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To the President and Members of the EFTA Court

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statue of the EFTA Court by

Saga Subsea AS

Represented by

Thor Harald Eike (H), lawyer

In

Case E-6/25

Saga Subsea AS

v.

Akselsen and Granlund

Represented by Bjørn Inge Waage (H), lawyer

Intervener for Akselsen and Granlund: The union Styrke

Represented by Edvard Bakke (H), lawyer

Participation by the Norwegian State

Represented by the Ministry of Justice and Public Security

Concerning a request by the Norwegian Supreme Court for an Advisory Opinion from the EFTA court, lodged on 11th of April 2025 in the case of Saga Subsea AS v. Akselsen and Granlund under Article 34 of the Agreement between the EFTA States and the Establishment of a Surveillance Authority and a Court of Justice.

1. Introduction

On the 11th of April 2025, the Norwegian Supreme Court (the “**Referring Court**”) submitted a Request for an Advisory Opinion to the EFTA Court (the “**Request**”) in Case No 24-047132SIV-HRET between Saga Subsea AS and Øyvind Akselsen and Simen Marius Granlund.

With its questions, the Referring Court seeks to clarify whether section 14-12a of the Act of 17 June 2005 No 62 relating to the working environment, working hours and employment protection etc. (Working Environment Act), which ensures at least the same conditions for hired-out workers as for the user undertaking’s own employees, applies to hired-out workers performing work on board Norwegian-registered multipurpose vessels.

An assessment of the Referring Court’s questions requires an overview of the legal and factual background, presented below in *sections 2 and 3*, respectively. Saga Subsea AS’ observations to the question referred are presented in *section 4*. Finally, in *section 6* Saga Subsea AS presents its proposal to the answer that the EFTA Court may/should provide to the Referring Court.

2. Legal background

2.1 Overview

The Request sections 4.1 and 4.2 set out relevant provisions of national and EEA law. This overview is to be supplemented by other relevant provisions below.

2.2 EEA law

The Temporary Agency Work Directive, pursuant to Article 2, is aimed at workers who have an employment contract or employment relationship with a temporary work agency. Its purpose is to ensure the protection of temporary agency workers and to improve their working conditions by introducing the principle of equal treatment.

EU Directive 2008/104/EC on temporary agency work was adopted on 19 November 2008 and published on December 5th 2008, with a deadline for implementation into national law by December 5th 2011. In accordance with the decision-making procedures under the EEA Agreement, the directive was made applicable also to the EEA countries.

The principle of equal treatment means that the basic working and employment conditions of the temporary agency worker must, at a minimum, be equivalent to those that would apply if the worker were employed directly by the undertaking employer for the duration of the assignment. The directive also aims to recognize temporary work agencies as employers and to establish an appropriate framework for the use of temporary agency work.

The scope of the directive is defined in Article 1, which states that the directive applies to workers who have an employment contract or employment relationship with a temporary work agency and who are assigned to user undertakings to work temporarily under their supervision and direction.

It should be noted that no explicit exemptions for workers or employment relationships in the maritime sector are provided in this provision. Such explicit exemptions are neither included in any other provisions of the directive. However, paragraphs 2 to 4 provide for the possibility of exemptions, including those established through collective agreements.

2.3 The implementation of EEA Law in Norwegian Law

Following the adoption of the directive in the EU and its approval by the EEA Joint Committee pursuant to Article 102 of the EEA Agreement, the Norwegian government was, in the usual manner, obliged to take the necessary steps to ensure that the directive was implemented and enforced nationally in accordance with Article 104 of the Agreement.

The Norwegian government subsequently concluded that it was necessary to implement the directive through new domestic legal provisions that clarified the requirements for equal treatment of temporary agency workers and directly employed workers. As a result, necessary amendments were made to three specific internal acts:

- the Working Environment Act,
- the Civil Servants Act, and
- the Annual Holidays Act.

