ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL INCLUSION

EFTA Surveillance Authority
Avenue des Arts 19 H
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BELGIUM

Your ref	Our ref	Date
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Answer to Letter of formal notice concerning restrictions on the use of temporary agency workers in Norway

The Ministry of Labour and Social Inclusion ("the Ministry") refers to the Letter of formal notice 19 July 2023 where the EFTA Surveillance Authority ("the Authority") preliminary concludes that certain regulatory amendments concerning temporary agency work conflict with Article 4(1) of Directive 2008/104 on temporary agency work and Article 36 of the EEA Agreement. The Authority has requested that the Norwegian Government submits its observation on the content of the letter within two months.

Reference is also made to the Ministry's request for extended deadline in letter dated 14 September 2023, and the Authority's letter dated 15 September 2023 granting such extension until 19 October 2023.

Please find enclosed the Governments answer to the Letter of formal notice.

Yours sincerely

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Director General

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This document is signed electronically and has therefore no handwritten signature

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

1 Introduction

Reference is made to the letter of formal notice of 19 July 2023 ("LFN"), in which the EFTA Surveillance Authority (the "Authority") preliminary concludes that certain regulatory amendments concerning temporary agency work conflict with Article 4(1) of Directive 2008/104 on temporary agency work (the "Directive") and Article 36 of the EEA Agreement (EEA).

The Ministry of Labour and Social Inclusion (the "Ministry") disputes those conclusions and maintains that the contested measures are compatible with the requirements of EEA law.

In this regard, it should be recalled at the outset that employment contracts of an indefinite duration are the general form of employment relationship. This is reflected in the laws of the EEA States as well as the legislative action of the EU.[1] Temporary agency work is thus an exception to the main rule and, according to the Court of Justice (CJEU), constitutes a particularly sensitive matter from the occupational and social point of view.[2]

It is settled case law, therefore, that the EEA States may justify restrictions on the provision of manpower for overriding requirements of public interests, such as inter alia protection of relations on the labour market and the lawful interests of the workforce concerned.[3] This case law is reflected by Article 4 of the Directive, which maintains – for the purposes of the States' internal review – that the EEA States may justify restrictions, and even prohibitions, of temporary agency work for reasons of such general interests.

Norway is consequently entitled to regulate the labour market with the aim of promoting employment contracts of indefinite duration rather than temporary agency work, thus also protecting relations on the labour market and the lawful interests of the workforce concerned, as well as promoting health and safety at work and preventing abuse. Such regulation also strengthens the ability of the social partners to regulate work conditions through collective agreements, thereby supporting the tripartite collaboration upon which the Norwegian labour model is based, as well as, in effect, promoting the fundamental right to bargain collectively.

Those objectives are apparent from the preparatory works, as the Oslo district court[4] recently affirmed, and it is in any event clear that the rules, viewed objectively, promote those objectives. Nor, therefore, should the suitability requirement present much doubt in this case.

The remaining question is whether the rules are also necessary. In this regard, it should be recalled that, in the absence of harmonisation, the EEA States retain a broad discretion to define the situations in which temporary agency work is justified and to determine their own

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[1] Opinion of 20 November 2014, *AKT*, C-533/13, para 111.

[2] Judgment of 17 December 1981, *Webb*, C-279/80, para 18.

[3] Ibid.

[4] TOSL-2023-89874. Enclosed in Norwegian. The ruling has been appealed.

level of protection. It appears that the Authority does not altogether acknowledge these limitations, from the perspective of judicial review, partly by arguing for particularly strict evidence requirements,[5] and partly by overtly challenging the chosen level of protection.[6] Neither approach is fully in conformity with the case law in this field, however.

Drawing the lines together, the fact remains that both the case law of the ECJU and the legislation adopted by the EU legislature acknowledge the sensitive nature of temporary agency work and the latitude retained by the Member States to regulate the situations in which such work, being an exception to the general form of employment relationship consisting of permanent and direct employment, are justified. Several EEA States have acted accordingly, without, to our knowledge, having incurred any adverse reactions by the Commission. This contrasts with the ambit and tenor of the present LFN, in which the Authority appears to take a more restrictive view of the EEA States' ability to regulate labour markets with the aim of promoting permanent and stable employment as well as collective agreements.

The Ministry will therefore in the following sections, in the spirit of dialogue and collaboration, undertake to further explain and elaborate on why the contested measures are, in fact, compatible with the EEA Agreement.

2 Restrictions on agency work – the legal framework

2.1 Article 36 of the EEA Agreement

Labour markets in various EEA States are not harmonised, and the EEA States are thus free to decide their national labour legislation, as long as it lies within the framework of primary law and complies with the minimum protection laid down in secondary law.

Already in *Webb* (C-279/80, Grand Chamber), it was made clear that provision of manpower is an activity that falls within the rules on free movement of services (paragraphs 9 and 11). The EUCJ also stated that the provision of manpower is a particularly sensitive area, which some Member States had chosen to regulate through restrictions and prohibitions (paragraph 18):

> «It must be noted in this respect that the provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned. That is evident, moreover, in the legislation of some of the Member States in this matter, which is designed first to eliminate possible abuse and secondly to restrict the scope of such activities or even prohibit them altogether.»

The case concerned Dutch rules on the requirements for licences for the provision of manpower. Pursuant to Dutch law a licence could be withheld if there was "reason to fear that the provision of manpower by the applicant might prejudice good relations on the labour market of if, by reason of that fact, the interests of the workers concerned are inadequately safeguarded" (p. 3311). The ECJU found that it was permissible for states to have such regulations and that it constituted a legitimate political choice to safeguard the public interest.

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[5] See, to this effect, LFN, paras 83 et seq.

[6] See, to this effect, LFN, para 94.

Given the differences between the labour markets in the different states, and the different conditions that could thus apply to the provision of manpower, the ECJU held that the State in which the service was provided could require a licence on the same terms as for its own citizens (paragraph 19):

> "It follows in particular that it is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded. In view of the differences there may be in conditions on the labour market between one Member State and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestional by the right to require possession of a licence issued on the same conditions as in the case of its own nationals."

It is reasons to take note of that the ECJU stated that the rules in question constituted "a legitimate choice of policy pursued in the public interest". The Ministry want to emphasize that the Court is reticent in its judicial examination. The reasons, as the ECJU refers to in paragraph 18, is the differences between labour markets in the different states and that provision of manpower is a particularly sensitive matter from the occupational and social point of view.

These differences are described in more detail in the initial presentation of the case (pp. 3311–3312).

Pursuant to the Dutch rules, a licence could be withheld if there was reason to fear that good relations on the labour market, or workers were not being safeguarded. These interests had been clarified through general provisions. Firstly, temporary agency workers could not receive higher remunerations than those employed in the user undertaking, because this could lead to "serious disturbances in labour relations by creating conflict with the permanent staff employed by the undertakings" (p. 3311).

Secondly, hiring was prohibited in the building and metallurgical industries.

Thirdly, hiring out of temporary staff was limited to a period of 3 months, unless special authorization was granted. Hiring out that could lead to agency workers replacing regular sub-contracting, or permanent employees losing their jobs, was considered to cause disruptions on labour relations. The Dutch rules therefore in practice entailed several prohibitions and restrictions on the provision of manpower.

In the United Kingdom (where Webb was licensed to hire out), however, a licence could only be refused on "grounds pertaining to the person of the applicant or for reasons connected with the management of the undertaking, or in the case of unsuitable premises". There were no prohibitions regarding the building and metallurgical industries, or restrictions on the duration (pp. 3311-3312). In Italy, hiring was completely forbidden at the time, while Luxembourg had no restrictions on hiring. Most states had rules on hiring in their labour legislation, usually with certain limitations on the duration (p. 3312). It follows from *Webb* that states can regulate hiring in different ways in their national labour law, based on different political priorities. Even a ban – in this case in the building and metallurgical industries – did not contravene the freedom of service.

Shortly after *Webb,* the Commission was asked about the ban on hiring in the building industry in Germany. The Commission replied as follows (Official Journal of the European Communities, Volume 25, 12.8.82 C 210/19):

> "3. The law in question does not appear to contravene Community legislation since the ban on the use of temporary workers supplied by employment businesses in the building sector in the Federal Republic of Germany appears to be in the public interest (need to protect the labour market and the legitimate interests of the workers concerned); also, the law makes no distinction between German temporary employment businesses and those established in other Member States.
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> 4. The Commission's views as set out above appear to be in conformity with the recent judgments by the Court of Justice to which the Honourable Member refers. The measures taken by the German authorities are in any case in line with those in effect in certain other Member States which have, for many years, imposed a ban on the activities of temporary employment businesses, whether in all sectors (e.g. Italy), in certain sectors (e.g. Belgium, the Netherlands) or in one specific sector only (Denmark)."

Germany still has a ban on hiring in inter alia this industry.

It is therefore unquestionable that it falls within the EEA states' discretion to decide which legitimate interests that are to be safeguarded by prohibitions and restrictions on agency work. Further, the states determine the level of protection for these interests and how the level of protection is to be achieved. These principles have not changed with the introduction of the Directive. The fact that one EEA State has rules that interfere less with freedom of services does not mean that stricter rules are disproportionate. National restrictions must be assessed only on the basis of the legitimate objectives pursued by the State and the chosen level of protection, cf. Case C-110/05 *Commission v Italy* paragraph 65 and Case E-8/16 *Netfonds* paragraph 131.

