Section 5.1 above, and on the basis of the identified aim/objective of the Norwegian Government, ESA's understanding of the second question is that it seeks to ascertain *whether reducing the use of temporary agency workers overall, also in temporary situations, with the desired result of leading to more permanent and direct employment, is a legitimate aim that can justify restrictions on Article 4(1) of the Temporary Agency Work Directive and Articles 36, 28 and 31 EEA*.

91. Whilst, again, acknowledging that the Norwegian Government may decide the level of protection afforded to workers and how the labour market should function, ESA submits that it must still do so within the confines of EEA law. ESA in this respect considers, as will be shown in the below, that increasing permanent and direct employment by reducing the use of temporary agency workers overall, also in temporary situations cannot be considered a legitimate aim under the Temporary Agency Work Directive, because it goes against the very purpose of that Directive.

92. ESA moreover fails to see that an aim that goes against the aim and nature of the Temporary Agency Work Directive could be considered as a legitimate aim or an overriding reason in the public interest capable of justifying a restriction on the

[85] The Opinion of Advocate General Szpunar in Case C-533/13 *AKT*, EU:C:2014:2392, paragraph 122.

freedom to provide services under Article 36 EEA, or any other fundamental freedom.[86] ESA in this respect notes that Recital 22 to the Temporary Agency Work Directive provides that the Directive must be implemented and applied in a manner which is consistent with the freedom to provide services.

93. The aim of the Temporary Agency Work Directive is, on the one hand, to improve the protection of temporary agency workers, in particular by establishing the principle of equal treatment, and, on the other hand, to support the positive role that agency work can play by recognising temporary-work agencies as employers and providing sufficient flexibility in the labour market.[87]

94. It is clear from the Directive itself that temporary agency work is considered to meet not only undertakings' needs for flexibility, but also the need for employees to reconcile their working and private lives, thereby contributing to job creation and to participation and integration in the labour market.[88] Moreover, the Directive does recognise that there are differences between the EEA States when it comes to use of temporary agency workers and the legal situation, status and working conditions of temporary agency worker.[89]

95. The Directive recognises that permanent employment is the general form of employment. However, that statement in the Directive must be read in its context: Recital 15 of the Directive provides that, since permanent employment contracts are the general form of employment relationship and given the special protection such a contract offers, workers who have a permanent contract with their temporary-work agency should be able to be exempted from the rules applicable in the user undertaking.[90] Therefore, the fact that permanent employment is the main form of employment *in temporary work agencies*, and not necessarily *in general*, in

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[86] That would go against the objective of the Directive, and the effectiveness of the Directive could not be achieved, compare Case E-17/15 *Ferskar kjötvörur ehf. v the Icelandic State*, paragraph 66.
[87] Article 2 of the Temporary Agency Work Directive. See also Recitals 9 and 11 of the Directive and the Commission's report on the application of Directive 2008/104/EC on temporary agency work (COM(2014) 176 final), p. 19.
[88] Recital 11 of the Temporary Agency Work Directive.
[89] See Recital 10 of the Temporary Agency Work Directive.
[90] In line with that, Article 5(2) allows for a derogation from the principle of equal treatment where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. Furthermore, Article 6(1) of the Directive provides that temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

no way reduces the importance of recognising temporary agency work as an alternative form of work, which can coexist with permanent employment. If anything, it emphasises that the purpose of the Directive is to protect those temporarily employed with the work agencies, as compared to those with a permanent contract at a temporary agency.

96. Importantly, the Directive aims to strike a fair balance between flexibility for employers and security for workers. By the very adoption of the Temporary Agency Workers Directive, it follows that temporary agency work is considered to have positive effect on the labour market as a whole.[91] In line with that, Article 9(2) of the Directive stipulates that the implementation of the Directive *shall under no circumstances* constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive.

97. The aim invoked by the Norwegian Government therefore in reality goes against the two-fold aim of the Directive, i.e. the protection of temporary agency workers and the flexibility of the labour market. Under the Directive, temporary agency work is considered a flexible form of work which has beneficial impact on the labour market as a whole. The Norwegian Government's view that temporary agency work is detrimental to the labour market and whose use should be severely reduced therefore contradicts the very basis of the Directive and goes against its aim and purpose.

98. ESA notes that, although the protection of permanent employment as such could *in principle* be a legitimate aim, a measure which is aimed at reducing the role and scope of temporary agency work as such (because of its supposed negative impact), also in temporary situations, with the hope of replacing those situations with permanent employment, does not pursue a legitimate aim under the Temporary Agency Work Directive.

