



**REPORT FOR THE HEARING**  
in Case E-3/16

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

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

v

**The Norwegian Government, represented by the Competition Authority (*Den norske stat v/Konkurransetilsynet*)**

concerning the interpretation of the EEA Agreement, and in particular Article 53 thereof.

**I Introduction**

1. By a letter of 19 February 2016, registered at the Court as Case E-3/16 on 24 February 2016, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between, on the one hand, Ski Taxi SA (“Ski Taxi”), Follo Taxi SA (“Follo Taxi”) and Ski Follo Taxidrift AS (“SFD”) and, on the other hand, the Norwegian Government, represented by the Norwegian Competition Authority (*den norske stat v/Konkurransetilsynet*) (“the Norwegian Government”). By its request, the Supreme Court referred three questions concerning the interpretation of Article 53 EEA.

2. In the proceedings before the referring court, Ski Taxi, Follo Taxi and SFD are appealing against the judgment of 17 March 2015 of Borgarting Court of Appeal (*Borgarting lagmannsrett*), which upheld a decision by the Competition Authority to impose administrative fines on Ski Taxi, Follo Taxi and SFD for infringing the national prohibition on anti-competitive agreements by submitting joint bids in two tender procedures launched by Oslo University Hospital.

## II Legal background

### *EEA law*

3. Article 53 EEA reads as follows:

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

- (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

4. 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, restriction or distortion of competition.

5. 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.

6. 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.

### **III Facts and procedure**

#### *Background*

7. Ski Taxi and Follo Taxi provide passenger transport 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. However, it also provides services in the other municipalities in the Follo region. 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. It also has a certain amount of activity in Ski and Oppegård.

8. 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 is because neither Ski Taxi’s dispatch centre nor Follo Taxi’s 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% of the shares in SFD.

9. SFD’s other activities consist in the submission of bids in tender procedures. While the tender is submitted by SFD and the contract is also 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.

10. 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”.

11. The SFD Shareholders’ Agreement provides that SFD’s board shall consist of five members. Of those five members, two are selected by Ski Taxi, two are selected by Follo Taxi, and one is independent of the shareholders.

12. 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*).

13. 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, that of Southern Follo, covered the municipalities of Nesodden, Ås, Frogn and Vestby. Therefore, as regards the area of Southern Follo, the framework agreements concerned the transport of patients from Nesodden, Ås, Frogn and Vestby to Oslo University Hospital, and from that hospital to those municipalities. Another of the nine areas, that of Northern Follo, covered the municipalities of Ski, Enebakk and Oppegård. As regards the area of Northern Follo, the framework agreements concerned the transport of patients from Ski, Enebakk and Oppegård to Oslo University Hospital, and from that hospital to those municipalities. The contract documents stated 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 criteria for award were price and quality, each weighing 50%. Quality was itself based on four parameters, each weighing 12.5%: 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.

14. In Tender Procedure 1, SFD submitted a joint tender on behalf of Ski Taxi and Follo Taxi for two areas, Southern Follo 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). It was clearly stated in the tender that the bid was submitted on behalf of Ski Taxi and Follo Taxi.

15. Since SFD was the sole tenderer for those two areas, Oslo University Hospital cancelled the procedure for those two areas. The procedure was completed for the remaining seven areas.

16. Therefore, on 21 September 2010, Oslo University Hospital launched another 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 the areas where Tender Procedure 1 had been cancelled, that is, the two areas of Southern Follo and of Northern Follo. However, Southern and Northern Follo was this time divided into five, and not two, areas: Oppegård, Ås, Nesodden, Frogn and Vestby. According to the contract documents, transport assignments in those five areas had accounted for approximately 33 900 journeys in 2009 spread over the 24 hours of the day.

17. In Tender Procedure 2, 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). It was clearly stated in the tender 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, but 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.

18. On 31 August 2010 Oslo University Hospital sent a letter to the Competition Authority and the municipal authority in charge of taxi licences, in which it voiced frustration concerning the lack of competition in the Follo region. In that letter, Oslo University 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".

19. A letter sent by SFD to the Competition Authority on 17 November 2010 describes as follows the submission of joint bids by SFD:

"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”.

20. By Decision of 4 July 2011, the Competition Authority found that Ski Taxi, Follo Taxi and SFD had infringed Section 10 of the Competition Act and imposed fines on them (“the Decision of the Competition Authority”).

21. According to the Competition Authority, Ski Taxi and Follo Taxi would have been able to submit separate tenders in Tender Procedure 1 and Tender Procedure 2. 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.

22. 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.”

23. 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.

24. By judgment of 17 March 2015, Borgarting Court of Appeal upheld the Decision of the Competition Authority. It held that the dispatch centres of Ski Taxi and Follo Taxi were competitors in Tender Procedure 1 and Tender Procedure 2. The Court of Appeal found that the submission of joint bids by SFD was capable of restricting competition and that the cooperation constituted a restriction of competition by object. Therefore, the Court of Appeal imposed on Ski Taxi, Follo Taxi and SFD administrative fines of, respectively, NOK 100 000, NOK 200 000 and NOK 1 million.

25. Ski Taxi, Follo Taxi and SFD appealed against that judgment to the Supreme Court of Norway. The appeal does not concern the factual findings of Borgarting Court of Appeal, which held that Follo Taxi and Ski Taxi would have been able to submit separate tenders in Tender Procedure 1 and Tender Procedure

2 and were thus competitors. Therefore, those factual findings may be relied on in the advisory opinion.

26. By decision of 24 July 2015, the Supreme Court granted leave to appeal on matters of law. The proceedings before the referring 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.

27. On 24 February 2016, the Court received a request from the Supreme Court for an advisory opinion.

#### **IV Questions**

28. The following questions have been referred to the Court:

**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?**

#### **V Written observations**

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

- Ski Taxi, Follo Taxi and SFD, represented by Stephan L. Jervell, Advokat;
- the Norwegian Government, represented by Pål Wennerås, Advokat, Office of the Attorney General (Civil Affairs);
- 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.

