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OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

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Complaint against Norway concerning breaches of public procurement law in relation to contracts for pension services

1. Introduction

Reference is made to the Authority's letter of 7 October 2022 in which the Norwegian authorities were invited to comment on the complaint from Advokatfirmaet Mageli on behalf of Storebrand Livsforsikring AS ("Storebrand") of 17 October 2022.

The comments of the Norwegian authorities, coordinated and represented by the Ministry of Local Government and Regional Development, are set out below. The Ministry has not been able to involve all the potentially affected parties directly in the process due to the vast number of contracting authorities referred to by the complainant. This implies that it may be necessary to come back with further comments from potentially affected parties, who have not yet been involved in the procedure.

The complex nature of Storebrand's complaint has made it necessary to obtain detailed information from Kommunal Landspensjonskasse Gjensidig Forsikringsselskap (KLP). The Norwegian authorities would welcome the opportunity to elaborate on the below comments in a meeting with the Authority.

The subject-matter of Storebrand's complaint is Norwegian contracting authorities' compliance with the EEA public procurement rules in respect of contracts for public occupational pension schemes entered into with KLP. Which rules apply and the scope of such rules, has been a topic of debate for several years in Norway. The legal and factual complexity is illustrated by the voluminous scope of the complaint itself as well as this letter.

The Norwegian authorities welcome the opportunity to get clarifications from the Authority on the scope of the relevant requirements under EEA public procurement law. However, it is vital that such clarifications adequately consider the complexity of the underlying facts, the characteristics of the product in question – public occupational pension schemes – and the national legal regime that applies to such schemes. When applying the EEA public procurement rules in this context, due regard must be

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had not only to the written provisions but also to the fundamental objectives that these rules are meant to achieve.

Please note that appendix 1 contains confidential information that should not be made public, cf. Freedom of Information Act section 13 cf. Public Administration Act section 13 number 2.

2. Overall comments to the complaint

First, the Norwegian authorities argue that contracts for public occupational pension schemes do not concern economic services for the purpose of the Directive 2014/24/EU (the "Directive"). The Norwegian authorities note in this respect that such contracts contain elements that resemble non-economic services of general interest. These issues are dealt with in section 8.2 below.

If the Authority should nevertheless conclude that contracts for public occupational pension schemes in Norway fall within the scope of the Directive, the Norwegian authorities raise the question whether such contracts involve providing a social or other specific service within the meaning of the Directive. The arguments in favour of applying these rules on the contracts in question are set out in section 8.4 below.

Second, the Norwegian authorities believe that it is important to take into account the close historical and structural links between KLP and its public owners. The Norwegian authorities emphasise that the very purpose of establishing KLP was for local and regional authorities to co-operate in fulfilling their public occupational pension obligations vis-à-vis their employees. This remains KLP's only objective and task, and the Norwegian authorities find that awarding contracts for public occupational pension schemes to KLP may hence be amongst the situations that fall outside the scope of the Directive pursuant to Article 12 (3) (direct awards to entities controlled jointly by contracting authorities). This is further explained in section 8.3 below.

If the Authority should conclude that contracts cannot be awarded to KLP in compliance with the Directive without a competitive tender process, the question arises as to how frequently such tenders must be conducted. In this respect the Norwegian authorities believe that a distinction must be made between contracts entered into before and after the entry into force of the EEA Agreement on 1 January 1994. For contracts entered into before 1994, the Norwegian authorities respectfully submit that no legal obligation exists under EEA law to conduct tenders. For contracts entered into after 1 January 1994, the Norwegian authorities believe that an obligation to initiate new tenders may be derived from the fundamental procurement principles of competition, equal treatment, and transparency. However, in deciding when and how contracts must be exposed to competition, each individual contract's nature, complexity and specificities, in addition to the contracting authority's needs and possibility to achieve better terms and conditions through competition must be taken into consideration. The arguments in this respect are set out in section 10.2 below.

When assessing all the above mentioned legal issues, the Authority should pay due consideration to the particular characteristics of contracts for public occupational pension schemes in Norway and the specific legal framework that applies to such contracts. The Norwegian authorities point to the considerable practical challenges and substantial costs that Norwegian contracting authorities would face if the arguments presented in the complaint were to prevail. Imposing an obligation on contracting authorities to regularly and frequently conduct tenders for public occupational pension schemes would imply unnecessary costs and losses for the contracting authority for no apparent gain. This should weigh in when determining the applicable legal principles and applying them to the matter at hand.

In the complaint, it is argued that all contracts between contracting authorities and public pension scheme managers have been substantially modified during the last decades. The alleged substantial modifications relate partly to amendments to the underlying legal framework for public pension schemes and partly to restructurings within central or local public administration, whereupon rights and obligations have been transferred from one administrative body to another.

In the view of the Norwegian authorities, it does not follow from the procurement principles concerning substantial modification of contracts that the consequence of these amendments and restructurings was that the contracting authorities were obliged to terminate their contracts for public pension schemes and conduct tenders. The rules concerning modification of public contracts must be interpreted and applied with due regard to the practical context in which they exist. It is the view of the Norwegian authorities that the doctrine of substantial modifications as set out in case law and in the Directive, does not apply to the examples presented in the complaint. The views of the Norwegian authorities are elaborated further in section 9.

In the following, the Norwegian authorities will explain the above considerations in further detail.

3. Overview of the Norwegian local government sector

Norway is divided into municipalities and county authorities with their own popularly elected leadership. Norway consists of 356 municipalities (“kommuner”) and 11 county authorities (“fylkeskommuner”). The smallest municipality has around two hundred inhabitants, while the biggest has more than 700 000. The municipalities vary between 6 and 9 700 square kilometres in size.

Each municipality and county authority is a separate legal entity and can make decisions on its own initiative and responsibility. The municipalities and the county authorities exercise their self-government within national frameworks. Limitations in the municipal and county authority self-government must be authorised by law.

The municipalities and county authorities fulfil four roles in the Norwegian society. First, they have a role as a public body exercising public powers. Linked to this role, they are obliged to provide statutory welfare and other services to its inhabitants. They can also take upon themselves to provide services in other fields such as culture and service industries and thus have role as a general service provider. The third role is to function as community and social developers. This role is conducted through long-term planning, investments in infrastructure, industrial and commercial development, and public health in the broadest interpretation. Finally, the municipalities have a role as a democratic arena.

The Local Government Act determines the ground rules for the organisation of the municipalities’ and county authorities’ work and proceedings, relationship with supervisory state bodies, etc. Overall, the regulations are the same for municipalities and county authorities. The Local Government Act does not regulate which duties are to be carried out locally. These questions are covered by separate laws.

The statutory distribution of responsibilities to county authorities and municipalities is based on the generalist local authority system (“generalistkommuneprinsippet”). This means that all municipalities are to perform the same services and are given most of the same rights and same responsibilities, regardless of size, location, or other factors. The same applies to county authorities. The various statutory responsibilities are divided between the two tiers. For instance, the county authorities are

responsible for upper secondary schools, county roads and public transport, regional planning and business development, culture and cultural heritage, whilst the municipalities are responsible for primary and lower secondary schools, primary healthcare, local planning, local roads, water supply, sanitation and harbours.

Furthermore, the county authorities and municipalities are, as a general rule, free to engage in activities they please as long as there is no statutory ban on these bodies performing the activity or the duty to provide the service is by law granted to a specific public body. The legal competence of the Norwegian municipalities is "negatively defined", meaning that the municipalities and the county authorities in Norway in principle can conduct any type of activity as part of their own organization, albeit within the framework of the Norwegian legislation.

Norwegian county authorities and municipalities are, as a main rule, free to organize their activities. This flexibility, based on the various sizes, topographies and locations of the municipalities, gives them the means to decide how to meet the publics need and various expectations at a local level. Consequently, they decide if activities should be organized within a legal person of a public body, in separate companies/entities, or in collaboration with other public bodies.

The local government sector is funded through tax revenues, grants (subsidies) from the state and user payments and fees from residents. Most of the revenue comes from tax revenues and the general grant from the state. These are "free" revenues, which the municipalities can dispose of freely within legal requirements for which services the municipalities are to provide. The free revenues make up just over 70 per cent of the local government sector's total revenues.

4. Overview of the Norwegian health care system

4.1. Patient rights and financing

The Norwegian health care system pursues a social objective. It is built on the principle of equal access to services for all inhabitants, regardless of their social or economic status and geographical location. This principle is enshrined in the Patients' and Users' Rights Act. [1] The patients are entitled to "necessary health and care services" from the municipal health and care service and the specialist health service.[2]

The health care provided is adapted to the individual's needs, in accordance with the requirements to professional responsibility and diligent care and based on the developments in technology and medical sciences. The responsibility for the provision and funding of health care is regulated by the Municipal Health and Care Act of 2011, the Specialist Care Act of 1999 and the National Insurance Act of 1997. For example, each resident is entitled to approved prescription drugs, preventive services, primary care, in particular by GPs, specialist ambulatory and hospital care, emergency care and nursing care.

The system is based on the principle of solidarity. Patients are entitled to receive these services for free, or subject to a very limited degree of cost-sharing. More than 85 % of the total health expenditure is

[1] Patients' and Users' Rights Act (pasient- og brukerrettighetsloven) Section 1-1.
[2] Patients' and Users' Rights Act (pasient- og brukerrettighetsloven) Sections 2-1 a and 2-1 b, Specialized Health Services Act (spesialisthelsetjenesteloven) Section 2-1 a and Health and Care Services Act (helse- og omsorgstjenesteloven) Sections 3-1 and 3-2.

funded by the general tax revenue system, comprising funding from the central and local governments and the National Insurance Scheme (NIS). GP and outpatient specialist visits require a contribution pr. visit, but these are flat-rate fees of negligible amount (i.e. NOK 400 per visit). Furthermore, these contributions are capped by low ceilings (approx. NOK 3000 pr year) beyond which services become entirely free. Hence, there is no direct link between contributions and benefits, and the same goes for disparities in risks and the benefits granted.

The vast majority of private health financing comes from households' out-of-pocket (OOP) payments. Outpatient pharmaceuticals and dental care attract the highest share of private financing. The role of (private) voluntary health insurance (VHI) in health care financing is negligible.

The provision of health care is strictly regulated and supervised by the State. It is predominantly regulated by law and entails statutory obligations on the public entities tasked with administering the system. The Ministry of Health and Care Services oversees further regulation as well as supervision of the system. Some of these tasks are delegated to subordinate agencies and fully owned regional health authorities (RHAs), yet they remain subject to control and supervision.

4.2. Organisation and legal framework

The health care system can be characterized as semi-decentralized, with responsibilities separated for specialist and primary health care. The responsibility for specialist care lies, since 2002, with the state – the owner of four regional health authorities (RHAs). Municipalities are responsible for primary care. The role of county authorities is limited to statutory dental care. The RHAs and the municipalities have a corresponding obligation to respectively ensure the provision of specialist services to everyone who resides in the region and primary services to everyone who resides in the municipality.

The Ministry of Health owns the RHAs, which are separate legal subjects, governed by independent boards. The activity of the RHAs is regulated in the Specialized Health Services Act, the Health Authorities and Health Trusts Act, and through the general meeting ("foretaksmøte") between the ministry and representatives of the RHAs. The ministry provides instructions to the four RHAs through an annual "letter of instruction", following the allocation of the annual national budget. The document contains tasks and specific requirements for the RHAs to follow.

Pursuant to the Specialized Health Services Act Section 2-1, "the State has the overall responsibility for the provision of necessary specialized health services to the population". This entails determining the overall health policy objectives, securing sufficient funding for the RHAs and supervise that they fulfil their duties. The RHAs are responsible for implementing the national health policy in the regions. The RHAs may not provide services themselves. They must either order their fully owned Public Health Trusts (independent legal entities owning hospitals, clinics etc.) to provide the services, or can enter into agreements with private providers, which provide the services on behalf of the authority. In 2016, the Public Health Trusts provided roughly 90 per cent of the services.

The Norwegian municipalities have a great deal of freedom in organising health services. There is no direct command and control line from central authorities to the municipalities (no right to direct instructions). The municipality may provide the services itself, or can enter into agreements with private providers, which provide the services on behalf of the municipality.

The main task of the central government is to assure the high quality of services across the municipalities through funding arrangements and legislation (i.e. the 2011 Municipal Health and Care Act).

5. Public occupational pension schemes

5.1. A part of the Norwegian pension system

The Authority has asked a number of questions to the Norwegian authorities based on Storebrand's complaint. In order to properly respond to these questions, the Norwegian authorities believe it is useful to, first, give an overview of the rules and principles of public occupational pension schemes in their proper context.

Three columns carry the overall pension system in Norway: (i) Social benefits from the Norwegian national social insurance scheme ("Folketrygden"), (ii) occupational pension schemes and (iii) individual pension savings. All citizens are eligible to social benefits from the national insurance scheme, which provides for a certain minimum level of pension benefits upon i.a. retirement and disability. Occupational pension benefits are afforded to employees and supplement the benefits from the insurance scheme.

It is mandatory for all employers in Norway to have an occupational pension scheme for their employees, cf. Act 21 December 2005 No 124 on Mandatory occupational pension. At the outset also public employers are covered by the Act. However, it follows from section 1 (3) of the Act that it does not apply to employers that have an occupational pension scheme in accordance with law or collective agreements for government or municipal employees. This exception applies to all government employees whose public occupational pension is regulated by the Act 28 July 1949 No 26 on the Norwegian Public Service Pension Fund ("lov om Statens Pensjonskasse"), and all nurses whose public occupational pension is regulated by Act 22 June 1962 No. 12 on pension scheme for nurses ("Sykepleierpensjonsloven"). Moreover, it applies to all employees of Norwegian municipalities ("kommuner"), counties ("fylkeskommuner"), Regional health authorities ("regionale helseforetak") and hospital trusts ("helseforetak") who are obliged to provide their employees with an occupational pension scheme pursuant to collective agreements.

> For municipalities and counties, Section 2-1 of the collective agreement "central general special agreement on pension schemes 2020" ("SGS 2020") provides that "*all employers shall have a pension scheme for its employees*". For the hospital doctors, Section 16 of the *Statutes* of the Regional health authorities (The RHFs) lays down a corresponding obligation in accordance with the relevant collective agreements.[3] The exception also applies to various statutory occupational pension schemes such as the Act 22 June 1962 No. 12 on pension scheme for nurses.

The reasons for exempting the public sector from the Mandatory Occupational Pension Act were explained as follows in the preparatory works, NOU 2005:15 Chapter 7.1.4:

> *"Public and municipal employers and undertakings will, almost without exception, have pension schemes that are better than pension schemes that meet the minimum standards that may be included in a scheme for compulsory occupational pensions. In relation to the new legislation on compulsory occupational pensions, there should therefore be no direct need for a special exemption for taxable public or municipal undertakings. Formally, however, there may be grounds for making exemptions for undertakings that have a pension scheme pursuant to law or collective bargaining agreements, see section 1, third paragraph of the draft bill."*

[3] The statutes of the RHFs are available at https://www.regjeringen.no/no/tema/helse-og-omsorg/sykehus/styringsdokumenter1/vedtekter-for-regionale-helseforetak/id461326/-

Hence, the reason public employers were exempted from the Mandatory Occupational Pension Act was that they were already obliged to establish occupational pension schemes with better pension benefits than the minimum standard imposed by the new Act.

