REPORT FOR THE HEARING
in Case E-14/15

REQUEST to the Court pursuant to 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 a case pending before it between

Holship Norge AS

v

Norsk Transportarbeiderforbund

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

I Introduction

1. Norsk Transportarbeiderforbund (the Norwegian Transport Workers Union or "NTF") has notified a boycott of Holship Norge AS ("Holship") in order to procure its acceptance of a collective agreement, a provision of which grants priority of engagement for stevedore work to dockworkers registered at the Administration Office ("AO") at the Port of Drammen. Before the national court, NTF seeks an advance ruling as to the lawfulness of the boycott.

2. By a letter of 5 June 2015, registered at the Court as Case E-14/15 on 11 June 2015, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between NTF and Holship. By its request, the Supreme Court refers six questions.

3. The first three questions (A1, A2, and A3) seek to establish: (1) whether the exemption from the competition rules of the EEA Agreement for collective agreements extends to 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 instead of using its own employees for the same work; (2) if the exemption does not so extend, whether such a system should be assessed under Article 53 or Article 54 EEA; and (3) if the exemption does not so extend and such a system should be assessed under Article 53 or Article 54 EEA, whether the existence of an identical or corresponding system in other ports is to be taken into

account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

4. The other three questions referred (B1, B2, and B3) seek to establish: (1) whether it is a restriction on the freedom of establishment pursuant to Article 31 EEA 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 instead of using its own employees for this work; (2) whether, for the purpose of an assessment of whether a restriction exists, the fact that the company's need for unloading and loading services proves to be very limited and/or sporadic is relevant; and (3) if a restriction exists, whether it is of significance for the assessment of the lawfulness of that restriction that the company, in relation to its own dockworkers, applies another collective agreement negotiated between social partners in the State where the port is located when that collective agreement concerns matters other than unloading and loading work.

II Legal background

EEA law

5. Article 31(1) EEA reads as follows:

> *1. 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.*

6. The second paragraph of Article 34 EEA reads:

> *'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.*

7. Article 53 EEA reads as follows:

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

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

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

(c) share markets or sources of supply;

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

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

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

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

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

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

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

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

8. 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.

9. Article 59(2) EEA reads as follows:

2. 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

The Boycott Act

10. 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

11. 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 establishes a fixed pay scheme for dockworkers in the thirteen largest Norwegian ports, including the Port of Drammen.

12. Clause 2(1) of the Framework Agreement, the so-called priority of engagement 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.*

ILO Convention No 137

13. Norway has been a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the Convention") since it entered into force on 24 July 1975.

14. Article 2 of the 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.*

15. Article 3 of the 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.*

16. Article 7 of the 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.*

III Facts and procedure

Background

17. Holship is a Norwegian forwarding agent wholly owned by a Danish parent company. Its principal activity is the cleaning of fruit crates. Previously, Holship had utilised the services of the AO. Holship acquired a new customer around the beginning of 2013, leading to an increase in the company's activities in the Port of Drammen. As a result, Holship added four further terminal workers to its existing sole terminal worker.

18. Holship is party to a collective agreement with Norsk Arbeidsmandsforbund (the Norwegian General Workers Union). The scope of that collective agreement includes cleaning work, the principal activity of Holship. Holship has elected to apply the collective agreement for cleaning workers to its unloading and loading workers.

19. In the light of Holship's increased activity and use of its own terminal workers for unloading and loading work in the Port of Drammen, NTF sent a letter to Holship on 10 April 2013, demanding that the Framework Agreement be applied. Holship did not reply. NTF sent reminders and eventually gave notice of a boycott in letters of 26 April 2013 and 11 June 2013, the latter gave notice that legal action would be taken to obtain a decision regarding the lawfulness of the notified boycott.

20. NTF brought a case before Drammen District Court (Drammen tingrett) on 12 June 2013, seeking an order that the boycott notified in the letter of 11 June 2013 was lawful. On 19 March 2014, Drammen District Court gave a declaration that the notified boycott was lawful. Borgarting Court of Appeal (Borgarting lagmannsrett) reached the same conclusion in its judgment of 8 September 2014. Both the District Court and the Court of Appeal found that the priority of engagement clause under the Framework Agreement fell within the exemption relating to conditions of work and employment under EEA and Norwegian competition rules. Furthermore, the Court of Appeal found that the claim for a collective agreement did not conflict with Article 31 EEA (Article 31 EEA had not been invoked before the District Court).

21. Holship submitted an appeal to the Supreme Court. By decision and order of 14 January 2015, the Appeal Committee of the Supreme Court (*Høyesteretts ankeutvalg*) granted leave to appeal. On 11 June 2015, the Court received a request from the Supreme Court for an Advisory Opinion.

IV Questions

22. The following questions were referred to the Court:

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 noticeable 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?

V Written observations

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

— Holship, represented by Nicolay Skarning, Advocate;

— NTF, represented by Håkon Angell and Lornts Nagelhus, Advocates;

— 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 Markus Schneider, Deputy 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 the Legal Service, acting as Agents.

VI Summary of the arguments submitted and proposed answers

Holship

24. Annexed to the written observations is a report by Professor Erling Hjelmeng (Attachment 1), which was excluded as evidence by the Supreme Court, and a presentation of Professor Hjelmeng's credentials (Attachment 2). Professor Hjelmeng's assessment and conclusion is endorsed.

Questions A1 – A3

25. Reliance is placed entirely upon the assessment and conclusion in Professor Hjelmeng's report. His conclusion is that: (i) the present organisation of loading and unloading services confers an exclusive right upon the AO that is contrary to Article 53 EEA; and (ii) the imposition of a duty to hire personnel regardless of the need must be deemed to constitute an abuse of a dominant position contrary to Article 54 EEA.

Questions B1 – B3

26. Holship submits that the organisation of Norwegian ports is contrary to Article 31 EEA.

Proposed answers

27. Holship does not propose any specific answers to the questions referred.

NTF

28. Although the referring court has not posed any question concerning the applicability of Article 59(2) EEA, NTF finds it appropriate to submit observations on this provision, as its applicability will determine whether it is necessary to answer the questions referred.

29. NTF submits that Article 59(2) EEA applies. First, the AO is an undertaking of the kind defined in Article 59(2) EEA. The AO provides a service of general economic interest. The Framework Agreement has been entered into with undertakings located in the largest ports in Norway, which are important traffic junctions and serve most of the cargo to and from Norway that is transported by sea. A number of the functions of a port have been characterised by both the Court of Justice of the European Union ("the ECJ") and the Commission as services of general economic interest.

30. Second, the AO has been entrusted with the task of providing the service. Article 2 of the Convention imposes an obligation on States to assure dockworkers of a certain minimum income or minimum periods of employment, and Article 3(2) gives registered dockworkers a priority of engagement for dock work. Under the Convention, if the situation established by the Framework Agreement regarding priority of engagement cannot be maintained, this must be established by legislation or other public authority resolution.[1] The AO must be regarded as part of the services offered by the port to meet the requirements for safe and efficient port services, and, in this regard, acceptance of the Framework Agreement is a prerequisite.

31. Third, the AO's provision of the service is obstructed by the rules of the EEA Agreement. If priority of engagement is regarded as contrary to EEA law, there will no longer be a basis for maintaining permanently employed dockworkers who are given the necessary courses and training. The supply of assignments will be random, and the dockworkers will lose their basis for achieving predictable pay and employment conditions.

Question A1

32. NTF argues that it is established EU and EEA law that, as a general rule, agreements between employer and employee organisations, even though they may entail restrictions of competition, fall outside the scope of the competition rules.[2] However, provisions of a collective agreement that pursue other, extraneous

[1] Reference is made to Section 40 of the Norwegian Act 19 of 2009 relating to Ports and Fairways.

[2] Reference is made to Case E-8/00 *Landsorganisasjonen i Norge and and Others* v *Kommunes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 44, as regards the EEA EFTA States, and Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paragraphs 59 to 64.

objectives or that do not, in practice, improve conditions of work and employment may come within the scope of Article 53 EEA.[3]

33. According to NTF, there is no doubt that the Framework Agreement is a collective agreement entered into between social partners. It argues further that the content of a provision in a collective agreement must constitute a "suitable measure" in order to provide immunity under competition law.[4] Moreover, the Court has specified that the concept of conditions of work and employment "must be interpreted widely".

34. According to NTF, there is no doubt that the priority of engagement clause in the Framework Agreement pursues social policy objectives and contributes to securing and improving conditions of employment and work for dockworkers by providing them with stable working conditions and regulated pay and employment conditions. Moreover, the priority of engagement clause also ensures Norway's compliance with its international law obligations under the Convention.

35. NTF concludes with respect to Question A1 that the Framework Agreement's priority of engagement provision does not constitute an infringement of EEA competition rules.

Question A2

36. With respect to Article 53 EEA, NTF limits itself to the submission that the circumstances of the present case do not give rise to an agreement between undertakings or any form of concerted practice as specified in that Article. Neither the workers, nor the NTF nor the employers can be regarded as undertakings for the purposes of that provision.[5] Moreover, a concerted practice of the type that Holship contends cannot be said to exist.[6]

37. With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an "undertaking" as defined therein and that, in any circumstance, the AO has not abused a dominant position.

38. According to NTF, the priority of engagement that follows from clause 2(1) of the Framework Agreement has been granted to individual dockworkers and not to the AO, which has been set up to manage and regulate the workforce in the port. The workers are formally employed at the AO. Furthermore, both the Staff Committee, which, pursuant to the Framework Agreement, has the authority to decide questions, and the administrative body, which is to handle the practical

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[3] Reference is made to *Landsorganisasjonen i Norge*, cited above, point 1 of the operative part of the judgment, and Case C-413/13 *FNV Kunsten Informatie en Media* v *Staat der Nederlanden*, judgment of 4 December 2014, published electronically, paragraph 22 et seq.