99. Moreover, as has been noted by the CJEU, reliance on the mere temporary nature of the employment of certain staff does not in itself constitute an objective ground

[91] See Case C-681/18 *KG*, EU:C:2020:823, paragraph 70. See also the Commission's report on the application of Directive 2008/104/EC on temporary agency work, cited above, p. 10, which states that, although the numbers of agency workers are relatively modest, the importance of this flexible form of working in the functioning of the national labour markets cannot be denied.

capable of justifying discrimination of fixed-term workers as compared to permanent workers.[92] Fixed-term workers cannot be treated less favourably than permanent workers on the sole ground that they are employed for a fixed-term, unless justified on objective grounds.[93] Thus, ESA submits that limiting the use of a specific form of fixed-term workers – in this case temporary agency workers – is not in itself an objective ground to justify restrictions under EEA law.

100. Finally, ESA notes, as held by the European Commission in its report on the application of the Temporary Agency Work Directive, that prohibitions or restrictions amounting to discrimination against temporary agency workers cannot be considered as justified on grounds of general interest.[94] As set out in paragraph 77 above, the measures in question amount to indirect discrimination and have affected foreign workers disproportionately, many of whom have lost their jobs and had to leave Norway.

101. ESA therefore submits that, in the same way as the aim of reducing the use of temporary agency workers overall, also in temporary situations in order to increase permanent and direct employment cannot be considered a legitimate aim under Article 4(1) of the Temporary Agency Worker Directive, it equally cannot constitute a ground of general interest or an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services pursuant to Article 36 EEA. The same applies to Articles 28 and 31 EEA. In the alternative, even if it were accepted that the measures at issue pursue a legitimate aim, they would still need to comply with the proportionality principle as set out further in Section 5.5 below.

5.5 The measures in question do not meet the requirement of proportionality

5.5.1 Introductory remarks

102. By its third question, the Referring Court asks which criteria will be relevant in the determination of whether the restrictions on the hiring of workers from temporary work agencies will be suitable and necessary in order to safeguard legitimate objectives, and whether, in that context, any significance should be attached to the

[92] See, e.g., Case C-270/22 *Ministero dell'Istruzione and INPS*, EU:C:2023:933, paragraph 71 and the case law quoted.
[93] Case C-715/20 *X,* EU:C:2024:139, paragraphs 45 and 64.
[94] See COM(2014) 176 final, p. 13.

fact that the prohibition in the construction sector constitutes a geographical and sector-specific prohibition on the hiring-in of workers from temporary work agencies.

103. It is settled case law that it is for the Referring Court, which has sole jurisdiction to assess the facts of the main proceedings and interpret the national legislation, to verify, in accordance with the rules of evidence of national law, provided the effectiveness of EEA law is not undermined, whether the restrictive measures in question satisfy the requirement of proportionality. However, it is also settled case law that the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation.[95] To ESA's understanding, the Referring Court is specifically asking for such clarifications in its third questions in the present case.

104. When a measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the party imposing the restriction to demonstrate, by way of appropriate evidence, that the measure in question is suitable, consistent, and necessary to attain the aim pursued. For the purposes of the present case, the Norwegian Government 's duty to demonstrate the suitability, consistency and necessity of the measures in question can be summarised in four key criteria:

105. The Norwegian Government must first demonstrate that the measures are suitable to achieving the legitimate objective pursued, along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[96] The Norwegian Government must second show in each case that the measure is necessary and proportionate to attain the aim pursued.[97] The necessity test third implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[98]

106. As regards the necessity test, the Norwegian Government in its Reply to the LFN, as also referred to in its submissions to the Referring Court, holds that the States

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[95] See Case E-5/23 *Criminal Proceedings against LDL*, paragraph 86.
[96] See, e.g., Case E-8/16 *Netfonds Holdings*, paragraph 117 and Case E-8/17 *Kristoffersen*, paragraph 118. See also Case C-795/19 *Tartu Vangla*, EU:C:2021:606, paragraph 44, with further references.
[97] Case E-8/17 *Kristoffersen*, paragraph 123.
[98] See, e.g., Case E-8/17 *Kristoffersen*, paragraph 122, Case E-8/16 *Netfonds Holdings*, paragraph 125-126, Case E-5/23 *LDL*, paragraph 82 and Case E-8/20 *Criminal proceedings against N*, paragraph 94.