The *type and level of benefits* under the *public* occupational pension schemes are largely identical regardless of whether the scheme is based on law or collective agreement.[4] The rules for central government employees are set out in the Norwegian Public Service Pension Fund Act ("lov om Statens Pensjonskasse") are more or less identical to those set out in the collective agreements in the municipal and county sectors. In addition, Regulation 22 April 1997 No 374 on pension schemes for municipal and county employees section 1 states that the benefit level from municipal and county occupational pension schemes must not surpass the benefits pursuant to the Norwegian Public Service Pension Fund Act. The identical nature and size of the benefits are illustrated by the fact that the Norwegian Public Service Pension Fund and other providers of public occupational pension schemes have entered into an agreement regarding transfer and coordination of pension rights in the public sector ("Overføringsavtalen").

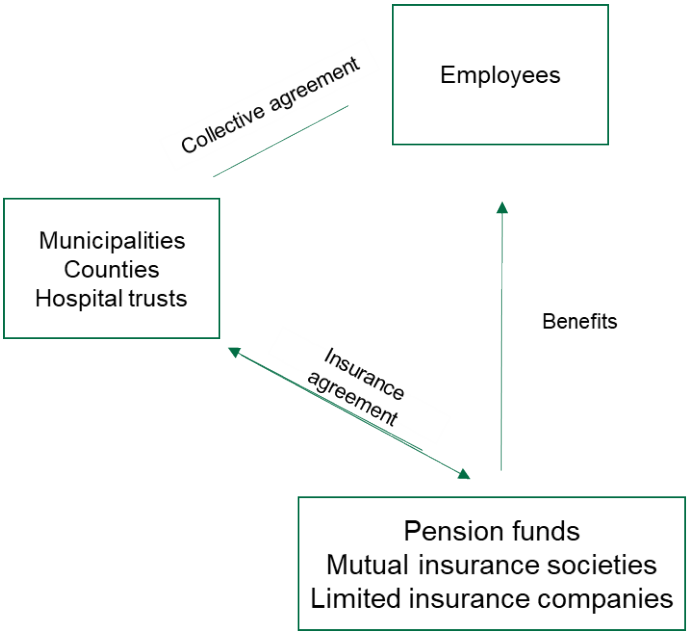
Taken together the above provides for a joint occupational pension scheme in the Norwegian public sector.

5.2. The product

A public occupational pension scheme is established by an agreement between a municipality, county authority or hospital trust and a pension scheme provider regarding a joint public occupational pension scheme for the contracting authorities' employees. The employees have directly enforceable rights towards the pension scheme provider, but are not parties to the agreement.

Illustration of the administration of public occupational pension schemes in Norway:

[4] Lov om Statens pensjonskasse sets out the rules for public servants, which is more or less identical to those set out in the collective agreements in the municipal and county sectors. In addition, Regulation 22 April 1997 No 374 on pension schemes for municipal and county employees section 1 states that the benefit level from municipal and county occupational pension schemes must not surpass the benefits pursuant to Lov om Statens pensjonskasse.



The public employer may terminate the agreement establishing the occupational pension scheme each year by giving two months prior notice. The pension scheme provider, on the other hand, may not terminate the agreement, cf. Act 16 June 1989 No 69 on Insurance Contracts (Insurance Contracts Act) ("forsikringsavtaleloven") Section 12-4.

The Norwegian public occupational pension scheme is so-called "benefit-based", and not based on a defined contribution. This entails that the level of benefits that the employees are entitled to under the scheme is determined by law and collective agreements. The premiums from the employers are calculated accordingly, to ensure the determined benefit level.

In contrast, most private occupational pension schemes are organized as defined contribution schemes, where the level of benefits to each employee will depend on the sum of contributions paid from the employer and each employee and the returns achieved by managing these funds. The employees hence carry the financial risk of the managing of the funds contributed under the scheme.

> The defined benefits in the public occupational pension schemes consist of old age-pension, disability pension, and survivor's pension. The pension is calculated based on the salary of the employee, limited upwards to 12 "G" (i.e. 12 times the basic amount of the National Insurance scheme, around NOK 1,3 million), and the number of years the employee has been a member of the scheme. For retirement pension there is a distinction between people born in 1962 or before and those born after. Previously, the employees were entitled to a lifelong retirement pension which together with old-age pension from the national insurance (the basic scheme) amounts to ca 66 per cent of final salary. Now the scheme is essentially a top-up scheme whereupon the occupational retirement pension benefit is calculated independently of and comes in addition to the old-age pension from the National Insurance (basic scheme). The overall level of the retirement pensions under the current scheme are intended to be approximately of the same size as under the previous scheme, and is also a lifelong benefit. Under both schemes the size of the benefits do not depend on the actual contributions paid or the management of these contributions.

The public occupational schemes are *managed* in different ways.

The pension scheme for government employees is managed by the Public Service Pension Fund.[5] This also applies to the statutory pension scheme for apothecaries.[6] The statutory pension scheme for nurses is, pursuant to a Royal decree 22 June 1962 managed by KLP.

As for the pension schemes in the municipal and county sector, as well as the pension scheme for hospital doctors, there are no provisions in law or collective agreements that determine the identity of the manager of the pension scheme. However, the SGS 2020, as its predecessors, provides that all public occupational pension scheme benefits must be insured, i.e. covered by an insurance company or a pension fund. It follows from the same provision that if the public employer (municipality, county authority etc.) does not have full insurance cover for the pension obligations, the individual employer (municipality, county authority etc.) is still responsible for the benefits vis-à-vis the employees.

Consequently, the pension obligations in the collective agreements and legislation entail substantial financial pension obligations on Norwegian municipalities, county authorities, hospital trusts etc. Moreover, these obligations are necessarily of a significant duration, as the pension rights of the employees by their very nature are life-long. Hence, it is of utmost importance to the public employers to ensure that these obligations can be fulfilled in a secure manner throughout the duration of the pension scheme, and at the same time at the lowest possible overall cost.

In the municipal, county authority and health sector, full insurance cover is obtained through fund investments. The pension scheme provider, regardless of being a pension fund or an insurance company, invests the employers' contributions in equity funds, interest funds and other financial instruments and other assets, which must correspond to the total amount of pension obligations under the scheme(s) in question. As we will revert to in section 6.3 below, these invested funds belong to the public employers (not the pension scheme provider, *e.g.* the insurance company) and must be kept separate from the pension scheme provider's own financial means. Consequently, returns on the investments accrue to the employers' funds and co-finance the employers' contributions to the pension scheme. Public occupational pension schemes thus contain a significant element of ordinary capital investments or savings.

The Pension Office ("Pensjonskontoret") supervises the pension scheme providers' administration of the public occupational pension schemes and ensures that the employees' rights and obligations embodied in the applicable collective agreements are fulfilled. In addition, the Pension Office works as an advisory body to its members. Each year, it publishes the Pension Guide ("Pensjonsveilederen") to provide guidance on various topics related to the current public occupational pension scheme.

5.3. Public occupational pension scheme managers

Pursuant to section 7-2 (1) and (3) of the Act on financial institutions and financial groups ("Financial Institutions Act"), there are three alternative organizational forms under which entities can provide insured public occupational pension schemes: (i) Public limited company (such as Storebrand), (ii) Pension fund ("pensjonskasse") or (iii) Mutual insurance societies (such as KLP).

The product "public occupational pension scheme" is, regardless of the pension scheme provider's organizational form, the same, and that is full insurance cover of the employers' pension obligations. However, these organizational forms have certain characteristics that affect the level of the public

[5] Act 28 July 1949 No 26 on the Public Service Pension Fund (Lov om Statens pensjonskasse),
[6] Act 26 June 1953 No. 11 on pension scheme for apothecaries.

employers' obligations to pay premiums and to contribute capital to the entity administrating the pension scheme.

The purpose of a limited company is to create profit for the shareholders, and the risk of the equity lies with the shareholders. Hence, the premiums will necessarily need to include a profit element to account for the shareholders' requirement for an adequate return on their investment.

A pension fund is ownerless and usually closed for other members than the founder. The only purpose of a pension fund is to manage the founder's pension obligations. The risk of the equity lies with the founder.

A mutual insurance society has similarities with a pension fund in that the members are both (the only) customers and (the only) owners of the company. The main difference is that a mutual society, as opposed to a closed pension fund, is open for new members who will then become customers and co-owners of the mutual society. As the owners are also the only customers of the mutual society, the purpose is not to generate profit on premiums. On the contrary, the sole purpose of a mutual society is to fulfil the obligations of its members at the lowest possible overall cost.

Because the customers are also the owners of the company, the employer must make a capital contribution when establishing a public occupational pension scheme with a mutual insurance society.

6. The overall legal framework for insured public occupational pension schemes

6.1. Overview

In the following sections, a brief account will be given of the overall legal framework for insured public occupational pension schemes. The Norwegian authorities believe that this will improve the understanding of the factual and legal framework that applies to the pension scheme providers' business and that they must comply with in their business decisions.

There are largely two legal instruments that govern the pension scheme providers and their insurance activities: (i) Act 10 April 2015 No 17 on financial institutions and financial groups (the Financial Institutions Act) ("finansforetaksloven") and (ii) Act 6 June 2005 No 44 on Insurance Activities (Insurance Activities Act) ("forsikringsvirksomhetsloven").

While the Insurance Activities Act mainly govern *insurance activities,* the Financial Institutions Act governs, among other things, institutional rules on licensing, general rules on insurance activities, as well as solvency and capital requirements.

The regulation of insured public pension schemes in these acts applies to all providers of public occupational pension schemes (i.e. pension funds, mutual societies, and (public) limited companies). Overall, the regulation is the same for the different providers, but with exceptions that accommodate for the differences in organizational form.

6.2. Calculation of premiums

The calculation of premiums for insured public occupational pension schemes is strictly regulated in Chapter 3 and 4 of the Insurance Activities Act and its regulations.[7]

Generally, all premiums collected must be in accordance with premium tariffs for which there is a mandatory reporting obligation to the Norwegian Financial Supervisory Authority ("Finanstilsynet").[8] The

[7] Regulation on life insurance Chapter 2
[8] Insurance Activities Act § 3-7 and Regulation on life insurance § 2-9

premiums must be based on objective factors, be justifiable and cover the insurance obligations undertaken by the companies. Further, the premiums must be structured so that differential treatment between products, product combinations or customer groups does not occur.[9] All profit margins that are added on the premiums must be transparent in the reported premium tariffs.[10] It is not allowed to deviate from these premium tariffs in negotiations with individual customers.

Further, there are special requirements for the equalization of the premiums between the public employers in the "joint schemes" established by the relevant pension scheme provider.[11] In such joint schemes, the premium that the individual municipality must contribute is equalized based on principles that prevent the contribution from varying as a result of the gender, age, early or late retirement, time of death and size of salary of the employees included in the municipalities' pension schemes. This is a clear expression of the *solidarity aspect* of the management of occupational pension schemes, and may, historically, be ascribed to the mutual society KLP. KLP has offered its members equalized calculation of premiums since the establishment of the "joint scheme" for municipal employees in 1974, i.e. before this became mandatory. According to KLP, this was largely a result of KLP's members' wish to treat all members equally regardless of the composition of their employees.

The annual premiums of municipal occupational pension schemes are equal to the sum of an ordinary annual premium, an adjustment premium, and special single premiums for benefits that cannot be determined in advance.[12] The ordinary annual premium, adjustment premium and special single premiums for benefits that cannot be determined in advance cover the pension rights that the employees acquire throughout the year, i.e. the funds necessary to finance the public employer's obligations vis-à-vis its employees. In addition, the public employer must pay for "costs for services". Costs for services include, in short, costs for management of the assets and costs for administrative services.[13] In addition the public employer pays an interest rate guarantee premium.[14]

Consequently, with the exception of premiums for services and any profit margins added to the premiums, the ordinary annual premiums, adjustment premiums and special single premiums exclusively cover the insurance obligations the pension provider has undertaken towards the customers. This amounts to approximately 97 per cent of the total premiums collected for insured public occupational pension schemes, according to KLP. These premiums must be provided in order to secure the obligations (all the benefits according to SGS 2020) that the pension scheme provider has undertaken towards the customers and the beneficiaries.

Thus, according to KLP, only approximately 3 per cent of the annual premiums will vary (albeit only to a limited extent) between the different providers, based on the level of the costs on administration and asset management, interest rate guarantee premium and the level of profit margins. The scope of the price parameters that may be subject to genuine competition is thus highly limited.

An example of KLP's calculation of premiums for 2022 is attached.

Appendix 1: KLP's calculation of premiums for 2022

[9] Cf. in particular the Insurance Activities Act § 3-3 and regulation on life insurance. §§ 2-1 to 2-4
[10] Cf. Regulation on life insurance Section 2-9 second paragraph letter c
[11] Cf., amongst others, SGS 2020 § 12-2 etc. and the Insurance Activities Act § 4-6.
[12] Insurance Activities Act section 4-4 and 4-5
[13] Insurance Activities Act Section 3-3 second paragraph
[14] Insurance Activities Act Section 3-3 second paragraph

6.3. Distinction between assets of the customer and assets of the company

In 2008 the Insurance Activities Act established a clear distinction between assets of the customers, and the assets of the pension scheme manager.

The assets of the customers are assets dedicated to cover the public employees' pension benefits, and are managed in a separate "group portfolio". The assets in this portfolio stem from the various premiums collected from the public employers, with the exception of the premiums for services, interest rate guarantee premium and any profit-margin added on the premiums (as described in the foregoing section). The assets of the customers (the said premiums including return on the investments) constitute the customers' savings to meet future pension obligations and will hence be transferred in full if the customer decides to join a different pension scheme provider.

The management of the assets in the group portfolio may generate profits or losses. In the case of profits, the profits shall, after certain deductions, be allocated to the "premium fund" of the public employer.[15] This is a fund that the customers may use to cover future premium payments.[16] In case of losses, this is – at the outset – the pension scheme manager's risk, and must therefore, as a main rule, be financed with equity capital.

The assets of the pension provider are the pension provider's own capital base, which is managed in the "undertaking's portfolio".[17] The assets in this portfolio stem from either the profit margins that may be added on the various premiums, margins on premiums for services, interest rate guarantee premium, as well as profits from management of existing assets in the undertaking's portfolio.[18] In addition, the assets in the undertaking's portfolio may stem from any paid-in equity from the members/shareholders.

As with the group portfolio, the management of the assets in the undertaking's portfolio may generate profits. If positive, these will be allocated to the undertaking's portfolio itself, as opposed to the situation before 2008, where all profits where, as a main rule, supposed to be allocated to the insurance contracts. If negative (losses), this is the company's own risk and must, if necessary, be covered by equity contributions from the members/shareholders or increased profit margins on the premiums.

