# JUDGMENT OF THE COURT

22 December 2016*

*(Article 53 EEA – Restriction of competition by object – Public procurement – Submission of joint bids through a joint management company)*

In Case E-3/16,

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

**Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS**

**and**

**The Norwegian Government, represented by the Competition Authority,**

concerning the interpretation of the Agreement on the European Economic Area, and in particular Article 53 thereof,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Ski Taxi SA ("Ski Taxi"), Follo Taxi SA ("Follo Taxi") and Ski Follo Taxidrift AS ("SFD"), (collectively "the Appellants") represented by Stephan L. Jervell, Advokat;

- the Norwegian Government, represented by the Norwegian Competition Authority (*den norske stat v/Konkurransetilsynet*) ("the Norwegian Government"), represented by Pål Wennerås, Advokat, Office of the Attorney General (Civil Affairs);

---

* Language of the request: Norwegian.

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin and Øyvind Bø, Members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Henning Leupold, Hubert van Vliet and Teresa Vecchi, members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of Ski Taxi, Follo Taxi and SFD, represented by Stephan L. Jervell; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Clémence Perrin and Øyvind Bø; the Commission, represented by Henning Leupold, Hubert van Vliet and Teresa Vecchi, at the hearing on 22 September 2016,

gives the following

## Judgment

## I Legal background

*EEA law*

1 Article 53 of the Agreement on the European Economic Area ("the EEA Agreement" or "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.*

*National law*

The Competition Act

2 Section 10 of the Norwegian Act of 5 March 2004 No 12 on competition between undertakings and control of concentrations ("the Competition Act") corresponds to Article 53 EEA. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, the restriction or distortion of competition.

3 Pursuant to Section 12 of the Competition Act, undertakings that infringe Section 10 of that Act may be ordered to bring the infringement to an end.

4 According to Section 29(1)(a) of the Competition Act, administrative fines may be imposed on undertakings that infringe Section 10 of the same Act.

## II Facts and procedure

5 Ski Taxi and Follo Taxi provide taxi services using small passenger cars. They are active in the Follo region outside of Oslo, more precisely in the seven municipalities of Nesodden, Frogn, Vestby, Ås, Enebakk, Ski and Oppegård. In autumn 2010, approximately 24 taxi licence holders were affiliated to Ski Taxi. Ski Taxi is active mostly in the municipalities of Ski, Ås and Oppegård. In autumn

2010, 46 taxi licence holders were affiliated to Follo Taxi. Follo Taxi is active mainly in the municipalities of Nesodden, Frogn, Vestby, Ås and Enebakk.

6 In 2001, Ski Taxi and Follo Taxi established a joint management company, SFD, to carry out administrative activities common to its shareholders' respective dispatch centres. This was done because neither Ski Taxi's nor Follo Taxi's dispatch centre have any employees. In particular, SFD is responsible for the booking system, the switchboard operation, the communication and IT infrastructure, the invoicing and accounting, as well as the organisation of courses for new drivers. Ski Taxi and Follo Taxi each own 50 per cent of the shares in SFD.

7 SFD's other activities consist in the submission of bids in tender procedures. While the tender is submitted by and the contract awarded to SFD, for the purposes of fulfilling the contract, the taxi licence holders affiliated to Ski Taxi and Follo Taxi are SFD's subcontractors.

8 An SFD document headed "Strategy Document - 2009-2010" ("SFD Strategy Document") describes the activity of SFD as follows: "to secure and win major contracts" and "to take measures to meet competition in the form of joint projects or marketing efforts". A shareholders' agreement entered into by Ski Taxi and Follo Taxi on 3 May 2007 ("SFD Shareholders' Agreement") provides as follows: "the position of the parties in relation to the functions assigned to the company indicates that there will be less competition between them in the market than previously. This applies to both pric[ing] policy in tenders and other strategic measures in relation to the market. Should this changed situation require permits from public authorities, such permits must be obtained".

9 The SFD Shareholders' Agreement provides that SFD's board shall consist of five members. Of those five members, Ski Taxi selects two, Follo Taxi selects two, and one is independent of the shareholders.

10 In 2010, Oslo University Hospital launched two tender procedures for the award of framework agreements for the provision of patient transport services for the South-Eastern Norway Regional Health Authority (*Helse Sør-Øst RHF*).

11 The first procedure launched by Oslo University Hospital was for the award of framework agreements for the provision of patient transport services from and to nine different areas in the Counties of Oslo and Akershus ("Tender Procedure 1"). One of those nine areas, Southern Follo, covered the municipalities of Nesodden, Ås, Frogn and Vestby. Another of the nine areas, Northern Follo, covered the municipalities of Ski, Enebakk and Oppegård. The contract documents stated, according to the referring court, that in 2009, transport assignments in Southern and Northern Follo had accounted for approximately 40 100 journeys, spread over the 24 hours of the day. The award criteria were price and quality, each weighing 50 per cent. Quality was itself based on four parameters, each weighing 12.5 per cent: training and competence of personnel, capacity (number of dedicated cars), condition of vehicles and equipment for use in the assignments, and system for

dealing with enquiries. The deadline for submission of tenders was 30 August 2010.

