EFTA Court
Registry
1, Rue du Fort Thüngen
L-1499 Luxembourg

Oslo, 18 April 2024

**WRITTEN OBSERVATIONS**

**TO**

**THE EFTA COURT**

submitted pursuant to Article 90 (1) of the Rules of Procedure of the EFTA Court

represented by

advokat Nicolay Skarning and

advokat Jan Magne Langseth

**IN CASE E-2/24**

**BYGG & INDUSTRI NORGE AS AND OTHERS**

***v.***

**THE NORWEGIAN STATE, THE MINISTRY OF LABOUR AND SOCIAL INCLUSION ("ARBEIDS- OG INKLUDERINGSDEPARTEMENTET")**

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## 1 INTRODUCTION AND THE BACKGROUND TO THE DISPUTE IN THE MAIN PROCEEDINGS

(1) On 26 January 2024, Oslo District Court (hereinafter the "referring court") requested an Advisory Opinion from the EFTA Court. The parties were requested to submit their written observations by Friday, 19 April 2024. As stated in the request, the case concerns the ban against utilising temporary agency workers in Section 14-12 of the Working Environment Act ("WEA") and Section 4 of the Regulation on Temporary Agency Work ("the Regulation").[1] The Plaintiffs brought the case before the referring court on 5 September 2023 after the EFTA Surveillance Authority ("ESA") had sent a Letter of Formal Notice ("LFN") dated 19 July 2023 to the Norwegian Government. The legal basis relied on in ESA's LFN is Article 36 EEA and the Temporary Agency Work Directive ("TAWD" or "the Directive") in conjunction.[2] ESA had received several complaints, including from the organisation "SMB Norway," an interest group for SMEs.

(2) The case pending before the referring court is, so far, the first and only lawsuit pending with a claim for redress and a declaratory judgment[3] against the Government ascertaining a breach of EEA law. However, already on 13 June 2023 (prior to the LFN), several other temporary-work agencies filed a petition for an interim injunction, where the claim is that the Government is obliged to tolerate that the appellants lease out employees to the same extent as before the entry into force of the new provisions in the TAWD and the Regulation. Both the Oslo District Court and Borgarting Court of Appeal dismissed the temporary-work agencies' claim.[4] The Norwegian Supreme Court quashed the Court of Appeal's decision on 25 March 2024[5] and sent the case back for reconsideration.

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[1] The national legal framework will be described further below under pt. 2.

[2] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[3] The Plaintiffs claim that Section 2 of the Norwegian EEA Act ("EØS-loven") and Protocol 35 EEA on the implementation of EEA rules must lead to the conclusion that the contested restrictions cannot be applied.

[4] Decision by the Oslo District Court, 30 June 2023 (TOSL-2023-89874). https://lovdata.no/avgjorelse/tosl-2023-89874, and decision by Borgarting Court of Appeal, 15 December 2023 (LB-2023-138986). https://lovdata.no/avgjorelse/lb-2023-138986

[5] Decision by the Interlocutory Appeals Committee of the Supreme Court, 25 March 2024 (case no.: 24-024396SIV-HRET (HR-2024-581-U)). https://www.domstol.no/globalassets/upload/hret/avgjorelser/2024/mars/hr-2024-581-u.pdf.

(3) As stated in the request, the Plaintiffs in the main proceedings before the referring court are mostly temporary-work agencies established in Norway. Two new Plaintiffs have joined since the referring court sent its request, and one of the Plaintiffs is a recruitment agency based in Poland that provides candidates for hire to Norwegian temporary-work agencies.

**Annex 1.** Submissions to the Oslo District Court ("prosesskriv") providing relevant information and clarifications regarding the identity and nature of two new Plaintiffs (incl. unofficial translation)

(4) One of the main issues in dispute is whether the Plaintiffs may rely on Article 36 EEA in the proceedings before the referring court. The Norwegian Government contends that there are no cross-border elements and that the case relates to a "wholly internal" situation, thus precluding the application of Article 36 EEA (the first question).[6] The Plaintiffs contend that the mere fact that the temporary-work agencies are established in Norway cannot lead to the conclusion that the situation is "wholly internal". Such a conclusion has no support in ECJ's case law. There are multiple cross-border elements in the case which allows for the direct application of the relevant EEA provision in the present case. This will be discussed further under the first question referred to the Court.

(5) The parties also disagree on which legitimate interests may justify the restrictions on the freedom to provide services afforded by EEA law (the second question) and the assessment of which criteria will be relevant for determining whether the restrictions in the present case are suitable, consistent, and necessary (the third question).

(6) Below, the changes to the WEA and the national regulatory framework will be described in pt. 2. The relevant EEA law and contextual background will be presented in pt. 3. Finally, the assessment of the questions under EEA law and the Plaintiffs' proposed answers will be addressed in detail in pt. 4.

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[6] In another parallel case, referred to above, brought by another group of plaintiffs (in an application for interim measures), the Borgarting Court of Appeal concluded that the situation was "purely internal" based on the merits of the case in question. Case reference: 23-138986ASK-BORG/04, decision of 1 December 2023. The Supreme Court partially quashed the decision, cf. the references cited in pt. 3 below.

## 2 NATIONAL LAW – THE RESTRICTIONS ON THE USE OF TEMPORARY WORK

### 2.1 Introduction

(7) In the Plaintiffs' view, the history and legislative background are relevant for the Court's assessment of whether the measures pursue a legitimate aim and are proportionate (questions 2 and 3). Therefore, the legal context and history are described in more detail below.

(8) As an introductory remark, it must be recalled that temporary-work agencies serve an essential purpose in the Norwegian economy. A report by independent consultants Menon Economics in 2022 examining the value of the staffing industry held that

> "The staffing industry plays an important role in the Norwegian economy and business, directly and indirectly, through the added value their industry creates for other industries that depend on the labour and flexibility (more scalable capacity) that the staffing industry offers, such as for companies in industries with large seasonal and production fluctuations and for companies that otherwise struggle to recruit qualified personnel. The access to being able to make use of hired labour provides more predictable delivery capability, less vulnerability to unforeseen events (for example illness or employees in quarantine), as well as increased quality of services (for example through access to specialised expertise that undertakings do not have a permanent need for). A simple metaphor for the industry's role and function can be 'small cog that plays a big role in the big machinery/clockwork'."[7]

(9) On 1 April 2023, the Government implemented the most stringent restrictions in recent history concerning utilising temporary agency workers in Section 14-12 of the WEA and Section 4 of the Regulation on Temporary Agency Work ("the Regulation").[8] These two significant changes concerned:

a) A prohibition on hiring employees from temporary-work agencies in situations where *"the work is of a temporary nature"*, cf. Section 14-12 (1), cf. Section 14-9 (2) letter a) WEA.

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[7] Jakobsen, Erik W. *et al.* (Menon Economics), "Report: The Value of the Staffing Industry: Consequences of a tightening or ban on the hiring of labour" ("Rapport: Verdien av bemanningsbransjen: Konsekvenser av en innstramming eller forbud mot innleie av arbeidskraft"), Menon publication no. 2/2021, p. 8-9 (our translation). https://www.nhosh.no/contentassets/0422d5a59df54d799fc3a0a506acbc4c/rapport_verdien-av-bemanningsbransjen-kopi.pdf. NO: "Bemanningsbransjen spiller en viktig rolle i norsk økonomi og næringsliv, direkte og indirekte, gjennom de merverdiene bransjen skaper for andre næringer som er avhengig av arbeidskraften og fleksibiliteten (mer skalerbar kapasitet) som bemanningsbransjen tilbyr, blant annet for bedrifter i næringer med store sesong- og produksjonssvingninger og for bedrifter som ellers sliter med å rekruttere kvalifisert personell. Adgangen til å kunne benytte seg av innleid av arbeidskraft gir mer forutsigbar leveringsevne, mindre sårbarhet for uforutsette hendelser (for eksempel sykdom eller ansatte i karantene), samt økt kvalitet på tjenester (for eksempel gjennom tilgang på spesialisert kompetanse som en ikke har permanent behov for). En enkel metafor på bransjens rolle og funksjon kan være «lite tannhjul som spiller stor rolle i det store maskineriet/urverket."

[8] Regulation 11 January 2013 No. 33 (NO: "Forskrift 11. januar 2013 nr. 33 om innleie fra bemanningsforetak").

b) A total prohibition on hiring from temporary-work agencies for construction work in the Wider Oslo area (counties of Oslo, Viken and the former Vestfold) in the Regulation to the WEA.

(10) The restrictions are far-reaching and have entailed significant repercussions for temporary-work agencies, including the Plaintiffs, user undertakings hiring workers from the agencies, and the temporary agency workers themselves. The restrictions also impact recruitment companies and other service providers to the temporary-work agencies established in other EEA countries because they can no longer offer services to temporary-work agencies operating in Norway. It is common for Norwegian temporary-work agencies to use recruitment companies elsewhere in the EEA to assist in recruiting employees for work in Norway. Due to the contested restrictions, several Norwegian temporary-work agencies have declared bankruptcy and gone out of business.[9] The parties agree that the measures amount to a restriction on the freedom to provide services under Article 36 EEA.

### 2.2 Review of past legislative amendments

(11) The regulations governing the use of temporary work, especially the provisions regarding temporary agency workers, have undergone several changes over time due to political disagreement between shifting governments. Until 1971, the use of hiring and leasing of labour was generally unregulated, with a few limited exceptions stipulated in Act of 27 June 1947.[10] In 1971, the law was amended, introducing a ban on the lease of labour. In 2000, this prohibition was lifted due to shifts in the labour market, allowing for leasing all types of labour. The same year, the prohibition on private labour mediation in the Employment Act of 1947 was repealed.[11] Private labour mediation became permissible under specific conditions based on the following rationale:

> "The conditions in the labour market are undergoing significant change, characterised by increased job turnover, continuing education, and flexibility. Furthermore, the labour market has become more specialised, with niches for specific professions. The current legislation, including the prohibition on private job placement, is poorly suited to this situation. Experiences from other countries that have lifted the ban on private job placement suggest that private job placement will have very little impact on public employment services. However, private specialised job placement firms can complement the public employment service by catering to niche segments of the diverse job market. As such, private entities can contribute to the goal of a well-functioning labour market. Access to private job

[9] See documentation provided further below.

[10] See Act of 27 June 1947.

[11] See Act 4 February 1977 No. 4.

> placement could stimulate the public employment service to enhance its efficiency and customer orientation."[12]

(12) Thus, all types of temporary labour were permitted. The provisions in today's WEA (2005)[13] were first incorporated into the WEA of 1977 as Section 55 K and 55 L. There was a general permission for hiring from temporary-work agencies in Section 55 K. However, a safeguard was introduced, stating that *"*The King may, by regulation, prohibit hiring for certain groups of workers or in certain areas when important societal considerations necessitate it."[14] The legislative committee in Report No. 1998: 15 expressed a concern that the temporary work industry would become an alternative "too attractive" for workers. [15] There was a fear that overly liberal temporary work regulations would lead employees to resign from their permanent positions, join temporary-work agencies, and subsequently be leased back to their employers. Historically, the legislator thus built upon the principle that hiring should be permitted to the same extent as temporary employment under the WEA and the Civil Service Act.[16]

(13) Upon implementing the TAWD in 2012, thorough assessments were conducted regarding the legality of existing regulations outlined in Section 14-12 of the WEA, in compliance with the allowed restrictions outlined in the TAWD Article 4, and Articles 36 and 37 EEA. The Directive introduced necessary regulations ensuring equal treatment of workers from temporary-work agencies concerning salary and working conditions. Furthermore, the Directive represented a compromise necessitated by the role played by temporary-work agencies and their recognition as employers, intending to effectively contribute to job creation and develop flexible forms of employment.

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[12] Ot.prp. nr. 70 (1998-1999) Chapter 5.3.1 (our translation). https://www.regjeringen.no/no/dokumenter/otprp-nr-70-1998-99-/id120864/?ch=1. NO: "Forholdene på arbeidsmarkedet er i sterk endring med større grad av jobbskifter, videreutdanning og fleksibilitet. Arbeidsmarkedet er videre blitt mer spesialisert med nisjer for spesielle profesjoner. Dagens regelverk med et forbud mot privat arbeidsformidling er lite tilpasset denne situasjonen. Erfaringer fra andre land som har opphevet forbudet mot privat arbeidsformidling tilsier at privat arbeidsformidling vil få svært liten betydning for den offentlige arbeidsformidlingen. Private spesialiserte arbeidsformidlingsfirmaer vil imidlertid på dagens varierte arbeidsmarked kunne supplere den offentlige arbeidsmarkedsetaten ved å betjene nisjer i arbeidsmarkedet. De private aktørene vil derved kunne bidra til målet om et godt fungerende arbeidsmarked. En adgang til privat arbeidsformidling vil kunne stimulere arbeidsmarkedsetaten til økt effektivitet og kundetilpasning.*"*

[13] The Working Environment Act 17 June 2005 No. 62. The WEA came into effect in January 2006.

[14] WEA (1977) Section 55 K (5). NO: *"*Kongen kan i forskrift forby innleie for visse arbeidstakergrupper eller på visse områder når viktige samfunnshensyn tilsier det."

[15] NOU 1998: 15 Chapter 12.3.1. https://www.regjeringen.no/no/dokumenter/nou-1998-15/id116456/.

[16] Act 4 March 1083 No. 3.