In its legislative preparatory works, the Norwegian government emphasized that within the limited framework of these three Acts, Norway's obligations to implement the Temporary Agency Work Directive (2008/104/EC) into national law was fulfilled. To the question on implementation, it was specifically expressed *that the maritime sector was not considered a natural area of application for the directive*.

A central premise for this restriction on the applicability of the directive in relation to the maritime sector seems to have been the distinctive regulatory and operational characteristics and conditions of the maritime sector, and the fact that the purpose of the Maritime Labour Convention (MLC, 2006) was to create a more transparent and user-friendly convention that strengthens the rights of seafarers, regardless of their location. In this context, there was neither scope nor necessity for a parallel regulation of seafarers' rights within The Temporary Agency Work Directive.

2.4 National Law

In the Working Environment Act, the Temporary Agency Work Directive is implemented via its Section 14-12a.

Section 14-12 a. Equal treatment regarding pay and working conditions in connection with the hiring out of workers by temporary-work agencies

(1) The temporary-work agency shall ensure that the workers that it hires out are at least given the conditions that would have applied if the worker had been recruited directly by the user undertaking to perform the same work regarding:

- a. the length and placement of working hours,*
- b. overtime work,*
- c. the length and placement of breaks and rest periods*
- d. nightwork,*
- e. holidays, holiday pay, days off and remuneration for such days, and*

f. pay and coverage of expenses.

(2) Temporary agency workers shall be given access to the user undertaking's collective amenities and facilities on equal terms with direct employees of the user undertaking unless otherwise objectively justified.

(3) The Ministry may in regulations decide whether and to what extent the provisions concerning equal treatment may be derogated from in collective agreements. The general worker protection provisions must in all cases be respected

It does not explicitly appear from the wording of Section 14-12a that it does not apply to work performed by employees assigned to work on offshore multipurpose vessels.

Section 1-2 of the Working Environment Act, which regulates the scope of the Act, states in its first paragraph that the Act applies to any undertaking that employs workers, unless otherwise expressly provided by law. The wording supports the interpretation that the Act is *enterprise-based* rather than *activity-based*.

The second paragraph of the provision states that maritime activities/ shipping, with the exception of diving operations and pilotage, are exempt from the Working Environment Act:

Section 1-2. The scope of the Act

(1) The Act shall apply to undertakings that engage employees unless otherwise explicitly provided by the Act.

(2) The following are exempt from the Act:

- a. shipping, hunting and fishing, including the processing of the catch on board the ship but such that diving operations and pilotage are covered by the Act,*
- b. military aviation which is covered by the Aviation Act.*

The Ministry may issue regulations concerning exemptions from the Act for civil aviation and state aviation other than military aviation and concerning special provisions for such aviation and concerning the application of the Act for diving operations and special provisions and exemptions for such operations

This exemption for maritime activities is a continuation of previously applicable law, and such employment relationships are regulated by the Ship Labour Act, the NIS Act, and the Ship Safety and Security Act, as well as by the Maritime Labour Convention (MLC) and related ILO conventions to which Norway is a party.

For maritime activities related to petroleum operations within the territorial sea, the general exemption for 'maritime activities' in Section 1-2, second paragraph (a) of the Working Environment Act is supplemented by an additional exemption provision in Section 1-3 (concerning 'petroleum activities offshore').

Section 1-3. Offshore petroleum activities

- (1) The Act shall apply to activities associated with the exploration for and exploitation of natural resources in the seabed or its substrata, Norwegian inland waters, Norwegian sea territory and the Norwegian part of the continental shelf.*
- (2) The Act shall apply to activities as referred to in the first paragraph in the area outside the Norwegian sector of the continental shelf if this ensues from a special agreement with a foreign state or from international law in general.*
- (3) The Ministry may by regulation wholly or partly exempt from the Act activities as referred to in the first and second paragraphs. The Ministry may also provide in regulations that the Act wholly or partly shall apply to activities as referred to in the first paragraph in areas outside the Norwegian part of the continental shelf if exploration for or exploitation of natural resources on the seabed or its substrata are conducted from an installation registered in a Norwegian shipping register or if manned underwater operations are carried out from an installation or*

vessel registered in a Norwegian shipping register. The Ministry may by regulation also provide that the Act shall apply in connection with the movement of installations or vessels as mentioned.

