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OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

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| | 22/6706-146 | 25 February 2025 |

**Complaint against Norway concerning breaches of public procurement law in relation to contracts for pension services**

## 1. Introduction

Reference is made to the meeting with the EFTA Surveillance Authority (the Authority) and representants for the Norwegian authorities on 24 October 2024 and the Authority's follow-up letter to the Ministry 30 October 2024.

Please find below the Norwegian authorities' comments on some of the issues raised during the meeting.

In section 2 the Norwegian authorities comment on the Authority's objections to the "long or indefinite duration" of contracts for public occupational pension services. The Norwegian authorities maintain that, even though we agree that there are arguments in favour of restricting the duration of public contracts, we fail to see that there is basis for such restrictions in the current procurement directives or in the EEA Agreement. Hence, we do not agree that the current practice concerning the duration of contracts for public occupational pension services is unlawful, nor that the Norwegian authorities can be held responsible for any breaches of the contracting authorities' obligations in individual cases.

In section 3 we highlight the particular status of the contracts entered into prior to Norway's accession of the EEA Agreement 1 January 1994. Irrespective of whether there is basis in EU law for restricting the duration of public contracts we maintain that this cannot apply to contracts entered into before 1994 unless they have since been substantially modified.


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In section 4 we explain further the position of the Norwegian authorities that the contracts have not been substantially modified since 1994. This applies to the longevity adjustments in 2011 as well as to SGS 2020. Here, we also comment on the position mentioned by the Authority during the package meeting that there may be a basis for cumulating changes in connection with this assessment. In the view of the Norwegian authorities, changes as those under consideration in the present case cannot be cumulated for the purpose of assessing whether the contracts have been substantially modified.

In section 5 we present the likely development of AFP premiums going forward, as well as the underlying reasons, as specifically requested in the Authority's follow-up letter. The increase in AFP premiums in the short term is merely a consequence of changes in the calculation and accrual rules following SGS 2020. Overall, neither the size of the benefits or the costs for the public employers are expected to change significantly.

The Norwegian authorities otherwise refer to the position set in our previous correspondence with the Authority. We are prepared to continue the dialogue with the Authority on the elements presented both in this letter and what has been presented previously, with the purpose of, among other things, ensuring that the Authority's decision is based on a complete understanding of both the facts and the legal aspects.

## 2. No obligation to terminate contracts of indefinite duration after a specific time

### 2.1. Background

In its letter 29 February 2024 the Authority states that, even though Directive 2014/24/EU does not specifically govern the maximum duration of a public service contract, the continuation of a contract without a fixed term may constitute a breach of EEA law if the duration becomes disproportionate.[1]

We understand that the Authority is inclined to afford contracting authorities a margin of discretion when it comes to the specific timing of terminating a contract and initiating a new tender process, and that the assessment will depend upon the subject-matter of the contract and other circumstances.[2] With respect to contracts for public occupational pension services the Authority has indicated that a maximum duration of 10 years may be appropriate, after which time the public authority will have an obligation under EEA law to terminate the contract and announce a new tender process.[3]

The Norwegian authorities note that the Authority does not refer to any case law or other sources that specifically support the position that EEA law requires a public authority to terminate an indefinite contract after a certain time, nor with respect to the 10-year limit for

[1] "pre article 31"-letter para 171
[2] "pre article 31"-letter para 171
[3] "pre article 31"-letter para 175

public occupational pension services contracts. As far as the Norwegian authorities understand, the Authority bases its position on "*the fundamental rules of EEA law in general, and the principle of proportionality in particular*".[4] Furthermore, the Authority notes that "*one of the aims of EEA public procurement law is to open public procurement to competition".*[5]

## 2.2. The position of the Norwegian authorities

The Norwegian authorities have doubts as to whether the Authority's position has basis in EEA law as it currently stands. The basis for the position is not apparent from the applicable directives, nor from the case law of the community courts, and there are principal considerations both for and against imposing absolute limitations on the duration of indefinite contracts. In such circumstances we believe that it should be for the EU legislature to determine whether a general rule should be adopted, and the legal requirements for applying it, following the prescribed process for amending the procurement directives.

