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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

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

EUROPEAN COMMISSION

represented by Donatella RECCHIA and Freya VAN SCHAIK, Members of its Legal Service, with a postal address for service in Brussels at the Legal Service, *Grefte Contentieux*, BERL 1/169, 200 Rue de la Loi, B-1049 Brussels,

in Case **E-6/25**,

Saga Subsea AS

against

Øyvind Akselsen and Simen Marius Granlund

in which the Supreme Court of Norway has requested an Advisory Opinion concerning the interpretation of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, which was incorporated into the EEA Agreement through Annex XVIII no. 32k.

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1. INTRODUCTION

1. The request for an Advisory Opinion has been made by the Supreme Court of Norway in proceedings between, on the one hand, the temporary work agency Saga Subsea AS and, on the other hand, two temporary workers, Mr Akselsen and Mr Granlund (also referred to as “the workers”).
2. Saga Subsea AS is a temporary work agency that hires out personnel to offshore installations and vessels in the offshore industry.
3. The workers were employed by Saga Subsea AS as a “ROV Supervisor Offshore” and “Rigger/Mechanic” respectively¹. They had concluded individual employment contracts with Saga Subsea AS and were hired out to three Norwegian undertakings to work on board various so-called ‘multipurpose vessels’² that were registered in Norway. Both workers spent the majority of their working time on multipurpose vessels in the offshore industry and the rest of their working time on offshore installations.
4. The national case concerns the salary for the periods during which they worked on multipurpose vessels³. Because the workers were paid less than the user undertakings’ own employees, despite performing the same work, they claim salary back pay from Saga Subsea AS in accordance with section 14-12a subsection 1(f) of the Working Environment Act⁴. Saga Subsea AS, however, argues that section 14-12a of the Working Environment Act – which implements the right to equal treatment laid down in Article 5 of Directive 2008/104/EC⁵ – does not apply to work on board multipurpose vessels⁶.

¹ Request for an Advisory Opinion, paragraph 9.

² The Supreme Court has explained that “multipurpose vessels” are vessels used for performing various supply and support functions in connection with the exploration for and extraction of subsea petroleum deposits (Request for an Advisory Opinion, paragraph 2).

³ Request for an Advisory Opinion, paragraph 11.

⁴ Request for an Advisory Opinion, paragraph 15.

⁵ See further paragraphs 15 and 21 below.

⁶ Request for an Advisory Opinion, Section 5.2.

5. As the Supreme Court of Norway doubts whether Article 5 of Directive 2008/104/EC on temporary agency work (as incorporated into the EEA Agreement) applies to work on multipurpose vessels in the given circumstances, it has requested an Advisory Opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (see also Section 3 concerning the question asked).

2. LAW

2.1. International law

2.1.1. *The United Nations Convention on the Law of the Sea (UNCLOS)*

6. The United Nations Convention on the Law of the Sea (UNCLOS) was ratified by Norway on 24 June 1996 and by the European Union on 1 April 1998.
7. Article 77 of the UNCLOS (*Rights of the coastal State over the continental shelf*) provides as follows:

“1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

[...]

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”

8. Article 94 (*Duties of the flag State*) provides as follows:

“1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

[...] (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: [...] (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; [...]"

2.1.2. The Maritime Labour Convention

9. The Maritime Labour Convention is an International Labour Organisation (ILO) Convention that was adopted on 23 February 2006 and entered into force on 20 August 2013. Norway ratified the Maritime Labour Convention on 10 February 2009. The Maritime Labour Convention contains provisions concerning, among other things, minimum requirements for seafarers to work on a ship and conditions of employment.

2.2. EEA/Union law

2.2.1. The EEA Agreement

10. Article 126(1) of the EEA Agreement provides:

“1. The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.”

11. Point 32k of Annex XVIII to the EEA Agreement refers to Directive 2008/104/EC on temporary agency work (see below 2.2.2) and Point 32j of that same Annex refers to Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention (see below 2.2.3).

2.2.2. Directive 2008/104/EC on temporary agency work

12. Article 1 of Directive 2008/104/EC provides the following with respect to its scope:

“1. 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.