2.2 The Temporary Agency Work Directive

The Directive establishes a framework for the protection of temporary agency workers[7] and contains minimum requirements for working and employment conditions for agency workers.[8]

According to the Directive Article 4(1) prohibitions or restrictions on agency work may only be justified on the grounds of general interest, such as the protection of temporary agency workers, the requirements of health and safety at work, the need to ensure that the labour market functions properly or preventing abuse. Article 4 is only addressed to the authorities of the member states, and cannot be invoked in national courts, cf. C-533/13 *AKT.*

The Directive does not contain any list of specific situations where hiring should be allowed or prohibited/restricted.[9] This means that the states still have considerable margin of discretion, both in terms of choice of situations hiring can be permitted, and in which

[7] The Directive recital 12.

[8] The Directive article 5 – 8.

[9] See also C-232/20 (Daimler) paragraph 33.

situations hiring can be banned or restricted.[10] The broad discretion in this field is also explicitly stated in the Advocate Generals opinion in C-533/13 *AKT* recitals 114 and 115:

> "114. Given that the EU legislature has chosen not to define the situations in which the use of temporary agency work is justified, the Member States retain a broad discretion in that regard.
>
> 115. That broad discretion stems from the competence of the Member States to make political choices affecting the development of the employment market and to legislate accordingly, in accordance with EU law. It is also confirmed by the existence of the clause pertaining to the prevention of social regression contained in Article 9(2) of Directive 2008/104. Indeed, the Member States must enjoy significant freedom of action in order to ensure that the removal of certain restrictions does not lead to a reduction in the general level of protection of workers in the area in question."

The Commission's report on the implementation of the Temporary Agency Work Directive from 2014[11], provides an overview of the prohibitions and restrictions in the member states after the implementation of the Directive.[12] The report illustrates that there are major differences between states, as they have developed their national labour market policies in different ways, e.g. by prioritising flexibility to varying degrees:

> "The reports on the results of the review of restrictions and prohibitions provided by the 24 Member States were very diverse in terms of format and length.
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> This diversity is partly attributable to the variety of situations encountered in Member States. Although temporary agency work only accounts for a small proportion of employed workers overall, it is much more widespread in some countries than in others. … All Member States have made specific choices in terms of employment policy, for instance, by favouring labour market flexibility to variable degrees. Such choices have an influence on the role and place of temporary agency work in their respective labour markets."[13]

Five EU states (Denmark, Estonia, Latvia, Lithuania and Slovakia) stated that they had no restrictions[14], while the rest had prohibitions and restrictions to varying degrees.[15] Amongst the justifications reported, were inter alia the interest of protection of temporary workers. This was referred to by Germany as the justification for restrictions in the construction industry, and by Poland for restrictions on how long a worker could be hired out to a particular user enterprise.[16]

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[10] It follows from recitals 10 and 12 in the Directive that there are considerable differences in the use of temporary agency work within EU, and that the directive respects the diversity of labour markets.

[11] 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, 21 March 2014: 1_EN_ACT_part1_v5 (2).pdf

[12] Ibid. page 8–12.

[13] Ibid. page 9–10.

[14] Ibid. page 10.

[15] Ibid. page 10–11.

[16] Ibid. page 10.

Interests of health and safety at work were invoked by several states as grounds for restrictions and prohibitions in connection with work tasks deemed to pose a particular risk to the health or safety of employees.[17]

Various states referred to "the need to ensure that the labour market functions properly" to justify restrictive measures, such as a limitative list of reasons for using agency workers and limitations on the number or proportion of agency workers who may be used in a user undertaking.[18]

Several states referred to the interest of preventing abuse as a basis for various types of regulations, such as restrictions on the tasks that agency workers may have, the possibility of limiting the number of fixed-term employment contracts for temporary workers through national collective agreements, and requirements that the user enterprise in certain cases obtain permission from representatives of the trade unions before using agency workers.[19]

Four states also justified restrictions by the need to protect permanent employment and to avoid a situation in which permanent positions might be filled by workers employed on a temporary basis. This explanation was used in particular to limit the duration of hiring, and to explain the existence of a list of valid reasons for using temporary hiring, such as replacing another worker, or temporary increases in workload or extraordinary or seasonal tasks.[20]

The Commission concluded that although a few restrictions and prohibitions on the use of temporary agency work had been removed, the review had not led to major changes in the extent of the restrictive measures applied by the states. In this connection, the Commission also clearly stated that states may regulate various forms of employment, including temporary agency work, and ensure a well-functioning labour market in accordance with their own policy choices, as long as they stay within the framework of the Directive and primary law:

> "Nevertheless, by stating that prohibitions or restrictions are justified only on grounds of general interest, Article 4(1) authorises Member States to continue to apply a number of prohibitions or restrictions that are based on such grounds. In the Commission's view, to the extent that these restrictive measures are the result of policy options based on legitimate grounds and are proportionate to their aim, they would appear to be justified on grounds of general interest, without prejudice to a more in-depth examination of those prohibitions and restrictions on a case-by-case basis.
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> The protection of temporary agency workers, the requirements of health and safety at work, the need to ensure that the labour market functions properly and that abuses are prevented may justify certain prohibitions or restrictions on the use of temporary agency work. Other grounds of general interest may also justify restrictive measures insofar as they are legitimate and proportionate to their objective. Provided that they comply with the Directive on temporary agency work and other applicable EU legislation and principles, such as the freedom to provide services, the freedom of establishment and the legislation on non-discrimination, Member States can regulate different types of employment, including

[17] Ibid. page 11.

[18] Ibid. page 11.

[19] Ibid. page 11.

[20] Ibid. page 12.

temporary agency work, and ensure the smooth functioning of the labour market according to their own policy choices."[21]

The Commission's submissions in Case C-533/13 *AKT*[22] have similar formulations, including that states may continue to apply restrictions and prohibitions based on the public interest and have a wide margin of discretion in the choice of methods, and that states may regulate different types of work, including hiring, and ensure a well-functioning labour market using methods of their choice:

> "According to the Commission, Article 4(1) of the Directive allows Member States to continue to apply restrictions and prohibitions which are justified on grounds of public interest and gives Member States considerable discretion in the choice of methods. Examples of reasons of general interest, such as reasons relating to the need to ensure the proper functioning of the labour market, are introduced by the term 'in particular', with wide discretion being left to the Member States. Member States may regulate different types of labour supply, including temporary agency work, and ensure the proper functioning of the labour market by means of methods chosen by them themselves. (Unofficial English translation)"[23]

By extension, the Commission states that since there is no secondary legislation determining what restrictions on hiring which are permissible, the scope of the concept of "public interest" is essentially left to the discretion of the state, under the control of the CJEU:

> "In the absence of rules in secondary EU law which would determine which restrictions on the activities of temporary employment undertakings are permitted and acceptable, the scope of the concept of 'reason in the public interest' is therefore essentially left to the discretion of the Member States, subject to review by the Court of Justice (Unofficial English translation)."[24]

Since the labour legislation is not harmonised in EU/EEA, states can decide how to develop their national labour market model, including how to balance between the interest of flexibility in the business sector against the interests of protection of workers, safeguarding the labour market model etc.

2.3 Comments to the LFN

<u>Regarding interpretation of the Directive recital 12:</u>

The Authority claims in paragraph 31 that "The reference in recital 12 to respect of the diversity of labor market and industrial relations is thus not relevant for the application of Article 4 of the Directive".

It may appear that the Authority is referring to the Time Partner-case (C-311/21). That case concerns the interpretation of article 5 in the Directive, and thus its reference to recital 12 is linked to the interpretation of article 5. But it cannot be inferred from this, that recital 12 is not relevant to the interpretation of article 4. On the contrary, it appears directly from the Advocate General's statement in the only case that deals with Article 4, C-533/13 (AKT)

[21] Ibid. page 12.

[22] Commission Written Observations, 20. January 2014, enclosed in a redacted French version.

[23] See section 17.

[24] See section 18.

section 113 that «Notwithstanding, Directive 2008/104 does not define temporary agency work, nor does it list the cases in which the use of this form of work may be justified. Recital 12 in its preamble does, however, state that the directive is intended to respect the diversity of labour markets". Moreover, Recital 12 itself says "this directive" and is not limited to Article 5.

Regarding the significance of the Directive for the assessment of restrictions:

The Authority has, with reference to the AKT-case, assumed that article 4 (1) in the directive "restricts the scope of the legislative framework open to EEA States in relation to restrictions on the use of temporary agency work."[25] It is not clear what the Authority means by this, but if the Authority considers that the Directive has narrowed down the scope for restrictions compared to what follows from the EEA-agreement, the Government disagree. What appears from the section in question, to which the Authority has referred, is that Article 4 (1) does not require any specific legislation to be adopted, as this provision addresses only the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers. This becomes clear when the section is read in conjunction with the court's conclusion in the next section:

> "– 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, and, therefore,
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> – the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1)."[26]

Consequently, it cannot be inferred from the judgment that Article 4 (1) should be interpreted more narrowly than what already follows from Article 36 of the EEA. The Directive does not set out requirements for specific regulations regarding situations when hiring can be used or the access to hiring. On the contrary – the preamble emphasizes that the Directive must respect diversity in the labour markets. The legislator has not regulated this in the directive, which means that the member states have considerable margin of discretion.

The fact that the Directive has not "restricted" the assessment regarding restrictions, also follows from the legal basis of the Directive. The legal basis of the Directive is the Treaty on the Functioning of the European Union (TFEU) part three – Title X: Social Policy - Article 153 (former Article 137 TEC). This article gives the Council authority to adopt directives and minimum requirements for gradual implementation regarding the fields listed in it, which includes working conditions. But it does not give the Council the authority to restrict the member states opportunity to have restrictions. Moreover, the legal basis of the directive also has a bearing on the interpretation of the Directive. Although the Directive has a two folded aim, the protection of workers and the social dimension must in light of the legal basis have a particular significance.

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[25] LFN paragraph 50.

[26] Case C-533/13 para. 32.