7. Development of market shares

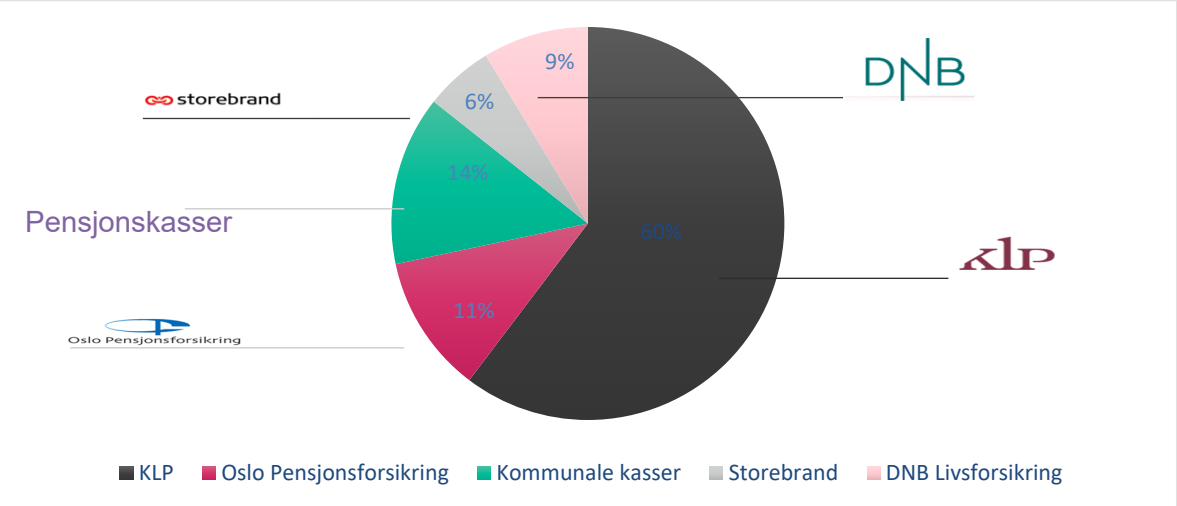
KLP has been in the market for insured public occupational pension schemes since the introduction of this product. According to KLP, it has never been the only alternative available to the customers. From time to time, limited life insurance companies, such as DNB, Vital or Storebrand, and its predecessor Norske Folk, have offered pension schemes to municipalities and public entities. In the periods where KLP has been the only insurance company offering public occupational pension schemes, the *pension funds* have still been present, constituting important benchmarks for KLP's efficiency.

At times, municipalities wish to transfer their public occupational pension scheme to a different provider. In this regard, the Insurance Activities Act lays down a flexible legal framework to accommodate for such transfer. The customers have a general right to transfer with a deadline of 2 months.[19] When transferring, all elements of the pension scheme, including obligations and assets, must be transferred from the

[15] Insurance Activities Act Section 3-13 second paragraph and Section 4-14 first paragraph
[16] Insurance Activities Act § 4-12, cf. Undertaking Pensions Act § 10-3.
[17] Insurance Activities Act section 3-11.
[18] Insurance Activities Act § 3-11 fifth paragraph, § 3-13 fourth paragraph and Ot .prp. nr. 74 (2003-2004) section 5.2.1. and section 5.2.3.
[19] cf. Sections 6-1 and 6-5 of the Insurance Activities Act.

existing provider to the new provider.[20] Assets are to be transferred in cash by realizing the necessary assets. Although the costs incurred by the pension providers when transferring schemes may be substantial, they are nevertheless not allowed to collect a transfer fee of more than NOK 5,000.[21]

After 2000, there was a growth of private life insurance companies in the market, and municipalities increasingly chose to conduct tenders to ensure the lowest possible administration costs. In the period from 2006 to 2012, each year around 10-15 municipalities conducted tenders. As of 31.12.2011 the market shares were as follows:



In 2012-2013, DNB and Storebrand decided to terminate their offering of insured public occupational pension schemes. The reasons for Storebrand's decision are set out in Storebrand's annual report for 2012.[22] Storebrand refers to lack of changes in the legal framework for public occupational pension schemes, investment costs and new capital requirements linked to products with interest guarantees. In short, the reason appears to be increased risks and costs, and slim prospects of financial profits.

Storebrand and DNB's exit left 93 municipalities and counties and a number of businesses without a pension scheme provider. Most of these transferred to KLP. In line with KLP's mutual character, the presence of a collective indivisible capital and the principle of being open to new members, KLP decided to accept all these municipalities as members, even though it entailed a significant increase in risk exposure.

Because of Storebrand's and DNB's exit, KLP was the only provider of insured public occupational pension schemes except for pension funds in the period from 2013-2019. In this period, no public tenders were conducted.[23]

When Storebrand re-entered the market in 2019, the tenders were again conducted.

[20] cf. Section 6-7 of the Insurance Activities Act. This includes funds corresponding to the pension scheme's premium reserve, premium fund and buffer fund. The existing supplier retains no obligations or funds linked to the pension scheme.
[21] cf. regulation on life insurance section 10-3
[22] Storebrand annual report 2012
[23] Pursuant to the public procurement rules, there is an exemption from the obligation to carry out competitions when there is only one undertaking active in the market.

8. Question 1: Whether there are any justifications for directly awarding contracts to KLP

8.1. Introduction

By its first question, the Authority has asked for the Norwegian authorities' opinion on whether there are any justifications for contracting authorities directly awarding contracts to KLP.

The rationale for the question appears to be the assumption that establishing public occupational pension schemes in Norway constitute public service contracts, to which the EEA rules on public procurement apply. As follows from the letter of 24 February 2012 (appendix 14 to the complaint), the Ministry of Reform, Administration and Church Affairs' at the time assumed that this was the case. However, in the light of developments in both case law and on the regulatory side, and having made a more thorough assessment of the question, the Norwegian authorities are uncertain whether the assessment of 2012 can be affirmed.

In the Norwegian authorities' view, several of the features and characteristics of the Norwegian public occupational pension scheme suggest that establishing such a pension scheme may not qualify as a public contract of works, supplies or services within the meaning of the Directive or its predecessors, i.a. because the contracts have significant elements of non-economic services.

Should the Authority conclude that the Directive nevertheless applies in the present case, the Norwegian authorities question whether establishing insured public occupational pension schemes may qualify as social and other specific services as listed in the Directive Annex XIV. If so, contracting authorities may award contracts establishing public occupational pension schemes directly to KLP, as long as the value is less than the threshold amount specified in the Directive Article 4(d).

In addition, the Norwegian authorities question whether direct award of contracts to KLP may be justified by the exclusion for public contracts between entities within the public sector embodied in Article 12 of the Directive. The Norwegian authorities note that it is not evident whether all the conditions in Article 12 are met as per today, but that certain structural adjustments to the organization of the public employers' ownership of KLP could affect this conclusion.

Irrespective of the Authority's conclusions on the above-mentioned issues, the Norwegian authorities' would like to point out that several of the municipalities, county authorities and hospitals that have their public occupational pension scheme in KLP today, established these schemes before the EEA Agreement entered into force 1 January 1994. Further, several of the municipalities and county authorities that have their public occupational pension scheme in KLP today established these schemes between 2012 and 2019, i.e. at a time when KLP was the only insurance company offering public occupational pension schemes to public employers in Norway. Awarding contracts to KLP directly under these circumstances appears to have been justified under the rules on public procurement in force at that time.

8.2. Applicability of Directive 2014/24

8.2.1. The Directive applies to public contracts of works, supplies and services

As set out in the preamble of the Directive section 4, the EEA rules on public procurement do not cover all forms of disbursement of public funds. The Directive only applies when the state, regional or local authorities, bodies governed by public law and other legally defined contracting authorities enter into public contracts of works, supplies or services for a value above the stipulated threshold amounts.[24]

[24] Directive 2014/24/EU Art. 1(1) and Art. 2(1) point (1)

A public contract is defined as a contract for pecuniary interests concluded in writing between one or more economic operators and one or more contracting authorities, having as its object the execution of works, the supply of products or the provision of services.[25] According to the European Court of Justice ("ECJ"), 'pecuniary interests' means that the contracting authority receives a service that is of direct economic benefit to that contracting authority in return for considerations. In addition, the contract must have a synallagmatic nature, which is an essential element of a public contract.[26]

A public service contract in the meaning of the Directive is defined as a public contract having as its object the provision of services other than works.[27] The term 'services' is not defined in the Directive or in its predecessors. However, as the Directive is designed to implement the provisions of freedom of establishment and freedom to provide services in the EEA Agreement, it is settled case-law that it must be interpreted in light of the concept of "services" in Article 37 EEA.[28]

'Services' for the purpose of the EEA Agreement are all activities provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement of goods, capital or persons.[29] The essential characteristic of remuneration in that context lies in the fact that it constitutes consideration for the service in question.[30] Provision of services that are regarded as non-economic activity are consequently not governed by Article 37 EEA or the Directive. This is also reflected in recital 6 of the preamble of the Directive, where it is clarified that "*non-economic services of general interest should not fall within the scope of this Directive*"

In case C-263/86, *Humbel,* ECJ held that the characteristic of remuneration is absent in the case of courses provided under the national education system. ECJ based its conclusion on the following reasons, as set out in section 18:

> *"That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents."*

The same reasoning was adopted by the EFTA Court in case E-13/19, *Hraðbraut,* when the EFTA Court ruled that contracts having as their object the provision of education under the Icelandic educational system did not constitute a public service contract within the meaning of the Directive:

> *"91 According to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered (see Private Barnehagers Landsforbund, cited above, paragraph 81 and case law cited).*
>
> *92 That characteristic is, however, absent in the case of education provided under a national education system in situations where the following two conditions are satisfied. First, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is*

[25] Directive 2014/24/EU Art. 2(1) No. 5
[26] C-796/18, *ISE,* section 40.
[27] Directive 2014/24/EU Art. 2 (1) point (8) and (9).
[28] E-13/19, *Hraðbraut,* section 90, C-436/20 ASADE par. 59.
[29] Article 37
[30] C-263/86, *Humbel,* section 17, C-76/05, *Schwarz,* section 38, E-5/07, *Private Barnehagers Landsforbund,* section 81 and E-13/19, *Hraðbraut,* section 90.

fulfilling its duties towards its own population in the social, cultural, and educational fields. Second, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents (compare the judgment in Humbel, cited above, paragraph 18). In this regard, it is not of significance whether that public funding is determined in an act of parliament or a decision of a minister adopted on the basis of domestic law and rules."

Consequently, according to the EFTA Court in *Hraðbraut,* the criteria developed by the ECJ in *Humbel* to draw the line between economic and non-economic services apply equally when the state uses a third party to provide the service in question on its behalf. The decisive factor still is whether the service in question (i) forms a part of a system in the educational, cultural or social field where the state is not seeking to engage in gainful activity, and (ii) is funded from the public purse. If those criteria are fulfilled, the characteristic of remuneration is not present and the activity in question may not be considered a 'service' within the meaning of the Treaty provisions.

8.2.2. Non-economic services of general interest

Applying the same line of reasoning as in *Humbel* and *Hraðbraut* to the case at hand may suggest that the management of public occupational pension schemes in Norway falls outside the scope of the directive as non-economic.

First, the Norwegian municipalities, county authorities, hospital trusts etc. enter into agreements with external pension scheme providers to fulfil their duties set out in law and collective agreements, not to engage in gainful activity. These pension benefits form an integral part of the social security system in Norway, which suggests that they should be regarded as "duties towards its own population in the social [...] fields", cf. Humbel section 18.

Second, the Norwegian public occupational pension scheme is funded by the municipalities, county authorities and hospital trusts through their contribution of ordinary annual premiums, adjustment premiums and special single premiums in accordance with the requirements set out in section 6 above. Albeit transferred to the pension provider, these premiums do not become the pension provider's assets. These premiums thus appear more like savings of public funds in order to finance the pension scheme rather than consideration for services provided by the pension provider.

This is not altered by the fact that up to two per cent of the employee's salary may be deducted as an employee contribution to the scheme. These contributions only constitute a fraction of the true costs of the pension benefits. They cannot be qualified as a quid pro quo vis-à-vis the pension benefits, but only as a contribution to a system which is predominantly funded by the public purse, cf. C-263/86, *Humbel,* section 19 and E-13/19, *Hraðbraut,* section 76.

Nevertheless, the Norwegian authorities note that the administration premium, capital management premium and interest rate guarantee premium constitute elements of consideration for the pension provider's management of the scheme. Even though these premiums only constitute approximately three per cent of the total amount of premiums paid to the pension provider, they may suggest that the Norwegian public occupational pension scheme is a contract for provision of 'services' for the purpose of the Directive.

Still, the Norwegian authorities are in doubt whether the Directive applies to agreements for Norwegian public occupational pension schemes entered into with KLP.

According to the Court's settled case law in the state aid sector, the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on *the principle of solidarity* and those activities are subject to *State supervision*.[31]

The Norwegian authorities are aware that the concept of "economic activities" under the state aid rules does not necessarily coincide with the same concept under the freedom of establishment and freedom to provide services. However, there is undeniably a clear conjunction between the two concepts. In this regard, it is of significance that both the ECJ and the EFTA Court draw upon case law on the concept of "undertaking" under the state aid rules, when establishing whether an activity constitutes "non-economic services" within the rules on free movement. Recently in C-436/20 *ASADE,* the ECJ considered whether the Spanish procurement of social welfare services by non-profit organisations fell outside the scope of the Public Procurement Directive as a non-economic activity. In section 64, the ECJ explicitly referred to case-law stating that "*the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on the principle of solidarity and those activities are subject to State supervision*".

The Norwegian authorities note in this respect that according to KLP the objective of their activities is not profit as such. The sole purpose of KLP within the area of public occupational pension is to fulfil the obligations of its members at the lowest possible overall cost. The solidarity aspect of KLP is further evidenced by the fact that KLP is an open mutual society which always has accepted new members on the same terms as existing members, even in times when this entailed overall financial obligations which had led other, private operators to cease providing such services.

The Norwegian authorities also note that the benefits provided under the public occupational pension schemes managed by KLP depend on the entitlements set out in law or collective agreements and are in this context independent of the contributions made, and not necessarily proportionate to the earnings of the person insured. The latter is e.g. demonstrated by the fact that there is a cap on the basis of calculation of pension ("pensjonsgrunnlaget") on 12 times the basis amount of the National Insurance Scheme (around NOK 1.3 million).

The Norwegian authorities further note that the solidarity aspect is evidenced through the mandatory *equalization of premiums*, under which all customers contribute with the same premium rates regardless of the gender, age, early or late retirement, time of death and size of salary of the employees included in the members' respective pension schemes.

Finally, KLP and its pension scheme are supervised by the State. The rules determining the amount of contributions paid to KLP are set out in law[32] and KLP is supervised by the Financial Supervisory Authority of Norway.

Considering the above, the Norwegian authorities question whether the Norwegian public occupational pension scheme, especially when entered into with KLP, constitute a *"non-economic service of general interest",* which falls outside the scope of the Directive, cf. recital 6 of the preamble to the Directive.

8.2.3. Capital investments

Irrespective of the above, the Norwegian authorities note that the Directive does not apply to contracts having as their object the purchasing of shares, bonds and other securities. Such contracts are not contracts for works, supplies or services, but constitute an exchange of capital or an investment.

