



**REPORT FOR THE HEARING**

in Case E-8/00

– revised\* –

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Arbeidsretten (Labour Court of Norway) in a case between

**Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions)  
with Norsk Kommuneforbund (Norwegian Union of Municipal Employees)**

supported by

**Kommunalansattes Fellesorganisasjon (Norwegian Confederation of  
Municipal Employees)**

and

**Kommunenes Sentralforbund (Norwegian Association of Local and  
Regional Authorities)**

**Hamarøy kommune and Tysfjord kommune**

**Steigen kommune and Hitra kommune**

**Tana kommune**

**Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os  
kommune, Vikna kommune and Volda kommune**

on the interpretation of Articles 53 and 54 of the EEA Agreement.

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\* Amendments to the list of Defendants, and to paragraphs 1, 53, 86, and 217.

## I. Introduction

1. By a reference dated 27 September 2000, registered at the Court on 2 October 2000, Arbeidsretten (Labour Court of Norway), submitted a Request for an Advisory Opinion in connection with a case brought before it by the Plaintiffs, Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions, hereinafter “LO”), with Norsk kommuneforbund (Norwegian Union of Municipal Employees), (hereinafter “NKF”), supported by Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees, hereinafter “KFO”) and Akademikernes Fellesorganisasjon (Confederation of Academic and Professional Unions in Norway) as interveners, against Defendants: (1) Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities), (hereinafter “KS”); (2-3) Hamarøy kommune and Tysfjord kommune; (4-5) Steigen kommune and Hitra kommune; (6-7) Alta kommune and Tana kommune; (8-13) Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune (hereinafter collectively the “Defendants”). By a letter dated 27 September 2001, the President of the Labour Court notified the Registrar of the EFTA Court that the Confederation of Academic and Professional Unions in Norway had withdrawn as intervener in the case. By a further letter dated 11 October 2001, the Labour Court notified the Registrar of the EFTA Court that Alta kommune was no longer a party to the case.

2. The dispute before Arbeidsretten concerns the Basic Collective Agreement for Municipalities, etc., for the Contract Period 1 May 1998 to 30 April 2000 (*Hovedtariffavtalen for kommuner, m.v. for tariffperioden 1. mai 1998 – 30. April 2000*, hereinafter referred to variously as the “Basic Collective Agreement” or by its Norwegian acronym “HTA”) between, on the one hand, various bodies representative of municipal employees and, on the other hand, bodies representative of municipalities and individual municipalities acting in their capacity as employers. It is *inter alia* alleged by the Defendants that certain provisions of the Basic Collective Agreement relating to pension matters are incompatible with Article 53 and 54 EEA.

## II. Legal background

### EEA law

3. The questions submitted to the Court concern the interpretation of Article 53 and 54 EEA.

4. Article 53 EEA reads as follows:

*“1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

*(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

*2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

*3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

*– any agreement or category of agreements between undertakings;*

*– any decision or category of decisions by associations of undertakings;*

*– any concerted practice or category of concerted practices;*

*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

*(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*

*(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*

5. Article 54 EEA reads as follows:

*“Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be*

*prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.*

*Such abuse may, in particular, consist in:*

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

## **National provisions – the Basic Collective Agreement**

6. The relevant provisions of the HTA as this case is presented before the EFTA Court are to be found in chapter 2 thereof. They read as follows:

### *“2.0 Definition*

*Occupational pension scheme means that pension to which an employee is entitled in accordance with the present collective agreement and corresponding to the articles of association as may be in force at any time for the joint municipal pension scheme with KLP.*

### *2.1 Occupational pension scheme*

*By 1 January 1997, all employers shall have established a pension scheme for their employees which meets the following requirements:*

*2.1.1 The pension scheme shall cover all permanent employees who have working hours corresponding to at least 14 hours per week. Temporary employees shall be covered after 6 months’ consecutive employment, provided that the working hours correspond to at least 14 hours per week.*

*As of 1 January 1999, the pension scheme shall cover all employees who have average working hours which correspond to the minimum requirement.*

*2.1.2 The pension scheme shall guarantee the members an aggregate retirement/disability pension of at least 66% of the fixed basis for calculating benefits at full accrual. The pension scheme shall also give entitlement to spouse and children’s pensions.*

*The accrual of pension shall take place in a linear fashion, i.e. equally great portions of full pension shall accrue for each year one is a member. The requirement for full accrual is set at 30 years. For those who cease employment with deferred pension, the requirement for full accrual is set at maximum 40 years.*

*The fixed basis for calculating benefits is calculated in accordance with clause 2.1.7, cf. 2.3.*

*2.1.3 The setting of age limits and rules on the right to withdraw retirement pension before the age limit is reached shall follow the same principles as are in force in the Norwegian Public Service Pension Fund. The parties to the collective agreement shall make the necessary adaptations in the municipal sector.*

*2.1.4 The pensions shall be adjusted in accordance with the adjustment of the basic amount under the National Insurance Scheme. The same applies for the fixed basis for calculating benefits for those who cease employment before they are entitled to pension.*

*2.1.5 The pension rights shall be covered by a transfer agreement with the Norwegian Public Service Pension Fund and other municipal pension schemes, so that the aggregate pension is calculated as if it had accrued in the last scheme in which one was a member.*

*2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution based on insurance products which are taken note of by the Banking, Insurance and Securities Commission.*

*2.1.7 The fixed basis for calculating benefits shall be set based on regular salary fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.*

*2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. Minutes of the discussions shall accompany the file through to the decision in the municipal council/county council/board.*

*Before the decision-making body may begin to deal with a possible change of company, relevant offers for a new occupational pension scheme shall be put before those members of the Pension Committee who represent the parties to the collective agreement, who shall attest whether the various pension insurance products satisfy the aforementioned requirements in the collective agreement.*

*In addition, the occupational pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.*

*Before the matter may be decided upon by the municipal council/county council/board, there must be approval from the Norwegian Public Service*

*Pension Fund, relating to inclusion in the transfer agreement, and the pension scheme must be taken note of by the Banking, Insurance and Securities Commission, cf. clauses 2.1.5 and 2.1.6.”*

7. After a revision in the spring of 2000, the above provisions were amended on essential points, following which clauses 2.1.6 – 2.1.8 read as follows:

*“2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution. If the members of KS do not have, or cannot have, full insurance cover for the pension obligations, the municipality/county municipality shall be liable for the balance of cost as a self-insurer.*

*2.1.7 The fixed basis for calculating benefits shall be set based on fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.*

*2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. The obligation to enter into discussion applies at the earliest possible point in time, and at the latest before the notice of termination has been adopted and given to the current supplier of occupational pension insurance.*

*The occupational pension scheme shall be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.*

*An expert group is set up with an advisory function, consisting of*

*1 representative appointed by the joint negotiations bodies;*

*1 representative appointed by KS; and*

*1 neutral chairperson appointed by those members of the Pension Committee who represent the parties to the collective agreement. Any dispute as to the appointments shall be settled pursuant to clause 4, 4-1, third paragraph HTA.*

*The expert group shall give a reasoned opinion to those members of the Pension Committee who represent the parties to the collective agreement as to whether the offers received for new pension products comply with the Insurance Activity Act, the Insurance Contracts Act, and whether all risks and benefits, cf. clause 2.1.6, have insurance coverage with the company, and whether the product meets the other requirements set out in the collective agreement. Any assessment by those members of the Pension Committee who represent the parties to the collective agreement shall be forwarded to the municipality/county municipality together with the opinion of the expert group.*

*Before the matter may be decided upon by the municipal council/county council, an application for approval under the transfer agreement between public pension institutions shall be sent to the Public Service Pension Fund, and the*

*opinion of union representatives who represent the active employees covered by the pension scheme shall accompany the file through to final decision by the municipal council/county council.”*

### **III. Facts and procedure**

#### **Procedure and matters in dispute**

8. As stated above, the case before Arbeidsretten concerns certain provisions of the HTA relating to pension schemes. The relevant provisions are reproduced above. The case concerns whether the defendant municipalities breached the abovementioned provisions contained in chapter 2 of the HTA, in particular clause 2.1.8, when they moved their occupational pension insurance from one supplier, Kommunal Landspensjonskasse (hereinafter “KLP”), to other insurance companies. There is also the issue of the legal consequences of any such breach.

9. LO/NKF argue that the municipalities, in moving their occupational pension insurance, breached several of the provisions of the HTA by which they are bound. The defendant municipalities have submitted that the claims be rejected. They argue *inter alia* that several of the provisions in the HTA invoked by LO/NKF are not legally binding because they are contrary to Articles 53 and 54 EEA, see Norwegian Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA), etc. – (*EØS-loven*).

#### **Municipalities and their status as employers**

10. The municipalities and county municipalities in Norway are established and regulated by Act No. 107 of 25 September 1992 Concerning Municipalities and County Municipalities (*kommuneloven*, hereinafter the “Local Government Act”). In the municipal sector, there are roughly 550 000 employees. Of these, about 100 000 are teachers, who are municipal employees but who are covered by collective agreements with the State. Thus in the rest of the municipal sector there are around 450 000 employees. Of these, roughly 430 000 are employed by the municipalities, of whom approximately 60 000 in Oslo. The aforementioned figures are estimates based on available statistical sources with reference to the labour market situation at the end of 1998/early 1999.

11. The principal Defendant, KS, is a membership organisation and interest group, and is also an employers’ association. All municipalities and county municipalities are currently members of KS and all are affiliated with KS’s employer activity. Oslo municipality is, however, exempt from following KS collective agreements. Thus, as an employers’ association KS has 434

municipalities and 18 county municipalities as members. These have a total of around 370 000 employees (excluding teachers). Of these, some – such as those filling temporary vacancies, extra staff, etc. – fall outside the scope of application of the basic collective agreements for municipalities and it is uncertain how many others are covered by their provisions on occupational pensions.

12. KS, as an employer association, can enter into collective agreements with binding effect for its members. For municipalities and county municipalities, section 28 of the Local Government Act allows them to delegate competency to conclude such agreements to “an association of municipalities and county municipalities”. This has been done by all of the municipalities/county municipalities who are affiliated with KS’s employer activity. KS’s competency to conclude agreements also follows from membership in KS and its Articles of Association, and this applies for “enterprises” as well.

### **Trade unions**

13. There are in all 39 “unions” (“*forbund*”) or “trade unions” (“*fagforbund*”) representing employees in the municipal sector in Norway. In negotiations with KS for the establishment and revision of collective agreements, the 39 unions are represented through their “joint negotiations bodies” (“*forhandlingssammenslutninger*”). The formal conclusion of collective agreements generally takes place directly between KS and the individual union.

14. Consequently, formally speaking, there is not just one basic collective agreement for municipalities, etc., but rather several basic collective agreements, with the union concerned as party for the employee side in the individual agreements and KS as party on the employer side in all of the agreements. For the contract period 1998-2000 there were in all 39 basic collective agreements for employees in municipalities and county municipalities. In practice, however, these basic collective agreements are identical in content in so far as it has any relevance to the present case. For the sake of simplicity, they will all be referred to below as HTA, unless otherwise indicated by the context. The HTA comprises in the main all employees who are employed by municipalities and county municipalities. However, for certain types of activities and for enterprise members, KS has separate collective agreements which contain different regulation on some points, *inter alia* on pension matters. The further details pertaining thereto are not relevant for the present case.

### **Collective agreements as legal instruments**

15. Under the Norwegian Act No. 1 of 5 May 1927 Relating to Labour Disputes (*arbeidstvistloven*, hereinafter the “Labour Disputes Act”), a collective agreement is understood to mean an agreement “respecting conditions of

employment and salary or other matters relating to employment”. It must be concluded between an employer or employers’ association on the one hand and a “trade union” on the other, see section 1(8) of the Act. A collective agreement is, according to Norwegian law, an agreement which is legally binding and creates mutual obligations. Firstly, as such, it is binding and creates obligations for the parties to the collective agreement. Next, it is also binding for the members of the parties to the collective agreement. The individual employers (as, in this case, the municipalities) and the individual employees who are employed by the employers in question, and who are members of the organisations party to the agreement (parties to the collective agreement), are legally bound by the collective agreement. Furthermore, a collective agreement binds only those employers and employees who are members of the organisations concerned. Thus, under Norwegian law a collective agreement has no general validity (“universal application” or *erga omnes* effect). Nor are there any legislative provisions in Norwegian law of relevance to the present case which give public authorities the power to stipulate that a collective agreement is to be “with effect for everyone” and binding for all employers (or employees) in a branch, sector, or the like. Who is legally bound by or has rights under a collective agreement depends on the collective agreement and the membership in the organisations participating in the agreement.

16. Furthermore, the parties to the collective agreement dispose over the collective agreement in that they may modify it, even during the course of the contract period. The parties also have a monopoly on interpretation, in that, if the parties agree on a certain interpretation of a provision, that interpretation will as, as a rule, be the one applied. The common interpretation agreed on by the parties is also binding for the members in the same way as the agreement itself.

### **The Norwegian pension system**

17. Briefly, the Norwegian pension system can be said to have three main types of schemes: a) benefits under the National Insurance Scheme, which are statutory pension benefits pursuant to Act No. 19 of 28 February 1997 Relating to National Insurance Pension Benefits (*Folketrygdloven*); b) group “occupational pension schemes” for supplementary pensions in addition to benefits under the National Insurance Scheme (see paragraphs 26 et seq. below); and c) individual pension and life insurance contracts, which can be concluded on a voluntary basis. Only group “occupational pension schemes” for supplementary pensions are to be considered in the case at hand.

18. Supplementary occupational pension schemes are characterised by the fact that they are related to work and they are collective. Such schemes may be based on law and be compulsory; otherwise, they are, in principle, voluntary. Such pension schemes are to be found in both the public sector – including in the municipal sector – and in the private sector. A common trait of all occupational

pension schemes is that they are “benefit-based”. Otherwise, the content, scope, etc. of the schemes vary.

19. Presently all municipalities and county municipalities have occupational pension schemes. The authority to establish or join occupational pension schemes follows expressly from section 24, fourth paragraph of the Local Government Act. The purpose of that provision was first and foremost to give a clearer basis of authority for State regulation, control and supervision of occupational pension schemes. Section 24, paragraph 4, second sentence of the Local Government Act confers authority for the King to promulgate further provisions on the material framework for municipal occupational pension schemes, their content and scope. The present rules are contained in Regulation No. 374 of 22 April 1997 on Pension Schemes for Municipal or County Municipal Employees (*forskrift av 22. april 1997 nr. 374 om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte*, hereinafter the “Regulation on Pension Schemes for Municipal or County Municipal Employees”). That Regulation sets out in the main that:

- pension benefits in municipal pension schemes must not be higher than in the Norwegian Public Service Pension Fund (section 2, first paragraph);
- age limits must not be lower than for equivalent positions in the State system (section 2, second paragraph); and
- as a rule, all employees in municipalities/county municipalities are to be covered; however, the pension scheme may have general conditions which limit membership in the scheme due to the scope of the employment situation, length of service and so on (section 3).

