JUDGMENT OF THE COURT

22 March 2002*

(Competition rules - Collective agreements - Transfer of occupational pension scheme)

In Case E-8/00

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 Arbeidsretten (Labour Court) of Norway for an Advisory Opinion in a case pending before it between

Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund (Norwegian Union of Municipal Employees)

supported by

Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees),

and

Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities)

Hamarøy kommune and Tysfjord kommune

Steigen kommune and Hitra kommune

Tana kommune

Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune

on the interpretation of Articles 53 and 54 of the EEA Agreement.

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* Language of the Request: Norwegian.

THE COURT,

composed of: Thór Vilhjálmsson, President (Judge-Rapporteur), Carl Baudenbacher and Per Tresselt , Judges,

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

– the Plaintiff, the Norwegian Federation of Trade Unions, represented by Advokat Atle Sønsteli Johansen and Advokat Håkon Angell, together with the Norwegian Union of Municipal Employees, represented by Advokat Geir Høin;

– the Intervener, the Norwegian Confederation of Municipal Employees, represented by Advokat Vegard Veggeland;

– the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Advokat Per Kristian Knutsen and Advokat Astrid Merethe Svele;

– the Defendants, Hamarøy kommune and Tysfjord kommune, represented by Advokat Haakon Blaauw and Advokat Dag Steinfeld;

– the Defendants, Hitra kommune and Steigen kommune, represented by Advokat Siri Teigum and Advokat Svein Aage Valen;

– the Defendant, Tana kommune**,** represented by Advokat Tarjei Thorkildsen, Advokat Kari B. Andersen, and Advokat Jan Magne Langseth;

– the Defendants, Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Advokat Wilhelm Matheson and Advokat Jan Fougner;

– the Government of Norway, represented by Marianne Djupesland, Adviser, Royal Ministry of Foreign Affairs, acting as Agent;

– the Government of Iceland, represented by Magnús Kjartan Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the Government of Sweden, represented by Anders Kruse, Director-General for Legal Affairs, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Officer, Legal and Executive Affairs Department, acting as Agent;

– the Commission of the European Communities, represented by Anthony Whelan and Wouter Wils, members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard the oral observations of the Plaintiff, represented by Atle Sønsteli Johansen; the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Per Kristian Knutsen; the Defendants, Hitra kommune and Steigen kommune, represented by Siri Teigum; the Defendants Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Wilhelm Matheson; the Defendants Hamarøy kommune and Tysfjord kommune, represented by Haakon Blaauw; the Government of Norway, represented by Beate Berglund Ekeberg; the EFTA Surveillance Authority, represented by Per Andreas Bjørgan; and the Commission of the European Communities, represented by Wouter Wils, at the hearing on 30 and 31 October 2001,

gives the following

Judgment

I Facts and procedure

1 By a reference dated 27 September 2000, registered at the Court on 2 October 2000, Arbeidsretten (Labour Court of Norway), submitted a Request for an Advisory Opinion in connection with a case brought before it by the Plaintiff, Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions, hereinafter "LO"), with Norsk Kommuneforbund (Norwegian Union of Municipal Employees, hereinafter "NKF"), supported by Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees, hereinafter "KFO") and Akademikernes Fellesorganisasjon (Confederation of Academic and Professional Unions in Norway) as interveners, against Defendants: Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities, hereinafter "KS"); Hamarøy kommune and Tysfjord kommune; Steigen kommune and Hitra kommune; Alta kommune and Tana kommune; Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune (hereinafter collectively the "Defendants").

2 The dispute before Arbeidsretten concerns the Basic Collective Agreement for Municipalities, etc., for the Contract Period 1 May 1998 to 30 April 2000 (*Hovedtariffavtalen for kommuner, m.v. for tariffperioden 1. mai 1998 – 30.*

April 2000) (hereinafter the "Basic Collective Agreement"), between, on the one hand, various bodies representing municipal employees and, on the other hand, KS. More precisely it is disputed whether the defendant municipalities had breached certain provisions contained in chapter 2 of the Basic Collective Agreement, in particular paragraphs 2, 3 and 4 in Section 2.1.8, when they transferred their occupational pension insurance scheme from one supplier, Kommunal Landspensjonskasse (hereinafter "KLP"), a private mutual life insurance company, to other insurance companies. There is also the issue of the legal consequences of any such breach.

3 The Plaintiff argues that the municipalities, in transferring their occupational pension insurance scheme, breached several of the provisions of the Basic Collective Agreement. The defendant municipalities have submitted that the claims must be rejected and argue *inter alia* that several of the provisions in the Basic Collective Agreement invoked by the Plaintiff are void because they are contrary to Articles 53 and 54 EEA and are therefore not legally binding.

The Municipalities and their status as employers

4 The municipalities and county municipalities in Norway are established and regulated by Act No. 107 of 25 September 1992 Concerning Municipalities and County Municipalities (*kommuneloven*, hereinafter the "Local Government Act"). In the municipal sector, there are roughly 550 000 employees. Of these, about 100 000 are teachers, who are municipal employees but who are covered by collective agreements with the State. Thus, in the rest of the municipal sector there are around 450 000 employees. Of these, roughly 430 000 are directly employed by the municipalities, of whom approximately 60 000 in the municipality of Oslo. The aforementioned figures are estimates based on available statistical sources with reference to the labour market situation in late 1998/early 1999.