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[31] C-262/18 P and C-271/18 P Commission and Slovak Republic v Dôvera zdravotná poist'ovňa par. 31.
[32] Lov om forsikringsvirksomhet (Insurance Act) of 10.102005 No 44.

As described above, approx. 97 per cent of the premiums paid by the public employers are invested in equity funds, interest funds and other securities by the pension scheme provider in order to fulfil its obligations towards the public entities and the members of the pension scheme.

As KLP is a mutual society, the public entities also must make an equity contribution and become co-owner of KLP. Establishing a public occupational pension scheme with KLP thus involves an investment by means of purchasing an ownership share in KLP.

Should the public occupational pension schemes in Norway established in KLP qualify as a transaction of capital, the Norwegian authorities believe that potential financial services provided in that connection will be excluded from the Directive pursuant to article 10(e):

> *"The Directive shall not apply to public service contracts for: (…)*
>
> *(e) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism"*

Consequently, provided that establishing a public occupational pension scheme in KLP (mainly) constitutes a capital transaction under the EEA Agreement, the Directive does not apply to the scheme.

8.3. Direct awards pursuant to Article 12 of the Directive

The Norwegian authorities believe that Article 12 of the Directive may be applicable to contracts for public occupational pension awarded directly to KLP by its owners, and welcome clarifications from the Authority on the interpretation of the requirements in said provision.

The background for the Norwegian authorities' position is related to the fact that both historically and presently KLP has been a vehicle established by public contracting authorities to serve their needs as regards public occupational pension services. KLP is, as a true mutual society, owned by its members and does not serve any other customers but its members. In the following the Norwegian authorities will explain the background and functioning of KLP vis-à-vis its members, to enable the Authority to assess the facts against the legal requirements in Article 12 of the Directive.

In the years after the Second World War, several the larger municipalities in Norway had organized their public occupational pension schemes in closed pension funds ("pensjonskasser"). However, due to the costs involved in setting up and managing such funds, this was not a feasible option for smaller municipalities, of which there were (and are) several hundred in Norway.

At that time, inter-municipal or otherwise open pension funds were not permitted under the applicable legal framework. Hence, the municipalities had to find a different structure to their potential co-operation. Following discussions amongst the municipalities on how to solve this challenge they eventually founded KLP as a mutual society on 15 February 1949. This was based on an overall consensus amongst the founding municipalities that their common public interests would be best served by organizing the fulfilment of their pension obligations in a mutual framework based on solidarity. This is still reflected in KLP's Articles of association, cf. Section 1-2:

> *"The object of the company is to safeguard the members' needs for occupational pension schemes".*

KLP's organisation is governed by the Articles of association of KLP. The purpose in the Articles of Association entails that KLP as such, i.e. the mutual society Kommunal Landspensjonskasse, is only involved in one activity, which is the provision of insured public occupational pension services for its members.

Appendix 2: Articles of Association - English translation 13 May 2022

Only members of KLP can have their pension schemes operated by KLP, and all those who have pension schemes in KLP automatically become members, cf. section 2.1 of the Articles of association:

§ 2-1 Membership

Members in KLP are those who have their pension scheme in the company.

Hence, in a mutual insurance society such as KLP, the "owners" and "customers" are the same entities, who constitute the mutual insurance society's *members*, cf. Section 7-8 of the Financial Institutions Act.

All capital built up through the operation of a mutual insurance society such as KLP is used for the benefit of existing and future members.

Already at the outset, the members agreed that KLP should be an open mutual society, meaning that it should be possible for other municipalities and public entities to join. Because of this principle, which can be regarded as a specific expression of the overall principle of solidarity on which KLP is based, KLP has over the years become the provider of public occupational pension schemes for a large number of Norwegian public entities.

Against this background the Norwegian authorities believe that it is fair to characterize KLP as in reality being an inter-municipal pension fund in the organizational form of a mutual society, as the former was not a legal option at the time of establishment.

That being the case, awarding contracts for public occupational pension schemes to KLP resembles the situations that fall outside the scope of the Directive pursuant to Article 12. Article 12(3) of the Directive states the following:

"A contracting authority (…) may nevertheless award a contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities."

At the outset, the Norwegian authorities believe that the requirement of joint control is met in the present case, cf. litra (a).

The main administrative bodies of KLP are the general meeting, the corporate meeting, the board of directors, the CEO and the election committee. The general meeting consists of KLP's members. The general meeting appoints the majority of the society's corporate assembly ("foretaksforsamling"), which in turn elects those board members who are not elected by the employees and/or labour unions. The majority of KLP's board of directors consists of representatives elected by the members.

Consequently, the decision-making bodies of KLP are composed of representatives of all participating contract authorities. These contracting authorities may jointly exert decisive influence of the strategic objectives and significant decisions of KLP through the elected board members. Finally, KLP does not pursue any interests which are contrary to those of the controlling contracting authorities; KLP's sole purpose is to provide public occupational pension schemes to its owners, i.e. the controlling contracting authorities, at the lowest possible cost.

Moreover, due to its sole purpose of providing public occupational pension schemes to its members, 100 % of the activities of KLP are carried out in the performance of tasks entrusted to it by the controlling contracting authorities, cf. litra (b).

What may give rise to doubts, is whether there is direct private capital participation in KLP within the meaning of Article 12 that renders the provision inapplicable in the present case.

As of 31 December 2021, KLP had the following members:

- 332 municipalities ("kommuner")
- 8 county authorities ("fylkeskommuner")
- 4 Regional health authorities ("Regionale helseforetak, RHF")
- 31 Hospital Trusts ("Helseforetak")
- About 2,200 "private members"

As for the "private members", these are essentially entities that in the past were part of the municipal legal entity, but later have been demerged as limited companies (still publicly owned), and/or various kinds of organizations with a close connection to municipalities. Such entities may establish municipal occupational pension schemes under section 4-1 c) of the Act 6 June 2005 No 44 on Insurance Activities (Insurance Activities Act) ("forsikringsvirksomhetsloven"):

Section 4-1 Scope

The provisions of this chapter apply to:

(a) pension schemes involving defined benefit pensions established in a life insurance undertaking or a pension fund by a municipal employer who is bound by a main collective bargaining agreement between the employer and worker organisations in the municipal sector, or by a collective bargaining agreement with corresponding pension scheme requirements for municipal employers,

(b) corresponding pension schemes for state health trusts and other state enterprises,

(c) corresponding pension schemes for undertakings in which a municipality has decisive influence or holds or has held a municipal ownership interest, or which are closely connected to a municipality.

Given the requirement of a close connection with a municipality (through ownership, funding or other) and the nature of the "private members" in question, the Norwegian authorities are uncertain as to whether their presence amongst KLP's members render Article 12(3) inapplicable as basis for direct awards to KLP. As far as the Norwegian authorities have been able to verify, the "private members" within the municipal pension schemes that are not publicly owned, are various non-profit organizations, trade unions, political parties, church entities etc.[33]

The Norwegian authorities have also been made aware that most of the "private members" in KLP remain members for historical reasons. Many of them have closed their public occupational pension scheme for new (and in many cases also for existing) employees. However, they still have to fulfil their obligations towards existing or former employees with public pension entitlements. KLP is prohibited by law from unilaterally terminating its agreements with their members, cf. Insurance Contracts Act Section 12-4.

Taking the private members' particular character and close connection to the public sector into account, the Norwegian authorities question whether these represent "private capital participation" within the meaning of Article 12(3) of the Directive.

In any event, the Norwegian authorities believe that it may be appropriate to consider the capital participation of the "private members" as being required by national legislative provisions, in conformity with the Treaties. As mentioned above, neither the collective agreements nor the Norwegian Insurance Activities Act allow for KLP (or other pension providers) to unilaterally terminate contracts for public occupational pension schemes.

Based on the above, the Norwegian authorities welcome clarification from the Authority on the applicability of the joint control exemption provided for in Article 12(3) of the Directive on the case at hand.

For the Authority's information, the "private members" have (as per 31 December 2022) a share of the total premium reserve in KLP of approximately 11 per cent.[34] Their share of the paid-in equity in KLP amounts to 10%. Hence, they are in any event non-controlling and non-blocking forms of private capital participation, which do not exert a decisive influence on KLP, cf. Article 12(3) point (c).

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[33] In addition, a number of private undertakings have nurses employed for whom membership in the pension scheme for nurses is mandatory under statutory law. As explained above, the pension scheme for nurses is administrated by KLP pursuant to a Royal decree from 1962.

[34] In the Ministry's letter to the Authority of 7 March 2023 regarding Storebrand's complaint under the state aid rules, this figure was stated to be 14%. The new figure is based on an updated calculation from KLP using newer and more comprehensive data. The figure is based on customers with active and/or closed schemes who pay premiums to KLP. It includes customers with mandatory membership in the pension scheme for nurses.

8.4. Social or other specific service for the purpose of the Directive

8.4.1. Social and other specific services are only subject the Directive's light regime

The Norwegian authorities note that the Directive distinguishes between public service contracts for ordinary services and 'public service contracts for social and other specific services. This has several implications for the scope of the procedural obligations under the Directive.

First, the threshold amounts in Article 4 are different. The Directive applies to 'public service contracts for ordinary services awarded by other than central government authorities with a value of EUR 134 000 excl. VAT.[35] 'Public service contract for social and other specific services' are, on the other hand, only subject to the Directive if its value exceeds EUR 750 000 excl. VAT.[36]

Second, contracting authorities' awards of 'public service contract for social and other specific services' are only subject to provisions in title III, Chapter I of the Directive. According to recital 114 of the preamble, this 'light regime' is established because the services in question, by their very nature, have limited cross-border potential.

In short, the Directive's 'light regime' entails an obligation on the Member States to observe the basic principles of transparency and equal treatment. This involves implementing an obligation for contracting authorities to publish notices[37] and to ensure that contracting authorities comply with the principle of transparency and equal treatment of economic operators.[38] Within these boundaries, the Member States are given a relatively wide discretion when it comes to determining the specific procedural rules to be applied when awarding public service contracts for social and other special services.[39]

The Norwegian authorities note that Article 76(1) requires that the procedural rules *"allow contracting authorities to take into account the specificities of the services in question".* The objective is to make sure that contracting authorities are able to apply specific qualitative criteria for the choice of the service provider, including the need to ensure *continuity.*[40]

Annex XIV of the Directive defines which services that qualify as social and other specific services within the meaning of the Directive.[41] In the third and fourth column of the Annex, *"compulsory social security services"* and *"benefit services"* are listed. The wording of the Annex thus suggests that a public contract having as its object the provision of services included in the relevant Member State's social security and welfare system only is subject to the Directive's 'light regime'.

The Norwegian authorities find that this understanding is supported by the preamble and the underlying considerations justifying the light regime. By their very nature, provision of services included in a Member State's social security and welfare system have a limited cross-border dimension, if any, as they are usually distinct for each Member State.

In addition to the above-mentioned service descriptions, Annex XIV lists CPV code 75300000-9 and 75320000-5. The CPV codes refer to the single classification system for public procurement adopted by Regulation (EC) No 213/2008. Code 75300000-9 indicates the main group of the services in question, while code 75320000-5 is a subcategory of the main group of services.

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[35] Article 4 point (c)
[36] Article 4 point (d)
[37] Article 75
[38] Article 76
[39] Article 76(1). See also the preamble section 114.
[40] Preamble section 114. See also Article 76(2).
[41] Article 4(d) and Article 74.

Regulation (EC) No 213/2008 establishes that code 75300000-9 covers compulsory social security services in general, while 75320000-5 covers provision of *"[g]overnment employee pension schemes"* specifically. Considering that the description of 75320000-5 does not specify which level of governmental administration the code applies to, the wording seems to suggest that all public employee pension schemes are covered.

The Norwegian authorities note in this respect that the Directive, in other contexts, draws a clear line between 'central contracting authorities' and 'sub-central contracting authorities', and also distinguishes between state, regional and local authorities.[42] The absence of such distinction in the description of code 75320000-5 in Regulation (EC) No 213/2008 suggests that no such distinction is intended with respect to the CPV code in question.

This interpretation of CPV code 75320000-5 is also supported by the Danish version of Regulation (EC) No 213/2008, which only refers to 'public employee pension schemes' (*Danish: Pensionsordninger for offentligt ansatte*).

Furthermore, a distinction between central government employee pension schemes and sub-central government employee pension schemes is not supported by the objectives of the Directive's light regime. Sub-central government employee pension schemes are also provided within a particular context that varies widely amongst Member States, due to different cultural traditions. Hence, the cross-border dimension is just as limited in sub-central government employee pension schemes as in central government employee pension schemes. The underlying considerations behind the light regime do not seem to justify a distinction between public employee pension schemes depending on whether they relate to central, regional or local administrative employees.

The explanatory notes for the CPV codes describe the services embodied in code 75320000-5 further:

> *"**Group 753: Compulsory social security services***
>
> *Class 7532: Government employee pension schemes*
>
> *This class includes:*
>
> *- Public administration services for government employee pension schemes*
>
> *- Administrative and operational services for retirement, pension and disability plans for government employees and their survivors, including government social assistance schemes to compensate for permanent loss of income due to partial or full disablement"*

Accordingly, provision of administrative and operational services for retirement, pension and disability plans for public employees are social and other specific services within the meaning of the Directive.

8.4.2. Whether Norwegian public occupational pension schemes involve providing a social or other specific service within the meaning of the Directive

As described under section 5.1 above, public occupational pension schemes form an integral part of the social security system in Norway and are compulsory by law and/or collective agreements. The Norwegian authorities recall that the public occupational pension schemes involve provision of old-age pension as well as disability and survivor's pension. These are traditional branches of social security that must be regarded as exclusively social.

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[42] Article 2(1) point 1 and 2.

Consequently, the wording of both Annex XIV of the Directive and the description of CPV 75320000-5 in Regulation (EC) No 213/2008 suggest that the Norwegian public occupational pension schemes involve providing a social or other specific service within the meaning of the Directive.

The Norwegian authorities believe that the explanatory notes support this assessment. The pension provider provides administrative and operational services for retirement, pension and disability plans for government employees. According to the explanatory notes, these services are included in CPV 75320000-5 and thus qualify as social and other specific services within the meaning of the Directive.

The fact that the pension scheme, for other employees than hospital nurses, is compulsory by collective agreements rather than law does not alter this conclusion. As described above, public employers were not included in the Mandatory Occupational Pension Act because they already had pension schemes with better benefits that the minimums standard imposed by the act pursuant to law and collective agreements. In addition, as shown in section 9.4 below, the benefits under the collective agreements are intended to correspond to those provided by the Norwegian Public Service Pension Fund for central government employees pursuant to the Public Service Pension Fund Act.

The Norwegian authorities believe that the above-mentioned conclusion should not be altered by the fact that the Norwegian public occupational pension scheme is referred to as an *insured scheme,* provided by an insurance company. We note in this respect that the Swedish version of Regulation (EC) No 213/2008 refers to CPV 75320000-5 as provision of "pension insurance" (*Swedish: Pensionsförsäkring för statstjänstermän).*

The characteristics of the Norwegian public occupational pension scheme further supports that the scheme qualifies as a social and specific service within the meaning of the Directive. The pension scheme is distinct for Norway and has, by its very nature, a limited cross-border dimension, if any. As far as the Norwegian authorities are aware, this is also the situation across the EEA. Presumably, this explains the low number of formal announcements for tenders within this area amongst EU and EFTA member states.