(14) The assessment process was undertaken as part of the Government's commitment to reviewing its regulatory framework and eliminating any restrictions that lacked justification based on public interests, cf. Article 4 (1) TAWD. Also, in the context of assessing Section 14-12 WEA in connection with the implementation of the Directive, the following rationale was cited:

> "The rules are justified by the aim to prevent circumvention of regulations regarding temporary employment. Ensuring that access to hiring is similar to that of temporary employment prevents the misuse of hiring regulations at the expense of temporary employment. These are alternative arrangements that must occur on equal terms. (…)
>
> In the preparatory works, the main rule of permanent employment is justified, among other things, by the fact that it provides job security for the employee regarding income and job protection. Additionally, it is pointed out that permanent employment also provides greater stability for an employer and makes investing in training measures and skills enhancement more profitable."[17]

(15) In connection with the proportionality assessment, it was further stated in the preparatory works:

> "The central rationale for limiting the use of temporary employment is to facilitate achieving a goal of a workforce predominantly composed of permanent positions. If one were to remove the "parallelism" between the access to temporary employment and the access to hiring through temporary-work agencies, the purpose behind the rules governing temporary employment could be easily circumvented. This argues against the idea that equivalent protection could be achieved through less intrusive measures."[18]

(16) In 2019, a definition of permanent employment was included in Section 14-9 (1) WEA. The definition aimed to ensure the predictability of employment for all employees, including temporary agency workers. Consequently, contracts known as *"zero-hour contracts"* were no longer permissible, as the definition ensured a clearly specified amount of pre-determined paid working hours. Additionally, an amendment to Section 14-12 required a collective bargaining agreement with a trade union with the right of nomination pursuant to the Labour Disputes Act (the major Norwegian nationwide unions having a minimum of 10,000 members),[19] replacing the previous practice of unrestricted hiring based on a local "house association" agreement.

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[17] Prop. 74 L (2011-2012) Chapter 7.1.5.2 (our translation). https://www.regjeringen.no/no/dokumenter/prop-74-l-20112012/id676850/. NO: "Reglene er begrunnet med at de skal hindre omgåelse av reglene om midlertidig ansettelse. At adgangen til innleie er lik den ved midlertidig ansettelse, hindrer misbruk av innleiereglene på bekostning av midlertidig ansettelse. Dette er alternative ordninger som må skje på samme vilkår" og "I forarbeidene begrunnes hovedregelen om faste ansettelser blant annet med at det fører til trygghet for arbeidstakeren når det gjelder inntekt og stillingsvern. Det vises i tillegg til at faste ansettelser også for en arbeidsgiver gir større stabilitet og gjør det mer lønnsomt å investere i opplæringstiltak og kompetanseheving."

[18] Prop. 74 L (2011-2012) Chapter 7.1.5.3 (our translation). NO: "Den sentrale begrunnelse for begrensningen på bruk av midlertidig ansettelse er å legge til rette for å nå målet om et arbeidsliv med hovedvekt av faste ansettelser. Dersom man skulle fjerne «parallelliteten» mellom innleieadgang og adgang til midlertidig ansettelse, ville formålet bak reglene om midlertidig ansettelse enkelt kunne omgås. Dette taler mot at tilsvarende beskyttelse kan oppnås ved mindre inngripende tiltak."

[19] Act 27 January 2012 No. 9 Section 30 ("Arbeidstvistloven").

(17) In 2020, the Norwegian Labour Inspection Authority was granted expanded supervisory and enforcement powers aimed at temporary-work agencies. It is for the Labour Inspection Authority to oversee the legality of the use of temporary work. They have the mandate to verify and ensure that the user undertaking and temporary-work agency comply with employment requirements and rules on equal treatment, including the obligation of the user undertaking to provide necessary information to the temporary-work agency.

(18) In 2022, the general authorisation to employ temporary workers for up to one year was revoked. On 1 April 2023, the current stringent restrictions on hiring of workers from temporary-work agencies entered into force. The possibility of using temporary agency workers is still available for instances outlined in Section 14-9 (2) letters b) to e). However, by eliminating the reference to Section 14-9 (2) letter a), the legislator *removed* one of the most central provisions governing the use of temporary agency workers.

(19) This disrupts the parallelism with the possibility of employing employees in temporary positions, a principle consistently underscored by legislators, as indicated by the historical review above. Letter a) previously constituted the prevailing method for engaging employees from temporary-work agencies. Consequently, the typical scenarios involving the utilisation of temporary agency workers for seasonal work, production peaks, or short-term projects where there is a need for competence not ordinarily available in the company are now prohibited.

(20) Due to the removal of letter a) in Section 14-12 (1) WEA, an exception clause was implemented in Section 3 of the Regulation:

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

(21) Section 3 of the Regulation provides that temporary agency workers are always allowed in the case of health care workers and specialised consultants, despite the general restriction in the use of temporary agency workers in Section 14-12 (1) WEA. Furthermore, Section 14-12 (2) WEA provides that in undertakings bound by a high-level collective agreement, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired may enter into a written agreement concerning the use of temporary agency workers for limited periods.

(22) The general restriction provided in Section 4 of the Regulation on hiring employees from temporary-work agencies in the construction industry is geographically limited but is nonetheless highly intrusive. The ban on construction sites applies even if a temporary workforce is needed to cover absences (e.g., both long-term and short-term sick leaves, parental leave, and military service) of a company's permanent employees. It applies without exception, and its application is not time limited. In addition, Section 14-12 (3) WEA was amended so that a temporary agency worker hired continuously for more than three years is entitled to permanent employment in the user undertaking, irrespective of the basis for the hiring. Further, Section 14-12 (4) WEA clarified the definition of hiring personnel. This provision is new and may result in more service contracts being classified as hiring of personnel rather than service agreements with third-party contractors.

(23) When the proposals for the restrictions were discussed in Proposition to Parliament 131 L (2021-2022), a proposal was also made to establish an approval scheme for temporary-work agencies. This approval scheme came into effect on 1 January 2024, following the restrictions on hiring-in of workers.[20] The approval scheme requires temporary-work agencies to document their compliance with existing legal obligations.

### 2.3 Rationale behind the restrictions

(24) The legislator has provided a similar rationale for the restrictions implemented in 2023 as when the legislation was reviewed due to the implementation of the Directive in 2012:

> "The proposals are grounded in the government's aim to ensure full-time and permanent positions that support the two-party relationship between the employee and employer. Permanent employment provides individual workers with security and predictability regarding their future work situation and income."[21]

(25) In the legislative proposal implementing the Directive, the Government highlighted that the equal treatment principle was necessary to ensure and uphold the main rule of permanent direct employment, limiting the use of temporary agency workers to situations where the need for flexibility was *genuine*.[22] In the same manner, the Government's intention with the current contested restrictions has been to reduce the use of temporary agency workers in order to obtain

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[20] See Regulation 4 June 2008 no. 541 on the public approval for temporary-work agencies.

[21] Prop. 131 L (2021-2022) Chapter 1, p. 6 (our translation). https://www.regjeringen.no/no/dokumenter/prop.-131-l-20212022/id2919207/. NO: "Forslagene er begrunnet i regjeringens mål om å sikre hele og faste stillinger som bygger opp under topartsforholdet mellom arbeidstaker og arbeidsgiver. Faste ansettelser gir den enkelte arbeidstaker trygghet og forutsigbarhet med hensyn til fremtidig arbeidssituasjon og inntekt."

[22] Prop. 74 L (2011-2012) p. 51.

more direct permanent employment. The Government's letter to ESA dated 5 May 2023 stated that *"the principal objective* of the new regulations is to facilitate permanent employment in a two-party relationship between an employee and an employer to be used to the greatest extent possible. … Thus, the use of agency work must not be too widespread.*"*[23] The letter further states:

> "The Ministry notes, *inter alia*, that enforcement measures are not enough to reduce the use of temporary agency work that displaces permanent and direct employment, and to limit the negative effects temporary agency hiring has on contract workers, the hiring agency's own employees and the labour market. The Ministry points out that there is a need for measures to limit the right to hire as such, and not only to crack down on illegal hiring."[24]

**Annex 2.** Letter from the Government to ESA dated 5 May 2023: "Request for information concerning restrictions on the use of temporary agency workers in Norway."

(26) The Government has not documented that the implemented restrictions will lead to more permanent direct employment. ESA highlighted this in its opening letter:

> "… it is difficult to see the causality between removing an option for temporary needs on the one hand and increasing permanent employment on the other hand. Using temporary agency workers for work of a temporary nature is caused by a short-term need in the user undertakings, and that need will not change or disappear. Since the need in the user undertakings is temporary, it will not be a desirable alternative to increase the number of permanently employed workers. In fact, this measure could just as well lead to more fixed-term employment, more part-time work, more overtime work, more self-employment, more subcontracting or more dismissals. The Norwegian Government even acknowledges in the letter of 5 May 2023, that some of these could be the consequences of this measure. In any event, the Authority cannot see that the likely consequences of this measures have been fully analysed, demonstrating a causal link between the measure and the objective pursued."[25]

**Annex 3.** ESA's Letter of Formal Notice dated 19 July 2023.

(27) The identical logic also applies to the restriction on hiring from temporary-work agencies for construction work.[26] The legislator has cited statistics that suggest the opposite of an increase in the utilisation of temporary agency workers. This follows from the preparatory works:

> "The figures from the staffing industry for 2021 indicate increased leasing activity. Throughout 2021, the industry had largely returned to the same level as before the pandemic. The exception was the construction sector, where leasing activity decreased by nearly ten per cent compared to the previous year."[27]

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[23] Op. cit. on page 4 (our formatting).

[24] Norway's Response to ESA's Request for Information dated 5 May 2023, p. 44.

[25] ESA's Letter of Formal Notice dated19 July 2023, para. 77.

[26] Ibid., para. 96.

[27] Prop. 131 L (2021-2022) Chapter 3.1 (our translation). NO: *"*Tallene fra bemanningsbransjen for 2021 viser økt utleieaktivitet. I løpet av 2021 var bransjen i stor grad kommet tilbake på samme nivå som før pandemien. Unntaket var bygg og anlegg, hvor utleieaktiviteten ble redusert med nærmere ti prosent fra året før."

(28) Regarding the construction industry, the legislator had the following statements:

> "The construction industry extensively utilises temporary work hiring. Statistics from SSB ["Statistics Norway"] show that hiring accounted for over 8 per cent of the work hours in the industry in 2019, equivalent to nearly 18.000 full-time equivalents. This level has remained high for some time, with a clear increase in the number of hired-in full-time equivalents during the period from 2015 to 2019. (…)
>
> Data from the temporary work industry indicate a decrease in the use of leasing to the construction sector from the second quarter of 2019 and onwards, which they attribute to changes in employment laws that came into effect that year, with a transitional period in the first half. Additionally, there are general effects of the pandemic and the impact of entry restrictions, which led to a significant reduction in labour immigration."[28]

### 2.4 Effects of the restrictions

(29) As a result of the amendment to Section 14-12 (1) WEA, the provision still permits the use of temporary agency workers in Norway, but only in a few strict instances. Consequently, the "typical" scenarios involving temporary-agency workers, such as seasonal work, production peaks, or short-term projects requiring specialised labour not readily available internally for other undertakings – typically deemed to be work of a "temporary nature" – are now illegal.

(30) The restrictions are *extensive* and *severe*, with potentially significant repercussions for user undertakings, temporary-work agencies, and temporary agency workers in Norway, in addition to service providers established elsewhere in the EEA that could previously sub-contract or deliver services to undertakings established in Norway. The restrictions in the WEA are applicable universally across all sectors and eliminate the primary avenue for utilising temporary agency workers. The restriction that applies to the construction sector constitutes a total prohibition in a specific industry, notably in Norway's most densely populated geographic area.[29] Furthermore, these imposed restrictions disproportionately impact small and medium-sized undertakings, which rely more heavily on high flexibility and cannot avail themselves of the

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[28] Prop. 131 L (2021-2022) Chapter 3.2 (our translation). NO: "Byggenæringen benytter innleie i betydelig omfang. SSB-tall viser at innleie utgjorde i overkant av 8 prosent av timeverkene i næringen i 2019, som tilsvarte oppimot 18 000 årsverk. Nivået har vært høyt gjennom lengre tid, og det var en klar vekst i antall innleide årsverk i perioden 2015-2019. … Bemanningsbransjen tall viser en reduksjon i utleie til bygg fra og med andre kvartal 2019, noe de knytter til endringene i arbeidsmiljøloven som trådte i kraft det året, med en overgangsperiode i første halvår. I tillegg kommer generelle virkninger av pandemien, og virkninger av de innreiserestriksjonene som har vært gjeldende, som førte til en betydelig reduksjon i arbeidsinnvandringen."

[29] In the legislative proceedings, reference was made to Fafo's 2017 report, which estimated that the proportion of leased workers in the construction industry was around 4-7 percentage points higher in Oslo and Akershus (former Viken) than in the rest of the country. Additionally, the temporary-work industry estimated that the percentage of leased workers in Oslo was around double the national average in the same year. See Prop. 131 L (2021-2022) point 3.2, page 13 "Fafo anslo i 2017 at andelen innleide i byggenæringen var om lag 4-7 prosentpoeng høyere i Oslo og Akershus enn resten av landet. Bemanningsbransjen anslo samme år at prosentandelen innleide i Oslo lå rundt det dobbelte av landsgjennomsnittet."

exception in Section 14-12 (2) WEA, as they lack a collective agreement with one of the major trade unions.[30]

(31) In February 2024, NHO Service and Trade presented several consequences following the restrictions on hiring from temporary-work agencies and the generally weak Norwegian economy. In the fourth quarter of 2023, working hours in the temporary-work industry decreased by 21.7% compared to the previous year, and its revenue decreased by 16.3%. There was a significant decline in the industry's share of employed workers and man-years, where the temporary-work industry accounted for 0.82% of employed workers and 1.06% of man-years, compared to the fourth quarter of 2022 where the industry accounted for 1.04% of the employed workers and 1.35% of man-years. Furthermore, six out of ten companies in the sector have terminated or will terminate employees due to the legislative changes, and the 51 companies that responded to the survey will collectively terminate 1700 employees.[31] Thus, the report indicates that the restrictions have resulted in significant negative consequences for the industry and workers.