[4] Reference is made to *Albany*, cited above, paragraphs 59 and 60.

[5] Reference is made to Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraphs 26 and 27, and to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 201 et seq.

[6] Reference is made to Professor Hjelmeng's assessment annexed to Holship's written observations, p. 5.

implementation, are composed of representatives of the employees and employers who are bound by the Framework Agreement. These same employers are also users of the services offered, and they are also generally referred to as employers in the collective agreement. In relation to the performance of the work, the dockworkers are subject to the port users' instructions in the same way as if they were employed there. The AO is therefore to be regarded as an administrative body for what is characterised as a "pool arrangement" in the Commission's Communication on a European Ports Policy.[7]

39. NTF argues that the present case has significant similarities with *Becu*, in which the ECJ held that a statutory priority of engagement for recognised stevedores to perform dock duties did not entail that special or exclusive rights had been granted to "undertakings".[8] Nor is it significant that the Belgian priority of engagement scheme at issue in *Becu* was not designed so that the dockworkers were formally employed by an employer other than the one for which the dock work was performed, nor that the scheme in *Becu* was statutory, unlike the situation in the present case where the arrangement follows from the Framework Agreement. There is also a similarity, though not as obvious, between the present case and *Porto di Genova*.[9] In that case, the exclusive rights were expressly granted to undertakings and not to dockworkers.

40. NTF contends that, as a consequence, the AO cannot be regarded as an "undertaking" and thus Article 54 EEA cannot have been infringed.

41. Further, NTF submits that a finding of an infringement under Article 54 EEA is conditional upon the abuse of a dominant position. In the assessment of whether there is any abuse, the market on which the AO has a dominant position must be defined, and it must be determined whether, in such a case, the performance of the activity can be regarded as constituting abuse. The AO hires out dockworkers, but does not itself provide stevedore services. Consequently, the AO does not operate on the market for loading and unloading services. This distinguishes the AO's activities from those of the dock work company in the judgment in *Silvano Raso*, where the importance of distinguishing between the market for labour and the market for services in the port was emphasised.[10]

42. NTF refers to *Silvano Raso* and *Höfner and Elser* as regards the question whether exclusive rights may, in themselves, constitute abuse.[11] It observes that the collective agreement system in Norwegian ports does not, however, establish

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[7] Reference is made to the Commission's Communication on a European Ports Policy of 18 October 2007 (COM(2007) 616 final), paragraph 4.5.

[8] Reference is made to *Becu*, cited above, paragraphs 26 to 31.

[9] Reference is made to Case C-179/90 *Merci convenzionali porto di Genova SpA* v *Siderurgica Gabrielli* SpA [1992] ECR I-5889.

[10] Reference is made by contrast to Case C-163/96 *Silvano Raso and Others* [1998] ECR I-533.

[11] Reference is made to *Silvano Raso*, cited above, paragraph 27, and Case C-41/90 *Höfner and Fritz Elser* v *Macrotron GmbH* [1991] ECR I-1979.

a monopoly, but a priority of engagement. This means that labour capacity is not restricted, as port users are free to use other labour where the demand cannot be met by the AO.

43. NTF maintains that other elements specified in the Framework Agreement, such as the requirement for a minimum number of hours, the regulation of meal breaks and the obligation that a minimum of one dockworker must be assigned, fall outside the competition rules as they are not imposed by an undertaking.

Question A3

44. NTF submits that this question must be answered in the affirmative, provided that the other conditions are met.

Question B1

45. In relation specifically to Question B1, NTF argues that the referring court is imprecise on the point that the priority of engagement is not given to the AO, but to the dockworkers. The dockworkers thus have a priority of engagement to perform unloading and loading work independently of the AO. The task of the AO is to manage the priority of engagement, but it does not derive any rights from the Framework Agreement.

46. NTF submits that the present case has clear similarities with the subject-matter in *Becu*, in which it was found that the exclusive right for dockers to perform dock work did not constitute a special right or an exclusive right for an undertaking, as the right was granted to the workers.[12] Moreover, NTF argues that the AO must be considered a non-profit-making company and hence not included within the definition of "companies and firms" for the purposes of Article 34(2) EEA.[13]

47. NTF argues, therefore, that there is no restriction on the freedom of establishment or on the right to provide services.

Question B2

48. NTF submits that Article 31 EEA does not prevent "nationality-neutral" regulation of business activities based on minimum intervention. In this regard, the Framework Agreement applies equally to all undertakings that carry on activities in Norwegian ports.

49. NTF argues that the priority of engagement clause did not limit Holship's opportunity to establish itself in Norway when it commenced its business activities

[12] Reference is made to *Becu*, cited above.

[13] Reference is made to Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, and Case C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others* v *San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus*, judgment of 11 December 2014, published electronically.

in 1996. The priority of engagement rule does not prevent Holship from offering unloading and loading services, or from providing these services itself, as long as the priority of engagement for dockworkers is respected. Holship thus has access to the market for unloading and loading services.

50. NTF also submits that EEA States can regulate the performance of business activities and market access, without such regulation being regarded as a restriction under Article 31 EEA.[14] The work that is covered by the priority of engagement is very limited, as further handling of the cargo, after it has been put down onto the quay, is not covered. Consequently, only the most risky work operations are subject to the priority of engagement. The priority of engagement does not prevent Holship from gaining access to the market under effective and normal conditions, given that by far the main part of the work tasks connected with cargo handling are not covered by the priority of engagement.

51. NTF therefore concludes that this question has to be answered in the affirmative.

Question B3

52. NTF maintains that the fact that Holship has entered into a collective agreement for another occupational group can hardly be of relevance in assessing the lawfulness of a restriction. Were the collective agreement for cleaning workers to be regarded as relevant to the assessment and also found to be of significance, the assessment of the lawfulness of collective agreements would differ depending on whether or not the undertaking is bound by a collective agreement. Such an effect would be contrary to fundamental rights, including the freedom of organisation and the right to take industrial action. The validity of those rights cannot be weakened by other occupational groups. Such an effect would be contrary to the principles of the collective agreement system and bargaining model that governs Norwegian working life. The Norwegian collective agreement system is based on and corresponds to the freedom of organisation rooted in international conventions and human rights. An undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction of the right to demand a collective agreement or to pursue such a demand via industrial action. Finally, NTF submits that the collective agreement entered into by Holship does not have regard to the special considerations contained in the Framework Agreement.

53. Based on the above, NTF submits that the question is to be answered in the negative.

[14] Reference is made to Case C-565/08 *Commission* v *Italy* [2011] ECR I-2101, paragraphs 50 and 51 and the case law cited.

Proposed answers

54. NTF proposes that the Court should provide the following answers to the questions referred:

> *(A1) The demand for a collective agreement and the notice of the use of a boycott, where acceptance of the collective agreement entails that the port user must give preference to hiring labour in the form of dockworkers, fall under the exemption from the competition rules of the EEA Agreement as this exemption has been defined in, inter alia, the advisory opinion of the EFTA Court in Case E-8/00.*

In the alternative, and if Question A1 is answered in the affirmative, NTF proposes that the Court should answer Question A2 as follows:

> *(A2) Articles 53 and 54 are not applicable.*

In the further alternative, and only if Questions A1 and A2 are both answered in the affirmative, NTF proposes that the Court should answer Question A3 as follows:

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

On the freedom of establishment, NTF proposes the following answer:

> *(B1) The claim for a collective agreement and the subsequent notice of a boycott to produce acceptance of the collective agreement do not constitute a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement.*

In the alternative, and if Question B1 is answered in the affirmative, NTF proposes that Questions B2 and B3 should be answered as follows:

> *(B2) It will be of significance for the assessment of whether a restriction exists that the company's need for unloading and loading services is limited and/or sporadic, and, moreover, it is for the referring court to assess whether the restriction meets the conditions stated in the grounds of this judgment.*
>
> *(B3) It is without 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 when that collective agreement concerns matters other than unloading and loading work.*

The Norwegian Government

Questions A1 – A2

55. In relation to the right of collective action, the Norwegian Government notes that that right is recognised in various international instruments and has been characterised by the ECJ as a fundamental right, forming an integral part of the general principles of EU law.[15]

56. The Norwegian Government maintains that collective agreements are excluded from the scope of Article 53 EEA subject to the satisfaction of two conditions. The first condition requires that the agreement is entered into within the context of collective bargaining between employers and employees.[16] It appears that this criterion is fulfilled in the present case.

57. The second condition requires that the agreement is intended to improve work and employment conditions.[17] In *Landsorganisasjonen i Norge* it was held that the protection of a collective agreement from the effect of Article 53 EEA cannot be upheld where the practical implementation of that agreement is intended to further extraneous interests.[18] In *Landsorganisasjonen i Norge* it was also held that the term "conditions of work and employment" must be interpreted broadly and that these broad categories included various matters improving the situation of workers.[19] A finding that a collective agreement contributes to improving work and employment conditions is not called into question by the fact that it designates a single entity administering the system in question, thereby excluding any possibility of affiliation to competing service providers.[20] As long as the contested provisions actually pursue the objective that places them outside of the scope of Article 53 EEA, any resulting restriction of competition is accepted.[21] The Norwegian Government finally alleges that the judgment in *Albany* did not take

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[15] Reference is made to Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paragraphs 43 to 45, 77 to 79, and 86, and Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767, paragraphs 90 and 91.