remain free to "*determine their own level of protection*" and that ESA "*does not altogether acknowledge these limitations, from the perspective of judicial review*".[99] However, the Court has held the exact opposite, noting that even though the EEA States "*have discretion in setting the level of protection*", this "*does not mean that the measures are sheltered from judicial review as to their necessity*".[100] ESA therefore maintains that the assessment of whether a restriction under EEA law is necessary remains a *legal one*, which is subject to the scrutiny of the Court. For the same reasons, ESA submits that the allegations of the Norwegian Government that the assessment of whether a measure is necessary must be based only on the current Government's objective of the measure, and not the considerations of previous governments, is fundamentally misconceived.[101]

107. Fourth, in addition to the above, ESA maintains, as it did in the LFN, that the reasons which may be invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness, necessity and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.[102] The CJEU has clarified that such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks in relation to the objective pursued.[103]

108. For the sake of completeness, ESA notes that Norway in the Reply to the LFN holds that ESA argues for "*particularly strict evidence requirements*"[104] and "*seems to impose a much stricter requirement of proof than what can be derived from EEA law.*"[105] The core of the argument of the Norwegian Government seems to be that other language versions than the English version of *Commission v Belgium* "*use information* […] *instead of 'evidence'*".[106] ESA will in this respect limit itself to note

[99] See the Reply to the LFN, p 1–2, as referred to in the Request, p. 10.
[100] See Case E-3/06 *Ladbrokes*, paragraph 55.
[101] See the Reply to the LFN, p. 26.
[102] See Case E-5/23 *LDL*, paragraph 85, Case E-9/11 *ESA v Norway*, paragraph 89, Case E-8/20 *Criminal Proceedings against N*, paragraph 95 and Case C-254/05 *Commission v Belgium*, EU:C:2007:319, paragraph 36, with further references. See, moreover, the LFN, p. 16, paragraph 68.
[103] Case C-515/14 *Commission v Cyprus*, paragraph 54; and Case C-651/16 *DW*, paragraph 34.
[104] Reply to the LFN, p. 2.
[105] *Ibidem*, p. 12
[106] *Ibidem*, p. 13, commenting on Case C-254/05 *Commission v Belgium*, paragraph 36.

that the requirements set out in the paragraph above were referred to by the Court as "*settled case law*" in *Criminal Proceedings against N*, in which it held that "*reasons invoked by an EEA State as justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments*".[107]

109. Therefore, as is evident from the Court's statements in *Criminal Proceedings against N*, as long as the State substantiates its arguments, it remains free to decide *how to* adduce the appropriate, precise evidence, for instance by an analysis of the appropriateness and proportionality of the measure. That is the context in which the statements of the CJEU in *Stoß* referred to in the Reply to the LFN must be understood. In that judgment, the CJEU simply held that "*studies serving as the basis for the adoption of the legislation at issue*" is not the *only way* in which the States can justify restrictions on the fundamental freedoms.[108]

110. The Norwegian Government on the other hand seems to be of the view that *mere generalisations* concerning the capacity of a specific measure is sufficient to show that the aim of that measure is capable of justifying derogations from the fundamental freedoms of EEA. This was specifically rejected by the Court in *Criminal Proceedings against N*, in which it held that mere generalisations *do not* constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving the aim of the measure.[109] Should such evidence and justifications not be provided through absence or passivity of the national authorities, the national courts must be able to draw all inferences which result from such failure.[110]

111. ESA submits, with reference to criteria one, two and three above, that Norwegian Government has failed to demonstrate that the removal of the option to use temporary agency workers when the work is of a temporary nature and the prohibition on the use of temporary agency workers for construction work on

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[107] Case E-8/20 *Criminal Proceedings against N*, paragraph 95 with further references. Emphasis by ESA. See also Case E-5/23 *LDL*, paragraph 85.
[108] Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß*, EU:C:2010:504, paragraph 72, referred to in the Reply to the LFN, p. 13.
[109] Case E-8/20 *Criminal Proceedings against N*, paragraph 104 and the case law quoted.
[110] See Case C 3/17 *Sporting Odds*, EU:C:2018:130, paragraph 54.

construction sites in Oslo, Viken and former Vestfold are suitable to achieving the objective of reducing the use of temporary agency workers overall, also in temporary situations and increasing permanent and direct employment or the subsidiary objectives of providing protection to all workers, the protection of health and safety at work and the prevention of abuse (Sections 5.5.2.2 and 5.5.3.2 below, respectively). ESA moreover submits that the Norwegian Government has failed to demonstrate that the measures are necessary and proportionate (Sections 5.5.2.3 and 5.5.3.3 below, respectively).

