ESA | EFTA Surveillance Authority

Brussels, 24 June 2025
Case No: 93931
Document No: 1538487

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

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

IN CASE E-6/25

Saga Subsea AS

v

Akselsen and Granlund

in which the Norwegian Supreme Court has requested an Advisory Opinion concerning the interpretation of Article 5 of Directive 2008/104/EC on temporary agency work.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. These written observations were prepared with support of Lemonia Tsaroucha and Per-Arvid Sjøgård, Senior Legal Officers, of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("**ESA**").

2. The present request for an Advisory Opinion ("**the Request**") concerns the interpretation of Article 5 of Directive 2008/104/EC on temporary agency work ("**the Directive**" or "**the Temporary Agency Work Directive**"),[1] with respect to its scope of applicability. The Request was submitted by the Supreme Court of Norway ("**the Referring Court**") in a dispute over salary back pay for hired-in work on vessels used in petroleum activities on the Norwegian continental shelf.

3. More specifically, the dispute concerns work carried out on vessels used for performing supply, construction and support functions in connection with the exploration for and extraction of subsea petroleum deposits – referred to in the national proceedings as "multipurpose vessels". Further, it follows from the Request that the vessels in the main proceedings are Norwegian-registered, and that all work has been carried out above the Norwegian continental shelf.[2]

4. The main question in the national proceedings is whether section 14-12a of the Norwegian Working Environment Act ("**WEA**")[3] applies to work carried out on multipurpose vessels under the circumstances described in the main proceedings. That provision implements Article 5 of the Directive and requires that hired-out workers receive at least the same working conditions as the user undertaking's own employees. The referring court notes that the wording of the WEA might indicate that work on the vessels at issue are exempt from its scope and therefore governed by the

[1] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 *on temporary agency work, OJ L 327, 5.12.2008, p. 9. The Temporary Agency Work Directive* was incorporated into the EEA Agreement by way of Decision of the EEA Joint Committee No 149/2012 of 13 July 2012, OJ L 309, 8.11.2012, p.34, which entered into force on 1 May 2013.
[2] The Request, para. 2.
[3] Act of 17 June 2005 No 62 relating to the working environment, working hours and employment protection, etc. (Working Environment Act). In Norwegian: *Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv*. *(arbeidsmiljøloven).*

Ship Labour Act.[4] ESA notes that the Ship Labour Act in Article 1(a) provides for equality of treatment in the workplace at sea.

5. The referring court has therefore asked the EFTA Court ("**the Court**") whether Article 5 of the Directive applies to employees of a temporary work agency domiciled in an EEA State, hired out to an undertaking domiciled in the same State, carrying out work on vessels engaged in petroleum activities on the State's continental shelf.

6. For more information about the facts of the case, reference is made to the Request.

2 EEA LAW

7. 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."*

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

> *"(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.*
>
> *[…]*
>
> *(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."*

[4] Act of 21 June 2013 No 102 relating to employment protection, etc. for employees on board ships (Ship Labour Act). In Norwegian: *Lov 21. juni 2013 nr. 102 om stillingsvern mv. for arbeidstakere på skip (skipsarbeidsloven).*

9. Article 1 on the scope of the Directive reads:

> *"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."*

10. Article 2 on the aim of the Directive reads:

> *"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."*

11. Article 3(1) of the Directive contains definitions and reads:

> *"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;*
> *(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;*
> *(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:*
> *(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;*
> *(ii) pay."*

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

> *"This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.*

[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."

13. Article 5(1), first subparagraph, of the Directive reads:

"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."

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

"2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 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.
3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.
4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.
The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers."

15. Article 9 of the Directive 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."*

16. 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 and implemented it *inter alia* in Ship Labour Act, three new regulations and amendments to two regulations for the implementation of the MLC, 2006.[5]

17. 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 ("the MLC Directive)[6] and Directive 2013/54/EU concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention[7] implement the 2006 Maritime

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[5] Available at: www.sdir.no/en/legislation/circulars/new-regulations-and-amended-regulations-for-the-implementation-of-the-mlc-2006/. The MLC has been implemented in Norway *inter alia* by way of Regulation on employment agreement and pay statement (*Forskrift om arbeidsavtale og lønnsoppgave mv. [skipsarbeid]*, FOR-2013-08-19-1000) and by way of Regulation on use of recruitment and placement services on ships (*Forskrift om bruk av arbeidsformidlingsvirksomhet på skip*, FOR-2013-08-19-999). Additionally, the Ship Labour Act in 2013 sets out in section 3-9 of the Ship Labour Act that employers using recruitment and placement services shall document that those services conform to requirements laid down in or pursuant to the Act of 10 December 2004 No. 76 relating to labour market services (Labour Market Act).