## **VI Summary of the arguments submitted and answers proposed**

### *Ski Taxi, Follo Taxi and SFD*

30. At the outset, Ski Taxi, Follo Taxi and SFD submit that, contrary to the contention of the Norwegian Government before the referring court, neither the Decision of the Competition Authority nor the judgment of Borgarting Court of Appeal found that Ski Taxi and Follo Taxi had agreed to refrain from submitting individual bids. Hence, a finding that an agreement to that effect between Ski Taxi and Follo Taxi exists constitutes a new matter of fact, which, according to the Notes for the guidance of Counsel in written and oral proceedings before the EFTA Court,<sup>1</sup> the Court should disregard.<sup>2</sup>

#### The first question

31. Ski Taxi, Follo Taxi and SFD submit that, in order to classify specific conduct as constituting a restriction by object, it does not suffice that such conduct is capable of restricting competition. Rather, it must reveal a sufficient degree of harm to competition.

32. In that respect, Ski Taxi, Follo Taxi and SFD state that Article 53(1) EEA prohibits agreements that “have as their object or effect” the restriction of competition. Only the most serious and harmful restrictions should be classified as restrictions by object.<sup>3</sup> They argue that caution should be exercised in that regard since restrictions by object (i) are prohibited without any requirement that their anti-competitive effects be shown; (ii) do not benefit from the *de minimis* exemption or the individual exemption provided for in Article 53(3) EEA; (iii) are presumed to appreciably restrict competition; and (iv) generally entail fines amounting to 10% of the annual turnover of the undertakings responsible for such conduct.

33. Ski Taxi, Follo Taxi and SFD claim that the test applied by Borgarting Court of Appeal, which is consistent with the case law of the Supreme Court of Norway, cannot be followed. The Court of Appeal held that conduct should be classified as constituting a restriction by object if it is capable of restricting competition. It further held that, since Ski Taxi and Follo Taxi could have submitted individual bids instead of joint bids, and since by submitting joint bids

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<sup>1</sup> Reference is made to Section B1, second paragraph, of the Notes.

<sup>2</sup> Reference is made to the judgment in *AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt München-Mitte*, C-30/93, EU:C:1994:224, paragraph 18.

<sup>3</sup> Reference is made, in particular, to the Opinion of Advocate General Wahl in *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:1958, points 54 to 61.



they agreed on the price to be offered to the contracting authority, their conduct was capable of restricting competition and thus constituted a restriction by object.

34. In the view of Ski Taxi, Follo Taxi and SFD, it follows from the case law of the Court of Justice of the European Union (“ECJ”), in particular its judgment in *Cartes bancaires*,<sup>4</sup> from the Commission’s Guidance on restrictions by object,<sup>5</sup> ESA’s General Guidelines<sup>6</sup> and ESA’s Horizontal Guidelines,<sup>7</sup> that conduct may be classified as constituting a restriction by object if it “reveal[s] a sufficient degree of harm to competition”, that is, if experience has revealed that such conduct likely leads to such harmful effects.

35. Therefore, Ski Taxi, Follo Taxi and SFD contend that it is not sufficient, in order to classify an agreement as a restriction by object, that it is capable of restricting competition. The ECJ’s findings in *T-Mobile* that a concerted practice may be regarded as having an anti-competitive object if it is “capable ... of resulting in the prevention, restriction or distortion of competition”<sup>8</sup> were rejected in *Cartes bancaires*, which set a higher standard for classification as a restriction by object, namely, a “sufficient degree of harm to competition”. That argument is supported by the subsequent judgment in *Maxima Latvija*. In that case, the ECJ held that a clause whereby the lessee of commercial premises in a hypermarket, a retailer, could prevent the lessor from renting premises to third parties, including competing retailers, “could potentially have the effect of restricting” those retailers’ access to the market. However, it went on to conclude that the agreements in question did “not ... show a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition by object”.<sup>9</sup>

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<sup>4</sup> Reference is made to judgments in *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 58; *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraphs 115 to 117; *SIA ‘Maxima Latvija’ v Konkurences padome*, C-345/14, EU:C:2015:784, paragraph 20; *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26; and *ING Pensii*, C-172/14, EU:C:2015:484, paragraphs 30 and 31.

<sup>5</sup> Commission Staff Working Document of 25 June 2014 – Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, accompanying the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (De Minimis Notice), OJ 2014 L 291, p. 1 (“the Commission’s Guidance on restrictions by object”). Reference is made to page 3, according to which “the distinction between ‘restrictions by object’ and ‘restrictions by effect’ arises from the fact that certain forms of collusion between undertakings reveal such a sufficient degree of harm to competition that there is no need to examine their actual or potential effects”.

<sup>6</sup> Guidelines of the EFTA Surveillance Authority on the application of Article 53(3) of the EEA Agreement, OJ 2007 C 208, p. 1, and EEA Supplement to the OJ 2007 No 42, p. 1 (“ESA’s General Guidelines”). Reference is made to paragraph 21 of ESA’s General Guidelines.

<sup>7</sup> Guidelines of the EFTA Surveillance Authority on the applicability of Article 53 of the EEA Agreement to horizontal cooperation agreements, OJ 2013 C 362, p. 3, and EEA Supplement to the OJ 2016 No 47, p. 1 (“ESA’s Horizontal Guidelines”). Reference is made to paragraph 24 of ESA’s Horizontal Guidelines.

<sup>8</sup> Reference is made to the judgment in *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraph 31.

<sup>9</sup> Reference is made to the judgment in *SIA ‘Maxima Latvija’*, cited above, paragraphs 22 and 23.

36. Ski Taxi, Follo Taxi and SFD consider it appropriate to reply next to the third question and, finally, to the second question.