(32) The restrictions may cause undertakings relying on temporary agency workers to lose the ability to quickly adapt to changes in workforce demand in case of seasonal fluctuations or unforeseen events. This can be particularly problematic in industries such as the construction sector, where workloads vary significantly over time and where the need for additional labour can arise suddenly, for instance, due to successful tender procedures (which may also be cross-border tenders) where the need for temporary labour is evident due to lack of previous, permanent establishment in Norway. Consequently, projects may be delayed, negatively impacting both schedules and finances. Potential bidders in tender procedures from other EEA States may also, in effect, be barred from participating in tenders in Norway. Moreover, the restrictions, except

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[30] Statistics Norway (NO: "Statistisk sentralbyrå"), *Statistics on hiring and leasing in the labor market* (NO: *"Statistikk om utleie og innleie på arbeidsmarkedet"*), 2022, point 3.2, page 19. https://www.ssb.no/arbeid-og-lonn/sysselsetting/artikler/statistikk-om-utleie-og-innleie-pa-arbeidsmarkedet.muligheter-og-kvalitet/_/attachment/inline/fc8f1a90-43e5-4486-81b2-a9477468a6e3:61c21a7d2d27f8dbb1a58e8861bb31794af97eb3/NOT2022-39.pdf.

[31] NHO Service and Trade (NO: "NHO Service og Handel"), *Staffing index 4th quarter 2023* (NO: "Bemanningsbarometeret 4. kvartal 2023"). https://www.nhosh.no/contentassets/f7f93d74f0af4639ba31d9ef2e860f0a/bemanningsbaroometeret-4q23.pdf.

for the consultancy specialist exemption, which is inapplicable to construction sites in the mentioned municipalities, restrict access to specialised expertise.[32]

(33) In the Plaintiffs' opinion, the restrictions will furthermore result in indirect discrimination as they are liable to affect foreign workers more severely than Norwegian workers. In 2021, non-resident temporary agency workers comprised approximately one-third of those employed in temporary-work agencies. According to Prop. 131 L (2021-2022), it is indicated that in 2017 approximately 55 per cent of temporary agency workers in Norway had an immigration background, primarily from EEA States in Eastern Europe:

> "There has been a significant growth in the use of temporary agency workers in the last decades, particularly escalating after the EU's eastward expansion in 2004. The growth has primarily been driven by labour immigrants from Eastern Europe. In 2004, approximately 18% of the employees in the staffing industry had an immigrant background. This proportion rapidly increased, reaching 55% in 2017, with the majority originating from the new EU/EEA countries. According to Fafo (Nergaard, 2021), non-resident immigrants make up about one-third of the employed workforce in the staffing industry."[33]

(34) It can be presumed that employees of temporary-work agencies are permanently employed as a main rule. Like all other undertakings, temporary-work agencies operating in Norway are regulated by the WEA, which only allows for temporary employment in the specific instances mentioned in Section 14-9 (2) letter a) to e). Consequently, temporary-work agencies are not allowed to have temporary employment contracts with their workers in order to lease out to an undertaking directly based on the fact that the temporary-work agency has a "temporary" need for labour.[34]

(35) Thus, the Plaintiffs, consisting of small and medium-sized temporary-work agencies, have had permanent employment contracts with their employees, who have therefore been given a predictability of a certain amount of paid working hours. As the temporary agency workers shall have job security in accordance with the provision in the WEA, they have the same job protection

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[32] Construction projects frequently demand competence in diverse fields such as electrical work, plumbing, and carpentry. Consequently, the restrictions will prevent companies from obtaining essential competence, potentially impacting their work's quality and efficiency and, at the same time, restricting intra-EEA trade.

[33] *Op. cit.* on page 11 (our translation). NO: "Det har vært en betydelig vekst i bruken av innleie fra bemanningsforetak de siste tiårene, særlig økte omfanget etter EUs østutvidelse fra 2004. Veksten er i hovedsak blitt drevet av arbeidsinnvandrere fra Øst-Europa. I 2004 hadde om lag 18 prosent av lønnstakerne i bemanningsbransjen innvandringsbakgrunn. Andelen vokste raskt, og utgjorde 55 prosent i 2017. De fleste kom fra de nye EU/EØS-landene. Ifølge Fafo (Nergaard, 2021) utgjør ikke-bosatte innvandrere om lag en tredjedel av de sysselsatte i bemanningsbransjen. I forbindelse med koronapandemien var det innreiserestriksjoner som også hadde betydning for aktiviteten i bransjen."

[34] Prop. 74 L (2011-2012) Chapter 5.10, p. 30.

as workers who are employed permanently and directly in a user undertaking. This differs from directly employed temporary employees who do not enjoy the protection of having a permanent employment contract (with a temporary-work agency) to "fall back" on.

(36) A significant consequence of the restrictions is that temporary agency workers may lose their permanent positions and instead be forced into temporary positions in the user undertaking, which leads to a significant amount of unpredictability.[35] The restrictions may contribute to more significant societal inequalities, in particular to the detriment of workers from other EEA States. Measures which indirectly impacts non-Norwegian EEA nationals more adversely may be seen as a protectionist measure incompatible with EEA law. The use of temporary labour may reduce employers' perception of risk associated with direct and permanent employment. The preparatory works address this by stating that some assessments suggest that work facilitated through temporary-work agencies can increase the likelihood of obtaining regular employment for non-Western immigrants and young individuals without completed secondary education.[36]

(37) Since the restrictions entered into force, the Plaintiffs have, at best, been compelled to resort to downsizing and, at worst, faced bankruptcy.[37] All the Plaintiffs in the present case have suffered substantial contract losses as a result of both the complete prohibition for the use of hiring from temporary work agencies in the construction sector, and the elimination of the option to hire workers for temporary work.

**Annex 4.** HIRE Norway AS: minutes from board meetings no. 3-2022 and no. 1-2023; minutes from a meeting between the General Manager and employee representative regarding downsizing; overviews of fired employees.

**Annex 5.** Report to Oslo District Court regarding the bankruptcy of AVANCER AS, layoff notices to AVANCEr employees, Fleksi Bemanning AS bankruptcy estate information.

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[35] An article from Statistics Norway stipulates that wage earners in the staffing industry with permanent jobs has remained stable at 75% from 2021 until the third quarter of 2023, when the proportion was reduced to 73%. The same article also establishes that 18% transitioned from having a permanent job in labour leasing to being employed temporarily in a new industry. Article: *Fewer wage earners in labour leasing* from Statistics Norway (NO: "Statistisk sentralbyrå"), 9 November 2023. https://www.ssb.no/arbeid-og-lonn/sysselsetting/statistikk/antall-arbeidsforhold-og-lonn/artikler/faerre-lonnstakere-i-utleie-av-arbeidskraft.

[36] Prop. 131 L (2021-2022) Chapter 3.6, p. 15.

[37] As held above, six out of ten temporary-work agencies have or will conduct layoffs as a result of the legislative amendments, see NHO Service and Trade, *Staffing index 4th quarter 2023*.

(38) As such, the restrictions have had and will continue to have severe impacts that create obstacles to the free movement of services, hereunder services facilitated by recruitment agencies in other EEA States serving temporary-work agencies established in Norway. The restrictions also affect the movement of workers across borders, a prerequisite for rendering – and receiving – such services, and hinder undertakings established in other EEA States from receiving temporary work services in Norway to compete with domestic undertakings that have full access to either a permanent workforce or temporary workers that have been hired directly by the "local" undertakings already established in Norway. As such, the restrictions are inherently indirectly discriminatory in several ways.

## 3 THE RELEVANT EEA LAW IN CONTEXT

(39) As previously held, it is not disputed that the contested national restrictions on using workers from temporary-work agencies constitute restrictions within the meaning of Article 36 EEA. Therefore, the Plaintiffs will not discuss the details of what constitutes a "restriction".

(40) The request does not include any direct question pertaining to the interpretation of the TAWD. However, the Directive, and especially its dual purpose, will impact the assessment of the questions posed. The Directive provides that in cases where workers possess permanent contracts with their temporary-work agency, given the heightened protection such contracts confer, provisions should be established to *permit* exceptions from the regulations governing the user undertaking.[38] The Plaintiffs thus contend that Article 36 EEA cannot be interpreted in a "vacuum" in the present case, and that the Directive is relevant for the assessment of whether the objective pursued may be considered legitimate, suitable and necessary. Also, since the Directive applies to both internal and cross-border situations, there seems to be no reason to apply a strict test in relation to the determination of whether a cross-border element is present or not.[39]

(41) In this context, it should also be underscored that ECJ, in Case C-533/13, *AKT* concluded that Article 4 of the Directive could not be directly relied on in proceedings between *private parties*. However, that does not preclude the conclusion that private parties can invoke Article 4 TAWD in proceedings against the State as an independent basis for a claim that national restrictions are

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[38] See the preamble of the Directive points 11 to 15.

[39] Directive 96/71/EC (the "Posted Worker Directive", or "PWD") can apply in conjunction with the TAWD, in certain cases. The Posted Worker Directive applies, by definition, only to cross-border situations, cf. Article 1 nr. 3. In the present case, some of the Plaintiffs are covered by the PWD. For more on this, see further below. Even though the TAWD, in principle, applies to internal situations, it also applies to cases which exhibit cross-border elements.

contrary to EEA law without invoking primary EEA law, such as Article 36 EEA. Since the Directive applies to purely internal and cross-border situations, the principles in Article 4 cannot be "set aside" due to the alleged lack of a sufficient cross-border element.[40]

(42) Moreover, the request does not raise issues directly related to the free movement of workers, cf. Article 28 EEA, or the freedom of establishment, cf. Article 31 EEA. However, the Plaintiffs have invoked Articles 28 and 31 EEA in *parallel* with Article 36 EEA as a basis for the claim for redress and a declaratory judgment in the main proceeding before the referring court. The Plaintiffs emphasise that the free movement of workers enshrined in Article 28 EEA can be invoked by entities other than employees, including employers, cf. the case law cited below.

(43) Even though the referring court has not directly posed any questions relating to Articles 28 or 31 EEA, the EFTA Court is not prevented from providing the referring court with all the elements of EEA law which may assist it in adjudicating the case in the main proceeding.[41] For this reason, the Plaintiffs invite the EFTA Court to give guidance to the referring court and provide its answer to whether the restrictions pursue a legitimate aim (second question) and whether they are proportionate (third question), not only in the context of Article 36 EEA but also in relation to Articles 28 and 31 EEA.

(44) It is evident that for the right to free movement of workers afforded to EEA nationals by Article 28 EEA, it is sufficient for the cross-border element to demonstrate a restriction which puts the exercise of the free movement of an individual at a disadvantage.[42] In the present case, workers from all over the EEA are disadvantaged in their service provision in Norway. The ECJ has repeatedly affirmed that Article 45 TFEU, corresponding to Article 28 EEA, can be invoked by parties other than the workers themselves, including employers.[43] It is also clear that this applies

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[40] The core of the matter was whether a private party could invoke the incompatibility of a national rule with Article 4 *against another private party*. In its conclusions, the ECJ stated that "the provision is addressed only to the competent authorities of the Member States, imposing *on them* an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified."

[41] Joined Cases C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort*, et al. para. 55, where the ECJ held that "… the fact that the referring court has limited its questions to the interpretation of certain provisions of EU law does not prevent the Court from providing it with all the elements of interpretation of EU law which may be of assistance to it in adjudicating on the case before it …"

[42] See, *inter alia, Joined* cases C-11/06 and C-12/06, see also Case C-406/04, *De Cuyper,* and Case C-192/05, *Tas-Hagen.*

[43] Case C-350/96, *Clean Car Autoservice,* para. 19. Parallel statements can be found in Joined cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals et al.,* and Case C-411/22, *Thermalhotel Fontana.*

to private employment agencies, as held by the ECJ in Case C-208/05, *ITC*.[44] It was not significant that the recruitment company was established only in Germany (the home State). The Court stated the following in para. 31:

> " … as regards the question whether national legislation such as the legislation at issue in the main proceedings constitutes a restriction on freedom of movement for workers, it must be pointed out that all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State."

(45) The ECJ concluded that both Articles 45 and 56 TFEU impacted the relevant German restriction. As demonstrated in the *ITC* case, the freedom to provide services afforded in Article 36 EEA may be applied in *parallel* with Article 28 EEA, which must also be true for Article 31 EEA. In this regard, the Plaintiffs note a recent decision by the Interlocutory Appeals Committee of the Supreme Court referred to above. The Supreme Court held that the Court of Appeal had an independent responsibility to consider both Articles 28 and 31 EEA *ex officio*, even when the parties had not invoked them directly.[45] This will also be binding for the referring court in the main proceedings.

(46) An assessment of the second and third question referred to the Court in relation to Article 36 EEA is thus valuable to the referring court in the assessment of the similar questions under Articles 28 and 31 EEA. The Plaintiffs, therefore, invite the Court to provide its answers to these questions irrespective of its findings with regard to the first question. The measures implemented in the present case by the Norwegian Government must be considered to be a restriction on a fundamental EEA right, regardless of whether it is considered in the context of Article 36, Article 28, or Article 31 EEA.

## 4 ASSESSMENT OF THE QUESTIONS UNDER EEA LAW

### 4.1 Question 1

#### 4.1.1 *The concept of cross-border elements and wholly internal situations*

(47) In essence, the first question referred seeks clarification of which factors are relevant to determine whether the situation in the main proceedings entails a "cross-border element" or a "wholly

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[44] Case C-208/05, *ITC,* para. 26 (our formatting)

[45] Cited above, HR-2024-581-U, para. 6.

internal situation" concerning the free movement of services and, thus, whether the Plaintiffs may invoke Article 36 EEA.