2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.”

13. Article 2 of Directive 2008/104/EC provides the following about the aim of the Directive:

“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.”

14. Article 3 of Directive 2008/104/EC contains the following definitions:

“1. For the purposes of this Directive:

(a) ‘worker’ means any person who, in the Member State concerned, is protected as a worker under national employment law;

(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

[...]

(f) ‘basic working and employment conditions’ means working and employment conditions laid down by legislation, regulations, administrative provisions,

collective agreements and/or other binding general provisions in force in the user undertaking relating to:

[...]

(ii) pay [...]"

15. Article 5 (The principle of equal treatment) provides as follows:

“1. 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. [...]"

2.2.3. Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention

16. Some of the provisions⁷ of the Maritime Labour Convention (see section 2.1.2) were transposed into Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC⁸.

17. Recital 13 of Directive 2009/13/EC states:

“(13) The provisions of this Directive should apply without prejudice to any existing Community provisions being more specific and/or granting a higher level of protection to seafarers, and in particular those included in Community legislation.”

18. Similarly, the Social Partners' Agreement annexed to the Directive provides:

⁷ Neither Articles II and V of the Maritime Labour Convention, nor Regulation 1.4, Standard A.1.4., Guideline B1.4, Guideline B1.4.1, Regulation 5.3, Standard A5.3 and Guideline B5.3 of the Maritime Labour Convention, which concern seafarer recruitment and placement services, were transposed into Directive 2009/13/EC.

⁸ OJ L 124, 20.5.2009, p. 30 (ELI: <http://data.europa.eu/eli/dir/2009/13/oj>).

“Final provisions

This Agreement shall be without prejudice to any existing and/or specific existing Community legislation.”

19. Directive 2009/13/EC does not contain any provisions that specifically cover temporary agency workers.

2.3. Norwegian law

20. The relevant provisions of Norwegian law are set out in detail in the request for an Advisory Opinion⁹.
21. Section 14-12a of the Working Environment Act implements the right to equal treatment laid down in Article 5 of Directive 2008/104/EC regarding pay and working conditions in connection with the hiring out of workers by temporary work agencies.
22. According to section 1-2 subsection 2(a) of the Working Environment Act, “*shipping*” is exempt from the Act¹⁰.
23. Section 1-3 of the Working Environment Act contains a separate provision on the application of that Act to offshore petroleum activities. Subsection 1 states that the Act applies to “*activities associated with the exploration for and exploitation of natural resources in the seabed or its substrata, in Norwegian inland waters, Norwegian territorial waters and on the Norwegian part of the continental shelf*”. However, according to subsection 3, the Ministry may “*by regulation wholly or partly exempt from the Act activities as referred to in subsection 1 [...]*”¹¹.

⁹ Request for an Advisory Opinion, Section 4.1.

¹⁰ Request for an Advisory Opinion, paragraph 21.

¹¹ Request for an Advisory Opinion, paragraph 23.

24. Such an exemption is provided for in Regulations of 12 February 2010 No. 158 relating to health, safety and the environment in the petroleum activities and at certain onshore facilities (the Framework Regulations)¹².
25. For workers employed on board Norwegian ships, the Ship Labour Act applies. Article 5(1) of the Temporary Agency Work Directive is not implemented in the Ship Labour Act¹³.

3. QUESTION ASKED

26. The Supreme Court of Norway has asked the EFTA Court the following question:

“Should Article 5 of the European Parliament and Council Directive 2008/104/EC of 19 November 2008 on temporary agency work (the Temporary Agency Work Directive) be interpreted to mean that the provision applies to employees of a temporary work agency domiciled in an EEA State during the period they are hired out for labour to an undertaking domiciled in the same EEA State on board a vessel used in connection with petroleum activities on that State’s continental shelf?”