The Norwegian authorities acknowledge that there are arguments in favour of imposing limitations on the duration of public contracts. First and foremost, such limitations would ensure that economic operators be given the opportunity to compete for the contract with regular intervals. In fact, the Norwegian authorities previously, based on a similar reasoning as the one advocated by the Authority in the present case, assumed that EEA law most likely contained such a limitation, cf. letter of 24 February 2012 to the Norwegian Competition Authority. The letter concerned specifically contracts for public occupational pension services.

**Appendix 1: Letter from the Ministry of Government Administration, Reform and Church Affairs to the Competition Authority dated 24 February 2012**

The position that EEA law requires that such contracts be tendered out with regular intervals was in line with the conclusion of an inter-ministerial working group established by the Norwegian Government in 2011 to give recommendations with respect to future choice of pension provider for the Norwegian regional health authorities.

**Appendix 2: Report by the inter-ministerial working group regarding pension provider for the Hospital Trusts dated 20 May 2011**[6]

This was also in line with the (then) practice of the Norwegian Procurement Complaints Board, according to which the failure to terminate a contract (either because it had been subject to an illegal direct award or because it had run longer than what appeared proportional) was a violation of EEA law, and the continuation of a contract in such circumstances would in itself constitute an unlawful direct award, cf. *i.a.* case 2011/179.[7]

[4] "pre article 31"-letter para 171
[5] "pre article 31"-letter para 169
[6] The report is also available on: pensjon-2011-endelig-rapport.pdf
[7] See also cases 2007/19, 2009/144, 2009/246, 2010/361, 2010/338, 2010/4, 2010/1, 2010/23, 2010/222, 2010/312, 2011/14 and 2011/58.

**Appendix 3: Decision of The Procurement Complaints Board on 5 March 2012 in case 2011/179**

However, following the adoption of the procurement directive in 2014 and subsequent case law from the CJEU, the Complaint Board revised its position. In its grand board decision 2 April 2023 in cases 2021/1132, 2021/1180, 2021/1181 and 2021/1182 the Complaint Board concluded that neither EEA law nor Norwegian law requires the termination of a contract entered into with a contracting authority.

**Appendix 4: Decision of the Procurement Complaints Board 2 April 2023 in joined cases 2021/1132, 2021/1180, 2021/1181 and 2021/1182**

The Norwegian authorities agree with the reasoning in this decision and believe that the position stated in the letter of 24 February 2012 probably does not correctly reflect the requirements under EEA law. In the view of the Norwegian authorities there is no obligation to terminate an indefinite contract solely due to the passage of time, neither under EEA law nor under Norwegian law. This is based on the following considerations.

As a starting point, the use of indefinite contracts terms is accepted under EU law. As recalled also by the Authority, the procurement directive contains no prohibition against the use of such contracts.[8] On the contrary, the directive contains provisions that would be rendered meaningless if the use of indefinite contracts by contracting authorities was prohibited.[9]

Correspondingly, the CJEU has not laid down a prohibition against indefinite contract terms in its case law. Arguably, the CJEU has expressed skepticism in certain cases, such as case C-454/06 *Pressetext* para 73, which ESA has highlighted. However, the CJEU did not go further than to state that the practice of concluding indefinite contracts may impede competition. It did not infer any legal consequences from the statement, nor introduce any prohibitions or limitations on the use of indefinite contracts. Instead, the Court clarified immediately below in para 74 that the conclusion of indefinite contracts was *not* prohibited under community law:

> *"(73) First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period,* ***the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts.*** *Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of*

[8] In compariconcon, the duration of a framework agreement can as a main rule never be more than 4 years, cf. directive 2014/24/EU article 33.
[9] cf. Directive 2014/24/EU art. 5 nr. 12 litra b concerning calculation of contract value in the event the contract term is indefinite or undefined.

*Community directives governing advertising of procedures for the award of public contracts.*

*(74)* ***Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.****"* (our highlighting).

The statement in para 74 shows that the CJEU considers that, despite the potential negative effects to competition highlighted in para 73, the conclusion of indefinite contracts is permitted under EU/EEA law.

It is inherent in a contract of indefinite duration that it will run until it is terminated. The choice of whether and when to terminate the contract is at the outset left to the commercial discretion of the contracting authority. A limitation on the duration of the contract, or an obligation to terminate the contract after a particular time, would require a clear legal basis. The EU legislature could have established such a basis when adopting the current procurement directive in 2014 but did not do so. There is no support in the wording of the Directive for the Authority's position.