112. Finally, ESA submits that the Norwegian Government, with reference to the fourth criteria above, has failed to provide the required *evidence and information to support its justification*. ESA cannot see that Norwegian Government has adduced appropriate evidence or an overall evaluation or analysis had been conducted of the temporary agency work industry in Norway of the intended restrictions, including their need and possible consequences, when these measures were adopted in December 2022.

113. For the sake of completeness, ESA contends that the same considerations concerning the principle of proportionality apply in relation to a restriction on the use of temporary agency workers under Article 4(1) of the Temporary Agency Directive. In that context, ESA also notes that the principle of proportionality is a general principle of EEA law which applies in the same way to justifications available under secondary legislation, in this case the Temporary Agency Work Directive. The same considerations moreover apply for the assessment of the measures under Articles 28 and 31 EEA.

5.5.2 Removal of the option to use temporary agency workers when the work is of a temporary nature

5.5.2.1 The measure in question

114. The proportionality of the measure removing the option to use temporary agency workers when the work is of a temporary nature must be assessed in relation to the overriding aim of that measure.[111] As set out in Section 5.4 above, the overriding aim of the Norwegian Government when removing the option of using temporary agency workers for work of a temporary nature in the WEA, was to reduce the use

[111] See, e.g., Case E-1/06 *Ladbrokes*, paragraph 56.

of temporary agency workers overall, also in temporary situations with the view to increase permanent and direct employment.

115. ESA at the outset notes that the measure is very broad, far-reaching and severely restricts the use of temporary agency workers in Norway. It applies across all sectors, with a few exceptions which will be further addressed in Section 5.5.2.2 as regards the lack of consistency. It also removes one of two main options of using temporary agency workers, where the need is biggest, i.e. for seasonal work and production peaks. Moreover, there is no time limit for the restriction and no benchmark for when it could be lifted. The measure is thus liable to have serious consequences for the operation of temporary-work agencies in Norway, as well as for the user undertakings which rely on temporary agency workers for work of a temporary nature, and the temporary agency workers themselves.

5.5.2.2 Suitability and consistency

116. As regards, first, whether the measure is *suitable* to achieving the objective pursued, the Norwegian Government claims that the removal of the option to use temporary agency workers for work of a temporary nature will result in increased permanent and direct employment.[112]

117. ESA however fails to see that the Norwegian Government has demonstrated the necessary causal link between the measure in question – removing the option of using temporary agency workers when the work is of a temporary nature – and the aim – increasing permanent and direct employment.[113]

118. It is true that removing the option of using temporary agency workers when the work is of a temporary nature evidently will result in reducing the use of temporary agency workers as such. However, this does not mean that it will lead to more permanent and direct employment.

119. The need for temporary agency workers, which is caused by a short-term need in the user undertakings, will not change or disappear by removing the option of using temporary agency workers when the work is of a temporary nature. Therefore, in

[112] See the Reply to the RQI, Sections 4.6, 6.2 and 6.3.
[113] See, e.g., Case C-208/05 *ITC*, paragraphs 42 and 43 in which the CJEU noted that Germany had not established the existence of a casual link between the issue sought to prevent and the measure in question.

fact, by removing the option of using temporary agency workers when the work is of a temporary nature could just as well lead to more fixed-term employment, more part-time work, more overtime work, more self-employment, more subcontracting or more dismissals. The Norwegian Government acknowledges in the Reply to the RQI and the Reply to the LFN that these are possible consequences of the measure.[114] The fact that the consequences of the restriction are other than the ones aimed for are a clear indication of unsuitability of the measure.

120. In addition to being suitable, the measure must genuinely reflect a concern to attain that aim in a *consistent* and *systematic* manner. ESA fails to see that this requirement is fulfilled, for at least three reasons.[115]

121. First, it is difficult to see the consistency in reducing the use of temporary agency workers with the aim of increasing permanent employment, when the main rule in Norway is that also temporary agency workers have permanent employment contracts with temporary-work agencies.[116] As regards the Norwegian Government's argument that permanent employment in a temporary-work agency is not the same as permanent employment in other undertakings,[117] ESA notes that both of these scenarios are regulated by the same provisions of national law, which provide that permanent employment is the main rule and that fixed-term employment or temporary agency work is only allowed in specific circumstances.[118]