[16] Reference is made to *Albany*, cited above, paragraphs 59 and 60; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 67; Case C-222/98 *Hendrik van der Woude* v *Stichting Beatrixoord* [2000] ECR I-7111, paragraph 22; Case C-437/09 *AG2R Prévoyance* v *Beaudout Père et Fils SARL* [2011] ECR I-973, paragraph 29, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

[17] Reference is made to *Albany*, cited above, paragraphs 59 and 60; *Pavlov*, cited above, paragraph 67; *van der Woude*, cited above, paragraph 22; *AG2R Prévoyance*, cited above, paragraph 29; *FNV*, cited above, paragraph 23, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

[18] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 56 and 59.

[19] Ibid., paragraph 53.

[20] Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

[21] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 73.

into account the third condition that is to be found in the Opinion delivered in that case.[22]

58. On that basis, the Norwegian Government submits that it is for the national court to examine the purpose of the Framework Agreement and whether it pursues social objectives by improving work and employment conditions for dockworkers or other objectives. The referring court draws attention to clause 2(1) of the Framework Agreement on priority of engagement and states that that clause has been regarded as fulfilling Norway's obligations under the Convention, in particular Article 3(2) thereof. The aims and content of the Convention thus provides relevant context. Norway refers in particular to preamble, its first, fourth and fifth recitals and Articles 2(1) and 3(2) of the Convention. Moreover, Article 7 clarifies that the obligations laid down in the Convention may be implemented *inter alia* by collective agreements. Report III (Part 1B) of the International Labour Organisation (2002) sheds further light on the relevant provisions of the Convention.[23] In this context, the Norwegian Government observes that EU and EEA law recognise requirements concerning minimum income and stable employment as directly contributing to the improvement of conditions of work and employment.[24]

59. The Norwegian Government notes that the request refers to the judgment of the referring court in *Sola Havn*.[25] According to that judgment, the Framework Agreement aims to give dockworkers security of employment and pay by setting up dock work offices that provide the dockworkers with terms of permanent employment and minimum rates of pay, both of which are facilitated by granting dockworkers priority of engagement. Moreover, it appears that the criteria for employment are non-discriminatory and any dockworker is eligible to apply for employment in the dock work offices.

60. The Norwegian Government maintains further that it is for the national court to undertake the examination whether or not the provisions of the Framework Agreement fall outside of Article 53 EEA.[26] In its submission, a finding that the Framework Agreement and the priority of engagement provided for in clause 2(1)

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[22] Reference is made to Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, the Opinion of Advocate General Mengozzi in *AG2R Prévoyance*, cited above, point 43; and the Opinion of Advocate General Fenelly in *van der Woude*, cited above, point 32.

[23] Reference is made to Report III (Part 1B) of the International Labour Organisation, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 90th Session 2002, paragraphs 130 to 133, 137, and 139.

[24] Reference is made to Case C-212/04 *Konstantinos Adeneler and Others* v *Ellinikos Organismos Galaktos* [2006] ECR I-6057, paragraphs 61 and 64; Case C-268/06 *Impact* v *Minister for Agriculture and Food and Others* [2008] ECR I-2483, paragraph 85 and 86; Joined Cases C-378/07 to C-380/07 *Kiriaki Angelidaki and Others* v *Organismos Nomarchiakis Autodioikisis Rethymnis* and *Charikleia Giannoudi* v *Dimos Geropotamou* [2009] ECR I-3071, paragraphs 104 and 105, and Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I-9981, paragraph 64.

[25] Reference is made to the judgment of the Supreme Court in Rt. 1997 p. 334 (*Sola Havn*).

[26] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 58.

contribute to improving conditions of work and employment for dockworkers and fall therefore outside the application of Article 53 EEA would not be called into question by the fact that the priority of engagement for dockworkers, administered by the AO as designated by the collective agreement, restricts port users from carrying out loading and unloading themselves or acquiring such services from other entities.[27]

61. Moreover, the Norwegian Government claims that the exemption from Article 53 EEA should also apply in relation to Article 54 EEA. It concedes that there is case law which could imply that Article 54 EEA can apply to undertakings set up under a collective agreement even though the agreement itself is exempt from Article 53 EEA. The facts of these cases, however, call into question the general applicability of that case law. All but one of the cases decided thus far have concerned collective agreements rendered universally applicable through State intervention.[28] In *van der Woude*, a case which did not concern the conferral of special or exclusive rights within the meaning of Article 106 of the Treaty on the Functioning of the European Union ("TFEU"), claims were nevertheless entertained that Article 102 TFEU had been infringed.[29] But that judgment did not shed much light on the applicability of Article 102 TFEU.[30] Further, the ECJ noted that the issue of whether unfair pricing or trading conditions *de facto* occurred and whether that would constitute an abuse of a dominant position fell outside of the scope of those proceedings.[31] These observations are directly transposable to the present proceedings.

62. The Norwegian Government submits further that a boycott action aimed at compelling a company to become affiliated to a collective agreement, such as that at issue in the present proceedings, could only raise questions with regard to Article 54 EEA if the entity concerned, merely by exercising the rights conferred upon it by the collective agreement, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.[32] Such questions could perhaps arise if the entity concerned is manifestly incapable of satisfying the demand prevailing on the market for such activities.[33]

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[27] Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

[28] Reference is made to *Albany*, cited above; Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV* v *Stichting Bedrijftspensioenfonds voor de Handel in Bouwmaterialien* [1999] ECR I-6025; *Drijvende Bokken*, cited above, and *AG2R Prévoyance*, cited above.

[29] Reference is made to *van der Woude*, cited above.

[30] Ibid., paragraph 31.

[31] Ibid.

[32] Reference is made to *Albany*, cited above, paragraph 93; *van der Woude*, cited above, paragraph 30, and *AG2R Prévoyance*, cited above, paragraph 68.

[33] Reference is made to *Albany*, cited above, paragraph 95, and *AG2R Prévoyance*, cited above, paragraph 69.

63. The Norwegian Government argues further that the present case, as in *van der Woude*, does not invite an in-depth assessment of the potential applicability of Article 54 EEA. The request does not disclose any information indicating that the system laid down in the Framework Agreement has induced the AO to abuse any dominant position it might have or that services provided by it do not meet the needs of the port users. With regard to the former aspect, dock work offices are non-profit bodies jointly set up by the organisations representing management and labour. In relation to the second aspect, the request states that a key element of the collective agreement is to ensure priority of engagement for dockworkers, which would suggest that it only applies insofar as the dock work offices have capacity to fulfil the assignments in question.

Question B1

64. The Norwegian Government notes that an agreement or activity being excluded from the scope of EEA competition rules does not entail that it also falls outside the scope of the four freedoms.[34] The present case concerns a company established in 1996 which is wholly owned by a Danish parent company. Insofar as the Danish company is involved on a continuous basis in the economic life of Norway, the situation falls within the provisions on freedom of establishment, and not those concerning services.[35]

65. The Norwegian Government contends that it is for the national court to determine whether the use of a boycott constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

Question B3

66. The Norwegian Government notes that, despite the Commission's proposals, there is no secondary legislation that harmonises market access to port services.[36] In a rather recent proposal, the Commission has, this time, steered clear of cargo handling in the port, which is expressly excluded from the proposed regulation.[37]

67. In relation to the application of Article 31 EEA, the Norwegian Government argues that a mechanical application of the reasoning in *Commission* v *Spain* must

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[34] Reference is made to *Viking Line*, cited above, paragraphs 53, 54 and 60 to 66.

[35] Reference is made to *Sodemare*, cited above, paragraph 24 and the case law cited.

[36] Reference is made to the proposal for a directive on market access to port services of 13 February 2001 (COM(2001) 35 final), and to the proposal for a directive on market access to port services of 13 October 2004 (COM(2004) 654 final). Reference is also made to the Report of the European Parliament (A6-0410/2005), Compromise 13 at p. 17.

[37] Reference is made to the proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports of 23 May 2013 (COM(2013) 296 final), in particular Article 11.

be ruled out.[38] It maintains that the contested rules in *Commission* v *Spain* went beyond protection of workers insofar as they required a cargo handling undertaking to participate in, and contribute to the share of capital of, a public limited company for the management of port cargo handlers. The cargo handling undertakings were also required to take workers from the port cargo handlers into employment, which was exacerbated by requirements to employ a certain number of workers regardless of need. Furthermore, the contested rules formed part of a general statutory framework regulating national ports and a predominant objective of those rules was to ensure the consistency, continuity, and quality of port services, which in turn was deemed necessary to ensure security in the ports.[39] The nature and purpose of the contested rules indicated that the relevant provisions had not been drafted with worker protection in mind. By contrast, the present case concerns conditions of work and employment laid down by organisations representing management and labour and regarded as fulfilling Norway's commitments under the Convention. The nature and purpose of the contested rules are thus different.

68. The Norwegian Government claims that 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 and further that the protection of workers is an overriding reason of public interest.[40] It is for the national court to ascertain whether the objectives pursued by NTF concern the protection of workers.

69. The Norwegian Government argues that even if collective action taken by a trade union could reasonably be deemed to fall within the objective of protecting workers, such a view would no longer be tenable if it is established that the jobs or conditions of employment at issue are not jeopardised or under serious threat.[41] This would be the case, in particular, if it transpired that the application of another collective agreement referred to by the national court in Question B3 was, from a legal point of view, as binding as the terms of the collective agreement to which the collective action relates and if it was of such a nature as to provide a guarantee that the terms of that collective agreement would be maintained.[42]

70. The Norwegian Government contends that it appears that the collective agreement Holship entered into as a party does not concern conditions of work and

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[38] Reference is made to Case C-576/13 *Commission* v *Spain*, judgment of 11 December 2014, published electronically.

