Brussels, 19 July 2023
Case No: 89887
Document No: 1373235
Decision No: 106/23/COL

Norwegian Ministry of Labour and Social Inclusion
Postboks 8019 Dep
0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning restrictions on the use of temporary agency workers in Norway

1 Introduction

1. By a letter dated 10 February 2023,[1] the Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case on 25 January 2023, *inter alia* on the basis of a complaint received, in order to examine newly adopted measures in Norway which restrict the use of temporary agency workers.

2. After having assessed the case, the Authority has reached the conclusion that, by maintaining in force national provisions such as Section 14-12(1), cf. Section 14-9(2), of the Working Environment Act[2] ("WEA") and Section 11(1) of the Civil Service Act[3], which prevent the use of temporary agency workers when the work is of a temporary nature, and Section 4 of the regulation on temporary agency work[4], which prohibits all use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold[5], Norway is in breach of Article 4(1) of Directive 2008/104 *on temporary agency work*[6] ("the Temporary Agency Work Directive" or "the Directive") and Article 36 of the EEA Agreement ("EEA").

2 Correspondence

3. On 10 February 2023, the Directorate sent a request for information to the Norwegian Government,[7] asking several detailed questions concerning the adopted measures in Norway restricting the use of temporary agency workers.

4. By a letter dated 19 April 2023,[8] the Directorate informed the Norwegian Government that it had received four complaints relating to the newly adopted measures in Norway restricting the use of temporary agency workers: one from an Estonian temporary-work agency which posts workers to Norway, two from big Norwegian

[1] Doc No 1348681.
[2] Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern, as amended.
[3] Lov 16. juni 2017 nr. 67 om statens ansatte mv., as amended.
[4] Forskrift 11. januar 2013 nr. 33 om innleie fra bemanningsforetak, as amended.
[5] The Authority understands that Vestfold was merged with Telemark in 2020 but will become Vestfold again on 1 January 2024.
[6] Incorporated into the EEA Agreement by Joint Committee Decision No 149/2012 of 13 July 2012 at point 32k of Annex XVIII (Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work) as adapted to the EEA Agreement by Protocol 1 thereto, with entry into force and compliance date of 1 May 2013.
[7] Doc No 1348681.
[8] Doc No 1367497.

temporary-work agencies and one from a Norwegian employers' organization for small and medium sized undertakings. It has been communicated to the Norwegian Government, and to the complainants, that the issues complained of will be examined and dealt with in the context of this own initiative case.

5. At the request of the Norwegian Government, a meeting was held in Brussels on 21 April 2023, where representatives of the Norwegian Government explained in general terms the Norwegian labour market model and the system of temporary agency work in Norway, as well as presenting the Government's view on the compatibility of the adopted measures with EEA law. The Authority's representatives asked questions relating to the adopted measures and the system in general.

6. By a letter dated 5 May 2023,[9] the Norwegian Government replied to the Directorate's request for information. In the letter, the Norwegian Government provided general information on the Norwegian labour market model and the Government's labour market policy, as well as some statistics and information regarding the use of temporary agency workers in Norway. The Norwegian Government, moreover, maintained that the adopted measures are compatible with EEA law as they constitute justified and proportionate restrictions on the use of temporary agency workers and the freedom to provide services.

3 Relevant national law

7. Section 14-9 WEA titled "*Permanent and temporary appointment"* provides:

"(1) An employee shall be appointed permanently. For the purposes of this Act, a permanent appointment shall mean that the appointment is continuous and not time-limited, that the provisions of the Act concerning termination of employment shall apply and that the employee is ensured predictability of employment in the form of a clearly specified amount of paid working hours.

(2) Temporary appointment may nevertheless be agreed upon
a. when the work is of a temporary nature
b. for work as a temporary replacement for another person or persons
c. for work as a trainee
d. with participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service
e. with athletes, trainers, referees and other leaders within organised sports
[…]"[10]

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

"(1) Hiring workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, second paragraph (b) to (e).

(2) In undertakings bound by a collective pay agreement concluded with trade unions with the right of nomination pursuant to the Labour Disputes Act, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired may enter into a written agreement concerning the hiring of workers for limited periods notwithstanding the provisions laid down in the first paragraph. In response to an enquiry from the Norwegian Labour Inspection Authority, the undertaking and the temporary work agency shall provide documentation that the hirer undertaking is bound by a collective agreement

[9] Doc Nos 1371303 and 1371305 / your ref. 23/709-.
[10] Official translation into English: https://lovdata.no/dokument/NLE/lov/2005-06-17-62

Concluded with trade unions with the right of nomination and that an agreement has been entered into with the employees' elected representatives as referred to in the first sentence.

[…]

(4) Any temporary worker who has been hired continuously according to this section for more than three years has the right to permanent employment with the lessor so that the rules on termination of employment apply. In the calculation, no deduction shall be made for the temporary worker's absence.

[…]

(6) The Ministry may by regulation prohibit the hiring of certain groups of workers or in certain sectors when so indicated by important social considerations.

(7) The Ministry may by regulation issue rules on the time-limited hiring of health personnel to ensure proper operation of the health and care service, and the time-limited hiring of special expertise, which deviate from the provision of the first paragraph."[11]

9. Section 14-12(1) was amended on 20 December 2022 with entry into force on 1 April 2023.[12] The amendment entails that the reference to item (a) of Section 14-9(2), which concerns the situation when the work is of a temporary nature, was removed.[13] The use of temporary agency workers is thus now only allowed in the situations covered by items (b)-(e) of Section 14-9(2) of the Act.

10. On 20 December 2022, the Norwegian Ministry of Labour and Social Inclusion amended regulation of 11 January 2013 on temporary agency work, with entry into force on 1 April 2023.[14]

11. Adopted on the basis of a new Section 14-12(7) WEA, Section 3 of the regulation on temporary agency work now reads:

"The use of workers from temporary work agencies is allowed despite the requirements in the Working Environment Act Section 14-12 in the case of:

a. Hiring of health care personnel in order to ensure proper operations of health care services. […]

b. Hiring of employees with special expertise that shall provide advisory- and consultancy services in clearly limited projects."[15]

12. Section 9(1) of the Civil Service Act states:

"State employees shall be appointed permanently. Temporary appointment may nevertheless be agreed upon

a. when the work is of a temporary nature
b. for work as a temporary replacement for another person or persons
c. for work as a trainee
d. for educational positions
e. for a period of up to six months when there is an unforeseen need."[16]

13. Section 11 of the Civil Service Act provides:

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[11] *Ibid*.
[12] Lov 20. desember 2022 nr. 99 om endringer i arbeidsmiljøloven m.m.
[13] Before the amendment, Section 14-12(1) WEA read: "*Hiring workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, second paragraph (a) to (e).*"
[14] Forskrift 20. desember 2022 nr. 2355 om endring i forskrift on innleie fra bemanningsforetak.
[15] Unofficial translation of the Authority.
[16] *Ibid*.

"(1) Hiring workers from undertakings whose object is to hire out labour (temporary-work agencies) shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 9(1)(b).

(2) The employer and civil servant organisations which have the right to negotiate under Act 18 July 1958 No 2 on civil service disputes, may enter into a written agreement concerning the hiring of workers for limited periods notwithstanding the provisions laid down in the first paragraph.