3 The Norwegian regulations of temporary agency work

3.1 Overview

The main rule and point of departure in Norwegian working life is that employees shall be employed on a permanent, time-unlimited basis, directly with the employer, cf. WEA § 14-9 (1). Fixed-term work and hiring of workers may be used if certain conditions are met. The WEA distinguishes between hiring from temporary work agencies (§ 14-12) and hiring from "non-agency"-companies; production companies (§ 14-13).

After the amendments in force 1. April 2023, hiring from temporary work agencies is permitted to the same extent as fixed-term employment can be agreed upon pursuant to § 14-9 (1) letter (b) to (e) of the WEA. Thus, such contracts can be entered into:

b) for work in place of another or others (substitute)

c) for practice-work

d) for participants in labour market schemes under the auspices of or in cooperation with the Norwegian Labour and Welfare Administration, and

(e) for athletes, athletic trainers, referees and other organised sport managers.

In addition, for enterprises bound by a collective agreement with trade unions with at least 10,000 members, the WEA allows for local agreements on time-limited hiring, cf. § 14-12 (2). This is a potentially practical option for many companies in Norway, and fully in line with the long-standing tradition and policy in Norway that the social partners can make agreements and locally adapted solutions. See more details below in 3.2.

In addition, certain special rules have been laid down concerning (a broader access to) the hiring of health personnel and the hiring of consultants, cf. FOR-2013-01-11-33 § 3 and FOR-2022-12-20-2355 Part I. Further, the new provisions on temporary agency work do not apply until further notice to "hiring for replacement in agricultural enterprises" or "hiring for short-term arrangements", cf. FOR-2022-12-20-2301. point 5.

The Ministry issued a consultation paper with proposed regulation on 30. June 2023 regarding the event sector.[27] A narrow exemption was proposed for hiring for rig and stage technical work for short-term events. The proposal for this regulation is, in the same way as for the other exceptions, concrete and carefully grounded.

The Ministry published a new guide on the regulations of temporary agency work (in Norwegian) 30 June this year.[28] The rules are thoroughly explained in this guide.

3.2 Local agreement with employee representatives

In general, Nordic countries often facilitate increased flexibility for the companies, based on consultations/agreements between the management and employee representatives. Besides local needs for adaptation/flexibility, this can also have a positive effect on the collective bargaining coverage. Such practice has also become very common in the EU-legislature, inter

[27] https://www.regjeringen.no/globalassets/departementene/aid/dokumenter/2023/horingsnotat-om-innleie-til-arrangement-.pdf

[28] https://www.regjeringen.no/no/dokumenter/veileder-innleie-av-arbeidskraft/id2987562/

alia in the different labour law aquis. In addition, the EU are taking further measures to strengthen the social dialogue and to increase the coverage of collective agreements in the member states, cfr the Council Recommendation on strengthening social dialogue in the European Union, adopted in June 2023, and the Minimum Wage Directive.[29] The latter promotes collective agreements to a considerable extent, see for example recitals 16, 24 and 25, as well as article 4.

In the Government's view, this is an expression of EU's consensus on the great importance of collective agreements and the requirement for Member States to introduce measures to increase collective bargaining coverage. The Norwegian government shares the aim of the EU on increasing collective bargaining coverage, and this is very clearly stated in the government's Platform (Hurdalserklæringen): "The Government's goal is full employment. A high degree of organization and strong trade unions are the core of the Norwegian working life model." … "It has given Norwegian working life high productivity and a unique competitive advantage, and a society with high trust, small differences and great adaptability. The Government wants a strengthened tripartite collaboration that is closer, more binding and more strategic in order to meet the major challenges facing Norway in the coming years. This implies to pursue a policy that stimulates an increased degree of organization among both employees and employers, and work in close collaboration with the social partners to ensure a serious and organized working life."

Several surveys indicate that agreements on hiring between user companies and employee representatives according to the WEA § 14-12 (2) have been used, or could be used, in about 20 per cent of the possible cases. However, there is also a potential for more extensive use of this option *(Nergaard. K. (2019). Innleie i byggebransjen i Trondheim. Fafo-rapport 2019:20. English summary).* One survey to enterprises in different sectors indicated that about 25 per cent of the companies that had used temporary agency work, were bound by a collective agreement, and 13 per cent had entered into one or more written agreements with employee representatives (*Svalund, J. et. al. Arbeidstakeres håndheving av regler for midlertidige ansettelser og innleie. Fafo-rapport 2019:38. English summary).* One survey based on some construction sites in Oslo indicated that 19 per cent had made agreements with union representatives in undertakings which were part of a collective agreement between LO (Norwegian Confederation of Trade Unions) and NHO (Confederation of Norwegian Enterprise) *(Engelstad, E. (2019). Slutt med mobilen i handa? Egenbemanning, underentreprise og innleie i byggenæringa i Oslo og Akershus høsten 2019. in Norwegian)*. In one survey, trade union representatives from different sectors in the Norwegian Confederation of Trade Unions back in 2012, more than one fourth answered that they usually or always entered into agreements on using temporary agency work in their company, while half of the trade union representatives rarely or never where parts of such agreements.

In their consultation response to the new regulation on temporary agency work, The Federation of Norwegian Industries (association within NHO) stated that there is an extensive practice of entering into agreements with employee representatives in the larger companies in manufacturing.

The above shows that the agreement-option is a real possibility, it is being used in practice, and that there is a potential for the option to be used even more.

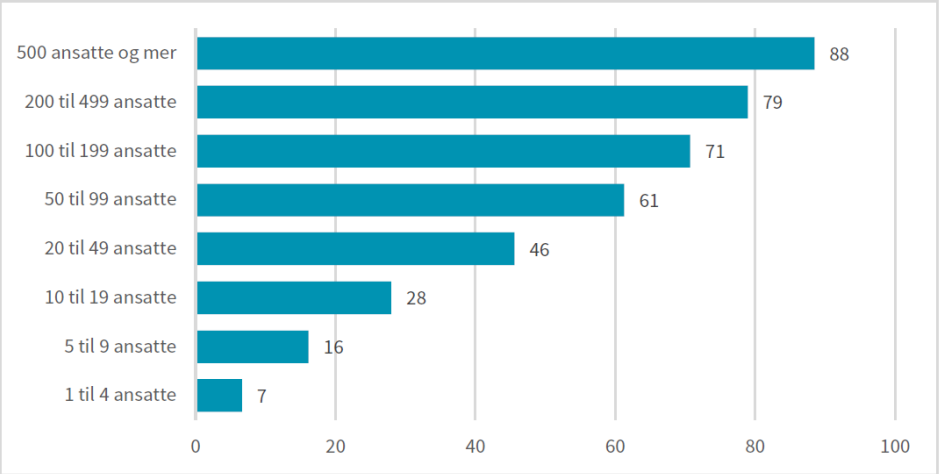
[29] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

The Authority is apparently of the view that small and medium sized undertakings cannot benefit from the regulation in § 14-12 (2) "as they do not have a collective agreement with one of the big trade unions."[30] The Government underlines that all public enterprises and almost half of the private enterprises are bound by collective agreements in Norway.[31] In general, the vast majority of these enterprises will be in a position to enter into agreements with employee representatives locally regarding temporary agency work. The reason for this is that when excluding purely local trade unions such as house associations etc., almost all organised workers are affiliated with a trade union of the said size (98.9 per cent). In such enterprises, the employer and the employee representatives locally may enter into a written agreement on time-limited hiring regardless of the terms in § 14-12 (1).

If certain business organizations or their member undertakings do not want to enter into collective agreements, they will not be able to get more flexibility in various fields. This is off course their own choice. It is a fact that increased flexibility regarding inter alia working time regulations and hiring rules via agreements between the social partners at local and central level, has been the policy in Norway for many, many years, and under different governments.

It is correct that the prevalence of collective agreements correlates with the size of the undertakings. In enterprises with more than 100 employees, the collective bargaining coverage is over 70 per cent. The collective bargaining coverage among small and medium-sized enterprises is thus lower. However, it is important to emphasize that also small and medium-sized enterprises could be bound by collective agreements at the required level according to WEA § 14-12(2). Based on information on employment from Statistics Norway and collective bargaining coverage from Fellesordningen for AFP (Contractual pension in the private sector), Fafo has estimated that 61 per cent of those working in enterprises with 50-99 employees are covered by a collective agreement, and 46 per cent of those working in enterprises with 20-49 employees.

Figure: Share of workers in undertakings with collective agreements



Source: Alsos, K., Nergaard, K. & Svarstad, E. (2021). Arbeidsgiverorganisering og tariffavtaler. Fafo-report 2021: 07. English summary.

[30] LFN paragraph 48.

[31] See letter 5. of May chapter 6.1.

According to the Institute for Social Research, the proportion of organized workers in working life as a whole increased in 2019. Their analysis shows that this increase took place among employees in companies with 21-100 employees, and these medium-sized companies were also the group that used hiring and/or subcontracting to the greatest extent. With new regulations that set higher requirements for collective agreements in the business and agreements with employee representatives on temporary agency work, it seems that the increase in the proportion of unionized workers was also part of the companies' adaptation to be able to continue using temporary agency work.

3.3 Comments to the LFN

The Authority alleges in the LFN e.g., that the Norwegian Government has "removed the possibility to use temporary agency workers for work of a temporary nature" (paragraph 59), that "the other options for using temporary agency workers are narrow and specific" (paragraph 37) and that "the exception for agreements with employee representatives is quite narrow" (paragraph 74).

The Government will emphasize that there are still several options for using temporary agency workers under Norwegian law, cf. above, and they all relate to a temporary need for labour or a time limited/fixed term use of temporary agency workers. It is therefore misleading to say that Norway has removed the possibility to use temporary agency work for work of a temporary nature as such.

The Authority claims in the LFN paragraph 74 that "the exception for the health care sector only benefits the state, as health care services in Norway are mainly public". That is not correct. Private providers of health and care services will also be able to use temporary agency work pursuant to the provision if the conditions are met.