[39] Ibid., paragraph 55.

[40] Reference is made to *Viking Line*, cited above, paragraphs 77 to 79, and *Laval*, cited above, paragraphs 40, 42, 90 and 91.

[41] Reference is made to *Viking Line*, cited above, paragraph 81.

[42] Reference is made to *Viking Line*, cited above, paragraph 82; on the nature of collective agreements reference is made to Case C-45/09 *Gisela Rosenbladt* v *Oellerking Gebäudereinigungsges. mbH* [2010] ECR I-9391, paragraph 41 and the case law cited; and on the flexibility available to the parties to a collective agreement reference is made to Joined Cases C-297/10 and C-298/10 *Sabine Hennings* v *Eisenbahn-Bundesamt* and *Land Berlin* v *Alexander Mai* [2011] ECR I-7965, paragraph 66 and the case law cited.

employment for dockworkers, but concerns cleaning work. It follows that, on becoming a party to that agreement, Holship did not enter into legal commitments relating to conditions of work and employment for dockworkers. Holship, of its own accord, has chosen to employ the conditions of that collective agreement to employment relationships outside of its scope. It therefore appears that the application of another collective agreement referred to by the national court in Question B3, from a legal point of view, is not as binding as the terms of the collective agreement to which the trade union seeks to induce Holship to become a party.

71. As for the second part of the question, the Norwegian Government submits that the collective agreement to which Holship is party concerns, in particular, minimum rates of pay. The Framework Agreement, however, covers not only minimum rates of pay but also conditions concerning permanent employment for dockworkers, both of which are intrinsically linked to priority of engagement for employed dockworkers. Hence, even if the commitment undertaken by Holship were to be considered legally binding, its undertaking is in any event not of a nature as to provide a guarantee that the terms of the Framework Agreement would be maintained.

72. Further, the Norwegian Government notes that it remains to be ascertained within the context of the broad discretion enjoyed by the social partners in the field of social and employment policy and the importance attached to collective agreement in the regulation of work and employment conditions whether the means used to achieve the protection of dockworkers are suitable and necessary.

73. In relation to the appropriateness of the action taken by NTF for attaining the objective pursued, the Norwegian Government notes that, according to settled case law, collective action is one of the main ways in which trade unions protect the interests of their members.[43] The European Court of Human Rights has held that, alongside the right to negotiate and enter into collective agreements,[44] collective action is also protected by Article 11 of the European Convention on Human Rights.[45]

74. On the question whether the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, the Norwegian Government claims that it is for the national court to examine, first, whether, under the national rules and law on collective agreements applicable to that action, NTF had other means at its disposal less restrictive of the relevant

[43] Reference is made to *Viking Line*, cited above, paragraph 86.

[44] Reference is made to the judgment of the European Court of Human Rights of 12 November 2008 in Case *Demir and Baykara* v *Turkey* [GC], no. 34503/97, ECHR 2008-V.

[45] Reference is made to the judgments of the European Court of Human Rights of 21 April 2009 in *Enerju Yapi-Yol Sen* v *Turkey*, No. 68959/01, unreported, and 27 November 2014 in *Hrvatski lijecnicki sindikat* v *Croatia*, No.36701/09, unreported.

freedom to successfully conclude collective negotiation with Holship and, if so, whether it exhausted such means before giving notice of boycott action.[46]

75. With regard to the necessity of the boycott action aimed at inducing affiliation to a collective agreement in order to protect the conditions of work and employment of its members,[47] the Norwegian Government maintains that the national court must assess whether there are less restrictive measures which, in an equally effective manner, could achieve the acknowledged aim. This assessment must take into account, consistent with the commitment of the undertaking concerned,[48] whether any alternative measure is of a nature as to provide a guarantee that the terms of the collective agreement would be maintained.

Proposed answers

76. The Norwegian Government proposes that the Court should provide the following answers to the questions referred:

> *(1) Articles 3, 53, and 54 EEA do not preclude a decision by a national court recognising the lawfulness of a boycott action aimed at inducing accession to a collective agreement, such as that at issue in the main proceedings, if the collective agreement contributes to improving work and employment conditions.*
>
> *(2) It is for the national court to determine, on the basis of all the relevant factual circumstances and the legal considerations [set out in the Norwegian Government's written observations], whether it constitutes a restriction within the meaning of Article 31 EEA for a trade union in an EEA State, through boycott actions, to attempt to compel a subsidiary of an undertaking established in another EEA State to accede to a collective agreement and to apply the terms set out in that agreement.*
>
> *(3) A restriction within the meaning of Article 31 EEA may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. It is immaterial in this context whether the company concerned applies a different collective agreement outside of its material scope, unless it thereby has undertaken a commitment which is, from [a] legal point of view, as binding as the terms of the collective agreement to which the collective action relates and if it is of such a nature as to provide a guarantee that the terms of the latter collective agreement are maintained.*

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[46] Reference is made to *Viking Line*, cited above, paragraph 87.

[47] For the acknowledgment that such aim falls within the objective of protecting workers reference is made to *Viking Line*, cited above, paragraphs 80 to 84.

[48] Ibid., paragraphs 81 and 82.

ESA

Question A1

77. At the outset, ESA notes that the request does not explicitly address Article 59(1) EEA and contends that the Court should not address the provision either, as the request by the referring court has not identified any facts allowing the conclusion that the AOs have been granted any special or exclusive rights by the Norwegian Government.

78. In relation to Question A1 and the exclusion of collective agreements from Article 101 TFEU and Article 53 EEA, ESA refers to the findings in *Albany*[49] and *Landsorganisasjonen i Norge*[50] and the conditions set out therein.[51] Both conditions must be fulfilled for the agreement to fall outside the scope of Article 53 EEA.[52] ESA submits that the application of the first condition is not contentious in the present case and it will focus on the second condition.

79. ESA submits that neither the Court nor the ECJ have, to date, had the opportunity to consider a priority of engagement clause such as that at issue in the main proceedings but case law may offer some general guidance.[53]

80. Since there are certain limits on how broadly the notion "conditions of work" can be construed, it is not sufficient to consider merely whether the broad objective of a collective agreement seeks to improve the conditions of work and employment. Instead, ESA maintains that the provisions of an agreement must be assessed individually and, if they are directed towards other purposes, those provisions or those that do not, in practice, operate to improve such conditions, may fall within the scope of Article 53 EEA.[54] In that assessment, account must be taken of the form and content of the agreement and its various provisions, the circumstances under which they were negotiated, the parties to the agreement, and its actual effect.[55]

81. Applying this guidance to the present case, ESA claims that the priority of engagement clause, as sought to be enforced by means of the proposed boycott notified by NTF, does not fulfil the second condition for three reasons. First, the priority of engagement clause would effectively be extended to undertakings that

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[49] Reference is made to *Albany*, cited above, paragraph 60; *Brentjens'*, cited above; Case C-219/97 *Maatschappij Drijvende Bokken BV* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] I-6121; *Pavlov*, cited above, and *van der Woude*, cited above.

[50] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 44.

[51] Reference is made to *Landsorganisasjonen i Norge*, paragraphs 49 and 50, and *Albany*, cited above, paragraphs 59 and 60.

[52] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.

[53] Ibid., paragraph 53.

[54] Ibid., paragraphs 51, 55, 56 and 59.

[55] Ibid., paragraph 52.

do not have employees protected by the Framework Agreement. In turn, the priority of engagement clause would not merely address the labour relationship, but would, in contrast to previous cases,[56] also impose obligations on third parties, such as Holship. The earlier cases dealt with collective agreements that were binding only on employers of workers protected by those agreements. Their exemption from EEA competition law was justified because they ensured a balance between employers and their employees because that balance should be established unimpeded by such rules.[57] However, this justification does not apply where collective agreements apply to undertakings that do not employ workers protected by the agreements.[58]

82. Second, ESA claims that to extend the strand of case law that excludes collective agreements from Articles 53 and 54 EEA carries a risk that trade associations could circumvent those articles by concluding collective agreements containing provisions that restrict competition, without there being any social policy justification for that restriction.

83. Third, ESA contends that, although the priority of engagement clause is arguably of benefit to the employees of the AO, it is detrimental for other workers, such as those employed by Holship. In this regard, the exclusion of collective agreements from the scope of EEA competition law should not be extended to agreements that protect a limited group of workers to the detriment of other workers.[59]

Questions A2 and A3

84. ESA argues that the main question in relation to Article 54 EEA is whether the use of a boycott in a situation such as the present case constitutes an abuse of a dominant market position.

85. In its assessment for the purposes of Article 54 EEA, ESA submits first that the AO constitutes an undertaking.[60] A dock work undertaking enjoying the exclusive right to organise dock work for third parties, as well as a dock work company having the exclusive right to perform dock work must be regarded as an undertaking.[61] Under the system established by the Framework Agreement, the right of priority of engagement to carry out unloading and loading work in the ports is vested in a separate legal entity, the AO, to the benefit of the dockworkers it

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[56] Reference is made to *Albany*, cited above; *AG2R Prévoyance*, cited above, and *van der Woude*, cited above.

[57] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 34 and 35.

[58] Further reference is made to the test set out by Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, and to *Landsorganisasjonen i Norge*, cited above, paragraph 53.

[59] Reference is made to the judgment of the Supreme Court of Norway in *Sola Havn*, cited above.

[60] Reference is made to Article 1 of Protocol 22 EEA, and Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54.