The third question

37. Ski Taxi, Follo Taxi and SFD submit that joint bidding does not constitute a restriction by object. Only hard core restrictions, for instance price fixing, output limitation and market sharing, constitute restrictions by object. Such is the case of bid rigging, as is stated in the Commission's Guidance on restrictions of competition by object.<sup>10</sup> According to ESA's Horizontal Guidelines, joint purchasing agreements do not constitute hard core restrictions, unless they serve as a tool to engage in a disguised cartel.<sup>11</sup> The same applies to joint bidding.

38. Ski Taxi, Follo Taxi and SFD 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. Those are the criteria defined in *Cartes bancaires*.<sup>12</sup>

39. First, Ski Taxi, Follo Taxi and SFD maintain that it cannot be deduced from the content of the agreement to submit joint bids, nor from the terms of the joint bids themselves, that joint bidding constitutes a restriction by object. They acknowledge that the submission of joint bids involves an agreement between the parties submitting the joint bids on the price offered to the contracting authority. However, the service tendered out is jointly performed by the parties to the joint bids. 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. Moreover, in the present case, the parties submitting the joint bids, namely, Ski Taxi and Follo Taxi, were not under an obligation to refrain from submitting individual bids. Had they been under such an obligation, the submission of joint bids would have to be assessed under the doctrine of ancillary restraints.

40. Second, Ski Taxi, Follo Taxi and SFD submit that, in order to determine whether joint bidding constitutes a restriction by object, account must be taken of the objectives of the parties submitting the joint bids. In the present case, their objective was to offer increased capacity on the market. Such objective is legitimate and cannot be regarded as restricting competition in principle. Moreover, neither the SFD Shareholders' Agreement nor the SFD Strategy

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<sup>10</sup> Reference is made to the Commission's Guidance on restrictions of competition by object, cited above, point 2.4.

<sup>11</sup> Reference is made to ESA's Horizontal Guidelines, cited above, paragraph 205.

<sup>12</sup> Reference is made to the judgment in *Cartes bancaires*, cited above, paragraphs 53 and 54.

Document *expressly* state that SFD is entrusted with the submission of joint bids on behalf of its shareholders. In any event, SFD would only be entrusted with the submission of joint bids in *large* tender procedures.

41. Third, Ski Taxi, Follo Taxi and SFD contend that, while consideration should be given to the economic and legal context of particular conduct in order to determine whether it constitutes a restriction by object, classification as a restriction by object cannot be based on context alone.<sup>13</sup> In any event, in terms of legal context, there is no case law of the Court or the ECJ, nor decisional practice of the Commission or ESA that recognises joint bidding to constitute a restriction by object. As for the economic context, this was not given proper consideration by Borgarting Court of Appeal.

42. Fourth, Ski Taxi, Follo Taxi and SFD maintain that, in order to determine whether joint bidding constitutes a restriction by object, account may be taken of the subjective intentions of the parties, although that is by no means a necessary factor.<sup>14</sup> In the present case, the Court of Appeal found that the parties did not intend to restrict competition.

43. Therefore, Ski Taxi, Follo Taxi and SFD contend that joint bidding does not constitute a restriction by object. They observe, in contrast, that legal literature and the French Competition Authority have recognised that joint bidding must be examined in view of its potentially restrictive effects.<sup>15</sup>

44. In that regard, Ski Taxi, Follo Taxi and SFD rely on paragraph 30 of ESA's Horizontal Guidelines. 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". In their view, it can be deduced from that paragraph that an agreement between competitors who are not able to carry out independently the project covered by the agreement must be assessed with regard to its effects on competition, in other words, that it is not a restriction by object. Moreover, the Competition Authority itself has acknowledged in its Guidance on cooperation on projects that if only one of the parties submitting a joint bid is able to submit an individual bid, an assessment of the effects of that joint bid must be carried out.<sup>16</sup> As for the submission of joint

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<sup>13</sup> Reference is made to the Opinion of Advocate General Wahl in *Cartes bancaires v Commission*, cited above, points 44 and 45.

<sup>14</sup> Reference is made to the judgment in *Cartes bancaires*, cited above, paragraph 54.

<sup>15</sup> Reference is made to Bellamy & Child, *European Union Law of Competition* (2013), pp. 330-333, and to decisions of the French Competition Authority n° 05-D-24 of 31 May 2005, and n° 03-D-01 of 14 January 2003.

<sup>16</sup> Reference is made to paragraph 42 of the Competition Authority's Guidance on cooperation on projects of 24 February 2014.

bids by parties who are both able to submit individual bids, legal and economic literature considers this not to constitute a restriction by object.<sup>17</sup>

45. Finally, Ski Taxi, Follo Taxi and SFD argue that to classify joint bidding as constituting a restriction by object has the disadvantage of deterring small and medium-sized companies from submitting joint bids, even though such bids could increase the competitive pressure on leading market players. A further disadvantage results from the difficulty in distinguishing between tenderers who are able to submit individual bids and tenderers who are not.

The second question

46. Ski Taxi, Follo Taxi and SFD claim that the bids submitted by SFD in Tender Procedures 1 and 2 clearly stated that they were made on behalf of Ski Taxi and Follo Taxi, and that Ski Taxi and Follo Taxi would be SFD's sub-contractors. While Ski Taxi, Follo Taxi and SFD acknowledge that such transparency does not preclude the practice at stake from having a restrictive object, they stress that bid-rigging arrangements such as cover bidding, bid suppression, bid rotation and market allocation, which are restrictions by object, are usually kept secret.