4 The measures are justified

4.1 Introduction

A restriction must be justified by legitimate grounds of interest and meet the requirement of proportionality. The latter means that the measure must be suitable for achieving the objective of the measure and not go beyond what is necessary to achieve it, see e.g. Case C-110/05 *Commission v Italy,* paragraph 59.

Further, it is the state that has the burden of proving that a restriction can be justified. However, the Authority seems to impose a much stricter requirement of proof than what can be derived from EEA law, by giving reference to e.g. C-254/05 *Commission v Belgium* paragraph 36:

> "In that regard, the reasons which may be invoked by a Member 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 (Case C-42/02 Lindman [2003] ECR I-13519, paragraph 25; Case C-8/02 Leichtle [2004] ECR I-2641, paragraph 45; Case C-147/03 Commission v Austria [2005] ECR I-5969, paragraph 63; Case C-137/04 Rockler [2006] ECR I-1441, paragraph 25; and Case C-185/04 Öberg [2006] ECR I-1453, paragraph 22)."

Based on the wording of the English language version of the judgment, it may immediately appear that a strict requirement of proof is imposed on the state ("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"). However, other language versions leaves a different impression:

> "Hertil bemærkes, at de hensyn, der kan påberåbes af en medlemsstat, skal ledsages af de nødvendige beviser eller af en gennemgang af, hvorvidt den restriktive foranstaltning, som medlemsstaten har truffet, er egnet og forholdsmæssig, samt af præcise oplysninger, der kan underbygge medlemsstatens argumentation."
>
> "De skäl som en medlemsstat kan åberopa skall åtföljas av ändamålsenlig bevisning eller en bedömning av lämpligheten och proportionaliteten av denna åtgärd samt närmare uppgifter till stöd för dess argument."
>
> "À cet égard, les raisons justificatives susceptibles d'être invoquées par un État membre doivent être accompagnées des preuves appropriées ou d'une analyse de l'aptitude et de la proportionnalité de la mesure restrictive adoptée par cet État, ainsi que des éléments précis permettant d'étayer son argumentation."
>
> "Außerdem ist darauf hinzuweisen, dass ein Mitgliedstaat neben den Rechtfertigungsgründen, die er geltend machen kann, geeignete Beweise oder eine Untersuchung zur Geeignetheit und Verhältnismäßigkeit der von ihm erlassenen beschränkenden Maßnahme vorlegen sowie genaue Angaben zur Stützung seines Vorbringens machen muss."

These language versions use "information" ("uppgifter", "éléments", "Angaben") instead of "evidence" ("precise evidence enabling its arguments to be substantiated"). The requirement imposed is thus that the State must 1) either provide "appropriate evidence" or an analysis of the suitability and proportionality of the measure, and 2) precise information to support its argument.

The fact that there is no strict requirement of proof under EEA law is also confirmed by the judgment of the CJEU in United Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß* (Grand Chamber). The question raised was whether the wording of Case C-254/05 (which was originally from Case C42/02 *Lindman* paragraph 25) meant that States had to submit a study substantiating the proportionality of a restrictive measure before the measure was adopted. The CJEU stated that no such requirement applied (paragraphs 71–72):

> "71. As the Advocate General has observed in points 81 and 82 of his Opinion, that question arises from a misreading of that judgment. As is clear from paragraphs 25 and 26 of the latter and from the subsequent case-law referring thereto (see, in particular, the judgment of 13 March 2008 in Case C-227/06 Commission v Belgium [2008] ECR I-46, paragraphs 62 and 63 and case-law cited), the Court has stated that if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality.
>
> 72. It cannot, however, be inferred from that case-law that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue."

The opinion of the Advocate General, which the CJEU supports in paragraph 71, is even clearer that there is no strict evidentiary requirement (paragraph 82):

> "That judgment [Lindman] shows only that the burden of proving that restrictions on the freedom to provide services are proportionate and consistent rests with the Member State, and the Court has never sought to impose a requirement that that defence be published before the legislation in question is enacted, or that it should take the form of statistical surveys, as suggested by one of the applicants."

Thus, the wording of Case C-42/02 *Lindman* paragraph 25, which was repeated in C-254/05 *Commission v Belgium* paragraph 36, implies no more than that the State has the burden of proving that the requirement of proportionality has been met, and that the CJEU never has set out a requirement that the State's justification for the restriction must be published before the measure is adopted or must consist of (statistical) studies.

The preparatory work for the Norwegian measures contains a precise and thorough description of the legitimate interests on which the measures are based, the level of protection that the government aims to achieve, and why the measures are suitable and necessary.

The Authority's comments on the need for measures[32] and the Authority's assessment that it "cannot […] see that the available data supports that the use of temporary agency workers in Norway was so widespread that adopting this restriction was necessary"[33], is in fact an intervention in the Norwegian authorities' political assessment. The Authority thereby challenges the level of protection chosen by the Government and endorsed by the majority in the Norwegian Parliament; a high level of protection for the Norwegian labour market model, for workers, and for safety and health. It is under the State's discretion to decide on how to prioritise legitimate interests in relation to other interests, such as flexibility for the business sector. The chosen level of protection cannot be overruled by the CJEU or the EFTA Court.

4.2 The measures are based on legitimate aims

4.2.1 Preservation of the Norwegian labour market model

As described in the preparatory work and the Ministry's letter to ESA 5th May 2023, one of the main objectives which underlies both measures in question is to preserve the politically chosen labour market model in a broad sense. This objective is defined as one of the legitimate grounds referred to in Article 4(1) of the Directive ("the need to ensure that the labour market functions properly").

The Government has chosen a labour market model where permanent and direct employment shall be the main rule, and where temporary agency work shall only be used in a way that does not crowd out permanent and direct employment. In the Government's view the Directive is also based on the premise that it is more advantageous for employees to be permanently employed in a user undertaking than in a temporary work agency, and that stimulating temporary agency workers to be permanently employed by the user undertaking is one of the objectives of the Directive.[34]

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[32] LFN paragraphs 83-86.

[33] LFN paragraph 86.

[34] Directive recital 15, C-681/18 paragraph 51 and Advocate General C-533/13 paragraph 110.

In order to maintain the Norwegian labour market model, permanent employment as a main rule, is required. The new measures make it more attractive and easier to recruit employees to permanent positions in the companies. It also provides a basis for better recruitment, e.g. through the apprenticeship scheme. For employees, permanent employment in a two-party relationship between employee and employer, implies increased security and predictability for future work and income. For employers permanent employment makes it more attractive to invest in skills development and produce highly productive jobs.

Further, the Norwegian working life model largely depends on a high degree of organisation for employees and employers. Broad collective agreement coverage ensures a balance of interests and power between the parties and centralised, national, and coordinated wage formation. The Government is concerned about declining unionization rates and collective agreement coverage. Available information indicates that there is a low unionization rate among temporary agency workers. The measures in question were thus also introduced to remedy this unfortunate development.

4.2.2 Protection of workers

Both measures also aim to protect workers as such, which is a recognized objective under EU-case law.[35] As explained in the preparatory work and the Ministry's letter of 5 May,[36] the use of temporary agency work may have several negative consequences for workers, including for the working environment, organization, employment and workplace training. Furthermore, short employment relationships and atypical forms of employment, such as temporary agency work, may increase the risk of injuries and accidents.[37] The measures have a clear purpose to ensure better working conditions for workers.

The Authority has pointed out that limiting the use of temporary agency workers cannot be said to protect those workers.[38] The Government aims to protect workers in a broad sense. Protecting workers is a recognised objective under EU law,[39] notwithstanding the wording in article 4 which particularly says protection of «temporary agency workers». The purpose is not only to protect temporary agency workers in the role as a agency worker, but to provide all workers, including those who have been agency workers, with the best possible working conditions.

4.2.3 Protection of health and safety at work

As described in the preparatory work and the Ministry's letter to the Authority of 5th May, the objective of protecting health and safety at work is particularly relevant for the prohibition on the use of temporary agency workers for construction work on construction sites in Oslo, Viken and former Vestfold.

The Labour Inspection Authority's analyses show that lack of competence and training is often an underlying cause for accidents, and that it is assumed that short-term employment

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[35] C-279/80 *Webb*, C-272/94 *Guiot*, C-60/03 *Wolff & Müller* and judgment on the substance C-164/99 *Portugaia Construções*.

[36] See Prop. 131 L chapter 3.6 and the Ministry's letter chapter 7.

[37] Ibid.

[38] LFN paragraph 65.

[39] See C-164/99 paragraph 20.

relationships and atypical forms of employment, such as temporary agency work, contribute to increase this risk.[40] Further, the Norwegian Labour Inspection Authority's consultation responses and reports point out that temporary agency workers often do not receive the same safety training as the workers who are permanently employed directly in the undertaking, and that the threshold for reporting errors and deficiencies in the working environment is higher for temporary agency workers.[41]

The prohibition on the use of temporary agency work in the construction industry in the Oslo area, where the percentage on the use of temporary agency workers is particularly high, is thus intended to ensure that the requirements and safety at work are safeguarded particularly in this area and are thus also directly justified by considerations deemed legitimate pursuant to Article 4(1).

4.2.4 Prevention of abuse

As described in the preparatory work, and in the Ministry's letter to the Authority of 5 May, the repealing of the right to use temporary agency work for "work of a temporary nature" is also justified by the objective of preventing abuse, which is defined as one of the legitimate grounds referred to in Article 4(1) of the Directive.[42]

The earlier provision, which allowed use of temporary agency work for "work of a temporary nature", was highly discretionary, and thus liable to be misunderstood and misused in cases when the need for employees was actually permanent in the user undertaking. Furthermore, the discretionary condition made it difficult to carry out effective supervision. This is explained in detail both in the preparatory work and in the letter of 5th May.