12 SFD submitted a joint tender on behalf of Ski Taxi and Follo Taxi for Southern and Northern Follo. The rate per kilometre in SFD's tender was NOK 19.60, and the number of dedicated cars was 42 (21 cars for the Southern Follo area, and 21 cars for the Northern Follo area). The tender stated that the bid was submitted on behalf of Ski Taxi and Follo Taxi.

13 Since SFD was the sole tenderer for Southern and Northern Follo, Oslo University Hospital cancelled the procedure for those two areas. The procedure was completed for the remaining seven areas.

14 On 31 August 2010, Oslo University Hospital sent a letter to the municipal authority in charge of taxi licences and to the Norwegian Competition Authority ("the Competition Authority"), in which it voiced frustration concerning the lack of competition in the Follo region. The hospital stated, in particular, that "as one of the largest purchasers of taxi services we experience that lacking competition in the taxi market in the Follo region is exploited through a disproportionately high kilometre price".

15 On 21 September 2010, Oslo University Hospital launched another tender procedure ("Tender Procedure 2"). That procedure concerned the award of framework agreements for the provision of the same services as in Tender Procedure 1, in Southern Follo and Northern Follo. However, Southern and Northern Follo was this time divided into five, instead of two, areas: Oppegård, Ås, Nesodden, Frogn and Vestby. The referring court states that, according to the contract documents, transport assignments in those five areas accounted for approximately 33 900 journeys in 2009 spread over the 24 hours of the day. The deadline for submission of tenders was 5 November 2010.

16 SFD submitted a joint tender on behalf of Ski Taxi and Follo Taxi for all five areas. The rate per kilometre in SFD's tender was NOK 18 for the Oppegård area and NOK 19.60 for the areas of Ås, Nesodden, Frogn and Vestby. The tender provided for 30 dedicated cars (10 cars for the Oppegård area, and 5 cars each for the other areas). The tender stated that the bid was submitted on behalf of Ski Taxi and Follo Taxi. Tenders for all five areas were also submitted by two other companies, Oslo Taxi and Konsentra. Konsentra offered the lowest price, and quality varied among the offers. Therefore, Oslo University Hospital entered into framework agreements with all three companies, namely SFD, Oslo Taxi and Konsentra, for all five areas. It assigned second priority to SFD in all areas, while Oslo Taxi and Konsentra were assigned first and third priority alternatively in different areas.

17 Based on the letter of 31 August 2010 from Oslo University Hospital, the Competition Authority opened an investigation into the joint tenders and requested information from Ski Taxi, Follo Taxi and SFD. A letter sent by SFD to the Competition Authority on 17 November 2010 describes the submission of joint bids by SFD in the following way:

> "b) Tenders that may be of interest to SFD are prepared and presented to the board of [….] SFD by the general manager. All aspects of the tender are then considered, such as capacity, profit and risk and so forth. It is thereafter decided whether a bid shall be submitted or not. This tender [the tenders submitted in Tender Procedures 1 and 2] is one of the most important tenders and sources of income for SFD and it has been agreed the whole time that SFD should submit a bid on behalf of the taxi centrals.
>
> c) As of the start in the middle of June 2001, there has been agreement that SFD shall submit bids in tender competitions on behalf of both of the taxi centrals.
>
> d) The content of the tender is examined and assessed by the general manager in SFD. The necessary information and statistics have been examined and assessed. Calculations made to ensure an acceptable economy and risk in the tender is presented to the board, which has approved the price setting.
>
> e) The general manager in SFD calculated the prices based on the economy and risks in the tender".

18 By a decision of 4 July 2011, the Competition Authority found that the Appellants had infringed Section 10 of the Competition Act and imposed fines on them ("the Decision of the Competition Authority").

19 According to the Competition Authority, Ski Taxi and Follo Taxi would have been able to submit separate tenders in both tender procedures. They were thus to be regarded as competitors. Therefore, the submission of joint bids through SFD constituted cooperation between Ski Taxi and Follo Taxi. Such cooperation had as its object the restriction of competition and was prohibited by Section 10 of the Competition Act.

20 The Decision of the Competition Authority reads as follows: "SFD's submission of a joint tender on behalf of Ski Taxi and Follo Taxi was [….] a tender cooperation between de facto and potential competitors. The two dispatch centres cooperated with respect to price, quality and capacity. As a result of the cooperation, Ski Taxi and Follo Taxi did not compete by submitting separate tenders in Tender [Procedure] 1 and Tender [Procedure] 2. The Competition Authority therefore finds that the tender cooperation in question must be deemed to have had a competition-restricting object in contravention of Section 10, first paragraph, of the Competition Act. It is not necessary, therefore, to provide evidence of any competition-restricting effect."

21 By judgment of 8 February 2013, Follo District Court (*Follo tingrett*) annulled the Decision of the Competition Authority. It found that Ski Taxi and Follo Taxi were not potential competitors as regards Tender Procedure 1 and were only partially potential competitors as regards Tender Procedure 2. The submission of joint bids by SFD did not constitute a restriction of competition by object. It could, as regards

Tender Procedure 2, constitute a restriction of competition by effect. However, that was not the case, since the effect on competition was not appreciable.

22 By judgment of 17 March 2015, Borgarting Court of Appeal (*Borgarting lagmannsrett*) upheld the Decision of the Competition Authority. It found that the dispatch centres of Ski Taxi and Follo Taxi were competitors in both tender procedures. The submission of joint bids by SFD was capable of restricting competition and the cooperation constituted a restriction of competition by object. The administrative fines imposed on Ski Taxi, Follo Taxi and SFD were set at, respectively, NOK 100 000, NOK 200 000 and NOK 1 million.