Proposed answers

47. Therefore, Ski Taxi, Follo Taxi and SFD propose that the Court should answer the questions as follows:

*1. It is apparent from EU case law that the concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition to such an extent 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. Consequently, it is established that certain collusive behaviour, such as that leading to 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 redundant, for the purposes of applying Article 53(1) EEA, to prove that they have actual effects on the market. Experience shows that such behaviour leads to decrease in production and increase in price, resulting in poor allocation of resources to the detriment, in particular, of consumers.*

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<sup>17</sup> Reference is made to page 15 of the November 2011 opinion "Prosjektsamarbeid", prepared for the Competition Authority by Erling Hjelmeng and Tommy Stahl Gabrielsen and to the articles by Simen Klevstrand: "Joint bid labelled 'by object' infringement", published on Nordic Competition Blog on 30 March 2015, and "EFTA Court to consider joint bidding", published on Nordic Competition Blog on 22 March 2016.

*Consequently, to categorise a conduct as a “by object” restriction pursuant to Article 53 EEA, it is not sufficient that the cooperation is merely “capable of restricting competition”. Classification as a “by object” restriction may be applied only to an agreement which inherently, that is to say without the need to evaluate its actual or potential effects, have a degree of seriousness or harm to such an extent that its negative impact on competition seems highly likely.*

*2. While not a decisive criterion under the concept of a restriction “by object”, the fact that cooperation is carried out openly is capable of substantiating that the cooperation in question does not constitute a restriction by object. This is a relevant factor when examining the content and objectives of the agreement and the context of which it forms part, as well as the subjective intention of the parties. Thus, in case of a joint bid between competitors, openness vis-à-vis the procuring authority indicates that the joint bid truly involves a joint bid on the joint performance of the services requested, and that it does not serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.*

*3. In order to determine whether an agreement between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition “by object”, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. In addition, although the parties’ intention is not a necessary factor in this regard, this factor may be taken into account.*

*These are also the relevant aspects to be considered when determining whether a joint bid between two undertakings, which each are able to submit individual bids, constitutes a “by object” restriction. As particularly regards the content of the provisions and the objectives of such cooperation, regard must be had, inter alia, to*

*(i) whether the joint bid implies a cooperation on the joint performance of the contract services,*

*(ii) whether the agreement is carried out openly vis-à-vis the procuring authority, and*

*(iii) whether the agreement on submitting the joint bid is exclusive, i.e. preventing the parties from submitting individual bids in the same tender competition.*

*Insofar as the joint bid involves a cooperation on joint performance of services; is made open vis-à-vis the procuring authority; and does not impose exclusivity on the parties, such cooperation is, by its very*

*nature, and absent any “hard core” restrictions, not capable of revealing a sufficient degree of harm to competition to such an extent that its negative impact on competition seems likely. In this respect, a joint price offered for the joint provision of services does not amount to “price fixing” within the meaning of Article 53(1)(a). In these circumstances, elements relating to the economic and legal context surrounding the joint bid at issue are not capable in themselves of establishing the existence of an anticompetitive object. Neither is the subjective intention by the parties.*

### *The Norwegian Government*

#### The first question

48. The Norwegian Government submits that an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition. This follows from the judgments of the ECJ in *ING Pensii* and *Toshiba*.<sup>18</sup> Once an agreement has been classified as constituting a restriction by object, its effects may only be taken into account in order to set the amount of the fine and to assess damage claims.<sup>19</sup>

49. In order to determine whether an agreement reveals a sufficient degree of harm to competition, account must be taken of the content of its provisions, its objectives and the economic and legal context.<sup>20</sup>

50. As to the intention of the parties, the Norwegian Government maintains that it is not an essential factor, although there is nothing preventing the competent competition authorities or courts from taking it into account.<sup>21</sup> Therefore, it is irrelevant, in order to determine whether an agreement constitutes a restriction by object, that the parties had no intention to restrict competition on the market but aimed at improving it.<sup>22</sup> The pursuit of legitimate objectives may only be taken into account under Article 53(3) EEA.<sup>23</sup>

51. The Norwegian Government disagrees with the argument advanced by Ski Taxi, Follo Taxi and SFD to the effect that the threshold for classifying an

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<sup>18</sup> Reference is made to judgments in *ING Pensii*, cited above, paragraph 31, and *Toshiba*, cited above, paragraph 26.

<sup>19</sup> Reference is made, in particular, to judgments in *T-Mobile*, cited above, paragraph 31, and *Allianz Hungária Biztosító Zrt. and Others*, C-32/11, EU:C:2013:160, paragraph 38.

<sup>20</sup> Reference is made to judgments in *ING Pensii*, cited above, paragraph 33, and *Toshiba*, cited above, paragraph 27.

<sup>21</sup> Reference is made to judgments in *T-Mobile*, cited above, paragraph 27, and *Cartes bancaires*, cited above, paragraph 54.

<sup>22</sup> Reference is made to judgments in *General Motors BV v Commission*, C-551/03 P, EU:C:2006:229, paragraph 64, and *Competition Authority v BIDS*, C-209/07, EU:C:2008:643, paragraph 21.

<sup>23</sup> Reference is made to judgments in *VSPOB and Others v Commission*, T-29/92, EU:T:1995:34, paragraphs 96, 140 and 178, and *BIDS*, cited above, paragraph 21.

agreement as a restriction by object is higher in *Cartes bancaires* than it was in *T-Mobile*. In *Cartes bancaires*, the ECJ held that an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition. In *T-Mobile*, it found that a concerted practice may be regarded as a restriction by object if it is capable in an individual case of restricting competition.<sup>24</sup> In the view of the Norwegian Government, the criterion for classifying an agreement as a restriction by object is the same in *Cartes bancaires* and in *T-Mobile* and reflects earlier case law of the ECJ.<sup>25</sup> As confirmed in subsequent cases *Dole Food* and *Toshiba*, an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition.<sup>26</sup>

52. In that regard, the Norwegian Government notes that, once an agreement has been classified as a restriction by object, it is not necessary, in order to conclude that Article 53 EEA has been infringed, to demonstrate anti-competitive effects. Therefore, it is sufficient, in order to classify an agreement as a restriction by object, that it has *potential* anti-competitive effects, in other words, that it is capable of restricting competition. *Actual* anti-competitive effects of such an agreement may only be taken into account in order to determine the amount of the fine. The Norwegian Government concludes that, in order to classify an agreement as constituting a restriction by object, it suffices to demonstrate that it has potential anti-competitive effects, that is, that it is capable of restricting competition.