In the LFN the Authority has argued that since there was a need to restrict the right to use temporary agency work in itself, the Authority is of the opinion that the repealing of the right to use temporary agency work for "work of a temporary nature" cannot be justified in the interest of preventing abuse. This is not correct, as a measure may be justified on several grounds without one excluding the other.[43] That the consideration of abuse has been part of the legislature's intention in considering the repeal of the right to hire for work of a temporary nature is directly stated in Prop. 131 L (2021 – 2022) paragraph 6.4.4 at page 30.

The Government would also like to point out that the CJEU has recognized that states can ensure legitimate aims by means of general rules that are easy to understand and apply, and easy to control and enforce, cf. C-110/05 *Commission v Italy*, paragraph 67.

4.3 Comments to the LFN

In assessing the aim behind the new regulation on temporary agency work, the Authority has referred to certain quotations in the preparatory works, the Norwegian Government's press-release of 20 December 2022 and formulations in Norway's letter of 5 May 2023, and taken

[40] The Ministry's letter to the Authority of 5th May 2023, chapter 7.2.

[41] Prop. 131 L (2021 – 2022) chapter 3.6, page 15 and the Ministry's letter to the Authority of 5 May, chapter 7.2.

[42] Prop. 131 L (2021 – 2022) chapter 3.7, page 16 and letter from the Ministry of 5 May, chapter 4.2 and 4.3.

[43] ESA's letter of inquiry paragraph 64.

these isolated statements as evidence that the purpose behind the new provisions "indeed [is] to reduce the use of temporary agency workers overall."[44]

The Government does not agree with the Authority's interpretation that the aim is to reduce temporary agency work in itself in order to achieve permanent and direct employment without further justification for why this form of employment should be strengthened in the Norwegian labour market.

Statements in the preparatory work and the political platform on limiting the role of temporary work agencies, reduce the use of agency workers, etc., are expressions describing which tools are required to achieve the Governments objectives. This is not descriptions of the objectives of the measures in question. The underlying objectives, which are lawful under EU/EEA law, is thoroughly described in the preparatory works, see above.

In the ruling from the Oslo District Court, it was also stated from the plaintiffs that the main purpose of the new regulations was to reduce and limit the scope and role of temporary work agencies in itself. The plaintiffs based this claim on certain quotations in the legislative preparations and the political platform (Hurdalsplattformen). This was rejected by the district court. The court found that the in-depth assessments to the new regulations in the legislative proposal did not support that the main purpose of the new regulations simply should be to reduce and limit the scope and role of the agency work industry.[45]

In any case, formulations about restricting temporary work agencies etc. are uncontroversial and a common way of referring to restrictions on temporary agency work. The European Commission has e.g. described restrictions on temporary agency work in the same manner (Official Journal of the European Communities, Volume 34, 13.12.91 No C 323/28, our underlining):

> "Moreover, the European Court of Justice has held that the freedom to provide services may be restricted by provisions which are justified by the general good and which are imposed on all persons operating in the Member States concerned, such being the case of national legislation restricting the provision of manpower 'which is designed first to eliminate possible abuse and secondly to restrict the scope of such activities or even prohibit them altogether."

On this basis, it is the Government's view that the Authority has not identified and interpreted the objectives of the new regulations on temporary agency work in a correct manner.

Based on the Authority's interpretation of what is the purpose for the new regulations, the Authority has concluded that the aim cannot be considered legitimate under the freedom of service or the Directive.[46]

The Authority justifies this interpretation on the grounds that, among other things, the Directive aims to contribute to "the protection of temporary agency workers and the flexibility of the labour market" and that since "temporary agency work is considered a flexible form of work which has beneficial impact on the labour market as a whole [under the Directive]", a

[44] LFN, para. 55.

[45] Oslo District Court's decision (case nr. 23-089874TVI-TOSL/09) page 11.

[46] LFN, para. 56.

national rule intended to reduce the use of temporary agency workers would not be a legitimate aim.[47]

In the Government's view, the Authority's assessment is based on an incorrect application of Article 4 (1). Such an interpretation would in reality imply that any national measure that would reduce the number of employees in temporary work agencies would not be legitimate under the Directive.

The Authority's interpretation is also problematic as it would have far-reaching consequences for a number of member states that have national rules, which in different ways, have the consequence of reducing the number of employees in temporary work agencies. The Commission's report from 2014 on the implementation of the Directive, illustrates clearly that, at the time of its implementation, several countries had restrictions on the use of temporary agency work such as a limitative list of reasons for using agency workers (France, Italy, Poland) and limitations on the number or proportion of agency workers who may be used in a user undertaking (Belgium, Italy). The said countries referred to 'the need to ensure that the labour market functions properly' to justify the said restrictive measures.[48]

As described in OECD's Employment Outlook 2020, many states still have various restrictions that in practice limit the number of employees employed in temporary work agencies. During the years from 2013 to 2019, 17 OECD countries reformed hiring regulations for temporary workers. Countries reforming hiring regulations for temporary workers were evenly split between those that reduced restrictions on the use of temporary contracts and those that imposed additional restrictions on them (OECD Employment Outlook 2020, figure 3.15). The OECD Employment Protection Legislation Index indicates that regulations on temporary agency work vary considerably between member states.[49]

Furthermore, the Authority appears to be of the view that the removal of the option of using temporary agency work for work of a temporary nature is not reconcilable with *Daimler*.[50] The Government does not agree with the Authority's interpretation of the case.

The Daimler ruling states that the Directive does not *forbid* a member state having national regulations that permits using agency work to fill permanent positions. But it is not saying that a member state is *obliged* to permit agency work in specific situations, [neither regarding filling temporary nor permanent positions].

This is also evident from paragraph 33 of the judgment where the Court has held that the Directive does not specify in which cases it may be lawful to allow the use of temporary agency work (our translation from the Danish version):

> "It should therefore be noted at the outset that there is no provision in directive 2008/104 that relates to the nature of the work or the nature of the position to be filled in the user company. This directive also does not list the cases that can justify the application of this form of work, as the Member States, as the Advocate General has stated in paragraph 37 of the proposed decision, have preserved a considerable margin

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[47] LFN, paragraphs 57-58 and 60.

[48] Report from the Commission on the application of Directive 2008/104/EC on temporary agency work, page 11: 1_EN_ACT_part1_v5.pdf

[49] http://oe.cd/epl. The fact that there were still large differences in2020 is evident, for example also, by Waas and others (red.): Restatement of Labour Law in Europe (2020) page lxxiii.

[50] LFN paragraph 58.

of discretion with regard to determining the situations that justify the application hereof."[51]

In the Government's view, the Authority has not assessed the legitimate objectives underlying the new regulations on temporary agency work as a whole, and as set out in the preparatory work, and the Ministry's letter of 5th May 2023. Instead, the Authority claims that the Government has not explained *how* those "possible justification grounds" are relevant to the adopted measure.[52] The Government has provided thorough and detailed reasons for the new measures in both the legislative preparatory work and in its letter to the Authority of 5 May and has thereby fulfilled the burden of proof on the Norwegian Government in explaining how the justification grounds are relevant to the measures introduced, cf. chapter **Feil! Fant ikke referansekilden.** and 5.

5 The measures are proportionate

5.1 Repealing the option "when the work is of a temporary nature"

5.1.1 Suitability

The measure of repealing the right to use temporary agency work "when the work is of a temporary nature" is suitable to achieve a labour market with more permanent and direct employment in a two-party relationship, and thereby to preserve and safeguard the Norwegian labour market model with a high degree of organisation. The measure is also suitable for protecting workers and prevent abuse. Reference is made to the description in the Governments letter of 5th May 2023, which will be further elaborated on in the following. As described in chapter 4.1 there is no strict requirement of proof under EEA law.

These legitimate grounds of interest (ensuring a well-functioning labour market, preventing abuse and protecting workers) are closely linked and must be seen in context. The overall purpose is to increase permanent and direct employment in user enterprises. It is the Government's opinion that the measure will lead to more permanent and direct employment. This is not "merely a speculation of what will happen" as the Authority claims,[53] but based on how the repealed provision has functioned and on assumptions on how the labour market can be expected to adapt to the measure.

The regulations on agency work are enforced by the Norwegian Labour Inspection Authority. Their experience indicates that enforcing the repealed provision has been challenging. Reference is made to the Labour Inspection Authority's consultative statement from 19th April 2022 in connection with the hearing of the proposed measure. In this statement, the Labour Inspection Authority refers to an inspection period in the autumn 2020, where they inspected 81 user undertakings in the central eastern part of Norway. They point out that it was challenging to draw conclusions, particularly on whether the work was carried out as hiring or sub-contracting, and on whether the hiring was legal

[51] Judgement of 17 March 2022 in C-232/20 *Daimler*, paragraph 33.

[52] LFN paragraphs 62 – 63.