[…]"[17]

14. Section 11(1) of the Civil Service Act was amended on 20 December 2022 with entry into force on 1 April 2023.[18] The amendment entails that the reference to item (a) of Section 9(1), which concerns the situation when the work is of a temporary nature, was removed. The use of temporary agency workers under the Civil Service Act is thus now only allowed for work as a substitute (replacement) for another person or if there is a written agreement in accordance with Section 11(2) of the Act.

15. Moreover, on the basis of Section 14-12(6) WEA, Section 4 of the regulation on temporary agency work introduced a prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold.

16. On 20 December 2022, the Ministry of Labour and Social Inclusion also adopted regulation on transitional rules in relation to the amendments to the Working Environment Act etc.[19] That regulation provides in Section 4 that the entry into force of the amendment to Section 14-12(1) WEA is suspended until further notice with regard to the use of temporary agency workers as substitutes in the agricultural sector. Following an amendment to that regulation, Section 5 now also provides for the suspension of the entry into force of the amendment to Section 14-12(1) WEA with regard to the use of temporary agency workers for events.[20]

4 Relevant EEA law

17. Article 36 EEA states:

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

18. The preamble to the Temporary Agency Work Directive provides:

"[…]

(9) […] the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market

[17] *Ibid*.

[18] Lov 20. desember 2022 nr. 99 om endringer i arbeidsmiljøloven m.m.

[19] Forskrift 20. desember 2022 nr. 2301 om overgangsregler til lov om endringer i arbeidsmiljøloven m.m.

[20] Forskrift 3. mars 2023 nr. 290 om endring i forskrift om overgangsregler til lov om endringer i arbeidsmiljøloven m.m.

and help both workers and employers to seize the opportunities offered by globalisation.

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

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

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

[…]

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

[…]

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

[…]"

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

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

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

"The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working."

21. Article 3(1) of the Directive contains definitions and provides:

"For the purposes of this Directive:

[…]

(b) 'temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

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

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

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

[…]"

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

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

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

"1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

2. By 5 December 2011, [EEA] States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.

3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.

4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

5. The [EEA] States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."

24. Article 5(1) lays down the principle of equal treatment and provides that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

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

26. Article 5(5) of the Directive stipulates:

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

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

28. Article 9 on minimum requirements reads:

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

5 The Authority's assessment

5.1 General observations – the aim and nature of the Temporary Agency Work Directive

29. The Authority at the outset acknowledges that it is for Norway to decide on its labour market model, with widespread collective agreements, high rates of organisation and permanent employment as the main form of employment. However, when doing so, Norway must comply with EEA law, including the freedom to provide services and the Temporary Agency Work Directive, which was incorporated into the EEA Agreement without adaptations.[21]

30. The aim of the Temporary Agency Work Directive is, on the one hand, to improve the protection of temporary agency workers, in particular by establishing the principle of equal treatment, and, on the other hand, to support the positive role that agency work can play by recognising temporary-work agencies as employers and providing sufficient flexibility in the labour market.[22] It is clear from the Directive itself that temporary agency work is considered to meet not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives, thereby contributing to job creation and to participation and integration in the labour market.[23] It follows that the Directive strikes a fair balance between flexibility for employers and security for workers and that temporary agency work is considered to have positive effect on the labour market as a whole.[24]

31. The Directive recognises that there are differences between the Member States when it comes to use of temporary agency workers and the legal situation, status and working conditions of temporary agency worker.[25] Recital 12 in the preamble to the Directive states that the Directive establishes a protective framework for

[21] The Temporary Agency Work Directive was mainly implemented into the Norwegian legal order by the Working Environment Act, as amended, the Labour Market Act, as amended (lov 10. desember 2004 nr. 76 om arbeidsmarkedstjenester) and the Civil Service Act, as amended (lov 4. mars 1983 nr. 3 om statens tjenestemenn m.m., later repealed and replaced by lov 16. juni 2017 nr. 67 on statens ansatte mv.).

[22] Article 2 of the Temporary Agency Work Directive. See also recitals 9 and 11 in the preamble to the Directive and the Commission's report on the application of Directive 2008/104/EC on temporary agency work (COM(2014) 176 final), p. 19.

[23] Recital 11 in the preamble to the Temporary Agency Work Directive.

[24] See judgment of 14 October 2020 in Case C-681/18 *KG*, paragraph 70. See also the Commission's report on the application of Directive 2008/104/EC on temporary agency work, cited above, p. 10, which states that, although the numbers of agency workers are relatively modest, the importance of this flexible form of working in the functioning of the national labour markets cannot be denied.

[25] See recital 10 in the preamble to the Directive.

temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. Article 5(2)-(4) of the Directive gives the States (and in particular the social partners) the possibility to derogate from the principle of equal treatment laid down in Article 5(1) as regards working conditions for temporary agency workers.[26] The reference in recital 12 to respect of the diversity of labour markets and industrial relations is thus not relevant for the application of Article 4 of the Directive.

32. It is true that the Temporary Agency Work Directive recognises that permanent employment is the general form of employment. However, that statement in the Directive must be read in its context. Recital 15 in the preamble to the Directive provides that, since permanent employment contracts are the general form of employment relationship and given the special protection such a contract offers, workers who have a permanent contract with their temporary-work agency should be able to be exempted from the rules applicable in the user undertaking. In line with that, Article 5(2) allows for a derogation from the principle of equal treatment where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. Furthermore, Article 6(1) of the Directive provides that temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. The reference in the Directive to permanent employment being the general form of employment, when read in its context, can thus not be understood as an acceptance of the possibility to reduce the use of temporary agency workers merely to increase permanent employment.

33. The Authority also notes that the whole Directive is built around the notion of 'temporariness'. Article 1(1) thus defines the scope of the Directive as applying to workers with a contract of employment with a temporary-work agency who are assigned to user undertakings to work 'temporarily' under their supervision and direction. Moreover, many of the definitions in Article 3 of the Directive explicitly mention that the work to be undertaken by the temporary agency worker in the user undertaking is 'temporary'.[27] Article 3(2) also specifically states that EEA States shall not exclude from the scope of the Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency. Lastly, the temporary nature of temporary agency work also follows from Article 5(5) of the Directive, according to which EEA States shall take appropriate measures with a view to preventing successive assignments designed to circumvent the provisions of the Directive.[28]

34. The Temporary Agency Work Directive lays down minimum requirements and EEA States can therefore always introduce measures which are more favourable to workers, see Article 9(1) of the Directive. In line with that, Article 9(2) also stipulates that the implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive.

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[26] See also judgment of 15 December 2022 in Case 311/21 *TimePartner*, paragraphs 35-39.

[27] Article 3(1)(b), (c), (d) and (e) of the Directive.

[28] See also *KG*, cited above, paragraph 60, where the Court held that Article 5(5) of the Directive must be interpreted as requiring EEA States to take measures to preserve the temporary nature of temporary agency work by prohibiting unlimited renewals of assignments at the same user undertaking, thereby preventing it from becoming a permanent situation for the temporary agency worker.

5.2 The measures in question constitute restrictions on the use of temporary agency workers and the freedom to provide services

35. In the presents case, the Authority has examined three separate restrictions on the use of temporary agency workers in Norway.