20. A municipality may organise its occupational pension scheme in various ways: through its own pension institution, through participation in a collective pension institution or through a life insurance company. As at November 1998, the total number of 453 municipalities and county municipalities had organised their occupational pension schemes as follows:

- 21 municipalities/county municipalities had their own pension institutions;
- 422 municipalities/county municipalities were members of the *Felles kommunal pensjonsordning* (hereinafter “FKP”) in KLP;
- 10 municipalities had group pension insurance contracts with other insurance companies than KLP. These figures show that 93% (422 of 453) of the municipalities were party to FKP as at 1 January 1998. The municipalities are of different sizes and have different numbers of employees. It is estimated that occupational pension schemes for about 65% of all municipal employees are covered with KLP; the estimate and the basis for it are, however, uncertain.

21. KLP is a private mutual life insurance company. Effective 1 January 1974, KLP had received a licence to operate group pension insurance, etc. under the insurance companies legislation then in force. The licence was later renewed under Act No. 39 of 10 June 1988 on Insurance Activity (*forsikringsvirksomhetsloven*, hereinafter the “Insurance Activity Act”), most recently in 1998. KLP’s members (company partners) are the policyholders, i.e. those employers who have signed an insurance contract with the company. KLP may have other members than municipalities/county municipalities, but with certain limitations. Section 1-3, second paragraph of KLP’s Articles of Association, which is part of the licensing conditions, reads as follows:

*“The proportion of policyholders which are not municipalities, county municipalities, undertakings, independent enterprises (undertakings), institutions or organisations in which municipalities or county municipalities have a majority interest (ownership) shall be limited so that together they cannot have premium reserves which equal more than 10 percent of the total premium reserves in the company. Majority interest means more than 50 percent of both the ownership shares and the voting rights or equivalent interest in relation to the purpose of the enterprise, institution or organisation.”*

22. KLP’s main product is group pension insurance, which is the most important and most far-reaching scheme. Furthermore, municipalities and county municipalities may be members of KLP, regardless of whether they are affiliated to FKP. As at September 1999, all 453 municipalities and county municipalities were members of KLP. At the same time, KLP had about 2 150 other members (“enterprises”). Their share of annual premium payments accounted for roughly 14.5% of a total premium volume of around NOK 5 billion.

23. KLP’s highest authority is the general meeting (section 3-8 Articles of Association, section 3-2 1999 Articles of Association). According to the current Articles of Association, the general meeting is to consist of representatives of the company’s members, elected in 19 constituencies. The municipalities/county municipalities make up 18 constituencies and the “enterprises” make up one constituency. An individual constituency “elects between 4 and 17 representatives, depending on the total premium volume in the company’s pension schemes paid by that constituency’s members”, see sections 3-2 and 3-3 of the 1999 Articles of Association.

24. Various “cooperation agreements” have been entered into between KLP and KS. Two of these are relevant for this case: one of 14 December 1994, which was later replaced by an agreement of 30 August 1999. Both agreements contain provisions on regular contact between KS and KLP, the right of KLP to participate at certain meetings and events in KS, the exchange of information and benefits (including compensation for marketing of KLP’s products), etc. The agreement of 1999 is more detailed than the one from 1994.

25. The Norwegian Ministry of Finance has given KLP a dispensation from certain provisions of the Insurance Activity Act, including section 7-6 on

premiums. As a mutual insurance company, KLP may, pursuant to its Articles of Association and section 4-8 of the Insurance Activity Act and its Articles of Association, conduct “retroactive assessment” of premiums – by which is meant that “all policyholders pay further premiums when it turns out, after the fact, that not enough premiums have been paid in advance, and the premium calculation system presupposes that adjustments, defined benefit guarantees, etc., are insured”, see the Banking, Insurance and Securities Commission’s letter of 16 December 1998 to the Norwegian Public Service Pension Fund.

26. KLP has entered into a transfer agreement with the Norwegian Public Service Pension Fund. Through this transfer agreement, policyholders with occupational pension schemes with KLP are affiliated to the “transfer system”.

27. FKP is an occupational pension insurance scheme with KLP. It was established as of 1 January 1974, at the same time as KLP was established as an independent insurance company, and is regulated by its own articles of association. FKP has been the object of amendments over the years. The relevant Articles of Association are from 1 January 1999, unless otherwise stated or evidenced by the context.

28. FKP is a joint group pension insurance scheme. Section 1-2 of the Articles of Association on “contracts of affiliation” reads:

*“Municipalities, county municipalities as well as undertakings, independent enterprises, institutions or organisations in which municipalities or county municipalities have a majority interest may enter into contracts with KLP on membership in and affiliation to the Joint municipal pension scheme.”*

29. FKP is subject to the Regulation on Pension Schemes for Municipal or County Municipal Employees and to Act No. 26 of 6 July 1957 Relating to the Coordination of Pension and Insurance Benefits (*samordningsloven*, the “Pension and Insurance Coordination Act”), and is a party to the “transfer system”.

30. With respect to benefits, FKP corresponds largely to the occupational pension scheme under the Public Service Pension Fund Act (in the Norwegian Public Service Pension Fund), see on this point section 1-1, second sentence of the FKP Articles of Association. FKP is thus a “defined benefit scheme” and includes the same benefits as the Norwegian Public Service Pension Fund, with the same pension coverage and rules on accrual time.

31. The financing of FKP is based on a system established on insurance principles with advance payment of premiums. The premium consists of the employer’s share and “membership contributions”, see section 12-1 of the FKP Articles of Association. “Membership contributions” are paid by the employees who are covered, at a rate of 2% of salary. Remaining premiums are to be covered by those employers who participate in FKP.

## **The provisions of the HTA concerning transfer of pension schemes**

32. The relevant provisions of the HTA are to be found in clause 2.1.8, reproduced above. Those provisions provide for certain conditions to be met in the event of transfer and further procedural requirements that must be fulfilled. The Defendants allege *inter alia* that these provisions are not in accordance with Articles 53 and 54 EEA.

33. The Request for an Advisory Opinion from Arbeidsretten contains a more detailed description of the system for municipalities in Norway, as well as a description of the Norwegian pension system. There is also a description of how the individual provisions of the collective agreement are to be construed by the parties, as well as a description of the points of disagreement. For the purposes of the present Report, it is not necessary to reproduce them further herein.

## **IV. Questions**

34. The following questions were referred to the EFTA Court:

### **Scope of application of Article 53 EEA**

**1a Does a collective agreement generally entail binding legal effects mutually between the participating members on the employer side which can be regarded as an “agreement[ ] between undertakings” under Article 53 EEA?**

**1b If an employer organisation concludes a collective agreement, is this a “decision[ ] by [an] association[ ] of undertakings” under Article 53 EEA?**

**1c Is a municipality an “undertaking” under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto?**

**2a Can a collective agreement provision which has objectives other than to improve salary and working conditions come within the scope of Article 53 EEA?**

**2b If question 2a is answered in the affirmative: which conditions must then be met?**

**3 Do collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall within the scope of application of Article 53 EEA?**

### **Prohibition in Article 53 EEA**

**4** Is it compatible with Article 53 EEA for a collective agreement condition to require that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier?

**5a** Is it compatible with Article 53 EEA for a collective agreement provision to provide that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement?

**5b** If question 5a is answered in the affirmative: will the assessment be otherwise if approval can only take place through unanimity amongst the parties?

**6** Is it compatible with Article 53 EEA for a collective agreement provision to provide that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body?

**7a** Is it compatible with Article 53 EEA for collective agreement provisions to provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the public body which administers the transfer scheme?

**7b** If question 7a is answered in the affirmative: will the assessment be otherwise if inclusion in the transfer agreements cannot take place before a decision on change has been made?

**8** Can the sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein?

### **Interpretation of Article 54 EEA**

**9** Can an association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, be regarded as an “undertaking” under Article 54 EEA in the negotiation of collective agreements?

**10** Can an undertaking, assuming that it has a “dominant position”, conclude an agreement for or practise conditions for

**change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA?**

## **V. Written Observations**

35. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Plaintiff, the Norwegian Federation of Trade Unions, represented by Advokat Atle Sønsteli Johansen and Advokat Håkon Angell, together with the Norwegian Union of Municipal Employees, represented by Advokat Geir Høin;
- the intervener, the Norwegian Confederation of Municipal Employees, represented by Advokat Vegard Veggeland;
- the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Advokat Per Kristian Knutsen og Advokat Astrid Merethe Svele;
- the Defendants Hamarøy kommune and Tysfjord kommune, represented by Advokat Haakon Blaauw and Advokat Dag Steinfeld;
- the Defendants Hitra kommune and Steigen kommune, represented by Advokat Siri Teigum and Advokat Svein Aage Valen;
- the Defendant Tana kommune, represented by Advokat Tarjei Thorkildsen, Advokat Kari B. Andersen, and Advokat Jan Magne Langseth;
- the Defendants Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Advokat Wilhelm Matheson and Advokat Jan Fougner;
- the Government of Norway, represented by Marianne Djupesland, Adviser, Royal Ministry of Foreign Affairs, acting as Agent;
- the Government of Iceland, represented by Dr Magnús Kjartan Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

- the Government of Sweden, represented by Anders Kruse, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Officer, Legal and Executive Affairs Department, acting as Agent;
- the Commission of the European Communities, represented by Anthony Whelan and Wouter Wils, members of its Legal Service, acting as Agents.

### **Norwegian Federation of Trade Unions (LO) and Norwegian Union of Municipal Employees (NKF)**

36. The Norwegian Federation of Trade Unions and Norwegian Union of Municipal Employees submit that: a) collective agreements between social partners fall outside the scope of application of Articles 53 and 54 EEA; b) when the parties to a collective agreement negotiate such agreements, they are not “undertakings” within the meaning of Articles 53 and 54 EEA; c) the HTA does not restrict the freedom of the municipalities to establish pension funds or choose the pension supplier they wish; and d) there has been no “abuse” under Article 54 EEA.

37. Furthermore, as an alternative argument in the event that the EFTA Court concludes that collective agreements concerning pension are covered by the competition rules, LO/NKF have submitted that Articles 53 and 54 EEA must be tested against – and possibly made subordinate to – the right of organisation and negotiation, as laid down in a number of international conventions. LO/NKF encourage the EFTA Court to follow the case-law of the Court of Justice of the European Communities in this area, which, they state, is compliant with those conventions.

38. Regarding the first submission, LO/NKF submit that the judgments of the Court of Justice of the European Communities in *Albany*,<sup>1</sup> *Brentjens*,<sup>2</sup> and *Drijvende Bokken*,<sup>3</sup> and the later judgments in *van der Woude*<sup>4</sup> and *Pavlov*,<sup>5</sup> all

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<sup>1</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (hereinafter “*Albany*”).

<sup>2</sup> Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 (hereinafter “*Brentjens*”).

<sup>3</sup> Case C-219/97 *Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121 (hereinafter “*Drijvende Bokken*”).

<sup>4</sup> Case C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* [2000] ECR I-7111 (hereinafter “*van der Woude*”).

<sup>5</sup> Joined Cases C-180/98 to C-184/98 *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 (hereinafter “*Pavlov*”).

support the assertion that collective agreements fall outside the scope of application of Articles 53 and 54 EEA. In those judgments, the Court of Justice of the European Communities drew a distinction between the regulation of competition and the sphere of labour law, based on an assessment of the nature and purpose of a collective agreement.

39. The “nature” of the agreement is a question of whether the agreement has been concluded in the form of a collective agreement and has been the subject of collective negotiations. In practice, this implies an examination of whether the agreement is the outcome of negotiations between management and labour organisations, see paragraphs 61-62 of *Albany*, paragraphs 58-59 of *Brentjens*’, paragraphs 48-49 of *Drijvende Bokken*, paragraphs 23-24 of *van der Woude*, and paragraphs 67-68 of *Pavlov*.

40. Determining the “purpose” of a collective agreement involves an examination of whether the substance of the collective agreement can be linked to employment terms. In *Albany*, the Court of Justice of the European Communities held that the purpose of collective agreements concerning supplemental pension is to improve the working conditions of the employees, see paragraphs 63-64 of *Albany*, paragraphs 60-61 of *Brentjens*’, and paragraphs 50-51 of *Drijvende Bokken*.

41. Thus, both “the nature and purpose” entail an examination of objective, ascertainable circumstances. How management and labour choose to administer or organise such benefits has not been of any import for immunity from the competition rules, and thus has not been the subject of examination by the Court of Justice of the European Communities. Consequently, it does not matter whether management and labour organisations choose to establish their own scheme for administering an insurance scheme, or leave it to commercial players. Whether management and labour organisations leave it up to a specifically appointed commercial player to administer the scheme, without participating themselves, also has no bearing on whether the collective agreement has immunity from the competition rules.

42. LO/NKF further submit that this approach of the Court of Justice of the European Communities is in line with the legal situation in the individual Member States and European traditions in general, as well as views expressed in legal theory.

43. LO/NKF then deal with the question of whether the HTA passes the *Albany* test.

44. LO/NKF state that, with respect to the “nature” of the agreement, the Request states that the HTA has been negotiated between KS, as an employers’ association, on the one hand, and four different joint negotiations bodies, on the other. These joint negotiations bodies encompass 39 trade unions representing employees in the municipal sector. The information in the Request from

Arbeidsretten to the EFTA Court is, therefore, sufficient to establish that the agreement, based on its “nature”, is not covered by the competition rules.

45. The “purpose” of the collective agreement entails an examination of whether the substantive subject-matter of the collective agreement can be linked to working conditions. Like the situation in *Albany*, *Brentjens*, and *Drijvende Bokken*, the HTA concerns supplemental pensions. In the absence of a collective agreement or some other scheme, the costs of any supplemental pension would have to be borne entirely by the municipal employees. The fact that pension rights are set out in a collective agreement ensures protection for the scheme, since it cannot then be amended unilaterally by an employer, but can be defended through a labour conflict. As established by *Albany*, *Brentjens*, and *Drijvende Bokken*, collective agreements on supplemental pensions have as their purpose the improvement of employees’ working conditions. Accordingly, given its “nature and purpose”, the HTA is not covered by the competition rules.

46. Operating on the assumption that the HTA do not come within the scope of the competition rules, LO/NKF submit that it is not necessary for the EFTA Court to delve into the detailed questions of Arbeidsretten. In the event that the EFTA Court nonetheless finds it necessary to answer all the questions, LO/NKF provide brief comments on the regulation of the pension scheme under the HTA.

47. LO/NKF then discuss the objections the municipalities have to the individual provisions of the HTA. Those objections concern both substantive matters, such as a gender- and age-neutral financing system, and procedural rules in the event of transfer of a pension scheme.

48. With respect to question 4, concerning a gender- and age-neutral financing system, LO/NKF submit that the parties to the collective agreement agree that the financing system under the pension scheme is the expression of weighty human resource policy considerations, the purpose of which is to prevent employers from having economic motives for recruiting men ahead of women and younger employees ahead of older ones. These aims can only be achieved by spreading the premium out over a large group of municipalities, and it is this view which forms the basis of question 4 from Arbeidsretten to the EFTA Court.

49. If the municipalities were allowed to enter into pension agreements with private life insurance companies, without the evening-out described above, it could lead in particular to municipalities with “good” risks (predominance of young men) leaving the group. The parties’ social policy objectives of preventing the exclusion of women and older employees, and thereby solidarity-oriented nature of the pension scheme, would thus be undermined, see paragraphs 108-111 of *Albany*.