Based on the above considerations, the Norwegian authorities believe that the Authority should recognize that Norway has a wide discretion to organise the selection of the pension provider in the way the authorities consider most appropriate, as prescribed in the recital 114, third paragraph of the preamble to the Directive.

8.4.3. Direct awards of contracts for social and other specific services

Article 4 litra (d) of the Directive sets the threshold amount to EUR 750 000 for public contracts for social and other specific services. Consequently, contracting authorities may award contracts of a value under this threshold directly to KLP (or other pension providers).

The methods for calculating the estimated value of a public contract are set out in Article 5. Section 1 states the following:

> *"The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents."*

For financial services, point 13 specifies the following:

> *"With regard to public service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:*

(a) insurance services: the premiums payable and other forms for remuneration;
(b) banking and other financial services: the fees, commissions payable, interest and other forms of remuneration;
(c) design contracts: fees, commissions payable and other forms of remuneration."

The value of Norwegian public occupational pension schemes shall thus be estimated on the basis of the total amount of premiums and other forms for remuneration for the services provided under the scheme. Other forms of monetary transfers, on the other hand, shall not be included in the calculation, cf. *"the premiums payable and other forms for remuneration"* for insurance services and the fact that only fees etc. are included for banking services (not deposits).

The Norwegian authorities note that the premium elements administration premium, capital management premium and interest rate guarantee premium represent proper remuneration to the pension provider. Together, these elements form the consideration that the pension provider receives in return for the services provided. These premiums must thus be included when calculating the value of the Norwegian public occupational pension scheme.

On the other hand, the ordinary annual premiums, adjustment premiums and special single premiums for benefits that cannot be determined in advance, do not represent remuneration as such to the pension provider. The pension scheme provider may not use these funds, or the returns on these funds, to finance its operations, including the administration of the pension scheme. As explained above in section 6.3, the funds have to be kept separate from the pension scheme provider's assets and separate from the pension scheme provider's assets and constitute the contracting authorities' savings to meet future pension obligations, not remuneration for the services provided. Upon transfer to a different pension provider, or if the contract is terminated for other reasons, these "assets of the customer" (the paid-in premium amounts and return on investments) are paid out in full to the contracting authority. Hence, although referred to as "premiums", the Norwegian authorities believe that these elements should not be included when calculating the contract value.

The Norwegian authorities have noted the ECJ's conclusion in case C-271/08, *Commission v. Germany*. In that case, the ECJ assessed whether Directive 2004/18 applied to a German public occupational pension scheme, which involved conversion of the employees' salary to pension benefits of future value. The Court stated that all premiums payable had to be taken into account when estimating the value of the contracts in question. In that case that included the amount paid in the context of salary conversion because *"[t]hose premiums constitute, in the present instance, the principal consideration for the services provided by the body or undertaking concerned to the local authority employer in the context of the provision of those benefits."*[43]

As explained above, that is not the case with respect to the Norwegian public occupational pension schemes. In Norway, there is a clear distinction between the assets of the customer and the assets of the pension provider. The German scheme did not seem to operate with such a distinction. Although the converted salary would finance the future pension benefits, the pension provider seemed to be free to dispose of those premiums. That is not comparable the legal regime in Norway with respect to public occupational pension schemes. The ordinary annual premiums, adjustment premiums and the special single premiums in the Norwegian scheme simply do not constitute the consideration for the services provided to the contracting authority. Rather, they are the public employer's capital which the pension

[43] Section 87

provider is set to manage on behalf of the employer and thus, comparable to a bank deposit or funds managed by an investment manager.

It is also noted that the methods for calculating the contracts estimated value addressed in Article 5 point 13(a) of the Directive, only applies *where appropriate*. The Norwegian authorities respectfully submit that the method adopted for the German scheme in C-271/08, *Commission v. Germany* is not appropriate for the Norwegian public occupational pension scheme.

Consequently, the Norwegian authorities find that only the fees that properly constitute remuneration should be included when calculating the contracts estimated value, which are the administration premium, capital management premium and interest rate guarantee premium.

Based on the above, contracting authorities may under EEA law directly award public occupational pension scheme contracts with an estimated value of less than EUR 750 000 to KLP, without any further justifications.

8.5. Alleged illegal direct award of contracts to KLP

The complaint states that *"several contracts on [public occupational pension schemes] have been entered into directly between the municipalities, RHFs and hospitals and KLP, in breach of the rules on public procurement".*

As far as the Norwegian authorities are aware, none of the existing contracts on public occupational pension schemes entered into between contracting authorities and KLP have been awarded in violation of the public procurement rules applicable at the time.

First, the Norwegian authorities note that most of KLP's present members established their public occupational pension scheme with KLP prior to the entry into force of the EEA Agreement 1 January 1994. The Norwegian authorities submit that, in accordance with the fundamental principle of legal certainty, EU public procurement rules cannot be applied retroactively on these contracts.[44] Direct award of contracts to KLP before 1994 do not constitute a breach of the public procurements rules under the EEA Agreement.

Second, the Norwegian authorities recall that both Storebrand and DNB withdrew from the market in 2012. They announced that they would not take on new customers in this area. The municipalities therefore had to find a new pension scheme provider. Most of these transferred to KLP, who was the only supplier of Norwegian public occupational pension scheme at that time. This remained so until Storebrand re-entered the market in 2019.

As described above, to the Norwegian authorities' knowledge the Norwegian Financial Supervisory Authority ("Finanstilsynet") did not receive any notices or applications from foreign insurance undertakings who had expressed an interest to provide public occupational pension schemes in Norway during that time (or at any other time). KLP was thus not only the sole supplier of Norwegian public occupational pension scheme in Norway, it was also the sole supplier within the EEA.

Consequently, competition was absent for technical reasons between 2012 and 2019. This was also assumed by “KS Advokatene” in their letter to the Pension Office's Pension Guide of 2013 and 2014, and practiced accordingly by the municipalities and counties.

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[44] See to this effect C-98/79, *Racke* paragraph 20, C-368/89, *Crispoltoni* paragraph 17, C-76/97, *Tögel* paragraph 52 and C-376/02, *Goed Wonen* paragraph 33

Both the Directive and its predecessor, Directive 2004/18, exempt contracting authorities from giving notice of its intention to conclude a public contract in such situations.[45] These exemptions must apply also to social and other specific services.

Article 32(2) litra (b)(ii) of the Directive states the following:

> *"The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: (…)*
>
> *(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (…)*
>
> *(ii) competition is absent for technical reasons;*
>
> *(…)*
>
> *The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement (…)"* (our underlining)

The term *technical reasons* refers to situations where only one tenderer in the marked is able to meet the requirements in the procurement documents. The preamble of the Directive section 50 addresses the scope of exemption further, which reads as follows:

> *"In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure."* (our underlining)

The objective of the provision is thus to avoid unnecessary formalism and spill of resources where the result of a competitive procedure already from the outset is given because only one economic operator will participate in the procedure. This is in line with the Directive's overriding objective to ensure the most efficient use of public funds, as discussed in the preamble section 2.

Following the withdrawal of Storebrand and DNB, KLP was the only provider of Norwegian public occupational pension scheme in the EEA until 2019.

We also point out that several contracting authorities did thorough market assessments and published voluntary ex ante transparency notices prior to awarding public occupational pension scheme contracts directly to KLP during this period, as further described in section 11 below. Neither national nor international economic operators challenged any of these voluntary ex ante transparency notices.

[45] Article 32(2) point (b) of the Directive and Article 31(1) point (b) of the Directive 2004/18

Further, it is evident that the contracting authorities in question did not have any reasonable alternatives or substitutes. The Norwegian public occupational scheme is compulsory, and the requirements are set out in detail by law and collective agreements.

Consequently, contracting authorities' direct award of contract on public occupational pension scheme to KLP during 2012 to 2019 was justified pursuant to directive 2004/18 Article 31 and the Directive Article 32.

9. Question 2-5: Alleged changes made to the pension scheme

9.1. Introduction

With regard to the question of whether there have been any substantial modifications of the contracts for public occupational pension schemes between Norwegian contracting authorities and KLP, the Norwegian authorities note that the purpose of these contracts is to provide an occupational pension scheme in accordance with the applicable laws and collective agreements in force at all times and reflect the pension rights and obligations set out therein. Amendments to these underlying laws and collective agreements are an inherent aspect of contracts for public occupational pension schemes.

The modifications referred to in the complaint, are the result of changes in the underlying legislation and collective agreements governing the scheme. Without corresponding modifications to the contracts, they would no longer fulfil their purpose; to provide an occupational pension scheme to public employees in accordance with the provisions of law and collective agreements in force at all times.

Furthermore, the modifications mainly affect the employees' rights and obligations under the scheme. The practical and financial balance between the contracting authorities and the pension provider is only marginally altered, if at all. Therefore, the modifications are not substantial for the purpose of the public procurement rules.

The Norwegian authorities also note that the scope of the Norwegian public occupational pension schemes is a result of management and labour exercising their fundamental right to collective bargaining. The public procurement rules on modification of contracts must be interpreted and applied in light of this context, and strike a fair balance between the respective interests involved, cf. case C-271/07, *Commission v. Germany,* section 52.

In our view, it would not be in line with the principle of striking a fair balance if existing contracts for public occupational pension schemes would have to be terminated and tendered out every time the organisations representing public employers and employees renegotiate the specific elements of the schemes. This would cause considerable practical challenges and costs for the public employers, and would presumable hinder sensible pension reforms being bargained collectively.

In order to properly respond to the Authority's questions in this respect the Norwegian authorities will first give an overview of the public procurement rules on modifications of contracts during their term.

9.2. The substantial modifications doctrine

As a general rule, the rules on public procurement only apply until the contract has been concluded. The subsequent contractual phase is governed by contract law. However, it is settled case-law that substantial modifications to a contract constitute a new contract, which requires a new competitive procedure in accordance with the public procurement rules.

The substantial modifications doctrine was first implemented by the ECJ in C-454/06, *Pressetext*, where the Court held the following in section 34:

"In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 Commission v France [2000] ECR I-8377, paragraphs 44 and 46)." (our underlining)

The doctrine is now codified in Article 72 of the Directive. In addition, some provisions have been added to clarify the application of the doctrine in particular situations. For instance, Article 72 (1) litra (c) explicitly provides that a contract may be modified without a new procurement procedure where:

"(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;

(ii) the modification does not alter the overall nature of the contract;

(iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive"

Pursuant to Article 72 substantial modifications are such that render the contract materially different in character from the one initially concluded. Article 72(4) litras a-d give the following examples of substantial modifications:

"(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1"

These examples embody the ECJ's ruling in case C-454/06, *Pressetext*. The said modifications would thus be deemed as substantial under the Directive 2004/18.

The examples furthermore illustrate the high threshold that applies for when modifications to a contract may be deemed to be substantial. It is crucial that contracting authorities have a certain flexibility to make legitimate and rational changes to a contract, including contracts entered into in accordance with the procurement rules. This is particularly necessary when legal amendments and other external circumstances warrant changes to a contract to comply with legal requirements or to achieve the objective of the agreement.

It is also in the nature of a contract, and particularly in the nature of long-term contracts, that certain adjustments may be necessary in order to implement the contractual obligations in the most rational manner, and in line with the contracting authority's needs. Both changed needs and changed factual

circumstances that affect the execution of the contract may occur during the contractual relationship. Against this background, it would conflict with the Directive's aim to ensure the most efficient use of public funds, cf. Preamble of the Directive section 2, if contracting authorities had to terminate their contract and announce a new call for tenders each time the need for adjustments arose.

When making the assessment of whether a modification is substantial, regard must be had to the nature of the contract, the factual background for the change and whether the change can be considered as a reflection of the parties' intention to renegotiate fundamental elements of the contract. If a change is prompted by external circumstances, the threshold for what constitutes a substantial modification is higher.

9.3. Question 2: Changes made to the pension scheme referred to in section 5.1 of the complaint and whether these constitute substantial modifications

9.3.1. Introduction

In section 5.1 of the complaint, it is asserted that the following changes have been made to Norwegian authorities' contracts for public occupational pension schemes entered into with KLP and that the changes constitute substantial modifications of the contracts:

Introduction of new method for calculation of premiums by means of equalization in 2003;

Lapse of insurance obligations following non-payment of premiums in 2004; and

Introduction of longevity adjustments in 2011.

The Norwegian authorities respectfully disagree.

9.3.2. Calculation of premiums from 2004

First, all premiums; the ordinary annual premiums, adjustment premiums and special single premiums were equalized prior to the legislative amendments of the Insurance Activities Act in 2004. This was a requirement according to the collective agreements governing the Norwegian public occupational pension scheme prior to the legislative amendments. Equalization was permitted prior to the legislative amendments in 2004, but required a dispensation from the then applicable Insurance Activities Act's main rule. KLP obtained such dispensation in 1974.

In 2002, the Norwegian Labor Court concluded that a pension scheme where the premiums were not equalised, breached the collective agreement pension scheme. Following the Labour Court's ruling, Storebrand applied for and got granted the same dispensation as KLP have had since 1974. Storebrand thus also implement equalized calculation of premiums prior to the legislative amendment in 2004.

Second, to our understanding Storebrand claims that KLP introduced a new principle for equalization of the adjustment premiums in 2003, prior to the legislative amendments of the Insurance Activities Act in 2004, and that this qualifies as a substantial modification of the contracts.