[61] Reference is made to *Porto di Genova*, cited above, paragraph 9.

employs and thus not vested in individual workers. Furthermore, the employees of the AO carry out loading and unloading assignments against fees set by and payable to the AO upon orders placed with the AO. The fact that the AOs lacks a profit motive does not, according to case law, affect its status as an undertaking.[62]

86. As regards the assessment of the existence of a dominant position in a substantial part of the EEA territory, ESA provisionally assumes, in the absence of adequate information from the referring court, that the market is limited to the provision of stevedoring services in the Port of Drammen. However, this is ultimately for the referring court to determine. ESA argues, given the apparent lack of alternative sources of relevant stevedoring services in the port of Drammen and the existence of the priority of engagement clause, that the AO may enjoy a dominant position on the assumed relevant market. It observes, however, that the crucial question is whether that dominant position is held in a substantial part of the territory covered by the EEA Agreement. In that regard, ESA makes reference to case law according to which the notion of a "substantial part thereof" refers also to "the pattern and volume of the production and consumption of the said product as well as to the habits and economic opportunities of vendors and purchasers".[63] Moreover, even if a dominant company does not reach the threshold itself, there may be an EEA interest in a situation involving a network of undertakings which enjoy dominance in markets that together constitute a substantial part of the territory covered by the EEA Agreement.[64]

87. As regards the notion of abuse for the purposes of Article 54 EEA, ESA submits that the request leaves open the question whether the AO has initiated or taken part in boycotts. This is a matter of fact which must be appraised by the referring court. However, the Court may provide guidance on how a boycott ought to be assessed.

88. ESA submits that abuse is a legal notion that must be examined in light of economic considerations.[65] It maintains that clauses with similar effects to the priority engagement clause at issue here were already considered in *Hoffmann-La Roche*.[66] Consequently, if it constitutes an abuse to tie a customer by means of such a clause, it must also amount to an abuse for a dominant undertaking to initiate a boycott against a purchaser in order to obtain acceptance by the purchaser of such

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[62] Reference is made to *Albany*, cited above, paragraph 85.

[63] Reference is made to Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Coöperatieve Vereniging "Suiker Uni" UA and Others* v *Commission* [1975] ECR 1663, paragraph 371, and *Porto di Genova*, cited above, paragraph 15.

[64] Reference is made to Case C-323/93 Société Civile Agricole du *Centre d'insémination de la Crespelle* v *Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, paragraph 17.

[65] Reference is made to Case E-4/05 *HOB-vín* v *The Icelandic State and Áfengis- og tóbaksverslum rikisins (the State Alcohol and Tobacco Company of Iceland)* [2006] EFTA Ct. Rep. 4, paragraph 51, and Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126.

[66] Reference is made to Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 215, paragraph 89.

a clause. This must apply in particular where a substantial part of the market is already tied to the dominant firm and where acceptance of the clause by another undertaking would reinforce the foreclosure of the market.

89. ESA stresses further that the referring court must also examine whether the behaviour of the AO can be objectively justified and submits that, in the present case, it is unlikely that the anti-competitive behaviour at issue could be justified on the basis that the behaviour protects the workers of the AO. In this regard, ESA relies on its observations relating to collective agreements seeking to protect workers employed by other undertakings. Further, the anti-competitive behaviour by the AO could not be justified on the basis that the Framework Agreement is regarded as fulfilling Norway's obligations under the Convention.[67] Nor could the AO invoke Article 59(2) EEA in its defence, as the stevedoring services it provides do not constitute services of a general economic interest within the meaning of that provision.[68]

90. As regards the assessment of whether there is an effect on trade between the EEA States,[69] ESA contends that the referring court should take account of identical or corresponding systems in other ports.[70] The system at the Port of Drammen forms an integral part of the larger system established by the Framework Agreement. The effect of this system as a whole may therefore be taken into account by the national court in its assessment of whether there is an appreciable effect on competition. The request also refers to another system of priority of engagement established in fourteen other ports in Norway by another collective agreement concluded by the same parties. This agreement also forms part of the economic context in which the Framework Agreement exists, and should be taken into account, provided that it contributes to the restrictive effects on competition.

91. ESA submits further that the threshold for meeting the test on effect on trade is not particularly high.[71] Further, the criterion referred to in *Coöperatieve*

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[67] Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, published in the 86th Session of the International Labour Conference (1998).

[68] Reference is made to *Albany*, cited above, paragraph 27.

[69] Reference is made, for example, to Case C-440/11 P *Commission* v *Stichting Administratiekantoor Portielje*, judgment of 11 July 2013, published electronically, paragraph 99; Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others* v *Banco Popolare di Novara soc. coop. arl (BPN) and Others* [1999] ECR I-135, paragraph 47, and Case E-7/01 *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others* v *Hydro Texaco AS* [2002] EFTA Ct. Rep. 310, paragraph 40.

[70] Reference is made to *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others*, cited above, paragraph 40, and Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, paragraph 14. Further reference is made to the Opinion of Advocate General Bot in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG and Others* v *Commission* [2009] ECR I-8681, points 143 to 148 and the case law cited.

[71] Reference is made to Case C-242/95 *GT-Link A/S* v *De Danske Statsbaner* [1997] ECR I-4449, paragraph 45, and *Silvano Raso*, cited above, paragraph 26.

Vereniging "Suiker Unie" v *Commission*[72] in another context may be of use in the assessment at hand. In the present case, there is a sufficient degree of probability to conclude that the clause may affect trade between EEA States, not least because of the fact that the thirteen largest ports in Norway are covered by the priority of engagement clause and that it applies to all ships of fifty tonnes dwt and more sailing between one of those ports and a port in another EEA State.

92. Accordingly, ESA argues that, although it is not mandatory to do so, identical and corresponding systems in other ports may be taken into account in the assessment of whether there is an appreciable effect on trade between the EEA States.

93. As regards the application of Article 53 EEA in the case at issue, ESA notes that for the Framework Agreement to be covered it has to be determined whether any other parties to that agreement constitute an undertaking within the meaning of the provision. The referring court could examine whether members of the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*) ("NHO") and the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*) ("NHO Logistics and Freight") are parties to that agreement. Alternatively, the referring court could examine whether the decision by NHO and NHO Logistics and Freight to conclude that the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings.[73]

94. If the Framework Agreement is considered to fall within Article 53 EEA on the basis of one of the alternatives above, it is then for the national court to appraise whether the agreement has as its object or effect the prevention, restriction, or distortion of competition. In the present case, ESA contends that a breach of Article 53 EEA seems unlikely, given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone have initiated the boycott.

95. ESA contends, moreover, that any restriction of competition under Article 53(1) EEA may be weighed against its claimed pro-competitive effects in the context of Article 53(3) EEA.[74] In that regard, those who seek to rely upon that provision must demonstrate that the conditions for obtaining an exemption are satisfied.[75]

Question B1

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[72] Reference is made to *Suiker Unie*, cited above, paragraph 371.

[73] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 68 to 70.

[74] Reference is made to Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136.

[75] Reference is made to Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services* v *Commission* [2009] ECR I-9291, paragraph 82.

96. ESA submits that in order to assess whether the boycott at issue in the present proceedings amounts to a restriction on the freedom of establishment, it is necessary to consider first whether the collective action, in this case the boycott, constitutes a measure within the scope of Article 31 EEA. It asserts that under *Viking Line* the right to take collective action is restricted and cannot be relied upon when it is contrary to national or EEA law, in this case, therefore, when it is contrary to Article 31 EEA.

97. It follows, in ESA's view, that Article 31 EEA should be interpreted as meaning that it confers rights on private undertakings, which may be relied on against a trade union in circumstances such as those in the main proceedings. Should the Court consider the *Viking Line* case law not to apply in the present case and the national court holds the notified boycott to be lawful under national law, the boycott itself may constitute a "national measure" within the scope of Article 31 EEA.[76]

98. However, if the boycott in question is regarded as private action and not a national measure, ESA maintains that Article 31 EEA may still be applicable, as the fundamental freedoms may also apply in circumstances where the State abstains from adopting the measures required in order to deal with obstacles to the fundamental freedom which are not caused by the State.[77] It follows from case law[78] that actions by private individuals, economic operators, and organisations in the territory of the EEA States, which are liable to obstruct undertakings from exercising the freedom of establishment, are just as likely to hinder or render less attractive the exercise of the fundamental freedoms as a positive act by the State. Therefore, if the referring court finds the boycott lawful under national law, in ESA's view, this implies that Norway has not taken the measures necessary to ensure that the freedom of establishment is fully respected.

99. As regards the existence of a restriction on the freedom of establishment,[79] ESA submits that the present case concerns a Danish company, which exercised its right of establishment by setting up a Norwegian forwarding agent (Holship). It must therefore be assessed whether the boycott in question is liable to pose an obstacle to operators from other EEA States to exercise their freedom of establishment.

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[76] Reference is made to Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others* v *QC Leisure and Others* and *Karen Murphy* v *Media Protection Services Ltd* [2011] ECR I-9083, paragraph 88.

[77] Reference is made to Case 269/83 *Commission* v *France* [1985] ECR 837, paragraphs 30 to 32.

[78] Reference, in relation to the free movement of goods, is made to Case C-573/12 *Ålands vindkraft AB* v *Energimyndigheten*, judgment of 1 July 2014, published electronically, paragraph 74.

[79] Reference is made to Case E-2/06 *ESA* v *Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 64 and Case E-9/11 *ESA* v *Kingdom of Norway* [2012] EFTA Ct. Rep. 442, paragraph 82; in addition, reference is made to Case C-327/12 *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e furniture* v *SOA Nazionale Costruttori*, judgment of 12 December 2013, published electronically, paragraph 45 and the case law cited.