(4) Special provisions may also be laid down in regulations issued pursuant to this section

The legal starting point in this provision is that the Working Environment Act generally applies to *all activities* related to the exploration for and exploitation of natural resources on or beneath the seabed, within internal Norwegian waters, the Norwegian territorial sea, and the Norwegian continental shelf.

However, the third paragraph allows for exceptions from this general rule, by permitting regulations to exempt activities that would otherwise fall within the definition in the first paragraph from the scope of the Act. This exemption authority has been exercised through the Norwegian Regulations relating to health, safety and the environment in the petroleum activities and at certain onshore facilities FOR-2010-02-12-158 ('the Framework Regulations'). Section 4, third paragraph (b) of the regulations states that vessels engaged in construction, pipe-laying, or maintenance activities in petroleum operations are exempt from the Working Environment Act (NB! Our Office-translation of the section generated by MS Copilot AI below):

§ 4. Application of the Working Environment Act in Offshore Petroleum Activities pursuant to Section 1-3, third paragraph of the Working Environment Act

The Working Environment Act and this regulation apply to manned underwater operations in petroleum activities carried out from vessels or installations, unless specific provisions have been adopted.

Vessels equipped with gangways may be used to accommodate workers engaged on simpler installations. The Working Environment Act and this regulation apply to these workers, including when they are accommodated on such vessels.

Exempted from the Working Environment Act and the provisions of this regulation adopted pursuant to the Act are:

- a. supply, emergency preparedness, and anchor handling services performed by vessels, seismic or geological surveys conducted by vessels, and other comparable activities considered to be maritime operations,*
- b. vessels performing construction, pipe-laying, or maintenance activities in petroleum operations, unless otherwise specifically determined by the Ministry of Labour through regulations or individual decisions.*

Parallel to the work on implementing the Temporary Agency Work Directive, efforts were also underway to develop a new Act concerning employment protection, etc., for employees on ships (the Ship Labour Act). The Working Environment Act and the Ship Labour Act are fully harmonized, meaning that employment relationships within the maritime sector that fall outside the scope of the Working Environment Act are covered by the Ship Labour Act, and vice versa.

Under the Working Environment Act, the scope is assessed based on the nature of the employer's undertaking, whereas under the Ship Labour Act, the scope is determined based on the actual activity performed by the employee on board. The Ship Labour Act was therefore adopted as new legislation on 21 June 2013 and entered into force on 20 August 2013. On the same date, the implementation of the Maritime Labour Convention – ILO 186 (MLC) – also entered into force with effect in Norwegian law. In parallel, a separate

regulation on the use of employment placement services on ships (Regulation of 19 August 2013 No. 999) was adopted, regulating the employer's obligations in this context.

Corresponding to the exemption provisions in the Working Environment Act, it follows from Section 1-2 of the Ship Labour Act that the Act applies to employees who perform their work on board Norwegian vessels. Consequently, employment relationships on Norwegian ships are not covered by the implementation of the directive in Section 14-12a of the Working Environment Act.

3. Factual background

Saga Subsea AS operates as a staffing agency, primarily supplying labor to Norwegian subsea companies that operate multipurpose vessels within offshore activities on the Norwegian continental shelf.

Akselsen and Granlund were employed by Saga Subsea as, respectively, a ROV pilot and a rigger/service mechanic, and were for the most parts assigned as skilled personnel to multipurpose vessels to operate the hiring companies' own remotely operated vehicles (ROVs) during maritime offshore operations.

Virtually all the respondents' offshore work tasks were carried out on board multipurpose vessels owned or operated by the hiring companies. Multipurpose vessels are ships designed to perform a wide range of tasks at sea. They are well-equipped, flexible, and efficient, and can be used for everything from oil spill response and shoreline cleanup to construction, maintenance, and inspection in the petroleum industry. As a result, these vessels have taken over many of the tasks that were previously performed from fixed installations on the continental shelf or by manned diving operations on the seabed.