According to KLP, this is not correct. KLP has informed that they did equalize the adjustment costs prior to the legislative amendments of the Insurance Activities Act in 2004, and these adjustment costs were in fact equalized using the size of the premium reserve linked to the individual pension scheme as a distribution formula/key. The changes made in 2003 was only a formality, codifying this practice and had little, if any, impact on the customers pension costs. This practice was furthermore codified in the legislative amendments of the Insurance Activities Act in 2004. This is evident from the preparatory works of the Insurance Activities Act. For instance, in section 5.3 of Ot.prp. no. 11 (2003-2004), the Ministry of Finance stated that:

"The Ministry of Finance has noted that the Banking Law Commission [Nw: Banklovkommisjonen] has proposed rules on premium calculations that to a significant extent are based on and continue the system developed by KLP, since the point of departure for the Banking Law Commission is the collectively bargained agreements. An advantage of this approach is that it is in principle based on an existing system, and that the proposed legal provisions also will have limited effect on the municipal employers that currently have their pension schemes with KLP". (our underlining)

Similarly, in NOU 2003:11 part 1, section 7.4.3, the Banking Law Commission's described the equalization system in KLP as follows:

"A characteristic of the premium calculation system that KLP has practiced over time is hence that it is first and foremost the annual advance premium that has been distributed according to – and determined as a percentage of – the total wage basis for the individual pension scheme, in accordance with what is stated in section 5 of the Insurance Terms and Conditions for the Joint Arrangement. However, the adjustment premium for the upward adjustment of the pension rights that follow from the wage trend and G-adjustment has in fact been adjusted according to – and determined as a percentage of – the size of the premium reserve linked to the individual pension scheme, as these pension costs have almost always been covered by surplus funds and not by paid-in premiums".(our underlining)

Further, in section 7.4.6 of NOU 2003:11, the Banking Law Commission stated the following:

"The Banking Law Commission has therefore concluded that the provisions in the draft legislation on adjustment premiums should be designed based on the principles that have in fact served as basis for KLP's practice in this field, see section 8b-6 fifth paragraph, cf. section 8b-5 second sentence of the draft legislation. This is best in line with the Labour Court's judgment to apply the distribution formula that KLP has indirectly been applying for a long time, and that KLP, from 2003, is also aiming to apply directly when calculating the adjustment premiums for the individual pension schemes.".(our underlining)

Last, the Norwegian authorities refer to Ot.prp. no. 11 (2003-2004) section 6.3.3:

"In the Ministry of Finance's view, the characteristic feature of KLP's practice for the calculation of the individual pension scheme's actual adjustment premium is that the distribution of the total premium volume between the pension schemes and the joint arrangement is based on a different distribution formula than that of the pension basis, cf. section 5 of the Insurance Terms and Conditions for the Joint Arrangement. As a consequence of the fact that in the vast majority of years, the adjustment premium has been fully covered by KLP's own surplus from the return result, the individual pension scheme's adjustment premium has indirectly, but in real terms, been decided by the size of the premium reserve that is linked to the pension scheme. To the Ministry of Finance's understanding, KLP now aims to continue this practice when calculating the adjustment premium for the individual pension schemes in the joint arrangement, and in its regulations expressly apply the premium reserve as the distribution formula". (our underlining)

Hence, the Norwegian authorities do not concur with the assumption in the complaint with regard to KLP's intentions with the formal implementation of using the size of the premium reserve linked to the individual pension scheme as a distribution formula/key in 2003. KLP has stated they did not implement this method of calculating the premiums to *"meet the increased competition for these services",* as asserted by Storebrand, but to ensure that the formal terms and conditions were in line with KLP's existing premium calculation practice.

Moreover, the recitals of the preparatory works demonstrate that it is not correct when it is stated in the complaint that *"the change of calculation of premiums in the joint scheme led to extensive changes to each customer's pension costs, both customers that "earned" and "lost" on the equalization".* For contracting authorities with their public occupational schemes in KLP, the formal, but not actual, changes made in 2003 had according to KLP little to no effect. These contracting authorities paid the same equalized premiums before and after the formal changes in 2003 and the legislative amendments in 2004.

KLP's formal changes in its terms and condition in 2003 did thus not seem to modify any existing contracts on public occupational pension scheme.

In any event, the Norwegian authorities are convinced that these changes do not demonstrate a renegotiation of the essential terms of the contracts. On the contrary, the change was according to KLP implemented to fulfil obligations already laid down in the collective agreements governing the scheme and to codify the existing practice regarding equalization of adjustment costs. According to the Pressetext-doctrine, the amendment of the contracts to these effects does not constitute a substantial modification.

9.3.3. Lapse of insurance obligations following non-payment of premiums in 2004

Storebrand claims that the introduction of a statutory provision in 2004, whereupon non-payment of premiums resulted in the lapse of the insurance obligations related to the unpaid premiums, significantly reduced KLP's insurance liability under the agreement, and thus qualify as a substantial modification of existing contracts for public occupational pension schemes.

It is correct that a provision stating that the pension provider would not be liable for providing pension benefits related to unpaid premiums was introduced to the Insurance Activities Act in 2004.[46] However, according to KLP, this did not entail any modifications in the contractual relationship between the Norwegian contracting authorities and KLP. The new provision in the Insurance Activities Act merely implemented the same liability limitation that already followed from KLP's and other pension providers' terms and conditions.

Storebrand claims that the *"change that followed from the statutory provision entailed a significant reduction in KLP's insurance liability under the agreement, and it changed the distribution of risk and the change of economic balance in KLP's favour".* However, KLP has informed the Norwegian authorities that theirs insurance liability was the same before and after the provision was introduced to the Insurance Activities Act. Accordingly, the distribution of risk and economic balance remained the same.

Furthermore, a modification of the contract in this situation would merely be the result of an amendment in the statutory legal framework governing the contractual relationship between the contracting authorities and KLP. It would not demonstrate a renegotiation of the essential terms of the contracts. Applying the same line of reasoning as ECJ in case C-454/06, *Pressetext,* a modification of the contracts in this situation is not substantial.

9.3.4. Longevity adjustments in 2011

Storebrand also claims that the longevity adjustments introduced in 2011 to the public occupational pension schemes transferred substantial longevity risk from the pension provider to the individual member of the scheme, and therefore constituted a substantial modification.

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[46] Insurance Activities Act Section 4-9

In 2011, Norwegian Authorities amended the calculation of old-age pension benefits in the National Insurance Pension Scheme ("Folketrygden") to reflect that the population lives longer, and provide for a sustainable Norwegian pension system also in the future. In the National Insurance Pension Scheme, the individual person's yearly old-age pension benefits are calculated by dividing the estimated total amount of old-age pension benefits to that person by the expected remaining lifetime after retirement. The legislative amendments introduced to the National Insurance Pension Scheme in 2011 involved that the same estimated total amount of old-age pension benefits was divided by a longer lifetime expectancy after retirement. Consequently, although the overriding right to old-age pension benefits remained the same, the yearly old-age pension benefits paid by the National Insurance Pension Scheme was reduced.

To keep the occupational pension benefits at the same level as prior to the amendment of the National Insurance Pension Scheme, the same longevity adjustment was incorporated to the laws and collective agreements governing the Norwegian public occupational pension schemes. According to the then applicable Norwegian Coordination of Pension and Social Security Act (*Norwegian: Lov om samordning av pensjons- og trygdeytelser)*, pension benefits from the National Insurance Pension Scheme and public occupational pension schemes were coordinated. Without a corresponding longevity adjustment in the public occupational pension schemes, the public employers would in practice have had to cover the yearly reduction in the benefits from the National pension scheme through the occupational pension scheme. This would have undermined the very purpose of the Norwegian authorities' pension reform of 2011.

According to KLP, their contracts on public occupational pension scheme were modified to account for these legislative amendments and the changes in the applicable collective agreements. Corresponding to the calculation of old-age pension benefits in the National Insurance Pension Scheme, the accrued pension benefits under the public occupational pension scheme were divided by a higher life expectancy number, as required by the collective agreements and laws governing the respective schemes.

The result of the above amendments was lower yearly pension benefits to the public *employees.* However, according to KLP this longevity adjustment did not affect the balance in the contractual relationship between KLP and the contracting authorities. KLP still provided a "benefit based" occupational pension scheme, which corresponded to the contracting authorities' obligations vis-à-vis their employees pursuant to law and collective agreements. Moreover, the annual premiums essentially remained the same, and the commercial balance did not shift in KLP's favour. Consequently, the longevity adjustments implemented in 2011 did not entail a substantial modification of the existing public occupational pension scheme contracts.

The Norwegian authorities believe that it is essential to the assessment that the modification was made to adjust the contracts to a new legal framework imposed by Norwegian legislators and the collective agreements. The modification was necessary to fulfil the contracting authorities' legal obligations, and does not alter the overall nature of the contract. As explained above, the purpose and functioning of the contracts for public occupational pension schemes is to always reflect the laws and collective agreements in force. Thus, the longevity adjustment made in 2011 do not demonstrate a renegotiation of the essential terms of the contracts. Consequently, the modification is not substantial according to the Pressetext-doctrine.

9.4. Question 3: Changes made to the pension schemes as a result of SGS 2020 and whether these modifications are substantial

9.4.1. Introduction

By its third question, the Authority has asked the Norwegian Government to elaborate on the extent of the changes made to the public occupational pension schemes as a result of SGS 2020 and to comment on Storebrand's argument that these constitute substantial modifications for the purpose of Article 72 of the Directive.

The Norwegian authorities do not agree with Storebrand's submissions on this point. The facts and legal reasoning are further explained below.

In the following, the extent of the changes made to the public occupational pension schemes because of SGS 2020 are described below under section 9.4.2. The Norwegian authorities' view on Storebrand's arguments are described in section 9.4.3 and 9.4.4.

9.4.2. Changes made to the public occupational pension scheme as a result of SGS 2020

In short, SGS 2020 introduced a new old-age pension *accrual scheme* for public employees that were born after 1962. The main differences are that:

The new scheme is based on an add-on model rather than a gross pension model. Instead of receiving benefits corresponding to a certain percentage of the employee's final salary, each employee accrues its own pension portfolio based on annual earnings, which is calculated independently of and added onto the pension benefits provided by the National Insurance Scheme. Before SGS 2020, the public occupational pension scheme was coordinated with the pension benefits provided by the National Insurance Scheme in order to correspond to the accrued gross pension level.

All years of work up until the age of 75 accrue pension benefits under the new accrual scheme, based on a "basic rate" of 5.7% in the interval between 0-12 G and an "additional rate" of 18.1% in the interval between 7.1-12 G. The accrued pension portfolio is adjusted in accordance with the wage growth in Norway throughout the accrual period. Before SGS 2020, the main rule was that up until 30 years of work accrued pension benefits, based on a percentage of the employees' salary throughout the accrual period and without any adjustment of accrued benefits.

The employees have more flexibility than under the old accrual scheme. Under the new accrual scheme, the employees may choose to receive pension benefits from the age of 62 to 75, either 100% or in intervals of 20, 40, 50, 60, and 80. Moreover, the employees can receive income without having the pension benefits reduced. Before SGS 2020, the employees could withdraw pension benefits from the age of 67 at the earliest, not in intervals and income from an employer with a public occupational pension scheme would result in reduced pension benefits.

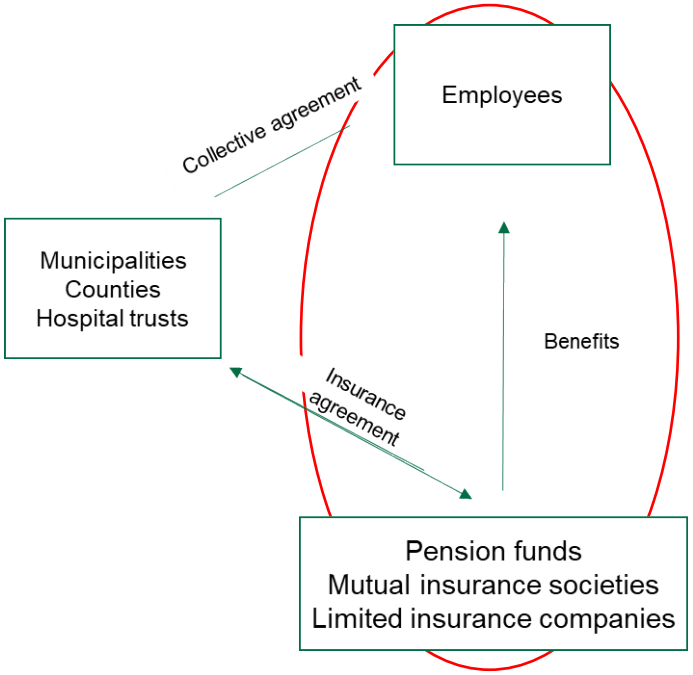
Employees had to work for at least three years to accrue pension benefits under the old scheme, while one year of service suffices under the new accrual scheme.

As demonstrated above, a common feature of the changes that were introduced to the public occupational pension scheme by SGS 2020 is that they affect (for those born after 1962) the way the employees' pension benefits are accrued. The public occupational pension scheme as such is nevertheless essentially the same; it still provides for a "benefit based" pension scheme.

The Norwegian authorities also note that SGS 2020 only affected the accrual scheme for old-age pension benefits. SGS 2020 did not affect the other social security benefits included in the Norwegian

occupational pension schemes, such as disablement pension benefits. Furthermore, the transition to SGS 2020 is made gradually over a long period of time. Pension benefits accrued before 1 January 2020 still follow the previous accrual scheme. The immediate effect of SGS 2020 on the benefits provided under the Norwegian public occupational pension scheme is thus limited, but will increase gradually over time.

Another common feature of the changes introduced by SGS 2020 is that they essentially affect the employees' rights and entitlement to receive benefits from the pension scheme, not the contractual relationship between the pension provider and the Norwegian contracting authorities.



The pension provider's obligation towards the contracting authorities is still to provide occupational pension benefits in accordance with applicable laws and collective agreements to the public employees upon retirement. The contracting authorities' obligation is still to pay premiums to the pension provider.

In that context, the Norwegian authorities note that the new accrual scheme is financed by the same premium elements as under the previous scheme; ordinary annual premium, adjustment premium and special single premiums for benefits that cannot be determined in advance. The level of these premiums are essentially the same as under the previous scheme, although the employees' pension rights are accrued differently.

The Norwegian authorities also emphasise that SGS 2020 did not introduce any new premium elements that may represent an economic advantage to the pension provider or affected the level of the administration premiums, capital management premiums and interest rate guarantee premiums in existing contracts. Consequently, SGS 2020 has not affected the content of the actual competitive parameters or shifted the commercial balance between the contracting parties.

9.4.3. Modifications due to SGS 2020 are justified pursuant to Article 72 (1) point (c) of the Directive

As described under section 9.2 above, contracts may be modified without a new procurement procedure pursuant to Article 72 (1) point (c) of the Directive provided that:

i. the need for modification have been brought about by circumstances which a diligent contracting authority could not foresee;
ii. the modification does not alter the overall nature of the contract;
iii. any increase in price is not higher than 50% of the value of the original contract.

SGS 2020 was the result of public employer's and public employees' respective trade unions' negotiations on a new collective agreement within the public sector, which again was an inherent part of a broad pension reform for all public employees. The same new elements that are described above were implemented for central government employees by the Norwegian lawmakers through amendments to the Norwegian Public Service Pension Fund Act ("lov om Statens Pensjonskasse"). In that context, it follows for the preparatory works to the Act (Prop.87 L (2018-2019) Chapter 6.5) that:

> *"The rules on municipal and county service pension schemes are set out in collective bargaining agreements or articles of association. It is assumed that the legislative amendments adopted by the Storting will be followed up in the regulations that apply to these schemes."*

Neither the contracting authorities as such, nor KLP (or Storebrand) had any direct influence on this circumstance. Also, while it is in principle foreseeable that the legal framework for public occupational pension schemes will be amended over time, it was not possible for contracting authorities to foresee the exact features of SGS 2020 or when they would be adopted. Still, once concluded, the contracting authorities were obliged to implement the new accrual scheme in their contracts for public occupational pension schemes. The need for modification have thus been brought about by circumstances which a diligent contracting authority could not foresee.

Further, the Norwegian authorities note that SGS 2020 did not alter the overall nature of the contracts. This condition is discussed in section 109 of the preamble to the Directive:

> *"However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed."*

The second criterion thus encompasses situations where the modifications as such are necessary, but the consequences are so comprehensive that in reality a completely new contract is entered. In the Norwegian authorities' view, this is typically the case if the modified contract would address a different market segment or product than the original contract.