100. ESA submits that the recent case of *Commission* v *Spain*[80] addressed the issue whether a priority of engagement clause for dockworkers, similar to the obligation in the Framework Agreement in the present case, amounted to a restriction on the freedom of establishment.[81] It was held that although the obligations imposed by the port regime applied equally both to national operators and to those from other Member States, they could still hinder the latter category of operators in establishing themselves in Spanish ports to pursue the activity of cargo handling.[82]

101. ESA argues further that restrictions on the freedom of establishment exist where measures can make it more difficult for undertakings from other EEA States to carry out their economic activity and to compete more effectively with undertakings established on a stable basis in the EEA State concerned.[83] In the present case, the priority of engagement clause contained in the Framework Agreement is liable to have economic consequences for economic operators such as Holship. If the boycott successfully induces Holship to enter the Framework Agreement and to buy unloading and loading services at the applicable rates set by the AO, this would entail a double cost for Holship, as it already employs workers for this purpose. The use of a boycott to impose the Framework Agreement on Holship under the circumstances may also result in changes to the company's existing employment structures and recruitment policies. If Holship is forced to join the Framework Agreement then this may render the exercise of the freedom of establishment less attractive. The boycott thus constitutes a restriction contrary to Article 31 EEA. As regards a possible justification of the restriction, ESA submits that NTF has not argued that any of the grounds listed in Article 33 EEA or any overriding reason in the public interest applies in the present case. NTF argues, however, that there are overriding public interest grounds for the claim that Holship should accept the Framework Agreement, namely to guarantee the pay and working conditions of permanently employed dockworkers. NTF argues further that this is in accordance with Article 3(2) of the Convention.

102. With regard to the Convention, ESA contends that EEA States must, when implementing international agreements, such as the Convention, ensure that they comply with the obligations arising from EEA law. Moreover, Article 3(2) of the Convention does not require the introduction of a *de facto* monopoly or prevent the introduction of competition on the market for stevedoring services. The Court has already held that international law cannot be relied upon as a justification for

[80] Reference is made to *Commission* v *Spain*, cited above.

[81] Ibid., paragraph 38.

[82] Ibid., cited above, paragraph 37.

[83] Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 57 and the case law cited, and *Laval*, cited above, paragraph 99.

derogations from obligations under EEA law where international law is permissive rather than mandatory.[84]

103. As regards the aim of protecting dockworkers, ESA submits that the Court has already recognised that the social protection of workers may constitute an overriding reason in the public interest.[85] While it is, in principle, for the national courts to ascertain whether the objectives pursued by NTF via collective action concern the protection of workers,[86] the Court may provide guidance on the interpretation of this notion of EEA law in the circumstances. Moreover, according to ESA, it follows from *Laval*[87] that the right to take collective action can be a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms.[88] However, it was also found in *Laval* that, as regard the specific obligations linked to the signature of the collective agreement for the building sector which the trade unions sought to impose on undertakings established in other Member States by way of collective action such as that at issue in the case, the obstacle which that collective action forms cannot be justified with regard to such an objective.[89]

104. ESA contends that NTF intends to use the boycott to impose the Framework Agreement on Holship. Holship has four employees for loading and unloading. However, the request does not explain why dockworkers at the AO require greater protection than Holship's dockworkers. Furthermore, the employees of Holship are covered by a different collective agreement, which protects the working conditions of those workers. The boycott does not, therefore, aim at securing the working conditions for workers who are not covered by a collective agreement and whose rights are not protected.

105. In light of the above, ESA contends that the restriction imposed on the freedom of establishment by the boycott in the present case cannot be justified by Article 33 EEA or any overriding reason in the public interest.

106. ESA is also doubtful that the collective action in this case actually pursues a legitimate aim as it appears to aim at protecting the working conditions and pay of one group of workers with an advantage over another group of workers.

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[84] Reference is made to Case E-1/02 *ESA* v *Kingdom of Norway* [2003] EFTA Ct. Rep. 1, paragraph 58.

[85] Reference is made to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-2/11 *STX Norway Offshore AS m.fl.* v *Staten v Tariffnemnda* [2012] EFTA Ct. Rep. 4, paragraph 81 and the case law cited.

[86] Reference is made to Case E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, paragraph 78; Case E-3/*06 Ladbrokes Ltd* v *The Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Ct. Rep. 86, paragraph 43, and *Viking Line*, cited above, paragraph 80.

[87] Reference is made to *Laval*, cited above.

[88] Reference is made to Case C-112/00 *Schmidberger Internationale Transporte und Planzüge* v *Republic of Austria* [2003] ECR I-5659, paragraph 74; *Viking Line*, cited above, paragraph 77 and the case law cited, and *Commission* v *Spain*, cited above, paragraph 50.

[89] Reference is made to *Laval*, cited above, paragraph 107.

Moreover, the boycott may intend to protect one group of workers to the detriment of other workers, since if Holship enters into the Framework Agreement it may render their own loading and unloading workers unnecessary.

107. ESA adds that if the Court considers the boycott in question to pursue a legitimate aim, the measure still needs to be proportionate.[90] It is established that collective action may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members.[91] In accordance with *Viking Line*,[92] it is for the national court to examine whether or not NTF had other means at its disposal which were less restrictive of the freedom of establishment in order to induce Holship to enter the Framework Agreement, and whether NTF had exhausted those means prior to initiating such action.

108. ESA argues that the boycott is not proportionate, as the aim of protecting dockworkers could be achieved by means that are less restrictive on the freedom of establishment. The dockworkers in the Port of Drammen could be organised in a pool of dockworkers operating as an agency for temporary work, from which the companies in the port are free to hire workers permanently or temporarily to cover their needs for unloading and loading services.[93] Furthermore, according to the request, most companies operating in the port are dependent on the services of the AO.

Question B2

109. ESA submits that whether the measure has any, or only very little, actual effect on the freedom of establishment does not change the fact that the measure constitutes a restriction which should be prohibited unless it is justified under Article 33 EEA (or any other overriding reason of public interest) and respects the principle of proportionality. There is no *de minimis* rule applying to the freedom of establishment.[94] As such, even if the collective action in question has no or little restrictive effect on the freedom of establishment, it is still an obstacle to the fundamental freedom unless justified on the grounds explained above. It follows that it has no significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proves to be very limited and/or sporadic.

Question B3

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[90] Reference is made, for example, to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-9/11 *ESA* v *Kingdom of Norway*, cited above, paragraph 83.

[91] Reference is made to *Viking Line*, cited above, paragraph 86.

[92] Ibid., paragraph 87.

[93] Reference is made to *Commission* v *Spain*, cited above, paragraph 27.

[94] Reference is made to Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949, paragraph 50 and the case law cited.

110. ESA contends that the fact that Holship's workers are already covered by another collective agreement is relevant for the assessment of the lawfulness of the restriction on the freedom of establishment. NTF cannot justify the boycott with reference to the protection of workers' conditions and pay as long as the priority of engagement clause applies regardless of whether the company is party to another collective agreement which may provide equal or even higher protection for its employees.[95] The boycott does not pursue a legitimate aim when that aim appears to provide one group of workers with an advantage over another. Hence, it is of significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement even if that collective agreement concerns matters other than unloading and loading work.

Proposed answers

111. ESA proposes that the Court should provide the following answers to the referred questions:

> *(A1) The use of a boycott against a port user in order to produce acceptance of a collective agreement, which entails that the port user must give preference to buying unloading and loading services from a separate AO in the port, rather than use its own employees for the same work, is not covered by the exclusion from the competition rules of the EEA Agreement of agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment.*
>
> *(A2) The system of a collective agreement and a boycott as that described in point 1 may be assessed under Articles 53 and 54 EEA.*
>
> *(A3) In the assessment under Articles 53 and 54 EEA of whether there is a noticeable effect on trade between Contracting Parties, account may be taken of the existence of identical or corresponding systems in other ports.*
>
> *(B1) It constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott against a company in order to produce acceptance of a collective agreement, which contains a priority of engagement requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.*
>
> *(B2) It is not 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) It is 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 between social partners in the State where the*

[95] Reference is made to *Viking Line*, cited above, paragraph 89.

port is located, when that collective agreement concerns matters other than unloading and loading work.

The Commission

Questions A1 – A3

112. The Commission submits that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside of Article 101(1) TFEU.[96]

113. The Commission argues that, in relation to Question A1, account should be taken of all the circumstances of the case, *inter alia*, of the fact that Holship's employees do not benefit from the collective agreement in question, but are covered by another collective agreement which has been applied to loading and unloading workers.

114. The Commission submits further that the ECJ has not exhaustively defined the conditions under which collective negotiations between management and labour must, by virtue of their nature and purpose, be regarded as falling outside the scope of EU competition rules. The notion of improving conditions of work and employment remains vague. This notion must be interpreted in light of the fact that, as the Court has held, the result arrived at by the ECJ in its case law is based on the balancing of concerns relating to the effective functioning of the internal market with the pursuit of social policy objectives such as the importance of promoting a harmonious and balanced development of economic activities, and a high level of employment and social protection.[97] Further, the ECJ's case law is not monolithic.[98] Even in the *Albany* line of case law, the ECJ, when formulating the exemption at issue, used the term "generally". This indicates that, under certain circumstances, clauses in collective agreements are not exempted from EU competition rules.

115. The Commission argues that it follows that collective agreements between management and labour must not always be sheltered from competition rules.[99] The Court has also stated that it is not sufficient that the parties to the agreement are a labour union and an employer or an association of employers, or that a collective bargaining agreement can generally be characterised as having the

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[96] Reference is made to *AG2R Prévoyance*, cited above, paragraph 29; *Albany*, cited above, paragraphs 59 and 60; *Brentjens'*, cited above; *Drijvende Bokken*, cited above; *Pavlov*, cited above, and *van der Woude*, cited above.