5 The principal Defendant, KS, is a membership organisation and interest group, and is also an employers' association. All municipalities and county municipalities are currently members of KS and are affiliated with KS's employer activity. Oslo municipality is, however, exempt from following KS collective agreements. Thus, as an employers' association KS has 434 municipalities and 18 county municipalities as members. These have a total of around 370 000 employees (excluding teachers). Of these, some – such as those filling temporary vacancies and positions, etc. – fall outside the scope of application of the basic collective agreements for municipalities, and it is uncertain exactly how many employees are covered by the provisions on occupational pensions.

6 KS, as an employer association, can enter into collective agreements with binding effect for its members. , Section 28 of the Local Government Act allows municipalities and county municipalities to delegate the power to conclude such

agreements to "an association of municipalities and county municipalities." This has been done by all of the municipalities/county municipalities who are affiliated with KS' employer activities. The power of KS to conclude collective agreements is stated in its Articles of Association.

Trade Unions

7 There are in all 39 "unions" ("*forbund*") or "trade unions" ("*fagforbund*") representing employees in the municipal sector in Norway. In negotiations with KS for the establishment and revision of collective agreements, the 39 unions are represented through their "joint negotiations bodies" ("*forhandlingssammenslutninger*"). The collective agreements are generally concluded between KS and the individual union as parties.

8 Consequently, the Basic Collective Agreement is not just one agreement for municipalities, etc., but rather consists of several basic collective agreements, with the relevant union as party on the employee side in the individual agreements and KS as party on the employer side in all of the agreements. For the contract period 1998-2000 there were 39 different basic collective agreements for employees in municipalities and county municipalities. In practice, however, these basic collective agreements are identical in content in so far as it has any relevance to the present case. The Basic Collective Agreement covers, in the main, all employees who are employed by municipalities and county municipalities. However, for certain activities and for enterprise members, KS has separate collective agreements containing different regulations on certain points, *inter alia* on pension matters.

Collective agreements as legal instruments

9 Under the Norwegian Act No. 1 of 5 May 1927 Relating to Labour Disputes (*arbeidstvistloven*, hereinafter the "Labour Disputes Act"), a collective agreement is understood to mean an agreement "respecting conditions of employment and salary or other matters relating to employment." It must be concluded between an employer or employers' association on the one hand and a "trade union" on the other, see section 1(8) of the Act. A collective agreement is, under Norwegian law, an agreement that is legally binding. Firstly, as such, it creates obligations for all parties to the collective agreement. Next, it also binds the members of the parties to the collective agreement. The individual employers (in this case, the municipalities) and the individual employees who are employed by the employers in question, and who are members of the organisations that are party to the collective agreement, are legally bound by the collective agreement. Furthermore, a collective agreement binds only those employers and employees who are members of the organisations concerned. Thus, under Norwegian law, a collective agreement has no general validity ("universal application" or *erga*

omnes effect). Nor is there any Norwegian legislation of relevance to the present case giving public authorities the power to stipulate that a collective agreement is to be "with effect for everyone" and binding for all employers (or employees) in a branch, sector, or the like. Who is legally bound by or has rights under a collective agreement depends on the individual collective agreement and the membership in the organisations participating in the agreement.

10 Furthermore, the parties to the collective agreement have full control over the collective agreement in that they may modify it, even during the course of the contract period. The parties also control the interpretation of the collective agreement, in that, if the parties agree on a particular interpretation of a provision, that interpretation will, as a rule, be the one applied. The interpretation agreed on by the parties is also binding for the members in the same manner as the agreement itself.

The Norwegian pension system

11 Briefly, the Norwegian pension system is based on: a) benefits under the National Insurance Scheme, which are statutory pension benefits pursuant to Act No. 19 of 28 February 1997 Relating to National Insurance Pension Benefits (*Folketrygdloven*); b) group occupational pension schemes for supplementary pensions in addition to benefits under the National Insurance Scheme; and, c) individual pension and life insurance contracts, which may be entered into on a voluntary basis. Only group occupational pension schemes for supplementary pensions are considered in the case at hand.

12 Supplementary occupational pension schemes are characterised by the fact that they are related to work and they are collective. Such schemes may be founded in law and be compulsory; otherwise, they are, in principle, voluntary. Such pension schemes are to be found in both the public sector – including in the municipal sector – and in the private sector. A common trait of occupational pension schemes is that they are benefit-based. Otherwise, the content, scope, etc. of the schemes vary.