23 The Appellants challenged that judgment before the Supreme Court of Norway. By decision of 24 July 2015, the Supreme Court granted leave to appeal on matters of law. The proceedings before the Supreme Court concern, provisionally, only the question whether the submission of joint bids by SFD on behalf of Ski Taxi and Follo Taxi constitutes a restriction of competition by object.

24 On 24 February 2016, the Supreme Court made a request to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") and posed the following questions:

> 1. *What is the legal test when determining whether an agreement between undertakings has a competition-restricting object within the meaning of Article 53 EEA?*
>
>    a) *In this context, is it sufficient in order to be able to categorise a form of conduct as an infringement by object pursuant to Article 53 EEA, that the cooperation is capable of restricting competition?*
>
> 2. *What is the legal significance for the consideration of whether a form of conduct constitutes an infringement by object, that such cooperation took place openly vis-à-vis the procuring authority?*
>
> 3. *What legal criteria must in particular be emphasised when considering whether cooperation that takes the form of two competing companies submitting a joint tender through a joint venture, and where the two undertakings are to be subcontractors to the joint venture, should be deemed to constitute an infringement by object?*

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

## III Admissibility

*Observations submitted to the Court*

26 ESA submits that, although the proceedings before the referring court concern a purely internal situation, the Court has jurisdiction. Although the facts of the case are outside the direct scope of EEA law, provisions of EEA law have been rendered applicable by domestic law. Domestic law adopts, for internal situations, the same approach as that provided for under EEA law. Section 10 of the Norwegian Competition Act mirrors Article 53 EEA. Therefore, the Court has jurisdiction.

*Findings of the Court*

27 Where domestic legislation, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see Case E-29/15 *Sorpa*, judgment of 22 September 2016, not yet reported, paragraph 35).

28 In the present case, as stated in the national court's reference, Section 10 of the Competition Act corresponds to Article 53 EEA. Therefore, it must be held that the Court has jurisdiction to rule on the questions referred.

## IV Answers of the Court

29 The first and third questions are related, since they concern the legal test to be applied and the criteria to be emphasised when determining whether a cooperation between undertakings constitutes a restriction of competition "by object". The Court therefore considers it appropriate to start by examining the first question, and then the third question. Finally, the Court will assess the second question on the legal significance of the fact that the cooperation took place openly.

*The first question*

Observations submitted to the Court

30 The Appellants submit that, for an agreement to be considered a restriction of competition by object, it must reveal a sufficient degree of harm to competition (reference is made to the judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 58).

31 Therefore, the Appellants claim that the test applied by Borgarting Court of Appeal, which held that conduct should be considered a restriction by object if it is capable of restricting competition, cannot be followed. It does not suffice, for an

agreement to be considered a restriction by object, that it is capable of restricting competition.

32 In the Appellants' view, the findings of the Court of Justice of the European Union ("ECJ") in *T-Mobile Netherlands and Others* that a concerted practice may be regarded as having an anticompetitive object if it is "capable [….] of resulting in the prevention, restriction or distortion of competition" (reference is made to the judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 31) were rejected in *CB* v *Commission*. The latter judgment set a higher standard for classification as a restriction by object, namely, a "sufficient degree of harm to competition". That argument is supported by subsequent case law (reference is made to the judgment in *SIA 'Maxima Latvija'*, C-345/14, EU:C:2015:784, paragraphs 22 and 23).

33 The Norwegian Government submits that an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition. In order to determine whether this is the case, account must be taken of the content of its provisions, its objectives and the economic and legal context. The intention of the parties is not an essential factor, although there is nothing to prevent the competent competition authorities or courts from taking it into account (reference is made to the judgments in *ING Pensii*, C-172/14, EU:C:2015:484, paragraphs 30 and 31, *Toshiba* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 27, *T-Mobile Netherlands and Others*, cited above, paragraph 31, and *CB* v *Commission*, cited above, paragraph 54).

34 The criterion for classifying an agreement as a restriction by object is the same in *CB* v *Commission* and in *T-Mobile Netherlands and Others* and reflects earlier case law of the ECJ (reference is made to the Opinion of Advocate General Wathelet in *Toshiba* v *Commission*, C-373/14 P, EU:C:2015:427, point 51). As confirmed in subsequent cases, an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition (reference is made to the judgments in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 112, and *Toshiba* v *Commission*, cited above, paragraph 31).

35 In that regard, the Norwegian Government contends that it is sufficient, in order to classify an agreement as a restriction by object, that it has *potential* (as opposed to *actual*) anticompetitive effects, that is, that it is capable of restricting competition.

36 ESA submits that an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition. In order to determine whether an agreement reveals a sufficient degree of harm to competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (reference is made to the judgments in *CB* v *Commission*, cited above, paragraph 57, and *Toshiba* v *Commission*, cited above, paragraphs 26 and 27).

37 In that regard, ESA contends that for those agreements which previously have been held to reveal a sufficient degree of harm to competition, the analysis of the legal and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (reference is made to the judgment in *Toshiba* v *Commission*, cited above, paragraph 29).

38 Moreover, ESA claims that, in order to classify an agreement as constituting a restriction by object, it suffices that the agreement, which in itself reveals a sufficient degree of harm to competition, is capable of restricting competition.

