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Brussels, 10 February 2023  
Case No: 89887  
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Norwegian Ministry of Labour and Social Inclusion  
Postboks 8019 Dep  
0030 Oslo  
Norway

Dear Sir/Madam,

**Subject: Request for information concerning restrictions on the use of temporary agency workers in Norway**

On 25 January 2023, the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) opened an own initiative case, *inter alia* on the basis of a complaint received from an Estonian temporary work agency on 12 January 2023 (Doc No 1343724), in order to examine newly adopted measures in Norway which restrict the use of temporary agency workers. In particular, the Directorate intends to assess whether the prohibition on the use of temporary agency workers in the construction sector in Oslo, Viken and Vestfold and the removal of the possibility to use temporary agency workers when the work is of a temporary nature are compatible with Directive 2008/104 on temporary agency work (“Directive 2008/104” or “the Directive”) and Article 36 of the EEA Agreement (“EEA”) on the freedom to provide services.

On 8 February 2023, the Authority received another complaint concerning the above issues from a Norwegian temporary work agency (Doc No 1350995), which will also be dealt with in the context of this own initiative case.

The Directorate understands that Section 14-12(1) of the Working Environment Act<sup>1</sup> has been amended so that it now only allows for the use of temporary agency workers in the situations covered by items (b) to (e) of Section 14-9(2) of the same Act, as opposed to items (a) to (e) before.<sup>2</sup> Section 14-9(2)(a) allows for fixed-term employment “when the work is of a temporary nature” (“*når arbeidet er av midlertidig karakter*”), but that option has now been removed for the use of temporary agency workers.

The Directorate also understands that the Ministry of Labour and Social Inclusion has adopted amendments to a regulation on temporary agency work.<sup>3</sup> Section 3 of that regulation now provides that the use of temporary agency workers is always allowed in the case of health care workers and specialised consultants, despite the general restriction in the use of temporary agency workers in Section 14-12(1), cf. Section 14-9(2) of the Working Environment Act. Moreover, Section 4 of that regulation now prohibits the use of temporary agency workers in the construction sector in Oslo and the surrounding municipalities of Viken and Vestfold.

<sup>1</sup> Lov 17. juni 2005 om arbeidsmiljø, arbeidstid og stillingsvern (arbeidsmiljøloven).

<sup>2</sup> Before the amendment, Section 14-12(1) of the Act stated that the use of temporary agency workers was allowed to the same extent as the use of fixed-term employment under Section 14-9(2)(a)-(e) of the Act. The amendment entails that the reference to item (a) of Section 14-9(2), which concerns the situation when the work is of a temporary nature, has been removed. The use of temporary agency workers is thus now only allowed in the situations mentioned in items (b)-(e) of Section 14-9(2) of the Act, including when the work constitutes a replacement (cover) for another person (item (b)).

<sup>3</sup> Forskrift om endring i forskrift om innleie fra bemanningsforetak (FOR-2022-12-20-2355 amending FOR-2013-01-11-33).

According to information available to the Directorate, the measures adopted will as a main rule enter into force on 1 April 2023, whereas the amended Section 14-12(1) of the Working Environment Act and Section 4 of the regulation will enter into force on 1 July 2023 for contracts already concluded before 1 April 2023. For the use of temporary agency workers in the agricultural sector, however, the entry into force of the amendment to Section 14-12(1) of the Working Environment Act is suspended for an indefinite period.

The Directorate notes that the aim of Directive 2008/104 is, on the one hand, to improve the protection of temporary agency workers, in particular by establishing the principle of equal treatment, and, on the other hand, to support the positive role that agency work can play by providing sufficient flexibility in the labour market.<sup>4</sup> The Directive thus strikes a fair balance between flexibility for employers and security for workers.<sup>5</sup>

Pursuant to Article 4(1) of Directive 2008/104, prohibitions or restrictions on the use of temporary agency work must be justified on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

As regards Article 36 EEA, it is established case law of the Court of Justice (“CJEU”) that contracting out workers from temporary work agencies established in other EEA States is a provision of services within the meaning of that provision.<sup>6</sup>

In relation to the principle of proportionality, the Directorate recalls that the reasons which may be invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.<sup>7</sup> Moreover, the CJEU has held that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.<sup>8</sup>

Against this background and in order for the Directorate to be able to fully assess the case, the Norwegian Government is invited to provide the following information:

1. Please provide the Directorate with an overview of the changes made to the relevant legislative provisions and regulations in relation to the system of temporary agency work since the implementation of Directive 2008/104 into Norwegian law. Has any assessment or analysis been made as to the effects of those changes?
2. Does the Norwegian Government have information and/or statistics on the development of the use of temporary agency workers in Norway from 2012 until 2022, in different sectors and different regions?
  - a. If so, please provide the Directorate with such information and/or statistics for each year for the whole country, including in particular information and/or statistics for the construction sector in the whole of Norway and in Oslo, Viken and Vestfold.
  - b. Can the Norwegian Government point to recent and reliable statistical information showing that the use of temporary agency workers in Norway

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<sup>4</sup> See Article 2 of Directive 2008/104. See also the Commission’s report on the application of Directive 2008/104/EC on temporary agency work (COM(2014) 176 final), p. 19.