13 Presently, all municipalities and county municipalities have occupational pension schemes. The authority to establish or join occupational pension schemes follows expressly from section 24, fourth paragraph of the Local Government Act. The purpose of that provision was first and foremost to provide a more definitive basis of authority for State regulation, control and supervision of occupational pension schemes. Section 24, paragraph 4, second sentence of the Local Government Act authorises the promulgation of detailed provisions on the material framework for municipal occupational pension schemes, their content and scope. The present rules are contained in Regulation No. 374 of 22 April 1997 on Pension Schemes for Municipal or County Municipal Employees (*forskrift av 22. april 1997 nr. 374 om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte,* hereinafter the "Regulation on Pension Schemes for

Municipal or County Municipal Employees"). That Regulation sets out, in the main, that:

> – pension benefits in municipal pension schemes must not be higher than in the Norwegian Public Service Pension Fund (section 2, first paragraph);
>
> – age limits must not be lower than for equivalent positions in the State system (section 2, second paragraph); and
>
> – as a rule, all employees in municipalities/county municipalities are to be covered; however, the pension scheme may contain general conditions which limit membership in the scheme due to the scope of the employment situation, length of service and so on (section 3).

14 A municipality may organise its occupational pension scheme in various ways: through its own pension institution, through participation in a collective pension institution or through a life insurance company. In 1998, the total number of 453 municipalities and county municipalities had organised their occupational pension schemes as follows:

> – 21 municipalities/county municipalities had their own pension institutions;
>
> – 422 municipalities/county municipalities were members of the Felles kommunal pensjonsordning (Joint municipal pension scheme, hereinafter, "FKP") in KLP;
>
> – 10 municipalities had group pension insurance contracts with insurance companies other than KLP.

15 These figures show that 93% (422 of 453) of the municipalities were party to FKP in 1998. The municipalities are of different sizes and have different numbers of employees. It is estimated that occupational pension schemes for about 65% of all municipal employees are entered with KLP; the estimate and the basis therefor are, however, uncertain.

16 KLP is a private mutual life insurance company. KLP had received a licence to provide group pension insurance, etc., effective 1 January 1974, under the insurance companies legislation then in force. The licence was most recently renewed in 1998by Act No. 39 of 10 June 1988 on Insurance Activity (*forsikringsvirksomhetsloven*, hereinafter the "Insurance Activity Act") . KLP's members (company partners) are the policyholders, i.e. those employers who have signed an insurance contract with the company. KLP is authorised to have members other than municipalities/county municipalities, but with certain limitations. Section 1-3, second paragraph of KLP's Articles of Association, which is incorporated in the licensing conditions, reads as follows:

> "The proportion of policyholders which are not municipalities, county municipalities, undertakings, independent enterprises (undertakings), institutions or organisations in

> which municipalities or county municipalities have a majority interest (ownership) shall be limited so that together they cannot have premium reserves which equal more than 10 percent of the total premium reserves in the company. Majority interest means more than 50 percent of both the ownership shares and the voting rights or equivalent interest in relation to the purpose of the enterprise, institution or organisation."

17 KLP's main product is group pension insurance, which is the most important and most far-reaching scheme. Furthermore, municipalities and county municipalities may be members of KLP, regardless of whether they are affiliated to FKP. As at September 1999, all 453 municipalities and county municipalities were members of KLP. At the same time, KLP had about 2 150 other members (enterprises). Their share of annual premium payments accounted for roughly 14.5% of a total premium volume of around NOK 5 billion.

18 KLP's highest decision-making body is the general meeting (section 3-8 Articles of Association, section 3-2 1999 Articles of Association). According to the current Articles of Association, the general meeting is to consist of representatives of the company's members, elected in 19 constituencies. The municipalities/county municipalities make up 18 constituencies and the enterprises make up one constituency. An individual constituency "elects between 4 and 17 representatives, depending on the total premium volume in the company's pension schemes paid by that constituency's members," see sections 3-2 and 3-3 of the 1999 Articles of Association.

19 Various "cooperation agreements" have been entered into between KLP and KS. Two of these are relevant to this case: one agreement of 14 December 1994, and an agreement of 30 August 1999, which replaced the earlier agreement. Both agreements contain provisions on regular contact between KS and KLP, the right of KLP to participate at certain meetings and events in KS, the exchange of information and benefits (including compensation for marketing of KLP's products), etc. The agreement of 1999 is more detailed than the one from 1994.

20 The Norwegian Ministry of Finance has given KLP a dispensation from certain provisions of the Insurance Activity Act, including section 7-6 on premiums. As a mutual insurance company, KLP may, pursuant to its Articles of Association and section 4-8 of the Insurance Activity Act, conduct a retroactive assessment of premiums – by which it is meant that "all policyholders shall pay further premiums when it turns out, after the fact, that not enough premiums have been paid in advance, and the premium calculation system presupposes that adjustments, defined benefit guarantees, etc., are insured," see the Banking, Insurance and Securities Commission's letter of 16 December 1998 to the Norwegian Public Service Pension Fund.

21 KLP has entered into a transfer agreement with the Norwegian Public Service Pension Fund. Through this transfer agreement, policyholders of occupational pension schemes with KLP are affiliated with the transfer system.

22 FKP is an occupational pension insurance scheme with KLP. It was established as of 1 January 1974, at the same time as KLP was established as an independent

insurance company, and is regulated by its own articles of association. FKP has been the object of amendments over the years. The relevant Articles of Association are from 1 January 1999.

23 FKP is a joint group pension insurance scheme. Section 1-2 of their Articles of Association, concerning contracts of affiliation, reads:

> "Municipalities, county municipalities as well as undertakings, independent enterprises, institutions or organisations in which municipalities or county municipalities have a majority interest may enter into contracts with KLP on membership in and affiliation to the Joint municipal pension scheme."