36. First, the Authority has assessed the recent amendment to Section 14-12(1) WEA, which now only allows for the use of temporary agency workers in the situations covered by items (b) to (e) of Section 14-9(2) of the same Act, as opposed to items (a) to (e) before. Section 14-9(2)(a) allows for fixed-term (temporary) employment "when the work is of a temporary nature" ("*når arbeidet er av midlertidig karakter*"), but that option has now been removed for the use of temporary agency workers.

37. This amendment entails that Section 14-12(1) WEA now only allows for the use of temporary agency workers in Norway in the following situations: (b) for work as a substitute for another person, (c) for work as a trainee, (d) with participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Administration and (e) with athletes, sports coaches, referees and other leaders in organised sport. It follows that the typical situations of using temporary agency workers for seasonal work, for production peaks or for short-term projects where there is a need for qualified labour not normally available in the undertaking are no longer allowed.[29] According to the Labour Inspection Authority, the option for work of a temporary nature and for work as a substitute were the main basis for temporary agency work.[30] The other options for using temporary agency workers are narrow and specific.

38. On the basis of Section 14-12(7) WEA, the Ministry of Labour and Social Inclusion has amended the Norwegian regulation on temporary agency work in order to provide for exceptions to the above restriction.[31] Section 3 of the regulation now provides that the use of temporary agency workers is 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. Moreover, the Authority understands that the entry into force of the amendment to Section 14-12(1) WEA was suspended for an indefinite period in the case of substitutes for farmers in agriculture and events.[32] Furthermore, Section 14-12(2) WEA provides that, in undertakings bound by a high-level collective agreement,[33] 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.

39. Second, the Authority has also assessed the recent amendment to Section 11(1) of the Civil Service Act, which has similarly removed the option to use temporary agency workers for work of a temporary nature. As this restriction is identical in substance to the amendment to Section 14-12(1) WEA discussed above, the

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[29] Except for in the case of advisory and consulting services for a clearly defined project, see Section 3(1)(b) of the regulation on temporary agency work.

[30] See the Labour Inspection Authority's report published on 16 February 2023, p. 10: https://www.arbeidstilsynet.no/contentassets/2fe781cd9b0e43a4924308b5aaf7f72b/arbeidstilsynet-innleieprosjekt---sluttrapport.pdf. Moreover, according to information available to the Authority, for both Adecco and Manpower, the main option for using temporary agency worker was for work of a temporary nature.

[31] See Prop. 131 L (2021-2022), p. 6, which states that this opens up for narrow exceptions within specific areas.

[32] See paragraph 16 above.

[33] The Authority understands that this refers to collective agreements with trade unions which have 10,000 members or more, cf. Section 39 of the Labour Disputes Act, meaning only the biggest trade unions in Norway.

Authority takes the view that the same considerations apply and refers to the argumentation below concerning Section 14-12(1) WEA *mutatis mutandis*.[34]

40. Third, the Authority has assessed the recent amendment to the regulation on temporary agency work, which now stipulates in Section 4 that the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold is prohibited. This amendment was made on the basis of Section 14-12(6) WEA which authorises the Ministry to adopt a regulation prohibiting the hiring of certain groups of workers or in certain sectors when so indicated by important social considerations. The Authority understands that this is an absolute ban, without any exception, such as the one in Section 14-12(2) WEA.

41. The Authority also observes that those restrictions cannot be viewed in isolation, as they complement other measures which have been adopted in Norway in relation to and subsequent to the implementation of the Temporary Agency Work Directive in 2012 (with entry into force in January 2013). At that time, the then applicable rules on the use of temporary agency workers in Section 14-12(1), cf. 14-9(2)(a)-(e), WEA (which have now been amended), had already been assessed by the Norwegian Government as justified on the grounds of ensuring that permanent and direct employment remained the general form of employment in Norway.[35] In the legislative proposal implementing the Directive, the Norwegian Government explained that the equal treatment principle was necessary in order to ensure that the main rule of permanent and direct employment was upheld and would also contribute to the use of temporary agency workers being limited to situations where there was a real need for flexibility, i.e. a temporary need for increased workforce or to cover absences.[36] In the legislative proposal, it was also explained that the main reason for allowing temporary agency work to the same extent as fixed-term work was that these were often alternative forms of employment which needed to be governed by the same set of rules in order to prevent misuse.[37] In the Norwegian Government's letter of 5 May 2023, it is further noted that these are alternative ways for the undertakings to cover temporary needs for labour.[38]

42. Since the Temporary Agency Work Directive was implemented into the Norwegian legal order, the temporary agency work industry has been further regulated in Norway, *inter alia* by strengthening the protection of temporary agency workers and the enforcement of the rules. In 2019, legislative amendments were made to the Working Environment Act.[39]

43. First, a definition of permanent employment was added to Section 14-9(1) of the Act, entailing that all employees, including temporary agency workers, were to be ensured of predictability of employment in the form of a clearly specified amount of paid working hours. According to the Norwegian Government, the amendment was introduced to prevent a widespread practice in temporary-work agencies, where the workers were permanently employed but without a guaranteed salary or minimum

[34] Although the Norwegian Government did not mention the amendment to Section 11(1) of the Civil Service Act in its letter of 5 May 2023, the legislative proposal explains that the same considerations apply in relation to restricting the use of temporary agency workers under the Civil Service Act as under the Working Environment Act (see Prop. 131 L (2021-2022), p. 54).

[35] See Prop. 74 L (2011-2012), p. 43-45. See also the Norwegian Government's letter to the Authority dated 27 March 2015 (Doc No 752762 / your ref. 15/30-) in Case 76521 – *Conformity assessment of the implementation of Directive 2008/104 on temporary agency work in Norway*.

[36] Prop. 74 L (2011-2012), p. 51. See in that context a report of the Commission's expert group on the transposition of the Temporary Agency Work Directive, p. 29, which states that the improvements in working conditions of agency workers, in particular, through the recognition of the principle of equal treatment, would make many restrictions obsolete.

[37] Prop. 74 L (2011-2012), p. 43.

[38] See p. 7.

[39] Prop. 73 L (2017-2018).

scope of work.[40] The Authority understands that this entails that most temporary agency workers in Norway now have a permanent employment contract with a temporary-work agency and must be given the predictability of a certain amount of paid working hours.

44. Second, Section 14-12(2) of the Act was amended so that the exception allowing for the use of temporary agency workers provided for there would only apply to undertakings which are bound by a collective agreement entered into with a trade union with more than 10.000 members. According to the Norwegian Government, this amendment was based on a goal of reducing the use of temporary agency contract as well as preventing abuse of the right to enter into agreements on the use of temporary agency work.[41]

45. Moreover, as of 1 July 2020, the Labour Inspection Authority was given the mandate to supervise and enforce the rules on temporary agency work, including to conduct inspections and issue orders and fines.[42]

46. Further measures were also adopted along with the amendments made in December 2022 described in paragraph 36-40 above. First, Section 14-12(4) WEA was amended so that a temporary agency worker who has been hired continuously for more than three years has a right to permanent employment in the user undertaking, irrespective of the basis for the hiring.[43] Second, a new paragraph was added in Section 14-12(5) of the Act to clarify the definition of temporary agency work. Lastly, a prior authorisation system was established for temporary-work agencies to provide services in Norway on the basis of an amendment to Section 27(2) of the Labour Market Act.[44]

47. The Norwegian Government does not dispute that the removal of the option to use temporary agency workers for work of a temporary nature and the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold constitute restrictions on the use of temporary agency workers under Article 4(1) of the Directive and the freedom to provide services under Article 36 EEA.[45]