50. As regards question 5, concerning the pension committee, LO/NKF state that the provision is a necessary element for ensuring that the relevant pension scheme fulfils the substantive conditions of the collective agreement, and thereby

contributes to the protection of employees' pension rights. The provision does not give the parties to the collective agreement – individually or together – any discretionary power to refuse a transfer. Substantive disagreements relating to the interpretation of the requirements of the collective agreement must, however, be resolved in the usual manner through the parties' dispute resolutions and possibly Arbeidsretten, and cannot be viewed as conduct which is restrictive of competition.

51. Question 6 concerns the role of the Banking, Insurance and Securities Commission and the meaning of the phrase "taken note of". LO/NKF state, firstly, that the Banking, Insurance and Securities Commission has traditionally informed the parties in writing of when it has no longer had objections to product notifications. Next, they point out that the HTA contains rules on a complex pension insurance product, and that the private life insurance companies have, on several occasions, had to modify their pension products in order to satisfy the conditions. Consequently, control of the products has proven to be most necessary. In the same manner as private purchasers, management and labour organisations must also be free both to specify their product requirements and decide which products they wish to use, regardless of whether the products may be marketed or legally sold.

52. With respect to questions 7a and 7b, LO/NKF submit that, during the contract period of the collective agreement, the Norwegian Public Service Pension Fund advised that it was not willing to consider applications for inclusion in the transfer agreement before a final decision on transfer of the pension scheme was taken by the municipal council/county council. The Pension Committee has considered clause 2.1.8, fourth paragraph of the HTA as fulfilled if an application for approval has been made before consideration by the decision-making body. Moreover, none of the defendant municipalities in the present case had applied for inclusion in the transfer agreement before the transfer took place.

53. LO/NKF then turn to questions 9 and 10. They state that, in principle, the conclusion of the HTA is not covered by Article 54 EEA. If it is accepted that collective agreements do not come within the scope of Article 53 EEA, the conduct of an undertaking cannot, either through the conclusion or practising of provisions in the collective agreement, constitute abuse under Article 54 EEA, regardless of whether KS/KLP are treated as undertakings or not. For a finding of abuse, there must be something other and more than conduct in compliance with the provisions of the collective agreement, for example, arbitrary application of the transfer rules or "abuse" through differential treatment. If "abuse" is interpreted in any other manner, Article 54 EEA will completely undermine the immunity of collective agreements.

54. In the alternative, LO/NKF submit that extreme caution must be exercised in employing the "abuse" criterion when the conduct is in accordance with a collective agreement (see also paragraph 38 of the Opinion of Advocate General

Fennelly in *van der Woude*). Disagreement on whether the municipalities have contracted for an insurance product in accordance with the requirements of the collective agreement must be resolved in the usual manner before national courts. There is no basis for assuming that the pension scheme has led KLP to abuse its dominant position or deliver benefits that do not meet the needs of the employees (see paragraph 30 of *van der Woude*).

55. As further support for immunity of collective agreements under the EEA competition rules, LO/NKF submit that the arguments relating to the social dimension and the support of the principles and basic rights of workers laid down in the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 are applicable to the EEA Agreement by virtue of a Declaration annexed to the Final Act of the EEA Agreement.<sup>6</sup> Article 12 of that Charter emphasises that management and labour organisations have the right to negotiate collective agreements in accordance with the rules applicable under national legislation.

56. Considerations of legal homogeneity and common rules within the EC and the EEA underline the importance of the abovementioned fundamental considerations and the case-law of the Court of Justice of the European Communities for the present case. LO/NKF submit that there is nothing in the present case which would justify a deviation from the case-law of the Court of Justice of the European Communities.

57. LO/NKF then turn again to the question whether LO/NKF and KS can be viewed as undertakings within the meaning of Articles 53 and 54 EEA. They submit that, even if the EFTA Court concludes that collective agreements concerning pension and health insurance are covered by the competition rules, LO/NKF and the other employee organisations cannot be viewed as undertakings under Articles 53 and 54 EEA. Nothing in the case-law of the Court of Justice of the European Communities supports such an approach. They further submit that, even if the EFTA Court concludes that the municipalities and KS are undertakings pursuant to Articles 53 and 54 EEA, the parties to the collective agreement do not act as undertakings when concluding collective agreements concerning pension.

58. In the alternative, LO/NKF submit that there is no restriction of competition pursuant to Article 53 and 54 EEA. The collective agreement places restrictions on the municipalities with respect to which requirements the pension product must fulfil. Because of the product specifications in the HTA, the municipalities are not free to purchase any product they wish. However, the competition regulations do not prevent the municipalities from committing themselves to a “pool scheme” with other municipalities, instead of concluding pension agreements with outside private companies. Accordingly, the HTA does

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<sup>6</sup> Declaration by the Governments of the EFTA States on the Charter of the Fundamental Social Rights of Workers.

not constitute an unlawful restriction of competition, even though those municipalities bound by the collective agreement cannot choose schemes other than the joint municipal pension scheme in KLP, due to the product requirements. Reference is made in this connection to paragraph 286 of the Opinion of the Advocate General in *Albany*.

59. LO/NKF add that, in the present case, the authorities have in no way made the scheme compulsory for all. The costs associated with occupational pension for the municipalities are, in any event, so indirect and marginal in relation to the price for municipal services, that there is no appreciable restriction of competition between the municipalities, see *Pavlov*, at paragraphs 95 – 97. Nor is there any obligation to organise, and the municipalities are free to cancel their membership in KS. Lastly, LO/NKF submit that the gender- and age-neutral financing scheme, which is currently established in the joint municipal pension scheme, is the only scheme which complies with the Equal Treatment Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) and the Equal Pay Directive (Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes).

60. Lastly, LO/NKF refer to the judgments of the Court of Justice of the European Communities in the light of international conventions concerning the right of organisation and negotiation. Specific reference is made to the European Social Charter of 16 October 1961, Article 11 of the European Convention on Human Rights, Article 22 of the UN International Covenant on Civil and Political Rights, the UN International Covenant on Economic, Social and Cultural Rights, and ILO Conventions 87 and 98. LO/NKF submit that the application of the competition rules to collective agreements could lead to an encroachment on the organisations' free right of negotiation. It cannot be the case that the EEA Agreement is intended to encroach upon constitutional traditions and previously-existing obligations under international law. In the same vein, nor can the EFTA Court interpret Articles 53 and 54 EEA in such a way as to restrict the parties' right of organisation and negotiation as compared to what follows from national legislation and treaties.

61. LO/NKF propose that the following answers be given to Arbeidsretten:

*“1. Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, do not fall within the scope of application of Article 53 EEA.*

*2. Notwithstanding Articles 53 and 54 EEA, an association of municipalities which is an interest and employer organisation, such as the Norwegian Association of Local and Regional Authorities, can, even if it is identified with an undertaking which has a ‘dominant position’, conclude an agreement for, or*

*practise, those conditions for change of supplier of occupational pension schemes which are laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000.”*

### **Norwegian Confederation of Municipal Employees (KFO)**

62. The views of KFO expressed in their written observations are in accord with the submissions made by LO/NKF as summarised above.

63. As regards the applicability of Articles 53 and 54 EEA, KFO submits that the questions put forward in the Request for an Advisory Opinion must be answered in the negative, on the basis of a series of judgments from the Court of Justice of the European Communities on the corresponding provisions in Article 81 EC (formerly Article 85 of the EC Treaty) and Article 82 EC (formerly Article 86 of the EC Treaty). Those cases are *Albany*, *Brentjens’*, *Drijvende Bokken*, *Pavlov*, and *van der Woude*.

64. KFO submits that the HTA falls outside the scope of application of Article 53 EEA because there is no agreement or decision between undertakings. Reference is made to paragraphs 27 and 28 of the judgment of the Court of Justice of the European Communities in *Becu*.<sup>7</sup>

65. In the alternative, KFO submits that, in any event, the activities of KS merely consist of representing the individual municipalities in collective negotiations, and that, consequently, the activities of the association can in no way be classified as independent economic activity which would bring the organisation within the concept of undertaking.

66. Referring to paragraphs 62 to 64 in *Albany*, KFO argues that, regardless of whether the general subjective grounds for exemption from the EEA competition rules apply, provisions dealing with employees’ occupational pensions schemes cannot come within the scope of application of Article 53 EEA. KFO points out that the Norwegian collective agreement scheme is contractually based, and this means that individual municipal employers can, at any time, withdraw from the employer organisation. The municipality is thereby no longer bound by the collective agreement, either. KFO submits that the freedom of the Norwegian municipalities bound by the collective agreement is not limited in any other way than that which follows from the individual municipality’s own actions in relation to membership in its own employer organisation. Accordingly, the limitations are both less and have another basis (autonomy) than the statutorily-imposed limitations which the Dutch companies in the textile (*Albany*), building materials (*Brentjens’*) and dock and transport (*Drijvende Bokken*) sectors had to endure. The delegation of the power to conclude agreements is a prerequisite for

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<sup>7</sup> Case C-22/98 *Becu and Others* [1999] ECR I-5665.

management and labour organisations to be able to conclude collective agreements.

67. KFO submits that it is not necessary for the EFTA Court to answer any questions other than question 3 from Arbeidsretten in relation to Article 53 EEA, which it proposes be answered as follows:

*“Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 are not covered by the scope of application of Article 53 EEA.”*

68. KFO then turns to question 10, concerning Article 54 EEA. KFO argues that the question assumes that the Norwegian Association of Local and Regional Authorities is identified with KLP in the conclusion and practice of the HTA. KFO adds that the EFTA Court has not been asked to rule on the question of whether the two institutions can be identified with each other, and that no question has been asked or information given which might provide a basis for an assessment of KLP’s conduct away from the collective agreement.

69. KFO submits that any identity between the municipalities’ mutual insurance company (KLP) and the municipalities’ employer organisation (KS) cannot change the nature and purpose of the collective agreement. The agreement is, in any event, concluded within the framework of collective negotiations with a united employee side as necessary contract parties. Furthermore, the practice of the pension provisions is assigned to a separate body – those members of the Pension Committee who represent the parties to the collective agreement.

70. KFO also refers to the discussion of the content of the provisions, etc., in relation to Article 53 EEA, and submits that, when a collective agreement on pension matters falls outside the scope of Article 53 EEA, then the conclusion of that agreement cannot be covered by Article 54 EEA. Moreover, the issue of whether the provisions which were concluded in 1998 are deemed to have the effect of KLP’s offer, i.e. the joint municipal pension scheme (FKP), being favoured, must be held to be without relevance.

71. It is expressly stated in *Albany*, at paragraph 56, and *van der Woude*, at paragraph 26, that the competition rules are not to be applied in such a way that they prevent management and labour from arriving at desired schemes within the framework of collective negotiations.

72. KFO submits that, when the rules of the HTA have a lawful content under the competition law rules, the practising of those same rules must be lawful. Pursuant to clause 2.1.8, second paragraph of the HTA, those members of the Pension Committee who represent the parties to the collective agreement exercise discretion within certain legal parameters when deciding whether a change of company is to be allowed or not. Thus, there can be no question of discretionary

practices in which considerations other than the provisions of the collective agreement can be taken into account.

73. KFO proposes the following answer to questions 9 and 10:

*“An association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, can, even though the organisation is identified with the municipalities’ own mutual insurance company, and assuming that the organisation has a dominant position, regardless of Article 54 EEA, conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000. ”*

### **Norwegian Association of Local and Regional Authorities (KS)**

74. KS argues that the contested provisions of the HTA are not contrary to either Article 53 EEA or Article 54 EEA. It maintains that those provisions apply to the regulation of an occupational pension scheme, i.e. salary and working conditions, and thus fall outside the scope of application of Article 53 EEA. KS also submits that, in any event, the conditions of application of Articles 53 and Article 54 EEA are not met, either as regards the scope of application of the provisions or the conditions relating to the criteria for prohibition under the provisions.

75. KS refers to the case-law of the Court of Justice of the European Communities, particularly *van der Woude* and *Albany*. KS submits that the disputed collective agreement provisions of clause 2.1 of chapter 2 HTA fulfil the conditions relating to “nature and purpose” set out in those judgments.

76. With respect to the “nature” of the disputed provisions, KS submits that they have been concluded in the form of a collective agreement and are the result of collective negotiations between employer and employee organisations. This fulfils the requirement of “nature” as established by the Court of Justice of the European Communities in its case-law. In addition, the purpose of the provisions of clause 2.1 of chapter 2 HTA fulfils the requirement of “purpose”, again as established by the Court of Justice of the European Communities in its case-law. The provisions of clause 2.1 of chapter 2 HTA on pension, including the transfer provisions, promote all forms of social security: the purpose of the provisions is to improve salary and working conditions. The provisions have been instituted to give employees satisfactory financial security during the transition from an active working life to retirement. The provisions ensure that that the employees’ occupational pension is the same, regardless of who the pension insurance supplier is.

77. In the light of the foregoing, KS finds that there is no basis for answering questions 21 and 2b, since they are purely hypothetical: see paragraph 40 of the judgment of the EFTA Court in *Wilhelmsen*.<sup>8</sup>

78. KS argues that, for Article 53 EEA to be applicable, both parties to the agreement must be considered as undertakings within the meaning of that Article, which criterion has not been fulfilled in the present case. KS is an employer organisation for municipal authorities. It negotiates salary and working conditions for its members, in the same way that LO/NKF negotiate salary and working conditions for their members. KS must thus be assessed in the same manner as LO/NKF. KS refers to paragraph 216 of the Opinion of Advocate General Jacobs in *Albany*, and submits that neither LO/NKF nor KS are “undertakings” pursuant to Article 53 EEA.

79. KS further argues that, the defendant municipalities cannot be regarded as undertakings, either, since their main function is the exercise of public authority, see *inter alia Cali & Figli*,<sup>9</sup> at paragraphs 23-25.

80. KS submits that, in any event, the municipalities cannot be considered as undertakings because the conditions of the collective agreement which KS negotiates on behalf of its members concern, directly or indirectly, salary and working conditions, and have immunity from the competition law rules, see *inter alia* paragraph 59 of *Albany*. It is clear from section 1(8) of the Labour Disputes Act that collective agreements are agreements concerning “conditions of employment and wages or other matters relating to employment”. The expression “conditions of employment and wages or other matters relating to employment” must be interpreted broadly. In both Norwegian case-law and legal theory, the expression comprehends provisions which directly or indirectly appertain to wages and conditions of employment or other matters relating to employment. Accordingly, it must be accepted that the pension provisions of clause 2.1 of chapter 2 HTA, including the transfer provisions, are encompassed by the expression “conditions of employment and wages or other matters relating to employment”. Chapter 2 HTA, which deals with pension matters, clearly contains provisions which come within the characterisation of the substantive content of a collective agreement contained in the Labour Disputes Act. KS also refers to the legal nature of collective agreements in general under Norwegian law, and argues that the municipalities, therefore, cannot be considered undertakings pursuant to Article 53 EEA.

81. If the EFTA Court nonetheless concludes that the municipalities are undertakings, KS submits that clause 2.1 of chapter 2 HTA does not constitute an agreement between the municipalities, and that, consequently, the condition of “agreement[] between undertakings” in Article 53 EEA is not fulfilled, and the

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<sup>8</sup> Case E-6/96 *Wilhelmsen v Oslo kommune* [1997] EFTA Court Report 53.

<sup>9</sup> Case C-343/95 *Cali & Figli v SEPG* (SEPG) [1997] ECR I-1547.

provisions of clause 2.1 of chapter 2 HTA fall outside the scope of Article 53 EEA.