39 The Commission submits that, in paragraph 57 of *CB* v *Commission*, the ECJ held that an agreement has the object of restricting competition if it reveals in itself a sufficient degree of harm to competition (reference is also made to the judgment in *Toshiba* v *Commission*, cited above, paragraph 26).

40 The Commission disagrees with the contention made by the Appellants that in *CB* v *Commission* the ECJ set a higher standard than it did in its earlier judgment in *T-Mobile Netherlands and Others*. By stating in paragraph 31 of *T-Mobile Netherlands and Others* that an agreement constitutes a restriction by object if it is merely capable of restricting competition, the ECJ did not seek to define the standard for classifying an agreement as a restriction by object. Rather, it was intended to refute the referring court's contention that classification of an agreement as a restriction by object requires consideration of its effects. By no means did the ECJ establish in *T-Mobile Netherlands and Others* a lower standard according to which any agreement capable of restricting competition constitutes a restriction by object. This has been confirmed in the ECJ's subsequent case law.

41 The Commission claims that, in order to determine whether an agreement reveals a sufficient degree of harm to competition, an analysis of its content and objectives, and of its economic and legal context is required. Although the intention of the parties is not a necessary factor, it may be taken into account (reference is made to the judgment in *CB* v *Commission*, cited above, paragraphs 53 and 54).

42 First, as regards the content and the objectives of the agreement, the Commission contends that account should be taken not only of the wording, but also of the substance of what was agreed between the parties. An agreement which does not have the restriction of competition as its sole aim but also pursues other, legitimate aims may still restrict competition by object (reference is made to the judgment in *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21).

43 Second, as regards the economic and legal context of the agreement, it is necessary to take account of the nature of the goods or services affected, as well as the real conditions of the functioning or structure of the market (reference is made to the judgment in *CB* v *Commission*, cited above, paragraph 78). It may be necessary to investigate whether the parties are competitors, whether the market is two-sided or regulated, and whether the restriction at stake is ancillary, that is, objectively necessary for another, wider operation which is not anticompetitive (reference is

made to the judgments in *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraphs 39 to 47, and *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 90 to 95 and 107). However, account cannot be taken of the effects of the agreement or the market power of the parties. The Commission contends that the findings of the ECJ in paragraph 29 of *Toshiba* v *Commission*, according to which the analysis of the economic and legal context of a market-sharing agreement may be limited to what is strictly necessary in order to determine whether it constitutes a restriction by object, should be applied to other obvious, established restrictions by object such as price-fixing.

Findings of the Court

44 By its first question, the referring court asks what legal test must be applied in order to determine whether an agreement may be regarded as a restriction of competition by object. In particular, it seeks to establish whether it suffices, for an agreement to be classified as a restriction of competition by object, that it is capable of restricting competition.

45 The Court has consistently held that whether an agreement restricts competition is a legal question that must be examined in the light of economic considerations (see Case E-8/00 *Norwegian Federation of Trade Unions and Others* ("*LO*") [2002] EFTA Ct. Rep. 114, paragraph 77).

(i) Legal test to determine whether an agreement may be considered a restriction of competition by object

46 For an agreement to be caught by the prohibition in Article 53(1) EEA, it must have as its "object or effect" the restriction of competition. Those are not cumulative but rather alternative requirements (compare the judgment in *LTM*, 56/65, EU:C:1966:38). In other words, conduct may infringe Article 53 EEA either if it aims at restricting competition or if it produces anticompetitive effects.

47 The consequence of the classification of an agreement as a restriction of competition by object is, essentially, the following: it alleviates ESA's burden of proof since ESA need not demonstrate that the agreement has anticompetitive effects (compare the judgment in *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, page 342). Nonetheless, the undertakings involved may still benefit from an individual exemption under Article 53(3) EEA, but the burden of demonstrating that the conditions laid down in that provision are met is on the undertakings (see Article 2 of Chapter II of Protocol 4 SCA). Furthermore, restrictions by object are presumed to be appreciable so that the *de minimis* threshold does not apply (compare the judgment in *Expedia*, C-226/11, EU:C:2012:795, paragraph 37), the block exemption regulations do not apply and the undertakings are likely to be subject to higher fines (see point 15 of ESA's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Chapter II of Protocol 4 to the SCA (OJ 2006 C 314, p. 84)).

48 It is apparent from case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (compare the judgment in *CB* v *Commission*, cited above, paragraphs 49 and 50).

49 In the present case, Borgarting Court of Appeal held that the submission of joint bids by SFD was to be considered a restriction of competition by object because it "was, by its content, capable of restricting, and thus harming, competition". The Appellants submit that the standard for classification as a restriction of competition by object applied by the Court of Appeal is lower than the standard set by the ECJ in *CB* v *Commission*.

50 In *CB* v *Commission* the ECJ held that, for an agreement to be considered a restriction of competition by object, it must reveal a sufficient degree of harm to competition (paragraph 49). The ECJ also held that, by finding that an agreement must simply be capable in the particular case, having regard to the specific legal and economic context, of restricting competition, the General Court had erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by object. More precisely, the ECJ underlined that the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition by object is the finding that such coordination reveals in itself a sufficient degree of harm to competition that it may be found that there is no need to examine its effects (see the judgment in *CB* v *Commission*, cited above, paragraphs 49 and 55 to 58).