53. The Norwegian Government considers it appropriate to reply next to the third question and, finally, to the second question.

#### The third question

54. Having regard to the requirement of independence and the proper functioning of normal competition, the Norwegian Government emphasizes at the outset that Article 53(1) EEA is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.<sup>27</sup>

55. The Norwegian Government claims that the agreements listed in Article 53(1) EEA, namely, price fixing, output limitation, market sharing, the application of dissimilar conditions to equivalent transactions and tying, 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

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<sup>24</sup> Reference is made to judgments in *Cartes bancaires*, cited above, paragraph 49, and *T-Mobile*, cited above, paragraph 31.

<sup>25</sup> Reference is made to the Opinion of Advocate General Wathelet in *Toshiba*, C-373/14 P, EU:C:2015:427, point 51.

<sup>26</sup> Reference is made to judgments in *Dole Food*, cited above, paragraph 122, and *Toshiba*, cited above, paragraph 31.

<sup>27</sup> Reference is made to judgments in *VSPOB and Others*, cited above, paragraph 123; and *BIDS*, cited above, paragraph 34.

does not extend to an examination of their effects.<sup>28</sup> For instance, in *Toshiba* a market-sharing agreement was regarded as a restriction by object. Since market sharing is mentioned in Article 101(1)(c) TFEU, the analysis of the economic and legal context was limited to what was strictly necessary in order to establish the existence of a restriction of competition by object. The analysis of the economic and legal context only sought to determine whether the parties to the agreement were competitors.<sup>29</sup> The same reasoning applies to price fixing. Price fixing is mentioned in Article 101(1)(a) TFEU and is considered to be a restriction by object even if the parties to the agreement set only one component of the price,<sup>30</sup> or if they set the price indirectly through the exchange of information.<sup>31</sup>

56. The Norwegian Government contends that agreements of which only parts are hard core restrictions may nevertheless constitute restrictions by object. For instance, commercialisation agreements, that is, agreements between competitors to sell, distribute or promote their substitute products, are not listed in Article 101(1) TFEU. Therefore, they do not constitute hard core restrictions. Nevertheless, the parties to a commercialisation agreement may coordinate on prices. In that case, according to ESA's Horizontal Guidelines, commercialisation agreements are likely to constitute restrictions by object.<sup>32</sup> However, a commercialisation agreement does not constitute a restriction by object if, according to ESA's Horizontal Guidelines, 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". In that situation, an assessment of its effects is required, although it normally does not restrict competition.<sup>33</sup> The Norwegian Government suggests that joint bidding may be seen as a cooperation agreement. It is apparent from paragraph 237 of ESA's Horizontal Guidelines, cited above, that a cooperation agreement is "objectively necessary" only if *none* of the parties to the cooperation agreement 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.

57. The Norwegian Government emphasises that independence of economic operators, which must determine independently their policy on the market,<sup>34</sup> is of particular importance when those operators prepare bids. Therefore, any coordination between tenderers is harmful. As stated by the Commission in *European Sugar Industry*, "in a system of tendering, competition is of the essence.

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<sup>28</sup> Reference is made to the Opinion of Advocate General Wathelet in *Toshiba*, cited above, points 72, 73 and 74.

<sup>29</sup> Reference is made to the judgment in *Toshiba*, cited above, paragraphs 29 to 34.

<sup>30</sup> Reference is made to the judgment in *VSPOB and Others*, cited above, paragraphs 145 and 146.

<sup>31</sup> Reference is made, in particular, to the judgment in *Dole Food*, cited above, paragraph 122.

<sup>32</sup> Reference is made to ESA's Horizontal Guidelines, cited above, paragraphs 225 and 234.

<sup>33</sup> Reference is made to ESA's Horizontal Guidelines, cited above, paragraph 237.

<sup>34</sup> Reference is made, in particular, to the judgment in *T-Mobile*, cited above, paragraph 32.



If the tenders submitted by those taking part are not the result of individual economic calculation, but knowledge of the tenders by other participants or of concertation with them, competition is prevented, or at least distorted and restricted”.<sup>35</sup> In *VSPOB and Others*, the General Court found that concertation between potential competitors in response to an invitation to tender had *the object* and effect of restricting competition since it could lead to the fixing of certain terms of the tenders.<sup>36</sup> Moreover, Stockholm District Court recently held that joint bids by potential competitors are restrictions by object.<sup>37</sup> So did the Danish Competition Appeal Tribunal.<sup>38</sup> The OECD has also warned against situation where “two or more businesses file a ‘joint bid’ even though at least one of the undertakings could have bid on its own”.<sup>39</sup>

58. In the present case, the Norwegian Government maintains that the submission of joint bids by Ski Taxi and Follo Taxi in Tender Procedures 1 and 2 constitutes a restriction by object.

59. 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 Tender Procedures 1 and 2. Joint bidding by undertakings that have the capacity to submit individual bids is particularly harmful since it entails a form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition. First, joint bidding reduces the number of tenderers and eliminates potential competition between the parties submitting the joint bid. Second, the parties submitting the joint bid substitute their judgment for that of the contracting entity. Third, joint bidding may be assimilated to a commercialisation agreement where the parties agree on prices, which is a hard core restriction. Fourth, Ski Taxi and Follo Taxi also agreed on the number of dedicated cars, which entails fixing “other trading conditions” within the meaning of Article 53(1)(a) EEA and/or “limit[ing] or control[ing] production” within the meaning of Article 53(1)(b) EEA. Finally, since Ski Taxi and Follo Taxi had, independently of each other, the capacity to submit individual bids, joint tendering amounts to an agreement to share markets.