82. KS proposes the following answers to questions 1a and 1 c:

*“Question 1a:*

*A collective agreement, as a general rule, does not entail binding legal effects between the participating members inter se on the employer side which can be held to be an ‘agreement[ ] between undertakings’ under Article 53 EEA.*

*Question 1c:*

*A municipality is not an ‘undertaking’ under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto.”*

83. KS further contests that an agreement between two contract parties, as in the present case, constitutes a “decision[] by [an] association[] of undertakings”. It argues that only those decisions which are taken truly independently are covered by the condition, such as the articles of association and internal rules of an association. The HTA is no such unilateral decision by KS.

84. KS proposes the following answer to questions 1b and 3:

*“Question 1b:*

*If an employer organisation concludes a collective agreement, this is not a ‘decision[] by [an] association[] of undertakings’ under Article 53 EEA.*

*Question 3:*

*Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 do not fall within the scope of application of Article 53 EEA.”*

85. KS also contends that, in the event of possible conflict between competition considerations and social policy considerations, it follows from the case-law of the Court of Justice of the European Communities that social policy considerations must take precedence over competition considerations.

86. If the EFTA Court decides to undertake an assessment of whether the provisions distort or prevent competition, KS contends that they do not, because the provisions of the HTA on occupational pension schemes make it possible for employees to be ensured occupational pension in addition to the pension schemes otherwise offered in the market. The alternative to the current scheme would be

to make the scheme into a fund, and have the fund allow a single pension insurance supplier to administer the scheme.

87. KS further maintains that clause 2.1.8, third paragraph of chapter 2 HTA, concerning gender- and age-neutrality, is compatible with Article 53 EEA, if the interpretation of the collective agreement advocated by KS is accepted. The requirement may be fulfilled by KLP and other insurance companies, since the collective agreement does not impose any requirement as to the size of the group. There is nothing preventing such an evening-out between gender and age from being carried out within an individual municipality, or among several municipalities. The determining factor is that the financing system has several employees among whom an evening-out can be achieved, and this is always the case for a municipality. Private life insurance companies also have, as a general practice, that evening-out may take place within an individual municipality.

88. If, based on the assumption that the pension provisions in clause 2.1 of chapter 2 HTA come within the scope of application of Article 53 EEA, the EFTA Court nonetheless accepts the interpretation of clause 2.1.8, third paragraph of chapter 2 HTA favoured by LO/NKF, to the effect that the requirement of a gender-neutral financing system can only be met using a larger group of several municipalities, KS contends that such an interpretation may be contrary to Article 53 EEA if the result is that only one supplier is actually given the opportunity to fulfil the requirement of clause 2.1.8, third paragraph of chapter 2 HTA.

89. KS proposes the following answer to question 4.

*“A collective agreement condition which requires that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier may be incompatible with Article 53 EEA.”*

90. With respect to the condition that the insurance product must be approved by those members of the Pension Committee who represent the parties to the collective agreement, KS submits that this is a control mechanism aimed at ensuring that employees’ occupational pensions are the same, even in the event of a change of pension insurance supplier. In so far as those members of the Pension Committee who represent the parties to the collective agreement do not approve the pension product, the pension insurance supplier must amend the product so that the occupational pension requirements in chapter 2 HTA are fulfilled. Such an approval scheme does not entail any distortion or prevention of competition, and is thus compatible with Article 53 EEA.

91. KS proposes the following answer to question 5a:

*“A collective agreement provision which provides that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement is compatible with Article 53 EEA.”*

92. With respect to the condition that the insurance product must be taken note of by the Banking, Insurance and Securities Commission, KS argues that this provision does not *de facto* entail prior control of new insurance products, but is only included to ensure that employees' occupational pensions are the same regardless of whether a change of pension insurance supplier occurs. Since the parties to the collective agreement are limited in their opportunities to carry out themselves complicated evaluations based on insurance principles, they have a legitimate need to receive such support from the Banking, Insurance and Securities Commission. In so far as the Banking, Insurance and Securities Commission does not take note of the schemes, it is because the schemes do not conform to the requirements which the Banking, Insurance and Securities Commission is to control, and the schemes must then be amended. This is in no way related to the tie-in mechanisms, but merely shows that the security scheme functions in accordance with its purpose, which is to ensure that the employees' pension schemes are the same regardless of who the pension supplier is; see, by way of comparison, *Albany*, at paragraph 23. Accordingly, the provision does not have any effect which is restrictive of competition, and does not prevent competition, either.

93. KS proposes the following answer to question 6.

*“A collective agreement provision which provides that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body is compatible with Article 53 EEA.”*

94. With respect to the condition to the effect that, before a matter may be decided upon, there must be approval from the Norwegian Public Service Pension Fund relating to inclusion in the transfer agreement, KS maintains that this requirement is in place to ensure that employees, in the event of a change of employer to a new employer affiliated to the Norwegian Public Service Pension Fund, can take with them their accrued HTA pension, thereby allowing their pension accruals to continue as though they had always been covered by the same scheme. There are relatively widespread transfers of employees within and between municipalities/county municipalities and the State. Accordingly, there are social considerations behind the provision, and the provision leads to protection of a social benefit, occupational pensions. On this basis, KS contends that clause 2.1.8, fourth paragraph of chapter 2 HTA is compatible with Article 53 EEA, and that the approval scheme, therefore, does not lead to any distortion or prevention of competition. KS reasons that it is not necessary to answer question 7b which has been submitted to the EFTA Court.

95. KS proposes the following answer to question 7a.

*“Collective agreement provisions which provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the*

*public body which administers the transfer scheme is compatible with Article 53 EEA.”*

96. The defendant municipalities have argued that the sum of the tie-in mechanisms of the HTA must be held to be distortive of competition and unlawful. KS responds to this argument by submitting that, when the individual provisions of clause 2.1 of chapter 2 HTA are compatible with Article 53 EEA, the provisions as a whole cannot then be judged to be distortive of competition or unlawful.

97. KS proposes the following answer to question 8.

*“The sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, cannot be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein.”*

98. KS then submits that Article 54 EEA is not applicable because the conditions of application of Article 54 EEA are not fulfilled, either with respect to scope of application (*ratione personae*) or the prohibition (*ratione materiae*).

99. The argument has been put forth that Article 54 EEA applies, since KS, because of its identity with KLP under corporate law, must be identified with KLP. KS rejects this argument, and maintains that KLP and KS are two completely independent, different and separate holders of legal capacity, thereby leaving no grounds for identifying KS with KLP and viewing the two independent holders of legal capacity as one and the same undertaking under Article 54 EEA. That the board of KS used to constitute the general assembly of KLP does not ipso facto result in KS’s being identified with KLP and being held to be one and the same undertaking. Additionally, KLP and KS’s work tasks and interests are fundamentally different, and their respective memberships are of different compositions.

100. KS proposes the following answer to question 9:

*“An association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, cannot be regarded as an ‘undertaking’ under Article 54 EEA in the negotiation of collective agreements.”*

101. If the EFTA Court finds that clause 2.1.8, second and fourth paragraphs of chapter 2 HTA do come within the scope of application of Article 54 EEA, KS submits that clause 2.1.8, second and fourth paragraphs of chapter 2 HTA are not covered by the prohibition in Article 54 EEA.

102. KS claims that there is no “abuse (...) of a dominant position” pursuant to Article 54 EEA. To include and practise the relevant provisions of the HTA does

not involve any abuse of a dominant position. Those provisions, which have been agreed following collective negotiations and based on social considerations, do not in any way entail abuse of a dominant position pursuant to Article 54 EEA. Furthermore, the case-law of the Court of Justice of the European Communities does not support the position put forward by the defendant municipalities.

103. KS also asserts that the occupational pension scheme under the HTA is of such a nature as to be compatible with Article 54 EEA. When it follows from *inter alia* paragraph 118 of *Pavlov* that it is not an abuse of a dominant position to give a body an exclusive right to administer a supplementary pension scheme, a corresponding view must at least be accepted for a scheme which allows for a change of pension insurance supplier.

104. KS proposes the following answer to question 10.

*“An undertaking, assuming that it has a ‘dominant position’, can conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, (...) and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA.”*

### **Hamarøy kommune and Tysfjord kommune**

105. Hamarøy kommune and Tysfjord kommune concur with and invoke the same factual and legal arguments as put forth in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, although with some additional comments.

106. Hamarøy kommune and Tysfjord kommune begin by pointing out that KLP was separated from the Norsk Kollektiv Pensjonskasse (“NKP”), effective 1 January 1974. The remaining NKP was later merged with Hygea, and the merged company is the current Vital Forsikring ASA (“Vital”), with which the defendant municipalities Hamarøy and Tysfjord are insured.

107. The separation of KLP from NKP did not lead to all of the municipalities’ leaving NKP, now Vital. *Inter alia* Tromsø kommune remained. In agreement with the Banking, Insurance and Securities Commission, and pursuant to a prior contract between Vital and the ministries concerned, Tromsø kommune became part of the transfer agreement effective 1 January 1991. Additionally: (i) insurance benefits paid to employees of Tromsø kommune are the same as those offered by KLP; and (ii) those benefits which are not “insurable” must be covered through “single premiums”, i.e. the policyholder (the municipality) itself guarantees the cover in the same manner that a municipality which is insured with KLP must cover possible capital contributions. LO or NKF have never argued that Tromsø kommune does not fulfil the requirements of the HTA.

Exactly the same product is offered to Hamarøy kommune and Tysfjord kommune as is offered to Tromsø kommune, and – as mentioned – no one has had any objections. The municipalities thus have great difficulty understanding the basis of the action brought by LO/NKF, including the “security mechanism” which LO/NKF maintain the transfer procedure under the HTA is intended to safeguard. Rather, they see it first and foremost as an attempt to shield KLP from competition.

108. Hamarøy kommune and Tysfjord kommune go on to state that the separation of KLP from NKP did not lead to any genuine competition on the market for group pension insurance. On the contrary, until the end of the 1980s, the market was characterised by a lack of competition. This situation was among the matters which were discussed by the government and which led to research work being commenced to foster competition. The right to transfer became a key element in forcing such competition to come into existence. Reference is made to Norwegian legislation concerning transfer of pension rights and the *appurtenant travaux préparatoires*.

109. Hamarøy kommune and Tysfjord kommune submit that, despite an attempt by the Norwegian authorities to stimulate competition in the area of pension rights, the practising of the HTA by LO/NKF aims at eliminating the right to transfer as regards KLP. The municipalities have noted that LO/NKF are preoccupied with arguing that the HTA ensures the right to transfer. However, the procedural rules are practised by LO/NKF in such a manner that transfer becomes impossible. This has been described in detail in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

110. Hamarøy kommune and Tysfjord kommune further claim that the insurance product which they have through Vital is the same as that offered by KLP. Premium calculations in both cases are made according to a linear model, as required by the regulations, and, consequently, do not exclude older employees any more with the Vital product than with the KLP product. As to the point concerning gender-neutrality, they submit that it cannot be concluded that KLP’s setting of premiums is more “gender-neutral” than that of the others.

111. They add that the HTA is not drafted in such a way that it would be an act of “solidarity” to calculate an average premium for KLP’s insurance sample which corresponds to 60% of municipal employees, and which does not necessarily constitute a “national average”, whilst it would be an act of “non-solidarity” to calculate the premium as an average for a smaller sample. The point in relation to the *Albany* test must be that municipal employees both within and outside KLP attain the same benefits, and that LO/NKF cannot show any basis for arguing that it is necessary to operate with such a large group as 60% so that all municipal employees can attain the insurance coverage provided for. LO/NKF clearly recognise that it is not necessary to have a larger group than that obtained with each individual municipality to make it possible to attain insurance

coverage for the municipal employees: it is only the transfer procedure from KLP to which objections are being raised.

112. Hamarøy kommune and Tysfjord kommune conclude that the restrictive mechanism which is practised in relation to those municipalities which are insured with KLP is not necessary for the joint scheme (group pension insurance) provided for in the HTA to be realised and function well. The HTA, as it is practised by LO/NKF, thus precludes competition, contrary to Articles 53 and 54 EEA, see paragraphs 272-274 of the Opinion of the Advocate General in *Albany*.

113. Hamarøy kommune and Tysfjord kommune ask for the questions from Arbeidsretten to be answered as set out in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

### **Hitra kommune and Steigen kommune**

114. Hitra kommune and Steigen kommune begin by mentioning that, in 1998, they moved their pension insurance contracts for their employees from KLP to Gjensidige Nor Spareforsikring.

115. Hitra kommune and Steigen kommune submit that the contractual interpretation and practice of the provisions of the HTA favoured by LO/NKF impede all forms of competition in the municipal occupational pension market. Accordingly, the interpretation of the provisions of the HTA advocated by LO/NKF is contrary to the EEA Agreement and, therefore, unlawful.

116. Hitra kommune and Steigen kommune concur with the statements, arguments, and proposed answers as set out in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, and, accordingly, restrict their comments to supplementing certain points.

117. Hitra kommune and Steigen kommune submit that the transfer rules of HTA 1998 – 2000 are of such a nature that the conditions established by the Court of Justice of the European Communities for acceptance of collective agreement provisions which restrict competition, in accordance with Article 86 EC, are not fulfilled. They contend that the transfer provisions of the HTA do not have a purely social policy objective, but also one of restriction of competition, and that the elements of the transfer provisions which are restrictive of competition are not necessary to safeguard any social policy objective.

118. They further claim that all conditions for the applicability of Article 53 EEA to the scheme provided for in the HTA are fulfilled. The scheme has as its object and effect the restriction of competition in the supply of municipal

occupational pensions, and has an appreciable effect on competition and trade in a substantial part of the EEA.

119. As to the relevance of the case-law of the Court of Justice of the European Communities relied on by LO/NKF, Hitra kommune and Steigen kommune hold the view that that case-law does not resolve the competition law issue in the present case. This is because the facts of those cases differ on essential points from the circumstances in the present case. Furthermore, the central criterion set out by the Court of Justice of the European Communities is whether social policy objectives are pursued by the agreement. The contested provisions of the HTA do not pursue any such objectives.

120. As regards certain of the individual conditions in the transfer rules of the HTA, Hitra kommune and Steigen kommune argue that the collective agreement condition which requires that a pension scheme be taken note of by the Banking, Insurance and Securities Commission is contrary to the provisions of the Insurance Activity Act. Under the amendments made to the Insurance Activity Act in 1994, a requirement could no longer be maintained for prior approval of premiums or other aspects of an occupational pension product. The legislative amendments were introduced because of Norway's obligations under the EEA Agreement, and were thus a step in the preparations for competition from foreign suppliers as well. That the collective agreement condition requiring pension products to be taken note of by the Banking, Insurance and Securities Commission does not pursue a necessary social policy objective is also confirmed by the fact that the parties did not maintain the condition when concluding a new Basic Collective Agreement for the period 2000 – 2002.

121. Hitra kommune and Steigen kommune also contend that the requirement of affiliation to the transfer agreement and approval from the Norwegian Public Service Pension Fund is contrary to Article 53 EEA. The collective agreement condition requiring the occupational pension scheme to be linked to inclusion in the transfer agreement means that a comprehensive contract must be entered into between the particular municipality and the Norwegian Public Service Pension Fund. It is difficult to imagine that such a contract can be entered into before the municipality has decided on its occupational pension supplier. The contract between the particular municipality and the Norwegian Public Service Pension Fund is based on the actual conditions in the pension insurance contract which is concluded between the municipality and the occupational pension supplier. It is clear from the foregoing that a requirement of approval for inclusion in the transfer agreement before a decision to transfer has been made is extremely restrictive of competition. The collective agreement condition cannot be viewed as necessary to safeguard a social policy objective and must, therefore, give way to the general scope of application of the competition provisions.