(48) All temporary-work agencies are, to some extent, *unique*, and their operations are not set up in the exact same manner. It is, therefore, crucial that the Court gives guidance that covers different "setups" and situations that will need to be addressed by the referring court in the main proceedings. However, all the Plaintiffs have in common that they hire workers across border from other EEA States, often relying on recruitment services from providers in other EEA States to recruit workers, while also actually or potentially competing for the delivery of services to undertakings entering the Norwegian market supplying goods or services cross border from other EEA States. The prohibition in question in this matter thus, directly and indirectly, actually and potentially restricts intra-EEA trade.

(49) The "wholly internal" concept relates to two different aspects of the Court's considerations. One aspect relates to the admissibility of the questions referred to the Court, whether the questions have EEA relevance, and therefore, whether the Court has jurisdiction to reply to them. The other aspect of the "wholly internal" concept is whether the EEA provision, which is an object for consideration in the present case, is directly applicable to the facts of the case. However, the divide between the two has, in ECJ case law, been unclear and has, to some extent, blended into each other.

(50) The purely internal rule first appeared in the ECJ jurisprudence with the *Saunders* judgment from 1979[46] but has since then developed significantly. Even when a case has no apparent inter-State elements, the relevant domestic measure can nonetheless be liable to affect cross-border trade and should thus be regarded as falling within the scope of the fundamental freedoms. The "wholly internal" doctrine in relation to the provision of *services* under Article 56 TFEU was first envisaged in Case C-76/90, *Säger,* but has since then been modified to its current iteration, partly by the own attempts of the ECJ to widen the reach of EU law by increasing the scope of what is to be considered a "cross-border element."[47]

(51) The lack of a cross-border element, or the presence of a "wholly internal situation," describes situations that do not involve *any* factor that links the facts of the case to EEA law and, therefore,

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[46] Case 175/78, *Saunders*.

[47] See Arena, Amedeo, "*The Wall* Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark", *Yearbook of European Law,* vol. 38, no. 1 (2019).

fall outside the area of application of the EEA Agreement. Thus, if a situation is *genuinely* wholly internal to an EEA State, the doctrine provides that the free movement rights afforded by EEA law do not necessarily apply.

> "The basic statement of the rule seems simple enough. If a dispute does not involve the cross-border exercise of market freedoms, it is normally held to be an internal situation, and Community law does not apply. In its early judgments such as *Moser* (persons) and *Höfner* (services), the [ECJ] labelled situations internal even if home country nationals were potentially deterred from exercising their free movement rights. What was required was actual movement, or an actual cross-border element. Later on, the [ECJ] *relaxed this requirement* and made it more complex."[48]

(52) The Plaintiffs contend that what is understood as a "wholly internal situation" must be construed narrowly to protect the fundamental freedoms under EEA law from being undermined. To ensure the effective application and the principle of equivalence central to the EEA legal order, the Court should not set the threshold for the application of EEA law too high. It follows from Case C-5/08, *Infopaq,* that

> "… according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly."[49]

(53) The ECJ expresses the sentiment that the application of EU law should be far-reaching. In contrast, exceptions to the application of EU law, *inter alia,* finding that a situation is wholly internal, should be applied cautiously because they could deprive the fundamental freedoms of their intended effect. There is no apparent reason why this concept would apply any differently to primary EU law than it would to secondary EU law. In fact, in Case C-53/81, *Levin*, a case relating to the rights of part-time and temporary workers, the ECJ held that "… promoting throughout the community a harmonious development of economic activities …"[50] was an essential objective which had a decisive impact on the interpretation of EU law. The disapplication of EEA law to the present case would, in reality, to a considerable extent, preclude temporary-work agencies from providing their services in Norway altogether, as well as prevent the service provision of other services to or dependent upon the staffing industry.

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[48] Mataija, Mislav, "Internal Situations in Community Law: An Uncertain Safeguard of Competences Within the Internal Market". CYELP 5 [2009] p. 31-63 on p. 34 (out formatting). "The Court" has been replaced with "ECJ" for clarity. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375663

[49] Case C-5/08, *Infopaq,* para. 56

[50] See Case C-53/81, *D.M. Levin v Staatssecretaris van Justitie*, para. 15.

(54) The relevant objectives that may justify a restriction on the TAWD provisions and those which may justify restrictions on Article 36 coincide. Also, the TAWD is a directive requiring no cross-border element for its application.

(55) Even though neither the ECJ nor the Court have provided a more extensive assessment and description of which situations must be considered wholly internal, it is noteworthy that the application of Article 36 EEA is only excluded insofar as the situation is confined in *all respects* within a single EEA State.[51] If the situation in one or more ways relates to other EEA States – i.e. are not confined in all respects within a single EEA State – Article 36 EEA applies.

(56) The determining factor for whether the situation is confined in all respects within a single EEA State is the potential impact of the adopted national rules, and not the geographical facts of the case in the main proceeding, as illustrated by the Opinion of AG Geelhoed in *Reisch*, where he contended that "… it is the *nature and substance* of the national measure that determines whether the Court answers questions referred to it for a preliminary ruling, *not the facts* in the main proceedings." [52]

(57) This view that the cross-border element needs to be interpreted wider by basing the fundamental considerations of the cross-border nature on the rule itself is also shared by other authors, one of which contends that

> "The specific facts of the case at hand should not be decisive, as long as the applicant is truly affected by the illegal measure. This would enable a number of trade-restrictive measures to be examined under Community law, even if there are no other factual cross-border elements. Thus, the internal market could function more effectively …"[53]

(58) As such, the EFTA Court should, as also held above, apply a broad interpretation of what may constitute a cross-border element while always keeping in mind the cross-border implication of

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[51] See Case C-680/21 *Royal Antwerp Football Club*, para. 38 and cited case law.

[52] Opinion of AG Geelhoed in Joined Cases C-515/99 and C-527/99 to C-540/99, *Reisch,* para. 88 (our formatting). This view is further supported in judicial literature, see Sanchez, Sara Iglesias, "Purely Internal situations and the limits of EU law: a consolidated case law or a notion to be abandoned?", *European Constitutional Law Review 2018, 14(1)*, p. 7-36.

[53] Mataija, Mislav, "Internal Situations in Community Law: An Uncertain Safeguard of Competences Within the Internal Market". *CYELP 5* [2009] p. 31-63 on p. 63.

the contested rule itself and not only the specific facts of the case. Such an interpretation further combats the issue of "false negatives" in the application of EEA law.[54]

(59) Further, the concept of a "wholly internal situation" and its application in ECJ case law has been harshly criticised, especially in the context of situations which do not have a "clear-cut" cross-border element. The following question has been posed:

> "How can we ensure that the exclusionary application of a purely internal rule in some cases is not arbitrary, given that the free movement framework also accepts a potential impact on movement as a legitimate factor for the purposes of connecting a situation to EU law?"[55]

(60) It has further been held that

> "All in all, the concept does not suffice to systematically serve as a basis for normative or jurisdictional consequences. As a result, the value of the concept of 'purely internal situations' has been reduced to being suitable, at most, for general use as a tentative metaphor or figure of speech"[56]

(61) This illustrates that the Court should exercise caution to ensure that what they consider to be a "wholly internal situation" is construed sufficiently narrowly.

(62) Based on the wording of Article 36 EEA, there is a cross-border element when either the service itself, the provider, or the recipient crosses borders between two EEA States.[57] The freedom of services not only entails a right to provide services but also includes a right to *receive* services, see *inter alia* Case C-405/98, *Gourmet*.[58] It must also be recalled that Article 36 EEA can be invoked by undertakings which have not moved from the EEA State of establishment.

(63) In the Joined cases of *Trijber*,[59] the ECJ further expanded the scope of what constitutes a cross-border element. The ECJ considered the interest of entrepreneurs from other Member States *providing* boat tour services in Amsterdam and the interest of individuals from other Member

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[54] "False negatives" refers to the disapplication of EEA law on a situation, because the facts of the case seemingly has no cross-border element, while the implemented measures, in reality, produce effects which hinders trade within the internal market.

[55] Shuibhne, Niamh N., "The Coherence of EU Free Movement Law. Constitutional Responsibility of the Court of Justice", *Oxford University Press* (2013), Chapter 4, p. 116

[56] See Sanchez, Sara Iglesias, "Purely Internal situations and the limits of EU law: a consolidated case law or a notion to be abandoned?", *European Constitutional Law Review 2018, 14(1)* p. 7-36

[57] Case C-311/19, *BONVER WIN*, para 18.

[58] Case C-405/98, *Gourmet*, para. 37: "In that regard, as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 *Corsica Ferries* …, paragraph 30, and Case C-384/93 *Alpine Investments* …, paragraph 30)."

[59] Joined cases C-340/14 and C-341/14, *Trijber.*

States in *receiving* that service in the Netherlands, from both national and foreign undertakings. The ECJ's reasoning is also highly relevant to the present case:

> "… it should be noted that … [while] the service provided by Mr Trijber which is the subject of the application for authorisation at issue in the main proceedings is in essence intended for residents of the Netherlands, the fact remains that the referring court itself notes … that *that service may also be enjoyed by nationals of other Member States and that the scheme at issue could impede access to the market for all service providers*, including those from other Member States who wish to establish themselves in the Netherlands in order to provide such a service.[60]

(64) There is no reason to differentiate between national undertakings and undertakings from other EEA States when assessing the right to receive services – it is the receipt of the services themselves which establishes the cross-border element.

(65) In the *Gourmet* case cited above, the Advocate General held that it was irrelevant whether the service provider had made its services available to foreign customers or whether they could demonstrate a desire for foreign customers for their service. The relevant condition was whether the measure constituted a future restriction on the ability to provide services to companies established in other EEA States.[61] This doctrine is followed up in the EFTA pillar in Case E-4/04, *Pedicel*, where the EFTA Court held that a dispute has a cross-border element because it "… impedes market access for both providers and recipients of the services at stake."[62]

(66) Furthermore, in Case C-384/93, *Alpine Investments*, the ECJ held that there is no need to demonstrate an actual entity wishing to receive the service and that the right to provide services would become illusory if so. The mere fact that nationals of other EEA States could potentially enjoy the services in question has been deemed sufficient in multiple cases before the ECJ.

(67) Based on the above, the Plaintiffs contend that there is a cross-border element when the national restrictions impede market access and hinder the provider from offering their service to undertakings from other EEA States, and also hindering recipients from other EEA States to receiving services in Norway.

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[60] Ibid., para. 41 (our formatting). Although *Trijber* asks the question of cross-border element in relation to the freedom of establishment as laid down in Directive 2006/123 (the "Services Directive"), the doctrine of a right to receive services is presented in the context of receiving a service from an established undertaking.

[61] Opinion of Advocate General Jacobs to Case C-405/98, *Gourmet*, paras. 68 and 69.

[62] Case E-4/04, *Pedicel*, para. 49. See also Case C-384/93, *Alpine Investments*, where the ECJ held that there is no need to demonstrate an actual entity wishing to receive the service, and that the right to provide services would become *illusory* if so.

4.1.2 *The cross-border elements in the present case*

(68) The Plaintiffs disagree with the contention by the Norwegian Government that considering the cross-borderness of the employees of the service providers is irrelevant in the context of Article 36 EEA. It follows from well-established case law that any cross-border elements which on their own do not fulfil the necessary threshold for cross-borderness may be considered cumulatively. Therefore, the EFTA Court should consider the cross-border elements described below in one joint assessment, not separately

(69) *First*, the Plaintiffs contend that there is a sufficient degree of cross-border element in the present case as the service provision, i.e. renting out temporary labour services in Norway, is contingent on the use and employment of non-Norwegian EEA nationals. It is a well-established fact that workers from other EEA States cross borders to work for temporary-work agencies in Norway,[63] and this must be considered a relevant cross-border element for the provision of services. It is not inconceivable that some temporary-work agencies fall within the scope of Directive 96/71/EC[64] (the "Posted Worker Directive", or "PWD) pursuant to Article 1 no. 3 letter b), which by its very definition requires a transnational measure.[65] This demonstrates the clear cross-border element in the present case.

**Annex 6.** Staffing lists of HIRE Norway AS per 1 June 2022 demonstrating hiring of EU/EEA nationals.

**Annex 7.** Termination notices to employees of Bygg & Industri AS, demonstrating EU/EEA nationals as workers; minutes from board meetings and deliberation meetings with employee representatives discussing downsizing.

(70) Should restrictions on the right of free movement for workers, upon which the service provision is entirely contingent, be irrelevant for the cross-border consideration under Article 36 EEA, the right to provide services would become illusory, contrary to the principle of effective application

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[63] The Plaintiffs in the present case hires workers from various EU countries, such as Poland, Romania, Latvia, Lithuania, Estonia, and Slovakia. As previously held, in 2017, approximately 55 per cent of temporary agency workers in Norway had an immigration background, primarily from EU Member States in Eastern Europe, cf. Proposition to Parliament 131 L (2021-2022), p. 11.

[64] 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.

[65] The wording of the Danish language version stipulates the need for "grænseoverskridende foranstaltninger", which directly translates to "cross-border measures".

of EEA law.[66] Therefore, it is clear that the nationality of the workers, which is essential to providing the services, is a relevant factor in the overall assessment.

(71) *Second,* there is a sufficient degree of cross-border element in the present case, as Norwegian temporary-work agencies are prevented from *receiving* services from other EEA States. As previously held, the right to receive services is also encompassed in the free movement of services enshrined in Article 36 EEA. In this context, it should be recalled that it is a frequent practice for Norwegian-based temporary-work agencies to recruit staff cross-border using recruitment services and companies established in other EEA States. Many temporary-work agencies collaborate with and receive services from different undertakings in other EEA States for various purposes across borders.[67]

(72) However, with the restrictions implemented by the Government, it is no longer possible for temporary-work agencies to provide their services. Therefore, they are, in effect, prevented from hiring any new workers or receiving related services from undertakings based in other EEA States.[68] The restrictions in the present case prohibit both Norwegian companies from receiving such cross-border services and prevent foreign undertakings from rendering such services, contrary to the free movement of services afforded to them by Article 36 EEA.

