ROYAL NORWEGIAN MINISTRY
OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

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Your ref	Our ref	Date
Case No: 89158	22/6706-9	6 March 2023

Complaint against Norway concerning public sector purchasing of occupational pensions

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 31 August 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 alleged aid providers directly in the process due to the vast number of potentially affected parties. However, the regional health authorities (RHAs) have been provided the opportunity to comment on Storebrand's complaint. The Ministry has also informed the Norwegian Association of Local and Regional Authorities (KS), the organisation for all local governments in Norway, about the details of the complaint. This implies that it may be necessary to come back with further comments from alleged aid grantors, 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 the alleged aid recipient Kommunal Landspensjonskasse Gjensidig Forsikringsselskap (KLP). If the Authority considers it appropriate, the Norwegian authorities would welcome the opportunity to elaborate on the below comments in a meeting with the Authority.

Please note that this letter and appendix 4 contains confidential information that should not be made public, cf. Freedom of Information Act section 13 cf. Public Administration Act section 13 number 2.

Appendix 1: Non-confidential version of this letter

2. Overall comments to the complaint

The essence of Storebrand's complaint concerns the conditions under which the members of KLP give KLP access to equity. Storebrand asserts that KLP's members do not receive a return on their invested

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capital that reflects the risk that the investment entails for them, and that KLP therefore has access to equity on more favourable terms than a private market participant in a similar position would accept. In this respect Storebrand also contests the practice whereupon members are not allocated a share of KLP's so-called retained earnings ("opptjent egenkapital") when transferring their public occupational pension scheme to a different provider. Storebrand also argues that KLP historically has allocated annual profits to retained earnings at a level that would not have been acceptable to a private market participant. As far as the Norwegian authorities understand, Storebrand argues that these elements, separately and in combination, constitute unlawful state aid from KLP's members to KLP.

Overall, the Norwegian authorities note that Storebrand largely compares the decisions and priorities of KLP's members with what a private shareholder in a limited company would be prepared to accept. The Norwegian authorities do not consider that such comparison adequately reflects the reality of the relationship between KLP and its members, the essence of a mutual society which is the organizational form of KLP, or the specific features of the public occupational pension schemes managed by KLP for its members.

First of all, the Norwegian authorities do not agree with Storebrand that KLP carries out an economic activity within the meaning of the state aid rules when providing insured public occupational pension services to its members. The Norwegian authorities submit that the public occupational pension scheme is a solidarity-based social security scheme, and thus not economic activity. Since it is KLP's only purpose to provide this scheme to its members, KLP is not an undertaking within the meaning of the state aid rules in this capacity. The nature of the public occupational pension obligations, KLP's role as a vehicle to fulfil these obligations and the manner in which the principle of solidarity is expressed as between KLP's (present and future) members and the employees benefitting from the scheme, suggest that KLP is carrying out an activity of non-economic nature when offering insured public occupational pension services to its members.

Secondly, the Norwegian authorities do not agree with Storebrand that the capital structure of KLP entails that KLP receives an advantage from its members that it would not otherwise receive in the market. The financial markets regulation set out spesific rules on both own funds (solvency requirements) and on the operation of insurance activtities such as rules on pricing of insurance products that must be fullfilled separately by KLP and other pension providers. Still, when applying the market economy operator principle on membership in a mutual society it may in the context of the state aid rules be appropriate to to take into account the full economic impact of said membership, *i.e.* both the financial implications of the ownership position and the financial implications of the position as customer.

Moreover, the market economy operator principle correctly applied in the present case needs to properly account for the magnitude and the life-long duration of the obligations that the members have vis-à-vis their employees. A private market participant faced with similar financial obligations would, in the view of the Norwegian authorities, be prepared to accept the same conditions as KLP's members have done historically and today. This is *i.a.* evidenced by the fact that KLP has a considerable number of non-public members who are under no obligation to use KLP as a vehicle to provide the necessary pension services but nevertheless choose to remain there because the conditions overall are commercially sound.

The fact that KLP's members do not have access to a share of KLP's retained earnings is not an aid measure, but a necessary and predictable feature of KLP's status as a mutual society. It is recognized both in Norway and in Europe that mutual societies have a collective, ownerless capital which does not belong to any of its members.

The manner in which KLP's retained earnings have developed over the years has been based on commercial decisions made by KLP's board and endorsed by KLP's members, according to KLP for the purpose of ensuring that KLP fulfils solvency requirements prescribed by law and is able to maintain an investment portfolio with a risk profile in line with the best interests of KLP's members. The retained earnings do not as such stem from capital contributions from the members. According to KLP, KLP's members have, except in extraordinary situations where it has been necessary to strengthen KLP's overall solvency level, each year received a market-based return on their paid-in equity.

In the Ministry's view it is questionable whether and to what extent the alleged aid measures are financed through state resources. The funds belonging to the non-public members of KLP clearly fall outside the scope of state resources. A more thorough assessment is required before the Norwegian authorities are prepared to conclude on whether the decisions taken with respect to KLP's retained earnings relate to state resources or KLP's collective capital as a mutual society for the purpose of the state aid assessment.

The Norwegian authorities also question whether the alleged aid measures are capable of affecting intra-EEA trade within the meaning of Article 61.1 EEA, as the Norwegian market for insured public occupational pension services is of a distinct national nature. Insofar as the Norwegian authorities are aware, this reflects the state of the equivalent markets throughout the EEA.

As the Norwegian authorities find that the requirements of undertaking and economic advantage are not met in the present case, it will in this reply refrain from elaborating on the requirements of state resources and effect on trade.

In our opinion, there are certain inaccuracies in the complaint relating to historical events and economic analyses. We will only address such them to the extent they are related to circumstances that are relevant to the state aid assessment.

The Norwegian authorities also note that Storebrand's complaint touches upon a number of issues that seem to be of little or no relevance to the assessment of the alleged aid measures under state aid law. Such issues include *i.a.* assertions about subsidization of premiums, lock-in effects resulting from KLP's capital structure and public authorities' obligation to organize public tenders regarding insured public occupational pension services. The Norwegian authorities will not address such issues in the following insofar as they are not viewed as relevant to determine the merit of the complaint under the state aid rules.

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 200 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 act as community and social developers. This role is carried out 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. On the whole 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 carry out 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 financed through tax revenues, grants (subsidies) from the state and user payments and fees from residents. The majority 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 financing 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 financed by the general tax revenue system, comprising financing 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

[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.

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 financing 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 percent 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. Overview of the Norwegian social insurance and pension system

5.1. Introduction

The Norwegian social insurance and pension system consists of three parts:

1. a social insurance scheme that, as a general rule, includes everyone living in Norway,
2. occupation-based pension schemes and
3. individual-based pension schemes.

The most important benefit of the Norwegian pension and social security system is the old-age pension. This benefit is given the greatest emphasis in the following. The system also provides benefits in the event of disability and death.

5.2. The national insurance scheme

The National Insurance Scheme in Norway (“Folketrygden”) ensures insured persons a minimum income as old-age pensioners, but it also contains an element which ensures that the pension is in proportion to previous earnings (standard insurance).

Folketrygden's old-age pension scheme was reformed with effect from 1 January 2011. Important and principled changes were implemented.

Firstly, flexible pension drawing was introduced. The flexibility means that the individuals decide from when and to what extent they wish to draw their old-age pensions.

Although the flexible pension drawing means that there is no longer a fixed time for when the pension should be drawn, a lower limit has been set for how early the pension may be drawn. This limit is set at the age of 62 but drawing a pension from this age requires that certain conditions are met. From the age of 67 there is an unconditional right to an old-age pension from Folketrygden.

Secondly, a scheme has been introduced whereby the drawing of a pension and its amount must be neutral in relation to the pensioner's age when pension drawing begins. The aim of this is that all persons who belong to a given cohort should receive the same total pension amount, regardless of when they begin to draw their pension, if they live as long as the cohort is expected to live.

Thirdly, a scheme has been introduced whereby pensions are adjusted for changes in the life expectancy of the population (so-called life expectancy adjustment). If life expectancy increases, this means that the annual pension payment will be lower, because it will be paid out over a longer period. But it is possible for the individual to compensate for the life expectancy adjustment by continuing to work longer or by postponing the pension drawing.

Fourthly, pensioners were given the opportunity to work while receiving their pensions, without this resulting in a reduction in the amount of the pensions. The abolition of income testing should motivate the individual to continue to work. At the same time, the scheme can contribute to making the transition from work to pension more flexible for the individual.

Fifth, a new way of adjusting pensions during payment was introduced. Pensions are no longer adjusted in line with the general wage growth in society, but by the average of price and wage growth.

In addition, a new accrual system for the old-age pension was introduced, called "new old-age pension".

The innovations with flexible pension drawing, neutral pension drawing, life expectancy adjustment, the abolition of income testing and the new way of adjusting pensions during payment apply to both the old and the new old-age pension scheme. Thus, one can somewhat simplistically say that the most significant difference between the two schemes is the way the pension is earned and calculated.

In the old old-age pension scheme, the pensioners receive a basic pension, which is calculated according to the length of time they have been insured under Folketrygden and marital status, and an additional pension which is based on the pensionable income they have had in the years in which pension points have been earned. A pension point is earned when the income exceeds the basic allowance. About the basic amount see below.

A full pension requires 40 years of earnings, and it is the 20 years with the highest income in relation to the basic amount in the national insurance that is used as a basis for calculating the additional pension. The basic amount is a technical amount which, among other things, is used to calculate pensions. the basic amount currently amounts to NOK 111,477.

People with little or no pension earnings receive a pension supplement, which corresponds to the difference between the minimum pension level and the Folketrygden-pension that the person has earned.

The new old-age pension scheme contains, in the same way as the old old-age pension scheme, both a standard insurance and a basic insurance. However, the pension is structured in a different way than

in the old old-age pension. The new old-age pension consists of an income pension and a guaranteed pension. The income pension safeguards the standard security, in that the pension is in proportion to the income that the pensioner had as an active worker. The basic insurance is taken care of by the guaranteed pension, which ensures the pensioner a minimum income in old age.

Entitlements to the income pension are earned by building up a pension capital each year, which is calculated based on the insured persons' pensionable income. All years of pensionable income from the age of 13 up to and including the age of 75 are included. Furthermore, pension accrual is granted to people who carry out unpaid care work. Pension accrual is also granted for conscripts and for persons receiving unemployment benefits and disability benefits.

The size of the annual old-age pension is arrived at by dividing the accrued pension capital by a divisor. The divisor expresses the individual's estimated remaining life expectancy at the time the pension is drawn. A divisor is determined for each cohort. It follows from this that the pension will be higher the longer one waits to take it out, because the accrued rights will be distributed over fewer years.

The new accrual system for old-age pension entered into force on 1 January 2010. It applies to persons born in 1954 or later. For persons born in the period 1954 to 1962, the pension will consist of proportional parts from the old and the new old-age pension scheme. Persons born in 1963 and later only receive an old-age pension from the new old-age pension scheme.

5.3. Job pension schemes / occupational pension schemes

5.3.1. Introduction

Until 2005, it was up to the employer to decide whether a pension scheme should be set up for the employees. For employees in the public sector, the occupational pension scheme was established for almost all employees, while around half of the employees in the private sector were covered by a pension scheme.

With effect from 1 January 2006, an act was adopted which required all Norwegian employers to set up an occupational pension scheme for their employees (Mandatory Occupational Pension Act, the "OTP Act". However, employers who had a pension scheme for their employees like the pension schemes for employees in the public sector (see below about these) were exempt from the act.

The OTP Act is not a complete pension act. It contains no detailed rules on how a pension scheme should be designed, secured, or managed. The act determines (1) which employers are obliged to set up a pension scheme for their employees, (2) what kind of benefits the scheme must provide to the insured persons of the scheme and (3) minimum requirements for the size of the annual payments that the employer must make to the pension scheme. There are three alternative designs for the pension scheme. The three options are regulated in three different laws.

5.3.2. Schemes for employees in the private sector

As has been stated, the OTP Act is not a complete pension act. Instead, it sets out certain minimum requirements for the pension scheme, and it requires the employer to design the pension scheme in one

of the following three ways: (1) defined benefit pension, (2) defined contribution pension or (3) hybrid pension.