51 The ECJ has reiterated that an agreement must reveal a sufficient degree of harm to competition in order to be regarded as a restriction of competition by object (compare the judgments in *MasterCard and Others* v *Commission*, cited above, paragraph 184; *Allianz Hungária Biztosító Zrt. and Others*, C-32/11, EU:C:2013:160, paragraph 34; *Dole Food and Dole Fresh Fruit Europe* v *Commission*, cited above, paragraph 113; *ING Pensii*, cited above, paragraph 31; *SIA 'Maxima Latvija'*, cited above, paragraph 18; and, *Toshiba* v *Commission*, cited above, paragraph 26). This standard was also adopted by the General Court in its judgment in *Lundbeck* v *Commission* (T-472/13, EU:T:2016:449, paragraph 339), which was raised at the hearing.

52 The Court finds, contrary to the arguments advanced by the Appellants, that the ECJ did not set a higher standard for classification of an agreement as a restriction of competition by object in *CB* v *Commission* than in *T-Mobile Netherlands and Others*. In paragraph 31 of the latter judgment, the ECJ found that, for a concerted practice to be considered a restriction of competition by object, it must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition (see the judgment in *T-Mobile Netherlands and Others*, cited above).

53 However, that finding must be read in the light of paragraph 30 and of the last sentence of paragraph 31 of that judgment. The ECJ held that, contrary to what the referring court claimed, there was no need to demonstrate that a concerted practice results in anticompetitive effects once its anticompetitive object is established. Therefore, by stating that a concerted practice must simply be capable of restricting competition, the ECJ held that, in order to establish that a concerted practice constitutes a restriction of competition by object, there is no need to demonstrate anticompetitive effects.

54 Moreover, in *T-Mobile* (cited above, paragraph 28) the ECJ relied on earlier case law, in particular on its findings in *Beef Industry Development Society and Barry Brothers* (cited above, paragraph 15) and in *LTM* (cited above) that the consequences of an agreement should be considered where an analysis of its clauses does not reveal the effect on competition to be sufficiently deleterious. Therefore, it is clear that since its judgment in *LTM* the ECJ has consistently held that the analysis of the object must reveal a sufficient degree of harm to competition.

55 Consequently, the judgments in *T-Mobile Netherlands and Others* and *CB* v *Commission* are not irreconcilable (see, to that effect, the Opinion of Advocate General Wathelet in *Toshiba* v *Commission*, cited above, point 51).

(ii) Criteria for determining whether an agreement is a restriction of competition by object

56 In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered as a restriction of competition "by object" within the meaning of Article 53(1) EEA, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (compare the judgment in *CB* v *Commission*, cited above, paragraph 53).

57 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Court from taking that factor into account (compare the judgment in *CB* v *Commission*, cited above, paragraph 54).

58 The Court notes that consideration of the economic and legal context of an agreement in order to identify an anticompetitive object within the meaning of Article 53(1) EEA must be clearly distinguished from the demonstration of anticompetitive effects under that provision. Otherwise the distinction between restrictions of competition by object and restrictions of competition by effect would be blurred (compare the Opinion of Advocate General Wahl in *CB* v *Commission*, C-67/13 P, EU:C:2014:1958, point 44; and the judgments in *M6 and*

*Others* v *Commission*, T-112/99, EU:T:2001:215, paragraph 74 et seq., and *MasterCard and Others* v *Commission*, cited above, paragraph 181).

59 However, an agreement which has the restriction of competition as its object must be capable of having at least some impact on the market (compare the Opinion of Advocate General Wathelet in *Toshiba* v *Commission*, cited above, point 65).

60 In that regard, the Court notes, first, that consideration of the economic and legal context of the agreement is required in order to characterise a restriction of competition within the meaning of Article 53(1) EEA. Therefore, the obligation to take account of the legal and economic context is imposed for the purpose of ascertaining both the object and effect of the agreement (compare judgments in *GlaxoSmithKline Services* v *Commission*, T-168/01, EU:T:2006:265, paragraph 110 and case law cited, and *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 49).

61 Second, the Court holds that, given the consequences that flow from classification of an agreement as a restriction of competition by object, that concept must be interpreted restrictively in the sense that it can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (compare the judgment in *CB* v *Commission*, cited above, paragraph 58). Only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object (compare the Opinion of Advocate General Wahl in *CB* v *Commission*, cited above, point 56).

62 Third, the Court recalls that it is incumbent on ESA or the competent national competition authority to adduce evidence capable of proving the existence of the circumstances that constitute an infringement of Article 53 EEA. Keeping in mind the guarantees provided by Article 6(2) of the European Convention on Human Rights, it follows from the principle of the presumption of innocence that the undertakings to which the decision finding an infringement was addressed must be given the benefit of the doubt (see Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 93).

63 Finally, it should be recalled that an assessment of whether an agreement is capable of having some impact on the market is only concerned with the likely impact of the agreement on competition. It cannot go as far as a full examination of its actual or potential effects. Nor does it amount to carrying out an assessment of the pro- and anticompetitive effects of the agreement and thus to applying a rule of reason (compare the judgment in *O2 (Germany)* v *Commission*, T-328/03, EU:T:2006:116, paragraph 69).