**Annex 8.** Recruitment agreement between HIRE Norway AS and JobZone Poland; rental agreement of offices in Poland for recruitment purposes; e-mail correspondence between representatives of the parties to the recruitment agreement; invoices for service provision; employment contract related to service provision

**Annex 9.** Note explaining the corporate structure of Cross Border Alliance (CBA Group), including a Polish daughter company (CBR) who recruits workers to CBA Group's other temporary-work agency daughter companies.

(73) In fact, as held above, one of the undertakings that joined the Plaintiffs after the request was sent to the Court is a Polish recruitment agency that exclusively provides its services (such as

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[66] See for comparison, Case C-384/93, *Alpine Investment*, para. 19.

[67] An example is the need for temporary-work agencies to receive legal services in the EEA State where their workers are based. For example, a Norwegian temporary-work agency will receive the services of a Polish lawyer to coordinate the contract relationship between the Polish worker and the Norwegian temporary-work agency.

[68] The use of recruitment companies based in, *inter alia,* Poland, is highly commonplace for the temporary-work sector, and is not a unique factor in the present case either.

recruitment and language courses) to Norwegian undertakings. However, due to the restrictions in the present case, they are, in effect, barred from providing their services.

**Annex 10.** The invoice list from Co-oP Recruitment and Training demonstrates cross-border recruitment of workers; invoices from 2023 as listed in the invoice list.

(74) *Third*, non-Norwegian temporary-work agencies from other EEA States are prevented from providing their services in Norway. This directly describes the situation of some of the Plaintiffs in the present case. One of the motivators behind ESA's LFN was a complaint lodged by an Estonian temporary-work agency.[69]

(75) A report from Menon Economics[70] cited above holds that "… Norwegian companies in some cases also make use of foreign temporary-work agencies",[71] and further, when discussing the use of temporary labour in shipyards, they contend that the temporary labour "… is hired from both Norwegian and foreign temporary-work agencies, which offer both Norwegian and foreign labour."[72] Fafo[73] holds, in its report on the extent of hiring-in and hiring-out of workers in the Norwegian labour market, that

> "We do not have information on how many workers in the industry are posted in the sense that they are employed by a foreign company and work in Norway on a short-term basis.[74] An estimate – based on a review of the register-based employment statistics – shows that about five percent of employed wage earners (just over 3,000 people) within NACE 78.2[75] is employed in a business that is not included in Statistics Norway's overview of Norwegian enterprises."[76]

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[69] ESA's Letter of Formal Notice dated 19 July 2023, para. 4.

[70] Jakobsen, Erik W. *et al.* (Menon Economics), "Report: The Value of the Staffing Industry: Consequences of a tightening or ban on the hiring of labour", Menon publication no. 2/2021, cited above.

[71] Ibid., p. 9.

[72] Ibid., p. 18.

[73] Fafo is an independent social science research foundation, which the Government in its preparatory works and submissions to ESA often refer to, see, to this effect, *inter alia,* Prop. 74 L (2011-2012), Innst. 108 L (2022-2023) p. 14, https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2022-2023/inns-202223-108l/?all=true, and The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023.

[74] A possible contributor to the relatively unclear statistic is that Norwegian rules regarding the provision of temporary labour services, in particular with regard to cross-border situations, are complicated and unclear. This may deter service provides from even attempt to provide such services, or at least contribute to significant dark numbers, as undertakings may be afraid to report their service provision.

[75] For reference, NACE Group 78.2 is defined as "temporary employment agency activities".

[76] Fafo note 2021:17, "The scope of the hiring-in and hiring-out in the Norwegian labour market" ("Omfanget av inn- og utleie i norsk arbeidsliv"), published 12 October 2021, https://www.fafo.no/images/pub/2021/10354.pdf, p. 16

(76) These wage earners referred to above are examples of foreign employees employed by a foreign company while working in Norway on a short-term basis. As such, it is evident that providing temporary labour services across borders is not hypothetical. This demonstrates that there are, in fact, other temporary-work agencies operating cross-border by providing their services. The restrictions make it more difficult for these undertakings to conduct such cross-border service provision, contrary to EEA law.

(77) While statistics available in Norway often disregard or lack information regarding the extent of international service provision across borders, as held in the Fafo report above, this is no reason for the Court not to consider this aspect of the reality of the case.

(78) *Fourth*, non-Norwegian user undertakings are prevented from *providing* their services in Norway. The restrictions have an inherent and indirect discriminatory effect, making it more difficult for user undertakings established elsewhere in the EEA to provide services and compete for several types of tenders and projects in Norway.

(79) Companies, especially companies that are only temporarily operating in Norway, depend on temporary labour via temporary-work agencies because they cannot necessarily bring their own workforce across borders. Therefore, their need for temporary labour must be met by temporary-work agencies. Thus, the restriction also forecloses the market for rendering services of various kinds, making it less attractive for companies established in other EEA States to compete with Norwegian undertakings established in Norway, as the Norwegian temporary-work agencies cannot offer employees for non-permanent projects. This creates an advantage for undertakings established in Norway on a permanent basis. A situation such as this, where a service provider in another EEA State is precluded from providing its services in the host State, is at the very core of Article 36 EEA, and there can be no doubt that this constitutes a cross-border element relevant to this case.

(80) *Finally,* non-Norwegian undertakings established in other EEA States are prevented from *receiving* temporary labour services by either Norwegian or foreign undertakings established in other EEA States. An example of such a situation would be when a project requiring temporary

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(our translation). NO: "Vi har ikke informasjon om hvor mange arbeidstakere i bransjen som er utstasjonerte i betydningen at de er ansatt i et utenlandsk foretak og arbeider i Norge på korttidsopphold. Et anslag – basert på gjennomgang av den registerbaserte sysselsettingsstatistikken – viser at om lag fem prosent av sysselsatte lønnstakere (drøye 3000 personer) innen NACE 78.2 er ansatt i en virksomhet som ikke inngår i SSBs oversikt over norske foretak."

labour is to be executed in Norway, and the temporary labour needs of the undertaking that carries out the project will be met by temporary-work agencies from another EEA State. This is inherently linked to the previous point regarding the cross-border elements made by the Plaintiffs. While the previous point related to the rights of the service providers established outside Norway, it is also clear that Norwegian undertakings are prevented from *receiving* such services from non-Norwegian temporary-work agencies.

(81) It is evident that the Plaintiffs can invoke the right to provide and receive services which directly relate to themselves. The Plaintiffs argue that they must also be allowed to invoke the right of other EEA nationals and undertakings from other EEA States to receive services, even for those situations where the Plaintiffs themselves are not prohibited from receiving said services, for example, the situation outlined above where Norwegian user undertakings are prevented from receiving temporary labour services from temporary-work agencies established in other EEA States.

(82) Further, the Plaintiffs are not required to provide concrete examples of situations, based on the facts of the case, where the right to provide or receive services has already been unlawfully restricted. This follows as a corollary from the *Trijber* judgement and is further an essential tool to ensure the effective application of EEA law.

(83) In conclusion, there seems to be no valid basis to claim that the restrictions' effects in the present case amount to a “wholly internal" situation that is confined in all respects within Norway's borders and does not entail any effects on intra-State trade. Such a conclusion would complete undermining of the exercise of fundamental freedoms, which are the core of the EEA Agreement's underlying purpose.

#### 4.1.3 *Briefly on admissibility*

(84) In any case, in situations where the dispute is factually contained to a single EEA State, the ECJ and the EFTA Court have nonetheless previously provided a response on the merits of the case, even in those situations where EEA law was not *per se* applicable to the specific facts of the case, based on the application of one or more well-established “exceptions” to the wholly internal rule *with regards to the admissibility of the case*. In Case C-268/15, *Ullens de Schooten,* the ECJ held that it must be indicated what constitutes the “connecting factor” between the relevant provision

and the facts of the case, which makes it necessary for the Court to give an Advisory Opinion.[77] In that same case, the ECJ recalled that

> "The Court has indeed regarded requests for preliminary rulings concerning the interpretation of provisions of the Treaties relating to the fundamental freedoms as admissible even though the disputes in the main proceedings were confined in all respect within a single Member State, on the ground that it was not inconceivable that nationals established in other Member States had been or were interested in making use of those freedoms for carrying on activities in the territory of the Member State that had enacted the national legislation in question, and, consequently, that the legislation, applicable without distinction to nationals of that State and those of other Member States, was capable of producing effects which were not confined to that Member State."[78]

(85) Such an approach, where the ECJ indicates that possible impacts on the free movement within the EEA, constitutes the "certain cross-border interest" exception to the "wholly internal" rule.[79] However, this exception does not apply without limitation. In *Ullens de Schooten,* the "certain cross-border interest" doctrine is a recognised way to demonstrate a cross-border element provided an adequate level of the degree of probability is shown.[80] However, as the Plaintiffs have already argued, this requirement for the degree of probability must not be set too high, as this would be contrary to the fundamental principles of the EU and EEA legal order.

(86) It must further be clear that the "certain cross-border interest" doctrine also applies to the free movement of services. The ECJ's approach in cases related to the free movement of services takes a narrow approach to the concept of what constitutes a "wholly internal situation." [81]

(87) The Plaintiffs are aware of the modifications to the "certain cross-border interest" doctrine provided by the ECJ in, *inter alia,* the aforementioned case *Ullens de Schooten*,[82] which, extrapolated to the present case, provides a somewhat stricter, albeit not too strict, burden of proof to demonstrate an actual undertaking which has been disincentivised or otherwise limited to make use of their freedom to provide services. In *Ullens de Schooten*, the ECJ states that in order to demonstrate a cross-border element, one must provide "… specific factors that allow a link to be established between the subject or circumstances of a dispute" and the EU provision(s) in the

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[77] Case C-268/15, *Ullens de Schooten,* para. 55 (our formatting).

[78] Ibid., para 50, with the case law cited (our formatting). See to this effect also Case C-231/03, *Coname*, para. 17 and Case C-367/12, *Susanne Sokoll-Seebacher*, para. 11.

[79] See Arena, Amedeo, "*The Wall* Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark", *Yearbook of European Law,* vol. 38, no. 1 (2019) p. 182-185, and p. 196-198.

[80] Case C-268/15, *Ullens de Schooten*, para. 55.

[81] Case C-470/11, *SLA Garkalns,* para. 21 and Case C-265/12, *Citröen Belux,* para. 33.

[82] See also Case C-318/15, *Tecnoedi,* and Case C-65/17, *Oftalma*.

case at issue, and one has to explain "… in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that make the preliminary ruling on interpretation necessary for it to give judgement in that dispute."[83] The Plaintiffs argue that the statements in *Ullens de Schooten* and Case C-65/17, *Oftalma,* imply that considerations *in concreto* must be conducted, and as such, it is necessary for the Court to take the aforementioned cross-border elements in the present case into consideration, also if it considers the admissibility of the case.

(88) In conclusion, the EFTA Court has the competence to reply to all of the questions referred to it. As demonstrated, there is a sufficient cross-border element in the present case. The effects of the rule, together with the demonstrated real and non-hypothetical cross-border interests, must constitute the basis for the EFTA Court's decision.

#### 4.1.4 *Plaintiffs' proposed answer to Question 1*

(89) The Plaintiffs invite the EFTA Court to reply to the referring court's first question in the following manner:

*"The fact that temporary-work agencies from Norway or another EEA State provide their services in Norway by means of utilising employees who are nationals of other EEA States, alongside the right of the agencies to receive services from undertakings established in other EEA States and the fact that other temporary-work agencies are prevented from entering the Norwegian market to provide their services to both national and non-national EEA-based undertakings, constitutes cross-border elements which allows for the application of the fundamental freedoms of the EEA Agreement."*

### 4.2 Question 2

#### 4.2.1 *Introductory comments*

(90) In essence, the question referred concerns whether the objective pursued by the prohibition on hiring-in from temporary-work agencies constitutes a legitimate aim. The Government has previously held that increasing the extent of permanent direct employment, and therefore, reducing the use and reliance on temporary labour in the Norwegian labour market, is the primary goal of the measures implemented. The Plaintiffs contend that this cannot be considered a

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[83] Case C-268/15, *Ullens de Schooten*, paras. 54-55.

legitimate aim. The Plaintiffs recognise that Norway has the autonomy to determine its labour market model. Nevertheless, in exercising this autonomy, Norway must adhere to EEA law, which encompasses the freedom to provide services in Article 36 EEA (and the other relevant primary law provisions of the EEA Agreement[84]) and the TAWD. In this specific case, the Norwegian Government has, in practice, banned the employment of temporary agency workers for permanent positions and even eliminated the option to hire them for temporary roles, contrary to the purpose of the Directive, which is, *inter alia,* 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 job creation and to the development of flexible forms of working."[85]

(91) It is clear that purely economic considerations,[86] protectionist measures[87] and the aim of strengthening the economy of the EEA State alone are not considered to be legitimate objectives. As such, Norway is not allowed to implement limitations on the right to provide temporary-work services on the grounds that a limitation will positively impact the Norwegian economy.

(92) The objective of curbing the use of temporary workers hired out from agencies contradicts the dual purpose of the Directive, namely, safeguarding the rights of temporary agency workers and at the same time, maintaining flexibility within the labour market.

(93) Although Article 4 does not contain a comprehensive list of legitimate aims under the Directive, the provision narrows down the grounds for justifications which the EEA States can use to limit temporary agency work. It is evident from the language of said provision that any national legislation incorporating restrictions on the utilisation of temporary agency work must be justified by reasons of general interest, specifically pertaining to the safeguarding of temporary agency workers, compliance with occupational health and safety standards, or to maintain the proper functioning of the labour market and prevent exploitation.

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[84] Articles 28 and 31 EEA.