24 FKP is subject to the Regulation on Pension Schemes for Municipal or County Municipal Employees and to Act No. 26 of 6 July 1957 Relating to the Coordination of Pension and Insurance Benefits (*samordningsloven*, the "Pension and Insurance Coordination Act"), and is a party to the transfer system.

25 With respect to benefits, FKP corresponds largely to the occupational pension scheme under the Public Service Pension Fund Act, see on this point section 1-1, second sentence of the FKP Articles of Association. FKP is thus a defined benefit scheme and includes the same benefits as the Norwegian Public Service Pension Fund, with the same pension coverage and rules on accrual time.

26 The system of financing of FKP is based on insurance principles with advance payment of premiums. The premium consists of the employer's share and "membership contributions," see section 12-1 of the FKP Articles of Association. "Membership contributions" are paid by the covered employees, at a rate of 2% of their salary. Remaining premiums are to be covered by those employers who participate in FKP.

II Questions

27 The following questions were referred to the EFTA Court:

> *Scope of application of Article 53 EEA*
>
> *1a. Does a collective agreement generally entail binding legal effects mutually between the participating members on the employer side which can be regarded as an "agreement[ ] between undertakings" under Article 53 EEA?*
>
> *1b. If an employer organisation concludes a collective agreement, is this a "decision[] by [an] association[] of undertakings" under Article 53 EEA?*
>
> *1c. Is a municipality an "undertaking" under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto?*

2a. Can a collective agreement provision which has objectives other than to improve salary and working conditions come within the scope of Article 53 EEA?

2b. If question 2a is answered in the affirmative: which conditions must then be met?

3. Do collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall within the scope of application of Article 53 EEA?

Prohibition in Article 53 EEA

4. Is it compatible with Article 53 EEA for a collective agreement condition to require that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier?

5a. Is it compatible with Article 53 EEA for a collective agreement provision to provide that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement?

5b. If question 5a is answered in the affirmative: will the assessment be otherwise if approval can only take place through unanimity amongst the parties?

6. Is it compatible with Article 53 EEA for a collective agreement provision to provide that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body?

7a. Is it compatible with Article 53 EEA for collective agreement provisions to provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the public body which administers the transfer scheme?

7b. If question 7a is answered in the affirmative: will the assessment be otherwise if inclusion in the transfer agreements cannot take place before a decision on change has been made?

8. Can the sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-

2000, be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein?

Interpretation of Article 54 EEA

9. Can an association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, be regarded as an "undertaking" under Article 54 EEA in the negotiation of collective agreements?

10. Can an undertaking, assuming that it has a "dominant position", conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA?

III Legal background

28 The questions submitted to the Court concern the compatibility of certain provisions of the Basic Collective Agreement with Article 53 and 54 EEA.

29 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."

30 Article 54 EEA reads as follows:

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

Such abuse may, in particular, consist in:

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

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

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

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

31 The relevant provisions of the Basic Collective Agreement, in the case presented to the EFTA Court, are to be found in chapter 2 thereof. They read as follows:

"**2.0 Definition**

Occupational pension scheme means that pension to which an employee is entitled in accordance with the present collective agreement and corresponding to the articles of association as may be in force at any time for the joint municipal pension scheme with KLP.

2.1 Occupational pension scheme

By 1 January 1997, all employers shall have established a pension scheme for their employees which meets the following requirements:

2.1.1 The pension scheme shall cover all permanent employees who have working hours corresponding to at least 14 hours per week. Temporary employees shall be covered after 6 months' consecutive employment, provided that the working hours correspond to at least 14 hours per week.

As of 1 January 1999, the pension scheme shall cover all employees who have average working hours which correspond to the minimum requirement.

2.1.2 The pension scheme shall guarantee the members an aggregate retirement/disability pension of at least 66% of the fixed basis for calculating benefits at full accrual. The pension scheme shall also give entitlement to spouse and children's pensions.

The accrual of pension shall take place in a linear fashion, i.e. equally great portions of full pension shall accrue for each year one is a member. The requirement for full accrual is set at 30 years. For those who cease employment with deferred pension, the requirement for full accrual is set at maximum 40 years.

The fixed basis for calculating benefits is calculated in accordance with clause 2.1.7, cf. 2.3.

2.1.3 The setting of age limits and rules on the right to withdraw retirement pension before the age limit is reached shall follow the same principles as are in force in the Norwegian Public Service Pension Fund. The parties to the collective agreement shall make the necessary adaptations in the municipal sector.

2.1.4 The pensions shall be adjusted in accordance with the adjustment of the basic amount under the National Insurance Scheme. The same applies for the fixed basis for calculating benefits for those who cease employment before they are entitled to pension.

2.1.5 The pension rights shall be covered by a transfer agreement with the Norwegian Public Service Pension Fund and other municipal pension schemes, so that the aggregate pension is calculated as if it had accrued in the last scheme in which one was a member.

2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution based on insurance products which are taken note of by the Banking, Insurance and Securities Commission.

2.1.7 The fixed basis for calculating benefits shall be set based on regular salary fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.