64 The answer to the first question is therefore that, for an agreement to be regarded as a restriction of competition by object within the meaning of Article 53(1) EEA, it must reveal a sufficient degree of harm to competition. It does not suffice that it

is simply capable, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition.

65 Moreover, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Court from taking that factor into account.

66 An agreement reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object only if its harmful nature is easily identifiable. That assessment cannot go as far as a full examination of its actual or potential effects. Nor can it amount to carrying out an assessment of the pro- and anticompetitive effects and thus to applying a rule of reason.

*The third question*

Observations submitted to the Court

67 The Appellants submit that joint bidding does not constitute a restriction by object.

68 They claim that, in order to determine whether joint bidding reveals a sufficient degree of harm to competition, in other words, whether it constitutes a restriction of competition by object, account must be taken of the content of the agreement between the parties submitting the joint bids, the objectives of that agreement, its economic and legal context, and the intention of the parties (reference is made to the judgment in *CB* v *Commission*, cited above, paragraphs 53 and 54).

69 The Appellants acknowledge that the submission of joint bids involves an agreement between the parties presenting the joint bids on the price offered to the contracting authority. However, the submission of joint bids allows tenderers to pool their limited resources and submit more competitive bids. Therefore, the submission of joint bids cannot be equated with a mere agreement to set prices. It does not follow from the case law that classifies price fixing as a restriction by object that joint bidding also constitutes a restriction by object.

70 As regards the particular economic and legal context of the agreement at stake, the Appellants contend that, while it should be given consideration, classification as a restriction by object cannot be based on context alone (reference is made to the Opinion of Advocate General Wahl in *CB* v *Commission*, cited above, points 44 and 45). In any event, in terms of legal context, there is no case law of the Court or the ECJ, nor decisional practice of ESA or the Commission that recognises joint

bidding to constitute a restriction by object. The economic context was not given proper consideration by Borgarting Court of Appeal.

71 Therefore, the Appellants contend that the submission of joint bids must be assessed with regard to its effects on competition. This follows, in their view, from paragraph 30 of ESA's Guidelines on the applicability of Article 53 of the EEA Agreement to Horizontal Cooperation Agreements ("Horizontal Guidelines") (OJ 2013 C 362, p. 3). Paragraph 30 belongs to a section headed "restrictive effects on competition". It provides that "horizontal co-operation agreements between competitors who, on the basis of objective factors, would not be able independently to carry out the project or activity covered by the co-operation [….] will normally not give rise to restrictive effects on competition".

72 As for the situation where one of the parties submitting a joint bid is able to submit an individual bid, the Appellants argue that the Competition Authority itself has acknowledged in its Guidance on cooperation on projects that an assessment of the effects must be carried out. As regards the submission of joint bids by parties who are both able to submit individual bids, legal and economic literature considers this not to constitute a restriction by object.

73 The Norwegian Government maintains that the submission of joint bids by Ski Taxi and Follo Taxi in Tender Procedures 1 and 2 may be considered a restriction of competition by object.

74 The agreements listed in Article 53(1) EEA, such as price fixing, constitute the hard core of restrictions by object. While agreements not listed in Article 53(1) EEA may be regarded as restrictions by object, their classification as such requires a more thorough analysis of their economic and legal context, although that analysis does not extend to an examination of their effects (reference is made to the Opinion of Advocate General Wathelet in *Toshiba* v *Commission*, cited above, points 72 to 74).

75 Moreover, the Norwegian Government contends that agreements of which only parts are hard core restrictions may nonetheless constitute restrictions by object. For instance, commercialisation agreements between competitors, that is, agreements between competitors to sell, distribute or promote their substitute products, are not listed in Article 101(1) TFEU. Nevertheless, if the parties to a commercialisation agreement coordinate on prices, the commercialisation agreement likely constitutes a restriction by object (reference is made to the Horizontal Guidelines, paragraph 234).

76 The Norwegian Government notes, however, that, according to paragraph 237 of the Horizontal Guidelines, a commercialisation agreement does not constitute a restriction by object if it "is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the cooperation". The Norwegian Government suggests that joint bidding may be seen as a commercialisation agreement. It is apparent from paragraph 237 of the Horizontal Guidelines that a

cooperation agreement is "objectively necessary" only if none of the parties could have entered the market without that agreement. Similarly, joint bidding is "objectively necessary" only if none of the parties that submitted the joint bid could have submitted an individual bid.

77 As regards the first criterion to be taken into account in order to determine whether an agreement constitutes a restriction by object, namely, its content and objectives, the Norwegian Government contends that both Ski Taxi and Follo Taxi had sufficient capacity to submit individual bids in both tender procedures. Joint bidding by undertakings that have the capacity to submit individual bids is particularly harmful. It reduces the number of tenderers and eliminates potential competition between the parties submitting the joint bid. Joint bidding may be assimilated to a commercialisation agreement where the parties agree on prices, which is a hard core restriction.

78 As regards the second criterion to be taken into account in order to determine whether an agreement constitutes a restriction by object, namely, its economic and legal context, the Norwegian Government reiterates that the parties to the joint bid only need to be potential competitors. Since Ski Taxi and Follo Taxi could have submitted individual bids, they are to be considered as potential competitors.

79 Therefore, in the view of the Norwegian Government, the agreement at stake in the present case reveals a sufficient degree of harm to competition and must be regarded as a restriction by object.