[97] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 37, and to Article 151 TFEU.

[98] Reference is made to *Porto di Genova*, cited above; Case C-18/93 *Corsica Ferries* v *Corpo dei piloti del porto di Genova* [1994] ECR I-1783, and *Silvano Raso*, cited above.

[99] Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 186.

nature and purposes of a typical collective agreement, to conclude that a collective agreement falls outside the scope of application of competition rules.[100] Moreover, the Commission draws attention to one criterion suggested by Advocate General Jacobs for the delimitation of the collective bargaining immunity from competition rules.[101]

116. The Commission submits that a collective agreement between management and labour to the disadvantage of third parties not participating in the negotiation should only exceptionally be exempted from the scope of EEA competition rules. Otherwise, such collective agreements could be concluded to circumvent the application of Articles 53 and 54 EEA and, respectively, of Articles 101 and 102 TFEU and, ultimately, be used as a vehicle to distort unfettered undertakings to the disadvantage, in particular, of customers or competitors of the undertaking(s) negotiating such agreement with it employees. The Commission acknowledges that in individual cases collective agreements have been found to fall outside the scope of application of competition rules although their rules were applied on a mandatory basis to undertakings not parties to the collective agreement.[102] However, such rulings can only be understood in light of the fact that the collective agreements in question also aimed at improving the working conditions of employees whose employers were not party to the collective agreements. In the present case, and by way of contrast, the Framework Agreement negotiated between NTF, on behalf of employees, and the employers' confederation NHO ensures stable employment and decent pay to the benefit of Drammen dockworkers employed by the Administration Office but workers employed by other companies might lose their jobs or see their working conditions otherwise deteriorate. Indeed, their employers might not be able to afford incurring the double costs resulting from the employment of workers that are not allowed to load or unload goods in Norwegian ports. This is a crucial difference between the present case and the line of case law where the collective agreements contributed to improving the working conditions of all employees in the sectors concerned.[103] Moreover, the Commission argues that the social objective of the Treaty or the EEA Agreement cannot be invoked to shelter from competition rules collective agreements that aim at improving the working conditions of certain workers to the disadvantage of others where both work in the same sector and generally merit the same social protection.

117. If it is determined that the Framework Agreement is not generally exempted from the application of competition rules, the Commission observes in relation to

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[100] Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.

[101] Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 193.

[102] Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above, in which, in the Commission's assessment, the ECJ accepted that affiliation to an insurance scheme/schemes for supplementary reimbursement of healthcare costs could be made compulsory for third parties who were not parties to the collective agreement.

[103] Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above.

Question A2 that Articles 53 and 54 EEA apply only to undertakings.[104] Since dockworkers are, for the duration of the relationship for which they perform dock work, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockworkers do not themselves constitute an undertaking within the meaning of EU competition law.[105] Furthermore, a person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association.[106] Accordingly, NTF is not an undertaking within the meaning of EEA competition rules. By contrast, the AO is more than a mere association of workers, given that it has legal personality and employs the dockworkers registered in Drammen and does not simply act on their behalf in negotiation with employers. With regard to dock work companies that employ stevedores and offer services to users of a port, the ECJ has found that a dock work undertaking enjoying the exclusive right to organise dock work for third parties as well as a dock work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State.[107]

118. The Commission submits that the above case law applies to the present case and that the non-profit character of the AO is irrelevant, given that non-profit entities can offer goods or services on a market and hence can be an undertaking within the meaning of the competition rules.[108] The AO conducts economic activities in offering stevedore services against a fee, thereby competing with other actual or potential market players who might wish to offer similar services. Accordingly, the Commission claims that, when rendering loading or unloading services against a fee, the AO is an undertaking within the meaning of Articles 53 and 54 EEA.

119. In relation to Question A3 and the "effect on trade",[109] the Commission claims, in the present case, given that the Framework Agreement establishes a priority of engagement rule and fixes wages to the benefit of dockworkers employed by AOs in all major ports in Norway, there seems to be a sufficient degree of probability that the practices applied in the context of that agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade

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[104] Reference is made to *Pavlov*, cited above, paragraph 74.

[105] Reference is made to *Becu*, cited above, paragraph 26.

[106] Reference is made to *Becu*, cited above, paragraph 28, and *Porto di Genova*, cited above, paragraph 13.

[107] Reference is made to *Porto di Genova*, cited above, paragraph 9.

[108] Reference is made to Joined Cases 209/78 to 215/78 *Heintz van Landewyck SARL and Others* v *Commission* [1980] ECR 3125, paragraph 88, *Höfner and Elser*, cited above, paragraphs 21 to 23, and Case C-475/99 *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz* [2001] ECR I-8089, paragraph 67.

[109] Reference is made to Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia* y *Crédito, SL* v *Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, paragraph 34 and the case law cited; Case C-439/11 P *Ziegler SA* v *Commission*, judgment of 11 July 2013, published electronically, paragraph 92 et seq; *Erste Group Bank and Others*, cited above, paragraph 36, and Case C-219/95 Ferriere Nord SpA v Commission [1997] ECR I-4411, paragraph 19.

between EEA States. The fact that trade in goods from other EEA States is involved in the present case is also relevant in the assessment of this issue. Moreover, the parent company of Holship is established in a different EEA State (Denmark). Finally, the Port of Drammen is one of the largest in Norway.[110] In other cases regarding ports their importance for inter-state trade has been emphasised.[111]

120. The Commission adds that even if the Port of Drammen were considered to be too small to be of importance for trade between EEA States, the cumulative effect of the priority of engagement rules applying in all major ports in Norway in accordance with the Framework Agreement would still lead to the conclusion that the practices in question may affect trade between EEA States. Indeed, in order to assess whether several practices impede access to a market, it is also necessary to examine the nature and extent of those practices in their totality, comprising all similar contracts.[112] It is clear from the case law, the Commission adds, that the effect on trade between EEA States of agreements between which a direct link exists and which form an integral part of a whole must be examined together.[113]

121. The Commission contends that the Court may give answers to issues relevant for the solution of the case pending before the national court,[114] such as whether certain practices infringe Articles 53 and 54 EEA.

122. With respect to Article 53 EEA, the Commission claims that the collective agreement appears to be an agreement between undertakings which has as its object the distortion of competition by fixing prices, sharing markets, and limiting or controlling markets. In order to establish a breach of Article 53 EEA resulting from horizontal agreements between AOs in different Norwegian ports it would need to be examined whether the latter are actual, or at least potential, competitors. Other AOs could not be said to be competitors as it would generate disproportionate additional costs for an AO established in one port to render, through its registered dockworkers, loading or unloading services in another port. The relevant geographic market concerned by the priority of engagement rules is thus local (the individual Norwegian ports covered by the Framework Agreement).[115]

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[110] Reference is made to ESA's letter of 3 March 2014 rejecting the complaint in Case No 73856, p. 4.

[111] Reference is made to *Porto di Genova*, cited above, paragraph 41, and *Silvano Raso*, cited above, paragraph 26.

[112] Reference is made to *Stergios Delimitis*, cited above, paragraph 19.

[113] Reference is made to Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 168, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraphs 126, 142 and 143.

[114] Reference is made to Case C-280/91 *Finanzamt Kassel-Goethestrasse* v *Viessmann KG* [1993] ECR I-971.

[115] Reference is made to *Silvano Raso*, cited above, paragraph 26.

123. As regards Article 54 EEA, the Commission submits that the product/services market consists of the provision of stevedoring services in ports. It leaves open the question whether the Port of Drammen in itself constitutes a substantial part of the territory covered by the EEA.[116] Rather, the priority of engagement rules applying in all major ports of Norway, which are linked through the Framework Agreement, have to be considered as covering cumulatively a substantial part of the common market.

124. The Commission argues that, by its conduct, the AO is trying to force a customer to take its services although it does not want and does not need them, and that this behaviour is abusive.[117] Moreover, given that the majority on the AO's Board are representatives of the employers (the ship operators already based in the Port of Drammen), the AO finds itself in a situation of conflicting interests. These ship operators are the direct competitors of Holship. In the Commission's view, this may be taken into account when establishing an abuse of a dominant position.[118]

125. The Commission submits that the question that ought to be asked is whether the behaviour of the AO can be objectively justified.[119] The social objective of the Treaty cannot be invoked in favour of rules that aim to improve the working conditions of certain workers to the disadvantage of others. Even if the national court takes a different view, according to the Commission, the boycott carried out by the AO and the priority engagement rule in the Framework Agreement that the boycott seeks to enforce still go beyond what is necessary to protect the rights of employees.

Questions B1 – B3

126. The Commission argues, with reference to case law, in particular to *Viking Line*,[120] that the boycott, i.e. the collective action in question, falls, in principle, within the scope of Article 31 EEA. If the reasoning of the ECJ in *Viking Line* is considered not to apply in the present case on the grounds that the collective action

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[116] Reference is made to *Porto di Genova*, cited above, paragraph 15, and *Silvano Raso*, cited above, paragraph 26.

[117] Reference is made to *Porto di Genova*, paragraphs 19 and 20, and to *Höfner and Elser*, cited above.

[118] Reference is made to *Silvano Raso*, cited above, paragraph 28, and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio* [2008] ECR I-4863, paragraphs 51 to 52.

[119] Reference is made to Case C-209/10 *Post Danmark A/S* v *Konkurrencerådet*, published electronically, paragraphs 40-41 and the case law cited.