[6] 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*, incorporated into the EEA Agreement by way of Decision of the EEA Joint Committee No 109/2010 of 1 October 2010, OJ L 332, 16.12.2010, p. 59.

[7] Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 *concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention*, incorporated into the EEA Agreement by way of Decision of the EEA Joint Committee No 28/2020 of 7 February 2020, OJ L 49, 16.2.2023, p. 59.

Labour Convention into the EU legal order and were incorporated into the EEA legal order. Article 3 of the MLC Directive reads:

> *"1. Member States may maintain or introduce more favourable provisions than those laid down in this Directive.*
> *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 shall be without prejudice to the rights of Member 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 complied with.*
> *3. The application and/or interpretation of this Directive shall be without prejudice to any Community or national provision, custom or practice providing for more favourable conditions for the seafarers concerned."*

18. The United Nations Convention on the Law of the Sea (UNCLOS), signed on 10 December 1982 and entered into force on 16 November 1994, is an international treaty that establishes a legal framework for all marine and maritime activities. Norway is a party, and so is the European Union and all the Member States.

3 NATIONAL LAW

19. The use of temporary agency work in Norway is regulated through provisions in Chapter 14 of the WEA, titled "Appointment, etc." and the Temporary Agency Work Regulation.[8]

20. Section 1-2 of the WEA provides:

> *"What the Act covers:*
> *(1)The Act applies to businesses that employ employees, unless otherwise expressly provided in the Act.*
> *(2) Exempt from the Act are:*
> *a. shipping, catching and fishing, including processing of the catch on board ships, but still so that diving operations and pilotage are covered by the law*
> *[…]"*

[8] Regulation 11 January 2013 on temporary agency work. In Norwegian: *Forskrift 11. januar 2013 nr. 33 om innleie fra bemanningsforetak.*

21. Section 1-3 of the WEA titled “Offshore petroleum activities” provides:

> *“(1) The Act applies to activities in connection with the exploration for and exploitation of natural resources on the seabed or in its subsoil, in internal Norwegian waters, Norwegian territorial waters and the Norwegian part of the continental shelf.*
>
> *(2) The Act applies to activities as mentioned in the first paragraph in the area outside the Norwegian part of the continental shelf if this follows from a special agreement with a foreign state or from international law in general.*
>
> *(3) The Ministry may, by regulation, exempt activities as mentioned in the first and second paragraphs in whole or in part from the Act. The Ministry may also issue regulations to the effect that the Act shall apply in whole or in part to activities as mentioned in the first paragraph in areas outside the Norwegian part of the continental shelf if exploration or exploitation of natural resources on the seabed or in its subsoil is carried out from a facility registered in the Norwegian ship register or manned underwater operations are carried out from a facility or vessel registered in the Norwegian ship register. The Ministry may also, by regulation, stipulate that the Act shall apply to the relocation of a facility or vessel as mentioned.*
>
> *(4) Regulations pursuant to this section may also lay down special rules.”*

22. Section 14-12 a. of the WEA titled “Equal treatment of pay and working conditions when hiring out from staffing agencies” provides:

> *“(1) The staffing agency shall ensure that the temporary worker is provided with at least the conditions that would have applied if the worker had been employed by the temporary worker to perform the same work, with regard to:*
>
> *a. length of working hours and location,*
>
> *b. overtime work,*
>
> *c. duration and location of breaks and rest periods,*
>
> *d. night work,*
>
> *e. holiday time off, holiday pay, days off and compensation on such days, and*
>
> *f. salary and expense coverage.*
>
> *(2) Employees who are hired out shall have the same access to common goods and services at the hiring company as the enterprise's own employees, unless objective reasons indicate otherwise.*
>
> *(3) The Ministry may, by regulation, determine whether and to what extent the provisions on equal treatment may be derogated from by collective agreement. The general protection of employees must in all cases be respected.”*