That is not the situation in the case at hand. As described above, KLP is still providing public occupational pension scheme to the contracting authorities on the essentially same conditions. Following SGS 2020, contracts having provision of Norwegian public occupational pension scheme as their object still only address (national) companies with licence to provide life insurance in accordance with the Insurance Activities Act.

Finally, SGS 2020 does not increase the price of more than 50% of the original contracts value. Even if one should include the ordinary annual premiums, adjustment premiums and special single premiums for benefits that cannot be determined in advance in this context (which presumably is not correct), any increases of the premiums are far less than 50% of the contracts' total value. The total amount of pension benefits under SGS 2020 were meant to correspond to the previous scheme. Hence, SGS 2020 presumably did not entail any increase in the premiums, which equals to less than 50% of the contracts original value.

The Norwegian authorities thus respectfully disagree with the complainant's assertion that a new procurement procedure is required due to the introduction of SGS 2020. The modifications of the existing public occupational pension scheme contracts concluded with KLP were justified pursuant to Article 72 (1) point (c) of the Directive.

9.4.4. Modifications due to SGS 2020 are in any event not substantial

As far as the Norwegian authorities understand, Storebrand asserts that modifications of the existing public occupational pension scheme contracts concluded with KLP are substantial for two reasons:

(i) The modified contracts would have addressed a different market segment than the original contracts, cf. Article 72 (4) point (a) of the Directive; and

(ii) They render the contracts materially different in character from the ones initially concluded, cf. Article 72 (4) of the Directive.

To substantiate its first submission, Storebrand refers to an article published by DNB Livsforsikring 19 March 2019. In the article, DNB expresses that it would be interested in returning to the market for Norwegian public occupational pension schemes *if it would be possible to only provide the new accrual scheme.* However, this is not an option under SGS 2020. The contracts, as they actually are modified due to SGS 2020, would not have addressed a different market segment than the original contracts. This is demonstrated by the fact that DNB is still not offering public occupational pension scheme, four years after the above-mentioned article and despite that SGS 2020 came into force 1 January 2020. In any event, neither the letter itself nor Storebrand's arguments are sufficient to reach the threshold set out in Article 72.

Consequently, the modifications are not substantial pursuant to Article 72 (4) point (a) of the Directive.

As regards to the second submission, the Norwegian authorities note that SGS 2020 is the result of a broad pension reform within the Norwegian public sector. The modifications made are thus a pure reflection of the compromise reached when amending the Norwegian Public Service Pension Fund Act and bargaining the new collective agreement. They are by no means the result of changed priorities or a subjective desire to renegotiate the contracts for public occupational pension scheme entered into with KLP, but adjustments to new legal and factual circumstances. Thus, the modifications do not demonstrate the parties' intention to renegotiate the essential terms of the contracts. Neither do they render the contracts materially different than the original ones. According to KLP, they are still providing a "benefit based" public occupational pension schemes to the Norwegian municipalities, county authorities and hospitals for essentially the same premiums as before.

Consequently, the modifications are not substantial pursuant to Article 72 (4) of the Directive.

9.5. Question 4: The allegation that no competitive procedures have been conducted in the health sector since 2002

In the complaint section 2.3.2, Storebrand states that no competitive procedures have been conducted in respect of contracts on public occupational pension schemes since 2002.

The Norwegian authorities confirm that this assertion is correct.

9.6. Question 5: Changes made to the pension schemes in the health sector referred to in section 7 of the complaint and whether these constitute substantial modifications

9.6.1. Introduction

In the complaint section 7, Storebrand asserts that the following amendments have been made to the pension schemes in the health sector and that they constitute substantial modifications for the purpose of EEA procurement law:

> The merger of the senior doctors and junior doctors respective pension schemes into the joint pension scheme for hospital doctors 1 January 1994; and
>
> Transfer of the ownership to the Norwegian hospitals sector RHFs from the county councils to the Norwegian central government.

The Norwegian authorities disagree with both submissions and will elaborate below.

9.6.2. Merging the separate pension schemes for senior and junior doctors 1 January 1994

It is correct that senior and junior doctors had separate occupational pension schemes in KLP prior to 1 January 1994. The pension scheme for junior doctors was established in 1950, while the pension scheme for senior doctors was established in 1970.

It is also correct that from 1 January 1994, the two schemes were merged into one joint pension scheme for hospital doctors.

However, it is not correct that this merger constituted a substantial modification of the contracts for provision of these public occupational pension schemes.

First, KLP managed both schemes prior to the merger. According to KLP, the merger therefore did not lead to a reduction in KLP's administrative burden or KLP's risk in managing the scheme. For KLP, the number of people eligible, the amount of total assets to be administrated, the scope and the value of the scheme remained the same as before the merger.

Second, the senior and junior doctors had the same public employers. Consequently, the merger did not entail an increase in the number of relevant contracting authorities or the total amount of premiums payable by each public employer. The contracting authorities' obligations under the joint scheme remained the same as before the merger.

Based on the above facts the Norwegian authorities respectfully submit that the merger of the senior and junior doctors' separate schemes does not demonstrate a renegotiation of the essential terms of the contracts. It merely implicated that two separate contracts between the same parties were merged into one contract, which created a more practical solution for all parties involved.

For the sake of completeness, the Norwegian authorities add that, in our view it is not substantiated that i) the joint scheme would have attracted more pension providers than the two schemes separately, ii) that different providers would have won a competitive procedure regarding the joint scheme rather than the two separate schemes or iii) that the scope was considerably extended.

9.6.3. Transfer of ownership of hospitals from the county councils to the Norwegian central government

In 2001, an extensive reform within the Norwegian health sector was conducted. The reform was named the "hospital trusts reform" (*Norwegian: Helseforetaksreformen).* In short, the reform involved the

transfer of ownership of and responsibility for the Norwegian hospitals from the Norwegian county authorities to the Norwegian State authorities through four RHFs with effect from 1 January 2002.

As part of the reform the state through the RHFs took over all the Norwegian counties' positions rights and obligations related to the hospital sector. This included all the existing contracts on public occupational pension scheme with KLP.[47] This transfer of the Norwegian counties' contractual rights and obligations was compulsory pursuant to the Hospital Trusts Act (*Norwegian: Helseforetaksloven*) and did not affect any existing legal positions, as it was based on a principle of universal succession, cf. Section 56 point 6:

> *"As from the implementation of this Act, the State, represented by regional health authorities, has the right and duty to take over all asset positions related to public undertakings within the specialist health services somatic health care, mental health care, rehabilitation and habilitation services, medical emergency services, and ambulance services. Furthermore, the State takes over all asset positions that are related to the undertakings public hospital pharmacies and all asset positions that are related to public initiatives for substance abusers and that are organised under the Specialist Health Services Act. The State, represented by regional health authorities, takes over all county-owned asset positions that are related to university and university college functions. The takeover shall include all rights and duties related to the undertakings. Act no. 17 of 6 April 1984 on compensation for expropriation of real estate shall not apply to the takeover. If there is clearly no natural connection between an undertaking and rights related to the undertaking, it may be decided that the State has no right or duty to take over such rights if it is reasonable that the county authority or the municipality should retain them."*

KLP was prohibited by law to object to this transfer of rights from the Norwegian counties to the RHFs pursuant to the Hospital Trust Act Section 50:

> *"County, municipal and central government undertakings or part of such undertakings may be transferred to a regional health authority or a hospital trust by a transfer of assets and rights, including public permits and obligations related to the undertaking, as a whole to the regional health authority or hospital trust.*
> *A transfer to the regional health authority or hospital trust of obligations related to the county authority, municipality and the State has a liberating effect. Claimants and other rights holders may not object to the transfer or assert that the transfer constitutes a reason for lapse for the legal status."*

As a consequence of this mandatory transfer of rights and obligations, all hospital employees other than hospital doctors and nurses were transferred from the county pension collective into a separate collective. However, the pension scheme as such was essentially the same as before the transfer into a separate collective. KLP still provided a "benefit based" occupational pension scheme, which corresponded to the contracting authorities' obligations pursuant to law and collective agreements. The transfer of ownership did not entail any less risks for KLP or any more risks for the contracting authorities, and the premiums essentially remained the same. By illustration, in 2023 the annual premium of the county collective was 9.78 per cent of the premium reserve and the hospital collective was 9.94 per cent

[47] Hospital Trusts Act Section 52 point 6

of the premium reserve. Thus, the balance in the contractual relationship between KLP and the Norwegian contracting authorities remained the same.

Moreover, the compulsory nature of the transfer clearly demonstrates that any amendments to the pension schemes were not the result of a renegotiation of the essential terms of the contracts. On the contrary, any amendments were merely adjustments to new factual and legal circumstances imposed by the Norwegian legislature. Such adjustments do not constitute substantial modifications under the Pressetext-doctrine.

10. Question 6 and 7: Contracts without a fixed term

10.1. Question 6: Whether any contracting authorities have any indefinite contracts with KLP which are still in force today

By its sixth question, the Authority have asked the Norwegian Authorities to confirm whether any contracting authorities have contracts with KLP for provision of public occupational pension scheme with indefinite durations which are still in force today.

For the sake of good order, the Norwegian authorities note that Norwegian contracting authorities do not have any contracts with KLP with indefinite durations in the true sense of the term 'indefinite'. According to KLP, all contracts for provision of public occupational pension scheme may be terminated by the contracting authorities yearly. KLP, on the other hand, may not terminate these contracts, cf. Insurance Contracts Act Section 12-4.

The Norwegian authorities further note that neither the Directive nor its predecessors prohibit contracts without a fixed term. On the contrary, Article 5 (14) point (b) presupposes that contracts without fixed terms are permitted under the procurement rules. We also refer to C-454/06, *Pressetext,* where the ECJ stated as follows in section 74:

> *"Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period"*

Norway has thus not implemented a prohibition against contracts without a fixed term in its national law. The National Public Procurement Complaint Board has handled several cases related to the subject matter without considering the absence of a fixed term as a legal obstacle.[48]

10.2. Question 7: Whether an obligation exists under Norwegian law to terminate indefinite contracts

10.2.1. Introduction

By its seventh question, the Authority has asked the Norwegian Authorities to elaborate on whether there is an obligation under Norwegian law to terminate contracts without a fixed term.

In this context, it is appropriate to distinguish between contracts entered into before 1 January 1994, when the EEA Agreement entered into force in Norway, and after 1 January 1994.

10.2.2. Contracts entered into before 1 January 1994

In case C-76/97, *Tögel,* the ECJ ruled that Community law does not require a contracting authority in a Member State to intervene in existing legal situations concluded for an indefinite period or for several years where those situations came into being before Community law came into force.[49] The ECJ applied

[48] Se i.e. KOFA-2010-361, KOFA-2010-312, KOFA-2011-14, KOFA-2011-59, KOFA-2011-299, KOFA-2011-231, KOFA-2012-53
[49] Section 54

the same line of reasoning in case C-337/98, *Commission v. France,* and held that the same principle can be applied to all stages of a procedure for the award of a contract.[50]

Consequently, an obligation to terminate contracts without a fixed term pursuant to the procurement rules applicable today will not apply to contracts for public occupational pension schemes concluded, or otherwise qualify as an existing legal situation before 1 January 1994.

The Norwegian authorities are aware that the Norwegian Complaint Board in case 2009/144 ruled that the Norwegian public procurement rules nevertheless applied to a public contract that was entered into before 1 January 1994, as also pointed out by Storebrand. The Complaint Board's decision in that case was based on the fact that the public contract in question, as opposed to the contract in case C-76/97, *Tögel,* had a termination clause, which allowed for the contracting authority to terminate the contract by giving twelve months' notice. According to the Complaint Board, this termination clause deprived the contract of its character as an existing legal situation.

However, the Norwegian authorities note that the contract in question in case C-76/97, *Tögel,* also had a termination clause, which allowed for the contracting authority to terminate the contract by giving notice three months before the year ended.[51] The Complaint Board's decision in case 2009/144 thus does not seem to be completely in line with case C-76/97, *Tögel.* That being the case, we find it difficult to give the Complaint Board's decision preference over the ECJ's ruling in case C-76/97, *Tögel*.

Thus, there is not an obligation under Norwegian law to terminate contracts without a fixed term that were entered into before 1 January 1994, unless they have been substantially modified. As the account in section 9.3 to 9.6 above shows, that is not the situation in the case at hand.

10.2.3. Contracts entered into after 31 December 1993

As in the Directive, there is no specific provision in the Norwegian Public Procurement Act or Regulation that imposes a duty on contracting authorities to terminate contracts without a fixed term after a certain amount of time. Hence, any such obligation would have to be derived from the fundamental procurement principles of competition, equal treatment, and transparency, implemented in the Norwegian Public Procurement Act Section 4.[52]

These fundamental principles must be interpreted and applied in accordance with Community law. The ECJ addressed the issue of contracts without a fixed term in case C-454/06, *Pressetext*, section 73:

> *"First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts."* (our underlining)

Based on this reasoning it is possible to establish a doctrine whereupon a practice of letting contracts without a fixed term run for too long may conflict with the fundamental principles of equal treatment and competition. However, the Norwegian authorities note that the ECJ did not rule that contracts without a

[50] Section 39
[51] See Opinion of Advocate General Section 17
[52] See i.e Directive 2014/24/EU article 18 nr. 1

fixed term were prohibited as such or stipulate any specific time within which it would be necessary to subject the contract to a new tender.

A similar concern was expressed by the ECJ in case C-451/08, *Helmut Müller*:

> *"In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order, as stated by the Advocate General in points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 pressetext Nachrichtenagentur [2008] ECR I-4401, paragraph 73)"*

The ECJ's reasoning in C-454/06, *Pressetext* and C-451/08, *Helmut Müller* may suggest that the principle of competition prohibits a practice of letting contracts without a fixed term run for too long. Following this line of reasoning, settled case-law could suggest that contracting authorities at some point are obliged to terminate contracts that do not have a fixed term.

There are elements in Norwegian national legal framework suggesting the same conclusion.

In the preparatory works related to implementing the Directive into national law the responsible committee ("Forenklingsutvalget") addressed the topic of whether contracting authorities can have a duty to terminate indefinite contracts. In section 15.3.3 the committee stated the following:

> *"The question so arises as to whether there is an obligation to terminate the agreement and announce a new competition after a certain period.*
>
> *The rules on public procurement mainly regulate the procedure leading up to the conclusion of a contract. This could indicate that such an obligation does not arise. Once an indefinite contract has been concluded after competition, and potential tenderers thus have had the opportunity to take the time aspect into account when assessing whether they are to deliver an offer, the contracting authority should also be free to let the contract run as long as it deems appropriate. Any negative effects of a contract running for a very long time will be compensated through the prohibition of substantial contract modifications.*
>
> *<u>However, in the committee's opinion, the principles of competition and proportionality enshrined in community law requires that indefinite contracts are subject to competition at regular intervals"</u>* (Our translation and underlining)

The statement of the committee supports the assumption that the fundamental principles embodied in the Norwegian Public Procurement Act Section 4 may include a duty to terminate ongoing contracts in certain situations.