When the wording and system of the Directive permits the use of indefinite contracts, the Directive arguably also permits that such contracts be applied in accordance with their wording. This is also in line with the reasonable expectations of actual and potential tenderers based on the contract notice. When a contract without a fixed term has been set out to tender, the relevant economic operators have had the opportunity to take the undefined duration in consideration when submitting their tender.

We add that the case law of the CJEU does not give basis for a limitation on the duration of indefinite contract or an obligation to terminate them after a particular time. The *Pressetext* judgement gives no support to a position that there might over time arise a situation where contracting authorities are obliged to terminate an indefinite contract and subject it to a new tender. It appears likely that the CJEU would have mentioned such an obligation had the Court meant that it existed.

Moreover, the EU legislature and the CJEU have so far been reluctant to introduce an obligation to terminate contracts that have been concluded contrary to the procedures set out in the procurement rules. Even in situations where there has been an illegal direct award EU procurement law does not lay down a legal obligation to terminate the contract. According to the procurement directive, member states shall admit contracting authorities a *right* to terminate such contracts, but not an obligation.[10] No such obligation follows from the Remedies Directive either. Contracts resulting from illegal direct awards may be declared "*ineffective"* by a review body, but the Remedies Directive does not impose an obligation for the contracting authority in question to unilaterally terminate the contract.[11]

[10] cf. directive 2014/24/EU article 73
[11] cf. directive 2007/66/EF article 1

Neither the CJEU nor the EFTA-court have ever established a general duty to terminate unlawfully concluded contracts.[12] In the case C-503/04 *The Commission v. Germany II* the CJEU admittedly found that Germany, by not terminating two unlawful contracts, had failed to execute measures necessary to comply with a judgment of the Court. However, the crucial issue in the case was whether Germany had complied with an earlier judgement, and not whether there exists a general obligation to terminate unlawfully awarded contracts. Moreover, the said judgement was rendered before the amendments to the Remedies Directive in 2007. After 2007 there are no examples in the CJEU's case law in support of a duty to terminate unlawfully concluded contracts, but there are examples to the opposite effect.

In the case C-91/08 *Wall* the CJEU held that no obligation to terminate an unlawfully concluded concession contract could be derived from the principles of equal treatment and non-discrimination. Instead, the CJEU stated in para 65 that it would be for the member states to decide if such a duty should be implemented in their domestic legal system:

> *"(65)* ***It follows that the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract*** *or the national courts to grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions.* ***It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation*** *in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult"* (Our highlighting).

The Norwegian authorities note that the Court did not derive any duty to terminate unlawful contracts based on the fundamental procurement principles referred to by ESA in the present case.

In the view of the Norwegian authorities, a limitation on the duration of an indefinite contract is indistinguishable from a duty to terminate said contracts. Imposing a limitation on the duration of indefinite contracts to ensure that the contracts are regularly subject to competition – will necessarily entail an obligation to terminate the contract after a specific time.[13] Effectively, the breaches alleged by the complainant in this regard are the failures on the part of the relevant contracting authorities to terminate the contracts before the duration became "disproportional". However, the Norwegian authorities find it difficult to understand how there can exist an obligation under EEA law to terminate lawfully concluded contracts that are being applied in accordance with their wording and the contract notices, when there is not duty to terminate unlawfully concluded contracts regardless of the nature of the violation.

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[12] cf. for instance the cases C-91/08 *Wall* premise 61 following, E-24/13 *Casino Admiral* premise 70 and C-518/17 *Rudigier* premise 57

[13] cf. "pre article 31"-letter para 171

In line with the reasoning of the CJEU in *Wall* the Norwegian authorities would propose that the establishment of an obligation to regularly terminate indefinite contracts should be a matter for the EU legislature or the member states to decide. The EU legislature had the opportunity to prohibit indefinite contracts, limit the duration of contracts or to establish a duty to eventually terminate such contracts in 2014, when working on the current procurement directive.[14] However, it refrained from doing so.

There is no reason to assume that this was unintentional. First of all, a limitation on the duration of framework contracts is laid down in directive 2014/24/EU article 33 nr. 1 (3). Moreover, in the Consession Contracts Directive, adopted at the same time, a prohibition against indefinite concession contracts is included.[15] Following the logic of *Wall* it would appear that the EU legislature, by not establishing more detailed rules on contracts duration or termination obligation, has left it for the member states to decide whether and how to implement such rules in their national laws.