23. Regulation 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),[9] Section 4 provides:

> *"The Working Environment Act and these regulations apply to manned underwater operations in petroleum activities that are carried out from vessels or installations, unless special rules have been given.*
>
> *Vessels with gangways can be used to accommodate workers working on simpler installations. The Working Environment Act and these regulations apply to these workers, also when they are accommodated on this type of vessel.*
>
> *Exempt from the Working Environment Act and provisions in these regulations that are laid down pursuant to the Working Environment Act are:*
>
> *a. supply, emergency and anchor handling services by vessel, seismic or geological surveys by vessel and other comparable activities, which are considered maritime transport,*
>
> *b. vessels that carry out construction, pipe-laying or maintenance activities in the petroleum industry, unless otherwise specifically stipulated by the Ministry of Labour by regulation or individual decision.”*

24. The Ship Labour Act Section1-1 titled “Purpose of the Act” provides:

> *“The purpose of the law is:*
>
> *a. to ensure secure employment conditions and equal treatment in working life at sea […]*

25. The Ship Labour Act Section 1-2 titled “The Scope of the Act” provides:

> *“(1) This Act shall apply to any employee working on board Norwegian ships. Chapters 8 to 10 shall also apply to other persons working on board Norwegian ships.*
>
> *(2) This Act shall not apply to employees who:*
>
> *a) only work on board while the ship is in port;*
>
> *b) serve on the Norwegian Armed Forces’ vessels, except for civilian personnel on board ships chartered by the Norwegian Armed Forces.*
>
> *(3) The Ministry may issue supplementary regulations to the first and second paragraph, including regulations concerning:*
>
> *a) the extent to which this Act shall not apply to employees performing work which in its nature does not form part of the ship's ordinary operation;*
>
> *b) the extent to which this Act shall apply to employees covered by the Civil Servants Act;*
>
> *c) what is considered a ship according to this Act;*

[9] In Norwegian: *Forskrift om helse, miljø og sikkerhet i petroleumsvirksomheten og på enkelte landanlegg (rammeforskriften).*

d) whether and to which extent this Act shall apply to employees working on board an installation at sea other than a ship, and foreign ships in Norwegian territorial waters, including the territorial waters of Svalbard or Jan Mayen, subject to limitations following from international law."

26. The Ship Labour Act Section 1-3 titled "Invariability" provides:

"(1) This Act may not be departed from by agreement to the detriment of the employee, unless this is expressly provided in this Act or in regulations issued pursuant to this Act.

(2) For employees working on board ships registered in the Norwegian International Ship Register (NIS), section 8 first paragraph of the NIS Act lays down whether and to which extent this Act may be departed from."

27. The Norwegian International Ship Register (NIS) Act[10] Section 8 titled "Ship Labour Act" provides:

"The provisions of the Ship Labour Act, Section 3-1 fourth subparagraph, Sections 3-3 to 3-8, Section 4-2 third subparagraph, Section 4-6 first sub paragraph letter a, Section 5-2 first subparagraph second sentence and second and third subparagraphs, Section 5-3 second subparagraph and third subparagraph letters a to d, Section 5-4, Section 5-6 second subparagraph, Section 5-7, Section 5-9, Section 5-10, Section 5-12, Section 5 A-2, Sections 6-1 to 6-3, Section 7-2, Section 7-3, Sections 7-5 to 7-12, Section 8-4 and Section 11-2 may be waived in a collective agreement."[11]

4 THE QUESTION REFERRED

28. The Supreme Court has referred the following question to the EFTA Court:

Should Article 5 of 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?

[10] Act of 12 June 1987 No 48 relating to a Norwegian International Ship Register (NIS). In Norwegian: *Lov 12 juni 1987 nr. 48 om norsk internasjonalt skipsregister (NIS-loven).*

[11] Translation by ESA.

5 LEGAL ANALYSIS

5.1 Preliminary remarks

29. In the present written observations ESA submits that Article 5 of the Temporary Agency Work Directive applies to employees of a temporary work agency domiciled in an EEA State during the period they are hired out 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.