48. The Authority would like to stress that those restrictions are far-reaching and severe and are liable to have serious consequences for undertakings[46] and temporary agency workers in Norway, as well as temporary-work agencies providing services in Norway.[47] The first two restrictions remove one of the two main options for using temporary agency workers and apply generally, across all sectors. The third restriction is an absolute ban in one sector, in an area where most of the construction projects in Norway take place.[48] Moreover, the adopted restrictions are particularly detrimental to small and medium sized undertakings which are more dependent on high flexibility,[49] and which cannot benefit from the exception in Section 14-12(2) WEA, as they do not have a collective agreement with one of the big trade unions. Lastly, the Authority also observes that it appears that the

[40] See Norway's letter of 5 May 2023, p. 8.
[41] *Ibid*.
[42] See Section 18-6 WEA, cf. Prop. 61 LS (2019-2020).
[43] The Authority understands that this implements Article 5(5) of the Directive.
[44] Lov 10. desember 2004 nr. 76 om arbeidsmarkedstjenester, as amended.
[45] See Norway's letter of 5 May 2023, p. 36, and Prop. 131 L (2021-2022), p. 61-63.
[46] And State authorities/entities in the case of the Civil Service Act.
[47] According to information available to the Authority, Adecco has already dismissed around 650 permanently employed workers and Manpower has already dismissed around 500 workers.
[48] See Norway's letter of 5 May 2023, p. 25.
[49] See e.g. report of the Norwegian Better Regulation Council (*Regelrådet*) p. 1: https://regelradet.no/2022/03/18/endringer-i-regelverket-for-ibemanningsforetak/

restrictions result in indirect discrimination as they are liable to affect foreign workers more than Norwegian workers.[50]

49. The Authority notes that recital 22 in the preamble to the Temporary Agency Work Directive provides that the Directive must be implemented and applied in a manner which is consistent with the freedom to provide services. Article 4(1) of the Directive can thus be seen as an expression of the freedom to provide services under Article 36 EEA. In light of that, the Authority takes the view that Article 4(1) of the Directive also applies to restrictions on the use of temporary agency workers in cross-border situations, where workers are posted from a temporary-work agency established in another EEA State to provide services temporarily in Norway. In any event, however, such situations would also be covered by Article 36 EEA. It is established case law of the CJEU that contracting out workers from temporary-work agencies established in other EEA States is a provision of services within the meaning of Article 36 EEA.[51]

5.3 The measures in question constitute unjustified restrictions

50. Pursuant to Article 4(1) of the Temporary Agency Work Directive, prohibitions or restrictions on the use of temporary agency work must be justified on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. As stated by the CJEU in *AKT*, this provision restricts the scope of the legislative framework open to EEA States in relation to restrictions on the use of temporary agency work.[52]

51. The EFTA Court has also held that a restriction on the freedom to provide services laid down in Article 36 EEA may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.[53]

52. It follows from the Norwegian Government's bill proposing legislative amendments and Norway's reply to the Directorate's request for information that the overriding aim of the restrictions in question is to reduce the use of temporary agency workers and thereby, hopefully, increase permanent and direct employment.

53. In that context, reference is made to the legislative bill, which explicitly states that the proposals follow up on the Government's statement in *Hurdalsplatformen* that the scope and role of the temporary agency work industry must be limited and that the proposals are intended to reduce the use of temporary agency workers as a form of work in the Norwegian labour market.[54] Reference is also made to the Norwegian Government's press-release of 20 December 2022 in relation to the adoption of the restrictions which states that the Government's aim is to reduce the use of temporary agency work.[55]

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[50] See Prop. 131 L (2021-2022), p. 11, which states that in 2017 around 55% of temporary agency workers in Norway had immigration background, mainly from Eastern Europe, and that in 2021 non-resident temporary agency workers constituted around a third of those employed in temporary-work agencies. See also Norway's letter of 5 May 2023 p. 47 which stipulates that the growth in the use of temporary agency workers in construction was mainly driven by migrant workers from Eastern Europe.

[51] See judgment of 17 December 1981 in Case C-279/80 *Webb*, paragraph 9; and judgment of 25 October 2001 in Case C-493/99 *Commission v Germany*, paragraph 18.

[52] Judgment of 17 March 2015 in Case C-533/13 *AKT*, paragraph 31.

[53] See judgment of 16 November 2018 in Case E-8/17 *Kristoffersen*, paragraph 114.

[54] Prop. 131 L (2021-2022) p. 5 and 21.

[55] https://www.regjeringen.no/no/aktuelt/skjerpa-reglar-for-innleige/id2952383/. See also Prop. 131 L (2021-2022), p. 63, where it is stated that the aim of the proposal to remove the option of using

54. Moreover, the Authority refers to Norway's letter of 5 May 2023 which states, *inter alia*, 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, use of agency work must not be too widespread.*"[56] The letter, moreover, states: "*Thus, a desired consequence of the proposals will be that temporary agency work should be used to a lesser extent*."[57] As regards, in particular, the justification for removing the option to use temporary agency workers when the work is of a temporary nature, the letter states that the overall purpose is to prevent the use of temporary agency work at the expense of permanent and direct employment in user undertakings.[58] In that context, the letter also provides:

    "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."[59]

55. In light of this, the Authority is of the view that the aim of the measures is indeed to reduce the use of temporary agency workers overall. The Government's desired result is that that will then lead to more permanent and direct employment.

56. Although the Authority acknowledges that the Norwegian Government may decide the level of protection afforded to workers and how the labour market should function, it must still do so within the confines of EEA law. The Authority 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 Temporary Agency Work Directive.

57. That aim in reality goes against the two-fold aim of the Directive mentioned above, i.e. the protection of temporary agency workers and the flexibility of the labour market. Under the Directive, temporary agency work is considered a flexible form of work which has beneficial impact on the labour market as a whole. The Norwegian Government's view that temporary agency work is detrimental to the labour market and whose use should be severely reduced therefore contradicts the very basis of Article 4 of the Directive and goes against the aim and purpose of the Directive, as it is based on distrust towards temporary agency work.

58. Furthermore, the removal of the option of using temporary agency workers for work of a temporary nature also goes against the nature and main elements of the Directive, as it is inherent in temporary agency work that it is work of a temporary nature. In that context, reference is also made to the judgment in *Daimler*, where the CJEU clarified, *inter alia* with reference to the Directive's objectives, that the term 'temporary' in the Directive does not preclude a temporary agency worker from being assigned *temporarily* to a user undertaking to fill a *permanent* position, confirming that temporary agency work can even be used to meet a permanent need of the user undertaking.[60] Thus, removing the option of using temporary agency workers for

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temporary agency workers for work of a temporary nature is to reduce the use of temporary agency workers which displaces permanent employment, and thereby to ensure that permanent and direct employment is the main form of employment on the Norwegian labour market.

[56] See p. 4.
[57] See p. 18.
[58] See p. 41.
[59] See p. 44.
[60] Judgment of 17 March 2022 in C-232/20 *Daimler*, paragraphs 36-38.

work of a temporary nature in order to, hopefully, increase permanent positions, is not reconcilable with this ruling of the CJEU.