<sup>5</sup> See Case C-681/18 *KG*, paragraph 70.

<sup>6</sup> See e.g. Case C-279/80 *Webb*, paragraph 9 and Case C-493/99 *Commission v Germany*, paragraph 18.

<sup>7</sup> See Case C-254/04 *Commission v Belgium*, paragraph 36, and case law cited therein.

<sup>8</sup> See Case C-795/19 *Tartu Vangla*, paragraph 44, and case law cited therein.

actually increased in the recent years, both in general and in the construction sector?<sup>9</sup>

3. Does the Government have information and/or statistics on the use of the different options for when temporary agency work is allowed in Section 14-12(1), cf. Section 14-9(2)(a)-(e) of the Working Environment Act?
  - a. If so, please provide the Directorate with such statistical information for the years 2012-2022.
  - b. If not, has any assessment or analysis been made on the possible impact of removing the option of using temporary agency workers when the work is of a temporary nature?
4. Does the Norwegian Government have information and/or statistics on the number (proportion) of undertakings that could make use of the option in the second paragraph of Section 14-12 of the Working Environment Act to enter into written agreements with elected employees' representatives and of those undertakings who actually have made use of this option? If so, please provide the Directorate with such information and/or statistics for the years 2012-2022.
5. Does the Government have information on the proportion of temporary agency workers which are contracted out from Norwegian temporary work agencies, on the one hand, and those posted from temporary work agencies established in other EEA States, on the other hand? If so, please provide the Directorate with such information for the years 2012-2022.
6. Please explain the scope of Section 14-12(1), cf. Section 14-9(2)(a) of the Working Environment Act, in light of preparatory works and case law of Norwegian courts? Which situations were typically covered by this option to use temporary agency workers when the work is of a temporary nature?
7. Please explain the scope and reasons behind the exception for health care workers and specialised consultants in Section 3 of the newly amended regulation on temporary agency work.
8. Please explain the reasons for suspending the entry into force of the amendment to Section 14-12(1) of the Working Environment Act as regards the agricultural sector.
  - a. What makes this sector different from e.g. the tourism sector, which also relies heavily on seasonal work?
  - b. When is it foreseen that the evaluation of this suspension of the entry into force will have taken place?
9. The Directorate recalls that when Directive 2008/104 was implemented into the Norwegian legal order in 2012 (with entry into force on 1 January 2013), the then applicable rules on the use of temporary agency workers in Section 14-12(1), cf. Section 14-9(1)(a)-(e) of the Working Environment Act (which have now been amended), had already been assessed by the Norwegian Government as justified on the grounds of ensuring that permanent and direct employment remained the general form of employment in Norway.<sup>10</sup> Now, those same rules have been

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<sup>9</sup> In that context, reference is e.g. made to the legislative proposal (Prop. 131 L (2021-2022)) p. 12 and 26, where it states that in the course of 2021 the use of temporary agency workers in Norway was back to what it was before the Covid-19 pandemic, except for the construction sector where the numbers were around 10% lower in 2021 than in 2020 and where the numbers had also been reduced in 2019.

<sup>10</sup> See Prop. 74 L (2011-2012) p. 43-45. See also Norway's letter to the Authority dated 27 March 2015 (Doc No 752762 in Case 76521 – Conformity assessment of the implementation of Directive 2008/104 on temporary agency work in Norway).

assessed by the Norwegian Government as being problematic as they allegedly do not uphold the main rule of permanent and direct employment. Please explain these different assessments of the same rules and on which information this new assessment is based.

10. The Directorate understands that the main and overriding aim of the adopted measures is to reduce the use of temporary agency workers (and eliminate the use in the construction sector in Oslo, Viken and Vestfold), thereby increasing the use of permanent and direct employment.<sup>11</sup>
  - a. Please explain how the aim to reduce or eliminate the use of temporary agency workers is a legitimate aim under Directive 2008/104 given the two-fold aim of the Directive mentioned above.
  - b. Does the Government have any evidence and/or analysis supporting the contention that undertakings are basing a permanent need on temporary agency workers?
  - c. Can the Government point to any evidence and/or analysis supporting the view that removing the option of using temporary agency workers when the work is of a temporary nature will actually increase permanent employment?
  - d. Please explain how the removal of the option to use temporary agency workers when the work is of a temporary nature will promote permanent employment when there certainly is a temporary need, when fixed-term employment will still be allowed in the same situations and when most of temporary agency workers in Norway already have a permanent employment relationship with temporary work agencies.<sup>12</sup>
  