[85] Article 2 of the Directive (our formatting). See also Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency Work at pt. 1.2. (COM (2014) 176 final). https://eur-lex.europa.eu/resource.html?uri=cellar:4dc1f4ba-b10b-11e3-86f9-01aa75ed71a1.0018.01/DOC_1&format=PDF.

[86] See Case E-8/17, *Kristoffersen,* para. 114.

[87] This principle applies the same for the free movement of services as it does for Article 33 EEA. See, as examples, Case C-352/8, *Bond van Adverteerders,* para 34, and Case C-288/89, *Gouda*, para 29.

4.2.2 *Assessment*

(94) As already mentioned, the Norwegian Government's proposal for legislative changes[88] and Government's response to ESA's LFN states that the *primary* goal of the mentioned restrictions is to diminish the utilisation of temporary agency workers, with the hope of subsequently promoting increased permanent and direct employment.[89] In pt. 56 of its LFN, ESA considers that the aim of reducing the use of temporary agency workers and increasing permanent and direct employment cannot be a legitimate aim under the Directive. The fact that this is the primary goal of the Government is, in particular, underscored by the introduction of the total ban on using such workers in the construction sector as a whole.[90]

**Annex 11.** The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023.

(95) The LFN further cites the Government's letter to ESA dated 5 May 2023, which *inter alia* outlines that the primary aim of the new national regulations is to promote permanent employment within a direct relationship between an employee and an employer, whenever feasible. Furthermore, the letter expresses the intention that temporary agency work should be reduced. Regarding the rationale behind eliminating the option to use temporary agency workers even for temporary tasks, the letter underscores the overarching goal of preventing substituting temporary agency work for permanent and direct employment within user undertakings.

(96) The Government, in its letter to ESA, contends that Case C-232/20, *Daimler*, does not entail that EEA States are *obliged* to permit agency work in specific situations.[91] As ESA has pointed out, the ECJ has confirmed that temporary agency work can even be used to meet a *permanent* need of the user undertaking.[92]

(97) Thus, the *Daimler* ruling demonstrates that the EU legislator did not intend to limit the use of temporary work by only allowing temporary workers to occupy a temporary position. The

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[88] See, *inter alia,* Prop. 131 L (2021-2022).

[89] The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 14-15.

[90] See pt. 2 above.

[91] The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 18.

[92] Case C-232/20, *Daimler*, paras. 36-38.

judgment also supports the position that an outright ban on the use of temporary-work agencies cannot be reconciled with the aims of the Directive.

(98) In the present matter, the Norwegian Government, notwithstanding its proscription on the engagement of temporary agency workers for tasks of a permanent character, has *further eliminated* the option of utilising such workers for assignments of a temporary nature. Consequently, the Plaintiffs opine that, if anything, this stance lends credence to the position that such a restriction lacks justification.

(99) The Plaintiffs thus agree with ESA

> "… that the aim of reducing the use of temporary agency workers and increasing permanent and direct employment cannot be considered a legitimate aim under the Temporary Agency Worker Directive and at the same time cannot constitute a ground of general interest or an overriding reason in the public interest capable of justifying a restriction on the use of temporary agency workers and/or the freedom to provide services."[93]

(100) In the view of the Plaintiffs, the stated objective of curbing the utilisation of temporary agency workers cannot be deemed a legitimate aim *in general* because it is contrary to the dual purpose of the Directive. As stated above, temporary-work agencies, entailing a three-party relationship, are acknowledged in the Directive as legitimate employers in the same manner as "traditional" undertakings, entailing a two-party relationship. As such, it does not constitute a valid basis of general interest or a paramount reason in the public interest sufficient to warrant a comprehensive ban on utilising temporary agency workers even for *non-permanent* positions. An outright ban is the most severe of all restrictions and needs a clear, legitimate aim to be justified.

(101) Furthermore, the Plaintiffs contend that the Government has not demonstrated how the prohibitions seek to attain the objectives in Article 4 of the Directive *in concerto*. It is not sufficient for the national measures to resort to a legitimate aim in the abstract.[94]

(102) The Norwegian Government has put forward rather vague objectives seeking to justify the implemented restrictions. For instance, concerning eliminating the possibility of engaging temporary agency workers for temporary assignments, the legislative proposal merely refers to interests protected by Article 4 (1) of the Directive without a further description and

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[93] ESA's Letter of Formal Notice dated 19 July 2023 at pt. 61.

[94] See, *inter alia*, Case E-14/15, *Holship*, at paragraph 125.

substantiation of how the restrictions seek to attain these objectives *in concerto*.[95] With regard to this total ban, the legislative proposal cites safeguarding worker interests, ensuring a well-functioning labour market and promoting health and safety at work as potential grounds for justification without delineating or substantiating the relevance of these aims to the adopted measure.

(103) The Norwegian Government has also mentioned the desire to ensure the efficacy of the labour market, protect workers' rights, and prevent abuse as alternative grounds for justifying the decision to disallow the engagement of temporary agency workers for temporary assignments. As for the restriction in the construction sector, the Government has referred to concerns about workplace offences, health and safety at work, the necessity for skilled labour, safeguarding workers' rights, and maintaining a well-functioning labour market as justification grounds.

(104) Article 4 (1) of the Directive clearly states that a relevant aim is the "protection of *temporary agency workers.*" The Norwegian Government argues that instead of protecting temporary agency workers, they wish to protect *permanent workers* and cite that the protection of workers is recognised as a legitimate aim under EEA law.[96] The Government fails to realise that this protection cannot occur to the detriment of temporary workers. While the Directive is not exhaustive in its provision of which aims it is legitimate to pursue, it is clear that aims which directly go against the reasons for derogation provided in Article 4 (1) cannot be considered a legitimate aim or an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services under Article 36 EEA.

(105) It is also clear that if the measures implemented have an indirectly discriminatory effect, as is the case with the present restrictions, the Court must conduct a closer review of the legitimacy of the object the Government seeks to attain.

#### 4.2.3 *Plaintiffs' proposed answers to Question 2*

(106) The Plaintiffs invite the EFTA Court to reply to the referring court's second question in the following manner:

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[95] Prop. 131 L (2021-2022) Chapter 14.1.

[96] The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 15.

*"The aim of increasing permanent and direct employment, and thus in effect reducing the usage of temporary agency workers, is not a legitimate objective in itself which may justify a derogation from a fundamental EEA freedom in the form of an absolute ban on the provision of temporary labour services from temporary-work agencies or by severely limiting the right to provide temporary labour services for work of a temporary nature. Thus, that aim cannot constitute a ground of general interest or an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services pursuant to Article 36 EEA nor any other fundamental freedom in the EEA Agreement."*

## 4.3 Question 3

### 4.3.1 *Introductory comments*

(107) In essence, the third question referred concerns whether the national measures are proportionate. The principle of proportionality constitutes a general principle of EEA law and entails that the adopted measures must be suitable, consistent and do not go beyond what is necessary.[97]

(108) When adopting a restriction on the fundamental freedoms enshrined in EEA law, the Government has the burden of proof to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by an EEA State as justification for the restrictions must be accompanied by appropriate evidence, or by an analysis, of the appropriateness and proportionality of the restrictions with specific evidence substantiating its arguments.[98] The statements in Case C-651/16, *DW,* regarding the burden of proof for documenting the suitability and necessity of a measure must be recalled:

> "The reasons invoked by a Member State by way of justification must thus be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the [objective the Member State seeks to attain.]"[99]

(109) The Government has previously contended in its reply to ESA's LFN that questioning whether the provided evidence was sufficient, in fact, constituted a challenge to the level of protection

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[97] See to this effect Case E-05/23, *Criminal proceedings against LDL*, para. 82, and case law cited.

[98] Case E-8/20, *Criminal proceedings against N*, para. 95, and case law cited.

[99] Case C-651/16, *DW*, para. 34 (our formatting).

chosen by the Government and endorsed by the Norwegian Parliament.[100] However, it is apparent that the Government's contention cannot be correct. It is for the Norwegian Government to determine the desired level of protection, because the labour market models are not harmonised across the EEA. However, in doing so, the Government must adhere to the requirements of EEA law. The Government has the burden of proof to substantiate that the national measures are appropriate and proportionate with specific evidence or an objective analysis containing solid and consistent data substantiating the Government's claim of that the measures are suitable and proportionate. Whether the Government has fulfilled its burden of proof is not a question of the *level of protection*; it is a question of whether the measures taken actually accomplish the objective in a way compatible with EEA law.[101]

(110) In its response to ESA's LFN, the Government consistently refers to the aim of ensuring permanent employment positions in two-party relationships, and they link the consideration of the appropriateness and proportionality of the measures taken to this aim. This is an incorrect way to assess the legality of the measure. The only reason ensuring permanent employment positions in two-party relationships may be a legitimate aim is because the underlying considerations (*inter alia,* the functioning of the labour market, the health and safety of workers and a well-functioning working environment, cf. Article 4 of the TAWD) may be considered legitimate. As held above, ensuring two-party relationships is not *in itself* a legitimate aim. As such, the suitability and necessity of the measures imposed must be considered in relation to these underlying considerations.

(111) As described in pt. 2 above, the restrictions impose *severe* constraints on utilising temporary agency workers in Norway. Consequently, the Court should therefore conduct a close review of the suitability, consistency, and necessity of the measures.

#### 4.3.2 *Suitability*

(112) The measure can only be regarded as suitable if the measures genuinely reflect a concern to attain the aims pursued. As held above, the Government must demonstrate with appropriate evidence or an objective, detailed analysis with figures sustained by solid and consistent data, that the

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[100] The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 14.

[101] Case E-8/20, *Criminal proceedings against N*, para. 71.

measure is suitable to attain the legitimate objective, hereunder also demonstrating with sufficient evidence that there are genuine risks to the legitimate objectives pursued.[102]

(113) First, the Plaintiffs argue that the there is a *lack of a genuine risk*, which appropriates and necessitates the restrictions. The Government has not documented with solid and consistent data that there the use of hiring-in from temporary-work agencies itself or consequences thereof constitute a genuine risk, neither in relation the functioning of the labour market, thereunder direct and permanent employment, nor workers' health and security *in concerto*. The restrictions seem to be based purely on the Government's perception that hiring from temporary-work agencies is allegedly inherently negative and unwanted, and that they need to be excluded from the labour market model.[103] Restrictions based on unsubstantiated or false assumptions of the existence of risks associated cannot, in any case, be considered as suitable measures.

(114) According to the preparatory works, the reasons for adopting the general restrictions in Section 14-12 WEA are that hiring from temporary-work agencies "… entail multiple negative consequences, see Chapter 3.6, and *might* lead to lower wages for the hired-in workers, a decreased wage development in the temporary-work agencies, decreased quality in the working environment, less trust and cooperation and a lower degree of organisation."[104] Moreover, the total ban on hiring from temporary-work agencies in the construction sector in the Wider Oslo-area are grounded in "clear *indications* that hiring [from temporary-work agencies] leads to negative consequences, on an individual and societal basis, see Chapter 3.6."[105]

(115) In fact, the argument that temporary agency work may lead to lower wages appears entirely incoherent when it is recalled that, as outlined in pt. 2 above, legislation which historically has limited the use of temporary labour argued that this option would be *too attractive* to workers. However, it seems counter-intuitive that workers would willingly choose a lower wage. Therefore, only one statement may be true – either temporary agency work is too attractive, or

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[102] Case E-8/20, *Criminal proceedings against N*, paras. 89 and 93, and case law cited.

[103] Prop. 131 L (2021-2022) Chapter 5, on p. 21. NO: "I denne lovproposisjonen legger departementet derfor frem flere forslag som på ulike måter er ment å begrense bemanningsbransjens rolle og bruken av innleie som tilknytningsform i norsk arbeidsliv"

[104] Ibid., Chapter 14.3, p. 63 (our formatting and translation), NO: "Departementet viser til at innleie innebærer flere negative konsekvenser for arbeidstakerne og arbeidsmarkedet, jf. punkt 3.6 og 14.2. Innleie fra bemanningsforetak kan medføre lavere lønn for de innleide og dårligere lønnsutvikling i innleievirksomheten, dårligere arbeidsmiljø, mindre grad av medvirkning og tillit, og lavere organisasjonsgrad."

[105] Ibid., Chapter 14.2, p. 62, NO: "Det er klare tegn på at innleie fører med seg flere negative konsekvenser, både på individ- og samfunnsmessig nivå, jf. punkt 3.6."

the wages are generally lower in temporary-work agencies – and this underlines how the Government's reasoning regarding the suitability of such restrictions is unclear and unsubstantiated.

(116) The negative consequences on an individual and societal basis described in Chapter 3.6 are that "hiring through temporary-work agencies can reduce the employers' perception of the risk of employment", "non-Norwegian workers are more prone to injuries and accidents", and that "the use of hiring from temporary-work agencies can increase the level of conflict between the permanent employees".[106] However, the alleged negative consequences described in Chapter 3.6 are merely speculations, which are not substantiated by any sufficient evidence or analysis showing that the use of temporary-work agencies in Norway actually constitute a genuine risk to the functioning of the labour market, or the workers' health and safety *in concerto*. In the preparatory works cited, it is argued that non-Norwegian workers are more prone to injuries and accidents, and further that *it is assumed* that shorter employments and atypical connections amplify this risk.[107] They substantiate this assumption by referring to a mapping of the risk profile conducted almost a decade ago (in 2017), and hold that the results "… *suggest* that forms of association such as temporary employment and hiring-in of workers from temporary-work agencies are more important when it comes to accident risk than the nationality of the employee."[108]

(117) The Government further claims that the use of hiring from temporary-work agencies can increase the level of conflict between the permanent employees, due to alleged increase of internal conflicts in the user undertaking. The Government's basis for this claim is that "… international studies *indicate* that [hiring from temporary-work agencies] *can* lead to an increase in internal conflicts, because the persons preforming the same tasks have different wages."[109] As is apparent, the study cited only provides mere indications of such an consequence, and does not prove that the use of temporary workers actually lead to increased levels of internal conflicts in the user undertaking. Moreover, the Government does not assess or provide any evidence for whether these indications can be transposed or otherwise are true with regards to the use of temporary-

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[106] Ibid., Chapter 3.6, on p. 14-16.