59. The Authority, moreover, contends that the opinion of the Advocate General in *AKT* cannot be used as an argument to support a restriction which removes the possibility to use temporary agency workers for work of a temporary nature, as indicated by the Norwegian Government.[61] The Advocate General's line of reasoning in *AKT* implies that, given the nature of temporary work, it is legitimate under the Temporary Agency Work Directive to limit the possibility of using temporary agency workers to situations where there is a temporary need or work of a temporary nature while prohibiting the use of temporary agency workers for work which extends over a long period of time.[62] In the case at hand, however, the Norwegian Government has, in addition to prohibiting the use of temporary agency workers for work of a permanent nature, also removed the possibility to use temporary agency workers for work of a temporary nature. The Authority thus takes the view that, if anything, this opinion supports the view that such a restriction cannot be justified.

60. For the reasons explained above, the Authority also fails to see that an aim that goes against the aim and nature of the Temporary Agency Work Directive could be considered as a legitimate aim or an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services under Article 36 EEA.

61. The Authority thus finds 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.

62. The Norwegian Government has also mentioned other, alternative, objectives as justifications for the adopted measures. With regard to the removal of the option to use temporary agency workers for work of a temporary nature, the legislative proposal merely makes a general reference to general interests protected by Article 4(1) of the Directive.[63] As regards the prohibition in the construction sector, the legislative proposal refers to the protection of workers and a well-functioning labour market, as well as health and safety at work, as possible justification grounds, without, however, explaining how those objectives were relevant for the adopted measure.[64]

63. In the Norwegian Government's letter of 5 May 2023, reference is made to the wish to ensure a well-functioning labour market, the protection of workers' rights and the prevention of abuse as alternative justification grounds for the measure to no longer allow for the use of temporary agency workers for work of a temporary nature.[65] As regards the prohibition in the construction sector, the Government refers to workplace crime, health and safety at work, the need for skilled workers, the protection of workers' rights and the need to ensure a well-functioning labour market as possible justification grounds.[66] However, also here, the Norwegian Government has not provided any detailed explanations as to the relevance of those objectives for the adopted measures. As stated by the EFTA Court, it is not sufficient for the

[61] See Norway's letter of 5 May 2023, p. 38-39.
[62] See Opinion of Advocate General Szpunar of 20 November 2014 in Case C-533/13 *AKT*, paragraphs 119-120. This is also in line with Article 5(5) of the Directive.
[63] Prop. 131 L (2021-2022), p. 64.
[64] *Ibid*, p. 62-63.
[65] See p. 40.
[66] See p. 45-46.

national measures to resort to a legitimate aim in the abstract, since it must rather be assessed whether the measures at issue actually pursue the invoked aim.[67]

64. As discussed above, it follows from statements made by the Norwegian Government, both in the legislative proposal and the letter of 5 May 2023, that the overriding aim is to reduce the use of temporary agency workers and thereby also increase permanent and direct employment. In relation to the alleged aim of preventing abuse, the Authority refers to two statements in the legislative proposal to the effect that: there was a need to limit the right to use temporary agency workers as such, and not only to crack down on illegal hiring, and that even in cases where the option of using temporary agency workers for work of a temporary nature would be applied correctly, it still opened up for a use of temporary agency workers which in the opinion of the Norwegian Government was too far-reaching.[68] The Authority cannot therefore see that the Government's objective was to prevent abuse of the option to use temporary agency workers for work of a temporary nature.[69]

65. Moreover, as regards the alleged objective of protecting workers, the Authority notes that, while the protection of temporary agency workers is a general interest under Article 4 of the Directive, a measure which is intended to limit the use of such workers due to its detrimental effects on the labour market cannot be said to protect temporary agency workers themselves.[70] Indeed, for such workers, it would seem to do the exact opposite. The Authority therefore takes the view that the Norwegian Government has not provided sufficient information to demonstrate that the measures at issue actually pursue the alternative objectives mentioned.

66. The Authority therefore considers that the adopted restrictions cannot be justified. In the alternative, even if it were accepted that the aim of reducing the use of temporary agency workers and increasing permanent and direct employment could be considered a legitimate aim, the measures would, in any event, breach EEA law as they are not proportionate.

5.4 The measures in question are not proportionate

5.4.1 General observations

67. It is established case law of the EFTA Court and the CJEU that, when a measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[71] The party invoking a derogation from a fundamental freedom must also show in each individual case that the measure is

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[67] Judgment of 16 May 2017 in Case E-8/16 *Netfonds Holdings*, paragraph 115. See also judgment of 19 April 2016 in Case E-14/15 *Holship*, paragraph 126.

[68] Prop. 131 L (2021-2022), p. 33.

[69] Additionally, reference is also made to Opinion of Advocate General Szpunar in *AKT*, cited above, paragraph 122 which states: *"I would observe that the adoption of measures to prevent abuses in the conclusion of temporary employment contracts cannot justify an almost general exclusion of that form of work, such as a prohibition on temporary work across an entire economic sector or the fixing of quotas for temporary contracts, in the absence of any other objective justification. Indeed, a measure that is intended to prevent abuses in the exercise of a right cannot be regarded as the equivalent of a renegotiation of the right in question."*

[70] See in that context also Article 9(2) of the Directive which provides that the Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of temporary agency workers.

[71] See judgment of 14 March 2007 in Case E-1/06 *ESA v Norway*, paragraph 43; *Netfonds Holdings*, cited above, paragraph 117; and *Kristoffersen*, cited above, paragraph 118. See also judgment of 15 July 2021 in Case C-795/19 *Tartu Vangla*, paragraph 44, and case law cited therein.

necessary and proportionate to attain the aim pursued.[72] The necessity test implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[73]

68. The Authority, moreover, emphasises that the reasons which may be invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.[74] The CJEU has, furthermore, clarified that such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks in relation to the objective pursued.[75]

69. The Authority contends that the same considerations concerning the principle of proportionality apply in relation to a restriction on the use of temporary agency workers under Article 4(1) of the Directive. In that context, the Authority also notes that the principle of proportionality is a general principle of EEA law which applies in the same way to justifications available under secondary legislation, in this case the Temporary Agency Work Directive.

70. As regards the proportionality of the restrictions in this case, the Authority observes at the outset that it cannot see that an overall evaluation or analysis had been conducted of the temporary agency work industry in Norway or the intended restrictions, including their need and possible consequences, when these measures were adopted in December 2022.

71. In that context, reference is also made to a report dated 13 March 2022 of the Norwegian Better Regulation Council (*Regelrådet*), which is an independent public oversight body tasked with issuing advisory statements on proposals for new regulations of the business sector at the stage of public consultation.[76] The report gave the Government's proposal on the restrictions at issue here a red light and concluded that the proposal had not been sufficiently investigated, that it lacked a socio-economic analysis, that alternative and less restrictive measures had not been considered (including the possibility of not adopting any measures and seeing how the situation would develop) and that there had been no weighing of the positive and negative effects against each other. To the Authority's knowledge, no further investigation or analysis was conducted on behalf of the Norwegian Government following this report and before the adoption of the restrictions. The Norwegian Government has merely stated that the consequences of the adopted restrictions will be evaluated retroactively.[77]

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

72. Given that the overriding aim set out by the Norwegian Government of the removal of the option of using temporary agency workers when the work is of a temporary nature in the WEA is to reduce the use of temporary agency workers and increase

[72] *Kristoffersen*, cited above, paragraph 123.
[73] *Kristoffersen*, cited above paragraph 122; and *Netfonds Holdings*, cited above, paragraph 125.
[74] See judgment of 16 July 2012 in Case E-9/11 *ESA v Norway*, paragraph 89; judgment of 5 May 2021 in Case E-8/20 *Criminal Proceedings against N*, paragraph 95; and judgment of 7 June 2007 in Case C-254/05 *Commission v Belgium*, paragraph 36, and case law cited therein.
[75] Judgment of 21 January 2016 in Case C-515/14 *Commission v Cyprus*, paragraph 54; and judgment of 7 March 2018 in Case C-651/16 *DW*, paragraph 34.
[76] https://regelradet.no/2022/03/18/endringer-i-regelverket-for-ibemanningsforetak/
[77] See Prop. 131 L (2021-2022), p. 30 and 63, and Norway's letter of 5 May 2023, p. 30.

permanent and direct employment, the proportionality of the measure will be assessed in relation to that aim.