122. With respect to the condition concerning gender-neutrality, Hitra kommune and Steigen kommune state that, if the position of LO/NKF is accepted, competition in the municipal occupational pension market in Norway

will be precluded. The requirement that the pension scheme be based on a gender-neutral financing system has no social policy objective to be safeguarded. Emphasis is placed on four aspects: (i) the main parties to the collective agreement strongly disagree on the interpretation of the collective agreement provision, and the parties to the collective agreement thus have no common understanding of such an actual objective to be safeguarded; (ii) the real consequences of fixing premium amounts based on calculations within the individual municipality, as opposed to a national average will, for the great majority of municipalities, not make a significant difference; (iii) there is other national legislation in place which protects against gender discrimination in employment, and consequently, which ensures enforcement of the notion that, in hiring, unfair consideration is not to be taken of any gender-related differences in premium in the occupational pension scheme; (iv) the collective agreement condition cannot then be viewed as necessary for the pursuance of a social policy objective and must, therefore, give way to the general scope of application of the competition provisions.

123. Hitra kommune and Steigen kommune then turn to the requirement that relevant offers for new occupational pension schemes must be submitted to and approved by those members of the Pension Committee who represent the parties to the collective agreement prior to being dealt with by the municipality's decision-making body. It has been argued before the national court that the collective agreement condition unlawfully restricts competition in the occupational pension market in the public sector. It was, therefore, deemed desirable to have an Advisory Opinion from the EFTA Court on the lawfulness of concluding collective agreements containing provisions which have the nature and effect which the municipalities maintain that clause 2.1.8, second paragraph of HTA 1998 – 2000 has.

124. The way in which the Pension Committee treated the request from Hitra kommune shows that, in reality, the contested condition has the effect of restricting competition, without there being legitimate social policy objectives to be safeguarded. There are thus no grounds for excluding it from the scope of EEA competition law. All matters which those members of the Pension Committee who represent the parties to the collective agreement are to assess pursuant to the collective agreement are adequately safeguarded through contracts and other legislation. It is not, in any event, necessary to maintain a requirement of prior approval by those members of the Pension Committee who represent the parties to the collective agreement.

125. Hitra kommune and Steigen kommune submit that Article 53 EEA applies to the scheme, since all conditions of application of Article 53(1) EEA are fulfilled. The scheme has as its object and effect the restriction of competition in the supply of municipal occupational pensions, and has an appreciable effect on competition and trade in a substantial part of the EEA.

126. Hitra kommune and Steigen kommune also discuss whether the conclusion and practising of the transfer rules of the HTA constitute an abuse of the undertaking's/undertakings' dominant position in the area covered by the Agreement, pursuant to Article 54 EEA. In that connection, they submit that KS and KLP must be identified with each other. They maintain that KLP and KS constitute an undertaking within the meaning of the EEA Agreement, one that has abused its dominant position by establishing and practising transfer rules in a basic collective agreement which, in practice, preclude competition. Such a lack of competition, and lack of a real right to transfer, favour KLP as the dominant market player. With respect to further comments regarding Article 54 EEA, reference is made to the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

### **Tana kommune**

127. With respect to the factual background of the case, Tana kommune refers to the Request for an Advisory Opinion and to the written observations of the other defendant municipalities, particularly the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune. The observations of Tana kommune are thus aimed at describing the special situation of Tana kommune and further pinpointing specific key issues.

128. In December 1998, Tana kommune reached an agreement with employee representatives to the effect that the municipality should consider transferring their pension scheme from KLP if they received a better offer in accordance with all the material provisions of chapter 2 HTA. Pursuant to the procedural provisions set out in clause 2.1.8 HTA, the municipality formally requested approval of transfer of the municipal pension scheme from KLP to the private insurance company VÅR. The application for approval was denied by the Pension Committee on the grounds that the Banking, Insurance and Securities Commission had not "taken note of" the pension product, even though the Banking, Insurance and Securities Commission had, as early as 1997, assessed and approved the pension insurance products in question.

129. Tana kommune points out, however, that the routines followed by the Banking, Insurance and Securities Commission for approval of insurance products have changed due to the entry into force of the EEA Agreement and the secondary legislation covering insurance companies and products, so that the former national advance approval routines were no longer in existence. The approval system referred to in clauses 2.1.6 and 2.1.8 HTA is, therefore, non-existent and would, in any event, be unlawful.

130. On 29 December 1998, on the basis of the guarantee from VÅR, which stated that the scheme offered fulfilled all the material provisions of chapter 2

HTA, the municipal council of Tana kommune decided to transfer their pension scheme from KLP to VÅR.

131. It is the view of Tana kommune that the Pension Committee did not have any objectively justifiable grounds for denying the transfer from KLP to VÅR. Tana kommune further submits that transfers of pension schemes are, in reality, effectively blocked by the Pension Committee, even if all attainable objective criteria for transfer are fulfilled. Reference is made to the fact that since the 1998 HTA entered into effect, the Committee has not rendered a single positive decision on transfer.

132. Tana kommune also points out that a number of municipalities in Norway already operate their own pension schemes in perfect harmony and respect of the HTA. This is not contested and shows that the objective criteria under the HTA can be fulfilled by insurance undertakings other than KLP.

133. With regard to the questions contained in the Request for an Advisory Opinion, Tana kommune submits that the manner in which the Basic Collective Agreement is currently practised is contrary to Articles 53 and 54 EEA, due to the behaviour of the parties in relation to the transfer of pension schemes from KLP.

134. The principal submission of Tana kommune is that the HTA, as it is practised, unavoidably leads to abuse of a dominant position contrary to Article 54 EEA. In addition, the HTA inevitably leads to a concerted practice by KLP and those municipalities which are parties to the HTA.

135. Tana kommune draws attention to a number of issues, which it maintains must be addressed for the EFTA Court to give a correct Advisory Opinion. Firstly, there are the behavioural issues, which must be examined in order to give an interpretation which makes it possible for the national court to have a correct understanding of the EEA competition rules before giving its judgment. Secondly, it must be established that the relevant parties are undertakings under EEA competition law. Thirdly, since the *Albany* case goes quite far in exempting pension schemes from the scope of the competition rules under the EC Treaty, the present case must be distinguished from *Albany*.

136. Taking the issues in reverse order, Tana kommune begins by discussing the difference between the present case and *Albany*, and emphasises two points. Firstly, the facts of *Albany* are quite different. *Albany* concerned a sector-specific pension scheme. By contrast, in the present case, the pension schemes for the whole municipal sector are covered by the HTA. This distinction is relevant, since a transfer from one insurance undertaking to another would entail a full transfer of all the municipal employees of the transferor from one pension scheme to another. Such a transfer cannot *per se* undermine the social object and aim of the pension scheme, by removing only a certain group of affluent

individual workers and leaving behind other workers who are “less advantageous” for the scheme.

137. Secondly, it is the settled case-law of the Court of Justice of the European Communities that collective agreements in pursuit of social policy objectives fall outside the scope – *ratione materiae* – of the competition rules. Therefore, it is, as a rule, for the national courts to decide, according to national law, how the different provisions of the collective agreements are to be interpreted. However, *Albany* also established that collective agreements, or the behaviour of undertakings, may go further than what is necessary to attain the goals of the collective agreement or fall outside the scope of the agreement altogether. In such cases, one will fall inside the *ratione materiae* of the EEA competition rules.

138. Tana kommune further argues that the system established under the HTA inevitably leads to a concerted practice between the municipalities as owners and participants in KLP, and as parties to the HTA through their participation in KS and the decision-making procedures under the HTA: see, in particular, clause 2.1.8 of the HTA. The system also unavoidably leads to abuse of a dominant position contrary to Article 54 EEA. It is a fact, for instance, that the municipalities do not know the grounds for the decisions of the Pension Committee or its deliberations. In that light, and taking into account the ownership structure of KLP, it is difficult to accept that decisions, concerted practices, or other behaviour by the municipalities, KLP or KS which are restrictive of competition may justifiably be excluded from the scope of Articles 53 and 54 EEA.

139. As to the issue of “undertaking”, Tana kommune argues that KS and KLP are indeed undertakings under the EEA competition rules. It has been consistently held by the Court of Justice of the European Communities that the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Municipalities engaged in economic activities do not fall outside the definition. Accordingly, employers remain undertakings when they engage in collective bargaining. It follows that the municipalities and KS (as an association of employers) are associations of undertakings. This is sufficient to draw the conclusion that the competition rules may apply.

140. Tana kommune states that it should not be ruled out that there are circumstances in which the activities or behaviour of trade unions may lead to the conclusion that the union is an undertaking. When trade unions are acting outside the scope of representing employees in collective agreements and engage in economic activity, as defined by the Court of Justice of the European Communities, the competition rules apply also to trade unions.

141. Regarding the question of abuse of dominant position, Tana kommune argues that KLP clearly holds a dominant position in the Norwegian municipal

pension insurance market. It stresses that undertakings which have been granted a *de facto* exclusive right to operate in a given market *per se* hold a dominant position. Reference is also made to the assessment of the Commission of the European Communities in *International Group of P&I Clubs*<sup>10</sup> and the XXIX Report on Competition Policy 1999.<sup>11</sup>

142. Tana kommune goes on to state that, in the light of the legal framework for the interpretation of Article 54 EEA, the current system under the HTA has the effect of hindering the maintenance of the degree of competition still existing in the market, or the growth of that competition. It assumes that the concrete grounds given by the Pension Committee for refusing the transfer of the Tana kommune pension scheme were not objectively justified. In other words, the denial of transfer on the grounds that the pension scheme was not based on insurance products which had been “taken note of” by the Banking, Insurance and Securities Commission was not, and cannot be, objectively justified, see clauses 2.1.6 and 2.1.8 HTA. Again, this is a criterion which is not capable of fulfilment following *inter alia* the entry into force of the EEA and the Third Life Assurance Directive.<sup>12</sup> Such criteria must necessarily then be disproportionate and unlawful. If the reason behind the refusal of the Pension Committee to allow transfer of a pension scheme to another insurance undertaking cannot be objectively justified under the provisions of the HTA, then that refusal is caught by Article 54 EEA, and, for the same reason, constitutes unlawful abuse of a dominant market position.

143. Tana kommune adds that the structure of the pension insurance market also gives rise to “structural abuse”, contrary to Article 54 EEA, see *Europemballage* and *Continental Can v Commission*.<sup>13</sup> It follows from that judgment that any commercial practices which are damaging to the maintenance of an effective competitive structure are prohibited by Article 82 EC and, accordingly, Article 54 EEA as well. The competition in the pension insurance services market in the municipal sector is limited, due to the structure of the market because of the role of the municipalities as owners of KLP and parties to the HTA, as well as their participation in *inter alia* the Pension Committee. The maintenance of an effective competitive structure is thereby rendered impossible.

144. A reference is also made to Joined Cases 142 and 156/84.<sup>14</sup> Tana kommune submits that the interrelation described above has at least some influence on the municipalities’ freedom to choose insurance providers for their

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<sup>10</sup> [1999] OJ L125.

<sup>11</sup> Sec(2000) 720 Final.

<sup>12</sup> Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third life assurance directive).

<sup>13</sup> Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215.

<sup>14</sup> Joined Cases 146 and 152/84 *BAT and Reynolds v Commission* [1986] ECR 1899.

pension schemes, and that the arrangement limits competition in the market for such insurance services.<sup>15</sup>

145. If the EFTA Court finds that Article 54 EEA does not apply to the above-described market structure, Tana kommune argues that the decision-making procedures under the HTA necessarily lead to a concerted practice on the part of those municipalities participating in KS and KLP, since they have a controlling interest in both undertakings. The organisational structure and the decision-making procedures of the municipalities, KS and KLP inescapably result in collusion. The system is, therefore, contrary to Article 53 EEA.

146. By way of conclusion, Tana kommune submits that the effect and practice of the decision-making procedures for transfer to other insurance providers under the HTA are contrary to Articles 53 and 54 EEA, and that the questions raised by Arbeidsretten in its Request for an Advisory Opinion should be answered accordingly.

**Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune**

147. For ease of reference, the aforementioned municipalities will be referred to below as the “municipalities”. The municipalities transferred their occupational pension schemes from KLP to the insurance company Storebrand, effective 1 January 1999. The six municipalities’ total net pension costs with Storebrand in 1999 were approximately NOK 32.5 million. By way of comparison, the corresponding simulated costs of a continued client relationship with KLP have been calculated at roughly NOK 62.2 million in 1999. In other words, by moving the pensions, the municipalities achieved calculated total savings in their net pension costs that year of approximately NOK 29.7 million.

148. The municipalities argue that there are three main issues which are central for the case as it is presented before the EFTA Court.

149. The first fundamental issue is whether the rules of the HTA governing the transfer of municipal pension schemes come within the scope of the competition rules of the EEA Agreement. The second main issue is whether the other conditions for the application of Article 53 EEA are fulfilled. The municipalities submit that all of those conditions are fulfilled. The third main issue is whether the adoption of the transfer provisions of the HTA constitutes abuse of a dominant position which is covered by the prohibition in Article 54 EEA.

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<sup>15</sup> Further reference is made to paragraph 57 of the Commission’s XXIX Report on Competition 1999, where it is stated that it:  
“ (...) takes the view that such [abusive] practices, which undermine competition, are particularly dangerous when they are carried out by undertakings with the power to shield themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree.”

150. The municipalities submit that the contested provisions of the HTA must be seen as a reaction to the increasingly competitive situation in the Norwegian pension market. They point out that, in 1980, a “reinsurance agreement” was entered into by the companies *Norske Folk gjensidig livsforsikringselskap* (one of the forerunners to the current company Storebrand) and KLP. The purpose of the agreement was to achieve a division of the two companies’ aggregate share of the Norwegian insurance market, and in such a way that insurance clients in the public sector were channelled into KLP, whilst private sector clients were channelled to *Norske Folk*. At the time the agreement was concluded, roughly 120 municipalities had their pension insurance agreements with *Norske Folk*. These insurance agreements were, with a few exceptions, transferred to KLP during the 1980s. Marketing efforts by various insurance companies led many municipalities to examine the issue of transfer of pension schemes, and this constituted a threat to KLP’s position. The municipalities state that the procedural rules contained in the HTA, which are of crucial importance for KLP’s market position, came into being in a meeting held at KLP’s premises and in which KLP’s senior management participated, and that there, the parties to the collective agreement took into consideration not only any interests they themselves might have had, but also the commercial interests of a pre-selected supplier.

151. The municipalities also claim that, although the contested transfer clauses in the HTA allow, in principle, for the transfer of pension schemes to other pension suppliers, in reality LO/NKF do not allow such transfers at all. So far, all requests for such a transfer have been refused. In fact, it is only KLP which, in the view of LO/NKF, meets the conditions for an age- and gender-neutral financing system, thereby rendering the right to transfer illusory. The agreed transfer rules in clause 2.1.8 HTA are thus self-contradictory: the parties have set out in the agreement that it should be possible to move pension insurance to and from the various pension insurance suppliers and pension institutions, whilst, at the same time, mechanisms are agreed which tie in the municipalities to a specific supplier in the market. In reality, LO/NKF counteract any real right of transfer for the municipalities.