122. Second, restricting the use of temporary agency workers when the work is of a temporary nature, while allowing fixed-term employment in the same circumstances, is inconsistent in relation to the aim of increasing permanent employment. This is particularly so given that the Norwegian Government has previously argued that temporary agency work and fixed-term work were often

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[114] See the Reply to the RQI, pp. 18, 30 and 42 and Reply to the LFN pp. 21 and 22.
[115] For a more comprehensive analysis of the consistency of the measure, see the LFN, Section 5.4.2.1, p 17 onwards.
[116] See, *inter alia*, the report of the Norwegian Better Regulation Council (available here: https://regelradet.no/2022/03/18/endringer-i-regelverket-for-ibemanningsforetak/), which states that since most temporary agency workers have permanent employment with the temporary-work agencies, the Council is unsure of how the proposal shall contribute to obtaining the aim of increasing permanent employment, p. 6.
[117] See the Reply to the RQI, p. 42.
[118] See Section 14-9 and 14-12 WEA. See also the report of the Labour Inspection Authority of 16 February 2023, cited above, which states on p. 7 that the impression is that most temporary-work agencies employee in 100% positions, or in real lower positions, and that in some cases it was normal to have a lower employment rate, for instance for students.

alternative forms of employment which needed to be governed by the same set of rules in order to prevent misuse.[119]

123. Third, as noted by the CJEU, exceptions to a provision of law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law.[120] ESA submits that the *exceptions* from the removal of the option to use temporary agency workers when the work is of a temporary nature confirms the lack of consistency in the measure. For instance, as regards the exception allowing for the use temporary agency workers for work of a temporary nature in the health care sector, ESA submits that it is not easily consistent with the aim of increasing permanent employment, since the need for labour in that sector is presumably quite flat, as opposed to for instance in the tourism industry.

124. ESA on the basis of the above submits that the Norwegian Government has not demonstrated that removing the option of using temporary agency workers for work of a temporary nature is suitable to achieving the aim of increasing permanent and direct employment in a consistent and systematic manner.

5.5.2.3 Necessity

125. In practice, the necessity test, as set out in Section 5.5.1 above, entails that the Norwegian Government must demonstrate that the use of temporary agency workers in Norway was causing problems for the labour market and challenging permanent and direct employment in such a way as to necessitating removal of the option to use temporary agency workers when the work is of a temporary nature.

126. ESA again notes that the Norwegian Government has not presented any evidence or analysis which substantiates that the use of temporary agency workers in Norway was actually challenging permanent and direct employment. To the contrary, according to information available to ESA, the proportion of permanent employment in Norway has been very stable and has even increased in the last 20-25 years.[121] The Norwegian Government's mere generalisations that temporary agency work

[119] Prop. 74 (2011-2012), p. 43. See also Prop. 131 L (2021-2022), p. 7.
[120] See, e.g., Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler*, EU:C:2011:508, paragraph 86.
[121] See NOU 2021:9, p. 120.

has the potential to displace and challenge permanent employments,[122] without any evidence or analysis substantiating that opinion, is not sufficient to justify derogations under EEA law.[123]

127. The necessity of the measure cannot be viewed in isolation but must be considered in the context of the overall functioning of the labour system, and more specifically in view of other measures which have been adopted in Norway predating the recent restrictions. Notably, when the Temporary Agency Work Directive was implemented, those same options of using temporary agency workers as were amended in December 2022, had been assessed by the Norwegian Government as sufficient to ensure the main rule of permanent and direct employment in Norway.[124] Moreover, the Norwegian Government has not demonstrated that the measures which were adopted in 2019 and 2020 and the measures which were adopted together with this restriction in December 2022, are not sufficient to meet their concerns.[125]

128. As regards other, less restrictive measures, ESA understands that several less restrictive alternative measures were suggested when the restriction was on public consultation, such as a quota system, a notification system for when an undertaking hires more than a certain number of temporary agency workers, increased control and enforcement.[126] However, as noted both by ESA in the LFN and by the Plaintiffs in the present proceedings, the Government ruled them out without further assessment.[127]

129. In that context, ESA first notes that the Norwegian Government in the Reply to the LFN relies on the judgment of the CJEU in *Webb* to justify its restrictions on the use of temporary agency workers. However, importantly, that case concerned a *licencing scheme* for the use of temporary agency workers.[128] A licencing or quota