30. At the outset, ESA notes that the question from the Referring Court refers to employees hired out for labour "on board a vessel". Based on the facts as described in the Request, ESA understands this as referring to Norwegian registered vessels, *i.e.*, those flying a Norwegian flag.[12] Furthermore, ESA understands the reference to Norwegian registered vessels to cover both vessels registered in the Norwegian Ordinary Ship Register (NOR) and the Norwegian International Ship Register (NIS).[13]

31. ESA also notes that the Directive only applies to "temporary work agencies", as defined in Article 3(1)(b). One of the conditions set out therein is that the agency concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings. It is not contested in the present case that Saga Subsea is a temporary work agency.[14]

32. It is nevertheless important to bear in mind that the definition of "temporary work agencies" in the Directive does not necessarily correspond to the definition of *"seafarer recruitment and placement service"* as referred to in Article II(1)(h) of the Maritime Labour Convention (MLC), meaning "any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners." The

[12] See the Request paras 2, 12 and 13.
[13] One difference between NIS and NOR vessels is that the former are exempted from some provisions of the Ship Labour Act, on matters which are to be covered by collective labour agreements for NIS vessels, see the first subparagraph of Section 8 of the NIS Act. The Court of Appeal in its judgment of 4 May 2025 in the present case, also refers to workers being hired out to work on NIR or NOR vessels, see page 8 of the judgment. The Court of Appeal also noted that the contracts in question only contain references to the Work Environment Act, not to the Ship Labour Act, see page 11 of the judgment.
[14] See the Request, para. 8: "Saga Subsea SA is registered as a temporary work agency with the Norwegian Labour Inspection Authority".

providers of such services are commonly known in the maritime context as *manning agencies*, which are responsible for the recruitment and placement of seafarers, either on behalf of and for a shipowner who is then the party signing the employment contract, or on their own behalf, thus signing employment contracts with the seafarers, similar to what temporary work agencies do.[15]

5.2 Temporary Agency Work Directive – scope *ratione personae*

33. As a starting point, ESA notes that it is settled case law that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part.[16]

34. Article 1 sets out the scope of the Directive. According to Article 1(1), the 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."[17] These terms are defined in Article 3.

35. Moreover, ESA notes that it is clear from Article 1, read in conjunction with the definitions in Article 3, that the Directive constitutes a harmonised area of EEA law which also applies to internal situations. Hence, as stated by the Advocate General in *AKT*, its application does not presuppose the presence of a cross-border element.[18]

36. In accordance with Recital 12 of the Directive, it 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.

37. The purpose of the Directive, as set out in Article 2, is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work. This is achieved 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. At the same time, the Directive takes into account the need to establish

[15] See footnote 5 above.
[16] Case E-13/23 *EFTA Surveillance Authority v The Kingdom of Norway*, para. 68; Case C- 357/20 *Magistrat der Stadt Wien (Grand Hamster – II)*, EU:C:2021:881, para. 20 and Case C-426/20 *GD and ED v Luso Temp*, EU:C:2022:373, para. 29.
[17] Emphasis added.
[18] Opinion of Advocate General Szpunar in Case C-533/13 *AKT*, EU:C:2014:2392, para. 92.

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.[19]

38. Pursuant to Article 3(1)(a) a 'worker' means any person who, in the EEA State concerned, is protected as a worker under national employment law.

39. As set out in the case law from the CJEU and the EFTA Court, the concept of 'worker' is defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he or she receives remuneration.[20]

40. Specifically as regards Article 3(1)(a), the CJEU has found that "it follows from the wording of that provision that the concept of 'worker' for the purposes of that directive covers any person who carries out work and who is protected on that basis in the Member State concerned".[21] Hence, at the outset, if a person is protected as a worker under national employment law in the EEA State concerned, that person is also considered a worker under the Directive. Furthermore, as regards the concept of 'temporary agency worker', defined in Article 3(1)(c) of Directive 2008/104, the CJEU has found that the concept of 'worker' may not be interpreted differently according to each national law, but has its own meaning in EU law.[22]

41. When Article 3(2) sets out that the Directive shall be without prejudice to national law as regards the definition 'worker', the CJEU concluded that this only means that the EU legislator intended to preserve the power of the Member States to determine the persons falling within the scope of the concept of 'worker' for the purposes of national law and who must be protected under their domestic legislation. This is an aspect of national law that the Directive does not aim to harmonise.[23]

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[19] Case E-2/24 *Bygg & Industri Norge AS and others v the Norwegian State*, para. 129.
[20] Case C-441/23 *Omnitel Comunicaciones and others,* EU:C:2024:916*,* para. 55 and case law cited.
[21] Case C-216/15 *Betriebsrat der Ruhrlandklinik,* EU:C:2016:883, paras 25-26.
[22] Case C-441/23 *Omnitel Comunicaciones and others,* para. 54.
[23] Case C-216/15 *Betriebsrat der Ruhrlandklinik*, para. 31. The same applies with regard to the concept of pay as defined in Article 3(2) of the Directive, see to that effect C-649/22 *XXX v. Randstad Empleo ETT SAU*, EU:C:2024:156, para 40.