[120] Reference is made to *Viking Line*, cited above, paragraphs 33, 35, 60 to 62, and 65, and to *Laval*, cited above; Case 36/74 *B.N.O. Walrave and L.J.N. Koch* v *Association Union Cycliste Internationale and Others* [1974] ECR 1405, paragraph 17; Case 13/76 *Gaetano Donà* v *Mario Mantero* [1976] ECR 1333, paragraph 17; Case C-117/91 *Jean-Marc Bosman* v *Commission* [1991] ECR I-4837, paragraph 82; Case C-265/95 *Commission* v *France* [1997] ECR I-6959; Joined Cases C-51/96 and C-191/97 *Christelle Deliège* v *Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, paragraph 31; Case C-309/99 *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, paragraph 120; and *Schmidberger*, cited above.

is a purely private action, an alternative line of reasoning could still lead to the conclusion that the Framework Agreement restricts the fundamental freedoms. In this regard, the Commission observes that the NTF sought to obtain from the national court a declaration of the lawfulness of the notified boycott, in accordance with the Boycott Act. It contends that if a national court declares the boycott lawful, this *de facto* clears the way for enforcement of the Framework Agreement by boycotting companies such as Holship.[121] A declaration of that kind would go beyond the mere omission by the State to intervene against individuals who restrict fundamental freedoms. Accordingly, a decision by a national court authorising the enforcement of the Framework Agreement by boycott could be regarded as tantamount to a State measure falling within the scope of Article 31 EEA.

127. The Commission contends further that the boycott restricts the freedom of establishment.[122] The priority of engagement rule that the AO intends to enforce through a boycott generates substantial extra costs for companies from other EEA States,[123] all the more so given that they have no influence whatsoever over the wages to be paid to the dockworkers in question. The fact that the economic activity underlying establishment is made more difficult suffices to qualify the measure at issue as a restriction.[124] Moreover, companies that use Norwegian ports only occasionally are arguably more likely to have their own employees at their disposal to carry out loading and unloading work than companies that exclusively operate in Norwegian ports, which are likely to have adapted to the omnipresent priority of engagement rules. It appears that the double costs imposed on undertakings such as Holship (which are able to carry out the loading and unloading of goods using their own personnel) are significant.

128. In relation specifically to Question B2, the Commission notes that there is no *de minimis* rule under which minor restrictions on the fundamental freedoms can escape the prohibition. According to the ECJ, a national measure cannot evade the prohibition merely because the hindrance to the fundamental freedom is slight or because it is possible for the operators concerned to exercise these freedoms in other ways.[125]

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[121] Reference is made to Case C-265/95 *Commission* v *France*, cited above, and *Schmidberger*, cited above.

[122] Reference is made to Case C-442/02 *Caixa Bank France* v *Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961, paragraph 12; Case C-89/09 *Commission* v *France* [2010] ECR I-12941, paragraph 44; *SOA Nazionale Costruttori*, cited above, paragraph 45; Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraphs 63 and 64; Case C-577/11 *DKV Belgium* v *Association belge des consommateurs Test-Achats ASBL*, judgment of 7 March 2013, published electronically, paragraphs 31 to 33; and *Laval*, cited above.

[123] Reference is made to *Commission* v *Spain*, cited above, paragraph 37.

[124] Reference is made to *Caixa Bank France*, cited above, paragraphs 13 to 16, and *Viking Line*, cited above, paragraph 70 et seq.

[125] Reference is made to Case C-49/89 *Corsica Ferries France* v *Direction générale des douanes françaises* [1989] ECR 4441, paragraph 8; Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov and ACO Industries Tábor* v *Odvolací finanční ředitelství*, judgment of 19 June 2014, published electronically, paragraph 42; Case 269/83 *Commission* v *France*, cited above, paragraph 10, and Joined Cases 177/82 and 178/82 *Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797. In addition, reference is made to Joined Cases

129. The Commission submits that the need to ensure a public service, invoked in other cases,[126] cannot be invoked in the present case as an overriding reason in the public interest[127], as it can be inferred from the request that the stevedores of the Port of Drammen are not obliged to offer their services at all times when required. In fact, the AO can reject a request for stevedoring services and seemingly without further explanation.

130. The Commission submits further that the Convention cannot be invoked to justify the use of a priority of engagement rule.[128] Article 3(2) of the Convention, is not intended to establish or facilitate a monopoly arrangement for performing the loading and unloading work for one company alone.[129] The Convention leaves open the question of how Member States ensure that dockworkers benefit from regular employment and decent income. Nowhere does the Convention authorise boycotts to enforce priority of engagement rules or otherwise call upon signatory states to enact or authorise restrictions on the freedom of establishment. Local dockworkers can be guaranteed a stable income throughout the year, whilst still allowing companies to have recourse to their own employees for loading or unloading in ports. Furthermore, there are examples of other EEA States that have signed the Convention which show that the Convention can be implemented without a priority of engagement rule.[130] In any event, an EEA State cannot invoke an international agreement to justify a violation of a fundamental freedom.[131]

131. The Commission argues that whilst the protection of workers can generally be invoked as a legitimate interest in order to justify restrictions on the freedom of establishment,[132] this legitimate interest cannot be invoked in favour of the Framework Agreement in the present case. The protection of workers generally cannot be invoked where one group of workers is protected to the detriment of others. Exceptions to this rule may be acceptable where some workers merit special protection or some employees are granted a certain level of social protection by

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C-49/98, C-50/98, C-52/98 to C-54/98, and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Ld[a] and Others* v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831, paragraphs 36 and 37, and to Case C-315/13 *Edgard Jan De Clercq and Others*, judgment of 3 December 2014, published electronically, paragraph 61.

[126] Reference is made to *Commission* v *Spain*, cited above, paragraph 51.

[127] Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 59, and *DKV Belgium*, cited above, paragraph 39.

[128] Reference is made to *Commission* v *Spain*, cited above, paragraph 41.

[129] Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, cited above, paragraph 2.

[130] For a detailed description of the situation in different EEA Member States that have signed the Convention, reference is made to the study commissioned by the Commission and authored by Eric Van Hooydonk, *Port Labour in the EU* (Volume II).

[131] Reference is made to Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraphs 130 to 144.

[132] Reference is made to *Viking Line*, cited above, paragraph 77. In addition, reference is made to Joined Cases C-369/96 and C-376/96 *Jean Claude Arblade and Others* [1999] ECR I-8453, paragraph 36, Case C-165/98 André *Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, paragraph 27, and *Finalarte and Others*, cited above, paragraph 33.

their employer and other employers should be incentivised to achieve upward convergence. Neither of these exceptions applies in the present case for two principal reasons.

132. First, the Commission argues that the request does not explain why the dockworkers registered with the AO merit special protection compared to other employees that might depend on the same jobs for their livelihoods. It questions whether precarious work conditions for dockworkers subsist under current Norwegian social security and social protection rules. It notes that the priority of engagement rule applies whether or not other employees whose working conditions might deteriorate because of the application of the Framework Agreement have social protection or employment conditions as good as that applying to the stevedores employed by the AO. Furthermore, in determining whether the dockworkers registered with the AO in Drammen merit special protection, account must be taken of the job opportunities that dockworkers can find in other ports of the EEA. The Commission observes that it has successfully challenged comparable priority of engagement rules that foreclosed the labour market for dockworkers in certain Member States such as Spain.[133] Ensuring the mobility of dockworkers with the EEA could provide a better solution for the fluctuating demand for stevedoring in ports of EEA States than "recruit-local" requirements. This solution would also be in conformity with the policy objective pursued by the Commission in this area.[134]

133. Second, the Commission continues, it cannot be argued that the priority of engagement rule is intended to target employers that do not respect the social standards applicable to the dockworkers registered with the AO, thereby forcing these employers to abstain from social dumping or strive for upward coverage. This rule applies irrespective of the existence of a collective agreement providing equal or even higher social protection to stevedores not covered by the Framework Agreement. The reasoning of the ECJ in *Viking Line* can be applied, by analogy, in this respect.[135]

134. In relation to Question B3, the Commission suggests that it should be answered in the light of the *Viking Line* case law. The fact that the priority of engagement rule applies to the benefit of the dockworkers registered with the AO and irrespective of whether another collective agreement already ensures adequate social protection to the benefit of Holship's employees shows that the Framework Agreement does not serve the legitimate purpose of incentivising Holship to improve the working conditions of its employees. Instead, the Framework Agreement merely aims at improving the situation of one group of workers to the detriment of other workers. Thus, the protection of workers cannot be invoked in favour of the Framework Agreement.

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[133] Reference is made to *Commission* v *Spain*, cited above, paragraph 28.

[134] Ibid.

[135] Reference is made to *Viking Line*, cited above, paragraph 89.

Proposed answers

135. The Commission proposes that the Court should provide the following answers to the questions referred:

(A1) The exemption from the competition rules of the EEA agreement that applies to collective agreements does not cover the use of a boycott against a port user in order to produce acceptance of a priority rule laid down in a collective agreement, when acceptance entails that the port user must give preference of buying unloading and loading services from a separate entity, rather than to use its own employees for the same work.

(A2) The system referred to under A1 should be assessed under Article 53 and Article 54 of the EEA Agreement.

(A3) The existence of an identical or corresponding system in other ports amongst other needs to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

(B1) It is 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 priority rule laid down in 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 entity having the characteristics described in paragraphs 10 to 14 of the reference order rather than use its own employees for this work.

(B2) It is without 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/sporadic.

(B3) It is of importance for the assessment of whether the restriction described in question B1 is lawful or not that the priority rule applies irrespective of whether the company that is to be prevented from using its own employees applies a different collective agreement which provides for equal social protection as the Framework Agreement.

Carl Baudenbacher
Judge-Rapporteur