[53] LFN paragraph 76.

was particularly challenging where the employer stated that the basis for hiring was that the work was of a temporary nature. The Labour Inspection Authority stated that the measures were suitable for preserving the Norwegian labour market model (translated from Norwegian, our underlining):

> "Initially, the Labour Inspection Authority would like to emphasize that we are positive to proposals that strengthen employees' rights and opportunities for permanent and direct employment. We believe that the proposals could strengthen the Norwegian working life model, by increasing the number of people employed in the enterprise where the work is performed, that the degree of organization is strengthened, that responsibility for the employees' health, safety and environment is clarified, and that full and permanent positions are not supplanted in favour of temporary agency work. We believe that permanent and direct employment is positive for the working environment, including by reducing the risk of work-related injuries. With regard to the significance of the affiliation form for the working environment, we refer to what emerges in the consultation document on p. 19.
>
> The Norwegian Labour Inspection Authority supports the Ministry in that permanent and direct employment within the enterprise that will have the work carried out is the form of affiliation that best lays the foundation for trust, development and cooperation between the parties, and thus best safeguards the commonality of interests surrounding the Norwegian working life model.
>
> The Labour Inspection Authority finds that direct employment in the enterprise that is to have the work performed contributes to a safer working environment and reduces the risk of occupational accidents. In this connection, we can mention that agency workers often do not receive the same training as direct employees with regard to how the work can be performed safely and securely by the hiring agency, including the use of work equipment. The threshold for reporting errors and deficiencies in the working environment is also higher for agency workers than for employees who are directly employed. The use of agency workers is also important for the working environment of employees who are directly employed. Frequent replacement of parts of the workforce can lead to additional burden for the direct employees. We also refer to the Norwegian Labour Inspection Authority's consultation response to NOU 2021:9. Based on the requirement that employees must have a fully satisfactory working environment, the Labour Inspection Authority supports the Ministry in that the clear main rule should be that the employees are directly - and primarily permanently - employed in the enterprise that will have the work performed."

The Labour Inspection Authority's experiences in the consultation reply thus provided an important input to and background for the Government's assessment.

Further, a report from the Norwegian Labour Inspection Authority from 16. February 2023 confirms the challenges of enforcement of the provisions in question (translated from Norwegian):

> "In a supervision, it is often not possible to do a complete review and a good assessment of whether there is a legal basis for each individual hiring case. A complete review of the basis for all hiring of labour requires, firstly, considerable and detailed knowledge of the relevant industry, the specific business and also of the specific assessments made in each individual case of hiring. In addition, it requires that the enterprises themselves have sufficient overview so that they can provide us with the necessary information about their hiring. If the enterprise has not had, or at the time of the audit has, a system where they have assessed or can document the legality of each individual agency worker, we have not had an

adequate opportunity to make an assessment of whether there is/has been a legal basis for all agency workers they have or have had. In some cases, we have concluded that there is more use of agency labour than there is a legal basis for, but we have not been able to point precisely to, for example, a specific number of employees or specific agency workers. In a small number of cases, however, we have been able to point to illegal grounds for hiring either specific employees or a specific group of employees."

Thus, the Labour Inspection Authority's descriptions on assessment of the legality of the hiring in the user enterprises, supports the arguments as to the necessity of this restriction.

The view of the Authority in the LFN paragraph 88, that the report "paints an overall positive picture of the temporary agency work industry in Norway" (our underling) is thus not relevant for assessing the situation in the user enterprises.

A state of law that creates such uncertainty for those who are to use the regulations, as well as great difficulties for effective supervision and enforcement by the supervisory authorities, implies a high risk of abuse. See also chapter 4.3. in our Letter of 5 May 2023, where it is referred to Alsos & Svalund pointing out that while the regulation of fixed-term contracts and agency work is rather strict in Norway, the limited bargaining power of many of the employees holding such contracts, combined with the lack of third-party sanctioning, means that the regulations in practice are much more flexible.

As described in Prop. 131 L (2021–2022) chapter 13, the measures will "in itself not reduce the need for labour and employment, but is intended to have an impact on how enterprises recruit labour. Hiring temporary agency workers is currently used in different ways to solve different needs in the enterprises. In cases where temporary agency work is used as a more or less permanent part of the workforce, the need to make changes as a result of the proposals will be higher" (translated from Norwegian).

Until now, broad access to temporary agency workers has functioned as a guarantee and predictability for providing labour for the enterprises. When this option has been revoked, there is reason to believe that enterprises will want to ensure predictability from other sources. The most predictable workforce is permanent and direct employment. The Government therefore believes that the measure is suitable for achieving the desired objectives, including increasing permanent employment.

Reference is also made to Oslo District Court's ruling on 30 June 2023 page 15, which states (translated from Norwegian): "The further objectives of the legislation also appear in the court's assessment as viable through the legislative decision to remove the possibility of hiring from temporary agencies for work of a temporary nature, even if one cannot ignore — as indicated by the plaintiffs — that part of the consequences may be that permanent positions in temporary agencies are replaced by fixed-term work in two-party relations. If the employers are to achieve the same predictability for their activities as the temporary agency work access has been, this does not appear to be as good, which supports the Ministry's assessments."

One cannot rule out that the measure leads to more enterprises using other methods, such as fixed-term contracts, sub-contracting etc. However, the Government is of the view that using such contracts/employment will also entail more permanent/direct employment and thereby be suitable for achieving the objectives. In the context of suitability, it is important to see the possible effects in a holistic way, and how the labourforce as a whole is connected to the labour market.

If some undertakings now increase their use of fixed-term contracts (instead of using temporary agency work), this is, first of all, direct employment. It will therefore be suitable for achieving the aim of more direct employment. Moreover, direct fixed-term employees are more likely to achieve permanent employment than temporary agency workers.[54] It is therefore also suitable for achieving the aim of more permanent employment.

In sub-contract arrangements the contractor must follow the same rules for employment, including hiring, as the principal. Under Norwegian law it is still permitted to deliver and purchase contracts of sub-contracting. Using sub-contracting will normally mean employees being directly (permanently or temporarily) employed in a two-party relationship with the "production undertaking".

Workers, hired-out from undertakings whose object is not to hire out labour (WEA § 14-13), must be permanent employed by the undertaking where the worker normally performs ordinary work. This is in a two-party relationship with his employer. A shift to more use of such hiring will therefore require permanent employment in a two-party relationship in a "production undertaking" and is thus suitable for achieving the objectives.

The Authority mentions more part-time work and overtime work as possible effects of the measure. If such flexible working hour arrangements is being used within the frame of a two-party relationship, this will imply direct and/or permanent employment.

5.1.2 Preliminary findings support the suitability of the measure

As part of the evaluation of the new regulations, Fafo has recently published results from a survey to enterprises in the construction industry.[55] They were asked how they solve their need for labour in cases where they would otherwise use temporary agency work. All possible options were mentioned by the enterprises.

In the Oslofjord area (Oslo, Viken & Vestfold), use of temporary agency work in construction has been extensive. 20 per cent of the enterprises now answer that they will employ more workers permanently in their own company. In addition, 35 per cent of the enterprises will increase their hiring from other enterprises in the industry (WEA section 14-13). 33 per cent will have an increased use of subcontractors. Both options might imply increased use of workers with permanent positions in two-party relationships, cf. above. 26 per cent will employ more workers with fixed-term contracts, 22 per cent will increase their use of overtime work and 32 per cent will seek to reduce the number of assignments. One fourth of all the enterprises participating in the survey answered that their company would not be particularly influenced by the prohibition on use of temporary agency work in this area, most common among smaller enterprises.

Enterprises in construction in other parts of Norway have been less dependent on use of temporary agency work. Fafo estimates an average of 6 per cent of temporary agency workers in craftsmen professions and unskilled workers of total employment in construction in these other regions. In these areas the enterprises can still use temporary agency work. The share of

[54] See the Governments letter 5 May 2023 page 42.

[55] https://www.fafo.no/zoo-publikasjoner/presentasjoner/begrensninger-pa-innleie-av-arbeidskraft-favorisering-av-de-store-bedriftene

small enterprises in construction are higher in these parts of the country. Smaller companies have a tendency to answer that they will reduce the number of their assignments to adapt to situations where they otherwise could have used temporary agency work. 47 per cent of the enterprises in the regions outside the Oslofjord area mention this option. Other common options are: Increased use of subcontractors (38 per cent), increased hiring from other enterprises in the industry (35 per cent), more overtime work (34 per cent), employ more workers with fixed-term contracts (26 per cent), employ more workers permanently in their own company (21 per cent). In these areas 12 per cent of the enterprises mention that they will not be particularly influenced by the new regulation.

Enterprises with collective agreements have a tendency to answer that they will not be particularly influenced. Moreover, they intend in a lesser degree than enterprises in construction without collective agreements to reduce their assignments or employ more workers with fixed-term contracts.

Among enterprises in construction with their activities located outside the Oslofjord area, 20 per cent assess that the new regulation will be positive for them, one third are neutral and about 40 per cent assess the consequences as negative for their company. 14 per cent of the enterprises in the Oslofjord area consider the prohibition of temporary agency work as positive for their company, 27 per cent are neutral and just over 50 per cent are negative.

These first results from the evaluation project will be supplemented with statistical analysis and surveys to trade union representatives, as well as a follow up survey to enterprises in construction and other industries in 2024 and 2026.

As briefly mentioned in the letter of 5 May 2023, Fellesforbundet (The United Federation of Trade Unions) has made a survey among their members with permanent residence in Poland, employed in temporary work agencies in Norway, and hired out to enterprises in shipbuilding/manufacturing industry and construction. 91 per cent of these workers wish to continue working in Norway. About two thirds plan to continue as employed in the temporary work agency. 27 per cent will seek permanent positions in other companies, with a somewhat higher share (35 per cent) among those who are working for user companies in construction. Many of these workers expect that the new regulation will make it easier for them to obtain a position in ordinary enterprises in these industries (56 per cent of those performing work in undertakings in shipbuilding/manufacturing and 42 per cent in construction). However, some are afraid of losing their current job because of the new regulation (52 per cent in construction and one third in shipbuilding/manufacturing).

According to Statistics Norway, employment in temporary work agencies has been adjusted in accordance with the amended regulations on temporary agency work. From Q2 in 2022 to Q2 in 2023 the number of jobs in the temporary work agency industry was reduced with 9,3 per cent (5 700 jobs). The reduction was pronounced for craftsmen in construction and for occupations dealing with administrative tasks. This is consistent with reports from the industry organization for temporary work agencies in NHO Service & Handel. Their member companies reported reduced activity in construction in Q1 2023, and increased hiring to the health and care sector. However, hiring to construction still represent 22 per cent of their total activity. The industry organization for temporary work agencies count on a change in activity in the industry from staffing to recruitment (for permanent and temporary positions),

placement of self-employed persons, subcontracting and consulting assistance within HR to take place in the time to come (NHO Service & Handel, Bemanningsbarometeret Q1 2023).