When the pension scheme is designed as a defined benefit pension, it is the pension itself that is defined. The traditional way of designing an old-age pension in such a scheme is that the pension, together with the expected pension from Folketrygden, should correspond to a certain level of the employee's salary, for example 66 per cent. However, no guarantee is given for the sum of the two pensions. A full defined benefit pension is granted after an earning period that can vary between 30 and 40 years.

If the pension scheme is designed as a defined contribution pension, it is the contribution that is paid into the pension scheme annually that is defined. The contributions are collected in a pension portfolio. The size of the annual pension depends on the size of the pension holdings, the return achieved on the funds, the period over which the pension is to be drawn and whether the pension is drawn in whole or in part.

Pension schemes can also be designed as so-called hybrid pensions. The reason is that they have features from both defined benefit pension schemes and defined contribution pension schemes.

The occupational pension schemes for employees in the private sector have been adapted to the reformed old-age pension of Folketrygden. Retirement pension may be drawn from the age of 62. In contrast to Folketrygden, which provides lifelong pensions, there is an opportunity to decide that the pension payments shall either cease or be reduced after a set minimum duration of the pay-out phase.

There have been collective agreements on contractual pensions ("AFP") since 1989, for employees in both the private and and the public sector. These agreements ensured the employees a right to receive a pension before Folketrygdens pensionable age, which until the introduction of the pension reform in 2011 was 67. The contractual pension could, under certain conditions, be drawn from the age of 62 and payments ceased when the payment of an old-age pension from Folketrygden started at the age of 67. Almost all employees in the public sector are covered by AFP, while around half of the employees in the private sector are covered.

In connection with the introduction of the pension reform in 2011 and flexible drawing of the old-age pension from Folketrygden, AFP for employees in the private sector was changed from being a pension paid out for a fixed numbers of years to being a lifelong addition to the old-age pension paid from Folketrygden. Furthermore, the scheme was changed to a qualification scheme, which means that certain conditions must be met at the age of 61 and at the time when the AFP is drawn (there is therefore no accrual). For those who meet the conditions for entitlement to AFP, the pension must amount to 0.314 per cent of the income with which the person is registered in Folketrygden up to and including the age of 61. Furthermore, the pension is adjusted with a ratio, which takes account of changes in life expectancy.

5.3.3. Schemes for employees in the public sector

The pension schemes for employees in the public sector (employees of the national government, the county councils, the municipalities, and the healthcare institutions) are regulated in acts, collective

agreements, or articles of association. A particular characteristic of the schemes for public employees is that the pension scheme for national government employees (Statens pensjonskasse, SPK) has entered into an agreement with almost all Norwegian pension schemes for public employees on the transfer of service time and joint payment of pensions. An important prerequisite for this is that the pension schemes must be almost identical as regards the calculation of benefits. By agreeing to the transfer agreement, the different Norwegian pension schemes for public employees have therefore undertaken to have a similar pension plan to that of SPK, and to make corresponding changes in their pension scheme to those that may be made in SPK. In practice, this means that all occupational pension schemes for employees in the public sector are the same. This contrasts with the occupational pension schemes that have been established for employees in the private sector, where there is considerable flexibility about the design of the pension schemes.

The old-age pension schemes for public employees are defined benefit schemes. They normally aim at giving the employees a pension based on the salary they have when they either become a pensioner or leave the pension scheme, but so that an upper limit applies. The pension percentage is normally 66, and a full benefit is given after 30 years of earnings.

The old-age pension is adapted to any old-age pension from Folketrygden by making a deduction in the pension from the occupational pension scheme. Old-age pension from the public service pension schemes is provided as long as the pensioner lives, and pensions in payment are adjusted annually by half of the increase in wages and prices.

Old-age pensions from the public service pension schemes may normally only be drawn from the age of 67, but certain groups of employees may draw a pension from a lower age. In addition, public employees may draw an old-age pension from the age of 62, where this has been agreed in the collective agreement. The collectively agreed pension ceases when the pensioner becomes entitled to an old-age pension from the occupational pension scheme.

The old-age pension system described above applies in full to public employees born in 1962 or earlier. For persons born in 1963 or later, the old-age pension scheme has been changed with effect from 2020. In the new pension scheme, there is no longer a defined benefit based on final salary, but a scheme that is reminiscent of the National Insurance Scheme’s new old-age pension scheme. This means that each year an amount is set aside from the employee's salary for pension purposes. The pension contributions are collected in a pension portfolio, which is adjusted annually in line with the general wage trend. Annual payments are made to the pension portfolio as long as the employee is an insured person of the pension scheme.

The pension capital is divided by a divisor, which reflects the employee's estimated remaining life expectancy at the time the pension is drawn. It is possible to draw the pension from the age of 62. Partial drawing of the pension is possible.

As a result of the fact that in the new old-age pension scheme for public servants, old-age pension may be drawn from the age of 62, it has been agreed that the collective old-age pension scheme for public servants born in 1963 and later will be amended with effect from 2025, so that the benefit becomes a

lifelong addition to the old-age pension from the occupational pension scheme, following the pattern of the contractual pension for employees in the private sector. The rules for this are currently being drawn up.

5.4. Private savings

In addition to the pensions that an employee earns in pillars 1 and 2, the person concerned can save for old age through private savings or other forms of investment. The person concerned can also enter into an agreement on individual pension savings with a pension provider. Doing this can result in an amount of up to NOK 15,000 annually being deducted in the tax equation. The return on the saved funds is exempt from tax during the savings period, but payments based on the agreement are taxed as wages. Pensions from the individual pension savings agreements can be drawn from the age of 62.

6. Administration of public occupational pension schemes

The complaint from Storebrand concerns the conditions under which public occupational pension schemes are organized and administered in Norway. The regulation and design of public occupational pension schemes was explained in section 5.5. In this section, we will give a more detailed description of how the public occupational pension schemes are administered.

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

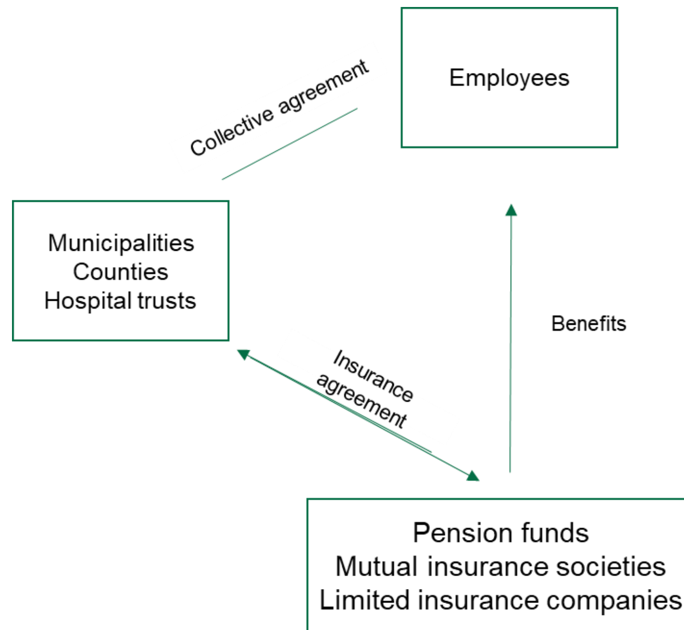
The pension scheme for government employees is managed by the Public Service Pension Fund.[3] This also applies to the statutory pension scheme for apothecaries.[4] The statutory pension scheme for nurses is, pursuant to a Royal decree 22 June 1962 managed by KLP.

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 etc.) does not have full insurance cover for the pension obligations, the individual employer (municipality, county etc.) is 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 employees 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.

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

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



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).

These organizational forms have certain characteristics which affect the level of the public employers' obligations to pay premiums and to contribute capital to the administration of 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 customers do not as such need to make capital contributions, but 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.

A mutual insurance society has significant 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.

7. KLP (the alleged aid recipient)

7.1. Overview

The introduction of public occupational pension schemes rendered it necessary for the municipal employers to find a way to provide the services at as low risk and overall cost as possible. This was the background for the establishment of KLP.

In the years after the Second World War, a number of the larger municipalities in Norway 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.

The municipalities eventually founded KLP as a mutual society 15 February 1949. The foundation was based on an overall consensus that these municipalities 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*".

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. 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.

KLP has, however, established a number of *subsidiaries* that are active in other markets to support and improve the provision of such services. These include, among others, KLP Kapitalforvalting AS, KLP Skadeforsikring AS og KLP Banken AS.

Appendix 2: Overview of group

7.2. KLP is a mutual society

KLP's organisation is governed by the Articles of association of KLP.

Appendix 3: Articles of Association - English translation 13 May 2022

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. Effectively, KLP can therefore be characterized as a mutual society managed by and for the members.

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 roles as "owner" and "customer " coincide. The "owners" and "customers" are the same, and constitute the mutual insurance society's *members*, cf. Section 7-8 of the Financial Institutions Act.

This ensures that there are no inherent conflicts of interest between the "customers" and the "owners" in a mutual insurance society. 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.

There are not many mutual societies in Norway. Mutual societies are, however, widespread in other parts of Europe. As of 2020 mutual insurance societies, in various forms, had a total market share of 33.4 %, of which 25.7 % in life insurance and 42.8 % in non-life insurance.[5] Despite the significant presence of mutual insurance societies in Europe, there is no common, uniform legislation of mutual insurance societies in the EU. This is, presumably, due to the relatively wide variety of organizational principles governing mutual societies and similar entities.[6]

The EU has worked to adopt a uniform legislation on European mutual insurance societies by way of a regulation similar to the regulations for European companies[7] and European cooperatives[8] respectively. Although a final regulation has not yet been agreed upon, there are several statements in the preparatory works of the draft regulation that is relevant to understand the distinctive characteristics of mutual societies. This will be further addressed in section 10.5.3 below.

7.3. KLP's members (the alleged aid grantors)

KLP is, and has been, an open mutual society, meaning that it is possible for other municipalities and public entities to join. Therefore, KLP has over the years become the provider of public occupational pension schemes for a large number of Norwegian public entities.

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 largely entities that have formerly been part of municipalities, but later have been demerged as limited companies, and/or various kinds of entities with a level of affiliation 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,*

[5] https://amice-eu.org/app/uploads/2022/06/European-Mutual-Market-Share-2022.pdf
[6] See, for instance, «A Practical guide to understanding mutual insurance» published by ICMIF (International Cooperative and Mutual Insurance Federation)
[7] Regulation 2157/2001
[8] Regulation 1435/2003

(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.

[redacted] they still have to fulfil their obligations towards existing or former employees with public pension entitlements. KLP cannot unilaterally terminate its agreements with such members, but the private members are free to transfer their pension scheme to a different provider.

According to KLP,the private members' share of the total premium reserve in KLP amounts to 14 %.

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

8.1. Overview

In the following sections, the Norwegian authorities will give a brief account 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 KLP's business and the boundaries with which KLP must comply with in its business decisions.

There are largely two legal instruments that govern KLP and its 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 KLP's *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 not only to mutual societies such as KLP, but also to other providers of public occupational pension schemes (i.e. pension funds and (public) limited companies). Overall, the regulation is the same for the different providers, but with important exceptions that accommodate for the difference in organizational form. This is especially the case for the capital structure, to which the Norwegian authorities will return in section 10.5.2 below.

8.2. Calculation of premiums

The calculation of premiums for insured public occupational pension schemes is strictly regulated in Chapter 3 of the Insurance Activities Act and its regulations.[9]

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").[10] The premiums must be based on objective factors, be justifiable and cover the insurance obligations undertaken by the companies and structured so that differential treatment between products, product combinations or customer groups does not occur.[11] All profit margins that are added on the premiums must be transparent in the reported premium tariffs.[12] It is not allowed to deviate from these premium tariffs in negotiations with customers.