60. As regards the second criterion to be taken into account in order to determine whether an agreement constitutes a restriction by object, namely, its

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<sup>35</sup> Reference is made to Commission Decision of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV-26 918 – European Sugar Industry), OJ 1973 L 140, p. 7, Section II, F.

<sup>36</sup> Reference is made to the judgment in *VSPOB and Others*, cited above, paragraph 123.

<sup>37</sup> Reference is made to the judgment of Stockholm District Court (*Stockholm Tingsrätt*) of 21 January 2014, *Konkurrensverket v Däckia and Others*, p. 136.

<sup>38</sup> Reference is made to the order of the Danish Competition Appeal Tribunal (*Konkurrenceankenævnet*) of 11 April 2016, *Eurostar and Others v Konkurrencerådet*, pp. 17-18.

<sup>39</sup> Reference is made to the OECD Roundtable on “Public Procurement - The Role of Competition Authorities in Promoting Competition”, DAF/COMP (2007), 8 January 2008, pp. 9 and 146.

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.

61. 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.

62. The Norwegian Government submits that the arguments put forward by Ski Taxi, Follo Taxi and SFD do not undermine that conclusion.

63. First, as regards the argument advanced by Ski Taxi, Follo Taxi and SFD that their joint bids are part of a wider, legitimate cooperation, the Norwegian Government maintains that the joint bids at stake involved price fixing, which is a restriction by object. Moreover, only if Ski Taxi and Follo Taxi had lacked the sufficient resources to submit individual bids could their joint bids be regarded as promoting competition. In the present case, Ski Taxi and Follo Taxi had the resources to submit individual bids. 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. They are irrelevant in order to determine whether the joint bids constitute a restriction by object within the meaning of Article 53(1) EEA.

64. Second, as regards the argument advanced by Ski Taxi, Follo Taxi and SFD argument that their joint bids are not sufficiently harmful to normal competition, the Norwegian Government reiterates that the joint bids eliminated potential competition between Ski Taxi and Follo Taxi with regard to price. Moreover, the existence, or absence of, a non-compete arrangement whereby Ski Taxi and Follo Taxi refrain from submitting individual bids would only be relevant in order to establish a single and continuous infringement since the creation of SFD in 2001. However, the existence, or absence of, a non-compete arrangement is irrelevant in order to determine whether by submitting joint bids in Tender Procedures 1 and 2 Ski Taxi and Follo Taxi infringed Article 53 EEA.

65. Third, as regards the argument advanced by Ski Taxi, Follo Taxi and SFD that joint bidding may only have anti-competitive effects if the parties submitting the joint bid have significant market shares, the Norwegian Government reiterates that classification of an agreement as a restriction by object does not entail an assessment of its effects. In any event, in tender procedures market power cannot be assessed by reference to market shares held in the general market, since the market is defined by the contracting entity (as evidenced by the fact that, in Tender Procedure 2, Oslo University Hospital defined smaller areas in comparison with Tender Procedure 1 in order to generate competition).

## The second question

66. The Norwegian Government contends 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.

67. In that regard, the Norwegian Government submits that it is irrelevant whether disclosure of the joint character of the bid indicates that the parties had no intention to restrict competition. As mentioned above, the subjective intention of the parties is not a necessary factor when assessing if an agreement constitutes a restriction by object. Moreover, an agreement may be regarded as a restriction by object even if it does not aim only at restricting competition but also pursues legitimate objectives.<sup>40</sup> In any event, in the present case Ski Taxi and Follo Taxi only disclosed that they were SFD's sub-contractors because the contract documents required this. Therefore, no conclusion may be drawn from such disclosure as to their intentions.

68. Moreover, the Norwegian Government contends that it is irrelevant, in order to determine whether a joint bid reveals a sufficient degree of harm to competition, whether the joint character of the bid was disclosed by the parties. In the present case, the joint bids reduced the number of potential tenderers and eliminated competition between the parties. They also led the parties to coordinate on all terms of the bids, namely, price, quantity and quality. Those restrictions of competition arise whether or not the joint character of the bid is disclosed to the contracting entity. Therefore, an agreement may constitute a restriction by object irrespective of whether the cooperation was disclosed by the parties. This is consistent with the judgments of the ECJ in *BIDS* and *VSPOB*.<sup>41</sup> This is also consistent with the judgment of Stockholm District Court of 21 January 2014 according to which “the question of whether an agreement has been open or concealed is immaterial in order to determine whether it restricts competition by object or effect”, and with the order of the Danish Competition Appeal Tribunal of 11 April 2016.<sup>42</sup>

## Proposed answers

69. Therefore, the Norwegian Government proposes that the Court should answer the questions as follows:

*1. The classification of an agreement as a restriction of competition by object relates to certain types of coordination between undertakings that reveal a sufficient degree of harm to competition that there is no need to*

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<sup>40</sup> Reference is made to the judgment in *General Motors*, cited above, paragraph 64.

<sup>41</sup> Reference is made to judgments in *BIDS*, cited above, paragraphs 4 to 10 and 40, and *VSPOB and Others*, cited above, paragraphs 359 and 360.

<sup>42</sup> Reference is made to the judgment of Stockholm District Court of 21 January 2014, cited above, p. 134, and the order of the Danish Competition Appeal Tribunal of 11 April 2016, cited above, p. 18.