42. Hence, Article 3(2) cannot be interpreted as a waiver by the EU legislator of its power itself to determine the scope of the concept of a worker for the purposes of the Directive, and accordingly its scope *ratione personae*. The EU legislature did not leave it to the Member States to define that concept unilaterally but specified itself the contours thereof in Article 3(1)(a), as it, moreover, also specified the contours of the definition of 'temporary agency worker' in Article 3(1)(c).[24]

43. To sum up, the concept of 'worker' for the purposes of the Directive may not be interpreted differently according to each national law and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.[25] In accordance with the settled case-law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which the person receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard.[26]

44. Furthermore, the CJEU has confirmed that neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a 'worker' within the meaning of Directive 2008/104.[27] Also, the *sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EEA law.[28] Provided that a person meets the conditions specified in paragraph 40 above, the nature of that person's legal relationship with the other party to the employment relationship has no bearing on the application of the Directive.[29]

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[24] *Ibid.*, para. 32.
[25] See also Case C-232/09 *Dita Danosa v. LKB Lizings SIA*, EU:C:2010:674, para. 39.
[26] Case C-216/15 *Betriebsrat der Ruhrlandklinik*, para. 27.
[27] *Ibid.*, para. 29.
[28] Case C-116/06 *Kiiski*, EU:C: 2007:536, para. 26 and the case-law cited.
[29] See also Case C-232/09 *Dita Danosa*, para. 40.

45. Accordingly, for the purposes of interpreting the Directive, the concept 'temporary agency worker' covers any person who has an employment relationship with a natural or legal person (a temporary work agency) in the sense that he or she, for a certain period of time, performs services for and under the direction of a user undertaking, in return for which he receives remuneration, and who is protected, in the EEA State concerned, by virtue of the work that person carries out.[30]

46. ESA has not been able to identify any provision in the Directive, or otherwise, which explicitly excludes seafarers from its scope. The Commission reached the same conclusion in the report from August 2011 referred to in the Request.[31]

47. While it is for the national court to determine whether the respondents are temporary agency workers as defined in Article 3 of the Directive to whom Article 5(1) of the Directive is applicable[32] ESA submits that such determination especially relies on one constitutive element of the definition in Article 3(1)(a) – i.e. whether the *worker is protected under national employment law.*

48. ESA submits that any worker protected by the *general national employment law*, such as the WEA, would fall within the scope of the Directive, if the other requirements set out in Article 3 of the Directive are fulfilled. ESA notes that the Court of Appeal found in the present case that the respondents are at least partly covered by the WEA.[33]

49. Furthermore, ESA submits that the same starting point applies to workers who are not covered by the WEA but who are protected under special national employment law, applicable *e.g.* to specific categories of workers and governing their overall employment situation. This, for example, would in ESA's view apply to workers protected by the Ship Labour Act, which applies to workers on Norwegian ships.[34]

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[30] Case C-216/15 *Betriebsrat der Ruhrlandklinik,* paras 27 and 33.
[31] The Request, para. 37.
[32] See for comparison, Case C-441/23 *Omnitel Comunicaciones and others,* para. 50.
[33] See page 8 of the judgment of 4 May 2023, LG-2022-124221-2.
[34] According to Section 1-2, the Ship Labour Act applies to workers working on Norwegian Ships, which covers both ships registered in NOR and NIS. According to the Norwegian Maritime Code of 24 June 1994 (*Sjøloven*) Section 1, a ship is a Norwegian ship when it has not been entered in the ship register of another state. Note, however, workers on NIS registered ships can be exempt from the Ship Labour Act through a collective agreement, see Section 8 of the NIS Act.

50. In ESA's view, temporary agency workers protected by the Ship Labour Act would be covered by the Directive, as they are protected under national employment law.[35] The criteria of applicability of the Directive are to be found in the Directive itself, as interpreted by the CJEU. In this regard, the claims that Article 5 of the Directive has not been transposed in the Ship Labour Act are not relevant.[36] As a matter of EEA law, the applicability of the Directive to workers protected under national employment law is not dependent on the legal technique chosen for the implementation of the Directive.