[122] See the Reply to the RQI, p. 4.
[123] Case E-8/20 *Criminal Proceedings against N*, paragraph 104 with further references.
[124] See also NOU 2021:9, which states on p. 292 that the majority of the committee could not recommend amendments to the rules on the use of temporary agency workers at that point in time, *inter alia* with reference to the amendments made in 2013, 2019 and 2020 and since those amendments needed more time to come into full effect and thereafter be evaluated.
[125] As noted in paragraph 106 above, also the considerations of previous governments are relevant when assessing whether a measure is necessary under EEA law, which is a legal assessment, and not up to the government alone to decide.
[126] Prop. 131 L (2021-2022), pp. 33-34.
[127] The Request, p. 7, referring to Prop. 131 L (2021-2022), Section 6.4.2.
[128] Case C-279/80 *Webb*, EU:C:1981:314, e.g., at paragraphs 12 and 19.

scheme which would certainly be a less restrictive measure than an outright ban was disregarded as a possibility by the Norwegian Government.

130. ESA second observes that if the real concerns were that temporary agency workers were being used in order to fill permanent needs in undertakings, then it should have been sufficient to clarify the meaning of the wording "*when the work is of a temporary nature*", either by amending the legislative provision or by issuing further guidelines, as well as increasing enforcement. Such a provision, applied correctly and only in order to cover temporary needs, should not challenge permanent employment in any way. Alternatively, the Norwegian Government could have strengthened the effectiveness and enforcement of the rule on turning temporary work contract into permanent employment.

131. In the Reply to the LFN, the Norwegian Government in support of removing the option to use temporary agency workers when the work is of a temporary nature relies on the notion that the EEA States cannot be denied the possibility of attaining objectives in the public interest by the introduction of general and simple rules which will be easily understood and applied and easily managed by the competent authorities, such as, in the present case, the Labour Inspection Authority.[129] The Norwegian Government in this respect *inter alia* also holds that the removal of the possibility of temporary agency work when the work is of temporary nature was necessary to prevent the abuse of the system as allowing such work was highly discretionary, liable to be misunderstood and misused and made it difficult to supervise the system.[130] ESA submits that the inadequate enforcement of the already existing rules[131] cannot in itself justify measures such as those at issue in the present case.

132. ESA notes that the case law relied on by the Norwegian Government in support of introducing general and simple rules mainly concern rules of a technical or specific nature, with a relatively limited impact, such as use of personal watercraft on waters other than general navigable waterways,[132] a prohibition on mopeds, motorcycles,

[129] Reply to the LFN, p. 26-27.
[130] See Reply to the LFN, Chapter 4.2.4.
[131] See Reply to the LFN, p. 20.
[132] Case C-142/05 *Mickelsson and Roos,* EU:C:2009:336, paragraph 36.

motor tricycles and quadricycles towing a trailer,[133] legislation concerning the establishment of shopping centres,[134] measures adopted by a local public authority restricting access to coffee-shops[135] and a temporal limit on the marketing and sale of cigarettes.[136] In ESA's view, the relevance of this case law is to be questioned in circumstances such as in the present case, where the restrictions is very broad, far-reaching and severely restricts the use of temporary agency workers in Norway.

133. In light of the above, ESA submits that the Norwegian Government has not demonstrated that the removal of the option of using temporary agency workers when the work is of a temporary nature was suitable and necessary to achieve the objective of increasing permanent and direct employment in a consistent and systematic manner.

5.5.3 Prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold

5.5.3.1 The measure in question

134. The proportionality of the prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold must also be assessed against its overriding aim, which is to reduce the use of temporary agency workers overall and increase permanent and direct employment.

135. It must be emphasised that this measure is very far-reaching and severe. It is an absolute ban, which is the strictest form of restriction, without any exceptions. Moreover, there is no time limit for the prohibition or any benchmark for when it could be lifted. Although the prohibition is geographically limited, ESA understands that around 60% of all use of temporary agency workers in the construction sector is concentrated to this area.[137] The prohibition is thus liable to have serious consequences for the operation of temporary-work agencies in Norway, as well as for the user undertakings which rely on temporary agency workers for construction projects in this area, and for the temporary agency workers themselves.

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[133] Case C-110/05 *Commission v Italy*, EU:C:2009:66 paragraph 67.
[134] Case C-400/08 *Commission v Spain*, EU:C:2011:172, paragraph 124.
[135] Case C-137/09 *Josemans*, EU:C:2010:774, paragraph 82.
[136] Case C-126/15 *Commission v Portugal*, EU:C:2017:504, paragraph 84.
[137] Reply to the RQI, page 25.