2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. Minutes of the discussions shall accompany the file through to the decision in the municipal council/county council/board.

Before the decision-making body may begin to deal with a possible change of company, relevant offers for a new occupational pension scheme shall be put before those members of the Pension Committee who represent the parties to the collective agreement, who shall attest whether the various pension insurance products satisfy the aforementioned requirements in the collective agreement.

In addition, the occupational pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.

Before the matter may be decided upon by the municipal council/county council/board, there must be approval from the Norwegian Public Service Pension Fund, relating to

inclusion in the transfer agreement, and the pension scheme must be taken note of by the Banking, Insurance and Securities Commission, cf. clauses 2.1.5 and 2.1.6."

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

IV Findings of the Court

General remarks on the relationship between collective agreements and EEA competition law

33 The law governing the conclusion, application and interpretation of agreements concluded in the process of collective bargaining between management and labour has not been the subject of harmonization within the European Economic Area. The legal foundation for dealing with a collective agreement is therefore to be found in national law. However, both national law and collective agreements must operate within the framework of EEA law.

34 Fundamental differences distinguish the labour market from the goods, service and capital markets. Industrial societies have recognised the need to establish a balance between employers and individual workers by enacting labour laws that authorise unions of workers to negotiate collective agreements with employers or associations of employers that have as an inevitable effect the restriction of competition in the labour market.

35 On that background, legislatures and courts in most market economy oriented jurisdictions have drawn the conclusion that collective agreements between management and labour must to some extent be sheltered from the competition rules, without making that immunity unlimited (see the analysis in the Opinion of Advocate-General Jacobs in Case C-67/96 *Albany*, Joined Cases C-115/97 to C-117/97 *Brentjens'* and Case C-219/97 *Drijvende Bokken*, reported in [1999] ECR I-5751, at paragraph 109).

36 The Court of Justice of the European Communities has acknowledged that certain restrictions on competition are inherent in collective agreements between organisations representing employers and workers. The social policy objectives of such agreements would be seriously undermined if made subject to Article 81(1) EC when management and labour are seeking jointly to adopt measures to improve conditions of work and employment. It follows from an interpretation of the provisions of the EC Treaty as a whole that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC (see

Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 59 and 60). The Court of Justice of the European Communities confirmed this conclusion in a series of judgments (see Joined cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121; Joined cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-645; and Case C-222/98 *van der Woude* [2000] ECR I-7111).

37 The result arrived at in the above mentioned judgments of the Court of Justice of the European Communities is based on the balancing of concerns relating to the effective functioning of the market with the pursuit of social policy objectives such as the importance of promoting a harmonious and balanced development of economic activities, and a high level of employment and of social protection.

38 The Court must examine whether the social policy objectives limiting the applicability of Article 81 EC have a sufficient basis in the EEA Agreement to limit the applicability of the corresponding Article 53 EEA.

39 As a preliminary point, the Court recalls that Article 53 EEA is identical in substance to Article 81 EC. According to Articles 6 EEA and 3(2) SCA, the case-law of the Court of Justice of the European Communities is therefore relevant for the Court in its interpretation of Article 53 EEA. It is a fundamental objective of the EEA Agreement to achieve and maintain uniform interpretation and application of those provisions of the EEA Agreement that corresponding to provisions of the EC Treaty, and to arrive at equal treatment of individuals and economic operators as regards conditions of competition in the whole European Economic Area.

40 Article 53 EEA must be read with Article 1(2)(e) EEA, in which the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected, are defined as being necessary means to attain the objectives of the EEA Agreement. The Court also recalls that the second paragraph of Article 3 EEA requires that each Contracting Party shall abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement.

41 The EEA Agreement contains various statements on the significance of social policy objectives. The Court observes that the seventh recital of the preamble to the EEA Agreement refers to the desire to strengthen the cooperation between the social partners in the European Community and the EFTA States. The eleventh recital of the preamble refers to the importance of the development of the social dimension in the European Economic Area and to the wish to ensure economic and social progress and to promote conditions for full employment, and for an improved standard of living and improved working conditions within the European Economic Area.

42 These considerations are further reflected in the Main Part of the EEA Agreement. Article 1(2)(f) EEA specifically refers to closer co-operation in the field of social policy. Furthermore, Part V, Chapter 1 of the EEA Agreement

(Articles 66 to 71) contains provisions on social policy. Article 66 EEA states that the Contracting Parties agree upon the need to promote improved working conditions and an improved standard of living for workers. Article 67 EEA provides that the Contracting Parties shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers. Article 71 EEA provides that the Contracting Parties shall endeavour to promote the dialogue between management and labour at the European level. Moreover, Article 78 EEA states that the Contracting Parties shall strengthen and broaden cooperation in the framework of the Community's activities in the field of social policy. In addition, Article 96 EEA makes provision for co-operation between economic and social partners.

43 Furthermore, the Declaration by the Governments of the EFTA States on the Charter of the Fundamental Social Rights of Workers, annexed to the Final Act to the EEA Agreement must be mentioned, where the EFTA States emphasise their commitment to the policy objectives laid down in the Charter. In the terms of that Declaration, the EFTA States share the view that an enlarged economic cooperation must be accompanied by progress in the social dimension of integration, to be achieved in full cooperation with the social partners. It is also stated that the EFTA States welcome the strengthened cooperation in the social field with the Community and its Member States established by the EEA Agreement.