Leaving the assessment to national laws or to the commercial discretion of the relevant contracting authority appears appropriate. In a situation where the contract terms are beneficial to the contracting authority, it would be unreasonable to impose an obligation to terminate it. In a subsequent procurement procedure, the contracting authority may risk receiving tenders that are far less beneficial or even no tenders at all. This can be illustrated by the contracts for public occupational pension services that form the subject-matter of the present case. Pursuant to Norwegian law, the pension provider cannot terminate such a contract once it is concluded. Only the customer, *i.e.* the contracting authority, has this right. However, the pension providers have no obligation to enter into new contracts or participate in public tenders. By forcing a contracting authority to terminate the contract every 10 years, one would also impose on the contracting authority the commercial risk of not only receiving less beneficial terms than under the current contract, but also being left without a supplier of public occupational pension services.

The Norwegian authorities note that there are other mechanisms under EEA law that would prevent the contracting authority from maintaining a contract unreasonably long. If the terms of the contract are no longer market reflective it may entail an illegal advantage under state aid law not to tender out the contract.[16] Furthermore, contracts that are substantially modified over time may also be considered as illegal direct awards of new contracts under the procurement directives.[17]

Finally, as evident from the Authority's letter 29 February 2024 para 171 to 176 the alleged duty to tender out indefinite contracts would have a rather unclear scope. So far, not even

[14] Under the leadership of Stéphane Séjourné, the EU legislature now has this opportunity once again in the work begun on revising the procurement regulations.
[15] cf. directive 2014/23/EU article 18. The EU legislator has also set out limitations to the duration of contracts in the sector of public transport, cf. Public Passenger Transport Services Regulation article 4 nr. 3.
[16] cf. Article Article 61 of the EEA Agreement. An example, where notably no violation was found, is the state aid case N 264/2002 London Underground. In this case, the British authorities had entered into a 30-year agreement for the maintenance and upgrading of the London Underground system.
[17] cf. Directive 2014/24/EU article 72

the Authority itself has been able to identify a clear and predictable maximum duration for the contracts in question, and the suggestions made so far appear somewhat arbitrarily chosen. In the interest of legal certainty, a rule that imposes an obligation to terminate valid contracts should have a clear basis and a clear scope and should not be made dependent upon the concrete application of vague and general principles.

In the Norwegian authorities' opinion, a rule with a very unclear scope that makes significant intrusions into lawful contractual relationships and risks causing losses to both the supplier and the contracting authority, cannot be considered to exist without solid legal basis. As Norwegian authorities have not yet been presented with such basis, we respectfully ask ESA to elaborate on the matter. As of now, the Norwegian authorities maintain the view that no duty to regularly terminate indefinite contracts follows from EEA law. Member states are however permitted to implement such a duty in their national laws.

Irrespective of the above, the Norwegian state cannot be held responsible for any alleged unlawful practice. The Norwegian authorities have implemented all relevant EEA legislation, as well as issued guidelines and interpretative statements on the duty to periodically tender out contracts for public service pensions.[18] In these statements the Norwegian authorities have presented arguments that largely resemble the ones presented by the Authority in the present case.

The regime pertaining to private enforcement of procurement rules is well established and has proven effective also in Norway. Suppliers who have had reason to believe that an indefinite contract has run for too long have had effective legal remedies at their disposal. This should in itself be sufficient to counter an argument that the Norwegian authorities have failed to intervene in an (alleged) unlawful practice.

The Norwegian authorities respectfully submit that it is not aware of any member state that has acted even more diligently, and hold that the above statements should be considered sufficient to have acted in accordance with Norway's obligations under the EEA Agreement.

## 3. No obligation to terminate contracts entered into prior to 1 January 1994

Irrespective of the above, and in the event that there exists a legal obligation to regularly tender out indefinite contracts under EEA-law, such obligation cannot apply to contracts entered into prior to the entry into force of the EEA-agreement. As held by the CJEU in the case C-76/97 *Tögel* community procurement law does not apply to contracts where the award was made (or award process commenced) prior to the accession of the state in question to the community. The CJEU stated the following in para 54:

[18] Cf. to illustration the Ministry of Health and Care Services' report (2011) section 4.3. See also Pensjonsveiledereren 2024, section 6.6.2, which is drawn up by the pension office - an association founded on the basis of a collective agreement between municipal employers and employees.