152. As to the question of whether Article 53 EEA applies to the contested transfer rules, the municipalities point out that the judgment in *Albany* should be interpreted as meaning that only those collective agreements which pursue social policy objectives which can improve wage and working conditions should be considered as falling outside the scope of the EEA competition rules. The conditions for transfer provided for in the contested provisions of the HTA must be assessed in this light. If a condition is unsuitable for attaining an objective which otherwise is to be safeguarded, there is no reason to exclude it from the scope of application of the competition rules. Furthermore, if it turns out that a condition is suitable for attaining the objective, it is also necessary, on the basis of the proportionality principle, to examine whether it is proportionate. This principle must also be part of the assessment of whether a competition-restricting

condition is necessary for social protection, or whether the same degree of protection might be attained through less extensive measures.

153. The municipalities maintain that the Court of Justice of the European Communities in *Albany* actually conducted an examination of the individual agreement condition, with the aim of assessing whether it was suitable and proportionate for attaining the social policy objectives pursued. They argue that the judgment in *Albany* shows that the lawfulness of the exclusive right of the fund was justified by the argument that it could otherwise become impossible for the fund to perform its task. In other words, the exclusive right was deemed as a necessary tool (suitable for attaining the objective and proportionate) for the fund to be able to achieve its social policy objective, *viz.*, to guarantee a certain level of pension for all workers in the sector.

154. The municipalities caution that it does not follow from *Albany* that compulsory insurance schemes are simply permitted outright. One cannot simply draw a deductive conclusion and argue that, since compulsory insurance schemes were accepted in *Albany* and the other related cases, so must affiliation schemes which contain a “weaker” restriction of competition be permitted in Norway. The core issue is what justified the lawfulness of the Dutch scheme and, therefore, *Albany* does not resolve the present case. Consequently, an assessment on the merits must be made of whether the contested transfer provisions of the HTA, which the municipalities maintain are restrictive of competition, fall within the scope of the competition rules.

155. The municipalities go on to state that the individual conditions in the contested transfer clauses of the HTA do, in fact, affect competition in the market for municipal occupational pension schemes, since they restrict competition between insurance companies. The assessment of the restrictive effect on competition must be conducted in precisely that market, see paragraph 249 of the Opinion of the Advocate General in *Albany*. The HTA contains peremptory rules for the municipalities bound by the collective agreement. The municipalities are *de facto* unable to choose any other insurance company than KLP as supplier of their occupational pension insurance. In other words, the freedom of contract which the municipalities have in principle as policyholders is taken from them through the HTA. This leads to a situation where the insurance companies are excluded from the potential market for municipal occupational pension schemes.

156. The municipalities submit that the restrictions inherent in the HTA do not have any social policy objective which must be safeguarded and therefore they come within the scope of the competition rules of the EEA. They are not suitable for attaining those objectives; nor are they proportionate, since the objectives can be achieved by less restrictive means.

157. The municipalities then discuss the condition to the effect that the products must be “taken note of by the Banking, Insurance and Securities Commission”. Firstly, they argue that the expression “take note of” the product is

an inapposite description of the tasks with which the Commission is entrusted by Norwegian law. Even so, the parties to the collective agreement have, through the HTA, based the municipalities' right to change insurance supplier on an assumption of the matter having been dealt with in a prior procedure by the Commission. Correspondence between KS and the Banking, Insurance and Securities Commission, on the one hand, and the Pension Committee and the municipalities, on the other, shows that the condition is intended to ensure not only that there must be confirmation that the product has been reported to the Banking, Insurance and Securities Commission in accordance with the requirements of the Insurance Activity Act, but that the Commission's examination of the product has been completed without there having been any comments. Reference is made to correspondence from the Banking, Insurance and Securities Commission, in which it is stated that it does not take note of products which have been lawfully reported, since that would amount to a requirement of prior approval, which is unlawful and restrictive of competition. Further reference is made to the *travaux préparatoires* for the legislative amendments made to section 7-6 of the Insurance Activity Act as part of the implementation of the EEA Agreement in the light of the Third Life Assurance Directive. In dealing with the contract condition pursuant to section 3-10 of the Norwegian Competition Act (Act No. 65 of 11 June 1993 Relating to Competition in Commercial Activity, *konkurranseloven*), the Norwegian Competition Authority (*Konkurransetilsynet*) has concluded that clause 2.1.8, fourth paragraph HTA, see clause 2.1.6, which requires that the insurance products must be "taken note of" before the municipalities may change insurance supplier, restricts competition.

158. The municipalities then argue that the contested condition does not safeguard any specific social policy objectives which might serve as justification. Firstly, as stated above, the Banking, Insurance and Securities Commission does not check the insurance product, since such prior control is prohibited under Norwegian law. Secondly, the fact that Norwegian law provides for follow-up control indicates that this rule is in no way related to the safeguarding of important social policy objectives. Thirdly, the Norwegian Competition Authority has found that the condition "taken note of" does not in itself lead to any quality control. Fourthly, this condition has now been removed and is not to be found in HTA 2000 – 2002.

159. The municipalities argue that the foregoing shows that the collective agreement provision in clause 2.1.8, fourth paragraph HTA, see clause 2.1.6, to the effect that the products must be "taken note of" by the Banking, Insurance and Securities Commission entails a restriction of competition in the market for municipal occupational pension insurance, whilst at the same time the condition does not have any social policy objective to be safeguarded which would lead to its falling outside the scope of application of Article 53 EEA.

160. The municipalities then turn to the requirement of gender-neutrality. They submit that the different interpretations of clause 2.8.1. as regards gender- and

age-neutrality are not a matter on which the EFTA Court should rule. The only issue before the EFTA Court is whether the interpretation of it favoured by LO/NKF to the effect that it requires gender-related differences to be evened out over a large group (national average) is compatible with the EEA. The municipalities are of the view that it is not.

161. The municipalities submit that this requirement gives rise to a restriction of competition in the market for municipal occupational pension schemes, and that it does not pursue any social policy objective to be safeguarded which might bring it outside the scope of Article 53 EEA.

162. They go on to argue that, if the interpretation advocated by LO/NKF is accepted, only one insurance group can, by definition, be established which can even out the premium over a nation-wide insurance sample. New players on the market will never be able fulfil the condition thus interpreted. This condition has a clear restrictive effect on competition by shutting out other companies from competition. One could even say that it not only restricts competition, it eliminates competition in the market for municipal occupational pension schemes.

163. The municipalities then discuss how the requirement of a financing system which is gender- and age-neutral, as LO/NKF interpret the requirement, does not pursue any social policy objective to be safeguarded, for several reasons. Firstly, the parties' agreement on the requirement of gender- and age-neutrality only in the event of a change of pension scheme weighs against the collective agreement provision's having any social policy objective to be safeguarded. If the objective of the provision had really been to arrange things so that more women and older employees would obtain work, and that those employee groups would not be discriminated against in municipal hiring, the neutrality requirement would have been imposed on each and every pension insurance scheme in effect. A requirement for gender- and age-neutrality which only applies when a municipality wishes to change insurance supplier would have an arbitrary scope of application, and is, by its form, not very appropriate for securing any social policy advantage. It also shows that the real objective with the requirement of gender- and age-neutrality is to prevent transfers from KLP, since there are no other companies which can satisfy the requirement.

164. Secondly, they argue that the recorded disagreement of the parties as to the interpretation of the collective agreement provision on gender- and age-neutrality in itself weighs against there being any social policy objective to be safeguarded in the interpretation of the requirement favoured by LO/NKF, see paragraph 59 of *Albany*.

165. Thirdly, reference is made to views expressed by KLP itself, to the effect that evening-out of premiums over a national average is of minimal significance for the level of premiums in individual municipalities. In other words, the restriction of competition implicit in the interpretation of the collective

agreement advocated by LO/NKF is not proportionate, in that the advantage of the measure is barely noticeable, and an equivalent effect can be attained through the municipalities' interpretation of the collective agreement. This would point to there not being any social policy objective to be safeguarded in the interpretation of clause 2.1.8, third paragraph HTA as advocated by LO/NKF.

166. The municipalities then turn to the condition of inclusion in the transfer agreement with the Norwegian Public Service Pension Fund before a decision on transfer may be made, see clause 2.1.8, fourth paragraph HTA, and again submit that this condition restricts competition within the meaning of Article 53 EEA, and that it does not serve any social policy objectives which must be safeguarded.

167. They point out that the processing time triggered by this requirement significantly delays the transfer process and, by its nature, gives rise to a restriction of competition. If it is assumed that the Norwegian Public Service Pension Fund will not, under any circumstances, consent to inclusion in the agreement before the municipal decision on change of supplier has been adopted, compliance by the municipalities with the collective agreement will completely exclude competition on the occupational pension market.

168. They further argue that this requirement cannot be justified by reference to any social policy objective to be safeguarded. The tightening-up of the procedural rules of the HTA on this point shows that the requirement that there must be inclusion before a decision on transfer can be taken cannot be justified by any social policy objective to be safeguarded. The substantive legal position of the municipal employees has always been safeguarded, regardless of whether the municipalities have only applied for inclusion in the transfer agreement at a later time than that assumed in the HTA. This shows that the objective behind the rule has only been to make transfers more difficult. Additionally, the provision, in the form it had in the HTA 1998 – 2000, has not been maintained in HTA 2000 – 2002. This would point to there not being any social policy objectives to be safeguarded.

169. The municipalities then turn to the condition of approval from those members of the Pension Committee who represent the parties to the collective agreement, see clause 2.1.8, second paragraph HTA. They claim that this condition restricts competition and does not serve any social policy objectives to justify its exclusion from the scope of Article 53 EEA.

170. The parties to the HTA have stated that the purpose of this condition was to assist the municipalities in ensuring the quality of the pension schemes to which they were considering transferring. However, the condition has not been applied in this manner, as the practice of the Pension Committee shows. In practice, the Pension Committee has accepted transfers between private companies, even though the collective agreement provisions, on their wording,

have not been fulfilled, whilst at the same time refusing to give approval in similar cases where the transfer is to be from KLP to a private company.

171. The municipalities argue that this arbitrary treatment of applications is possible because the principal parties to the collective agreement, pursuant to minutes of 22 December 1998, agreed that “those members of the Pension Committee who represent the parties to the collective agreement” would be composed of one representative for KS, and one representative from each of the four joint negotiations bodies on the employee side. In other words, the composition of the Committee is determined by organisational affiliation and not by requirements of particular competence in the area of pension insurance. Nor are there any guidelines for the Committee’s consideration of business or voting procedure. Further, there is no requirement that reasons be given for the decisions of the Committee. The lack of such procedural rules has given rise to a pending separate action before Arbeidsretten on how “those members of the Pension Committee who represent the parties to the collective agreement” are to carry out their tasks. The municipalities state that this shows that the contested requirement is restrictive of competition within the meaning of Article 53 EEA.

172. The municipalities further submit that the arbitrary nature of the treatment of applications for transfer, depending on whether a transfer is from KLP or not, shows that there are no social policy objectives which must be safeguarded in this way. They argue that, in reality, the Pension Committee does not offer any quality control, and point to the fact that the requirement was not maintained in the new HTA 2000 – 2002.

173. The municipalities then discuss the significance of the attitude of Norwegian authorities towards competition in the municipal occupational pension market. They submit that this point is relevant for the assessment of whether the contested provisions of the HTA are to enjoy immunity from the competition rules. A description of the present Norwegian legislation and its background is provided. They argue that it follows from the *travaux préparatoires* for the Insurance Activity Act that the background for the statutory right to transfer was a wish to ensure competition between the insurance companies. The Norwegian authorities have, on numerous occasions, stated that the principle of free competition is to apply in the occupational pension market, and that the provisions of the HTA should be amended.

174. The municipalities then turn to the further conditions for the application of Article 53 EEA. The concept of “undertaking” is discussed. The municipalities submit that management and labour organisations act as undertakings when they, through their contractual framework, determine who is to be the supplier of services provided for in the collective agreement. LO and KS, therefore, act as undertakings when they, in connection with collective agreements, pursue the clear economic interests of a commercial player. Consequently, the transfer provisions of the HTA constitute an agreement between undertakings within the meaning of Article 53 EEA.

175. The municipalities submit that, in any event, those municipalities bound by the collective agreement must be held to be undertakings. Thus, any decision by an association of those undertakings, in this case KS, must be held to be a decision by an association of undertakings. They advance three arguments in support of this position.

176. Firstly, they submit that the municipalities bound by the collective agreement are undertakings within the meaning of Article 53 EEA. The municipalities disagree with the argument of LO/NKF to the effect that it is enough that the exercise of public authority is the central activity for them to be excluded from the scope of the competition rules. They point to the case-law of the Court of Justice of the European Communities,<sup>16</sup> which, they maintain, shows that there is no question of any overall assessment based on which part of the municipality's activities is greatest in scope ("the authority part" as opposed to "the economic part"). If that were so, such an "overall assessment" would mean that the public sector's participation in economic activities through *inter alia* the purchase and sale of goods and services would fall outside the scope of the competition rules.

177. Secondly, they submit that the municipalities do not exercise public authority when they, as employers, become bound by a collective agreement. A municipality does not perform its tasks in that connection *qua* public body, but on the basis of its private law autonomy as employer. The question then becomes whether a municipality carries on activities of an economic nature when it, in its capacity as employer, becomes bound by a collective agreement.

178. Thirdly, they argue that the municipalities are undertakings when they, as employers, become bound by collective agreements. The key point in this assessment is the classification of the municipality in the function as employer in the context of a collective agreement. The economic nature of that function becomes particularly clear when one considers the effect of the negotiated collective agreement provisions on the finances of the municipality.

179. The municipalities turn briefly to the significance of the statements of Advocate General Tesauro in *SAT Fluggesellschaft v Eurocontrol*,<sup>17</sup> to the effect that only those activities which, in principle, can be carried out by private undertakings for profit are of an economic nature. If a given municipal activity can conceivably be carried out by a private undertaking with a view to profit, that activity will then make the municipality an undertaking for the purposes of competition law in relation to the activity in question. The municipalities submit that the municipal employer liability cannot be entrusted to private undertakings,

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<sup>16</sup> Case C-41/90 *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979; Case C-55/96 *Job Centre Coop arl.* [1997] ECR I-7119; Case C-179/90 *Merc* [1991] ECR I-5889; Case 30/87 *Corine Bodson* [1988] ECR 2479; Case C-343/95 *Cali* [1997] ECR I-1547; Case 118/85 *Commission v Italy* [1987] ECR 2599.

<sup>17</sup> Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

but the function as employer in the context of negotiations can, in principle, be performed by others in return for compensation. Lawyers, consultants, and advisers, for example, can be entrusted with the task of conducting negotiations, within a given framework.