4. ANALYSIS

4.1. Introduction

27. The Supreme Court of Norway in essence wants to know whether Directive 2008/104/EC applies to workers who are employees of a temporary work agency domiciled in an EEA State during the period they are hired out for labour to an undertaking domiciled in the same EEA State on board a vessel used in connection with petroleum activities on that State’s continental shelf.
28. That question should be seen in the light of the arguments raised in the national proceedings. On the one hand, the workers have argued that it is clear from the wording and the aim of Directive 2008/104/EC as well as the relevant context that

¹² Request for an Advisory Opinion, paragraph 24.

¹³ See Request for an Advisory Opinion, paragraphs 3 and 22.

the Directive applies to seafarers who carry out their work on the continental shelf of Norway¹⁴. On the other hand, both Saga Subsea AS and the Norwegian government have argued that Directive 2008/104/EC is not applicable to work on board ships on the Norwegian continental shelf¹⁵. They have, moreover, argued that Directive 2008/104/EC does not apply to shipping or to seafarers, who would perform their work under very specific working conditions and would already be protected by sector-specific rules (which include the Maritime Labour Convention and Directive 2009/13/EC as incorporated into the EEA Agreement)¹⁶.

29. In order to propose an answer to the question raised by the Supreme Court, the Commission will *first* examine if the work performed on the continental shelf of an EEA State is to be regarded as work performed on the territory of that State (see section 4.2). *Second*, the Commission will examine if workers in the circumstances described in paragraph 27 above, fall within the scope of Directive 2018/104/EC, as defined in its Article 1¹⁷.

4.2. Work performed on the continental shelf of an EEA State

30. According to Article 126(1) of the EEA Agreement, the Agreement applies to “*the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to **the territory of [...] Norway***” (emphasis added).
31. Legal acts incorporated into the EEA Agreement incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement¹⁸.
32. The case-law of the Court of Justice confirms that the national territory of the Member States consists of the territorial sea, its bed and subsoil¹⁹. The territorial

¹⁴ See Request for an Advisory Opinion, Sections 5.2.

¹⁵ See Request for an Advisory Opinion, Sections 5.1 and 5.4.

¹⁶ See Sections 2.1.2 and 2.2.3 above.

¹⁷ The text of Article 1 is quoted in paragraph 12 above.

¹⁸ Compare the judgments of the Court of Justice of 15 December 2015, *Parliament v Council*, C-132/14 to 136/14, ECLI:EU:C:2015:813, paragraph 77 and case-law cited; and of the EFTA Court of 16 July 2020, *Scanteam AS v the Norwegian Government*, case E-8/19, paragraph 65.

scope of Union law can, however, also extend beyond the territorial seas of a State to the exclusive economic zones and the continental shelf²⁰.

33. Furthermore, it is settled case-law of the Court of Justice that Union law applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the European Union²¹. The Court of Justice has also held that Union law may apply to professional activities pursued outside the territory of the European Union as long as the employment relationship retains a sufficiently close link with the European Union²².
34. In order to assess whether work performed on the continental shelf of an EEA State should be considered as work on the territory of that State, reference must be made to the rules and principles of international law relating to the legal regime applicable to the continental shelf²³. The rights and duties of coastal states are laid down in the UNCLOS.
35. The International Court of Justice has ruled that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea exist *ipso facto* and *ab initio* by virtue of the State's sovereignty over the land and by extension of that sovereignty in the form of the

¹⁹ Judgment of the Court of Justice of 29 March 2007, *Aktiebolaget*, C-111/05, ECLI:EU:C:2007:195, paragraph 57.

²⁰ See e.g. judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraphs 34-36; *Commission v UK*, C-6/04, ECLI:EU:C:2005:626, paragraph 117. In certain cases, it can even extend to the high seas; see e.g. judgment of the Court of Justice of 14 July 1976, *Kramer*, 3/76, 4/76 and 6/76, ECLI:EU:C:1976:114, paragraphs 30/33.

²¹ Judgment of the EFTA Court of 16 July 2020, *Scanteam AS v the Norwegian Government*, case E-8/19, paragraph 67; with reference to the judgments of the Court of Justice of 12 December 1974 *Walrave and Koch*, C-36/74, ECLI:EU:C:1974:140, paragraph 28, and of 28 February 2013, *Petersen*, C-544/11, ECLI:EU:C:2013:124, paragraph 40.