This view has also been adopted by the Norwegian Complaint Board of public procurements in a number of cases.[53] An illustrative example is case 2011/231. This case concerned a contract for public occupational pension scheme that did not have a fixed term. One of the questions to the Complaint Board was whether the contracting authority had violated the procurement rules by not terminating the contract after 8 years. The complaint board cited passages from its earlier cases and concluded that the principle of competition potentially can render a duty to terminate indefinite contracts. In that case, however, the Complaint Board ruled that such a potential duty was not violated.

[53] See i.e. KOFA-2010-312 avsnitt 48, KOFA-2011-14 avsnitt 27, KOFA-2011-59 avsnitt 202, KOFA-2011-299 avsnitt 24, KOFA-2011-231 avsnitt 15, KOFA-2012-53 avsnitt 31

Finally, the Ministry of Trade, Industry and Fisheries has addressed the question in its national guidelines to the rules on public procurement.[54] In section 43.6 the Ministry states:

> *"The contracting authority can also enter into indefinite contracts, cf. § 30-5 second sentence. However, the client must ensure that the contract contains an option to terminate the contract. When it comes to indefinite contracts, the European Court of Justice has stated that there is no prohibition against entering into indefinite public service contracts in community law as it currently stands. However, the Court considered that indefinite contracts may be at odds with the purpose of the procurement rules because such contracts may prevent competition between possible service providers and the application of the rules on public procurement. Long lasting contracts can establish a supplier monopoly contrary to the requirement that public contracts must be subject to competition. Failure to terminate an ongoing, indefinite contract could therefore constitute an illegal direct procurement"* (Our translation and underlining)

Considering the abovementioned legal sources, the Norwegian authorities believe that there exists – in general – an obligation under Norwegian law to expose contracts without a fixed term to competition. However, within which time limits this obligation arises is subject to the Norwegian contracting authorities' discretion and must be assessed on a case-by-case basis, applying their procurement expertise within the framework of the fundamental procurement principles.

By comparison, the Norwegian Complaint Board has in several cases stated that Norwegian contracting authorities have a wide discretion when deciding a contract's term in advance. The we refer to case 2013/23 as an illustrative example:

> *"(49) As a starting point, the contracting authority selects the duration of an agreement, which is a choice subject to assessments based on its procurement expertise. When the agreement in question is not a framework agreement or a dynamic purchasing system, the legislation does not impose any limitations on the duration that an agreement may have. In the present case, the complainant has chosen a contract period of 10 years, with a right to terminate the agreement with a six-month notice. The background for the choice was a desire to reduce costs. In this context, the respondent has argued that ten-year agreements have resulted in cost savings of 30-40% and that in this tender they achieved a cost saving of 32%. The respondent also saves internal resources as it more rarely needs to issue invitations to tender".* (Our translation and underlining).

The Norwegian authorities respectfully submit that this reasoning must apply correspondingly to contracts where the term is not set in advance.

In deciding when and how contracts without a fixed term must be exposed to competition, each individual contract's nature, complexity and specificities, in addition to the contracting authority's needs and possibility to achieve better terms and conditions through competition must be taken into consideration. That especially holds true for public contracts for provision of social and other specific services, i.e. the Norwegian public occupational pension scheme contracts.

Applying this line of reasoning on the present case, the Norwegian authorities are of the opinion that the Norwegian contracting authorities have not violated the public procurement rules by not terminating their public occupational pension schemes with KLP.

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[54] See P-2017-399

As described above, the Norwegian public occupational pension scheme is complex. Conducting a competitive procedure requires highly qualified personnel, which in turn implies significant direct costs. In Norway there is presently more than 400 contracting authorities who have a contract for a public occupational pension scheme with an external provider. Requiring each of these to conduct a full new tender process frequently would result in a very large number of more or less identical tenders each year with considerable public spending on external advisors, in addition to the strain on internal resources.

Further, the indirect costs may also be substantial. The Norwegian public occupational pension scheme involves investing the annual premiums in securities and other assets, of which the returns are partially funding future premiums. These investments must be liquidated upon transfer to a new pension provider. Frequent termination of the Norwegian public occupational pension scheme contracts would thus entail that the pension providers must invest the annual premiums in more liquid assets, which gives a lower return and, accordingly, a higher annual premium. In addition, liquidation of the contracting authority's assets will increase the costs of the pension provider. The pension provider would have to cover these costs by increasing the administration and capital management premiums.

In that context, the Norwegian authorities note that the Norwegian municipalities, county authorities and hospital trusts, as part of their overall social responsibility, expect their pension scheme providers to invest the premiums paid in infrastructure and other projects that facilitate conversions to green forms of energy. Norwegian contracting authorities, in other words, actively use their positions vis-à-vis providers of public occupational pension schemes to achieve sustainability goals adopted by the United Nations and the EU. These efforts will be significantly restricted if the contracting authorities are imposed a duty to frequently conduct formal tender process regarding their existing contracts, as it would be necessary to invest in more liquid assets to be prepared for a potential transfer of the funds to a new pension provider.

Moreover, there would in practice be little financial and/or socio-economic gain by tendering out a large number of contracts for public occupational pension schemes at frequent intervals. The Norwegian authorities would like to point out that approx. 97% of the annual premiums in public occupational pension schemes are the municipalities' own savings to cover the pension obligations under the scheme. The calculation of these premiums are, as described under section 6.2, set out in detail in law and collective agreements, reported to the Norwegian Financial Supervisory Authority ("Finanstilsynet"), and must be justifiable based on objective factors and equalized. They will for all practical purposes be the same regardless of the identity of the pension provider and cannot be derogated from during negotiations with the individual contracting authority. The real possibility for Norwegian contracting authorities to achieve significantly better terms and conditions through competition is thus very limited.

In addition, the fundamental principle of equalization of premiums applies to all suppliers of public occupational pension schemes. The principle of equalization implies an obligation on all public pension scheme managers to equalize all premiums, based on principles that prevent the premiums from varying as a result of gender, age, early or late retirement, time of death and size of salary of the employees included in the municipalities' pension schemes. Basically, this means that all public employers within a pension scheme pay the same premium rates for their employees. The pension providers' terms and conditions remain the same, regardless of how many competitions that are conducted and by whom; the pension providers must offer the same terms and conditions to all public employers due to the principle of equalized premiums.

As a result of this, it is not strictly necessary for all the contracting authorities within a scheme to conduct formal tender processes in order to market-test the financial terms of their contracts for public occupational pension. In practice, this will be tested every time one of the contracting authorities under the scheme conducts such a process. Through each process all the other contracting authorities within each scheme will be able to verify whether the terms of their contracts fulfil the overall aim of spending public funds in the most efficient way. If the tender demonstrates that the current terms are competitive, the other contracting authorities within the scheme can be certain that the same applies to them.

In our view, these effects are clearly relevant to determine the scope of each contracting authority's obligation to terminate existing contracts for public occupational pension scheme and launch new tenders. The Norwegian authorities therefore question whether there is a commercial or socio-economic justification for imposing an obligation on several hundred contracting authorities to terminate contracts and carry out tenders, when there are other means to test the market.

11. Verification of specific details

11.1. Introduction

The Authority has also asked the Norwegian Government to verify specific details. The requested verifications are set out below. In addition, the municipalities' initial responses are attached to this letter. We have also had some additional clarifying correspondence with the municipalities succeeding their responses.

Appendix 3: Norwegian contracting authorities' response to the Authority's information request

11.2. Skedsmo municipality

The Norwegian authorities confirm that Skedsmo municipality awarded a public occupational pension scheme contract directly to KLP late 2013, with effect from 1 January 2014. The contract was awarded directly to KLP on the basis of technical reasons meaning the contract could only be awarded to a particular economic operator.

Prior to this, DNB Livsforsikring AS provided public occupational pension scheme to Skedsmo municipality. However, DNB withdrew from the market in 2013. Storebrand also withdrew from the market before the decision to award the contract directly to KLP was made and thus there was only one provider of Norwegian public occupational pension scheme in the market.

This contract is no longer in force. Skedsmo municipality no longer exists, as it merged with Sørum municipality and Fet municipality to the new Lillestrøm municipality 1 January 2020. Lillestrøm municipality's arrangements for the provision of Norwegian public occupational pension scheme is described under section 11.6 below.

11.3. Kristiansund municipality

The Norwegian authorities confirm that Kristiansund municipality awarded a public occupational pension scheme contract directly to KLP in 2014, with effect from 1 January 2015. The contract was awarded directly to KLP on the basis of technical reasons meaning the contract could only be awarded to a particular economic operator (Article 31(1)(b) of Directive 2004/18).

Prior to this, DNB Livsforsikring AS provided public occupational pension scheme to Kristiansund municipality.

Kristiansund municipality published a voluntary ex ante transparency notice before awarding the contract directly to KLP in 2014. In the notice, Kristiansund municipality reasoned its decision to award the contract directly to KLP as follows:

> *"Given DNB' and Storebrand' decisions to withdraw from the market and that it is not as of 01 October 2014 new licence applications for processing at the Norwegian Financial Supervisory Authority no other economic operator in Norway or EEA obtain licence in due time to participate in the competition in 2014. In other words, there is only one potential provider (KLP)"*

Link to the notice: https://www.doffin.no/Notice/Details/2014-264359

This contract did not have a fixed term but may be terminated at the end of each year by giving two months' prior notice. The contract is still in force today.

11.4. Rogaland county authority

The Norwegian authorities confirm that the county authority awarded a contract to KLP in 2011/2012 after a competition. The contract notice was published in the national and international public procurement database. Vital (DNB), Storebrand and KLP participated in the competition.

The Norwegian authorities confirm that the contract had a term of two years with options to extend for a maximum of three additional years. Thus, the contract originally expired 31 December 2016.

The Norwegian authorities inform that Rogaland county authority has prolonged its contract with KLP due to the market situation. The contract could only be awarded to KLP when the original contract expired. The contract is extended until a new competitive procedure is conducted.

11.5. Stavanger municipality

The Norwegian authorities confirm that Stavanger municipality has a public occupational pension scheme contract with KLP.

KLP has provided public occupational pension scheme to all new employees in Stavanger municipality since 1965. For employees employed prior to 1965, Stavanger had its own pension fund, which was gradually reduced until it ceased in 2005. In 2005, the remaining pension obligations were either transferred to KLP or the Norwegian Public Service Pension Fund.

Stavanger did not enter into the contract for provision of public occupational pension scheme with KLP after a competitive procedure complying with EEA public procurement law. The contract does not have a fixed term, but Stavanger municipality may terminate the contract.

11.6. Lillestrøm municipality

The Norwegian authorities confirm that Lillestrøm municipality has a public occupational pension scheme contract with KLP.

The decision to enter into this contract with KLP was made in 2018, with effect from 1 January 2020.

The contract was awarded directly to KLP on the basis of technical reasons meaning the contract could only be awarded to a particular economic operator. Moreover, all the merging municipalities (Skedsmo municipality, Fet municipality and Sørum municipality) already had established their public occupational pension schemes with KLP.

The contract is without a fixed term, but Lillestrøm municipality may terminate the contract yearly by giving two months' prior notice.

11.7. Fredrikstad municipality

The Norwegian authorities confirm that Fredrikstad municipality has a public occupational pension scheme contract with Fredrikstad municipality.

Fredrikstad municipality first entered into a contract for provision of public occupational pension scheme 1 January 1992 in connection to a municipal merger, with effect 1 January 1994.

1 January 2011, Fredrikstad municipality formally entered into a new contract with KLP, which was adjusted to the pension reform of 2011. However, this contract was in reality an extension of Fredrikstad municipality's existing contract with KLP. As the adjustments made in the contract of 2011 did not impose any new obligations or increased premiums, Fredrikstad municipality did not consider this as a substantial modification of the existing contract.

The contract is without a fixed term, but Fredrikstad municipality may terminate the contract yearly by giving two months' prior notice.

11.8. Details of the municipalities involved in all municipal mergers

The Norwegian Government is also asked to set out details of the municipalities involved in all municipal mergers which have taken place since 2017 and the dates of these mergers.

An overview of the municipalities involved in all municipal mergers which have taken place since 2017, including the dates of these mergers and whether KLP is providing public occupational pension schemes to them, is attached to this letter.

Appendix 4: Overview of municipalities involved in all municipal mergers that have taken place since 2017

The Norwegian authorities have not been able to find information about how all the contracts were entered into.

If any of the merged municipalities have entered into their contracts without conducting one of the competitive procedures prescribed for in the Directive, the Norwegian authorities believe that it was in accordance with EEA public procurement law to award these contracts directly to KLP.

Overall, the municipal mergers represent organizational restructurings on the contracting authority's side, based on a principle of continuity of the previous entities. This means that the identity of the municipality, or their rights and obligations, do not change in such a way that a different contracting authority is established for the purpose of procurement law. This means that a municipal merger *does not in itself* trigger an obligation to publish a contract notice. This applies regardless of whether the merger is between two or more municipalities who have pension schemes with KLP, or whether one or more municipalities who have pension schemes with KLP are merging with one or more municipalities with separate funds. Storebrand seems to be of the same opinion in its complaint.

In the Norwegian authorities' view, the fact that the volume under the contracts increases as a consequence of the mergers does not entail that the existing contracts are substantially modified. This is evident in those cases where KLP provided public occupational pension scheme to all the municipalities merging. In that situation, the only difference is that the volume is included in one agreement, instead of being divided between two or more separate agreements.

However, the Norwegian authorities' position is that the same conclusion is valid in the few instances where one of the merging municipalities had its own pension fund and these pension obligations were transferred to KLP following the merger. Contracts for public occupational pension schemes are meant to be dynamic, so that they may encompass all employees employed by the municipality at any given time. It is in the nature of such an agreement, in the same way as e.g. a power supply agreement, that the employer's need at any given time will be decisive for the specific volume under the agreement. Whether the municipal mergers entailed that the scope of the existing contracts were extended considerably, for the purpose of Article 72(4) point (c) of the Directive, must be assessed in light of these features.

We also note that any modifications as a result of mandatory mergers of municipalities decided by the Norwegian Parliament would fall within the scope of Article 72(1) point (c) of the Directive. The mergers were not foreseeable at the time the original contracts were entered into, the overall nature of the contracts remained unchanged and the overall increase in volume did not exceed 50% in any of the cases known to the Norwegian authorities.

In addition, we note that KLP was the only provider of Norwegian public occupational pension schemes at the time when the merged municipalities chose their pension provider. Lillestrøm municipality's response to the Authority's information request (appendix 4) is illustrative:

> *"The municipal merger was a very demanding time for the municipality's employees and one had to start such complex processes early in order to get everything in place before the new municipality was established on 1 January 2020. For example, just merging the three databases with many thousands of employees was a demanding task in itself. The work had to be completed no later than the summer of 2019, in order to ensure the necessary subsequent test/control of the work, for start-up 1 January 2020. All this was thus done before Storebrand decided to enter into the business area, with effect from 1 January 2020. The fact that they first started on 1 January 2020 is stated by Storebrand in several places, including in the 2019 annual report. Since this is the same date as the municipality was established, it would not have been possible for the municipality to choose Storebrand."*

Yours sincerely

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This document is signed electronically and has therefore no handwritten signature