*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. An agreement pursues an anti-competitive object within the meaning of Article 53(1) EEA where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition.*

*2. Joint tendering by potential competitors in response to an invitation to tender, irrespective of whether it is made known to the contract awarder, is by its very nature harmful to the proper functioning of normal competition in a system of tendering. It is therefore immaterial for the classification of a joint tender as a restriction of competition by object within the meaning of Article 53(1) EEA whether the cooperation between the undertakings is made apparent in the tender. Beneficial effects and legitimate objectives put forward in justification of such cooperation may only be considered in relation to the criteria laid down in Article 53(3) EEA.*

*3. When assessing whether joint tendering constitutes a restriction of competition by object, particular regard must be had to whether one or more of the participants could have submitted independent bids and thus whether the joint tendering was objectively necessary. Joint tendering by potential competitors restricts competition by object since it leads to fixing of competition parameters, including selling prices, and entails that practical cooperation is substituted for the risks of competition. A joint tender accordingly pursues an anti-competitive object within the meaning of Article 53(1) EEA in situations where the participating undertakings could have submitted separate bids.*

ESA

Admissibility

70. ESA submits that, although the proceedings before the referring court concern a purely internal situation, the Court has jurisdiction. It is settled case law that it has jurisdiction to rule in situations where the facts of the cases being considered by the national courts were outside the direct scope of EEA law but where those provisions have been rendered applicable by domestic law, which adopts, for internal situations, the same approach as that provided for under EEA law.<sup>43</sup> In the present case, Section 10 of the Competition Act mirrors Article 53 EEA. Therefore, the Court has jurisdiction.

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<sup>43</sup> Reference is made, in particular, to the judgment in *Allianz Hungária*, cited above, paragraph 20.

### The first question

71. ESA submits that an agreement constitutes a restriction by object if it reveals a sufficient degree of harm to competition.<sup>44</sup> 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.<sup>45</sup>

72. 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”. The purpose of such analysis is to assess whether the individual agreement, in the particular circumstances, is capable of revealing a sufficient degree of harm to competition. For example, an agreement may constitute a restriction by object if its parties are competitors, whereas a similar agreement may not constitute such a restriction if its parties are not competitors. Therefore, analysis of the economic and legal context is required.<sup>46</sup>

73. 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.

### The second question

74. ESA contends that it is irrelevant, in order to determine whether an agreement constitutes a restriction by object, whether the cooperation between the parties was disclosed to the contracting entity. Moreover, it is irrelevant, to that end, whether the parties to the agreement had the subjective intention to restrict competition or whether they had other legitimate objectives.<sup>47</sup>

### The third question

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

76. ESA contends that 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.

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<sup>44</sup> Reference is made to judgments in *Cartes bancaires*, cited above, paragraph 57, and *Toshiba*, cited above, paragraph 26.

<sup>45</sup> Reference is made to the judgment in *Toshiba*, cited above, paragraph 27.

<sup>46</sup> *Ibid.*, paragraph 29.

<sup>47</sup> Reference is made to the judgment in *BIDS*, cited above, paragraph 21.

77. 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 bid submitted by Ski Taxi and Follo Taxi can be limited to determining whether those undertakings are actual or potential competitors. Therefore, the pro-competitive elements, if any, may only be taken into account under Article 53(3) EEA.

78. Finally, ESA claims that sub-contracting agreements have to be analysed on a case-by-case basis.<sup>48</sup> There is nothing to prevent competitors from acting as subcontractors for each other. However, subcontracting cannot result in the substitution of cooperation for competition.

#### Proposed answers

79. Therefore, ESA proposes that the Court should answer the questions as follows:

*1. The legal test to be applied when determining whether an agreement between undertakings has a competition-restricting object within the meaning of Article 53 EEA is whether it reveals a sufficient degree of harm to competition, having regard to the content of its provisions, its objectives and the economic and legal context in which it forms part. In order to categorise an agreement as an infringement "by object", it is sufficient that the agreement, which in itself reveals a sufficient degree of harm to competition, is capable of restricting competition.*

*2. The fact that a cooperation takes place openly is not a determining element when assessing whether a form of conduct constitutes an infringement by object.*

*3. The legal criteria that must be emphasised when considering a cooperation in the form of two competing companies submitting a joint tender through a joint venture is whether it reveals a sufficient degree of harm to competition, having regard to the content of its provisions, its objectives and the economic and legal context of which it forms part. In order to categorise an agreement as an infringement "by object", it is sufficient that the agreement, which in itself reveals a sufficient degree of harm to competition, is capable of restricting competition.*

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<sup>48</sup> Reference is made to ESA's General Guidelines and ESA's Horizontal Guidelines.

## *The Commission*

### The first question

80. The Commission submits that in *Cartes bancaires* the ECJ clearly stated that an agreement has the object of restricting competition if it reveals in itself a sufficient degree of harm to competition.<sup>49</sup>

81. The Commission disagrees with the contention made by *Ski Taxi*, *Follo Taxi* and *SFD* that in *Cartes bancaires* the ECJ set a higher standard than it did in its earlier judgment in *T-Mobile*. It is true that in *T-Mobile* the ECJ held that, in order to be categorised as a restriction by object, an agreement must simply be “capable in an individual case, having regard to the economic and legal context, of restricting competition”.<sup>50</sup> However, by stating in *T-Mobile* 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. It aimed at dismissing the referring court’s contention that classifying an agreement as a restriction by object requires consideration of its effects. By no means did the ECJ in *T-Mobile* establish a lower standard according to which any agreement capable of restricting competition constitutes a restriction by object. Therefore, in *Cartes bancaires* the ECJ did not, contrary to the allegations of *Ski Taxi*, *Follo Taxi* and *SFD*, overrule the standard set in *T-Mobile*. The standard for classifying an agreement as a restriction by object is, and has always been, that it must reveal a sufficient degree of harm to competition. This was confirmed in the subsequent judgment in *Toshiba*.<sup>51</sup>

82. The Commission states, however, that an agreement cannot constitute a restriction by object if it is not capable of restricting competition. This is because Article 101 TFEU can only apply where there is competition to be restricted. Consequently, while an agreement needs to be capable of restricting competition in order to be classified as a restriction by object, it may not be classified as such simply because it is capable of restricting competition; it must also reveal a sufficient degree of harm to competition.