²² *Ibid.*

²³ See also judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraph 31.

exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources²⁴.

36. It follows from Article 77 of the UNCLOS that the coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources. Those rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without its express consent²⁵. Since a Member State has sovereignty over the continental shelf adjacent to it – albeit functional and limited sovereignty – work carried out on multipurpose vessels, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Union/EEA law²⁶.
37. A Member State that takes advantage of the economic rights to prospect and/or exploit natural resources on its continental shelf cannot avoid the application of the Union/EEA law provisions designed to ensure the protective framework for temporary agency workers working on multipurpose vessels on the continental shelf²⁷.
38. Consequently, contrary to the arguments of the Norwegian government, work performed on the continental shelf of Norway is to be regarded as work performed on the territory of that State for the purposes of applying Article 126(1) of the EEA Agreement²⁸. Norway is thus required to apply Directive 2008/104/EC to economic

²⁴ Judgment of the Court of Justice of 27 February 2002, *Weber*, C-37/00, ECLI:EU:C:2002:122, paragraph 34, referring to the judgment of the International Court of Justice of 20 February 1969 in the so-called North Sea Continental Shelf cases, Reports, 1969, p. 3, paragraph 19.

²⁵ Judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraph 33.

²⁶ See, by analogy, judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraph 36.

²⁷ See, by analogy, judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraph 36.

²⁸ Judgment of the Court of Justice of 17 January 2012, *Salemink*, C-347/10, ECLI:EU:C:2012:17, paragraph 36.

activities of temporary agency workers falling within the scope of Article 1 of Directive 2008/104/EC.

39. The Commission adds for completeness that Union/EEA law also applies by virtue of the close relationship between a temporary work agency in an EEA State and its workers from that same EEA State who work on a multipurpose vessel flying the flag of that same EEA State. That relationship is sufficiently closely linked to the EEA to fall within the scope of EEA law²⁹.

4.3. Workers within the scope of Directive 2008/104/EC

40. The Commission will now assess whether Directive 2008/104/EC as incorporated into the EEA Agreement covers workers domiciled in an EEA State during the period that they are hired out for labour to an undertaking domiciled in the same EEA State on board a vessel flying the flag of that EEA State, which is used in connection with petroleum activities on that EEA State's continental shelf.
41. As the Court of Justice recalled in its case-law, under Article 1 of Directive 2008/104/EC, the application of that directive presupposes, *inter alia*, that:
- (i) the person in question is a “*worker*”, within the meaning of Article 1(1); and
 - (ii) the temporary-work agency which assigns that person to a user undertaking is engaged in “*economic activities*”, within the meaning of Article 1(2)³⁰.
42. Consequently, in order to propose a reply to the question of the Supreme Court, it is necessary to determine whether those two conditions are satisfied in circumstances such as those in the case at hand³¹.

²⁹ Judgment of the EFTA Court of 16 July 2020, *Scanteam AS v the Norwegian Government*, case E-8/19, paragraphs 67 and 72; with reference to the judgments of the Court of Justice of 12 December 1974 *Walrave and Koch*, C-36/74, ECLI:EU:C:1974:140, paragraph 28, and of 28 February 2013, *Petersen*, C-544/11, ECLI:EU:C:2013:124, paragraph 40.

³⁰ Judgment of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 23.

43. With regard to the first condition, in accordance with the settled case-law of the Court of Justice, the concept of “*worker*” as referred to in Directive 2008/104/EC must be interpreted as covering any person who carries out work, that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration, and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of legal relationship between those two persons and the form of that relationship³².
44. While it is for the Supreme Court of Norway to determine whether those conditions are satisfied in the case at hand³³, this does not appear to be contested in the main proceedings. There is nothing in the case at hand that would cast doubt on the conclusion that workers such as those in the case at hand are to be considered as workers within the meaning of Article 1(1) of the Directive 2008/104/EC.
45. As regards the interpretation of the concept of “economic activities” as referred to in Article 1(2) of Directive 2008/104/EC (the second condition), it should be noted that, in accordance with the settled case-law of the Court, any activity consisting in offering goods or services on a given market is economic in nature³⁴.
46. In the present case, the temporary work agency offers services on the market for the supply of personnel to onshore activities, offshore installations (*i.e.* petroleum activities on the continental shelf) and to assignments on multipurpose vessels in the offshore industry as a main part of the hiring out activities. The parties in the main proceedings do not appear to dispute that the temporary work agency is engaged in economic activities within the meaning of Article 1(2) of Directive 2008/104/EC.