51. For workers not protected under national law, *e.g.* because they are not covered by national law or because they specifically have been excluded due to national definitions of workers, ESA submits that a case-by-case assessment is required, in order to assess if a person is covered by the definition of 'workers' as a matter of EEA law.[37]

52. On the other hand, workers might not be protected under national law, because they fall outside the jurisdiction of the EEA States, such as seafarers working on ships not flying the flag of an EEA State. In that case, the worker would not be covered by the Directive, unless a 'sufficiently close link' to the EEA can be established.[38] The situation of such seafarers would on the other hand generally be governed by the MLC.

53. Consequently, ESA submits that, if the respondents before the Supreme Court are workers protected by the WEA or the Ship Labour Act, or any other relevant instrument of national employment law, which is for the national court to determine, and have an employment relationship with a temporary work agency, Article 5 of the Directive applies.

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[35] See however para. 32 of these written observations above.

[36] In any case, ESA notes that one of the purposes of Ship Labour Act in Section 1a is to ensure equality of treatment which also encompasses pay. The CJEU has consistently held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of that directive in order to achieve an outcome consistent with the objective pursued by the directive. See to that effect Case C-176/12 *Association de médiation sociale*, EU:C:2014:2, para. 38 and the case-law cited; Case C-497/13, *Faber*, EU:C:2015:357, para. 33; Case C-232/20 *Daimler*, EU:C:2022:196, para. 76 and in the context of Temporary Work Agency Directive Case C-426/20 *Luso Temp*, para 50.

[37] Compare also Case C-232/09 *Dita Danosa,* para. 56.

[38] See paras 41, 46 of these written observations above and para. 56 below.

5.3 Geographical scope

54. As regards territorial scope in the EU, Article 52 TEU states that the Treaties apply to all the Member States and the territorial scope of the Treaties is specified in Article 355 TFEU. As pointed out by the Court in *Scanteam*, it follows from well-established case law of the CJEU that EU 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 Union.[39]

55. The starting point for determining the territorial scope of the EEA Agreement is Article 126. With respect to the EEA EFTA States, Article 126 sets out that the EEA Agreement "*shall apply […] to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway*."

56. As set out above, 'workers' are defined in Article 3(1)(a) of the Directive as any person who, in the EEA State concerned, is protected as a worker under national employment law. ESA notes that the Directive does not contain any specific geographical limitation.

57. As set out by the Court in *Scanteam*, even if a directive is not subject to any specific geographical limitation, this does not entail that the applicability of that directive is without limit. Legal acts incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement.[40]

58. In Case C-347/10 *Salemink*, the CJEU dealt with the issue whether EU law is applicable to work carried out on a fixed installation on the continental shelf adjacent to a Member State. In its assessment the CJEU found that in establishing the applicability of EU law "*reference must be made to the rules and principles of international law relating to the legal regime applicable to the continental shelf*".[41] In application of those principles the CJEU found the necessary link with the territory of the Member State.

[39] Case E-8/19 *Scanteam AS,* para. 67 and the case law cited.
[40] Case E-8/19 *Scanteam AS,* para. 65.
[41] Case C-347/10 *Salemink,* EU:C:2012:17, para. 31.

59. Specifically, the CJEU then referred to Article 80 of the Convention on the Law of the Sea, read in conjunction with Article 60, according to which the coastal State has the exclusive right to construct the artificial islands, installations and structures on the continental shelf, to authorise them and to regulate their construction, operation and use.[42]

60. With reference to Articles 77 and 80 of the Convention on the Law of the Sea, the CJEU found that:

> *Since a Member State has sovereignty over the continental shelf adjacent to it — albeit functional and limited sovereignty […] work carried out on fixed or floating installations positioned on the continental shelf, 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 EU law […].*[43]

61. In ESA's view, Article 126 of the EEA Agreement does not preclude the approach set out in *Salemink* with regard to the EEA Agreement as regards the territory of an EEA State, in the same way as that Article does not preclude EEA law from having effects outside the territory of the EEA, as confirmed by the Court in *Scanteam*.[44] On the contrary, ESA submits that it is necessary to consider jurisdiction on the continental shelf where EEA States exercise sovereign rights as the "territory" of that State under Article 126 EEA, in order to an ensure a homogenous application of EEA law across the EEA.

62. Consequently, ESA submits that also under the EEA Agreement, work carried out on fixed installations on the continental shelf adjacent to an EEA State must be

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[42] Case C-347/10 *Salemink,* para. 34.