73. Before going into an assessment of the suitability and necessity of the removal of the option to use temporary agency workers when the work is of a temporary nature, it must be emphasised that this measure is very broad and far-reaching and severely restricts the use of temporary agency workers in Norway. It applies across all sectors in Norway, except for a few limited exceptions, and it removes one of two main options of using temporary agency workers, where the need is biggest. Moreover, there is no time limit for the restriction and no benchmark for when it could be lifted. This restriction is thus liable to have severe consequences for the operation of temporary-work agencies in Norway, as well as for the user undertakings which rely on temporary agency workers for work of a temporary nature, and the temporary agency workers themselves.

74. As regards the exceptions to this restriction, the Authority notes that the exception for the health care sector only benefits the State, as health care services in Norway are mainly public, and the exception for consultants is quite specific. As for substitutes in the agriculture sector and events, the entry into force of this restriction has merely been postponed, pending further assessment. Lastly, the exception for agreements with employee representatives is quite narrow, as it only benefits those user undertakings which have a collective agreement with one of the big trade unions and is, in any event, always dependent on the approval of the employee representatives.

5.4.2.1 Suitability and consistency

75. With regard to the suitability of the removal of the option to use temporary agency workers for work of a temporary nature, the burden of proof is on the Norwegian Government to demonstrate that removing this option is actually suitable to achieve the aim of reducing the use of temporary agency workers and increasing permanent and direct employment. Moreover, the Norwegian Government needs to present precise, objective and detailed evidence or analysis enabling its arguments relating to suitability to be substantiated, which is supported by figures and solid and consistent data.

76. The Authority observes, however, that the Norwegian Government's statement that increased permanent and direct employment will actually be the result of this measure is merely a speculation of what will happen and the desired result, but is not supported by any evidence or analysis.[78]

77. Although it can be accepted that removing the option of using temporary agency workers when the work is of a temporary nature is suitable for reducing the use of temporary agency workers as such, it is far from obvious that this measure will also lead to more permanent and direct employment. In particular, 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 its letter of 5 May 2023, that some of these could be the consequences of this measure.[79] In any event, the Authority cannot see that

[78] See Norway's letter of 5 May 2023, sections 4.6, 6.2 and 6.3.
[79] See p. 18, 30 and 42.

the likely consequences of this measure have been fully analysed, demonstrating a causal link between the measure and the objective pursued.

78. As mentioned above, the suitability requirement also entails that the measure must genuinely reflect a concern to attain the aim pursued in a consistent and systematic manner. The Authority fails to see that this requirement is fulfilled, for several reasons.

79. First, it is difficult to see the consistency in reducing the use of temporary agency workers with the aim of increasing permanent employment, when the main rule is that temporary agency workers in Norway have permanent employment contracts with temporary-work agencies. As regards the Norwegian Government's argument that permanent employment in a temporary-work agency is not the same as permanent employment in other undertakings,[80] the Authority notes that both of these scenarios are regulated by the same legal provisions, which provide that permanent employment is the main rule and that fixed-term employment or temporary agency work is only allowed in specific circumstances.[81] In that context, reference is also made to the report of the Norwegian Better Regulation Council, which states that since most temporary agency workers have permanent employment with the temporary-work agencies, the Council is unsure of how the proposal shall contribute to obtaining the aim of increasing permanent employment.[82]

80. Second, restricting the use of temporary agency workers when the work is of a temporary nature, while allowing fixed-term employment in the same circumstances, does not reflect consistency in relation to the aim of increasing permanent employment. This is particularly so, given that the Norwegian Government had previously argued that temporary agency work and fixed-term work were often alternative forms of employment which needed to be governed by the same set of rules in order to prevent misuse.[83] The Norwegian Government appears to be of the view that temporary agency work in its nature provides less security and benefits for employees than fixed-term work in other undertakings.[84] However, arguments could also be made to the contrary. The use of fixed-term contracts rather than permanent employment in temporary-work agencies could make employment more precarious and uncertain for the employees since they themselves will most likely have to find new employment at the end of the fixed-term contract. Moreover, as discussed above, temporary agency workers have been provided with strong protection in Norwegian legislation.

81. Lastly, the Authority has difficulty seeing consistency in relation to the exceptions to this restriction that have been adopted. Providing for an exception to use temporary agency workers for work of a temporary nature for the health care sector is not easily consistent with the aim of increasing permanent employment, since the need for labour in that sector is presumably quite flat, as opposed to for instance the tourism industry. Moreover, deciding to postpone the entry into force for the agriculture and event sector does not represent a consistent and systematic approach to the matter.

82. With reference to the above, the Authority cannot conclude that the Norwegian Government has demonstrated that removing the option of using temporary agency

[80] See Norway's letter of 5 May 2023, p. 42.
[81] See Section 14-9 and 14-12 WEA. See also the report of the Labour Inspection Authority of 16 February 2023, cited above, which states on p. 7 that the impression is that most temporary-work agencies employee in 100% positions, or in real lower positions, and that in some cases it was normal to have a lower employment rate, for instance for students.
[82] See p. 6.
[83] Prop. 74 (2011-2012), p. 43. See also Prop. 131 L (2021-2022), p. 7.
[84] See Norway's letter of 5 May 2023, p. 18 and 42-43.

workers for work of a temporary nature is suitable to achieve the aim of increasing permanent and direct employment in a consistent and systematic manner.

5.4.2.2 Necessity

83. Even if the restriction at issue here were to be considered as suitable to achieve the aim pursued in a consistent and systematic manner, the requirement of necessity would, nevertheless, need to be fulfilled. That requirement entails that the Norwegian Government must demonstrate that the use of temporary agency workers in Norway was actually causing problems for the labour market and was challenging permanent and direct employment, thereby necessitating the adoption of this restriction. Moreover, the Norwegian Government must also present precise, objective and detailed evidence or analysis, which is supported by figures and solid and consistent data.

84. The Norwegian Government states in its letter of 5 May 2023 that there are no complete statistics on the use of temporary agency workers in Norway.[85] This already indicates that the available information on the use of temporary agency workers in Norway is not precise and detailed and is not supported by solid and consistent data.

85. Moreover, even the statistics which the Government has referred to do not, in the Authority's view, support that the use of temporary agency workers in Norway is increasing or is of such a scale that it would necessitate this measure. According to the information available to the Authority, it appears that the use of temporary agency workers in Norway has been quite stable overall for more than 10 years, or around 1,5-2%, except for the construction sector, which will be discussed below.[86] In any event, the overall numbers for the use of temporary agency workers are similar today as they were in 2013 when the Temporary Agency Work Directive was implemented.