[107] Ibid., Chapter 3.6, on p. 15.

[108] Ibid. (our translation and formatting). In NO: "En kartlegging fra SINTEF i 2017 tyder på at tilknytningsformer som midlertidig ansettelse og innleie har større betydning når det gjelder ulykkesrisiko enn hvilken nasjonalitet arbeidstakeren har."

[109] Ibid., Chapter 3.6, on p. 16.

work agencies in Norway.[110] It must be recalled that the WEA sets out the strict requirements for workers rights and the working environment both for the temporary agency workers and the workers in the user undertaking. Regarding the total ban of the use of temporary-work agencies in the construction sector in the Wider Oslo area, the Government does not point to specific problems, but states that the degree of hiring workers from temporary-work agencies is high and that this sector is more prone to experience the (speculative) negative effects as set out in Chapter 3.6 of the legislative proposal.[111]

(118) The Government's allegations of the negative effects of temporary agency work are based on documentation which is either *unspecified* (*inter alia* "documentation from The Norwegian Labour Inspection Authority", and "information from different sources") or *general statements* without any subsequent evidence confirming whether the statement is true, and if so, to which extent. As such, the Government has not sustained that the use of temporary-work agencies constitutes a genuine risk to the functioning of the labour market, nor to the workers' health and safety.

(119) Second, if it is accepted that a genuine risk exists, the Plaintiffs argue that the Government have not substantiated with appropriate evidence or an objective, detailed analysis with solid and consistent data, that the measures are suitable to protect the functioning of the labour market by increasing direct and permanent employment, or to protect workers' health and security. The Court must in the following keep in mind that the Government has the burden of proof to demonstrate the suitability of a measure and the implications thereof. The Plaintiffs do not need to demonstrate that the measures are unsuitable – the Plaintiffs need only demonstrate that the Government has *not* demonstrated the suitability of the measures, meaning the Government has not substantiated that the measures actually have the intended effect.

(120) The Government contends that it aims to preserve the Norwegian labour market model and cite, *inter alia,* that the changes to Section 14-12 WEA (1) make it "… easier to recruit employees to *permanent positions* in the companies*"* and that this change *"*… implies *increased security and*

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[110] Ibid., Chapter 3.6, on p. 15.

[111] Prop. 131 L (2021-2022), Chapter 6.4.2, on p. 26. NO: "Når innleieandelen er såpass høy, vil næringen etter departementets vurdering i større grad være eksponert for de negative konsekvensene knyttet til innleie, jf. punkt 3.6 og kapittel 5. Departementet viser i denne sammenheng særlig til de negative virkningene for arbeidsmiljø, medvirkning og fagorganisering, men også til økt ulykkesrisiko."

*predictability* for future work and income*"*.[112] As held above, the aim of increasing direct and permanent employment in a two-party relationship, and subsequently reducing the use of temporary agency workers because they entail a three-party-relationship, is not legitimate in itself, but may only be considered legitimate if considered in relation to the underlying objectives as outlined in Article 4 of the Directive.

(121) The Government has not substantiated with specific evidence containing solid and consistent data that the restrictions are suitable to *protect the functioning of the labour market* by increasing direct and permanent employment. The Plaintiffs contend that the Government has failed to provide any sufficient evidence that supports the notion that restricting the use of temporary-agency work will lead to more direct and permanent employment. The Plaintiffs agree with ESA that it is difficult to see a correlation, or in any case a causality, between revoking the option to use temporary-work agencies both when *"the work is of a temporary nature"* and in the construction sector in the Wider Oslo area on the one hand, and the increase of direct and permanent employment on the other.[113]

(122) The Government further fails to realise that the temporary-work agencies themselves are a part of the labour market the Government seeks to ensure the proper functioning of. Many temporary workers who have permanent contracts with temporary-work agencies who are now unable to provide their services are their workers are therefore let go from their respective agencies – either due to the bankruptcy of the temporary-work agencies or as a cost-saving measure by the agencies. Subsequently, some of them are unable to find new permanent work.[114] The Government is essentially, in effect, removing permanent contract relations between workers and temporary-work agencies, and subsequently removing the two-party relationship between the

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[112] The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 15 (out formatting).

[113] ESA's Letter of Formal Notice dated 19 July 2023 at pt. 77.

[114] The actual number is unclear. Different legitimate sources state varying degrees of re-hiring in permanent positions following layoffs from temporary-work agencies. SSB cites that 70% of workers that left temporary-work agencies gained full-time positions in the industry their previously served, see an article from Statistics Norway, https://www.ssb.no/arbeid-og-lonn/sysselsetting/statistikk/antall-arbeidsforhold-og-lonn/artikler/faerre-lonnstakere-i-utleie-av-arbeidskraft. However, Fafo reports that only 20% of user undertakings considered hiring more permanent workers to mitigate the effects of the new legislative changes, see a presentation from Fafo, https://www.fafo.no/images/pub/lysark/Begrensninger_p%C3%A5_innleie_av_arbeidskraft_-_favorisering_av_de_store_bedriftene.pdf, see p. 10 and 20. Regardless, there is a not insignificant number of workers who suffer from this issue.

temporary agency as an employer and the temporary agency worker, in direct contradiction to their underlying aim.[115]

(123) Artificially creating a sector-wide crisis which inevitably leads to layoffs or bankruptcies, which potentially leads temporary agency workers to provide their services freelance as opposed to through temporary-work agencies, does not solve the problem as cited in their the legislative proposal, *inter alia*, increased risk of injuries and negative impacts on the work environment. While it may, in some cases, create a two-party relationship between the worker and the undertaking – although this effect too remains purely speculative and undocumented – this is, as held above, not a relevant consideration, as it is not a legitimate objective in itself. Notably, the Directive recognises that in the case of workers who have a permanent contract with their temporary-work agency, such contracts offer "special protection."[116] Therefore, it cannot in any case be considered suitable for the protection of workers to "force" them into temporary two-party contracts.

(124) Furthermore, as held previously, a severe restriction of the option to use temporary labour from temporary-work agencies option may lead to a situation where permanent employees will be required to compensate for the shortage of manpower in certain situations – *inter alia* to fulfil seasonal demands, illness in the permanent workforce, demands resulting from a successful cross-border tender – potentially leading to exceeding the statutory limits for working hours and overtime hours regulated in the WEA.[117] An increased workload for permanent employees may again potentially lead to higher turnover and lower productivity in the long run. This is clearly

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[115] In fact, when surveyed, 52 per cent of temporary employees in the construction sector report that they are afraid of losing their job.[115] From Q2 in 2022 to Q2 in 2023, the number of jobs in the temporary-work agency industry was reduced by 9.3 per cent, accounting for approx. 5 700 jobs.[115] The contested legislative amendments were implemented in the middle of Q2 2023, and as such, there is good reason, partly on the basis of the documentation provided by the Plaintiffs, to believe that this trend of layoffs will continue, and only get worse over time, cf. The Norwegian Government's Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway, dated 19 October 2023, p. 23.

[116] See pt. 15 of the Preamble.

[117] In fact, when surveyed, 22% of undertakings within the Wider Oslo area, and 34% outside the Wider Oslo area, reported an intent to increase their use of overtime to remedy the losses caused by the legislative changes, cf. Presentation by Fafo, "Presentation: Restrictions on the hiring of labour - favouring the big companies?" (NO: "Presentasjon: Begrensninger på innleie av arbeidskraft - favorisering av de store bedriftene?), dated 15 August 2023, see especially p. 10 and 21.
https://www.fafo.no/images/pub/lysark/Begrensninger_p%C3%A5_innleie_av_arbeidskraft_-_favorisering_av_de_store_bedriftene.pdf.

not a suitable way to ensure the functioning of a labour market, nor to protect workers' rights as laid down in the WEA. In fact, the measures may have quite the opposite effect.

(125) Finally, the measures do not ensure the protection of workers' health and safety. In the preparatory works, it is held that it is non-Norwegian workers are more prone to injuries and accidents, and further, that *it is assumed* that shorter employment relationships and atypical connections amplify this risk.[118] As previously demonstrated, over half of all workers associated temporary-work agencies have an immigration background. This aim of ensuring workers' health and safety must, therefore, seek to protect the temporary-agency workers. In effect, preventing temporary workers from providing their labour through a temporary-work agency is not a suitable way to protect them from injury. As held, there are other avenues through which they would be able to provide their services and be exposed to the same risk profile. Even if the workers were to be employed directly in a user undertaking, an unsubstantiated *assumption* cannot prove that direct and permanent employment *in itself* is suitable to reduce the risk of health and safety issues.

(126) In any case, should the aim of increasing direct and permanent employment in a two-party relationship be a legitimate aim in itself, the Plaintiffs argue that the restrictions are not suitable to increase permanent employment in the user undertaking. The user undertakings use temporary agency workers to meet a temporary need. The need of the user undertakings for temporary labour is *limited*, while permanent employment is a solution which entails employment on an *unlimited* basis. Therefore, the temporary nature of the undertaking's underlying need and permanent employment of workers as a solution do not reconcile. Permanent employment by its nature cannot cover the underlying need in the user undertaking that hiring from temporary-work agencies fulfils. It is, therefore, inherent and logical that the restrictions will not lead to more permanent employment. As such, the restrictions are unsuitable to protect the functioning of the labour market by increasing permanent employment in a two-party relationship. On the contrary, the restrictions seem to be liable to decrease permanent employment and increase the use of fixed-term employment, self-employment, and subcontracting, counter to the aim of enhancing direct and permanent employment in a two-party relationship.

(127) Based on the above, the measures are not suitable, and as such the restrictions are not compatible with EEA law. The Government has not substantiated that there is a genuine risk to the objectives they seek to attain which may justify their measures. In any case, they have not provided sufficient

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[118] Prop. 131 L (2021-2022) Chapter 3.6, on p. 15

evidence containing solid and consistent data which demonstrates that their chosen measures actually have the intended effect of combatting the societal issues the Government contend exists. As such, a conclusion that these measures are suitable cannot be made.

#### 4.3.3 *Consistency*

(128) The adopted measures must also genuinely reflect a concern to attain the aims pursued in a consistent and systematic manner in order to be justified.[119] As such, the Government is required to take a systematic and consistent approach to address the relevant concern, and arbitrary restrictions which do not coincide with other measures may not be justified under the guise of a legitimate restriction.

(129) In the Plaintiffs' view, it is challenging to see that the restrictions on hiring from temporary-work agencies form part of a systematic and consistent approach taken by the Government to ensure the functioning of the labour market, specifically to increase permanent and direct employment.

(130) The inherent inconsistency of the restrictions is especially evident because temporary agency workers, as a main rule in Norway, have a permanent employment contract with their temporary-work agency.[120] Regarding the Norwegian Government's argument that permanent employment in a temporary-work agency *differs* from permanent employment in other entities, it is essential to note that the same legal provisions govern both permanent employment in the user undertaking and with the temporary-work agency itself. These regulations emphasise permanent employment as the general norm, allowing fixed-term or temporary agency work only under specific circumstances.[121]

(131) Furthermore, the Plaintiffs argue that it is inconsistent with the aim of increasing permanent employment to ensure the functioning of the labour market by restricting hiring in from temporary-work agencies while permitting fixed-term employment under similar circumstances.

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[119] Case E-08/20, *Criminal Proceedings against N*, para. 94, and the case law cited. See also Case E-03/06, *Ladbrokes*, para 51, and Case E-3/00, *Kellogg's* para. 26, where the EFTA Court held that the object the State seeks to attain "… must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken". In *Kellogg's*, the Court held that it was inconsistent that selling fortified cornflakes (7mg iron/100g) was prohibited while selling brown whey cheese (10mg iron/100g) was allowed.

[120] Innst. 108 L (2022-2023) Chapter 1.2, NO: "Hovedregelen om fast ansettelse er et grunnleggende prinsipp i norsk arbeidsliv. Et arbeidsliv preget av trygge, faste arbeidsforhold gagner både arbeidstakerne, virksomhetene og samfunnet som helhet. Et arbeidsliv der hele og faste stillinger skal være den klare hovedregelen." See also Prop. 74 L (2011-2012) Chapter 7.1.5.2.

[121] Namely the exceptions which apply to temporary labour services provided within the healthcare sector, and for short-term consultancy services. See pt. 2 above for further clarifications.

This inconsistency is highlighted by the Government's statement in the preparatory work that temporary agency work and fixed-term employment are often alternative forms of employment that should be governed by the same rules to prevent misuse.[122] Furthermore, under the current rules, "user undertakings" can rely on temporary workers as long as they are hired directly, without a temporary-work agency as an "intermediary." If the same challenges apply to both temporary-agency workers and fixed-term employees, it is entirely inconsistent to restrict their use differently. The Government's perspective suggesting that temporary agency work *inherently* provides less security and benefits than fixed-term work in other sectors, is purely speculative and undocumented. Opting for permanent employment in temporary-work agencies may actually *increase* job security compared to fixed-term contracts, as employees no longer need to seek new employment at the end of each fixed-term contract.

(132) Moreover, the Plaintiffs argue that the exception in Section 3 of the Regulation allowing hiring from temporary-work agencies in the healthcare sector while prohibiting hiring-in from temporary-work agencies in general and in the construction sector, is inconsistent with the aim of ensuring the functioning of the labour market by increasing permanent and direct employment.