5.1.3 Consistency

The essence of the requirement of consistency is that the State "must not take, facilitate or tolerate measures that would run counter to the achievement of the stated objectives of a given national measure", see E-1/06 paragraph 43.

Since taking office, the Government has pursued a consistent policy linked to an overarching objective of safeguarding labour rights and creating safe jobs in an organized working life. When the Government took office autumn 2021, the Government's political platform ("Hurdalsplattformen") stated that (translated from Norwegian):

> "For the Government, it is important to strengthen workers' rights in a changing working life. Full time and permanent employment shall be the main rule in Norwegian working life. Hiring and fixed-term contracts that displace permanent employment, as well as forms of affiliation where the purpose is to circumvent employer responsibility, create increased inequalities in working life and insecurity for people. The Working Environment Act is a cornerstone of the Norwegian model and must be strengthened and renewed to meet developments in working life. The Government will therefore quickly follow up the proposals from the Fougner Committee on the future of work."

At the same time, the policy is balanced. The intention is not to remove all flexibility in the interests of workers' rights. The Government recognizes the labour market's need for flexibility, and therefore also the need for the use of fixed-term contracts and temporary agency work in certain situations. The purpose of the measure is not to remove temporary agency work as such, but to keep it at an acceptable level, and to be used in certain situations. Such a comprehensive policy does not mean that the measure is inconsistent. A restriction of the right to use temporary agency work is not inconsistent, and thus contrary to EU/EEA-law, merely because a State at the same time permits using temporary agency workers in certain situations or using other flexibility mechanisms such as fixed-term employment.

As described in chapter 5.1.1 above, fixed-term employment will imply direct employment in a two-party relationship. Allowing the use of fixed term contracts is thereby consistent with the purpose of direct employment. Moreover, direct fixed-term employees are more likely to be employed for permanent employment than temporary agency workers. It is therefore also suitable, and not inconsistent, for achieving the aim of more permanent employment.[56]

The right to use temporary agency work is assessed on the basis of a balance between the labour market's actual need to use temporary agency work on one hand, and the need to secure a high level of protection for workers and safeguarding the Norwegian labour market model on the other hand. The various options for using temporary agency work, including the special exemptions, are concrete and carefully grounded.[57]

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[56] In paragraph 80 the Authority states that "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."

[57] In paragraph 81 the Authority stated that "the Authority has difficulty seeing consistency in relation to the exceptions to this restriction that have been adopted."

Permanent employment in a temporary work agency is not the same as permanent employment directly in a two-party relationship. The directive and EEA law also recognize that direct employment in the user enterprises is preferable. This does not imply that the measure is inconsistent.[58]

The Government's assessments related to this are described in Chapter 5 of Prop. 131 L (2021–2022). As mentioned in chapter 4.4 in the letter of 5 May 2023, an evaluation of changes in regulation implemented in 2019 showed that the average work hours for temporary agency workers declined, much of it due to an increase in contracts with agreed working hours below 10 per cent and between 10 and 20 per cent. The Institute for Social Research believes this was probably connected to the fact that previous zero-hours contracts were replaced by part-time work contracts with a low agreed percentage of positions. According to Statistics Norway the share of full-time temporary agency workers has been declining since 2020 for workers in most occupations, and the reduction in agreed working hours continued in 2022 *(SSB-notat 2022/39 tabell 3.10 & 3.11)*.

Statistics for the period 2015-2019 show that the average regular working time for employees in temporary work agencies was just over 60 per cent of a full-time position. According to register data analysed by the Institute for Social Research, employees in temporary work agencies have an average of six months of the year with pay from the agency where they are employed. About three-quarters of all employees in temporary work agencies had this as their main source of income, while one quarter had other work as their main source of income. *(Strøm. M & Wentzel, M. Innleie og forutsigbarhet for arbeid. En evaluering av endringene i arbeidsmiljøloven 2019. ISF-rapport 5:22. English summary)*.

Different surveys of the working environment, unionization, participation, and co-determination at the workplace show that temporary agency workers score somewhat lower than employees with a permanent position in ordinary enterprises when it comes to job satisfaction, experiencing positive challenges at work and participation in on-the-job-training. There are significantly more temporary agency workers feeling that they do not have enough competence to carry out the work tasks or that they do not get enough training.

A main finding underscored in OECD Employment Outlook 2020 is that strict job protection provisions for regular workers also require strict hiring laws for temporary workers to limit labour market duality and segmentation. According to OECD, larger duality – in the sense of a segmented labour market between highly protected workers on regular contracts and little protected workers on temporary contracts – has been shown to be associated with weaker productivity levels and growth rates. OECD refers to research showing that a deeper divide between workers on regular contracts and others on temporary contracts has been found to be associated with worse working environments, weaker job stability and greater wage inequality. In addition, it can have negative effects from one generation to the next: children with fathers on a temporary contract have been shown to be more likely to drop out of the education system and be unemployed than children with fathers on a regular contract.

In the survey from Fellesforbundet, mentioned above, the workers also gave both quantitative and qualitative information about their employment relationships and their experience of being a temporary agency worker. 60 per cent of these workers have a full time (over 80 per cent) permanent position in the temporary work agency, while 24 per cent have a fixed-term

[58] In paragraph 79 the Authority states that "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".

contract. More than one third of these workers have been hired to the same user companies for more than three years. Many of the workers experience uncertainty about when they have work and find it difficult to make plans for the future. Some of the answers in this survey underscore the temporary agency workers` perception of uncertainty about future job opportunities (translated from Norwegian):

«*Temporary jobs are never 100 percent secure. This causes stress if you want to have a job and money to live on».*

«The temporary work agency has a two-week notice period and you live in constant uncertainty when you go home».

«I am never sure if, and for how long, I will work in a given company. This results in lower earnings during the year and a lack of development opportunities and constant stress».

This knowledge reflects, firstly, that not all temporary agency workers have permanent employment, and secondly, that the *content* of the permanent employment can neither quantitatively nor qualitatively be compared with permanent employment in a two-party relationship directly in a production company. Accordingly, the measure pursues a policy of consistency. The Government would also like to emphasize that the Directive recognizes that direct employment in a two-party relationship is the preferred form of employment, cf. C-681/18 paragraph 51 and Advocate General in C-533/13 paragraph 111.

5.1.4 Necessity

The necessity requirement means that the measure must not go beyond what is necessary to attain the objective of the measure, see e.g. Case C-110/05 Commission v Italy, paragraph 59.

The necessity assessment must only be based on what the current Government's objective of the measure was. What previous Government has stated, or which regulations other countries might have, are therefore irrelevant. Reference is made to C-186/11, 28: “The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (Case C-176/11 HIT and HIT LARIX [2012] ECR, paragraph 25 and the case-law cited).”

In the view of the Government, the measure is necessary, as there are no less restrictive measures to ensure the level of protection chosen by the present Government and what the Parliament has endorsed.

The Government chosed this measure in order to achieve more permanent and direct employment, 1) because the repealed provision was particularly discretionary and thus likely to be misunderstood and abused, and 2) because it allowed for a too wide access to temporary agency work. By repealing this particular provision, while preserving the other options for using temporary agency work, and in addition introducing some new special rules for the use of temporary agency work, a sharpened and well-founded regulatory framework has been established. Current regulations are also easier to apply (less discretionary), including for the supervisory authorities, which will help ensure better compliance.

In this important area, it is crucial to have provisions that can be easily enforced and controlled. The remaining options on using temporary agency work are in our view easier to

understand and apply. ECJU has recognized that uncomplicated solutions may be preferred, for example to facilitate enforcement, cf. C-110/05 (Commission v Italy), see paragraph 67.

Measures related solely to enforcement or guidance are not enough to reduce the use of hiring that displaces permanent and direct employment. It is important to emphasize that the Norwegian rules express the aim for a high level of protection. The regulations of the use on temporary agency work must also be seen in connection with the regulations of employment protection. In order to prevent abuse, it is desirable with high correlation between these two sets of regulations. Reference is made to OECD Employment outlook 2020 (p. 194):

> The overall positive relationship between the regulation of regular and temporary contracts is likely to be the result of the differences in regulation of regular contracts together with policy makers' desire to restrain the use of temporary contracts. Where regular contracts are not much regulated, firms have few incentives to replace regular with temporary contracts; the need to restrict the use of temporary contracts is therefore not there. In countries with high regulation of dismissals of regular workers, strict regulation of temporary contracts can help avoid that these are overused. As seen in the Netherlands, Portugal and Sweden for example (OECD, 2014[60]), relatively low regulation of temporary contracts in situations of high regulation of regular contracts can lead to strong, unintended labour market segmentation between highly protected regular workers and weakly protected temporary workers.

The Norwegian Government considers that the former framework was not effective enough to ensure the main rule on permanent employment. Other measures have been considered but are not considered as effective when it comes to achieving the aim.

In the proposition the Ministry considers various alternatives but concluded that these will not be sufficient.[59] For example, better guidance and/or strengthened enforcement of the repealed provision, which is also mentioned by the Authority in paragraph 91, was deemed insufficient. The enforcement authorities have pointed out that it was difficult to enforce the provision because the assessment of whether the work is of a "temporary nature" is highly discretionary.[60] Consequently, simply introducing more enforcement resources will not be as effective. Moreover, the proposition states that the provision in any case allowed for too broad a practice of using temporary agency work. This would not have been remedied by strengthened guidance/enforcement.[61]

A quota scheme is referred to in the proposition, where it is noted that this has been considered before, and that the same objections also applied this time.[62] The objections were partly related to challenges with practice, enforcement, and sanctioning, and that a quota could be perceived as a norm and lead to more use of hiring.