180. The municipalities are, in any event, of the view that there is an agreement between undertakings within the meaning of Article 53 EEA. The HTA not only creates rights and obligations between the principal parties to the collective agreement, but also creates mutual obligations in the relationship between the members of the contracting groups on each side. In other words, the collective agreement gives rise to an obligation for the municipalities *inter se* to comply with the substantive and procedural requirements for change of supplier of pension insurance. This is sufficient to establish a finding of an agreement between undertakings under Article 53 EEA. Reference is made to the case-law of the Court of Justice of the European Communities.<sup>18</sup>

181. The municipalities point out that the HTA creates obligations for the individual municipalities towards the other member municipalities in KS, and refer *inter alia* to Norwegian law. The municipalities then deduce that there can be no doubt that the HTA between LO and KS not only creates rights and obligations between the principal parties to the collective agreement, but that it also creates mutual contractual obligations between the members of the contracting group on the employer side. In other words, applied to the present case, the collective agreement gives rise to an obligation between the municipalities to comply with the substantive and procedural requirements of the HTA regarding change of pension insurance supplier. This is sufficient for there to be an “agreement between undertakings” under Article 53 EEA, see the discussion of the Advocate General in *Albany*.

182. The municipalities further point out that, in *Albany*, the Advocate General discussed whether the collaboration which restricted competition in that case was of the nature of an agreement or some other form of concertation. The municipalities submit that the EFTA Court must do the same in the present case: if the EFTA Court is in doubt as to whether the conditions of the collective agreement constitute an agreement between undertakings, the conditions must, in any event, be covered by the wording “concerted practices” in Article 53 EEA.

183. The municipalities further submit that, in any event, the transfer provisions of the HTA are a decision by an association of undertakings within the meaning of Article 53 EEA.

184. Next, the municipalities discuss whether the criterion relating to trade is fulfilled. One of the requirements for Article 53 EEA to be applicable is that

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<sup>18</sup> Case 28/77 *Tepea v Commission* [1978] ECR 1391, paragraph 41 and Case 107/82 *AEG v Commission*, [1983] ECR I-3151, paragraph 38; Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; and Joined Cases 209-215 and 218/78 *van Landewyck v Commission* [1980] ECR 3125.

there must be an effect on cross-border trade. According to the case-law of the Court of Justice of the European Communities, it is sufficient to demonstrate that trade may potentially be affected, directly or indirectly. With respect to what is required for the criterion to be deemed fulfilled, reference is made to *Consten and Grundig v Commission*,<sup>19</sup> in which the Court of Justice of the European Communities stated that the issue of whether an agreement may affect trade will depend on whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Reference is also made to the Commission's Decision in *Carlsberg*.<sup>20</sup> In that case, a large-scale purchaser was bound to purchase from a single supplier. That obligation led to imports being reduced, and the condition relating to effect on trade was thus fulfilled.

185. The municipalities argue that this illustration is applicable to the contested provisions of the HTA. The municipalities together constitute a large-scale purchaser. The transfer rules of the HTA lead to the municipalities' being tied in to a contractual relationship with one supplier of pension insurance, to wit, KLP. The result is that the import of pension insurance services is reduced. Even if the conclusion were reached that the municipalities are not completely tied to KLP, the transfer procedures do, in any event, mean that the system is weighed down with a slowness which affects trade.

186. The municipalities add that the Third Life Assurance Directive assumes normal, cross-border trade in insurance products. No insurance categories are exempted from this general rule. Even though, in Norway today, municipal pension insurance is, in practice, not bought and sold across national borders, there is, in any event, a potential effect on trade, in the light of the assumption contained in the Life Assurance Directive. In so far as the transfer provisions of the HTA preserve KLP's market position in Norway and restrict competition from other companies, they will also be of import for EEA trade in municipal occupational pension schemes.

187. By way of conclusion, the municipalities submit that it is clear that trade in municipal occupational pension insurance products is weakened by compliance with the transfer rules of the HTA, and that this is due to the tie-in effect with KLP.

188. The municipalities further submit that the criterion relating to appreciable effect on trade is fulfilled. The disputed transfer provisions of the HTA have an appreciable effect on competition and trade, since all of the municipalities and

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<sup>19</sup> Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299. See also Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235; Case 322/81 *Michelin v Commission* [1983] ECR 3461, at paragraph 104; and Case 42/84 *Remia v Commission* [1985] ECR 2545, at paragraph 22.

<sup>20</sup> Commission Decision *Carlsberg*, OJ [1984] L 207/26.

county municipalities – with the exception of Oslo – are bound by that agreement structure. KLP’s share of the market for municipal occupational pension schemes is roughly 90% of the municipalities and over 60% of municipal employees. They argue that the ties established with one supplier holding such a significant market share have an appreciable effect on competition within the meaning of the Treaty and the EEA Agreement.

189. Next, the municipalities turn to Article 54 EEA. They contend that the adoption of the transfer provisions is an abuse of a dominant position within the meaning of that Article. Referring to earlier argument, the municipalities state that LO and KS must be deemed to be undertakings when they, in connection with collective agreements, pursue economic objectives which lie outside their own sphere of activity, and which regulate competition in an outside market. The position KS thereby acquires as an undertaking should, by itself, have significance in relation to Article 54 EEA. That Article, however, requires that the undertaking has abused its dominant position. Thus, for Article 54 EEA to apply, it is necessary to establish also that KS is dominant in the market for municipal occupational pension schemes. Such a position requires that KS can be identified with KLP.

190. The municipalities invoke several factors to demonstrate that KS and KLP can be identified with each other. First of all, they refer to the fact that the Board of KS is KLP’s general assembly. Moreover, KS and KLP are to be identified with each other through the entire time-frame which is relevant to the present case. It is clear that KS, through its complete control over KLP’s general assembly, administered KLP right from the conclusion of HTA 1998-2000 through to the turn of the year 1999/2000. In addition to their being identical under corporate law, there were apparently particularly close financial ties between the two enterprises. Those ties show how – and why – KS tends to favour KLP as a company and hedge this way in the competition with other insurance companies. Moreover, there is also considerable interaction between the two enterprises, which crystallises KS’s and KLP’s being identified with each other from a legal standpoint. In addition, there has been a “marketing agreement” or “cooperation agreement” for a number of years between KS and KLP. At the time HTA 1998-2000 was negotiated and concluded, an agreement which had been signed on 14 December 1994 was in effect. That agreement gave KLP *inter alia* rights with respect to participation and marketing at KS events such as the national assembly, national council, conferences, county meetings for mayors, chief officers, etc. It also contained provisions to the effect that union representatives and employees in KS were obliged to support actively the marketing of KLP. The agreement also had provisions on mutual support in individual matters, exchange of information, as well as a clause on loan payments to KS’s enterprises. The cooperation agreement also assumed annual compensation from KLP to KS in the order of NOK 2.5 million, an amount which was later indexed. The agreement was renewed on 30 August 1999. Lastly, reference is made to KLP’s contribution to the negotiation of collective

agreements and participation by KLP during meetings with those members of the Pension Committee who represent the parties to the collective agreement.

191. The municipalities conclude that the close organisational and economic ties between KS and KLP justify the municipalities' view that, at the time HTA 1998-2000 was negotiated and concluded, KS and KLP were identical under corporate law, and that those ties remained at least until 1 January 2000, when the new Articles of Association for KS entered into effect. The municipalities argue that there can be no doubt that KS must be deemed to be carrying on business through its strong management of KLP and active hedging of KLP's interests, *inter alia* by bringing KLP directly into the organisation's employer activity during the collective agreement negotiations in the spring of 1998. KS, as a party to the HTA, must thus undoubtedly be covered by the concept of undertaking in Article 54 EEA.

192. The municipalities go on to discuss in more detail the individual conditions for the applicability of Article 54 EEA.

193. Firstly, they submit that KLP's market position is the decisive factor as to whether the criterion relating to dominant position is fulfilled. The assessment must start with the notion that group pension insurance for employees in the municipalities constitutes the relevant product market in the present case. Moreover, since it does not appear that group pension insurance is being purchased from any offerors other than ones established in Norway, it must be assumed that Norway constitutes the relevant geographical market. As regards the issue of dominance in the relevant market, they argue that there can be no doubt that KLP, with 90 per cent of the municipalities and some 60 per cent of the municipal employees in its pension scheme, is the dominant player in the market. The municipalities affiliated with KLP, taken together, hold a correspondingly dominant position as purchaser in the same market.

194. The municipalities then argue that KS/KLP have abused their dominant position by applying the tie-in contractual mechanisms of the HTA in connection with the transfer of municipal pension schemes. The tie-in mechanisms in clause 2.1.8 of the transfer provisions of the HTA cannot be justified for the purposes of competition law, and, therefore, constitute an abuse of a dominant position within the meaning of Article 54 EEA.

195. The municipalities propose the following answer to questions 2a and 2b.

*“An employee and/or employer organisation acts as an ‘undertaking’ under Article 53 EEA when it, in a collective agreement, adopts provisions which are not suitable for improving ‘conditions of work and employment’ for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

196. The municipalities propose the following answer to question 1c:

*“A municipality acts as an ‘undertaking’ under Article 53 EEA when it, in its capacity as employer, becomes bound by a collective agreement.”*

197. The municipalities propose the following answer to question 1a:

*“Those legal obligations which might arise between the members bound by the collective agreement on the employer side as a result of a collective agreement concluded between the principal parties to the collective agreement must be deemed to be an ‘agreement’ under Article 53 EEA.”*

198. The municipalities propose the following answer to question 1b:

*“An employee organisation’s conclusion of a collective agreement can be deemed to be a ‘decision[] by [an] association[] of undertakings’ under Article 53 EEA.”*

199. The municipalities are of the view that there is no need to answer question 3 separately.

200. The municipalities propose the following answer to question 4:

*“Provisions in a collective agreement which require that a group occupational pension scheme must be based on a gender-neutral financing system, and which can only be satisfied by one supplier are incompatible with Article 53 EEA if the provisions are not suitable for improving conditions of work and employment for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

201. The municipalities propose the following answer to question 5a:

*“Provisions in a collective agreement which require that offers from an insurance company to an employer concerning occupational pension schemes must be approved by representatives of the parties to the collective agreement are incompatible with Article 53 EEA if the provisions are not suitable for improving conditions of work and employment for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

202. The municipalities are of the view that there is no need to answer question 5b.

203. The municipalities propose the following answer to question 6:

*“A provision in a collective agreement which requires that an insurance product must be tacitly or explicitly accepted by the local insurance authority before a*

*change of pension insurance scheme may lawfully be made is incompatible with Article 53 EEA if the provision is not suitable for improving ‘conditions of work and employment’ for the employees, but which has first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

204. The municipalities propose the following answer to question 7a:

*“Provisions in a collective agreement which require that, before a decision may be taken on change of supplier of occupational pension insurance, the employer must have concluded a separate agreement on mutual transfer of pension schemes through approval from the public body which administers the transfer scheme are incompatible with Article 53 EEA if the provision is not suitable for improving conditions of work and employment for the employees, but which has first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

205. The municipalities propose the following answer to question 7b:

*“Provisions in a collective agreement which require that, before a decision may be taken on change of supplier of occupational pension insurance, the employer must have concluded a separate agreement on mutual transfer of pension schemes through approval from the public body which administers the transfer scheme are incompatible with Article 53 EEA if such an agreement cannot be concluded before a decision on change has been taken.”*

206. The municipalities propose the following answer to question 8:

*“The sum of provisions in a collective agreement may be incompatible with Article 53 EEA, even though none of the provisions, viewed in isolation, come under the prohibition therein, if the sum of the provisions have the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement.”*

207. The municipalities propose the following answer to question 9:

*“An interest and employer organisation such as the Norwegian Association of Local and Regional Authorities, in the negotiation of collective agreements, acts as an ‘undertaking’ under Article 54 EEA when the organisation, in the negotiations, seeks to defend the interests of an undertaking which the organisation owns, manages, or with which it has close economic and organisational cooperation.”*

208. The municipalities propose the following answer to question 10:

*“An undertaking which has a dominant position in the market for municipal occupational pension schemes cannot conclude an agreement for, or practise,*

*conditions for change of supplier of such schemes, unfettered by Article 54 EEA, in a manner which makes transfer from the undertaking more difficult or completely impossible, unless the restrictions are required to be able to maintain the insurance scheme, and the undertaking's scheme is necessary to improve 'conditions of work and employment' for the insured parties."*

## **The Government of Iceland**

209. The Government of Iceland limits its remarks to questions 1 to 3. Reference is made to *Albany, Brentjens'*, and *Drijvende Bokken*. In those cases, the Court of Justice of the European Communities concluded that the provisions of collective agreements which are aimed at improving conditions of work and employment for workers must, by virtue of their nature and purpose, be regarded as falling outside the scope of (now) Article 81(1) EC.

210. On the basis of that case-law, the Government of Iceland submits the following: (i) it is a pre-condition for exemption from the scope of Article 81 EC that agreements must be concluded under the umbrella of a collective agreement; (ii) the parties must be employers (associations of employers), on the one hand, and associations of workers, on the other, concluding collective bargaining between themselves which is aimed at improving employment conditions; (iii) the content of the collective agreement must concern improvement of the working conditions of the workers; (iv) employers' contributions to the pension schemes must be deemed to be a kind of remuneration to the workers, in the broad sense of the term; (v) the term "conditions" must be applied in a very broad sense and must include all financial claims, including all types of remuneration to which workers are entitled in return for their work, as well as non-financial claims which workers may receive from their employer on the basis of the collective agreement; (vi) regardless of Article 81 EC, the employees must be entitled to create and run institutions or engage in other activities in order to realise their aim of improving working conditions, as provided for by the collective agreements, in whatever form those commitments may take; (vii) lastly, the Government of Iceland endorses the views expressed by the Norwegian Federation of Trade Unions and the Norwegian Association of Local and Regional Authorities.

211. The Government of Iceland proposes the following answers to questions 1 to 3.

*"1a: Due to their nature and purpose, collective agreements fall outside the scope of Article 53 of the EEA Agreement. Consequently, collective agreements are not 'agreements between undertakings' in the context of Article 53 of the EEA Agreement.*

*1b: With reference to the answer given to the first question, collective agreements are not 'decisions between associations of undertakings' in the*

*context of Article 53 of the EEA Agreement, although they are concluded on the employers' side by an employers' organisation.*

*1c: The entity or sector in which an employer operates is irrelevant in the context of Article 53 of the EEA Agreement.*

*2a: Only in exceptional circumstances may a provision of a collective agreement come within the scope of Article 53 of the EEA Agreement.*

*2b: It is not possible to define specific rules to answer this question. However, if a provision of a collective agreement, which must be concluded in good faith and concerning core subjects of a collective bargaining such as wages or working conditions, is inappropriate or disproportionate to what is necessary to secure the purpose and nature of the collective agreement, and the provision directly affects relations between an employer and a third party, it may, in exceptional circumstances, come within the scope of Article 53 of the EEA Agreement.*

*3: Collective agreement provisions on group occupational pension schemes, such as those disputed in the main proceedings, form a part of provisions regarding remuneration of workers and thus fall outside the scope of Article 53(1) of the EEA Agreement. This is also true in regard to those provisions which serve the purpose of safeguarding the contracting parties' control over the pension scheme or verifying whether the employees covered by the collective agreement will be sufficiently covered if the municipalities concerned seek other insurers."*

## **The Government of Norway**

212. The Government of Norway emphasises the importance of the EEA competition rules, whilst at the same time pointing out that the competition rules necessarily must be balanced with other, equally important goals, such as those underlying collective agreements.