[9] Regulation on life insurance Chapter 2
[10] Insurance Activities Act § 3-7 and Regulation on life insurance § 2-9
[11] Cf. in particular the Insurance Activities Act § 3-3 and regulation on life insurance. §§ 2-1 to 2-4
[12] Cf. Regulation on life insurance Section 2-9 second paragraph letter c

Further, there are special requirements for the equalization of the premiums between municipalities etc. in the "joint schemes" established by the relevant insurance undertaking.[13] In such joint schemes, the premium that the individual municipality must pay is equalized based on principles that prevent the premiums 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 their members equalized calculation of premiums since the establishment of the "joint scheme" for municipal employees in 1974, i.e. long before this became mandatory by law. 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.[14] The ordinary annual premium covers the pension rights the employees acquire throughout the year, but also includes "costs for services". Costs for services include, in short, costs for management of the assets and costs for administrative services.[15] In addition members pay an interest rate guarantee premium.[16] The interest rate guarantee premium will vary between pension providers based on, among other factors, the pension scheme's "buffer fund".[17]

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. According to KLP, this amounts to approximately 97 % of the total premiums collected for insured public occupational pension schemes. KLP or any other pension provider has in practice no impact on the level of these premiums. They must be paid in order to secure the obligations (all the benefits according to SGS 2020) that the pension provider has undertaken towards the customers and the beneficiaries

Thus, it is only approximately 3 % of the annual premiums that will vary 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.

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

Appendix 4: KLP's calculation of premiums for 2022

8.3. 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 undertaking (the insurance company).

The assets of the customers are assets dedicated to cover the insurance undertaking's liabilities towards the customers and are managed in a separate "group portfolio". The assets in this portfolio stem from the various premiums collected from the members, with the exception of the premiums for services, interest rate guarantee premiums and any profit-margin added on the premiums (as described in the foregoing section).

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[13] Cf., among other things, SGS 2020 § 12-2 etc. and the Insurance Activities Act § 4-6.
[14] Insurance Activities Act section 4-4 and 4-5
[15] Insurance Activities Act Section 3-3 second paragraph
[16] Insurance Activities Act Section 3-3 second paragraph
[17] The Norwegian Authorities will return to the "buffer fund" in section 5.3 below

The management of the assets in the company's 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 members.[18] This is a fund that the customers may use to cover later years' premium collections.[19] In case of losses, this is – at the outset – the company's risk, and must therefore, as a main rule, be financed with equity capital. However, all or part of the yearly profits on the group portfolio may be allocated to the pension scheme's "buffer fund", that may be used in times when the insurance companies do not achieve the guaranteed return on the funds in the collective portfolio.[20] This buffer fund was introduced in 2021 as a replacement of the previous buffer structure. The old structure was considered to give sub-optimal incentives with regards to switching of pension providers, and the new buffer was introduced with an aim to facilitate at more fair and neutral market for switching providers of municipal pension schemes. The fund is of great importance for the insurance companies' investment risk profile and, also, the insurance companies' solvency level. If the buffer fund is large, it will allow the insurance companies to take higher risks in the management of the funds in the group portfolio, which over time may give higher returns. Such returns can again be added to the customers' premium fund. We will return to the importance of the buffer fund in the solvency and capital requirement calculations under section 10.6 below.

The assets of the undertaking are the company's capital base, managed in the insurance company's "undertaking's portfolio".[21] The assets in this portfolio come 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 the assets in the undertaking's portfolio itself.[22] In addition, the assets in the undertaking's portfolio may come 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. Please note that, in KLP, losses will be covered first by the "retained earnings". Only after the retained earnings have been depleted, losses will be covered by the paid-in equity. Thus, in KLP the retained earnings acts as a buffer for the paid-in equity that lowers the risk for the members of KLP. KLP has never had to use paid-in-equity to cover losses.

8.4. Moving of pension schemes between providers

The Insurance Activities Act set out rules for moving pension schemes between pension providers in chapter 6. These rules apply to both private occupational pension schemes and public municipal pension schemes, cf. section 6-1. According to section 6-7 the pension schemes' funds that are subject to moving between providers include among other things the premium reserve, the buffer fund and the employers premium fund. The Insurance Act chapter 6 only regulates the dispositions of the pension scheme funds when switching providers. Regulation of pension providers own funds is outside of the scope of these rules.

[18] Insurance Activities Act Section 3-13 second paragraph and Section 4-14 first paragraph
[19] Insurance Activities Act § 4-12, cf. Undertaking Pensions Act § 10-3.
[20] Insurance Activities Act section 3-13 second paragraph, cf. section 4-10a
[21] Insurance Activities Act section 3-11.
[22] Insurance Activities Act § 3-11 fifth paragraph, § 3-13 fourth paragraph and Ot.prp. No. 74 (2003-2004) section 5.2.1. and section 5.2.3.

8.5. Solvency requirements

The regulatory need for equity capital in mutual insurance societies can be ascribed to the introduction and development of Norwegian – and later European – capital requirements from 1988. Before 1988, the Insurance Activities Act made no special requirements for equity capital, own funds or solvency in mutual insurance societies. This has changed considerably during the last 30 years.

While the former requirements were largely based on national legislation, insurance companies are today subject to the, among other things, capital requirements, minimum capital requirements and solvency capital requirements in the Solvency II directive[23], with associated regulations[24]. The overall framework in the Solvency II directive has been implemented in Norway through the Financial Institutions Act.[25]

The capital requirements have always had the same basic purpose; to protect the policyholders and others who derive rights from the insurance contracts against the losses the insurance companies may incur in their operations, either through the management of the policyholders' funds or other risk events. The insurance companies must have own funds that are sufficient to withstand large losses as a result of risk events and to adapt their operations based on the risk the company is exposed to at all times, in order to ensure that the companies' obligations towards policyholders and others who derive rights from the insurance contracts are protected.

For a society like KLP, with significant liabilities and insurance capital to manage, this requires sufficient own funds, including equity. The Norwegian authorities will return to KLP's assessment of their fulfilment of these requirements in section 10.6 below.

9. Development of market shares

KLP has always been in the market for insured public occupational pension schemes, but has never been the only alternative available to its members. At times, 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 KLPs 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.[26] When transferring, all parts of the pension scheme's obligations and assets must be transferred from the existing provider

[23] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

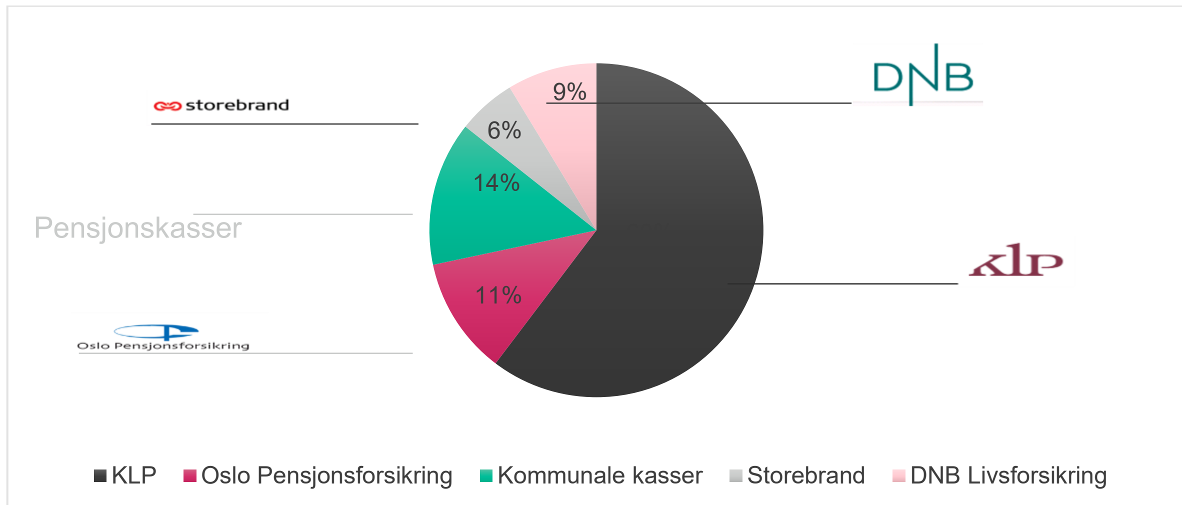
[24] Commission Regulation (EU) 2015/35 on completion of the Solvency II directive

[25] The parts of the Solvency II Directive that have not been implemented in the Financial Institutions Act, have been implemented in Regulation 25 August 2015 No. 999 to the Financial Institutions Act on implementation of the Solvency II Directive (Solvency II Regulation). Delegated Commission Regulation (EU) 2015/35 on completion of the Solvency II directive has been made a regulation through reference to the regulation in the Solvency II regulation § 53.

[26] cf. Sections 6-1 and 6-5 of the Insurance Activities Act.

to the new provider.[27] 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.[28]

After 2000, there were a growth of private life insurance companies in the market, and municipalities increasingly chose to carry out tenders to ensure the lowest possible administration costs. In the period from 2006 to 2012, there were every year around 10-15 municipalities that carried out tenders. As of 31 December 2011, the market shares were as follows[29]:



In 2012-2013, DNB and Storebrand decided to terminate their offering of insured public occupational pension schemes. The reason for Storebrand's decision is apparent from Storebrand's annual report for 2012.[30] In short, the reasons were lack of changes in municipal occupational pensions to pension schemes that more resembled private pension schemes, investment costs and new capital requirements linked to products with interest guarantees.

Storebrand and DnB's exit left 93 municipalities and county authorities and a number of businesses without a pension 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. According to KLP, this entailed a significant increase in risk exposure.

As a consequence of Storebrand and DNBs exit, KLP was the only provider of insured public occupational pension schemes except for pension funds in the period from 2013-2018.

When Storebrand re-entered the market in 2018, the tenders were again carried out.

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[27] 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.
[28] cf. regulation on life insurance section 10-3
[29] The figure is based on statistics from Finans Norge. The market shares are calculated on the basis of the premium reserves.
[30] Storebrand annual report 2012

10. The financing of KLP and KLP's capital structure

10.1. Introduction

The essential elements of Storebrand's complaint concerns the principles of financing of KLP, KLP's distribution of profits and KLP's equity structure. In the following the Norwegian authorities will review and comment on these principles.

10.2. Overview – premiums, paid-in equity and profits

According to KLP, KLP's *ongoing operations* are essentially financed through "premiums for services", cf. section 4-5 of the Insurance Activities Act. KLP's members, and hence KLP, wish to keep these premiums as low as possible. Therefore, these premiums only include sufficient margins to ensure that KLP's operational costs are adequately covered.

KLP has explained that although the purpose of KLP is to maintain the best interests of its members, and not to make a profit on its operations, KLP as a mutual society needs to build up and maintain sufficient *equity capital*. This has several reasons, most importantly the solvency requirements in Norwegian and European legislation (see section 8.5 above).

Under the current legal framework (see section 8.3 above), mutual insurance societies like KLP have three main alternatives by which to build up their equity: (i) taking profit margins on the premiums, (ii) returns on the management of the equity or (iii) equity contributions from the members. Below are KLP's views of these alternatives.

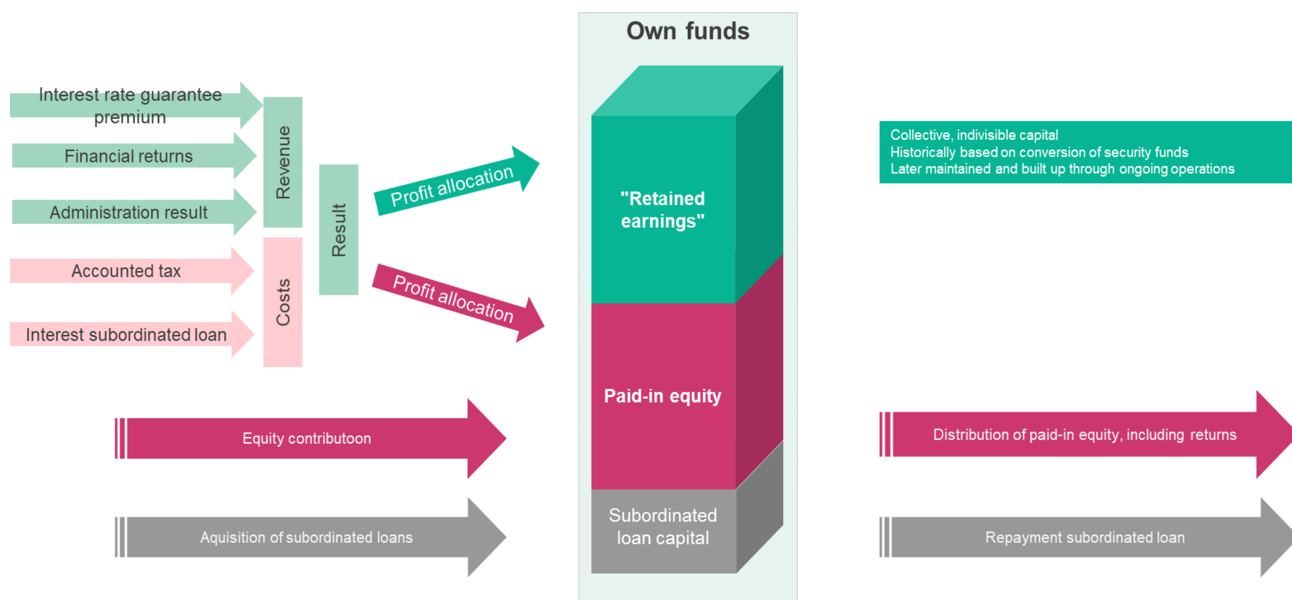
Alternative (i) has not been considered appropriate by KLP's board of directors. The members wish the premiums to be as low as possible, i.e. without profit margins. This is partly related to the fact that employer's tax is added to the premiums. Higher premiums give higher employer's tax and hence higher costs for the members.

KLP and its members have not considered alternative (ii) to be viable, as it is considered undesirable to take high risk on the management of the equity. The equity in KLP is therefore managed conservatively, in line with the members' commercial preferences.

Based on the above, and in line with the members' preferences for low premiums and low risk in the management of the equity portfolio, KLP has opted for alternative (iii), i.e. that the members make regular capital contributions as paid-in equity. Such equity can be paid in without additional fees or taxes and may also be repaid if and when a member decides to transfer their occupational pension scheme to a different provider and terminate their membership with KLP.

At the same time, KLP must have the necessary equity at all times to comply with its legal obligations and to carry out its activities at an optimal level. In KLP's view, this also includes being prepared to include new members, including in times when other insurance companies choose to withdraw from the market due to lack of profitability, as Storebrand and DNB did in 2012-2014. For these reasons, it is also rational to build up and maintain an element of retained (collective) earnings in the society.

KLP's capital structure may be illustrated as follows:



In the following sections, the Norwegian authorities will argue that the equity paid in by KLP's members is proportional to the obligations and risk undertaken by KLP related to the respective members, that profits generated on the paid-in equity is allocated to each member and that the paid-in equity, with profits, is paid to a member upon transfer to a different provider (section 10.4). Further, the Norwegian authorities will explain that the retained earnings are a collective, indivisible capital that does not belong to the members as such, and is therefore not repaid upon transfer. This is a recognized expression of a universal feature of a mutual society (section 10.5).

10.3. KLP's premiums

In line with the commercial preferences of its members, KLP has explained that it seeks to charge its members with as low premium as possible, while still complying with all statutory obligations. The members of KLP pay ordinary annual premiums, adjustment premiums and special single premiums in accordance with the requirements set out in section 8.2 above.

These premiums cover the insurance liabilities KLP has undertaken and are in line with the price tariffs KLP has communicated to the Financial Supervisory Authority. Similarly, KLP's premiums for administration services and premiums for managing assets cover KLP's total costs related to its operations.

In relation to the distinction between "customers' assets" and "undertaking's assets" (section 8.3 above), KLP has made clear that the premiums collected from KLP's members (except administration premium, capital management premium and interest rate guarantee premium) are the *customer's assets*. This implies that (i) profits generated on the management of the paid-in premiums, are allocated to the respective insurance contracts, and (ii) that the premiums collected, including returns, may be transferred to another provider (see section 8.5 above).

10.4. Paid-in equity – individualized equity capital

10.4.1. Introduction

KLP has explained that to satisfy the solvency requirements introduced in 1989, relying on KLP's retained earnings (collective capital) was insufficient.[31] KLP needed to obtain additional equity capital in order to meet the solvency requirements. At the same time it was important to the members that this could happen at the lowest possible cost. It was therefore decided to raise equity through contributions from KLP's members. The alternative would be to drastically increase profit margins on the premiums, but this was, for several reasons, not an attractive alternative.[32]

The members' obligation to pay in equity is set out in KLP's articles of association section 2-3.[33] The payment obligation is not unqualified, but delimited "*to the extent necessary in order to give KLP a satisfactory solidity*". The wording ensures that the paid-in equity constitute "high-quality capital" (tier 1) under the Solvency II Directive. In order to ensure equal treatment between the members, each member's payment is calculated based on a proportional formula corresponding to each members' share of the total premium reserve.

KLP has explained that the obligation to pay in equity is relevant in two different situations:

First, existing members pay annual equity contributions in accordance with the board's decision. The need for such payment is assessed and decided annually by the board. Historically, equity contributions have, with only few exceptions, been paid annually to KLP. ██████████████████████ Second, an equity contribution is required from new members upon transfer of their public occupational pension schemes to KLP. ██████████████████████ The purpose of this contribution is to account for some of the equity strain taking on new insurance obligations entails for KLP. It is also a result of the overall principle of equal treatment between the members.

In addition, KLP has the right under the articles of association to require the members to pay in extraordinary equity contributions.[34] In practice, however, this alternative has never been used, not even during the financial crisis of 2008. As KLP's members have given priority to building up substantial customer buffers (see section 10.6 below), the risk of extraordinary capital contributions is non-existent in practice.

10.4.2. Allocation of the returns on paid-in equity

Both today and historically, it is for the board of KLP to decide if and how much of the annual profits that shall be distributed to the members. In doing so the board must consider, among other things, the society's financial position, the overall need for equity capital and solvency level.[35] In that regard, KLP is no different from a limited company such as Storebrand. Neither shareholders of a limited company, nor members of a mutual society, have a *legal right* to receive returns/dividend on their paid-in capital. But they do have *expectations* in that regard. Based on its review of KLP's practice and management principles the Norwegian authorities consider that these expectations have been fulfilled as regards KLP's members.

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[31] See point 7.5.1 below on the origins of the retained earnings

[32] Among other things because premiums are charged with employer's tax, as opposed to equity contributions.

[33] The Financial Institutions Act Section 7-8, second paragraph, requires that such an obligation must be stated in the company's articles of association.

[34] KLP's articles of association section 2-3 first paragraph

[35] Currently stated in KLP's Articles of association section 2-3 (3)

According to KLP, the form and method for allocation of annual profits have varied over the years, largely due to changes in legislation or commercial considerations.

As mentioned in section 8.3 above, Norwegian legislation on insurance companies did not distinguish between "customers' assets" and "undertaking's assets" before 2008. This entailed that the return on the paid-in equity before 2008 was not separated from the return on management of the customer's assets. During this period, all profits were supposed to be "returned to the insurance contracts", cf. the (then in force) Insurance Activities Act Section 8-1. This entailed that the returns (indirectly) were used to cover the members' future premiums.

After 2008, each member's share of the profits was transferred directly to the members' respective *premium funds*. Such funds could then (as today) be used to cover the members' future premiums.[36]

Consequently, from the equity contribution started early in the 1990-ies and up until late in the 2010s, the return on paid-in equity was allocated directly to the customer's assets (the insurance contracts or the premium fund), thereby contributing to lower premium payments going forward. In section 4.4.2 of the complaint, Storebrand claims that "*this gave KLP a competitive advantage that the company's competitors did not have*". The Norwegian authorities do not agree with this assessment. Storebrand does not consider the fact that KLP's members in this period paid in equity on a yearly basis. Such obligation is an inconvenience for the members, and according to KLP a competitive disadvantage for KLP, which in this period was compensated by lower premiums. This demonstrates that the members' roles as customer and as owner of KLP cannot be viewed in isolation when assessing their behaviour under the state aid rules.

As explained, the annual allocation of profits to the members, and hence their return on the paid-in equity, has, according to KLP, been dependent upon the board considering it commercially sound and reasonable. In the years immediately after Storebrand and DnB withdrew from offering insured public occupational pension schemes (2014-2018), the board had to take the current and future financial situation for the society into consideration. The reasons for not allocating any of the returns to the members in the period is evident from the many board meetings in the period, and may be summarized as follows:

- Maintenance of solvency and risk capacity after DnB and Storebrand's customers transferred their pension schemes to KLP. The transfer entailed that KLP consumed approximately NOK 50 billion in increased insurance liabilities, which, in isolation, resulted in a severe solvency burden and dilution of both the retained (collective) earnings and the customer buffers.
- A need to increase retained (collective) earnings, to strengthen premium reserves as a result of increased life expectancy in the population, cf. new, legislative requirements for contributions from equity.
- Adaptation to new capital and solvency requirements with the Solvency II regulations which were to be introduced in 2016.
- Strengthening of solvency and risk capacity in order to maintain a return on customer capital (insurance capital) above the basic interest rate in a low interest rate regime.
- The redemption of two subordinated loans in 2016 and 2017 in a total of NOK 2.9 billion.

[36] Insurance Activities Act § 4-12 (3) and Enterprise Pensions Act § 10-3

KLP has informed that the board in 2018 considered that the level of equity and solvency was sufficient to again start distributing profits to the members. However, at that time KLP had become aware that the practice of transferring return on paid-in equity to the members' premium funds may be questionable from a legal perspective, among other things because of the Insurance Activities Act's clear distinction between the customer's and undertaking's assets. After a thorough legal assessments of the laws and regulations, the board assumed the position that section 4-2 of KLP's articles of association allowed for the allocation of returns directly to the paid-in equity. Such allocation would strengthen the paid-in equity in KLP (compared to a solution with payment directly to the members) and thus not affect KLP's solvency. At the same time, returns on the paid-in equity would this way be paid to members upon transfer to another pension provider, cf. KLP's articles of association section 2-3 (4).

Consequently, from and including 2019, the members have received returns *directly* on the paid-in equity. The distribution of profits in the form of return on paid-in equity is always subject to the board's assessment, but the strategy that is followed is that the paid-in equity shall be allocated a share of the profits in proportion to its relative share of the overall equity. Thus, the Norwegian authorities disagree with Storebrand when they assert (section 4.4.2 of the complaint) that "*KLP have also in 2019 and 2020 retained a significant part of the return generated on the owners' equity contributions".* The return generated by the paid-in equity is allocated to the paid-in equity.

The table below gives an illustration of the allocation of returns on the paid-in equity from 2008-2021, in line with the descriptions set out in the paragraphs above:

Returns on paid-in equity	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Allocated to premium fund	2.1 %	4.8 %	3.6 %	2.8 %	3.2 %									
Allocated to paid-in equity												4.8 %	3.5 %	4.3 %

As can be seen, the paid-in equity was not allocated any of the returns in the period 2013-2018. In comparison, Storebrand Livsforsikring AS did not distribute dividends to its shareholders in the period 2011-2016.[37]

10.4.3. Members maintain their share of paid-in equity upon transfer

According to KLP, the paid-in equity, included returns, is and has always been repaid to members who transfer their occupational pension schemes to other providers. Before 2013, this followed from the fact that the returns in this period were allocated annually to the insurance contracts or the premium fund, *i.e.* customer's (pension scheme's) assets that *must* be transferred when members transfer their insurance contracts to a new pension provider.[38] Today, this follows from Section 2-3 of the articles of association of KLP.

Thus, we do not share the complainant's view expressed in section 4.4.2 of the complaint that only the "*krone amount that has been invested in KLP*" is repaid. The members also receive the returns, not only from the last year but also the accumulated returns on the paid-in equity from previous years as allocated by the annual board decisions.

[37] Annual reports from Storebrand 2012, 2013, 2014, 2015 and 2016

[38] Insurance Activities Act Section 6-6 and Section 6-7.

As Storebrand points out, the question of repayment upon transfer must formally be decided by the board and must be approved by the Financial Supervisory Authority ("Finanstilsynet").[39] This is a consequence of the statutory solvency requirements; in order to qualify as "high quality capital" under the solvency rules, KLP's member cannot have an absolute legal right of repayment. Such right would effectively mean that the assets would lose their status as equity for the society. Hence, a formal approval process is necessary for legal reasons.

10.5. Retained earnings – collective, indivisible capital

10.5.1. Development of the retained earnings

In formal terms, the collective capital/retained earnings in KLP was established when the statutory capital requirements were introduced in 1988. However, also prior to this KLP had funds that best could be characterized as risk capital, including bonus funds, security funds and funds for special purposes. According to KLP, these were collective, indivisible funds that functioned as security against financial problems. They could be used to cover deficits and were not distributed if a member transferred from KLP.

In order to satisfy the capital requirements introduced in 1988, KLP implemented three measures:

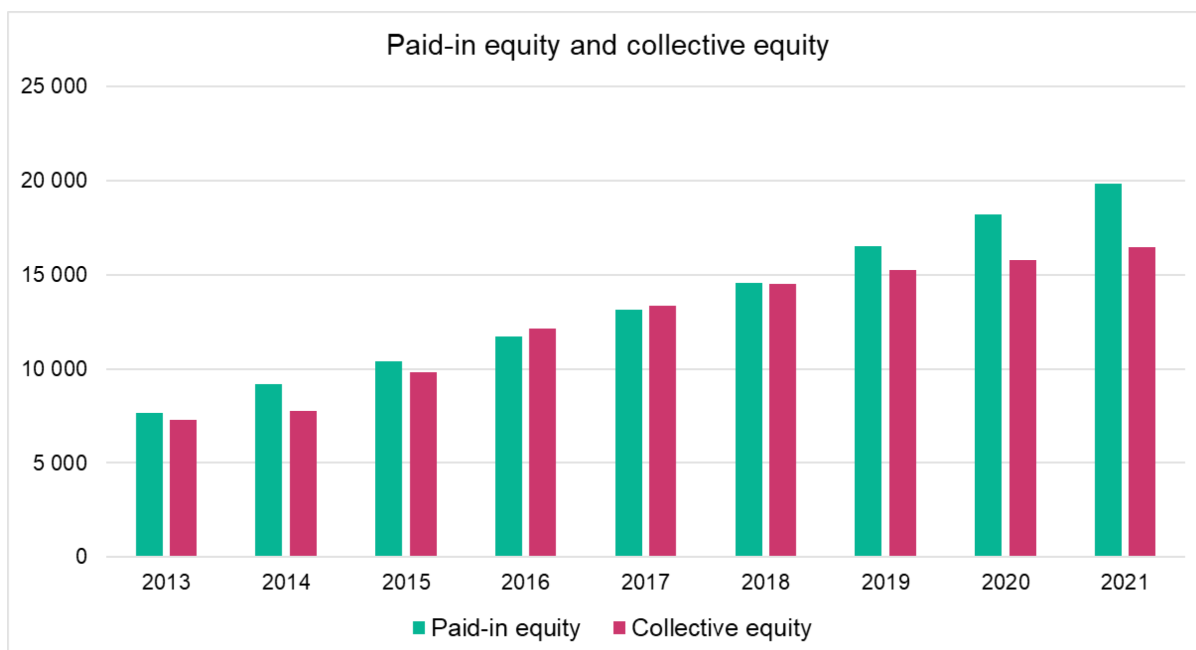
(i) KLP's former "security fund" (NOK 388 640 059) was transferred to a new "equity fund"
(ii) Assets in the former "special fund" (NOK 22 350 881) were classified as equity
(iii) KLP raised a subordinated loan (NOK 375 000 000)

Storebrand claims that "*the retained earnings is the return that has been generated over time on the owner's equity contributed…"* (complaint section 4.4.2) and that *"The retained earnings are the return on the municipalities', RHFs' and hospitals' paid-in equity"* (complaint section 4.4.5). However, KLP's retained earnings are based on, and stem from, collective indivisible funds established *before* members started to pay in equity (i.e. before 1991).

From the formal establishment of the retained earnings and until today, the board of KLP has made consecutive decisions as to if and how much of the annual profits that needs to be allocated to the retained earnings in order to keep them at a level sufficient to satisfy their purpose (i.e. to make KLP fulfil the capital requirements, make sure that KLP can operate at the desired risk level in terms of asset management, to protect the paid-in equity and remain open to new members in the future). The overall strategy has been to allocate areturn that reflects their proportionate share of KLP's equity. However, as the market conditions, regulatory framework and number of members has varied significantly through the years, KLP's board has, from time to time, considered it necessary to allocate more (or less) of the returns to the retained earnings.

For instance, such considerations had to be made in the period from 2013-2018, when Storebrand and DnB had left the market, and KLP took over substantial customer liabilities. For the reasons set out in section 10.4.2 above, KLP chose in this period to allocate all of the profit on the undertaking's assets to the retained earnings. However, as illustrated below, the ratio between paid-in equity and retained earnings was more or less the same throughout this period:

[39] Articles of association section 2-3



10.5.2. "Retained earnings" are ownerless capital that may not be distributed to the members

The Norwegian legislation on the members' and shareholders' access to the equity capital in insurance companies is not the same for mutual societies, limited companies and pension funds.

In mutual societies, only the last year's profits may be distributed to the members. This follows from the Financial Institutions Act section 10-7 (1). The provision only establishes legal basis for allocation of the *last year's profit*:[40]

> *"The net profit for the year of a financial institution that is not organised as a private limited company or public limited company, and that has not issued equity certificates, shall be assigned to the institution's ownerless capital, unless the articles of association provide that net profit shall be distributed as dividend."*[41]

This provision also presumes that mutual insurance societies have "*ownerless capital*", which is the underlying reason why mutual insurance societies may not distribute more than last year's profit to the members. This shows that mutual societies have a collective capital that does not belong to the members, and that may not be distributed to them. This is also supported by various statements in the preparatory works of the Norwegian legislation, which presumes that mutual societies have "*ownerless capital*"[42], and, in the case of KLP, that retained earnings are "*the company's own part of the equity*"[43]. Consequently, in KLP the *retained earnings* constitute *ownerless capital*.

[40] Contrary to limited companies, which may distribute profits also from earlier year.
[41] For the sake of completeness, the Norwegian authorities add that KLP has not issued equity certificates.
[42] NOU 2003: 11 Konkurranse i kollektiv livsforsikring Del I section 7.9
[43] Prop. 125 L (2013-2014) section 6.4.4.

We therefore do not share Storebrand's view that: "*The Financial Undertakings Act does not contain rules that limit mutual companies' opportunities to distribute dividends or in other ways give the owners ownership of the company's profits*."[44]

The same principle under Norwegian law appears to apply to pension funds. In a recent judgement from Borgarting Court of Appeal, the appeal court concluded that a company was not entitled to a share of the pension fund's equity capital upon transferring its pension scheme to Storebrand.[45] The result and reasoning in this judgement contrasts Storebrand's assertion in section 4.4.4 of the compliant claim that "*In comparison, for example, a share of both paid-in and earned equity are distributed to public customers/owners who leaves a pension fund."*

The retained earnings' status as ownerless, indivisible capital in mutual societies, is also supported by various international sources on mutual societies. With regard to the members' access to capital in mutual societies, the European Parliament states:

> *"The European Parliament underlines the importance of the principle of solidarity in mutual societies, where clients are also members and thus share the same interests; recalls the principle of common ownership of the capital and its indivisibility; (…)"*[46] (our underlining)

In other words, the European Parliament confirms that mutual societies have and must have a collective capital that may not be distributed to the members. When Storebrand suggests that the members should be able to take a share of the retained (collective) earnings with them when they leave the society, it contradicts this fundamental principle of mutual societies.[47]

10.5.3. It would be contrary to the purpose of mutual societies to distribute KLP's retained earnings

The fundamental principle that mutual societies have an ownerless capital which may not be distributed to the members, also have a bearing on another central feature of a mutual society such as KLP; that membership shall be *open* to anyone who wants to become a member:

> *"whereas mutual societies are voluntary groups of natural or legal persons whose purpose is to meet the needs of their members rather than to achieve a return on investment; whereas they operate according to the principles of voluntary and open membership and solidarity between members, and are managed according to democratic principles (such as the one member/one vote principle for mutual societies composed of individual persons), thereby contributing to responsible and sustainable management;"*[48]

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[44] Storebrand's approach is probably related to the fact that they wrongly assume that KLP has equity as regulated in the Financial Institutions Act Section 10-1 (1), which is the one cited in section 4.4.4 of the complaint. This provision defines equity in insurance limited companies, and not mutual undertakings. The latter is regulated in section 10-1 (2) of the Financial Institutions Act.
[45] Borgarting Court of Appeal No. 22-013431ASD-BORG/03
[46] European Parliament resolution of 14 March 2013 with recommendations to the Commission on the Statute for a European mutual society: https://www.europarl.europa.eu/doceo/document/TA-7-2013-0094_EN.html
[47] The principle that members in a mutual insurance undertaking do not have ownership rights to the undertaking's collective capital has also been expressed in ICMIF (International Cooperative and Mutual Insurance Federation)'s "A Practical guide to understanding mutual insurance" on p. 16:«*The question of asset protection is an essential one as it addresses the notion of ownership of the undertaking and its accumulated assets. In general, and despite different ownership features between jurisdictions, the members of a mutual do not have any divisible property interests in the net value of the company*", see (Guide_Mutual insurance_Icmif.pdf)
[48] European Parliament resolution of 14 March 2013 with recommendations to the Commission on the Statute for a European mutual society: https://www.europarl.europa.eu/doceo/document/TA-7-2013-0094_EN.html

A requirement under state aid law that retained earnings shall be individualized and distributed, as Storebrand requests, will entail that KLP most likely no longer can operate as an open mutual society with public members.

The value of having open, stable mutual insurance societies in the market, even in turbulent times, are factors highlighted by the European Parliament in connection with its work to establish a common European regulatory framework for mutual companies:

> *"[…] whereas mutual societies are solid and sustainable organisations which have well withstood the financial crisis in all economies and have contributed to a more resistant, diversified market, particularly in the area of insurance and social protection; whereas mutual societies are particularly active in the area of population ageing and social needs; whereas the involvement of mutual societies in the area of pensions offers additional opportunities for Union citizens and whereas they have a role to play in preserving the European social model;*
>
> *"[…] whereas mutual societies have no shares but are owned jointly, their surpluses being reinvested rather than distributed to the members; whereas this has helped mutual societies to resist the crisis better than other private-sector entities;"*[49]

Based on the foregoing, we would like to comment on Storebrand's opinion on page 29 of the complaint whereby:

> "*a lock-in effect has been created by KLP withholding earned equity ("retained earnings") upon termination of the customer relationship and transfer from KLP. As a significant part of the customers' returns are tied up in KLP, it will be rational for the customers to want to remain in KLP. In the event of a change of pension provider, the funds will remain in KLP, and according to the company's articles of association, the funds will then be lost to the customer*."

The retained earnings are not "the customers' returns". The retained earnings are collective equity that cannot legally be distributed to the members, neither during ongoing operations nor upon transfer. This is not a form of equity that is "lost" or "left behind" by a transferring member, nor is it an equity that must be paid in when membership is established. This is a *collective equity* that works to the benefit of members of KLP, potential members of KLP, creditors, and which ensures that KLP may be an open society for everyone who needs municipal pension schemes, also when limited life insurance companies choose to exit the market.

10.6. The solvency level of KLP

In section 4.4.3 of the complaint, Storebrand claims that KLP has "*significantly higher solvency capital adequacy than their competitors*", that KLP's capitalization "*by far exceeds the need to build up solvency in the company*" and that the solvency capital adequacy is *"significantly higher than the regulatory requirement, and significantly higher than KLP's expressed solvency target"*.

Storebrand uses the alleged over-capitalization of KLP to substantiate the argument that KLP has access to capital on more favourable terms than its competitors, which in turn, allegedly, entails state aid.

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[49] European Parliament resolution of 14 March 2013 with recommendations to the Commission on the Statute for a European mutual society: https://www.europarl.europa.eu/doceo/document/TA-7-2013-0094_EN.html

According to KLP, a review of the actual solvency level of KLP shows that it does not exceed what is necessary, considering the legal and factual framework in which KLP operates.

The solvency capital adequacy is not necessarily comparable across different companies. Different companies have different product ranges and balance sheet compositions. How sensitive these are to market movements and other events can vary significantly. According to KLP, the closest comparison to KLP is probably Oslo Pensjonsforsikring AS, which, like KLP, only provides public occupational pension schemes. While KLP had a solvency capital adequacy of 340 % in 2022, Oslo Pensjons-forsikring AS had 386 %.[50] Storebrand, on the other hand, also operates in other markets and has a different product range and balance sheet composition, and may in KLPs view therefore not be comparable to KLP.

On the basis of the Solvency II Directive, Solvency capital adequacy (solvenskapitaldekning) may be defined as: Own funds / Solvency Capital Requirement ("SCR")

According to Section 14-9 (1) of the Financial Institutions Act, insurance companies must at all times have own funds that are at least sufficient to cover the SCR. If so, the solvency capital coverage will be 100 %. This is the minimum requirement for solvency capital adequacy.

Equity capital counts as own funds. The SCR shall cover the risk of loss of the insurance company's own funds, cf. section 14-10 of the Financial Institutions Act.

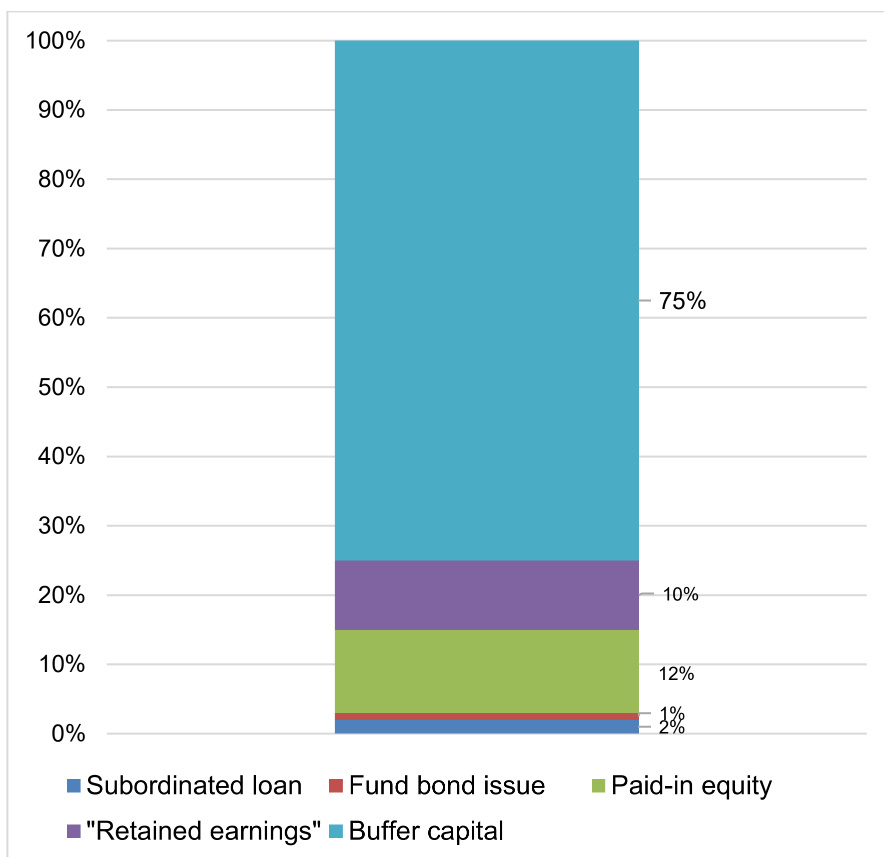
In broad terms, as the customer-distributed "buffer funds" (see section 8.3 above) reduce the insurance companies' market risk, the buffer funds also reduce the risk of loss of own funds. Consequently, buffer funds reduce the SCR. Equity therefore increases the numerator in the definition of solvency capital coverage, while buffer funds decrease the denominator. But regardless of the size of the buffer fund, the insurance company still needs own funds to maintain a solvency coverage above 100%. If the insurance company has zero own funds, the solvency coverage will be zero, regardless of how large the buffer fund is.

As the above account shows, it is clear that buffer funds are very important for solvency capital coverage. An insurance company may satisfy the SCR with moderate own funds, as long as the buffer fund is of sufficient size. According to KLP, their strategy has been to build large customer buffers in order to increase the solvency capital adequacy.[51] This improves the ability to take higher market risks, and maintain risks, and thus increase the expectations on return on the members' insurance capital (customers' assets).

The composition of KLP's buffer capital and equity per 2021 is as follows:

[50] Oslo Pensjonsforsikring AS accounts Q2 2022 and KLP accounts Q2 2022

[51] Can be seen from, inter alia, the following statement from KLP's «Strategi for samlet risikostyring 2023»: *In order to increase KLP's long-term risk handling capacity and to achieve a capacity equal to its competitors, the building of financial buffers shall be prioritized*" (our translation)



The table below illustrates KLP's customer buffers compared to other comparable undertakings:[52]

Undertaking, per second quarter 2022 (mill. NOK)	Premium reserve (mill. NOK)	Buffer fund (mill. NOK)	Buffer fund share
KLP	506 138	104 970	20.7 %
Oslo Pensjonsforsikring AS	76 208	26 061	34.2 %
Storebrand Livsforsikring AS	184 687	12 497	7.7 %

As can be seen, KLP's customer buffers is small compared to Oslo Pensjonsforsikring AS, which KLP views as the comparable undertaking to KLP because they both exclusively operate in the market for insured public occupational pension schemes.

Below is a table that illustrates KLP's equity share compared to a representative selection of undertakings and pension funds as of 31 December 2021.[53]

[52]Oslo Pensjonsforsikring AS results, second quarter 2022 , KLP results, second quarter 2022 , Storebrand Interim report 2nd quarter 2022
[53] KLP's annual report 2021 p. 289
Storebrand Livsforsikring AS' annual report 2021 p. 49
Oslo Pensjonsforsikring AS' annual report 2021, p. 18

Undertaking, per 31.12.2021 (mill. NOK)	Paid-in equity	Collective equity	Total equity	Total balance	Equity share
KLP	19 831	20 847	40 678	706 748	5,80 %
Storebrand Livsforsikring AS	15 150	10 567	25 717	411 447	6,30 %
Oslo Pensjonsforsikring AS	1 430	10 035	11 465	125 509	9,10 %
Bergen kommunale pensjonskasse	1 157	1 108	2 265	23 039	9,80 %
Bærum kommunale pensjonskasse	1 012	578	1 590	13 116	12,10 %
Harstad kommunale pensjonskasse	310	62	372	2 757	13,50 %
Elverum kommunale pensjonskasse	62	10	72	1 321	5,50 %

As can be seen, KLP's equity as a ratio of total assets, is lower than for other suppliers. According to KLP, it has taken and still takes a higher market risk in its asset management than comparable undertakings, relative to its level of equity.

According to KLP, its solvency capital coverage is sound and mainly as a result of large buffer funds, and not due to significant equity, neither paid-in equity nor retained earnings. As previously mentioned, the buffer capital is a part of the customer's assets that are allocated to the customer when transferring (as opposed to the retained earnings).

10. No presence of state aid

10.1. KLP is not an undertaking under the state aid rules

In accordance with Article 61 (1) of the EEA Agreement, the state aid rules apply to "undertakings". Undertakings are entities engaged in economic activity regardless of their legal status, the way in which they are financed or whether or not they make a profit.[54] Thus, the classification of a particular entity as an undertaking depends entirely on the nature of its activities.

In order to clarify the distinction between economic and non-economic activities, the EEA Courts have consistently held that any activity consisting in offering goods and services on a market is an economic activity.[55]

It follows from case law that social security schemes may be classified as either economic or non-economic activity depending on their essential features. In order to determine if a social security scheme

[54] Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, Cassa di Risparmio di Firenze SpA and Others, C-222/04, ECLI:EU: C:2006:8, paragraph 107

[55] See Judgment of the Court of Justice of 16 June 1987, Commission v Italy, 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, Commission v Italy, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75; Judgment of the EFTA Court of 10 May 2011 in Joined Cases E-4/10, E-6/10 and E-7/10 The Principality of Liechtenstein and others v EFTA Surveillance Authority EFTA Ct. Rep [2011] p. 16, paragraph 54.

is of a non-economic or economic nature, it is necessary to examine how the services are organised, financed and structured within a particular national regime.[56]

ESA's Guidelines on the Notion of State aid (NoA) sums up case law and gives guidance as to which elements should be present for an activity to fall into the category of a solidarity-based social security scheme and hence be a non-economic activity:

> *20. Solidarity-based social security schemes that do not involve an economic activity typically have the following characteristics:*
>
> *(a) affiliation with the scheme is compulsory;*
>
> *(b) the scheme pursues an exclusively social purpose;*
>
> *(c) the scheme is non-profit;*
>
> *(d) the benefits are independent of the contributions made;*
>
> *(e) the benefits paid are not necessarily proportionate to the earnings of the person insured; and*
>
> *(f) the scheme is supervised by the State.*

In the Norwegian authorities' view, the pension schemes managed by KLP have all of these characteristics.

As for (a), the members of KLP are obliged by law and collective agreements to have a pension scheme for their employees (see section 3 above). The collective agreements and legislation set out detailed rules for both the entitlement to and calculation of the benefits. Neither the employees nor the employers have any influence over these matters. These pension schemes may therefore be referred to as "*compulsory*", both for the employers and for the employees.

In this regard, the pension schemes managed by KLP resemble the schemes that were subject to the judgment of the Court of Justice ("ECJ") in *Poucet and Pistre*[57], where the Court found that the funds managing those schemes where not engaged in economic activities. The Court explicitly referred to the fact that affilitation with the scheme was compulsory, and that the fund, in the discharge of their duties, "*apply the law and thus cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits*".[58]

In contrast, in case C-244/94 *Fédération française des sociétés d'assurance and Others* the court concluded that a non-profit making organisation managing supplementary schemes was engaged in economic activities, this was largely due to the fact that affiliation with the scheme was optional.[59]. In the case of Albany[60] concerning a supplementary pension fund, the pension fund was based on a system of compulsory affiliation and applying a solidarity mechanism for determination of the amount of contributions and the level of benefits. However, the Court noted that the fund itself determined the amount of the contributions and benefits and operated in accordance with the principle of capitalisation.

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[56] Judgment in FENIN, T-319/99, EU:C:2003:50, paragraph 39. See also judgment in Cisal and INAIL, C-218/00, EU:C:2002:36, paragraph 40 and judgment in Poucet and Pistre, C-159/91 and C-160/91, EU:C:1993:63, paragraph 14

[57] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraph 13, ECLI:EU:C:1993:63

[58] *Poucet and Pistre*, paragraph 15.

[59] C-244/94 *Fédération française des sociétés d'assurance and Others* paragraph 17

[60] Case C-67/96, paragraph 81-82.

The Court deduced therefrom that such a fund engaged in an economic activity in competition with insurance companies.

In the view of the Norwegian authorities, both these cases differ from the case at hand. In the public occupational pension scheme, which is subject to the present case, the beneficiaries have no influence over the way the funds are managed, nor can they choose between different providers. The provider of the pension scheme is decided by the employer. Neither can KLP determine the contributions from the employees nor the benefits in the scheme which are both determined by the collective agreements and the law.

Further, the public occupational pension schemes managed by KLP are pursuing an "exclusively social purpose" within the meaning of point (b) above. There is no other purpose of the schemes than to provide old-age pension, disability pension and survivor's pension to the employees, i.e. to cover the risk of getting old, disabled or of surviving one's partner. These are "traditional branches of social security" that, according to the case-law of the European courts, must be regarded as exclusively social:

> *In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty*.[61]

This is not altered by the fact that the pension schemes managed by KLP are supplementary to the basic scheme provided by the national social insurance scheme (Folketrygden). The compulsory nature of the occupational pension scheme and coordination between the basic and supplementary scheme, demonstrate that the Norwegian legislator considers the public occupational pension part of the social security system in Norway.[62]

The public occupational pension scheme provided by KLP is *non-profit*, cf. point (c) above. As described in section 10, KLP does not charge any profit on the premiums, and all returns generated on the management of the assets are returned to the members. The sole purpose of a mutual society like KLP is to fulfil the obligations of its members at the lowest possible overall cost.

Moreover, as regards points (d) and (e) above, there is not necessarily direct correlation between the benefits provided under the public occupational pension schemes managed by KLP, and the earnings of the person insured. As described in section 6, although up to 2 % of the employees' salary is deducted as employee's contribution, the level of benefits that the employees are entitled to under the scheme is not as such dependent upon each individual's actual contribution. Firstly, the level of the premiums not covered by the 2 % contribution, must be covered by the public employer. Secondly, even though premiums are required to be sufficient to finance the pre-specified benefits, the level of the benefits under the scheme are in this context independent of the actual contributions or premiums paid, as they fully depend on the entitlements set out in law or collective agreements. Furthermore, there is a cap on the basis of calculation of pension ("pensjonsgrunnlaget") on 12 times the basic amount of the national Insurance scheme (around NOK 1,3 million). Thus, for employees with a higher salary than this cap, the benefits provided are not proportionate to the employees' specific earnings.[63]

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[61] C-218/00, Cisal and INAIL, paragraph 45, ECLI:EU:C:2002:36.
[62] Further on this in section 3 above.
[63] ESA Decision No 017/18/COL

Finally, the KLP and its pension scheme are "supervised by the State" within the meaning of point (e) above. The rules determining the amount of contributions paid to KLP are set out in law[64] and KLP is supervised by the Financial Supervisory Authority of Norway.

As can be seen from the above, KLP's public occupational pension scheme fulfils the criteria for non-economic activity. However, as the list of criteria in the NoA is not exhaustive, other solidarity aspects of KLP's management of the public occupational scheme may also be taken into account. In this regard, the *equalization of the premiums* is of significance. As explained in section 8.2 above, this entails a clear solidarity aspect in that the level of premiums is equalized between the members so as to avoid different premiums as a result 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.

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 led other, private operators to cease providing such services.

The fact that there are also private, commercial providers of insured public occupational pension schemes, is not in itself sufficient to characterize the activity as economic in nature. As the European Court pointed out in the Dôvera-case:

> *The presence of competitive elements in the Slovak compulsory health insurance scheme is secondary, as compared with the scheme's social, solidarity and regulatory aspects, and, as such, as has been set out in paragraphs 41 to 50 of the present judgment, is not capable of changing the nature of that scheme. The ability of insurance bodies to compete with each other cannot extend either to the amount of the contributions or to the compulsory statutory benefits, so that those bodies can only differentiate themselves, in a residual and ancillary manner in relation to the latter benefits, in terms of the scope and quality of services*.[65]

The same holds true for the Norwegian insured public occupational pension scheme. The scheme is built on a principle of solidarity and governed by law and collective agreements. As explained above, the statutory benefits are independent of the compulsory contributions, and the contributions both at employee and employer levels are based on a principle of solidarity. Thus, the fact that there are alternative providers of insured public occupational pension schemes active in the market from time to time, is not sufficient to change the fundamental character of the scheme as one of social security based on solidarity.

Lastly, the Norwegian authorities' position is further supported by the Authority's decision in the case of compensation for pension costs for non-profit organisations in 2018, in which the Authority assessed KLP's provision of pension to non-profit organisations ("NPOs") under the state aid rules.[66] The Authority concluded that KLPs pension services to the employees of NPOs did not constitute an economic activity, and thus, that KLP was not an undertaking as regards those activities:

> *(41) In view of the above, the Authority considers that KLP, by providing its pension services to the benefit of employees of NPOs, which have not engaged in economic activities, is not carrying out an economic activity.*

[64] Lov om forsikringsvirksomhet (Insurance Act) of 10.102005 No 44.

[65] Joined Cases C-262/18 P and C-271/18 P Dôvera, Paragraph 61, ECLI:EU:C:2020:450

[66] ESA Decision No 017/18/COL paragraph 41

(44) The Authority concludes that NPOs providing certain health or child welfare services and KLP offering pension services to NPOs do not carry out economic activities and they are thus not considered „undertakings" within the meaning of Article 61(1) of the EEA Agreement. [67]

The Authority's reasons for this conclusion was largely the same as the ones we have set out above:

(40) The Authority notes that the pension benefits that are laid down in the agreements with the Norwegian State are governed by the same rules that apply to pension benefits provided to state employees, i.e. the Act on the Norwegian Public Service Pension Fund. The NPOs cannot deviate from those rules, and neither can KLP. In addition, the amount of benefits paid is not necessarily proportionate to the insured person's earnings. Salaries that exceed NOK 1.1 million or overtime pay would not result in a higher pension, for example. It is also clear from the information provided that KLP and the municipal service pension scheme are supervised by the State. The rules determining the amount of contributions paid to KLP are set out in a law and KLP is supervised by the Financial Supervisory Authority of Norway.

Applying the approach to the present case, KLP's provision of pension services to the benefit of employees of Norwegian municipalities and county authorities, does not constitute economic activity. The Norwegian authorities recall in this respect that it is not only the NPO-members of KLP that are not engaged in economic activities. The same will generally apply to the public members of KLP, i.e. hospitals, municipalities and county authorities.

10.2. No economic advantage

In the event that the Authority concludes that KLP is an undertaking for the purpose of the state aid rules, the Norwegian authorities will submit that the behaviour of KLP's members is in line with the market economy operator principle (MEOP). Hence, KLP has not received an economic advantage that it would not otherwise have obtained in the market.

Membership in a mutual society entails a sum of rights and obligations vis-à-vis the other members and the mutual society as such. In its complaint Storebrand only focuses on one of these elements, the capacity as "owner", and ignores the financial implications of the other elements. In our view, both elements must be considered when applying MEOP to mutual societies.

Overview – MEOP

The EEA-Agreement is neutral with regard to the system of property ownership[68] and does not prejudice the right of EEA States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form,[69] they are subject to EEA State aid rules. As a consequence, the Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.

Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions.[70] Hence, ownership of undertakings has to be exercised in line with normal

[67] ESA Decision No 017/18/COL
[68] Article 125 of the EEA Agreement provides that 'This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership'
[69] See for example Judgment of the Court of Justice of 10 July 1986, Belgium v Commission, 40/85, ECLI:EU:C:1986:305, paragraph 12.
[70] Judgment of the Court of Justice of 11 July 1996, SFEI and Others, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61

market conditions to ensure that the undertaking does not receive state aid due to being owned by public entities.

The EEA courts have developed the ‘market economy operator principle and test’ to identify the presence of State aid when public bodies participate in the market. The principle states that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions conducted by such bodies grant an advantage to their counterparts.

Firstly, it was and is consistent with MEOP for municipalities, county authorities and the other public bodies to join a mutual society and cooperate on the provision of pensions to their employees. As explained in section 3 above, the pension obligations in the collective agreements and legislation entail substantial financial pension obligations on Norwegian municipalities, county authorities, hospital trusts etc. The magnitude of this obligation warrants cooperation.

Secondly, the correct application of MEOP on participation in the mutual society has to take into account all aspects of the participation. Storebrand in its complaint states that only the ownership position of the municipalities in KLP should be considered. Storebrand claims with reference to the Mesta[71], Kippermoen[72] and Trondheim analyse centre[73] cases that:

> *Practice also shows that the return on a public investment should be considered in isolation*,..[74]

Furthermore, Storebrand states that:

> *The decisive element is whether the public bodies have received the same return on their investments as a private investor would have demanded in a similar situation, regardless of any benefits the public bodies obtain as a customer or through its role as a public authority. If this is not the case, KLP has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favorable position compared to that of its competitors.*[75]

We do not share this understanding of case law, and find that this application of the MEOP would render it difficult to assess the legitimacy of the behaviour of members in a mutual society.

MEOP provides that the behaviour of the public bodies should be compared to that of similar private economic operators under normal market conditions. Mutual societies are characterised by the owners also being the customers, and the full picture has to be considered in order to determine if the transaction is on market terms. Any private economic operator maximising profit would take the overall and total income, costs and risks into consideration when making investments and operational decisions. This is also in line with case law; potential profit has to reflect overall costs and risks.

It is inherent in the nature of the mutual society that members have a two-fold role, both as owner and as customer. This is the basis for the concept of mutual societies. Hence, assessing all financial aspects of both of these roles would be the prudent thing to do for any investor, and is what a private economic operator considering investment in a mutual society would do. Assessing both the owner and the customer positions as a whole in the context of the assessing the MEOP, is not the same as bringing

[71] ESA decision 390/09/COL
[72] ESA decisions 176/11/COL and 90/13/COL
[73] ESA decision 129/13/COL
[74] Storebrand complaint p. 15
[75] Storebrand complaint p. 14-15

public policy considerations into the assessment, as Storebrand seems to indicate. The European courts have stated clearly that non-economic justifications cannot be accepted.[76] However, in the case of mutual societies, an assessment of both potential revenues and costs, as well as risk, would be to take all economic factors into consideration, and thus be in line with MEOP.

The decisive element is whether the members in questions have acted as a market economy operator would have done in a similar situation, i.e. as a member of a mutual society.

If Storebrand's understanding of how MEOP should be applied to members in mutual societies were to be accepted, the state aid rules could make it difficult for public entities to participate as members in mutual societies on equivalent terms with private operators. Given the importance of mutual societies in Europe, that would also conflict with the neutrality principle enshrined in Article 125 EEA.

Market-based return on paid-in equity

Storebrand asserts several places in the complaint that the members of KLP do not receive a market-based return on their equity, and that KLP as a consequence of this is given access to equity on more favourable terms than the market would provide:

> *The owners' equity contribution has given and gives a lower return than the return the owners should have received, with the risk, concentration and illiquidity that is attached to the investment in KLP.*[77]
>
> *The equity contributed is tied up in KLP, and it generates a profit in KLP. Storebrand believe that KLP have access to equity on more favorable terms than they would otherwise have had in the market. For many years, KLP have denied the owners any of the profit generated. Thus, the owners (municipalities, RHFs and hospitals) have not been adequately compensated for the risk that the equity contributions entails. Neither have KLP compensated for the right to collect compulsory equity, the possibility of extraordinary contributions or the extensive binding on equity contributions.*[78]

The assertions are not consistent with the concept and functioning of mutual societies.

The assessment of whether the return on equity received by the members of KLP is market based, must take into account that KLP is a mutual society. In a mutual society, the board decides the investment strategy, the size of buffer funds, the appropriate risk level of the portfolio etc., recalling that the board is elected by and composed of members. The members have decided that the purpose of KLP is to provide public occupational pension scheme at the lowest cost possible to the members, at a conservative risk level. The paid-in equity of the members is invested and managed based on these considerations, in accordance with the investment strategy carefully considered and adopted by the board of directors, by KLP’s asset management team. In our view, this should ensure that the return is market-based.

Storebrand claims that the members' return on the paid-in equity is too low as it does not reflect the risk taken by the members of KLP. It follows from the state aid rules that return on investments should reflect the risk taken. However, the risk taken by the members of KLP is lower than Storebrand claims. As explained in section 10.2, KLP has three types of owned funds; retained earnings, paid-in equity and subordinated loan capital. According to KLP, if KLP has to take losses on its investments, these losses

[76] See for example C-234/84 Belgium v Commission (Meura) [1986] ECR 2263, ECLI:EU:C:1986:302
[77] Storebrand complaint p. 13
[78] Storebrand's complaint p. 19

will be covered by the retained earnings first, then after they have been depleted, losses will be covered by the paid-in equity. Thus, there is a buffer between the losses and the paid-in equity that lowers the risk for the members of KLP. If KLP were to increase its profit, it would either have to increase its premiums or significantly alter the risk profile on the asset management. Increasing the premiums would not make the members' overall situation any different, as it would be the members who would have to pay the higher premiums (in fact they would be worse off, given that employer's tax is added to the premium amount). Altering the risk profile could give a higher return, but it would also increase the likelihood of losses, which is what KLP's members, according to KLP, are trying to avoid in their investment strategy. It is not the role of state aid rules to require public entities to assume a level of risk in their investments that they consider to be commercially unsound.

Hence, based on an assessment of all relevant factors, the return on equity is market-based, and thus MEOP compliant, for the members of KLP.

Furthermore, Storebrand points out that for the years 2013-2018, the members did not receive any return on their equity. The reasons for this, and why the board and members of KLP considered it necessary to increase KLP's equity, are explained in greater detail in section 10.4.2. In our view, KLP's commercial considerations seem to be in line with how a rational market participant would have acted in a similar situation.

Market-based premiums

As explained above, KLP's members pay premiums that are fully in line with the applicable legal framework, without any profits included in the premium amounts. This is clearly in line with what a rational market operator would accept.