[43] Case C-347/10 *Salemink,* para. 35 (emphasis added). See also Joined Cases 3/76, 4/76 and 6/76 *Cornelis Kramer and others*, EU:C:1976:114, paras 30-33, Case C-37/00 Weber, EU:C:2002:122, paras 34-35, Case C-6/04 *Commission v UK*, EU:C:2005:626, para. 117 and Case C-111/05 *Aktiebolaget*, EU:C:2007:195, para. 59. In the latter, the CJEU held that "*the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State. That finding is confirmed by Articles 58(1) and 79(1) of the Convention, which permit, subject to certain conditions, any State to lay undersea cables in those zones".*

[44] Case E-8/19 *Scanteam,* paras 65-66 and Case E-11/20 *Eyjólfur Orri Sverrisson v The Icelandic State*, para. 63.

considered carried out on the territory of that State, as set out by the CJEU in *Salemink*.[45] As the CJEU has established, a Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.[46] ESA submits that the same applies in relation to the application of the EEA law provisions establishing a protective framework for temporary agency workers who are covered by the national employment law of the Member State concerned.

63. The referring court's question, however, does not concern work carried out <u>on</u> fixed installations, but rather on vessels in connection with petroleum activities on the Norwegian continental shelf.[47] ESA notes that the case of *Kik* concerned a person working on board a pipe-laying vessel. However, in *Kik* there were no indications that the work on the vessel above the continental shelf of a Member State was "*intended for the exploration of the continental shelf or the exploitation of its resources*".[48] The absence of indications of a connection of the work with the exploitation of natural resources on the continental shelf adjacent to the Member State was considered to be (i) not sufficient to treat such work as carried out on the territory of the Member State,

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[45] Case C-347/10 *Salemink,* paras 34-35. See ESAs Reasoned Opinion of 24 September 1999 No 233/99/COL, in particular page 4-6.

[46] Case C-347/10 *Salemink,* para. 36.

[47] Request para. 13. It is also clear from the Request that the work carried out on the vessels represented a large percentage of the working time for both the respondents, see para. 11. As the question of the applicability of EU law on fixed installations for the exploitation of national resources is settled in the case law of the CJEU, it can be understood that the national court focuses on the novel question, namely that of the applicability of EEA law to work carried out on vessels in connection with such activities.

[48] Case C-266/13 *Kik*, EU:C:2015:188, paras 40 and 41. Here, when assessing the jurisdiction of the Member State under the Convention of the Law of the Sea, the CJEU held that such a vessel could not "*be regarded as an 'artificial island', an 'installation' or a 'structure' on the continental shelf, within the meaning of Article 80 of that convention*". It added that in any case, "*there is no indication in the order for reference that the pipelines laid by the vessel on which Mr Kik was working during the periods when it was above the part of the continental shelf adjacent to certain Member States were <u>intended for the exploration of the continental shelf or the exploitation of its resources</u>.*" (emphasis added). ESA also notes Case C-37/00 *Weber*, EU:C:2002:122, concerning the question whether the contract of employment on board mining vessels or on mining installations stationed over the Netherlands continental shelf had a connection with the territory of at least one Contracting State of the Brussels Convention, although the person in question was a cook and not engaged in activity connected with mining installations. The CJEU held in para. 36 that that *"work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) of the Brussels Convention."*

but (ii) not capable of calling into question the applicability of EU law.[49] The CJEU had to look into other factors to establish a connection with the territory of a Member State and to conclude on that EU law was applicable.[50]

64. In the present case, unlike in *Kik*, it appears from the Request uncontested that the respondents' work on the vessels was connected to the exploration of the continental shelf of an EEA State or the exploitation of its resources. Hence, it could be argued that work carried out on vessels such as those in the main proceedings must be considered as carried out on the "territory" of an EEA State under Article 126 EEA, *because the vessel is used in relation to fixed installations on the continental shelf adjacent to that State*.[51] Consequently, any national rules applicable to such vessels must be in compliance with EEA law.

65. Notwithstanding the arguments set out above, it is clear from the case law of the CJEU and the EFTA Court that the mere fact that a worker carries on his activities outside the territory of the EU or the EEA, is not sufficient to exclude the application of EU/EEA law. EU and EEA law may apply to professional activities outside the territory of the EEA if the employment relationship retains a *sufficiently close link* with the EU or the EEA.[52] More specifically, in the *Sverrisson case*, the Court held that:

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[49] Case C-266/13 *Kik*, paras 40 and 42.