(133) The public healthcare sector is large, with close to 400.000[123] employees and approximately 68.000 workers holding temporary positions.[124, 125] The Government's rationale behind the exception in Section 3 of the Regulation allowing for hiring in from temporary-work agencies in the healthcare sector is that the need for skilled labour in this sector fluctuates, *inter alia* to handle disease outbreaks, larger accidents or to cover deficits due to illness.[126] Similarly, the need for a temporary workforce in the construction sector, and other sectors in general, fluctuates in a

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[122] Prop. 74 L (2011-2012), Chapter 7.1.5.3. See also Prop. 131 L (2021-2022), at p. 7.

[123] NOU 2023: 4 – "Tid for handling — Personellet i en bærekraftig helse- og omsorgstjeneste." pt. 4. https://www.regjeringen.no/no/dokumenter/nou-2023-4/id2961552/. NO: "Det er over 400 000 sysselsatte i helse- og omsorgstjenestene i Norge (SSB, tabell 13470). Drøyt 240 000 jobber i de kommunale helse- og omsorgstjenestene, nesten 150 000 jobber i spesialisthelsetjenesten og nesten 13 000 jobber i tann-helsetjenesten."

[124] Source: Statistics Norway (SSB) table 13916: "Sysselsatte med helse- og sosialfaglig utdanning, etter fagutdanning, statistikkvariabel, år og ansettelsesform". https://www.ssb.no/statbank/table/13916/tableViewLayout1/.

[125] The healthcare industry represents 8% of the total client base of temporary-work agencies affiliated with NHO Service and Trade. In 2020, the counties and healthcare undertakings spend approx. 1.7 billion NOK on the hiring-in of workers from temporary-work agencies, cf. Consultation Note from the Ministry of Labour and Social Inclusion dated 11 October 2022, p. 3. https://www.regjeringen.no/globalassets/departementene/aid/dokumenter/2022/horingsnotat-forslag-til-forskriftsregulering-av-innleie-til-helse-og-omsorgstjenesten-og-innleie-av-radgivere-og-konsulenter-med-spesialkompetanse.pdf.

[126] Consultation Note from the Ministry of Labour and Social Inclusion dated 11 October 2022, p. 3 (cited above).

similar manner due to seasonal and project-based demand. The Government itself acknowledges in the preparatory works that there is a need for a larger workforce in the construction sector. In the legislative proposal, the Government itself predicts that there will be a growing deficit of trained workforce in both the public health sector and construction sector.[127] As a corollary, the workforce needs in the healthcare sector are presumably stable or increasing in the future. In light of the foregoing, it appears directly counter to the aim of enhancing permanent and direct employment to allow hiring from temporary labour agencies in the healthcare sector. Thus, granting an exception for temporary agency workers in the healthcare sector, based on the *nature of its labour needs*, appears entirely inconsistent with the goal of promoting permanent and direct employment, especially compared to other sectors needing temporary workers.

(134) Lastly, the exception for agreements with employee representatives as outlined in Section 14-12 (2) WEA is relatively narrow, primarily benefiting user undertakings with a collective agreement with major trade unions and, in any case, contingent upon the approval of the employee representatives. This exception will inherently create indirect discrimination against undertakings that do not have a collective agreement with a major trade union to the benefit of Norwegian companies already established in Norway. It seems reasonable to assume that unions will not consent to the use of temporary labour if the use of temporary workers enables foreign undertakings to more effectively compete with domestic undertakings organised within the Norwegian labour unions. There is a real risk that the assessment of whether consent should be given pursuant to Section 14-12 (2) WEA may be arbitrary, not transparent, and impossible to reconcile with the, if even valid, objective of the rule. Such a system has an inherently protectionist effect which is contrary to the fundamental principles of the internal market of the EEA.[128] The Government has, in any case, not documented how this exemption may in any way ensure the protection of the aims outlined in Article 4 of the Directive.

(135) Based on the above, the restrictions do not constitute a systematic and consistent effort to attain the functioning of the labour market by increasing permanent and direct employment. Instead, the Government is potentially concealing indirect discrimination and favouring governmental undertakings over private undertakings, under the guise of a restriction they argue is suitable. The

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[127] Prop. 131 L (2021-2022) Chapter 6.4.2, on p. 26, NO: "Departementet viser dessuten til at det er stor etterspørsel etter lærlinger og fagarbeidere i næringen. En rapport fra SSB om sysselsetting og arbeidsstyrke frem mot 2040 viser at det kan bli særlig underskudd på helsefagarbeidere og fagarbeidere innen industri, bygg og anlegg og håndverksfag."

[128] See, to that effect, Case C-352/8, *Bond van Adverteerders,* para 34, and Case C-288/89, *Gouda*, para 29.

Plaintiffs, therefore, contend that the measures are not implemented consistently and systematically and are thus inconsistent.

4.3.4 *Necessity*

(136) The restrictions must not go beyond what is necessary to attain that objective, meaning that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[129] As stated above, the Government must demonstrate with specific evidence or an objective, detailed analysis with figures containing solid and consistent data that the measures are strictly necessary to attain the legitimate objective.

(137) First, the Plaintiffs contend that the Government has not substantiated that an underlying genuine risk actually exists which necessitates the prohibition, as described above. As such, the measures cannot be considered necessary.

(138) Second, if it is accepted that such a genuine risk actually does exist, the Plaintiffs argue that the adopted measures cannot be deemed necessary because the Government has not fully assessed whether less restrictive, alternative measures are equally effective in order to protect the functioning of the labour market, or the workers' health and safety.

(139) In the Plaintiff's view, the Government could have adopted multiple alternative measures that would be less prejudicial to the free movement of services and workers and would protect the functioning of the labour market and/or the workers' health and safety in an equally effective manner.

(140) It is important to note that both of the adopted prohibitions disproportionately impact small and medium-sized agencies and undertakings, which rely more heavily on high flexibility and cannot avail themselves of the exception in Section 14-12 (2) WEA, as they lack a collective agreement with one of the major trade unions. Consequently, small and medium-sized temporary-work agencies are more prone to lay-offs and bankruptcy. The Plaintiffs cannot see that the Government have assessed whether the prohibitions in conjunction with an exception for small and medium sized undertakings could, in an equally effective manner, protect the functioning of

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[129] Case E-8/17, *Kristoffersen*, paras. 121 and 122, and the case law cited. See also *inter alia* Case C-602/19, *Kohlpharma*, where it is held that where the objective "… can be protected equally effectively by measures less restrictive of trade within the internal market", the implemented measure is not necessary.

the labour market or workers' health and security. Due to the lack of such an assessment, the Government have not fulfilled its burden of proof. Thus, less restrictive measures could attain the objectives in an equally effective manner, and consequently both prohibitions on hiring from temporary-work agencies go beyond what is strictly necessary to protect the functioning of the labour market or workers' health and security.

(141) Regarding the restriction on hiring employees from temporary-work agencies in situations where "the work is of a temporary nature" according to Section 14-12 WEA (1), cf. Section 14-9 (2) letter a), there is reason to recall that in the preparatory works regarding *inter alia* changes to the WEA, the following was held regarding the proportionality of the legislation regulating the access to temporary labour from temporary-work agencies *before* the contested amendments to Section 14-12 WEA:

> "The Norwegian rules interfere with the right to hire labour, but in the Ministry's view, no further than is necessary to achieve the objective of placing the main emphasis on permanent employment and bilateral relations.
>
> At the same time, it must be emphasised that the Norwegian authorities recognise the role of temporary employment agencies in the labour market. It is pointed out that according to Norwegian law there is a not insignificant access to hiring labour from a temporary agency, pursuant to both the WEA § 14-12 first paragraph, *when there is a real need for temporary labour* and also without hindrance of the conditions in the first paragraph through the agreement access in section 14-12, second paragraph, in the case of tariff-bound businesses. It must be recalled that during periods of high demand for labour, the temporary agency industry has experienced strong growth under the current regulatory regime.
>
> *On this basis*, the Ministry believes that the conditions for hiring in the WEA § 14-12 can be justified in the public interest and that these are proportionate in accordance with Article 4 no. 1 of the Directive."[130]

(142) Accordingly, the necessity of the legislation as it were *before* the amendments at issue in the present case was dependent on the possibility of hiring temporary labour from temporary-work agencies for work of a "temporary nature." However, now that this alternative is no longer an

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[130] Prop. 74 L (2011-2012) Chapter 7.1.5.3 (our translation and formatting). NO: "De norske reglene griper inn i adgangen til å leie inn arbeidskraft, men etter departementets syn, ikke lenger enn det som er nødvendig for å oppnå formålet om hovedvekt på faste ansettelsesforhold og topartsrelasjoner.

Det må samtidig understrekes at norske myndigheter anerkjenner vikarbyråenes rolle i arbeidsmarkedet. Det vises til at det etter norsk rett er ikke ubetydelig adgang til å leie inn arbeidskraft fra vikarbyrå, både etter arbeidsmiljøloven § 14-12 første ledd, når det er et reelt behov for midlertidig arbeidskraft og også uten hinder av vilkårene i første ledd gjennom avtaleadgangen i § 14-12 annet ledd, ved tariffbundne virksomheter. Det vises til at vikarbyråbransjen i perioder med stor etterspørsel etter arbeidskraft, har hatt en sterk vekst under gjeldende regelverksregime.

Departementet mener på denne bakgrunn at vilkårene for innleie i arbeidsmiljøloven § 14-12 kan begrunnes i allmenne hensyn og at disse er proporsjonale i henhold til direktivets artikkel 4 nr. 1. Det er etablert passende rammer for innleie av arbeidskraft i Norge og reguleringen kan videreføres ved en gjennomføring av vikarbyrådirektivet"

option, it becomes clear that the measures taken have become too stringent and go beyond what is necessary to attain the aims the Government seeks to attain.

(143) The Plaintiffs further argue that if the genuine concern was the misuse of temporary agency workers to fulfil permanent needs in undertakings, a more effective approach would have been to clarify the meaning of the phrase *"when the work is of a temporary nature"* in the WEA.[131] Such clarification could be achieved by adopting a definition in the legislative provision, issuing additional guidelines, and enhancing enforcement measures. A well-defined provision, correctly applied to address temporary needs exclusively, should not pose any challenge to direct and permanent employment.[132]

(144) Furthermore, the Plaintiffs contend that the Government has not substantiated with specific evidence or an analysis containing solid and consistent data that it is strictly necessary with a total on hiring from temporary-work agencies in the construction sector in the Wider Oslo area.[133] In the Plaintiff's view, there are a number of less restrictive, alternative measures that are equally effective to protect the functioning of the labour market and workers health and security which could have been adopted. In this regard, it is important to note that a total ban is the most restrictive measure on the free movement an EEA State can adopt. Thus, the Government must be required to have conducted a complete and thorough assessment of whether less restrictive measures are equally effective to attain the intended objective, and to substantiate why these less restrictive measures are not adequate to attain the intended objective.

(145) The Plaintiffs argue that the Government could have opted for more flexibility by adopting further or more far-reaching exceptions in the Regulation. It is important to note that the regional total prohibition in force *applies equally to all temporary-work agencies and user undertaking* in the construction sector. As such, the restriction also applies to temporary-work agencies and user undertakings that are run in a serious manner and complies with the stringent Norwegian rules, for example by offering their temporary agency workers, *inter alia*, the same wage and good

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[131] Case C-681/18, *JH v KG* is illustrative. The ECJ held that the TAWD precludes "… a Member State from taking no measures at all to preserve the temporary nature of temporary agency work and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole."

[132] ESA's Letter of Formal Notice, pt. 91.

[133] Prop. 131 L (2021-2022) Chapter 6.4.2, p. 29. The Government recognises that alternatives exist, but they have not in reality considered them. They hold that "The Ministry will assess such measures in more detail [at a later date]".

working conditions. If the objective of the Government is to protect the functioning of the labour market and workers security by limiting abuse and regulate unserious market operators in the construction sector, the Plaintiffs argue that the Government could have targeted the unserious market operators specifically by adopting an exception from the total ban for temporary-work agencies that could document that they complied with Norwegian labour law, for example by allowing the Norwegian Labour Inspection Authority to grant exemptions from the ban, in accordance with its existing mandate as outlined in pt. 2 above. Such a system is inherently logical to avoid measures that go beyond what is necessary. If a temporary-work agency does not pose a threat to the interests the Government seeks to protect by adhering to the other rules in the WEA, then their activities should not be restricted. In other words, an approval system could ensure compliance with the fundamental freedoms provided by EEA law.

(146) Based on the reasons outlined above, the Plaintiffs contend that the restrictions go beyond what is necessary to attain the aimed objective and that they run counter to the dual purpose of the TAWD.[134]

#### 4.3.1 *Plaintiffs' proposed answer to Question 3*

(147) The Plaintiffs invite the EFTA Court to reply to the referring court's third question in the following manner:

*The measures taken by the Norwegian Government, both the changes to the Working Environment Act and the Regulation on the hiring-in of workers, are neither suitable, consistent, or necessary to attain the objectives pursued, and, therefore constitutes an unjustifiable derogation from the free movement of services under Article 36 EEA and other fundamental freedoms enshrined in the EEA Agreement. The Government has not substantiated that temporary agency work results in the negative consequences the Government assumes, and in any case, they have not demonstrated that the implemented measures actually have the intended effects. Theoretical considerations or unsubstantiated facts supposedly demonstrating the need for the far-reaching scope of the prohibitions are irrelevant to considering whether the measures are proportionate. The geographical and sector-specific prohibition on the hiring-in of workers*

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[134] See Case C-681/18 (cited above) at para. 50: "Directive 2008/104 is … designed to reconcile the objective of flexibility sought by undertakings and the objective of security corresponding to the protection of workers."

*cannot in any case be considered suitable, consistent, or necessary and is therefore contrary to Article 36 EEA and other fundamental freedoms enshrined in the EEA Agreement.*

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Oslo, 18 April 2024

Advokatfirmaet Simonsen Vogt Wiig AS

Jan Magne Langseth

Advokat – Admitted to the Supreme Court

Nicolay Skarning (sign.)

Advokat – Admitted to the Supreme Court