5.2 Prohibition in construction sector in the Oslo area

The Government is of the view that the prohibition in construction sector in the Oslo area is both suitable and necessary to achieve the objectives of a working life with as much

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[59] Prop. 131 L (2021–2022) page 33.

[60] Prop. 131 L (2021–2022) page 31, The letter 5. May 2023 page 41.

[61] Prop. 131 L (2021–2022) page 31.

[62] Prop. 131 L (2021–2022) page 33.

permanent employment as possible in a two-party relationship between employee and employer, and thereby preserving and safeguarding the Norwegian labour market model with a high degree of organisation, and for the protection of workers. The measure is also suitable and necessary for promoting safety and health at work.

The challenges associated with hiring in the construction sector have persisted for a long time. The growth in temporary agency work in the building and construction sector has been considerably higher than in other industries, with a marked increase after the financial crises in 2008–2009.[63]

The growth has mainly been driven by labour immigrants from Eastern Europe. According to Fafo, non-resident immigrants make up about one-third of the employed persons in the industry.[64] Ensuring decent working conditions for vulnerable workers has been given high priority by the Government.

The construction industry has been vulnerable to work-related crime, cf. our letter 5. May 2023 Chapter 4.5. The police and the Norwegian Labour Inspection Authority identify foreign workers as particularly vulnerable to exploitation. The action plan against social dumping and work-related crime, which the Government presented in autumn 2022, consists of several measures to strengthen workers' rights, including the amendments on the hiring regulations.

It is important to distinguish between the consequences in the short term and long run. In the short term, and in a transitional phase, the prohibition may entail certain adaption challenges for enterprises regarding the supply of labour. Employees who have previously been employed by temporary employment agencies may also experience unpredictability before they get a new job. However, the initiative's long-term aim is to create permanent and lasting changes in this sector.

In the Government's view, the prohibition is likely to increase the proportion of permanent employment in user enterprises. The use of temporary agency work has been particularly extensive in the construction industry, particularly in Oslo and the surrounding area. With no access to use temporary agency workers, the enterprises in the construction sector must find other ways to engage labour. Some enterprises will enter into more fixed-term contracts, some may increase the use of subcontracts, and some will be hiring employees from undertakings whose object is not to hire out labour (WEA § 14-13). It is nevertheless likely that many enterprises in the construction sector will increase the amount of permanent employment, as this will provide the enterprises the predictability that previously came from hiring from temporary agencies. See also our analyses in chapter 5.1.1.

The hiring companies' need for labour remains unchanged, and this indicates that workers will be employed directly in the enterprises. Moreover, information is already beginning to emerge confirming that the prohibition leads to more employment directly in the enterprises.

As mentioned under chapter 5.1.2 the Fafo publication on results from a survey to enterprises in the construction industry shows that 20 % of the companies surveyed say that after the amendments they will cover the need for labour by hiring more permanent employees directly in the company.

In addition, De Facto/Fellesforbundet has recently published a report with surveys from construction sites in Oslo and Akershus, which confirms that many agency workers are now

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[63] See letter 5 May p. 23.

[64] Prop. 131 L (2021–2022) chapter 3.1.

offered permanent positions in the user undertakings.[65] The report states that a new and more sustainable culture is emerging related to staffing and production on construction sites.

The measure is also consistent. Reference is made to Chapter 5.1.3 above. The same analyses apply to this measure to a large extent. The Government will in addition make a comment regarding the geographical scope of the prohibition.

Regarding the consistency requirement, the Authority claims that "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" (paragraph 97). Reference is made to the Governments letter 5. May 2023 chapter 5.3.2, explaining the development on the use of temporary agency workers in the construction sector in Oslo, Viken and Vestfold. Information on temporary agency work in the construction sector in the Oslo area is also described in Prop. 131 L (2021–2022) chapters 3.2 and 6.4.2, as well as in the consultation document 19.01.22 chapters 2.5 and 3.2.3.3. The measure is specifically aimed at the area where surveys show that the hiring share has been highest, but also that these areas are assumed to constitute a common labour market, and to avoid adjustments.[66]

That the legislator chooses not to go further than necessary regarding the geographical scope, cannot imply an inconsistency that makes the measure unlawful. This is not how EEA law can be understood. Reference is made to Chapter 5.1.3 above, where the Government states that having a balanced policy must be allowed without implying inconsistency. Such a strict interpretation of the consistency requirement will make it particularly demanding to formulate balanced policy.

The introduction of a ban in the construction industry is also necessary, as there are no other less restrictive measures that can ensure the same level of protection for the interests the Government is seeking.

We would like to emphasize once again that the assessment of necessity must be made solely in the light of the objectives of the present Government. The Authority's reference in paragraph 104 to what a previous government meant in 2018, is therefore irrelevant.

In the Government's view, a prohibition was now required.

It follows directly from Article 4 of the Directive that a prohibition may be appropriate and necessary. This follows also from *Webb*. In this context, it may also be mentioned that Directive 91/383/EU article 5 explicitly allows Member States to prohibit temporary agency workers "from being used for certain work as defined in national legislation, which would be particularly dangerous to their safety or health, and in particular for certain work which requires special medical surveillance, as defined in national legislation", cf. article 5.1 cf. article 1.2.

The Government wishes to highlight the following from the proposition, which describes the background for the introduction of the prohibition, and which describes why the Government

[65] Bygningsarbeidernes Fagforening: – Innleieforbudet virker! (fafooestforum.no)

[66] The Ministry's hearing document 19.01.22 chapter 3.2.3.3.

believes that a prohibition is needed to achieve the level of protection that the Government wants (translated from Norwegian):[67]

> "When the hiring share is so high, the industry will, in the view of the Ministry, be exposed to a greater extent to the negative consequences associated with temporary agency work, cf. Section 3.6 and Chapter 5. In this context, the Ministry refers in particular to the negative effects on the working environment, participation and unionisation, but also to the increased risk of accidents. The Ministry also points out that there is great demand for apprentices and skilled workers in the industry. A report from Statistics Norway on employment and the labour force up to 2040 shows that there may be a particular deficit of healthcare workers and skilled workers in manufacturing, construction and crafts. In BNL's January 2021 member survey, nearly half of businesses said they can't find skilled workers, while a quarter can't get apprentices. Figures from the Norwegian Directorate for Education and Training show that there is a certain increase in the number of applicants to upper secondary education in construction-related subjects, and the number of apprentices and training establishments. The figures may nevertheless indicate that the interest in applying for such education is too low in relation to the need. There may be several factors that affect this.
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> In the view of the Ministry, the volume of temporary agency work, combined with the negative consequences of temporary agency work, indicates that fundamental changes are necessary with regard to hiring in the construction industry. As in the rest of working life, it must be the clear general rule that employees who perform work on construction sites are permanently employed directly in the enterprise that performs the work. In the view of the Ministry, stimulating the use of permanent employment will also facilitate the organization and use of collective agreements in the industry. It also provides a basis for strengthened recruitment to the industry through apprenticeship schemes and the use of skilled workers. In Norwegian working life, there is a tradition for self-employed skilled workers to contribute to improvements and innovation in enterprises, and for employers to invest in skills development for their employees. Traditionally, enterprises have been characterised by flat organisational structures and close interaction between management and employee representatives. These are qualities in working life that risk being weakened when jobs in the construction industry consist of several agency workers with no permanent connection to the enterprise.
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> …
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> The Ministry points out that over time there has been a focus on the level of hiring and working conditions, particularly in the construction industry. In recent years, the authorities have investigated, assessed and introduced a number of measures, as well as various measures from the industry itself. Despite this, there is still a persistently high hiring rate in the construction industry in the Oslo area. The Ministry is of the view that there is a need for a strong and clear measure, aimed at an industry and geographical sector where there is a need for a fundamental change in how staffing is planned and organised. In the Ministry's view, a rule prohibiting hiring from temporary employment agencies will be necessary to ensure that permanent changes are created in the company’s staffing methods, in order to stimulate increased use of permanent employment, which in turn can have a positive effect on, among other things, organisation and recruitment in the industry. The Ministry will

[67] Prop. 131 L (2021–2022) page 26-27.

therefore by regulations lay down a geographically delimited prohibition on hiring from temporary work agencies for construction work on construction sites."

It follows from the proposition that the Ministry has considered other measures but has concluded that these will not be sufficient. The assessments are set forth in Prop. 131 L. 2021–2022) page 29.

The Norwegian Government believes that this is what is needed for ensuring that companies in the construction industry to change course and invest in their own employees. As mentioned before, the amendments will be followed very carefully in the years to come.

Norway is not the only state that has introduced a ban on hiring in certain industries. As mentioned, there are major differences in the regulation of temporary agency work between the individual EU Member States. Germany, for example, has (with certain exemptions) a ban on hiring in the construction industry, according to the German law on hiring out workers (Arbeitnehmerüberlassungsgesetz § 1b), see Prop. 131 L, section 4.3. Furthermore, there is a ban on hiring for work that can be described as core activities in the meat industry.

5.3 Other comments to the LFN

The Authority states in paragraph 70 and 71 that there has not been conducted an evaluation or analysis of the temporary agency work industry in Norway, also with reference to Regelrådet.

As also stated in the ruling from Oslo district court page 13, the consequences for the temporary agency work industry are implicitly addressed throughout the proposition, and are also explicitly stated by the Ministry assuming, as a basis for its EEA legal assessment, that the measures in question entail restrictions on the use of agency work, see Prop. 131 L (2021–2022) Chapter 14. The economic and administrative consequences for the temporary agency work industry are also discussed in chapter 13 of the proposition.