80 That conclusion is not undermined by the argument advanced by the Appellants that that their joint bids are part of a wider, legitimate cooperation. Even if the joint bids were to be regarded as having legitimate, pro-competitive effects, such effects could only be taken into account under Article 53(3) EEA.

81 ESA submits that it is for the referring court to determine whether the submission of joint bids by Ski Taxi and Follo Taxi constitutes a restriction by object. However, ESA invites the Court to provide some guidance on the issue.

82 The submission of a joint bid inevitably entails cooperation between the parties on the price offered to the contracting entity. Moreover, it is comparable to a market-sharing agreement, since the parties jointly provide the services at stake and share the contracts awarded.

83 In ESA's view, since it is settled case law that price fixing and market sharing agreements reveal a sufficient degree of harm to competition, the analysis of the economic and legal context of the joint bids submitted by Ski Taxi and Follo Taxi can be limited to determining whether those undertakings are actual or potential competitors. Therefore, any pro-competitive elements may only be taken into account under Article 53(3) EEA.

84 The Commission submits that in order to determine whether joint bidding, or any type of agreement, constitutes a restriction by object, regard must be had to its

content and the objectives, the economic and legal context of which it forms part, and, although that is not a necessary factor, the intentions of the parties.

85 As regards the content and the objectives of the agreement, the Commission notes that according to SFD Strategy Document and SFD Shareholders' Agreement, SFD was established in order to reduce competition between Ski Taxi and Follo Taxi and to strengthen their market position vis-à-vis third parties.

86 As regards the economic and legal context of the agreement, it is, in the Commission's view, of particular importance that, according to the reference of the national court, Ski Taxi and Follo Taxi could both have submitted individual bids (reference is made to paragraph 237 of the Guidelines of the Commission on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11, p. 1).

87 Moreover, the submission of joint bids was part of a wider scheme, which entailed the establishment of SFD as a provider of administrative tasks for Ski Taxi and Follo Taxi. Therefore, the submission of joint bids may constitute a restraint ancillary to the operation of SFD. If such is the case and the operation of SFD is not anticompetitive, the submission of joint bids does not fall within the scope of Article 53 EEA. It should thus be assessed whether the submission of joint bids was "strictly indispensable" to the operation of SFD (reference is made to the judgment in *MasterCard and Others* v *Commission*, cited above, paragraph 91). The Commission questions whether the pooling of administrative resources through the establishment of SFD required cooperation on price, quality and capacity, as was achieved through the submission of joint bids.

Findings of the Court

88 By its third question, the referring court asks which legal criteria must be applied in order to determine whether the submission of joint bids by two undertakings may be considered a restriction of competition by object.

89 On this matter, regard must be had to the content of the agreement's provisions, its objectives and the economic and legal context of which it forms a part. Although the parties' intention is not a necessary factor, it may be taken into account.

90 It appears that the following categories of agreements have been held to constitute restrictions by object: horizontal agreements to set prices (*CB* v *Commission*, cited above, paragraph 51); market-sharing agreements (*Toshiba* v *Commission*, cited above, paragraph 28); agreements to restrict capacity (*Beef Industry Development Society and Barry Brothers*, cited above, paragraph 40); exclusive purchasing agreements (*Stremsel- en Kleurselfabriek* v *Commission*, 61/80, EU:C:1981:75, paragraph 12); and agreements to exchange price information (*T-Mobile Netherlands and Others*, cited above, paragraph 35). Although often less harmful than horizontal agreements, some vertical agreements too have been held to constitute restrictions by object: resale price maintenance (*Binon*, 243/83, EU:C:1985:284, paragraph 47); the prohibition of parallel trade (*Consten and*

*Grundig*, cited above, page 343); and a clause in a distribution contract whereby distributors are prohibited from selling certain products on the internet (*Pierre Fabre Dermo-Cosmétique*, cited above, paragraph 54).

91 In the present case, the Competition Authority found that the submission of joint bids by SFD on behalf of Ski Taxi and Follo Taxi was to be considered a restriction of competition by object within the meaning of Section 10 of the Competition Act. This was because, by submitting joint bids in Tender Procedures 1 and 2, Ski Taxi and Follo Taxi had "cooperated on price, quality and capacity". The Appellants do not dispute that. By submitting joint bids in Tender Procedures 1 and 2, they agreed on the price offered to the contracting authority.

92 Direct or indirect price fixing is listed in Article 53(1)(a) EEA as prohibited conduct. It is established that horizontal price-fixing by cartels may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered a restriction of competition by object (compare the judgment in *CB* v *Commission*, cited above, paragraph 51).

93 In the case of agreements expressly referred to in Article 53(1) EEA, the assessment of the economic and legal context of which the agreement under examination forms a part may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (compare the judgment in *Toshiba* v *Commission*, cited above, paragraph 119). In other words, the assessment needs not be as thorough as it would be for agreements not listed in that provision (compare the Opinion of Advocate General Wathelet in *Toshiba* v *Commission*, cited above, point 74).

94 Therefore, in order to determine whether an agreement expressly referred to in Article 53(1) EEA may be regarded as a restriction of competition by object, it still needs to be assessed, albeit in an abridged manner, whether its parties are actual or potential competitors, and whether it is an ancillary restraint.