213. The Government of Norway is of the view that it is essential to protect the freedom of the social partners to enter into collective agreements. This freedom is, to some extent, limited by law, but it is important that the purpose of collective agreements, namely, to regulate wages and other working conditions, is not jeopardised by competition rules, under either national law or the EEA Agreement. The socially accepted goals of labour law could not have been achieved in a satisfactory manner if the anti-competitive effect of collective agreements on wages and working conditions were to be regarded as contrary to Articles 53(1) EEA.

214. The Government of Norway refers to the judgments of the Court of Justice of the European Communities in *Albany*, *Brentjens'*, *Drijvende Bokken*, *Pavlov*, and *van der Woude*, which dealt with the relationship between collective agreements and Article 81 EC. It submits that that case-law brings out three

elements which must be present for an agreement to fall outside the scope of application of Article 81(1) EC: (i) the agreement must be concluded in the form of a collective agreement; (ii) the agreement must be an outcome of collective organisations representing employers and workers; and (iii) the agreement must contribute to improving working or employment conditions.

215. The Government of Norway submits that the abovementioned case-law of the Court of Justice of the European Communities is relevant to answering the questions in the present case and that there is no reason, such as, for instance, the particular characteristics of the EEA Agreement, why the scope of application of Articles 53(1) EEA should, in the present context, differ from that of Article 81(1) EC with regard to collective agreements.

216. The Government of Norway then concludes that agreements which are entered into in the form of collective agreements which are the outcome of collective negotiations between organisations representing employers and workers, and which contribute to improving working or employment conditions, fall outside the scope of application of Article 53(1) EEA. On the basis of that conclusion, the Government of Norway considers it unnecessary to examine further the questions referred by Arbeidsretten.

217. The Government of Norway then turns to the purpose of the Advisory Opinion procedure. It mentions that the Advisory Opinion procedure is an instrument of cooperation between national courts and the EFTA Court, the aim of which is to provide the national courts with the necessary elements of EEA law to decide the cases before them,<sup>21</sup> and that it is clear from Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement) that the EFTA Court only has competence to rule on the interpretation of the EEA Agreement. It is for the national court, however, to apply the relevant provision of the EEA Agreement to the factual circumstances of the case in its judgment at the national level. If the EFTA Court wishes to answer the questions in the present case in detail, then the Government of Norway is of the view that that would be going beyond a mere interpretation of the EEA Agreement. The Government of Norway, apart from stating that agreements which are concluded in the form of a collective agreement, which are the outcome of collective negotiations between organisations representing employers and workers, and which contribute to improving working or employment conditions, fall outside the scope of application of Article 53(1) EEA, suggests that the EFTA Court should refrain from answering the questions referred to it by Arbeidsretten, on grounds of lack of jurisdiction.

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<sup>21</sup> Case E-5/96 *Ullensaker kommune and Others v Nille AS* [1997] EFTA Court Report 30, at paragraph 12.

## **The Government of Sweden**

218. The Government of Sweden begins by stating that the Court of Justice of the European Communities has, in several cases, established that collective agreements should enjoy immunity from competition law, see *inter alia Albany, Drijvende Bokken, Brentjens*'. The Government of Sweden submits that this principle also applies to Article 53(1) EEA. Any special characteristics the EEA Agreement may have do not justify a different interpretation in the present case.

219. The Government of Sweden points out that the agreement at issue in the present case were concluded in the form of a collective agreement, and that it is the outcome of collective negotiations between organisations representing employers and workers. Furthermore, the establishment of a compulsory group occupational pension scheme, such as the one at hand, which seeks to guarantee a certain level of pension for all workers, clearly aims to improve the remuneration of the workers. The specific provisions referred to by the Labour Court under questions 4 to 7b do not, by themselves or read in conjunction with each other, change the general purpose of the agreement. Accordingly, the agreement falls outside the scope of application of Article 53(1) EEA.

220. As regards Article 54 EEA, the Government of Sweden argues that the agreement, taken as a whole or in part, cannot, by its nature and content, be considered an abuse of a dominant position. The provisions of the agreement at hand are also less far-reaching than the systems under scrutiny in, for example, *Albany* and *van der Woude*. Since the agreement does not confer exclusive rights to one undertaking to manage the pension schemes, as was the case in *Albany* and *van der Woude*, the agreement *per se* cannot be said to lead to abuse of dominant position. Therefore, the agreement cannot be considered to be contrary to Article 54 EEA.

## **EFTA Surveillance Authority**

221. The EFTA Surveillance Authority points out that questions such as those in the present case have been the subject of judgments by the Court of Justice of the European Communities. It follows from those judgments that, by their nature and purpose, collective agreements which have as their object the improvement of employment and working conditions fall outside the scope of Article 81 EC, which is identical in substance to Article 53 EEA. It follows from this that a pension fund entrusted with the task of realising those objectives is not in violation of the competition provisions.

222. The EFTA Surveillance Authority offers an analysis of the relevant case-law of the Court of Justice of the European Communities, i.e., *Albany, Drijvende Bokken*, and *Brentjens*'. It submits that that case-law is directly relevant for the interpretation of the corresponding provisions of the EEA Agreement.

223. The EFTA Surveillance Authority points out that the HTA was concluded in the form of a collective agreement, and is the result of collective bargaining between organisations representing employers and employees. It establishes the right to supplementary pension benefits, and the pension scheme must satisfy a number of requirements aimed at securing the employees a certain level of pension. The provisions are aimed at improving employees' working conditions, namely, remuneration. According to *Albany* and related cases, such provisions fall outside the scope of the competition rules.

224. As regards the HTA provisions (clause 2.1.8) concerning the procedure and approval for change of company/pension institution, and the intercession of the Norwegian Public Service Pension Fund and the Banking, Insurance and Securities Commission, the EFTA Surveillance Authority submits that it appears that, by their nature and purpose, such provisions seek to guarantee employees rights under the collective agreement, and thus fall outside the scope of Article 53 EEA.

225. With respect to the requirement under clause 2.1.8 that the pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees, the EFTA Surveillance Authority points out that the intention of the parties was to prevent municipal employers from having an economic incentive to recruit younger men ahead of older persons. Although the provision is not directly aimed at improving remuneration, its stated purpose is to prevent older, female workers from being excluded from participating in working life. In view of the EFTA Surveillance Authority, the provision may be said to improve conditions of work and employment.

226. Against this background, the EFTA Surveillance Authority submits that the nature and purpose of the HTA provisions on pension fall outside the scope of Article 53 EEA. Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second third and fourth paragraphs HTA, fall outside the scope of Article 53 EEA.

227. As to the issue of possible abuse of a dominant position, the EFTA Surveillance Authority submits, firstly, that it should be reasonably clear that KLP is to be considered as an "undertaking" within the meaning of Article 54 EEA. Moreover, there cannot be any reasonable doubt that KLP has a dominant position within the relevant product and geographic market. However, two further conditions must be fulfilled for a finding of infringement of Article 54 EEA. Firstly, the undertaking must have abused its dominant position, and, secondly, the abuse must have the potential to affect trade between the Contracting Parties. The EFTA Surveillance Authority is of the view that the facts presented in the case do not permit any conclusion as to whether this last condition is fulfilled.

228. The EFTA Surveillance Authority contends that the provisions in clause 2.1.8 may have the effect of tying the municipalities to one company which has a dominant position. This may constitute abuse under Article 54 EEA, if the tying goes further than what is necessary to attain the purpose of the provisions. However, the Request does not contain a sufficient factual basis on which to make such an assessment. Therefore, the national court must make the necessary findings of fact.

229. The EFTA Surveillance Authority submits that the questions should be answered as follows:

*“Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third, and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall outside the scope of Article 53 of the EEA Agreement.*

*Such provisions may have the effect of tying the municipalities to one company which has a dominant position. If the tying goes beyond what is necessary for the provisions to attain their purpose, and are otherwise not justifiable, there may be an abuse under Article 54 of the EEA Agreement. It is for the national court to make the necessary factual findings.”*

### **Commission of the European Communities**

230. The Commission of the European Communities suggests that the Court should first examine question 3, and refers to the case-law of the Court of Justice of the European Communities, in which it has been held that agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC. This approach of the Court of Justice of the European Communities is founded on the commitments in the EC Treaty to both a policy of undistorted competition and a policy in the social sphere. The former is expressed by the terms of Article 81(1) and (2) EC, as well as by the description of activities of the Community in Article 3(1)(g) EC. The social policy, on the other hand, is provided for in general terms by the references in Article 2 and Article 3(1)(j) EC.

231. The Commission of the European Communities observes that the terms of Article 81 EC and Article 53 EEA are identical. Whilst the social policy provisions of the EEA Agreement are less extensive than their EC Treaty counterparts, the Contracting Parties’ intentions in the area are reflected in the preamble, Articles 1(2), 66, and 71 EEA. The Commission submits that the social policy objectives of the EEA Agreement would be seriously undermined if Article 53 EEA were not construed by reference to the provisions of the EEA Agreement as a whole. This would entail construing Article 53(1) in line with the

interpretation of Article 81(1) EC given by the Court of Justice of the European Communities in *Albany* and related cases.

232. The Commission of the European Communities points out that the facts of the present case differ from those of the *Albany* and related cases in a number of respects, but concludes that none of those differences should lead to a materially different outcome in the present case. As in the *Albany* cases, the HTA was concluded in the context of collective negotiations between, on the one hand, KS, representing the municipal employers, and, on the other hand, a number of employee organisations. Furthermore, by requiring the employers to establish supplementary occupational pension schemes, the HTA seeks generally to guarantee a certain level of pension for all workers in the municipal sector, *viz.*, at least 66% of their final salary, and therefore contributes directly to improving one of their working conditions, namely, their remuneration.

233. Once the general condition, *viz.*, that the contested provisions of a collective agreement are designed to improve conditions of work and employment, is met, the parties to that agreement must have reasonable freedom to provide in detail for the organisation of the pension schemes in question. The provisions should, therefore, be the subject of a general verification, as opposed to a detailed examination of individual provisions, having due regard to the autonomy of the social partners, to ensure that no implementing provision (that is potentially restrictive of competition) is inconsistent with, or unnecessary to, the pursuit of the overall objective of improving conditions of work and employment. This is a task for the national court, especially in the present case, because of the numerous uncertainties regarding the interpretation of the HTA. The Commission then offers some guidance as to how that analysis should be conducted.

234. The Commission of the European Communities points out, firstly, that the interpretation of clause 2.1.8, third paragraph, regarding a gender-neutral financing system, is a matter of dispute between KS and LO/NKF, on which the Commission cannot pronounce a view. It states merely that, whichever interpretation is adopted, the requirement of gender-neutral financing, combined with the requirement that the scheme does not have the effect of excluding workers, seems clearly to be designed to improve conditions of work and employment, by preventing employers from having an economic incentive to recruit younger men ahead of women and older persons, and thus equalising chances for all members of the workforce. The Commission further argues, with reference to the *Albany* line of cases that, even if the requirement of gender-neutral financing were, in practice, to confer an effective monopoly on KLP, this would not entail a more extensive restriction of competition than was at issue in the earlier case-law of the Court of Justice of the European Communities. Furthermore, it would not establish that the clause in question was unnecessary to or inconsistent with the social policy objective pursued, as it would be precisely the objective of ensuring gender equality in the workplace which had necessitated such a monopoly. Consequently, it argues, clause 2.1.8, third

paragraph HTA should be held to fall outside the scope of application of Article 53(1) EEA.

235. The Commission of the European Communities observes that clause 2.1.8, fourth paragraph, contains two material requirements. The first relates to a transfer agreement with the Norwegian Public Service Pension Fund, see clauses 2.1.5 and 2.1.6 HTA, whilst the second relates to the Banking, Insurance and Securities Commission's taking note of the scheme to which a municipality wishes to transfer its affiliation. As to the first requirement, the Commission notes that the purpose of such agreements is to ensure that employees who have been covered by several public pension schemes receive a pension as though they had always been covered by one and the same scheme. It is a condition designed to improve conditions of work and employment, as it aims at the protection of the continuously-accrued pension entitlements of employees who have worked for more than one public body during their careers. Similarly, the Commission takes the view that the second requirement aims at extending to the new scheme a condition already applicable, by virtue of clause 2.1.6 HTA, to the municipality's existing scheme. This contributes to the improvement of conditions of work and employment, as it reinforces the guarantee to workers that the benefits foreseen under the scheme will, in fact, be paid. The supervisory role of the Banking, Insurance and Securities Commission is also apparently consistent with this objective, as it provides an additional guarantee that the insurance offered for the pension benefits in question is adequate. Clause 2.1.8, paragraph 2, governs the procedure to be followed in order for a change of affiliation to take place. In the view of the Commission, it is quite logical, and consistent with the autonomy of the social partners in negotiating, concluding and applying collective agreements in respect of conditions of work and employment, that the parties should assume a role in supervising the execution of such agreements.

236. Referring to *Albany* and related cases, the Commission of the European Communities notes that it is permissible for a fund itself to decide upon exemptions, without the need for the power of exemption to necessarily be attributed to a separate body, provided that decisions on refusal are subject to judicial review, and provided of course that the fund, in this case those members of the Pension Committee representing the parties to the HTA, apply the substantive criteria of the HTA in a non-arbitrary manner. Therefore, in order to justify the exclusion of such provisions from the scope of application of Article 53(1) EEA, legal recourse must be possible against any alleged use by the parties to the HTA of their power to verify compliance with either the general requirements of clauses 2.1.1 to 2.1.7, or the specific requirements regarding a change of schemes in clause 2.1.8 for ends other than achievements of the social policy objectives inherent in those requirements. Thus, even if the parties were required to approve all schemes or changes of scheme by unanimity, and if the defendant municipalities were correct in positing a fundamental identity of interests between KS and KLP, thereby resulting in KLP having a veto over approval of the other schemes, the possibility of objective judicial review should prevent any restriction of competition within the scope of the prohibition in

Article 53(1) EEA. The Commission is of the view that the main proceedings before the national court suggest the existence of the necessary avenues of legal recourse.

237. In conclusion, the Commission of the European Communities proposes that the Court respond to the third question referred by the national court that the provisions of clause 2.1.8, second, third and fourth paragraphs HTA appear to fall outside the scope of application of Article 53(1) EEA. As a result, it is not necessary to answer questions 1 and 2, or questions 4 to 7; in any event, the latter questions have, to a considerable extent, already been addressed implicitly. The Commission adds, for the purposes of briefly responding to question 8, that it sees no reason why the combination of the provisions in question should fall within the scope of Article 53(1) EEA if the provisions do not do so individually. There is no apparent cumulative effect that might be inconsistent with or unnecessary to the pursuit of the social policy goal of chapter 2 of the HTA.

238. In relation to Article 54 EEA, the Commission proposes that the EFTA Court address question 10 first. If this question is answered in the affirmative, it will not be necessary to respond to question 9.

239. The Commission of the European Communities has argued earlier that the contested provisions of the HTA do not fall within the scope of application of Article 53(1) EEA, since they relate to the aim of improving of conditions of work and employment. However, if an undertaking which enjoyed a dominant position derived from a collective agreement were to engage in abuses that were unrelated to the pursuit of the social policy objectives of that agreement, it would remain subject to Article 82 EC and Article 54 EEA, as the case may be. In conclusion, the Commission submits that the Court should respond to the tenth question referred by the national court that the provisions of clause 2.1.8, second, third and fourth paragraphs HTA fall outside of the scope of application of Article 54 EEA.

Thór Vilhjálmsson  
Judge-Rapporteur