86. The Authority cannot therefore see that the available data supports that the use of temporary agency workers in Norway was so widespread that adopting this restriction was necessary. Nor has any evaluation or analysis been conducted on behalf of the Norwegian Government as to what would then be the acceptable use of temporary agency workers in Norway, including what the benchmark would be in relation to the possibility of lifting such a restriction.

87. The Authority notes that the Norwegian Government has also not presented any evidence or analysis which substantiates that the use of temporary agency workers in Norway was actually challenging the main rule of permanent and direct employment. It is not sufficient for the Norwegian Government to merely state its opinion that temporary agency work has the potential to displace and challenge permanent employments,[87] without any evidence or analysis substantiating that opinion. In the Authority's view, respecting the Norwegian labour market model and acknowledging that permanent employment is and shall be the main form of employment does not prevent flexibility and other forms of employment to meet temporary variations in the need for labour. In that context, reference is also made to the fact that, according to information available to the Authority, the proportion of

[85] See p. 19. See also report on the Norwegian labour market model, NOU 2021:9, p. 126 and 290-291.
[86] See Norway's letter of 5 May 2023, p. 20. See also Fafo report 2021:17 which states on p. 31 that temporary agency work constituted around 1,7-1,9% of the labour market in 2019 and had been quite stable over the last 10 years.
[87] See Norway's letter of 5 May 2023, p. 4.

permanent employment in Norway has been very stable and has even increased in the last 20-25 years.[88]

88. The Norwegian Government has referred to a report issued by the Labour Inspection Authority on 16 February 2023, based on almost 1000 inspections conducted in 2022, in support of its arguments. However, in the Authority's view, the report actually paints an overall positive picture of the temporary agency work industry in Norway. The headline of a press release issued by the Labour Inspection Authority to present the report is that there are few serious breaches of the rules on temporary agency work.[89] The press release also states that there has been a positive development in this industry in the recent years, *inter alia* due to the requirements introduced in 2019 concerning definition of permanent employment, which has led to improvements. The Labour Inspection Authority, moreover, found few instances where a temporary agency worker did not receive equal treatment with employees of the user undertaking. It even saw more examples of temporary agency workers getting better working conditions then they would have had as permanently employed in the user undertakings.[90] The Authority therefore cannot see that this report supports the Norwegian Government's arguments as to the necessity of this restriction. On the contrary, it gives an overall positive view of the temporary agency work industry in Norway. Furthermore, this report cannot, in any event, form a basis for the Norwegian Government's justifications for this restriction, as it was published almost two months after the restriction was adopted.

89. The Authority is also of the view that the other measures which have been adopted in Norway in recent years and in December 2022 regulating temporary agency work and strengthening the protection of temporary agency workers even further contribute to the lack of need for the restriction at issue here. As has been discussed above, Norway had already extensively regulated temporary agency work before the adoption of the restrictions at issue here in December 2022.[91] When the Temporary Agency Work Directive was implemented, those same options of using temporary agency workers as were amended in December 2022, had been assessed by the Norwegian Government as sufficient to ensure the main rule of permanent and direct employment in Norway. The Authority cannot see that anything has changed since then which would necessitate such a far-reaching restriction. Moreover, important amendments were made in 2019 and 2020 which have been said to have had a positive impact on temporary agency work in Norway.[92] However, the Authority cannot see that any assessment or analysis was made of these amendments to see their full impact before the adoption of the legislative amendment in December 2022. In addition to that, the Government also adopted further measures in December 2022, whose effect is yet unknown. In particular, the amendment to Section 14-12(4) WEA, according to which a worker is entitled to a permanent position in the user undertaking after successive assignments of three years, entails that it will not be possible to continuously fill permanent positions with temporary agency workers in Norway.

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[88] See NOU 2021:9, cited above, p. 120.

[89] https://www.arbeidstilsynet.no/nyheter/hvordan-er-tilstanden-i-bemanningsbransjen/

[90] *Ibid*.

[91] See also NOU 2021:9, cited above, which states on p. 139 that, according to OECD's index, Norway is one of the countries with the strictest rules on the access to fixed-term employment and other temporary forms of work and that it is in particular in the context of rules for fixed-term work and temporary agency work that Norway stands out from the other Nordic countries.

[92] See paragraph 88 above. See also NOU 2021:9, cited above, which states on p. 292 that the majority of the committee could not recommend amendments to the rules on the use of temporary agency workers at that point in time, *inter alia* with reference to the amendments made in 2013, 2019 and 2020 and since those amendments needed more time to come into full effect and thereafter be evaluated.

90. Another element of the necessity test is that the 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. The Authority understands that several less restrictive alternative measures were suggested in the public hearing process of this restriction, such as a quota system, a notification system for when an undertaking hires more than a certain number of temporary agency workers, increased control and enforcement.[93] However, the Authority cannot see that the Norwegian Government actually engaged in an assessment of possible alternative measures. Moreover, the Government has not demonstrated that the measures which were adopted in 2019 and 2020 and the measures which were adopted together with this restriction in December 2022, are not sufficient to meet their concerns, as their full impact has not come to light and been evaluated.

91. In addition, the Authority observes that, if the real concerns were that temporary agency workers were being used in order to fill permanent needs in undertakings, then it should have been sufficient to clarify the meaning of the wording "when the work is of a temporary nature", either by amending the legislative provision or by issuing further guidelines, as well as increasing enforcement. Such a provision that would be applied correctly and only in order to cover temporary needs, should not challenge permanent employment in any way.

92. In light of the above, the Authority must conclude that the Norwegian Government has not demonstrated that the removal of the option of using temporary agency workers when the work is of a temporary nature was suitable and necessary to achieve the objective of increasing permanent and direct employment in a consistent and systematic manner. This applies also for the amendment to Section 11(1) of the Civil Service Act, as the above argumentation is applicable *mutatis mutandis*.

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

93. For the same reasons as indicated above in paragraph 72, the proportionality of the prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold will also be assessed against the overriding aim of the prohibition which is to reduce the use of temporary agency workers overall and increase permanent and direct employment.

94. Before going into an assessment of the suitability and necessity of the prohibition on using temporary agency workers in the construction sector in Oslo, Viken and former Vestfold, it must be emphasised that this measure is very far-reaching and severe. It is an absolute ban, which is the strictest form of restriction, without any exceptions. Moreover, there is no time limit for the prohibition or any benchmark for when it could be lifted. Although the prohibition is geographically limited, the Authority understands that around 60% of all use of temporary agency workers in the construction sector is concentrated to this area. This prohibition is thus liable to have serious consequences for the operation of temporary-work agencies in Norway, as well as for the user undertakings which rely on temporary agency workers for construction projects in this area, and for the temporary agency workers themselves.

5.4.3.1 Suitability and consistency

95. With regard to the suitability of the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold, the burden of proof is on the Norwegian Government to demonstrate that this prohibition is actually suitable to achieve the aim of reducing the use of temporary agency workers and increasing permanent and direct employment. Moreover, the Norwegian

[93] Prop. 131 L (2021-2022), p. 33-34.