The wages paid to Akselsen and Granlund were lower than those paid by the hiring companies to their own employees on board the multipurpose vessels. The dispute between the parties concerns whether this is in breach of the Temporary Agency Work Directive and the Working Environment Act's requirements for equal treatment of hired-in and directly employed workers.

The issue before the Supreme Court, and therefore the Request, is whether the respondents were entitled to equal treatment with the hiring companies' own employees, on the basis that the equal treatment provisions of the Temporary Agency Work Directive, as implemented in Norwegian law through Section 14-12a of the Working Environment Act, apply to the respondents' employment contracts with Saga Subsea AS during the performance of work on offshore multipurpose vessels.

If the employment relationship is subject to the provisions of the Working Environment Act by virtue of the Temporary Agency Work Directive also applying to maritime activities, there is no doubt that Saga Subsea AS qualifies as a temporary work agency. Likewise, it is undisputed that Akselsen and Granlund would, in that case, be considered temporary agency workers. At the time of the employment relationship, Saga Subsea AS had not entered into any collective agreements directly with its employees. Nor were there any generally applicable collective agreements covering the employment conditions of Akselsen and Granlund during the relevant period.

4. Observation to the question

4.1 The application question

With its question, the referring Court is essentially asking whether the Norwegian state's implementation and application of the Temporary Agency Work Directive is correct. The directive contains no explicit exemption for maritime activities, yet it has not been applied to this sector by the state through national legislation.

The legislature has justified this by explicitly stating that the directive does not have maritime activities as its natural area of application, due to the conditions that apply to workers and the nature of the work performed in this sector. Furthermore, this area is regulated by other legal frameworks that are more specifically tailored to address the considerations relevant to this segment.

4.2 Systematic and purposive interpretation

The working conditions at sea differ greatly from those on land, which is reflected in how seafarers' rights are regulated in separate and different legal acts. There are different protective aims that are of greater importance to the seafarers than those underlying the Directive. Therefore, there are also explicit rules related to working life applicable to seafarers in other directives and international conventions.

The wording in the Temporary Agency act gives no indication that it applies to seafarers and is not commented on in the Preamble. According to the considerations and special regulations for the seafarers, the expectation is that this would be clearly expressed in the Directive if that was the case.

4.3 Comments on Mr. Akselsen, Mr. Granlund and the union Styrke's arguments

Reference is made to the foregoing analysis in section 2 and 4 concerning the legislature's approach to the regulation of maritime activities and the deliberate legislative choice not to extend the applicability of the Temporary Agency Work Directive to workers in this sector. The underlying legal and practical considerations support the conclusion that it is not appropriate for the directive to apply to such workers, as their employment relationships are governed by a distinct and specialized legal framework tailored to the specific conditions of maritime employment.

The Directive does not extend to work carried out on board vessels operating on the Norwegian continental shelf. According to Article 126 of the EEA Agreement, the territorial scope of the Agreement is confined to Norway's land territory, which, under established principles of international law, does not encompass the continental shelf. The drafting history and context of this provision indicate that this limitation was an intentional decision made during the negotiation of the EEA Agreement, distinguishing its scope from that of the European Union.

Furthermore, the activities in question lack a sufficiently strong connection to the EEA, as clarified by the EFTA Court in Case E-8/19, *Scanteam*. That case involved a claim for wages

related to periods spent working aboard multipurpose vessels, specifically for tasks performed exclusively on the continental shelf.

4.4 Comments on the State's arguments

Saga Subsea AS adopts the reasoning put forward by the Norwegian State.

5. **Proposed answer to the Referring Court's question**

In light of the observations above, Saga Subsea AS respectfully propose that the EFTA court answers the question raised by the Referring Court as follows:

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) should not 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.

Haugesund, 20.06.2025
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