136. To address the second part of the third question from the Referring Court – if any significance should be attached to the fact that the restriction in question constitutes a geographical and sector-specific prohibition – ESA submits that it must be considered not on the basis of its geographical limit, but on the basis of being a far reaching, absolute ban with no exceptions, concerning 60 % of the use of temporary agency work in that sector. As set out in the below, ESA submits that such a ban does not meet the requirements of being suitable, consistent, and necessary.

5.5.3.2 Suitability and consistency

137. As regards, first, whether the measure is *suitable* to achieving the objective pursued, the Norwegian Government asserts that also the prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold will result in increased permanent and direct employment.[138] As in Section 5.5.2.2 above, ESA however fails to see that the Norwegian Government has demonstrated the necessary causal link between the measure in question, and its aim.

138. Although, evidently, such a prohibition will reduce the use of temporary agency workers, it is not obvious that prohibiting the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold will lead to more permanent and direct employment.

139. That is particularly so given that the construction sector is presumably to a large extent characterised by short-term projects. ESA thus questions whether this prohibition could just as well lead to more fixed-term employment, more part-time work, more overtime work, more self-employment, more subcontracting or more dismissals. The Norwegian Government even acknowledges in the Reply to the RQI and the Reply to the LFN that these are potential consequences of the measure.[139]

140. In any event, the Norwegian Government has not produced evidence or analysis which substantiates the statement that increased permanent and direct employment will actually be the result of this prohibition. To the contrary, in the

[138] Reply to the LFN, pp. 27-28.
[139] See Reply to the RQI p. 46 and Reply to the LFN pp. 21-22.

subsequent statistics in relation to the construction sector provided by the Norwegian Government, there is no evidence to support that permanent employment has increased overall, also taking into account the fact that the temporary agency workers as a main rule had permanent employment, and that many of them following the entry into force of the ban are no longer part of the Norwegian labour market and have left Norway.[140]

141. Moreover, ESA submits that the adopted measure fails to meet the requirements of genuinely reflecting a concern to attain the aim pursued in a consistent and systematic manner, for at least three reasons.[141]

142. First, it is difficult to see the consistency in reducing the use of temporary agency workers with the aim of increasing permanent employment, when the main rule is that temporary agency workers in Norway have permanent employment contracts with temporary-work agencies.

143. Second, restricting the use of temporary agency workers in the construction sector, while allowing fixed-term employment in the same circumstances, does not reflect consistency in relation to the aim of increasing permanent employment, see further Section 5.5.2.2 above concerning the same issue with regard to the removal of the option to use temporary agency workers when the work is of a temporary nature.

144. Third, the Norwegian Government has not provided detailed and precise evidence, based on consistent data, which would explain why the prohibition was necessary in *the specific areas of Oslo, Viken and former Vestfold*, and not in other areas in Norway.[142] The Norwegian Government merely states that *"the fact that the legislator chooses not to go further than necessary regarding the geographical scope cannot imply any inconsistency that makes the measure unlawful* […] *having a balanced policy must be allowed without implying inconsistency."*[143] However,

[140] Reply to the LFN page 23. Norway refers to numbers from Statistics Norway, according to which from Q2 in 2022 to Q2 in 2023 the number of jobs in the temporary work agency was reduced with 9.3% (5700 jobs).
[141] For a more comprehensive analysis of the suitability and consistency of the measure, see the LFN, Section 5.4.3.1, p. 21 onwards.
[142] In the reply to the RQI, p. 24-25 Norway only points out that Oslo, Viken and Vestfold represent one common labour market area and that one third of the economic value in construction business takes place in Oslo and Akershus.
[143] Reply to the LFN, p. 29.

these statements to not explain why the prohibition is necessary in that specific geographic area, as opposed to the rest of the country.

145. ESA therefore submits that the Norwegian Government has not provided sufficient evidence for demonstrating that the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold is suitable to achieving the aim of increasing permanent and direct employment in a consistent and systematic manner.

5.5.3.3 Necessity

146. As regards the necessity requirement, ESA refers to its general remarks set out in Section 5.5.2.3 above which applies *mutatis mutandis*, requiring the Norwegian Government to demonstrate that the use of temporary agency workers in the construction sector in Oslo, Viken and former Vestfold was actually causing problems for the labour market and was challenging permanent and direct employment, thereby necessitating the adoption of this prohibition.