³¹ Judgment of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 24.

³² Judgment of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 43.

³³ Compare judgment of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 43.

³⁴ Judgment of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 44.

47. However, Saga Subsea AS and the Norwegian government have nonetheless argued in the national proceedings that Directive 2008/104/EC does not apply given that the working conditions at sea differ significantly from those on land, and that this is reflected in the fact that seafarers' rights are extensively regulated in separate legal acts, including Directive 2009/13/EC³⁵. The Supreme Court itself also notes that the Norwegian legislation “*seems to build on the premise that the Temporary Agency Work Directive does not apply to shipping, or that the issue in any case is unresolved.*”³⁶
48. The Commission considers that such a premise would be incorrect.
49. *Firstly*, as regards the wording of Directive 2008/104/EC, it should be noted that seafarers are not explicitly excluded from the application of Directive 2008/104/EC³⁷. By contrast, such (partial) exclusions exist in other Union legislation:
- Article 1(3) of Directive 2003/88/EC on working time³⁸ provides that “[t]his Directive **shall not apply to seafarers**, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive.” (emphasis added)
 - Article 1(8) of Directive 2019/1152 on transparent and predictable working conditions³⁹ provides that “*Chapter II of this Directive applies to seafarers and sea fishermen without prejudice to Directives 2009/13/EC and Directive (EU) 2017/159, respectively. The obligations set out in points (m) and (o) of Article 4(2), and Articles 7, 9, 10 and 12 **shall not apply to seafarers or sea fishermen***”. (emphasis added)

³⁵ Request for an Advisory Opinion, Sections 5.1 and 5.4.

³⁶ Request for an Advisory Opinion, paragraph 29.

³⁷ See also Request for an Advisory Opinion, paragraph 37: “*Directive 2008/104/EC does not exclude seafarers from its scope*”.

³⁸ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

³⁹ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, p. 105.

- Similarly, Article 1(5) Directive 2022/2041 on minimum wages⁴⁰ provides that “[t]he acts by which a Member State implements the measures concerning *minimum wages of seafarers* periodically set by the Joint Maritime Commission or another body authorised by the Governing Body of the International Labour Office *shall not be subject to Chapter II of this Directive.*” (emphasis added)

50. It cannot be inferred from the absence of a reference to shipping or seafarers in Directive 2008/104/EC that seafarers or shipping would be excluded from the scope of application of Directive 2008/104/EC. On the contrary, the absence of an explicit exclusion for seafarers rather indicates that Directive 2008/104/EC is applicable to seafarers. If seafarers were not (or only partially) intended to be covered by Directive 2008/104/EC, such an exception would have been explicitly provided for (see paragraph 49 above).
51. *Secondly*, as regards the objective of Directive 2008/104/EC, the Commission notes that Recitals 10 and 12 of that directive refer to the fact that there are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the Union, and that the directive is intended to establish a protective framework for those workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.
52. Accordingly, Article 2 of Directive 2008/104/EC provides that the purpose of that 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 is applied to those workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.
53. According to the Court of Justice, that dual objective is reflected in the structure of Article 5 of Directive 2008/104/EC, paragraph 1 of which lays down the rule that

⁴⁰ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275, 25.10.2022, p. 33.

the basic working and employment conditions of temporary agency workers (including pay⁴¹) are at least those of the user undertaking's own workers⁴².