44 This leads the Court to the conclusion that the test identified by the Court of Justice of the European Communities for defining the scope of Article 81 EC in relation to collective agreements must likewise be applied with respect to the scope of Article 53 EEA. Agreements entered into in the framework of collective bargaining between employers and employees and intended to improve conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of the prohibition contained in Article 53(1) EEA.

45 The factual circumstances and the various issues in dispute between the parties in the main proceedings demonstrate a considerable complexity. The written pleadings and oral arguments have not led to clarity on all points. Therefore, the factual situations in the above-cited judgments of the Court of Justice of the European Communities may be distinguishable from the one in the present case.

46 The Court also observes that the several jurisdictions of the European Economic Area have employed differing legislative techniques in demarcating the interface between the law of collective agreements between management and labour, and other areas of law, such as the general law of contract and competition law. National legislatures must have a measure of appreciation for balancing rules of national competition law with the law of collective labour agreements.

Questions 2a, 2b and 3

47 By its questions 2a, 2b and 3, which the Court finds must be examined first, the national court essentially seeks to ascertain whether a provision of a collective agreement may come within the scope of Article 53 EEA, and, if so, under what conditions.

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

49 The answers to the questions from the national court require a detailed consideration of all the elements of the test first developed by the Court of Justice of the European Communities in *Albany*, cited above, paragraphs 59 and 60. As indicated in paragraph 44 above, the elements to be satisfied comprise: first, the requirement that an agreement has been entered into in the framework of collective bargaining between employers and employees, and second, the requirement that the agreement is concluded in pursuit of the objective of improving conditions of work and employment.

50 In the view of the Court, the two elements must both be satisfied in order to warrant a finding that a collective agreement must be regarded as falling outside the scope of the prohibition contained in Article 53(1) EEA. The fulfilment of a single element alone does not place that agreement outside the scope of Article 53 EEA. It is not sufficient to verify that the parties to the agreement are, respectively, a labour union and an employer or an association of employers, or that a collective bargaining agreement can generally be characterised as having the nature and purpose of a typical collective agreement.

51 The Court also notes that even where the broad objective of a collective agreement is recognised as seeking to improve conditions of work and employment, this is not by itself a sufficient premise for the conclusion that the agreement in its entirety falls outside the scope of Article 53 EEA, when individual provisions of that agreement may be directed towards other purposes.

52 In determining whether provisions of a collective agreement pursue the objective of improving conditions of work and employment, account must also be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The subsequent practice of the parties to the agreement may be of importance, as may the effect, in practice, of its provisions.

53 The term “conditions of work and employment” must be interpreted broadly. As a point of departure, the term includes provisions relating to the core elements of

collective agreements, such as wages, working hours and other working conditions. Those broad categories may include, *inter alia*, such matters as safety, the workplace environment, holidays, training and continuing education, and consultation and co-determination between workers and management. Provisions relating to the total remuneration are comprised within the term, such as the assumption by an employer of an obligation to establish and contribute to an occupational pension scheme (see *Albany*, cited above, paragraph 63).

54 At present, there may appear to be a tendency to include in collective agreements elements that reflect changing needs and interests of the parties. Such novel elements of a collective agreement may require particular scrutiny as to whether they aim to improve conditions of work and employment.

55 The examination by the national court of the issues under consideration must therefore include an assessment of whether the purpose of any provisions concerning a supplementary pension insurance scheme and its operation, is to improve remuneration, or is extraneous to the improvement of conditions of work and employment. In the Court's view, it would fall within the privileged scope of a collective agreement to establish certain criteria for the quality of an insurance product, or to specify requirements with regard to the business practices or the financial soundness of an insurance provider. However, the more circumstantial detail encompassed in a provision of a collective agreement, the further it may deviate from the pursuit of the objective of improving conditions of work and employment. A certain margin of discretion must be allowed for the parties to a collective agreement in this regard. Where it is clear that the intended, immediate and practical effect of any such clause is to improve conditions of work and employment, inherent restrictions on competition must be accepted.

56 The good faith of the parties in concluding and implementing a collective agreement must also be taken into account. Where, on the face of it, an element of a collective agreement pursues the improvement of conditions of work and employment, but its practical implementation is actually intended to further other interests, the protection of the agreement from Article 53 EEA can not be upheld. In this respect, it is immaterial whether the principal underlying objective pursued might be laudatory in and of itself.

57 When examining the several elements of a collective agreement, the national court must consider the aggregate effect of the provisions. Even if individually, the provisions would not lead to any certain resolution of the status of the collective agreement in relation to the applicability of Article 53 EEA, their aggregate effect may bring the agreement within the scope of that Article.

58 In the case at hand, the Court cannot, by abstract deduction from the rules and principles of EEA law, determine if the provisions of the Basic Collective Agreement fall outside the scope of Article 53 EEA. It does not fall within its competence to embark upon an assessment of the conflicting views of the parties with regard to the factual circumstances. In this situation, the Court is bound to

hold that the national court must undertake that examination, on the basis of its assessment of the facts of the case and of the criteria set out above.

59 The answer to questions 2a, 2b and 3 of the national court must therefore be that provisions of a collective agreement that pursue the objective of improving conditions of work and employment fall outside the scope of Article 53 EEA. Provisions of a collective agreement that pursue objectives extraneous to that of improving conditions of work and employment, or that do not, in practice, operate to improve conditions of work and employment, may come within the scope of Article 53 EEA.

Questions 1a, 1b and 1c

60 By its questions 1a, 1b and 1c, the national court essentially seeks to ascertain whether a collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.

61 Those questions become relevant only if the national court finds that provisions of the contested collective agreement come within the scope of Article 53 EEA.

62 Pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking is an entity carrying out activities of a commercial or economic nature. This definition follows the established case law of the Court of Justice of the European Communities, according to which the concept of an undertaking in the context of the competition rules covers all entities engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, at paragraph 21; Case C-160/91 *Poucet and Pistre* [1993] ECR I-637, at paragraph 17; Case C-244/94 *Fédération Française des Sociétés d´Assurance* [1995] ECR I-4013, at paragraph 14; and *Albany*, cited above, at paragraph 77).

63 As regards the possible application of the EEA competition rules to an entity of public law, a distinction must be made between the situation where the entity acts in the exercise of official authority, and that where it carries on economic activities of an industrial or commercial nature by offering or demanding goods or services in the market (see, to that effect, Case C-343/95 *Calì & Figli* v *SEPG* [1997] ECR I-1547, paragraph 16). Article 53 EEA may only apply to the latter.

64 Municipalities are entities of public law. Article 53 EEA does not apply to municipalities acting in their capacity as public authorities (see Case 30/87 *Bodson* v *Pompes funèbres des règions libèrèes* [1988] ECR 2479, paragraph 18). To the extent that the activities of a municipality consist of political decision-making or public administration, it will not in that capacity be an undertaking. However, when a municipality engages in economic activity, such

as the offering of goods and services on the market for payment , it may, in that capacity, be an undertaking within the meaning of Article 53 EEA.

65 If an organisation of municipalities engages in collective bargaining in respect of employees that are engaged exclusively in the realm of public administration, neither the organisation nor its members could in that respect be considered an undertaking within the meaning of Article 53 EEA.

66 The Court notes that the collective agreement at issue in the main proceedings covers municipal employees of all groups, not only employees engaged in the realm of public administration. A municipality that, as a member of an organisation of employers, is protecting its interests as an employer engaged in economic activities, may, within that organisation, act as an undertaking within the meaning of Article 53 EEA.

67 It follows from the foregoing, that a municipality may constitute an undertaking when, in its capacity as employer, it becomes bound by a collective agreement without being party thereto.

68 The issues relating to the legal position of a municipality, as a member of an organisation of employers, in relation to a collective agreement, is a matter of national law, to be determined by the national court.

69 If the national court finds, based on the above considerations of EEA law, that provisions of the collective agreement at issue fall within the scope of Article 53 EEA, and that the municipalities are undertakings within the meaning of that Article, such provisions may be regarded as implying a decision by an association of undertakings. Depending on the national court’s findings with regard to the issues referred to in paragraph 68 above, the provisions of the collective agreement may also be regarded as an agreement between undertakings.

70 The answer to questions 1a, 1b and 1c, must therefore be that a collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.

Questions 4, 5a, 5b, 6, 7a and 7b

71 By questions 4, 5a, 5b, 6, 7a and 7b, the national court essentially seeks to ascertain whether the contested provisions of the Basic Collective Agreement are incompatible with Article 53 EEA.

72 The contested provisions set forth certain substantive requirements with regard to the contents of a pension scheme, and some procedural conditions. On their face, the substantive provisions appear directed towards securing that pension schemes will satisfy certain *desiderata* of a social policy nature, and the procedural rules

towards securing the quality of a pension scheme, or securing that the parties to the collective agreement maintain control of any transfer of a pension scheme from one supplier to another. These objectives appear to be directed towards the improvement of conditions of work and employment. It follows that *prima facie*, the contested provisions fall outside the scope of Article 53 EEA.

73 In this context, it is not material whether these provisions will have the effect that only one, or a restricted number, of potential insurance providers may in practice be able to qualify as insurance suppliers when a transfer is sought. As long as the contested provisions actually pursue the objectives that place them outside the scope of Article 53 EEA, any resulting restriction of competition is accepted.

74 If, however, the national court, in the assessment described in paragraphs 55 and 56 above, finds that the contested provisions do not, in fact, pursue those objectives, they may, depending on the objectives actually pursued, fall within the scope of Article 53 EEA. If that is the case, and it is found that these provisions in effect require that municipalities obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting their possibility of selecting other qualified service providers, these provisions may, depending on the factual, economic and legal circumstances, constitute a restriction of competition, in a manner affecting trade between EEA States, within the meaning of Article 53 EEA.

75 The answer to questions 4, 5a, 5b, 6, 7a and 7b, must therefore be that *prima facie*, the contested provisions of the Basic Collective Agreement fall outside the scope of Article 53 EEA. If, however, the national court finds that the contested provisions do not, in fact, pursue the apparent objectives, they may, in light of the objectives actually pursued, fall within the scope of Article 53 EEA. If so, and if it is found that these provisions in effect require the municipalities to obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting their possibility of selecting other qualified service providers, these provisions may constitute a restriction of competition within the meaning of Article 53 EEA.

Question 8

76 By question 8, the national court essentially seeks to ascertain whether the aggregate effect of the contested provisions of the Basic Collective Agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary to that Article.

77 Whether an agreement restricts competition, and thereby infringes Article 53 EEA, is a legal question that must be examined in the light of economic considerations. In this assessment, account must be taken of the actual conditions in which the agreement functions (see Joined Cases T-374/94, T-384/94 and T-388/94 *ENS and Others* v *Commission* [1998] ECR II-3141, at paragraph 136).

The individual provisions of the agreement should not only be examined separately, but must also be viewed in connection with other provisions of the agreement and the agreement as a whole. Separate provisions functioning together may in aggregate have as their object or effect the restriction of competition within the meaning of Article 53 EEA. It is immaterial that it can not be established that any individual provision has that effect.

78 The same must apply with regard to collective agreements, provided that the nature and purpose of the agreement is not such as to warrant its exclusion from the scope of Article 53 EEA pursuant to the criteria set out in paragraphs 49 - 57 above.

79 The answer to question 8 must therefore be that the aggregate effect of individual provisions of a collective agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary thereto.

Questions 9 and 10

80 By its question 9, the national court seeks to ascertain whether an association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.

81 As found in paragraphs 62 - 64 above, a municipality may be regarded as an undertaking within the meaning of Article 53 EEA when it is engaged in economic activities. The same line of reasoning must apply with regard to the question of whether an association of municipalities may be regarded as an undertaking within the meaning of Article 54 EEA.

82 A municipality that, as a member of an organisation of employers, is protecting its interests as an employer engaged in economic activities, may, within that organisation, act as an undertaking. To the extent that an organisation of employers engaged in economic activities is protecting the interests of its members in the negotiation of an agreement regarding those activities, the organisation of employers may be deemed to be an undertaking within the meaning of Article 54 EEA.

83 The answer to question 9 must therefore be that an association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.

84 By its question 10, the national court essentially seeks to ascertain whether it is compatible with Article 54 EEA for an undertaking in a dominant position to conclude an agreement containing the contested provisions of the Basic Collective Agreement, or to practise such provisions.

85 The question is based on the assumption of a finding that the economic strength enjoyed by the undertaking in the relevant market is sufficient to conclude that the undertaking has a dominant position.

86 The Court refers to what is stated in paragraphs 48 and 58 above. It falls outside the competence of the EFTA Court to provide the national court with an answer to a question that requires an evaluation of the evidence of the case and an application of the law to the facts of the case.

87 It does not appear from the papers provided by the national court or from the uncontested written and oral observations of the parties that the system set forth in the Basic Collective Agreement or its implementation amounts to an abuse of any existing dominant position. However, this may be otherwise if the national court were to find that KLP enjoys a dominant position in the relevant market, that an identification may be made between KS and KLP, and that their conduct in relation to the conclusion of the contested provisions of the Basic Collective Agreement, or the implementation of those provisions, have, in practice, prevented transfers of supplementary pension insurance schemes from KLP to other insurance companies, in order to protect the position of KLP. Whether this constitutes an abuse of a dominant position must be decided by the national court on the basis of the factual, economic and legal circumstances.

88 The answer to question 10 must therefore be that it is for the national court to decide, on the basis of all relevant factual, economic and legal circumstances, whether it is compatible with Article 54 EEA for an undertaking in a dominant position to conclude or to practise the contested provisions of the Basic Collective Agreement.

V Costs

89 The costs incurred by the Government of Iceland, the Government of Norway, the Government of Sweden, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Arbeidsretten in Norway by an order of 27 September 2000, hereby gives the following Advisory Opinion:

1. **Provisions of a collective agreement that pursue the objective of improving conditions of work and employment fall outside the scope of Article 53 EEA. Provisions of a collective agreement that pursue objectives extraneous to that of improving conditions of work and employment or that do not, in practice, operate to improve conditions of work and employment may come within the scope of Article 53 EEA.**

2. **A collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.**

3. **Provisions such as those contested in the Basic Collective Agreement *prima facie* fall outside the scope of Article 53 EEA. If, however, the national court finds that the contested provisions do not, in fact, pursue the apparent objectives, they may, in the light of the objectives actually pursued, fall within the scope of Article 53 EEA. If so, and if it is found that these provisions in effect require the municipalities to obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting, their possibility of selecting other qualified service providers, these provisions may constitute a restriction of competition within the meaning of Article 53 EEA.**

4. **The aggregate effect of individual provisions of a collective agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary thereto.**

5. **An association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.**

6. **It is for the national court to decide, on the basis of all relevant factual, economic and legal circumstances, whether it is compatible with Article 54 EEA for an undertaking in a dominant**

position to conclude or to practise the contested provisions of the Basic Collective Agreement.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 March 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President