147. In this context, it should also be noted that the Norwegian Government had already in 2018, when the use of temporary agency workers was higher than today, assessed a prohibition on the use of temporary agency workers in the construction sector as being too restrictive as there were legitimate needs to use temporary agency workers in periods and as that could also impact other permanent employees by undertakings not being able to take on projects without temporary agency workers.[144]

148. ESA moreover notes that the Norwegian Government has not presented any evidence or analysis which substantiates that the use of temporary agency workers in the construction sector in Oslo, Viken and Vestfold was actually challenging the main rule of permanent and direct employment.

149. As regards possible alternative and less restrictive measures. the Norwegian Government has not engaged in an assessment of such alternatives. ESA understands that several less restrictive alternative measures were suggested in the public hearing process of the prohibition. Such measures include a quota

[144] See Prop. 73 L (2017-2018), p. 42.

system, requirements concerning employment rate of temporary agency workers and increased control and enforcement.[145] However, it seems like those suggestions were rejected by the Norwegian Government without much evaluation.[146] Moreover, the Government has not demonstrated that the measures which were adopted in 2019 and 2020 and the measures which were adopted together with the prohibition in December 2022 are not sufficient to meet their concerns. In that context, it must also be noted that this prohibition adds on to the general removal of the option to use temporary agency workers for work of a temporary nature, making those measures combined even more severe and strict. It however remains uncertain what impact that first restriction will have and whether that would have been sufficient to meet the Government's concerns.

150. The Norwegian Government noted that *"the challenges associated with hiring in the construction sector have persisted for a long time. The growth in temporary agency work in the building and construction sector has been considerably higher than in other industries […] The growth has mainly been driven by labour immigrants from Eastern Europe […] non-resident immigrants make up about one-third of the employed persons in the industry. Ensuring decent working conditions for vulnerable workers has been given high priority by the Government."*[147] The Norwegian Government also refers to the objective of protecting health and safety at work as relevant for the prohibition in the construction sector.[148]

151. With regard to those alternative objectives or concerns raised by the Norwegian Government (and also discussed at paragraphs 86-88 above), ESA notes that EEA law contains a number of legal instruments geared at ensuring health and safety at work, including prevention of abuse. In the context of the temporary employment relationships one such instrument is Council Directive 91/383 of 25 June 1991 *on supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.* That Directive recognises that the temporary employment relationships might be more exposed to the risk of accidents at work than other

[145] See Prop. 131 L (2021-2022), p. 29.
[146] *Ibidem*.
[147] Reply to the LFN, p. 28.
[148] *Ibidem,* p. 15.

workers and adopts special additional rules, particularly on the provision of information (Article 3 and 7), the training appropriate for the particular characteristics of the job (Article 4) and the medical surveillance of the workers concerned (Article 5).[149] Under Article 8 of this Directive *"without prejudice to the responsibility of the temporary employment business as laid down in national legislation, the user undertaking and/or establishment is/are responsible, for the duration of the assignment, for the conditions governing performance of the work".*[150] It seems to ESA that in terms of the necessity of the measure, there would be other possibilities to target such alternative or subsidiary objectives, instead of the introduction of a far-reaching ban.

152. In particular, given the severity of an absolute ban on the use of temporary agency workers in this particular sector and area and given that the Norwegian Government's overriding aim was to *reduce* the use of temporary agency workers, not *eliminating it*, the Authority fails to see that alternative, less restrictive measures were in fact not available to achieve the objective pursued.

153. In light of the above, ESA submits that the Norwegian Government has not demonstrated that the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold was suitable and necessary to achieve the objective of increasing permanent and direct employment in a consistent and systematic manner. Moreover, ESA fails to see that alternative, less restrictive measures were in fact not available to achieve the objective pursued.

6. CONCLUSION

Accordingly, ESA respectfully requests the Court to answer the questions from the Referring Court as follows:

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[149] Especially with regard to Article 5 of the Directive EEA states have an option of *"prohibiting workers with an employment relationship as referred to in Article 1 from being used for certain work as defined in national legislation, which would be particularly dangerous to their safety or health, and in particular for certain work which requires special medical surveillance, as defined in national legislation."*

[150] Emphasis by ESA.

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

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

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

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

3. **In the determination of the proportionality of restrictions, such as in the present case, it has to be demonstrated that the restrictions genuinely reflect a concern to attain the invoked aim in a consistent and systematic manner, that they are suitable and necessary to achieving the legitimate aim pursued and that they are not capable of being replaced by an alternative measures that are equally useful but less restrictive to the fundamental freedoms of EEA law.**

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

Ewa Gromnicka Marte Brathovde

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority