JUDGMENT OF THE COURT

19 April 2016*

(Articles 31, 53 and 54 EEA – Competition law – Collective agreements – Collective action – Freedom of establishment)

In Case E-14/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

Holship Norge AS

and

Norsk Transportarbeiderforbund,

concerning the interpretation of the EEA Agreement, and in particular Articles 31, 53 and 54,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Holship Norge AS ("Holship"), represented by Nicolay Skarning, Advocate;

- Norsk Transportarbeiderforbund (the Norwegian Transport Workers' Union – "NTF"), represented by Håkon Angell and Lornts Nagelhus, Advocates;

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* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Norwegian Government, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Director, Maria Moustakali, Officer, Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;

- the European Commission ("the Commission"), represented by Luigi Malferrari and Manuel Kellerbauer, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Holship, represented by Nicolay Skarning and Kristin Valla, Advocates; NTF, represented by Håkon Angell and Lornts Nagelhus; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Carsten Zatschler; and the Commission, represented by Luigi Malferrari and Manuel Kellerbauer, at the hearing on 11 November 2015,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) EEA reads as follows:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

2 Article 34 EEA reads as follows:

> *Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.*
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> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

3 Article 53 EEA reads as follows:

> *1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*
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> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
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> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*
>
> *3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
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> *- any agreement or category of agreements between undertakings;*
>
> *- any decision or category of decisions by associations of undertakings;*
>
> *- any concerted practice or category of concerted practices;*

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

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

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

4 Article 54 EEA reads as follows:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

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

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

5 Article 59(2) EEA reads as follows:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

National law

6 Section 2 of the Norwegian Boycott Act of 5 December 1947 No 1 ("the Boycott Act") lays down several conditions for a boycott to be lawful. The condition relevant for the present case is Section 2(a), according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without

causing a breach of the law. Pursuant to Section 3, legal action may be instigated to determine whether a notified boycott is lawful.

The Framework Agreement

7 The collective agreement relevant to this case is the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere* – "the Framework Agreement"). Initially entered into in 1976 and subsequently renewed every other year, it was created to address the fact that dockworkers were originally casual workers with no guarantee of work or a consistent salary. The Framework Agreement establishes a fixed pay scheme for certain dockworkers in the 13 largest ports in Norway, including the Port of Drammen.

8 The parties to the Framework Agreement on the employee side are the Norwegian Confederation of Trade Unions (*Landsorganisasjonen i Norge* – "LO"), which is the largest labour organisation in Norway, and its member union NTF, which represents the interests of dockworkers *inter alia* in Drammen. The parties on the employer side are the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon* "NHO"), which is the largest employers' organisation in Norway, and its member association, the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*).

9 Clause 2(1) of the Framework Agreement, the so-called priority of engagement clause ("the priority clause"), reads as follows:

> *For vessels of 50 tonnes dwt and more sailing from a Norwegian port to a foreign port or vice versa, the unloading and loading shall be carried out by dockworkers. Exempted is all unloading and loading at the company's own facilities where the company's own workers carry out the unloading and loading.*

10 Unloading and loading operations that fall within the scope of the priority clause are limited to the transfer of cargo from the ship onto the quay and vice versa. For the handling of goods from and to the quay, the port users may choose whether to engage the dockworkers or use other workers.

11 In accordance with clause 3 of the Framework Agreement, the Administration Office for Dock Work in Drammen (*Administrasjonskontoret for havnearbeid i Drammen* –"the AO") was established.

ILO Convention No 137

12 Norway is a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the ILO Convention"), which entered into force on 24 July 1975. The priority clause in the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention.

13 Article 2 of the ILO Convention reads as follows:

> *1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.*
>
> *2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.*

14 Article 3 of the ILO Convention reads as follows:

> *1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.*
>
> *2. Registered dockworkers shall have priority of engagement for dock work.*
>
> *3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.*

15 Article 7 of the ILO Convention reads as follows:

> *The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.*

II Facts and procedure

16 By a letter of 5 June 2015, registered at the Court on 11 June 2015, the Supreme Court of Norway made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Holship and NTF.

17 The case before the Supreme Court concerns an advance ruling pursuant to Section 3 of the Boycott Act regarding the lawfulness of a notified boycott. NTF gave notice of a boycott of Holship in order to procure its acceptance of the Framework Agreement giving priority of engagement for stevedore work to dockworkers registered at the AO at the Port of Drammen.

18 Holship is a Norwegian forwarding agent wholly owned by a Danish company. Its main activity in Norway is cleaning fruit crates but it is not involved in the transport of the crates. In addition, Holship handles certain goods transported by ships. Holship is neither a party to the Framework Agreement nor a member of NHO or the Norwegian Logistics and Freight Association. Rather, it is a member of the Norwegian Business Association (*Bedriftsforbundet*).

19 Holship has signed a collective agreement with the Norwegian General Workers' Union (*Norsk Arbeidsmandsforbund*), a union that, like NTF, is a member union of LO. The collective agreement covers cleaning work (referred to as onshore cleaning), which corresponds to the main business of the company. Therefore, there is no conflict between the matters covered by that agreement and the Framework Agreement. However, Holship has chosen to apply the collective agreement also to unloading and loading work.

20 Registered dockworkers in 14 other ports benefit from priority of engagement for unloading and loading under the same terms as provided for in the Framework Agreement, but they do not have a fixed pay scheme. This is provided for in the the dock work agreement for Southern and Northern Norway (*Losse- og lasteoverenskomsten for Sør- og Nord-Norge*), entered into between the same parties as the Framework Agreement.

21 The priority of engagement is administered by the AO, which was established under clause 3 of the Framework Agreement. All permanently employed dockworkers in the Port of Drammen are engaged by the AO, which currently employs eight dockworkers. They are paid a fixed wage and may earn supplemental pay varying with each ship call. The dockworkers work under a rota managed by the AO. Additional personnel can be engaged when needed.

22 The AO is a non-profit-making entity and a legal person *sui generis*. It has its own board consisting of three representatives of the employers and two representatives of the employees. It is one of the board's tasks to employ the AO's dockworkers. Ships arrive 24 hours a day, and most port users rely upon AO's dockworkers to carry out unloading and loading operations.

23 Were Holship to affiliate to the Framework Agreement, it would be bound to observe the right of dockworkers employed by the AO to priority of engagement for unloading or loading operations at ship calls. The AO would decide whether it had the capacity to take on an assignment or whether Holship would be allowed to use its own employees. Holship would not be obliged to participate in the management of the AO or to provide the AO with funds. It would be required to pay for the unloading and loading assignments at the applicable rates set by the AO.

24 Holship has previously used the services of the AO. At the turn of the year 2012/2013, Holship acquired a new customer, which entailed an increase in the company's activities in the Port of Drammen. Until then, Holship employed one terminal worker. Now it employs five workers to handle the unloading and loading work. The parties disagree on the extent of Holship's unloading and loading activities in the Port of Drammen and on its relevance for determining whether the freedom of establishment has been restricted.

25 Following the company's increased activities in the Port of Drammen and its practice of using its own terminal workers for unloading and loading work, NTF sent a letter to Holship on 10 April 2013 demanding that Holship respect the

Framework Agreement. Holship did not respond. NTF sent further letters requesting a response and eventually gave notice of a boycott in letters dated 26 April and 11 June 2013. In the latter, NTF stated that a declaration from the competent national court would be sought to determine whether the notified boycott was lawful. NTF brought a case before Drammen District Court (*Drammen tingrett*) on 12 June 2013, seeking an order declaring that the boycott notified in the letter of 11 June 2013 was lawful.

26 On 19 March 2014 Drammen District Court ruled that the notified boycott was lawful. On appeal, Borgarting Court of Appeal (*Borgarting lagmannsrett*) reached the same conclusion in a judgment of 8 September 2014.

27 Both the District Court and the Court of Appeal found that the priority of engagement provided by the Framework Agreement was exempted from EEA competition law and Norwegian competition law as it relates to conditions of work and employment. Furthermore, the Court of Appeal held that the fact that Holship was compelled to accept the terms of the Framework Agreement did not conflict with Article 31 EEA. Article 31 EEA was not at issue in the proceedings before the District Court.

28 Holship challenged the judgment of the Court of Appeal before the Supreme Court of Norway. Leave to appeal was granted by decision of 14 January 2015.

29 On 5 June 2015, the Supreme Court of Norway decided to make a request to the Court under Article 34 SCA and posed the following questions:

On competition law:

(A1) Does the exemption from the competition rules of the EEA Agreement that applies to collective agreements, as this exemption is described inter alia in the advisory opinion of the EFTA Court in Case E-8/00 Landsorganisasjonen i Norge and NKF [2002] EFTA Ct. Rep. 114, cover the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate administration office as described in paragraphs 7 and 10 to 14 [of the Request], rather than to use its own employees for the same work?

(A2) If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?

(A3) In that case, must the existence of an identical or corresponding system in other ports be taken into account in the assessment of whether there is a appreciable effect on cross-border trade within the EEA?

On the freedom of establishment:

(B1) Is it a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to

produce acceptance of a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate administration office having the characteristics described in paragraphs 10 to 14 [of the Request], rather than use its own employees for this work?

(B2) Would it be of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic?

(B3) If a restriction exists: Is it of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work?

30 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

Question A1

31 By its first question concerning competition law, the Supreme Court seeks to establish whether the exemption of collective agreements from EEA competition law applies to the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from an administration office in place of using its own employees for the same work.

Observations submitted to the Court

32 Holship, ESA and the Commission, mainly relying on the conditions set out in the judgment of the Court of Justice of the European Union ("ECJ") in *Albany* (C-67/96, EU:C:1999:430) and the Court's judgment in *LO* (Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. 114) ("*LO*"), claim that the priority clause goes beyond the objective of improving conditions of work and employment and therefore is not exempted from the application of the EEA competition rules. ESA and the Commission argue that the notion of improving conditions of work and employment remains vague and that, in light of the *LO* judgment in particular, there are limits on how broadly it can be construed. Additionally, according to ESA, it does not suffice to consider merely whether the general objective of a collective agreement is to improve the conditions of work and employment, instead each provision must be assessed individually.

33 In relation to the case at hand, ESA and the Commission argue that the Framework Agreement imposes obligations on third parties and is detrimental to the interests of other workers, such as those employed by Holship. A general exclusion of collective agreements from competition rules carries a risk that trade associations will be able to circumvent those rules with provisions that restrict competition without having to establish a social policy justification for such restrictions.

34 NTF and the Norwegian Government accept that provisions of a collective agreement that do not improve conditions of work and employment may come within the scope of the EEA competition rules. However, they argue that, according to the case law of the Court, the concept of conditions of work and employment must be interpreted broadly and include various matters related to improving the situation of workers (reference is made to *LO*, cited above, paragraph 53).

35 NTF concludes that the priority clause pursues social policy objectives and contributes to securing and improving conditions of work and employment for dockworkers. Therefore, the clause is not subject to the EEA competition rules.

36 On the question whether the provisions of the Framework Agreement fall outside the EEA competition rules, the Norwegian Government argues that it is for the Supreme Court to examine the purpose of the priority clause and to decide whether it pursues social objectives by improving work and employment conditions for dockworkers. In this regard, the Norwegian Government refers to the Supreme Court's judgment of 5 March 1997 in *Sola Havn* and notes that the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention and that its objective is to give dockworkers security of employment and pay by setting up dock work offices providing dockworkers with terms of permanent employment and minimum rates of pay, both of which are implemented by granting dockworkers priority of engagement.

Findings of the Court

37 The Court finds it appropriate at this stage to recall that the procedure provided for in Article 34 SCA is an instrument of cooperation between the Court and the national courts. It is the function of the Court to provide the national court with guidelines for the interpretation of EEA law that are required for the decision of the matter before it. It is for the national court to examine and evaluate evidence and to make factual findings, and then apply EEA law to the facts of the case (see *LO*, cited above, paragraph 48).

38 The law governing the creation, application and interpretation of agreements concluded in the process of collective bargaining between management and labour has not been the subject of harmonisation within the EEA. However, both national law and collective agreements must comply with EEA law.

39 Fundamental differences distinguish the labour market from the markets for goods, services and capital. Industrial societies have recognised the need to establish a

balance between employers and workers by enacting labour laws that authorise unions of workers to conclude collective agreements with employers or associations of employers.

40 It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if such agreements were prohibited because of their inherent effects on competition (see *LO*, cited above, paragraphs 36 to 44, and case law cited; and for comparison, the ECJ in *Albany*, cited above, paragraph 59; and the Opinion of Advocate General Poiares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* ("*Viking Line*"), C-438/05, EU:C:2007:292, point 27).

41 Yet, to exclude all collective agreements from the reach of competition law would go too far. It would create a legal environment where collective agreements containing provisions restricting competition could be concluded, without there being any judicial review of such restrictions.

42 According to established case law, the following conditions must each be satisfied for a collective agreement to fall outside the scope of competition law: the agreement must have been entered into following collective bargaining between employers and employees, and it must pursue the objective of improving conditions of work and employment (see *LO*, cited above, paragraphs 49 and 50).

43 The first requirement, that the agreement must have been entered into after collective bargaining between employers and employees, is fulfilled in the present case.

44 With regard to the second requirement, the Court notes that the term "conditions of work and employment" must be interpreted broadly (see *LO*, cited above, paragraph 53 and case law cited). It relates to core elements of collective agreements, such as wages, working hours and other working conditions. Further elements may concern, *inter alia*, safety, the workplace environment, holidays, training and continuing education, and consultation and co-determination between workers and management.

45 In determining whether the second requirement is fulfilled, account must be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The subsequent practice of the parties to the agreement may be of importance, as may be the effect, in practice, of its provisions. It is not sufficient that the broad objective of a collective agreement is recognised as seeking to improve conditions of work and employment, as individual provisions may be directed towards other purposes (see *LO*, cited above, paragraph 51).

46 When examining the collective agreement's provisions, their aggregate effect must be considered. Even if individually the provisions would not lead to any certain

resolution of the status of the collective agreement in relation to the applicability of Articles 53 and 54 EEA, their aggregate effect may bring the agreement within the scope of those Articles (see *LO*, cited above, paragraph 57).

47 Clause 3 of the Framework Agreement provides for the establishment of the AO in the Port of Drammen, and clause 2(1) is the priority clause for dockworkers employed by the AO.

48 It follows from the request that the aggregate effect of the two clauses is that port users bound by the Framework Agreement must engage dockworkers employed by the AO to unload or load cargo from or to their ships, unless the AO has decided that it has insufficient capacity to take on an assignment. Consequently, these provisions appear to benefit workers employed by the AO, in the sense that they guarantee the employees of the AO permanent employment and a certain wage.

49 It follows further from the request that the boycott seeks to protect the effect of this system, by compelling Holship to observe the terms of the Framework Agreement. As a rule, a trade union's industrial action is initiated to promote only the interests of its members. The Framework Agreement established the AO in the Port of Drammen. NTF is a party to that agreement. It follows from the request that NTF participates in the management of the AO. It is in NTF's and the AO's common interest to preserve the market position of the AO. This combination of a business objective with NTF's core tasks as a trade union becomes possible when a trade union engages in the management of an undertaking, such as it turns out in the present case. In this situation, NTF acts in support of the AO. The boycott must therefore also be attributed to the AO, although it was NTF, which notified the boycott.

50 The effects of the priority clause and the creation of the AO appear therefore not to be limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition (see *LO*, cited above, paragraph 55).

51 Moreover, the Court notes that the AO system in the present case protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

52 Consequently, the collective agreement in the present case appears to differ from those at issue in the *Albany* line of case law and, for the reasons set out above, cannot generally be exempted from the scope of the EEA competition rules.

53 Therefore, the answer to Question A1 must be that the exemption from the EEA competition rules applicable to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of

a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate company, such as the AO, in place of using its own employees for the same work.

Questions A2 and A3

54 By its second question concerning competition law, the referring court essentially asks whether the system under consideration should be assessed under Article 53 or 54 EEA. By its third question concerning competition law, it asks further whether the existence of an identical or corresponding system in other ports must be taken into account in the assessment of whether there is an appreciable effect on cross-border trade within the EEA. These questions will be assessed together.

Observations submitted to the Court

55 Holship contends that the exclusive right to carry out an economic activity conferred upon the AO and the workers employed there is contrary to Article 53 EEA, as this goes beyond the aim of improving working and employment conditions.

56 Furthermore, Holship claims that the imposition of a duty to hire personnel regardless of actual need constitutes an abuse of a dominant position contrary to Article 54 EEA, in the sense that payment is demanded for services that have not been requested and are not required.

57 ESA argues in relation to Article 53 EEA that NTF does not constitute an undertaking within the meaning of the EEA competition rules. Furthermore, although the AO is an undertaking, it is not a party to the Framework Agreement and therefore not a party to an agreement for the purposes of Article 53 EEA. Hence, for there to be a breach, there would have to be another party to the Framework Agreement constituting an undertaking within the meaning of the provision. Alternatively, ESA suggests that the referring court could examine whether the decision by NHO and the Norwegian Logistics and Freight Association to conclude the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings. Should the Framework Agreement fall under Article 53 EEA, ESA contends that, in any event, a breach is unlikely given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone initiated the boycott in question.

58 In relation to Article 54 EEA, ESA submits that it is for the Supreme Court to determine whether the AO as an undertaking holds a dominant position on the relevant market, which – in ESA's view – is the provision of stevedoring services in Drammen. In this respect, ESA refers to the ECJ's judgment in *Merci* (C-179/90, EU:C:1991:464), which held that even a market limited to a single port can constitute a substantial part of the internal market. ESA also cites the ECJ's judgment in *Crespelle* (C-323/93, EU:C:1994:368), which held that there may be

an EU interest in a situation that involves a network of undertakings enjoying dominance in markets, which together may constitute a substantial part of the territory covered by the internal market. ESA submits that, by analogy, it must amount to an abuse for an undertaking in a dominant position to initiate or employ a boycott against a purchaser in order to compel the purchaser to accept a priority clause. Reference is made to the ECJ's judgment in *Hoffmann-La Roche* (102/77, EU:C:1978:108). Therefore, the referring court should consider whether the AO initiated the boycott or was involved in its preparation.

59 Finally, ESA considers there to be sufficient evidence to conclude that the priority clause may affect trade between EEA States, not least because of the fact that it covers the 13 largest ports in Norway and applies to all ships of 50 tonnes dwt and more sailing between one of those ports and a port in another EEA State.

60 The Commission notes that Articles 53 and 54 EEA apply only to undertakings. Neither the dockworkers themselves nor NTF qualify as an undertaking. However, in the Commission's view, the AO constitutes an undertaking.

61 With regard to the cartel prohibition laid down in Article 53 EEA, the Commission contends that it must be examined whether the AOs in various Norwegian ports are actual or potential competitors. In the Commission's view, this cannot be the case as it would generate disproportionate additional costs for an AO established in one port to provide registered dockworkers to ship calls in another port. Thus, for the assessment of the priority clause, the relevant geographic market is local.

62 As regards Article 54 EEA, the Commission argues that it is unnecessary to determine whether the Port of Drammen is in itself a substantial part of the territory covered by the EEA Agreement. This is because the priority clause that applies in all major ports in Norway should be considered cumulatively to cover a substantial part of the internal market. The Commission considers the conduct of the AO to constitute an abuse in that it seeks to force a customer to take its services although the customer does not want or need them. Moreover, the behaviour of the AO cannot be justified and, in any case, goes beyond what is necessary to protect the rights of employees.

63 Like ESA, the Commission submits that, even if the Port of Drammen is considered too small to be of importance for trade between EEA States, the cumulative impact of the priority clause applying in all major ports in Norway in accordance with the Framework Agreement still leads to the conclusion that trade between EEA States may be affected.

64 NTF, with reference to the judgments in *Albany* (cited above) and *Becu and Others* (C-22/98, EU:C:1999:419), argues that neither itself, nor the employers represented by NHO, can be regarded as undertakings. Therefore, the present case does not give rise to an agreement between undertakings for the purposes of Article 53 EEA. Furthermore, NTF claims that, whether or not the AO can be regarded as an undertaking, it cannot be held that any form of concerted practice exists.

65 With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an undertaking. In the view of NTF, the AO is rather to be regarded as an administrative body for what is characterised as a "pool agreement". The priority clause has been granted to the individual dockworkers and not to the AO. NTF claims that although the workers are formally employed with the AO, they are subject to the port user's instructions in the same way as if they were employed by the user. Finally, NTF argues that the AO cannot be described as abusing a dominant position since its activity is the hiring out of dockworkers and not the provision of dock work services. Therefore, the AO does not, in the view of NTF, offer unloading and loading services in the Port of Drammen and consequently does not operate on the market for unloading and loading services. Furthermore, NTF observes that the collective agreement system in Norwegian ports does not establish a monopoly, but only a priority clause, which means that the labour capacity is not restricted, as port users are free to use other labour where demand cannot be met by the AO.

66 NTF adds that the third question concerning competition law must be answered in the affirmative, provided that the other conditions are met.

Findings of the Court

Notion of an undertaking

67 The application of Articles 53 and 54 EEA requires that the actors involved are undertakings.

68 Under the EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement, and *LO*, cited above, paragraph 62).

69 Any activity consisting of offering goods or services in a given market is an "economic activity" (see, in particular, Joined Cases E-4/10, E-6/10 and E-7/10 *REASSUR and Swisscom* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54).

70 In the present case, the relevant activity under consideration is the offering and performance of stevedore work by the AO, a legal person *sui generis*. The referring court must assess, in light of the system established under the Framework Agreement, whether this activity is attributable to the AO.

71 The stevedore services offered and provided by the AO are an economic activity as this involves offering a service on a market. The customers in this market are all undertakings requiring stevedore work at the Port of Drammen, whether or not they are bound by the Framework Agreement. The AO competes with other actual or potential market players who offer such stevedore services. Furthermore, the fact that the AO is organised as a non-profit entity is of no relevance in the assessment whether the AO is to be considered an undertaking (compare the ECJ in *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraphs 19 to 22).

72 Accordingly, an entity such as the AO will constitute an undertaking within the meaning of Articles 53 and 54 EEA provided that the conditions which the Court has set out above are fulfilled. It is for the referring court to assess whether that is the case in the present proceedings.

73 For the sake of order, the Court recalls that a trade union is normally not considered an undertaking when it acts as an agent of its members and is solely an executive organ of an agreement between its members (compare the ECJ in *Becu and Others*, cited above, paragraph 28). However, a trade union will be considered an undertaking with respect to activities where it is acting in its own right, independent to a certain extent of the will of its members, and not merely operating as an executive organ of an agreement between its members (compare the Opinion of Advocate General Jacobs in *Albany*, C-67/96, EU:C:1999:28, points 222 and 224). With regard to trade union activities a two-stage approach is therefore necessary. It must be asked, first, whether a certain activity is attributable to the trade union itself and, if so, second, whether that activity is of an economic nature.

Effect on trade between EEA States

74 Article 53 EEA prohibits certain agreements between undertakings "which may affect trade between Contracting Parties". Similarly, Article 54 EEA prohibits the abuse by an undertaking of a dominant position "in so far as it may affect trade between Contracting Parties". The concept of an agreement or an abuse of a dominant position which "may affect trade between Contracting Parties" is intended to define the boundary between the areas covered respectively by EEA law and national law. It is only to the extent to which the agreement or the abuse may affect trade between EEA States that the deterioration in competition it causes falls under the prohibition laid down in Articles 53 or Article 54 EEA (compare the ECJ in *Consten and Grundig* v *Commission*, Joined Cases 56/64 and 58/64 EU:C:1966:41).

75 It is sufficient for the purposes of Articles 53 and 54 EEA that trade between EEA States "may" be affected. For this condition to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that the practices under consideration may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraphs 48 and 49).

76 Moreover, Articles 53 and 54 EEA apply only to agreements and abuses of a dominant position whose effect on trade between EEA States may be appreciable. In that assessment, account must be taken of the position and the importance of the parties on the market for the goods or the services concerned. However, an agreement or an abuse of a dominant position confined to the territory of an EEA State, or to part of that territory, is capable of appreciably affecting trade between EEA States.

77 Whether the requirement is fulfilled in the present case, is an issue for the referring court to determine on the basis of all the facts before it. As mentioned above, indirect and potential effects on trade are to be taken into account alongside direct and actual effects. In particular, regard may be given to foreseeable market developments.

Article 54 EEA

78 As part of the assessment under Article 54 EEA the relevant market needs to be defined.

79 First, the referring court has to determine the relevant product market (compare the ECJ in *Raso and Others*, C-163/96, EU:C:1998:54, paragraph 54). That market comprises all products that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use. Depending on the circumstances, supply-side substitutability must also be taken into account (see Case E-7/01 *Hegelstad and Others* [2002] EFTA Ct. Rep. 310, paragraph 29).

80 Second, the referring court must consider the geographical scope of the market. The relevant area is the area in which the undertakings concerned are involved in the supply and demand of products and in which the conditions of competition are sufficiently homogeneous, and it can be distinguished from neighbouring areas because the conditions of competition are appreciably different (see *Hegelstad and Others*, cited above, paragraph 30).

81 In the present case, the referring court must assess whether the relevant market is limited geographically to the Port of Drammen. However, the possibility that the relevant market includes other ports cannot be ruled out. Therefore, the national court must also consider in its assessment and determination of the geographical scope of the market whether the AO's potential customers include undertakings who currently use other ports for their unloading and loading needs.

82 The referring court must then assess whether the AO holds a dominant position on the relevant market. A dominant position relates to the economic strength enjoyed by an undertaking. That economic strength enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (compare the ECJ in *United Brands*, 27/76, EU:C:1978:22, paragraph 65).

83 A market share of 50% or more is in itself, save in exceptional circumstances, evidence of the existence of a dominant position (compare the ECJ in *AKZO Chemie* v *Commission*, C-62/86, EU:C:1991:286, paragraph 60).

84 It follows from the information before the Court that the majority of undertakings operating in the Port of Drammen are members of NHO, and are covered by the Framework Agreement. The referring court must assess whether this fact, taken

together with other facts of the case, leads to a dominant position of the AO in the market in question.

85 If the referring court comes to the conclusion that the AO holds a dominant position, it must assess further whether that position covers a "substantial part" of the EEA territory, as required by Article 54 EEA (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraph 38). In that respect, one port may be regarded as a substantial part of the EEA, depending on the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the EEA (compare the ECJ in *GT-Link*, C-242/95, EU:C:1997:376, paragraph 37, and case law cited).

86 If the Port of Drammen is considered not to cover a substantial part of the EEA, the referring court would have to assess the extent to which comparable AO systems exist in other ports. In the case at hand, it appears that on the basis of the Framework Agreement a series of AOs linked by that agreement were established in the largest ports of Norway. Thus, when assessing whether a substantial part of the EEA territory is covered, due account may be taken of the system established by the Framework Agreement.

87 The notion of abuse of a dominant position is a legal notion that must be examined in the light of economic considerations (see Cases E-4/05 *HOB-vín* [2006] EFTA Ct. Rep. 4, paragraph 51, and E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126). Moreover, Article 54 EEA must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.

88 Article 54 EEA does not prohibit an undertaking from acquiring, on its own merits, a dominant position in a market. However, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (see *Posten Norge* v *ESA*, cited above, paragraph 127).

89 The concept of abuse of a dominant position, prohibited by Article 54 EEA, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see *Posten Norge* v *ESA*, cited above, paragraph 130).

90 The referring court needs to assess different types of abuse that may exist in the present case: in particular, first, where an undertaking enjoying a dominant position obliges purchasers to obtain all or most of their requirements from that undertaking, it will be abusing its dominant position (compare the ECJ in *Hoffmann-La Roche & Co.* v *Commission*, 85/76, EU:C:1979:36, paragraph 89).

As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

91 Second, it constitutes abuse to charge disproportionate prices or to grant price reductions to certain consumers and to offset such reductions by an increase in the charges to others (compare the ECJ in *Merci,* cited above, paragraphs 19 and 20).

92 As for charging disproportionate prices, it follows from the information before the Court that if Holship were to affiliate to the Framework Agreement, it would be subject to the pay rates fixed by the AO for using dockworkers in the Port of Drammen.

93 Third, the priority clause may reduce incentives for the AO to employ modern technology. Were this the case, it could imply higher costs for stevedore services in the Port of Drammen.

94 The referring court must determine on the basis of a full assessment of the facts, whether the AO abused a dominant position on the relevant market in breach of Article 54 EEA.

95 If abuse of a dominant position exists, it is open to a dominant undertaking to provide justification for conduct otherwise caught by the prohibition under Article 54 EEA.

96 An undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, for comparison, the ECJ in *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 41, and case law cited). In the present case, it appears difficult to conclude that the conduct of the AO was objectively necessary, or that the exclusionary effect produced can be counterbalanced or outweighed by advantages or efficiencies.

97 Finally, the Court notes for the sake of completeness that, contrary to the claim made in NTF's pleadings, the AO cannot rely upon Article 59(2) EEA, since it appears from the file that the AO cannot be considered an undertaking entrusted with the operation of services of general economic interest. It suffices to recall in that regard that the AO has the possibility to decline requests to use their services.

Article 53 EEA

98 As regards the application of Article 53 EEA to the system in the present case, the referring court must assess whether the 13 AOs are parties to an agreement or whether there is any concerted practice between them.

99 The information before the Court is not sufficient in order to give guidance on whether there is an agreement between the AOs themselves or a concerted practice that needs to be assessed under Article 53 EEA.

100 The answer to the second competition law question is therefore that Articles 53 and 54 EEA may apply separately or jointly to the system under consideration. The answer to the third competition law question is that, should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding AO systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or of a substantial part of it.

Questions B1 to B3

101 By the fourth to six question, the referring court essentially seeks guidance on whether it constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA when a trade union uses a boycott against a company in order to procure acceptance of a collective agreement, when the collective agreement entails that the company must give preference to buying unloading and loading services from an administrative office in place of using its own employees. The referring court further seeks clarification on whether specific circumstances are relevant for the existence of a restriction and, if a restriction exists, whether it may be lawful. It is appropriate to assess these questions together.

Observations submitted to the Court

102 Holship, ESA and the Commission submit that the boycott at issue entails a restriction on the freedom of establishment under Article 31 EEA.

103 Upon a question from the bench, the Commission put forward arguments at the oral hearing on the basis of the judgment of the European Court of Human Rights ("ECtHR") in *Sørensen and Rasmussen* v *Denmark* [2008] 46 EHRR 29. In that case, the ECtHR held that a closed shop arrangement, whereby a specific employment was contingent on the workers joining a trade union with which the employer had a special relationship, infringed Article 11 of the European Convention on Human Rights ("ECHR").

104 The Commission contends that, with regard to the negative freedom of association, employers such as Holship are in an analogous position to the applicants in *Rasmussen* in so far as the priority clause means that they are not permitted to provide a service unless they agree to a collective agreement, which they were not involved in negotiating. Moreover, a collective agreement that restricts the freedom of establishment cannot be justified by reason of the protection of workers where, in reality, that agreement amounts to a closed shop arrangement.

105 ESA and the Commission submit further that the restriction imposed on the freedom of establishment cannot be justified by any overriding reason of public interest and that the boycott is disproportionate. Furthermore, there is no *de minimis* rule applying to the freedom of establishment and it is thus irrelevant whether the collective action in question has only little restrictive effect.

106 NTF argues that the priority clause must be respected whether the undertaking needing unloading and loading services is based in Norway or a different country and that Holship is not prevented from gaining access to the market. Therefore, NTF argues that there is no restriction on the freedom of establishment. NTF further maintains that an undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction on the right of other workers to demand a collective agreement or to pursue such a demand through industrial action. Finally, it contends that, as the AO is a non-profit undertaking, it falls outside the scope of Article 34 EEA.

107 The Norwegian Government contends that it is for the national court to determine whether the use of a boycott in the present case constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA. The right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the EEA Agreement.

Findings of the Court

108 If EEA competition law is found not to be applicable with regard to an agreement or an activity, the rules on free movement may still apply, as the two sets of provisions are based on different conditions (compare, to that effect, the ECJ in *Viking Line*, C-438/05, EU:C:2007:772, paragraph 53).

109 According to settled case law, the right of establishment is intended to enable an EEA national to participate, on a stable and continuous basis, in the economic life of an EEA State other than his State of origin and to profit from that participation, thus contributing to the economic well-being of the EEA (see, to this effect, Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 94).

110 The freedom of establishment under Article 34 EEA entails the right for companies, formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a subsidiary established there (compare Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 58).

111 According to the facts presented to the Court, Holship, founded in 1996 and wholly owned by a Danish company, is established on a stable and continuous basis in Norway and may rely on the provisions on freedom of establishment.

112 The Court recalls that the provisions on the fundamental freedoms also extend to rules of any nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (compare the ECJ in *Viking Line*, cited above, paragraph 33 and case law cited).

113 Working conditions in the different EEA States may be governed by provisions laid down by law or regulation, or by collective agreements and other acts concluded or adopted by private persons. Consequently, there would be a risk of creating inequality in the application of the prohibitions set out in the fundamental freedoms if their scope were limited to acts of a public authority (compare the ECJ in *Viking Line*, cited above, paragraph 34 and case law cited).

114 In the present proceedings, the organisation of collective action by trade unions must be regarded as covered by the legal autonomy, which those organisations enjoy pursuant to the trade union rights accorded to them by national and other sources of law. Collective action, which may be the trade unions' last resort to ensure the success of their claim to regulate work, must be considered inextricably linked to the collective agreement the conclusion of which is sought in the case at hand (compare the ECJ in *Viking Line*, cited above, paragraphs 35 and 36).

Existence of a restriction

115 Article 31 EEA prohibits all restrictions on the freedom of establishment within the EEA. Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality, are an encroachment upon these freedoms requiring justification (compare Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64, and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 82).

116 With regard to question B2 it is important to recall that a restriction on the right of establishment is prohibited by Article 31 EEA, even if it is of limited scope or minor importance. No form of *de minimis* rule exists in that regard. It is thus of no significance for the assessment whether a restriction on the freedom of establishment exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

117 In the present case, a boycott aiming at protecting the priority clause is at issue. According to the referring court, the boycott is intended to compel Holship to affiliate to the Framework Agreement, as a result of which Holship would be obliged to resort by way of priority to the dockworkers engaged by the AO in order to carry out unloading and loading operations. As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

118 Under the Framework Agreement, Holship would be bound by the priority clause, as administered by the AO, which employs all permanently employed dockworkers in the Port of Drammen. The AO would decide whether it has the capacity to take on an assignment or whether Holship is allowed to use its own employees. Although Holship would not be obliged to participate in the AO or provide it with funds, it would be obliged to pay the fees for the unloading and loading assignments that are carried out by AO's employees.

119 As has been submitted by ESA and the Commission, it appears that Holship may even encounter additional costs, since it may need to maintain resources to carry out unloading and loading operations itself if the AO declines an assignment for unloading and loading operations.

120 In light of the preceding considerations, the Court holds that a boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.

Justification

121 It is settled case law that restrictions on the freedom of establishment may be justified either by Article 33 EEA or, if applicable without discrimination on grounds of nationality, by overriding reasons of general interest (compare, for example, the ECJ in *Commission* v *Spain*, C-576/13, EU:C:2014:2430, paragraph 47 and case law cited).

122 Collective bargaining may involve sensitive issues of balancing social policy objectives, such as protection of workers, with an effective functioning of the market. Collective bargaining and collective action are recognised as fundamental rights. The protection of workers has therefore been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment (see Case E-2/11 *STX Norway and Others* [2012] EFTA Ct. Rep. 4, paragraph 81, and compare the ECJ in *Commission* v *Spain*, cited above, paragraph 50 and case law cited).

123 Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23). The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. Thus the national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see *Olsen and Others*, cited above, paragraph 226). It is for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 ECHR and the case law of the ECtHR (compare, for example, the ECtHR in *Sørensen and Rasmussen* v *Denmark*, cited above, paragraphs 54 and 58).

124 Whether a restrictive measure aims at protecting workers needs to be answered in light of these considerations. When determining the aim pursued by the boycott, the national court must therefore take into account the objective pursued by the

overall system established through the collective agreement in question. In that regard, the boycott cannot be viewed in isolation from the agreement of which it seeks to procure acceptance.

125 The Court notes further that it is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers. The absence of such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States (see, for comparison, AG Poiares Maduro in his Opinion in *Viking Line*, cited above, point 67 et. seq.).

126 It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition. The AO system protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

127 The right to collective action also covers situations where workers take collective measures in order to support other workers in their labour disputes with a view to promoting their interests in establishing a system of fair conditions of work and pay. However, from the information before the Court, there is nothing to suggest that some kind of labour dispute between Holship and its employees exists and that the boycott imposed aims at improving the working conditions of Holship's employees. The boycott is even to the detriment of Holship's employees and may touch upon fundamental rights of Holship, such as the negative right to freedom of association, and possibly that of its employees. Thus, it is of no significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement in relation to its own dockworkers.

128 NTF and the Government of Norway have argued that the priority clause must be considered part of the fulfilment of Norway's obligations under the ILO Convention. However, it follows from Protocol 35 to the EEA Agreement that, in case of a conflict between national law implementing EEA law and other national provisions not implementing EEA law, the EFTA States shall introduce a statutory provision to the effect that national law implementing EEA law shall prevail. Therefore, a Contracting Party cannot make rights conferred by Article 31 EEA subject to the ILO Convention or other international agreements (see, to that effect, Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 31).

129 In the present case, the conflicting provision does not follow from national legislation. It is part of a collective agreement. Consequently, EEA law applicable in this case must in any event prevail.

130 For the sake of completeness, it is recalled that for a restriction to be justified it does not simply suffice that it pursues a legitimate aim. A restrictive measure must be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (compare the ECJ in *Commission* v *Spain*, cited above, paragraph 53 and case law cited).

131 It is for the referring court to determine, having regard to all the facts and circumstances before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified.

IV Costs

132 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **The exemption from the EEA competition rules that applies to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate company, such as the administrative office at issue, in place of using its own employees for the same work.**

2. **Articles 53 and 54 EEA may apply separately or jointly to a system such as the one at issue.**

3. **Should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding administrative office systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or a substantial part of it.**

4. **A boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.**

5. **It is of no significance for the assessment whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.**

6. **In a situation such as that in the main proceedings, it is of no significance for the assessment of the lawfulness of the restriction that the company, upon which the boycott is imposed, applies another collective agreement in relation to its own dockworkers.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 19 April 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President