Government needs to present precise, objective and detailed evidence or analysis enabling its arguments relating to suitability to be substantiated, which is supported by figures and solid and consistent data.

96. Although it can be accepted that prohibiting all use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold will reduce the use of temporary agency workers, it is not as obvious that this will also lead to more permanent and direct employment. That is particularly so given that the construction sector is presumably to a large extent characterised by short-term projects. The Authority thus questions whether this prohibition could just as well lead to more part-time work, more overtime work, more self-employment, more subcontracting or more dismissals. The Norwegian Government even acknowledges in its letter of 5 May 2023, that some of these could be the consequences of this measure.[94] In any event, the Norwegian Government has not produced evidence or analysis which substantiates the statement that increased permanent and direct employment will actually be the result of this prohibition.

97. As regards the requirement that the measure must genuinely reflect a concern to attain the aim pursued in a consistent and systematic manner, the Authority fails to see that this requirement is fulfilled as regards this prohibition. First, it is difficult to see the consistency in reducing the use of temporary agency workers with the aim of increasing permanent employment, when the main rule is that temporary agency workers in Norway have permanent employment contracts with temporary-work agencies. Second, restricting the use of temporary agency workers in the construction sector, while allowing fixed-term employment in the same circumstances, does not reflect consistency in relation to the aim of increasing permanent employment. In that context, reference is made to the argumentation above in paragraphs 79 and 80 which applies in the same way to the restriction at issue here. Additionally, as for this measure particularly, the Authority cannot see that the Norwegian Government has provided detailed and precise evidence, based on figures and consistent data, which explains why the prohibition was necessary in these three specific areas and not in other areas in Norway.

98. With reference to the above, the Authority cannot therefore conclude that the Norwegian Government has provided sufficient evidence for demonstrating that the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold is suitable to achieve the aim of increasing permanent and direct employment in a consistent and systematic manner.

5.4.3.2 Necessity

99. Even if the measure at issue here were to be considered as suitable to achieve the aim pursued in a consistent and systematic manner, the requirement of necessity would, nevertheless, need to be fulfilled. That requirement entails that the Norwegian Government must demonstrate that the use of temporary agency workers in the construction sector in Oslo, Viken and former Vestfold was actually causing problems for the labour market and was challenging permanent and direct employment, thereby necessitating the adoption of this prohibition. Moreover, the Norwegian Government must also present precise, objective and detailed evidence or analysis, which is supported by figures and solid and consistent data.

100. As mentioned above (in paragraph 84), the Norwegian Government has stated that there are no complete statistics on the use of temporary agency workers in Norway. Moreover, the Authority understands that there are no comprehensive and precise statistics for the construction sector in Oslo, Viken and former Vestfold specifically. This already indicates that the available information on the use of temporary agency

[94] See p. 46.

workers in the construction sector in Oslo, Viken and former Vestfold is not precise and detailed and is not supported by solid and consistent data.

101. Moreover, even the statistics which the Government has referred to do not, in the Authority's view, support that the use of temporary agency workers in the construction sector in Oslo, Viken and former Vestfold is increasing at this point in time thereby necessitating this measure. The statistics referred to by the Norwegian Government indicate that there was an increase in the use of temporary agency workers in the construction sector in the years leading up to 2019, when the use was around 8%. The numbers, however, show a decrease in the use of temporary agency workers in the construction sector since 2019.[95]

102. As mentioned, there appear to be no comprehensive and precise statistics for the construction sector in Oslo and the surrounding areas specifically, but the Authority understands that Fafo *estimated* that the use of temporary agency workers in the construction sector in 2017 was around 4-7% higher in Oslo and Akershus than in the rest of the country.[96] However, there are indications that also in Oslo and surrounding areas, there has been a decrease in the use of temporary agency workers in the construction sector since 2018.[97]

103. Although the pandemic can have played a role in the decrease in the use of temporary agency workers in Norway in 2021 and 2022, the decrease seems to have already begun in 2018/2019, when measures were adopted to further regulate the use of temporary agency workers in Norway. In any event, the use of temporary agency workers in the construction sector is not increasing at this point in time. There is therefore uncertainty about whether the decrease will continue or whether the use will increase again. While that is the situation, the Authority cannot see that the Norwegian Government has demonstrated a need for this prohibition.

104. In this context, it should also be noted that the Norwegian Government had already in 2018, when the use of temporary agency workers was higher than today, assessed a prohibition on the use of temporary agency workers in the construction sector as being too restrictive as there were legitimate needs to use temporary agency workers in periods and as that could also impact other permanent employees by undertakings not being able to take on projects without temporary agency workers.[98]

105. The Authority, moreover, notes that the Norwegian Government has not presented any evidence or analysis which substantiates that the use of temporary agency workers in the construction sector in Oslo, Viken and Vestfold was actually challenging the main rule of permanent and direct employment. In that context, reference is made to the argumentation in paragraph 87 above. The Authority also refers to paragraphs 88 and 89 above, concerning the report of the Labour Inspection Authority and the other measures which have been adopted but not fully evaluated, which apply *mutatis mutandis*.

106. As regards possible alternative, less restrictive, measures, the Authority fails to see that the Norwegian Government has engaged in an assessment of such alternatives. The Authority understands that several less restrictive alternative measures were suggested in the public hearing process of this prohibition, such as a quota system, requirements concerning employment rate of temporary agency workers and increased control and enforcement.[99] However, it seems like those suggestions were

[95] See Prop. 131 L (2021-2022), p. 12 and Norway's letter of 5 May 2023, p. 23.
[96] Prop. 131 L (2021-2022), p. 12.
[97] See Norway's letter of 5 May 2023, p. 26.
[98] See Prop. 73 L (2017-2018), p. 42.
[99] See Prop. 131 L (2021-2022), p. 29.

rejected by the Norwegian Government without much evaluation.[100] Moreover, the Government has not demonstrated that the measures which were adopted in 2019 and 2020 and the measures which were adopted together with this prohibition in December 2022, are not sufficient to meet their concerns, as their full impact has not come to light and been evaluated. In that context, it must also be noted that this prohibition adds on to the general removal of the option to use temporary agency workers for work of a temporary nature, making those measures combined even more severe and strict. It, however, remains uncertain what impact that first restriction will have and whether that would have been sufficient to meet the Government's concerns.

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

108. In light of the above, the Authority must conclude that the Norwegian Government has not demonstrated that the prohibition on using temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold was suitable and necessary to achieve the objective of increasing permanent and direct employment in a consistent and systematic manner.

6 Conclusion

109. In light of all the above-mentioned, the Authority concludes that the adopted restrictions on the use of temporary agency workers cannot be justified on grounds of general interest or overriding reasons in the public interest. In the alternative, even if it were to be accepted that the adopted restrictions could be justified, the requirements of proportionality are not met, as the Norwegian Government has not demonstrated that the adopted restrictions are suitable and necessary to achieve the aim pursued in a consistent and systematic manner.

110. Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force national provisions such as Section 14-12(1), cf. Section 14-9(2), WEA and Section 11(1) of the Civil Service Act, which prevent the use of temporary agency workers when the work is of a temporary nature, and Section 4 of the regulation on temporary agency work, which prohibits all use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold, Norway is in breach of its obligations under Article 4(1) of the Temporary Agency Work Directive and Article 36 of the EEA Agreement.

111. In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

112. After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

[100] *Ibid*.

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