[50] it was sufficient that the person concerned was resident in a Member State and his employer was established in a State treated as a Member State for the purpose of social security rules, see Case C-266/13 *Kik*, para. 44.

[51] Such a conclusion would, in principle, mean that EEA law could also apply to ships used in connection with installations on the continental shelf adjacent to that State, even if those ships do not fly the Norwegian flag. In that regard, ESA notes that the Norwegian Government adopted legislative amendments to apply Norwegian wage conditions to domestic shipping and vessels serving offshore installations. These have been approved by the Norwegian Parliament on 6 June 2025. 'Lovvedtak 84 (2024-2025) *Lov om endringer i allmenngjøringsloven og petroleumsloven mv. (allmenngjøringslovens anvendelse på innenriks skipsfart og rettighetshaveres plikt til å sørge for norske lønnsvilkår på skip)*, entering into force partly on 1 July 2025 and partly on 1 January 2026. In the preparatory works in Prop. 88 L (2024-2025), the Ministry argued that Norway's jurisdiction extends to all such vessels, regardless of flag, because they are involved in the operation or use of installations on the continental shelf, see page 25. ESA has, as part of a public consultation, submitted to the Norwegian Government that the proposal would be in breach of the Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States and Council Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. See Decision 176/24/COL with Annex.

[52] Case C-544/11 *Petersen*, EU:C:2013:124, para. 41 and case law cited; Case C-266/13 *Kik,* para. 42 and the case law cited; Case E-8/19 *Scanteam,* paras 67-69.

> *"provisions of EEA law may apply to professional activities pursued outside the territory of the EEA States as long as the employment relationship retains a sufficiently close link with the EEA. That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of an EEA State and thus the relevant rules of EEA law, on the other".*[53]

66. As set out by the CJEU, a sufficiently close connection between the employment relationship in question and the territory of the EU derives, *inter alia*, from the fact that an EU citizen, who is resident in a Member State, has been engaged by an undertaking established in another Member State on whose behalf he carries on his activities.[54]

67. In that regard, ESA considers that the also fact that the work is carried out on vessels flying the flag of an EEA State, would be one element establishing such a link. Article 92 of Convention on the Law of the Sea provides that every State has exclusive jurisdiction over ships flying its flag on the high seas (and therefore also when they are located above that State's own continental shelf and in the Exclusive Economic Zone (EEZ)). As pointed out by the CJEU in *Sea Watch,* this entails several obligations for flag State, including the obligation to exercise effectively its jurisdiction and control and to ensure safety at sea, particularly about labour conditions.[55] The CJEU has also in cases such as *Vas Shipping APS* determined the applicability of EU law based on that distinction.[56]

68. Further, ESA notes that there are also several other relevant elements in the present case linking the case to the EEA. In *Kik* the CJEU found that there was there is a sufficiently close link with the territory of the EU because Mr Kik, who worked on a vessel above continental shelf of a Member State, paid tax in the Netherlands and received his salary in either the Netherlands or Switzerland, from which it might be

[53] Case E-11/20 *Eyjólfur Orri Sverrisson*, para. 64 and the case law cited.
[54] Case C-266/13 *Kik,* para. 43 and case law cited.
[55] Joined Cases C-14/21 and C-15/21 *Sea Watch*, EU:C:2022:604, para. 99
[56] Judgment in Case C-71/20 *VAS Shipping ApS*, EU:C:2021:550, para. 25 and Case C-286/90 *Poulsen*, EU:C:1992:453*,* paras 12-22.

assumed that the law applicable to the employment contract was the law of one of those States, which was confirmed by the CJEU.[57]

69. In the present case, based on the information in the Request, ESA notes that the respondents are Norwegian nationals residing in Norway, employed by a Norwegian temporary work agency, from which they receive their salaries, and are hired out to Norwegian undertakings. Consequently, ESA submits that there in any case is a sufficiently close link to the EEA.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to give following answer to the Request:

Article 5 of the Temporary Agency Work Directive is to 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.

Ewa Gromnicka Kyrre Isaksen Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority

[57] Opinion of Advocate General Cruz Villalón in Case C-266/13 *Kik,* EU:C:2014:2300, para. 40 and judgment in Case C-266/13 *Kik,* para. 44.