Storebrand asserts that KLP's low premiums are due to subsidies from the members:

> *As can be seen from the subtotal in the overview, KLP's cost for asset management and for interest rate guarantee are significantly lower than Storebrand's. Storebrand and KLP have approximately the same risk in their municipal asset management portfolios, which should indicate that asset management costs and interest rate guarantee costs are approximately equal. They are also two very large asset management companies (Storebrand are somewhat larger), so volume and economies of scale cannot explain why KLP have a lower price.*[79]
>
> *The subsidy, the active use of the benefits of the retained earnings and the lock-in effect are concrete results of how competition is limited as a result of the financial benefits that KLP has received. The subsidy alone is enough to demonstrate that KLP have received economic advantages that (significantly) exceed the real need to capitalize on the company*.[80]

According to KLP, their purpose is to provide insured public occupational pensions to the lowest cost possible. In KLPs view, it would seem to make little sense for the members to pay extra in the form of unlawful subsidies.

Furthermore, as explained in section 8.2, the calculation of the premiums for insured public occupational pension schemes is regulated in Chapter 3 of the Insurance Activities Act and its regulations. According to KLP, KLP seeks to charge its members the lowest possible premiums, in line with the principle of mutuality . The members of KLP pay ordinary annual premiums, adjustment premiums and special single premiums in accordance with the legal requirements. These premiums cover KLP's insurance

[79] Storebrand complain p. 22
[80] Storebrand compliant p. 23

liabilities, and are compliant with the announced price tariffs, sufficient and justifiable. There are no profit margins incorporated in the price tariffs. Similarly, KLP's premiums for administration services and premiums for managing assets cover KLP's costs related to these operations. The premiums contain no profit margins, but safety margins to ensure that KLP does not price the products below costs.

Storebrand uses as an argument that Storebrand and KLP are of almost equal size, and thus should have the same volume and economies of scale, and hence the same cost base. However, the cost base is not determined merely by volume, but by the type of management of funds and type of assets in which one invests. Investment can be actively or passively managed. Funds that are managed passively are called index funds. These funds have a portfolio constructed to match or track the components of a financial market index. An index mutual fund provides broad market exposure, low operating expenses, and low portfolio turnover. According to KLP, they rely heavily on index funds and passive management and is one of the largest providers of index funds in Norway. Hence, KLP has low management costs, explaining why they have a lower price (asset management premium) than Storebrand.

KLP also has a lower interest rate guarantee premium. Storebrand argues that Storebrand and KLP have approximately the *same risk in their municipal asset management portfolios*, which should indicate that the interest rate guarantee costs are approximately equal. However, the interest rate guarantee cost/premium is largely based on the level of the pension schemes' buffer funds. Pension schemes managed by KLP have large buffer funds compared to Storebrand's pension schemes, as explained in section 10.6. Hence, KLP has lower interest rate guarantee costs, explaining why they have a lower price (interest rate guarantee premium). Also, Storebrand may include profit margins in their interest rate guarantee premiums. This could also explain the difference in the interest rate guarantee premiums.

Market-testing of conditions

In addition to the descriptions above showing that KLP is operated according to the MEOP and does not receive state aid from its members, the conditions under which KLP is operated is also market tested on a regular basis. This happens largely in two ways, through the private companies that are members of KLP and through public tendering of the public occupational pension schemes.

One of the appropriate methods for assessing whether a public authority is acting or has acted in accordance with the MEOP, is the pari passu principle. It follows from the NoA that

> *A transaction's compliance with market conditions can be directly established through transaction-specific market information in the following situations (i) where the transaction is carried out 'pari passu' by public entities and private operators*;[81]

It follows from case law[82] that pari-passu transactions have to carried out under the same terms and conditions (and therefore with the same level of risk and reward) by public bodies and private operators who are in a comparable situation. More specifically, the transactions have to be decided and carried out at the same time, the terms and conditions of the transaction have to be the same for the public bodies and all private operators involved – also taking changing risk into consideration – and the participation of the private operators have to have real economic significance.

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[81] NoA paragraph 84.
[82] ESA decision 273/14/COL, Opinion of Advocate General Geelhoed in Joined cases C-328/99 and C-399/00 SIM 2 Multimedia (Seleco) [2003] ECR I-4035, ECLI:EU:C:2001:492, paragraphs 53-54, 2008/729/EC: Commission decision 11.12.2007, C53/06 on the city of Amsterdam's investment in fibre-to-the-home network, OJ L 247, 16.9.2008, pp. 27-49, paragraphs 99-100

KLP has about 2200 private members. As explained above, several of these companies used to be part of municipalities or county authorities, but have due to liberalisation of certain markets become separate entities. The majority of these companies have chosen to close their public occupational pension schemes to new employees. These companies provide an insured private occupational pension scheme to their new employees, provided by a one of the insurance companies offering such schemes for example Storebrand.[83] Thus, these companies, who do not have access to a public purse, have a good knowledge of alternative providers of pension schemes. They have still chosen to remain with KLP for their public occupational pension schemes.

These private companies have as members of KLP taken part in the decisions on return on equity and premiums pari-passu with the public authorities. The companies are in the same situation as the public bodies with respect to all such decisions, and the decisions are made by the members at the same time. The terms and conditions are thus the same for all members regardless of their status as public bodies or private companies. The fact that the decisions have been made pari-passu confirms that the decisions of KLP's members are in line with the MEOP.

Furthermore, KLP's conditions are also tested in the market through the use of tenders.[84] If purchase of services is carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the EEA Agreement on public procurement, it can be presumed that those transactions are in line with market conditions.[85]

Several of KLP's members have in the past tendered out the insured public occupational pension scheme. According to KLP, on average 10-15 tenders have been carried out annually, with the exception of the years 2013-2018 when there was no alternative providers. KLP has won several of these tenders. Bearing in mind that KLP operates under a principle of equality and solidarity, whereupon all members pay the same premiums and receive the same return on their paid-in equity, it can be presumed that KLP's offering is in line with market conditions.

11. Existing aid

11.1. Overview

Storebrand alleges that the KLP has received new aid, and that the aid has not been granted on the basis of an aid scheme. As explained above, the Norwegian authorities do not agree that any state aid has been granted. However, in the event that the Authority concludes that KLP has received state aid, the aid would be existing aid granted on the basis of an aid scheme.

Storebrand states in its complaint that the aid is new because the General meeting each year adopts KLPs allocation of retained earnings:

> *The State aid has been granted when the General Meeting each year has approved the Board's proposal that the result should be allocated as retained earnings[86].*

Furthermore, Storebrand asserts that the aid is not granted according to an aid scheme:

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[83] KLP does not offer private occupational pension schemes

[84] The Norwegian authorities recall that the use of tenders is not sufficient to turn an activity into an economic activity under the state aid rules, cf. C-264/01, C-306/01, C-354101 and C-355/01 AOK Bundesverband, EU:C:2004:150, paragraph 56, ESA Decision No 017/18/COL paragraph 37, and Letter from ESA to Norwegian authorities dated 14 September 2015

[85] NoA paragraph 89

[86] Storebrand additional complaint 11.11.2022, p. 1

There is no act on the basis of which, without further implementing measures being required, individual aid awards may be made to KLP[87].

11.2. Aid scheme

The Norwegian authorities recall that an aid scheme is defined as:

> *… any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount; (e) 'individual aid' shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;*[88]

In the case of Oslo Sporveier, the Authority considered if the financing of Oslo Sporveier was based on an aid scheme and if the aid was existing aid.[89] Oslo Sporveier received compensation from the municipality of Oslo. The municipality would determine the compensation annually when the municipality adopted its budget. In spite of this, the Authority concluded that the aid was granted on the basis of an aid scheme:

> *In view of the above, the Authority concludes that an aid scheme was in place in Oslo. The provisions providing for that aid scheme were the CTA, the CTR and the relevant administrative practice in Oslo*.[90]

The Authority reached the same conclusion in its decision on aid to public bus transport in the County Authority of Aust-Agder[91] even though in this case, the operation of buses had been expanded though the ATP-project, in addition to annual budgeting. The Authority observed that

> *The increased production through the ATP project on those routes was compensated pursuant to the same legal provisions as the local scheduled and school bus transport.*[92]

Thus, case law shows that the fact that compensation or aid is decided annually is not enough to establish that there is not an aid scheme in place, as long as there is a legal basis that remains unchanged.

As explained earlier, KLP's Articles of Association states that the General meeting shall determine the distribution of profit each year. Furthermore, this is a consistent administrative practice. It is not possible to pre-determine the distribution of profit or set a pre-determined share for the distribution between retained earnings and the members since, as explained in section 8.5, it is necessary to take solvency requirements and risk into consideration. However, the legal basis has remained the same.

Hence, to the extent that KLP receives state aid, the aid is granted on the basis of an aid scheme. The Norwegian authorities can elaborate on this if so required by the Authority.

11.3. Existing aid

The Norwegian authorities recall that existing aid is defined as

[87] Storebrand additional complaint 11.11.2022, p. 2
[88] Article 1 d of Part II of Protocol 3 to the Surveillance and Court Agreement (the SCA)
[89] ESA decision 519/12/COL
[90] ESA decision 519/12/COL paragraph 188
[91] ESA decision 179/15/COL
[92] ESA decision 179/15/COL paragraph 188

all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;[93]

Case law stipulates that the constituent elements of an aid scheme must be changed in order for an aid scheme to become new aid[94]:

In the case of aid existing prior to the entry into force of the EEA Agreement, the significance of the alteration will have to be assessed by reference to the purport of the aid itself, its terms and its limits. In doing so, it is necessary to examine whether those changes affected the constituent elements of that system of the aid measure, such as the class of beneficiaries, the objective pursued by the aid, the public service task assigned to the beneficiaries and the source or, substantially, the amount of the aid.[95]

The constituent elements of KLP and its operations have not been changed. Hence any aid to KLP is existing.

Storebrand claims that the adoption of annual budgets is sufficient to make the aid new. For the sake of this answer, the Norwegian authorities will comment shortly on this allegation, but can elaborate on the other elements if so required by the Authority.

It follows from case law, that adoption of yearly aid or compensation under an aid scheme is not enough to make the aid new. The Authority assesses this question in both the Oslo Sporveier and Aust-Agder cases discussed above, as well as in other cases. In neither of these cases, was the adoption of yearly budgets sufficient to consider the aid as new aid.

In a case concerning the financing of German broadcasting[96], the European Court reached the conclusion that a change in how the financing was determined was not enough to change the existing aid scheme into new aid. Financing of German broadcasting had until 2013 been based on a fee payable by all who was in possession of a receiving device. In 2013 this was substantially altered so that it was payable by every owner of a dwelling. The Parties to the case agreed that the fee constituted state aid.

However, the European court reached the conclusion that this change did not alter the existing aid scheme because the constituent elements of the aid scheme was unchanged:

(57)…, it must therefore be determined whether the Law on the broadcasting contribution, in that it alters the basis of the obligation to pay the contribution whose purpose is to finance public broadcasting in Germany by providing that it is no longer payable on the basis of possession of a receiving device but on the basis in particular of occupation of a dwelling, constitutes an alteration to existing aid within the meaning of the provisions referred to in the preceding paragraph.

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[93] Article 1(b)(i) of Part II of Protocol 3 to the Surveillance and Court Agreement (the SCA)
[94] See for example case E-1/22 paragraph 60, C-44/93 Namur-Les assurances du crédit, C-492/17 Rittinger and Others paragraphs 60 to 63 and T-69/18 Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover v Commission, cited above, paragraphs 189-191, Commission decision E 3/2005 Financing of public service broadcasters in Germany
[95] Case E-1/22 paragraph 60
[96] Case C-492/17 Rittinger and others

(59) The alteration to the basis of payment of the broadcasting contribution did not affect the constituent elements of the system of financing German public broadcasting, as assessed by the Commission in connection with the decision of 24 April 2007. [97]

To the extent that KLP receives state aid, it does so under an existing aid scheme. The fact that the aid is allocated each year, does not change any of the constituent elements of the scheme. The legal basis, the objective of the aid, the nature of the advantage, the beneficiary and the scope of activities of the beneficiary all remain the same even though the aid amount is determined on a yearly basis.

We look forward to discussing the case with the Authority in a meeting.

Yours sincerely

Siri Halvorsen
Deputy Director General

Signe Bechmann
Senior Adviser

This document is signed electronically and has therefore no handwritten signature

[97] Case C-492/17 Rittinger and others