83. The Commission submits that horizontal price fixing,<sup>52</sup> market sharing,<sup>53</sup> customer sharing<sup>54</sup> and joint capacity reduction<sup>55</sup> have been recognised by the ECJ as restrictions by object. However, the category of restrictions by object

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<sup>49</sup> Reference is made to judgments in *Cartes bancaires*, cited above, paragraph 57; *BIDS*, cited above, paragraph 15; and *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*, 56/65, EU:C:1966:38, page 249.

<sup>50</sup> Reference is made to the judgement in *T-Mobile*, cited above, paragraph 31.

<sup>51</sup> Reference is made to the judgment in *Toshiba*, cited above, paragraph 26.

<sup>52</sup> Reference is made, in particular, to the judgment in *Cartes bancaires*, cited above, paragraph 51.

<sup>53</sup> Reference is made to the judgment in *Toshiba*, cited above, paragraph 28.

<sup>54</sup> Reference is made to the judgment in *ING Pensii*, cited above, paragraph 32.

<sup>55</sup> Reference is made to the judgment in *BIDS*, cited above, paragraphs 33 to 40.

encompasses also other, less obvious, restrictions, for which a closer examination of the agreement may be required.

84. 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.<sup>56</sup> Although the intention of the parties is not a necessary factor, it may be taken into account.<sup>57</sup>

85. First, as regards the content and the objectives of the agreement, the Commission contends that account should be taken not only of the wording of the agreement<sup>58</sup>, 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 restrict competition by object.<sup>59</sup>

86. Second, as regards the economic and legal context of the agreement, the Commission submits that 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.<sup>60</sup> 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 anti-competitive.<sup>61</sup> 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 *Toshiba*, 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.<sup>62</sup>

The second question

87. The Commission contends that it is irrelevant, in order to determine whether joint bidding constitutes a restriction by object, whether the cooperation between the parties was disclosed to the contracting entity. What is relevant is whether joint bidding reveals in itself a sufficient degree of harm to competition. Whether cooperation was concealed or disclosed to the contracting entity has no bearing on

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<sup>56</sup> Reference is made, in particular, to the judgment in *Cartes bancaires*, cited above, paragraph 53.

<sup>57</sup> *Ibid.*, paragraph 54.

<sup>58</sup> Reference is made, in particular, to the judgment in *BIDS*, cited above, paragraph 21.

<sup>59</sup> Reference is made, in particular, to the judgment in *General Motors*, cited above, paragraph 64.

<sup>60</sup> Reference is made, in particular, to the judgment in *Cartes bancaires*, cited above, paragraph 78.

<sup>61</sup> Reference is made to judgments in *Pierre Fabre Dermo-Cosmétique SAS*, C-439/09, EU:C:2011:649, paragraphs 39 to 47, and *MasterCard Inc. and Others v European Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 90 to 95 and 107.

<sup>62</sup> Reference is made to the judgment in *Toshiba*, cited above, paragraph 29.



this. Moreover, cooperation conducted publicly has been found to constitute a restriction by object.<sup>63</sup>

### The third question

88. 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.

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

90. As regards the economic and legal context of the agreement, the Commission contends that Ski Taxi and Follo Taxi were competitors in each of the seven municipalities in the Follo region. Moreover, it is of particular importance that, according to the request for an advisory opinion, Ski Taxi and Follo Taxi could both have submitted individual bids, and the submission of joint bids is thus not necessary to allow them to enter the market.<sup>64</sup>

91. Moreover, the Commission notes that 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 an ancillary restraint to the operation of SFD. If such is the case and the operation of SFD is not anti-competitive, the submission of joint bids would 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.<sup>65</sup> More precisely, it should be assessed 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.

92. Finally, the Commission claims that the fact that an agreement does not seek only to restrict competition but has other, legitimate aims is irrelevant in order to determine whether it constitutes a restriction by object. Such additional aims may only be taken into account under Article 53(3) EEA.

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<sup>63</sup> Reference is made to the judgment in *BIDS*, cited above.

<sup>64</sup> Reference is made to 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 L 11, p. 1, paragraph 237.

<sup>65</sup> Reference is made to the judgment in *MasterCard*, cited above, paragraph 91.

Proposed answers

93. Therefore, the Commission proposes that the Court should answer the questions as follows:

*1. The legal test for determining whether an agreement constitutes a restriction of competition “by object” within the meaning of Article 53 EEA is whether it reveals, in itself, a sufficient degree of harm to competition such as to be regarded, by its very nature, as being injurious to the proper functioning of normal competition.*

*The criteria to be applied in making this assessment require an analysis of the content and objectives of the agreement, as well as the economic and legal context of which it forms part.*

*Furthermore, the EFTA Court is not precluded, in its assessment of whether an agreement constitutes a restriction of competition by object, from having regard to the intentions of the parties to that agreement.*

*It is not sufficient, in order to categorise a form of conduct as restrictive by object pursuant to Article 53 EEA, that it is capable of restricting competition. While agreements need to be capable of restricting competition to constitute restrictions by object, the mere fact of such capacity is not, of itself, sufficient to find an anti-competitive object, without proof that the agreement discloses a sufficient degree of harm to competition such as to restrict competition by its very nature.*

*2. The fact that cooperation is conducted openly is of no legal significance for the consideration of whether it constitutes a restriction by object.*

*3. The application of the legal criteria employed to determine if an agreement reveals a sufficient degree of harm to competition and thus constitutes a restriction by object does not vary depending on the circumstances of the case.*

*Therefore, an agreement to submit a joint tender ought to be assessed with regard to its content and objectives, as well as the economic and legal context of which it forms part.*

*In this regard, the Commission takes the view that particular consideration be given to (i) the wording used by the parties themselves in characterising their cooperation; (ii) the national court’s finding that both parties could have submitted a tender application separately; and (iii) the fact that joint tendering generally has the object of coordinating prices.*

Carl Baudenbacher  
Judge-Rapporteur