95 Whether the submission of joint bids by SFD on behalf of Ski Taxi and Follo Taxi in the two tender procedures is to be considered a restriction of competition by object is a matter of fact and as such for the referring court to assess. However, the Court will provide the referring court with all the criteria of interpretation within the scope of EEA law which may enable that court to determine the case before it.

96 First, as regards the content of the agreement's provisions and its objectives, the Court notes that, although there appears to be no written agreement relating specifically to the submission of joint bids in the two tender procedures, SFD Shareholders' Agreement states that "there will be less competition between [Ski Taxi and Follo Taxi] in the market than previously", and "this applies to […] pricing policy in tenders".

97 Second, as regards the economic and legal context of the submission of the joint bids, in particular the question whether the parties are actual or potential competitors, the Court observes that, according to paragraph 237 of the Horizontal

Guidelines, a commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually. This applies in particular to consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. Only if the parties are actual or potential competitors may the agreement be considered a restriction of competition by object (compare the judgments in *E.ON Ruhrgas* v *Commission*, T-360/09, EU:T:2012:332, paragraph 104; *Toshiba* v *Commission*, cited above, paragraphs 30 to 36; and *Lundbeck* v *Commission*, cited above, paragraph 437). This is because, if the parties are not competitors, their agreement cannot have any form of impact or effect on competition.

98 However, in the present case, according to the Supreme Court's request, Borgarting Court of Appeal found that Ski Taxi and Follo Taxi would have been able to submit individual bids in both tender procedures, and that they were thus competitors in both procedures. That finding is not challenged before the Supreme Court.

99 Third, on the question whether the submission of joint bids may be regarded as an ancillary restraint, the Court notes that an anticompetitive restriction may escape the prohibition laid down in Article 53(1) EEA because it is ancillary to a main operation that is not anticompetitive in nature. It is necessary to enquire whether that operation would be impossible to carry out in the absence of the restriction in question and whether that restriction is proportionate to the underlying objectives of the operation. The fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the "objective necessity" required for it to be classified as ancillary. This would undermine the effectiveness of the prohibition laid down in Article 53(1) EEA (compare the judgment in *MasterCard and Others* v *Commission*, cited above, paragraphs 91 and 107).

100 It is for the referring court to assess whether those conditions are met. At the hearing, the Appellants stated that the question whether the submission of joint bids by SFD was to be considered ancillary to the operation of the joint management company SFD was hypothetical and that they preferred to refrain from commenting on the matter. The Norwegian Government and the Commission, on the other hand, questioned whether the pooling of Ski Taxi's and Follo Taxi's administrative resources achieved through the creation and the operation of SFD required the cooperation on price, quality and capacity which the submission of joint bids implied.

101 Therefore, the answer to the third question is that, in order to determine whether the submission of joint bids through a joint management company reveals a sufficient degree of harm that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor.

102 Moreover, since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint.

*The second question*

Observations submitted to the Court

103 While the Appellants acknowledge that disclosure of the cooperation to the contracting authority does not preclude the submission of joint bids from being considered to have a restrictive object, they contend that bid-rigging arrangements such as cover bidding, bid suppression, bid rotation and market allocation, which are restrictions by object, are usually kept secret.

104 The Norwegian Government, ESA and the Commission submit that it is irrelevant, in order to determine whether a joint bid constitutes a restriction by object, whether the cooperation between the parties was made apparent in the bid. The Commission states that cooperation conducted publicly has been found to constitute a restriction by object.

Findings of the Court

105 By its second question, the referring court asks whether it is relevant, in order to determine whether the submission of joint bids may be considered a restriction of competition by object, that the joint character of the bids was disclosed to the contracting authority. It is not disputed that the tenders clearly stated that the bids were submitted on behalf of Ski Taxi and Follo Taxi.

106 Disclosure to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings. However, as mentioned above, although the parties' intention may be taken into account in order to determine whether an agreement may be considered a restriction of competition by object, it is not a necessary factor. As noted by the Commission, cooperation conducted publicly has been found to have an anticompetitive object (compare the judgment in *Beef Industry Development Society and Barry Brothers*, cited above, paragraph 10).

107 It is for the referring court to assess whether the fact that Ski Taxi and Follo Taxi disclosed the joint character of their bids to the contracting authority may support a finding that their conduct cannot be considered a restriction of competition by object.

108 Therefore, the answer to the second question is that, while the disclosure of the joint nature of the bids to the contracting authority may be an indication that the

parties did not intend to infringe the prohibition on agreements between undertakings, that, in itself, is not a prerequisite for determining whether an agreement may be considered a restriction of competition by object.

## V Costs

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

On those grounds,

THE COURT

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

1. **For an agreement to be regarded as a restriction of competition by object within the meaning of Article 53(1) EEA, it must reveal a sufficient degree of harm to competition. It does not suffice that it is simply capable, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition.**

2. **In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Court from taking that factor into account.**

3. **An agreement reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object only if its harmful nature is easily identifiable. That assessment cannot go as far as a full examination of its actual or potential effects. Nor can it amount to carrying out an assessment of the pro- and anticompetitive effects and thus to applying a rule of reason.**

4. **In order to determine whether the submission of joint bids through a joint management company reveals a sufficient degree of harm that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor.**

5. **Since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint.**

6. **While the disclosure of the joint nature of the bids to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings, that, in itself, is not a prerequisite for determining whether an agreement may be considered a restriction of competition by object.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 December 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President