54. To exclude shipping or seafarers from the scope of application of Directive 2008/104/EC would be liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive⁴³.
55. *Thirdly*, as regards the regulatory context, the Commission stresses that no other Union legislation than Directive 2008/104/EC contains provisions that establish a protective framework specifically targeted at temporary agency workers.
56. While there is legislation that protects seafarers (in particular, Directive 2009/13/EC), this does not detract from the fact that Directive 2008/104/EC covers temporary agency workers who are seafarers.
57. As a matter of fact, Directive 2009/13/EC does not provide for the same equal treatment requirement as laid down in Article 5 of Directive 2008/104/EC. Directive 2008/104/EC thus complements the regime of Directive 2009/13/EC (without in any way contradicting that regime) as regards temporary agency workers who are also seafarers. It is clear from Directive 2009/13/EC that its application does not preclude the application of Article 5 Directive 2008/104/EC. Recital 13 of Directive 2009/13/EC explicitly states that “[t]he provisions of this Directive should apply **without prejudice to any existing Community provisions being more specific and/or granting a higher level of protection to seafarers, and in particular those included in Community legislation.**”; and the Social Partners’ Agreement annexed to Directive 2009/13/EC provides in its final provisions that it “**shall be without**

⁴¹ See Article 3(1)(f) (ii) of Directive 2008/104/EC.

⁴² Judgment of the Court of Justice 15 December 2022, *CM v TimePartner Personalmanagement GmbH*, C-311/21, ECLI:EU:C:2022:983, paragraph 38.

⁴³ Judgments of the Court of Justice of 17 November 2016, *Ruhrlandklinik*, C-216/15, ECLI:EU:C:2016:883, paragraph 36; and of 24 October 2024, *Omnitel*, C-441/23, ECLI:EU:C:2024:916, paragraph 41.

prejudice to any more stringent and/or specific existing Community legislation”⁴⁴
(emphasis added).

58. Indeed, if workers falling under Directive 2009/13/EC were excluded from the scope of Directive 2008/104/EC, temporary agency workers who are seafarers would not be subject to any Union level framework aimed specifically at protection of temporary agency workers. This would not be in line with the wording and the objective of that Union legislation (see paragraphs 49 to 54 above).
59. It follows from the above considerations that workers who are in the situation of the workers in the national proceedings fall within the scope of Directive 2008/104/EC as defined in Article 1 of that directive and are subject to the principle of equal treatment as laid down in Article 5 thereof.
60. This conclusion is not called into question by the opinion of the Expert Group of August 2011 to which the Supreme Court has referred in paragraph 37 of its Request for an Advisory Opinion. The Expert Group pointed out that it can be complex to determine which law applies to seafarers; and that this issue is not regulated by Directive 2008/104/EC but by Regulation 593/2008 on the law applicable to contractual obligations⁴⁵ (the “Rome I Regulation”).
61. However, such a possible ‘conflict-of-laws’ issue does not arise in a case that concerns exclusively employees of a *Norwegian* temporary work agency who are hired out to *Norwegian* undertakings to perform work on board *Norwegian*-registered multipurpose vessels in connection with petroleum activities on the *Norwegian* continental shelf. Moreover, the Commission points out that the Rome I Regulation does not apply in Norway. The EEA Agreement does not cover judicial cooperation in civil matters; consequently, the Rome I Regulation has not been

⁴⁴ See similarly, as regards fishermen, recital 8 and Articles 2(3) and 20 of Council Directive (EU) 2017/159 of 19 December 2016 implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche), OJ L 25, 31.1.2017, p. 12.

⁴⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

rendered applicable in Norway under that Agreement nor is there another international instrument that extends the Union's rules on applicable law to Norway.

5. CONCLUSION

62. In the light of the above considerations, the Commission considers that the question referred to the EFTA Court for an Advisory Opinion should be answered as follows:

Article 5 of Directive 2008/104/EC on temporary agency work applies to employees of a temporary work agency domiciled in an EEA State during the period they are hired out for labour to an undertaking domiciled in the same EEA State on board a vessel flying the flag of that EEA State, which is used in connection with petroleum activities on that EEA State's continental shelf.

Donatella RECCHIA

Freya VAN SCHAIK

Agents for the Commission