11. Additionally, for both of the adopted measures, the Norwegian Government refers in the legislative proposal in a general way to all the mentioned justification grounds in Article 4(1) of the Directive, as secondary grounds of justification,<sup>13</sup> without however explaining how these measures actually pursue such aims.<sup>14</sup>
  - a. Is the Norwegian Government relying on all these grounds in order to justify the measures at issue in this case? If so, please explain how each of them are relevant for the measures adopted and why the measures are suitable and necessary to achieve each of those aims.
  - b. If the Norwegian Government is relying on the aim of ensuring a well-functioning labour market, please explain the following:
    - i. Does the Government have any evidence and/or analysis supporting the contention that the Norwegian labour market is not functioning properly and that the current numbers in the use of temporary agency workers are detrimental for the labour market as a whole and challenge the main rule of permanent employment?
    - ii. Does the Government have any evidence and/or analysis supporting the view that the adopted measures will actually be beneficial for workers and the functioning of the labour market, i.e. that they will lead to more permanent and direct employment instead of leading to e.g. dismissals, overtime work, more fixed-term employment and more use of contractors, as has been suggested?<sup>15</sup>

<sup>11</sup> This follows from the legislative proposal (Prop. 131 L (2021-2022)) p. 5, 21, 23, 33, 57, 62-63 and also the Government's press-release of 20 December 2022 in relation to the adoption of the measures: <https://www.regjeringen.no/no/aktuelt/skjerpa-reglar-for-innleige/id2952383/>.

<sup>12</sup> See in that context p. 14 and 57 of the legislative proposal (Prop. 131 L (2021-2022)).

<sup>13</sup> See Section 14.1 of the legislative proposal (Prop. 131 L (2021-2022)).

<sup>14</sup> See in that context Case C-914/19 *Ministero della Giustizia*, paragraph 40.

<sup>15</sup> See e.g. p. 31 of the legislative proposal (Prop. 131 L (2021-2022)).

- iii. What makes the situation in Norway special so as to justify such restrictions, given that the use of temporary agency workers in Norway is lower than the average in the EU/OECD countries?
    - c. If the Norwegian Government is relying on the justification of protecting temporary agency workers, please explain the following:
      - i. How can measures which are intended to reduce or eliminate the use of temporary agency workers protect such workers?
    - d. If the Government is relying on requirements of health and safety at work, please explain the following:
      - i. Can the Government point to any evidence and/or analysis showing that temporary agency workers in Norway have a higher risk of health or safety issues than permanent workers with direct employment, both in general and in relation to the construction sector particularly?
    - e. If the Norwegian Government is relying on the justification of preventing misuse/abuse, please explain the following:
      - i. Does the Government have any evidence and/or analysis showing that there has been such misuse/abuse of the option of using temporary agency workers when the work is of a temporary nature?
      - ii. Is there anything indicating that the numbers on the use of temporary agency workers in Norway are caused by misuse/abuse rather than being a consequence of increase in need and lack of labour?
12. The legislative proposal restricting the use of temporary agency workers in Norway makes several references to the negative consequences of temporary agency work.<sup>16</sup>
- a. The Norwegian Government is invited to refer to evidence and/or analysis supporting that view.
  - b. Please also explain whether these alleged negative consequences have been weighed against the positive consequences of temporary agency work, for workers and undertakings (reflecting the balance introduced in the Directive), and against the negative consequences these measures could entail? Please refer to the appropriate evidence and/or analysis if available.
13. The Directorate understands that the Norwegian Better Regulation Council (*Regelrådet*), which is an independent oversight body tasked with issuing advisory statements on proposals for new regulation of the business sector at the stage of public consultation, issued a report on 13 March 2022 on the proposed restrictions on the use of temporary agency workers.<sup>17</sup> The report concluded *inter alia* that the proposal had not been sufficiently investigated, that alternative and less restrictive measures had not been considered and that there had been no weighing of the positive and negative effects against each other. The Norwegian Government is invited to comment on these findings of the report.
14. Please explain whether it is in line with the requirement of consistency inherent in the principle of proportionality:
- a. To prohibit the use of temporary agency workers when the work is of a temporary nature with the main aim of promoting permanent employment, while still allowing for the use of fixed-term workers in the same situations.<sup>18</sup>

<sup>16</sup> See e.g. p. 26, 31 and 62-63 of the legislative proposal (Prop. 131 L (2021-2022)).

<sup>17</sup> <https://regelradet.no/2022/03/18/endringer-i-regelverket-for-ibemanningsforetak/>

<sup>18</sup> In that context, reference is also made to Prop. 74 L (2011-2012) p. 43, where it was stated that the main reason for allowing temporary agency work to the same extent as fixed-term work was

- b. To prohibit the contracting out of workers from temporary work agencies when the work is of a temporary nature, while making no such restrictions in relation to the contracting out of workers from all other undertakings, see Section 14-13 of the Working Environment Act?
15. Does the Norwegian Government consider that Article 36 EEA is applicable to the posting of workers to Norway from temporary work agencies established in other EEA States and that the adopted measures need to be assessed in light of the compatibility with Article 36 EEA?
  - a. If so, please elaborate on the Norwegian Government's view on such an assessment, in particular whether the adopted measures are a justified and proportionate restriction on the freedom to provide services under Article 36 EEA.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *10 March 2023*.

Yours faithfully,

Maria Moustakali  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Maria Moustakali.*