*"The reply to be given to the fourth question must therefore be that Community law does not require an awarding authority in a Member State to intervene, at the request of an individual, in existing legal situations concluded for an indefinite period or for several years where those situations came into being before expiry of the period for transposition of Directive 92/50"*

The CJEU has consistently maintained that the application of new EU/EEA procurement rules on awards that were made prior to the entry into force of said rules is incompatible with the principle of legal certainty. [19]

Thus, even if a duty to regularly terminate and tender out indefinite contracts were to be derived from community law, such duty will not apply to contracts that were entered into prior to the entry into force of the EEA-agreement. It is the Norwegian Authorities understanding that this is in line with the Authority's position.[20]

Consequently, the EEA procurement rules may *only* apply to indefinite contracts entered into prior to 1994 if those contracts have been substantially modified after this date.[21] As explained in the following the Norwegian authorities respectfully submit that the contracts in question have not been substantially modified.

# 4. The contracts have not been substantially modified

## 4.1 Introduction

In its letter 24 March 2023 and subsequent correspondence, the Norwegian authorities have explained that the contracts between KLP and the contracting authorities have not been substantially modified. This applies to contracts entered into both before and after 1994. The contracts stipulate that KLP shall provide an insured pension service against an annual premium, in accordance with the contracting authorities' obligation in their respective collective agreements. The changes referred to in Storebrand's complaint concern solely adjustments necessary to reflect amendments to the public legal framework and/or the collective agreements. Such amendments must be reflected in the contracts between KLP and the contracting authorities in order for the latter to operate in accordance with their obligations vis-à-vis their employees. While such amendments will affect the exact scope of the benefits that the employees receive under the contracts, the nature of the services provided by KLP – calculating premiums, asset management and paying out pensions – remain unchanged.

None of the modifications highlighted by Storebrand entail a change in the allocation of risk under the contracts. Nor do they in any other way alter the financial balance between the contracting parties. Both the allocation of risk and the remuneration for KLP's services are completely unchanged.

[19] Cf. for instance C-138/08 *Hochief* para 29
[20] Cf. "pre article 31"-letter para 16
[21] Cf. directive 2014/24/EU article 72

In its letters 24 March 2023, section 9.4 and 21 December 2023, section 7.3.4 the Norwegian authorities have explained in detail how SGS 2020 did not alter the allocation of risk, or the financial balance of the contracts entered into with KLP. Based on the discussions in the recent package meeting, as well as ESA's follow-up letter, we assume that ESA acknowledges that SGS 2020 did not in itself constitute a substantial modification of the contracts.

However, we have noted ESA's suggestion that the adjustments following SGS 2020 may be cumulated with previous adjustments, most notably the longevity adjustments in 2011, and that these adjustments assessed in combination may entail that the contracts have been substantially modified.

It is the clear view of the Norwegian authorities that modifications considered under the Procurement Directive Article 72 (1) c, cannot be cumulated as indicated by ESA. Such cumulation would be contrary to the wording and system of the Directive and CJEU case law, and would result in an unclear and highly impractical legal rule.

In any case, even if there were a basis to cumulate amendments made under Article 72 (1) c of the Directive, the modifications of the contracts between KLP and the municipalities are not substantial. The modifications have had minor, if any, effect on the level of premium payments under the contracts and have not altered the overall nature of the services delivered under the contracts.

## 4.2 The longevity adjustment in 2011 was not substantial

In the package meeting, ESA specifically referred to the longevity adjustment in 2011 as a potential basis for substantial modification of the contracts with KLP. The Ministry has in its letters of 24 March 2023 and 14 June 2024 explained why the longevity adjustment does not constitute such a substantial modification. This modification had merely minor effects on the contracts as such, and was made solely to adapt the contracts to the public legal framework of the Norwegian pension reform that entered into force at the same time.

The main purpose of the pension reform was to reduce government spending, while adapting the public pension system under the National Insurance Scheme to demographic changes, particularly an increasingly older population. Following a lengthy process a new old-age pension system was enacted in 2009 through changes in the National Insurance Act. The changes concerned accrual rules, life expectancy adjustments, flexible withdrawal from age 62, and new rules for adjustment of pensions. The main purpose of the changes was to strengthen the employees' incentive to remain actively employed.

Corresponding changes were subsequently made to the statutory public occupational pension schemes, to ensure that the effect of the pension reform was not counteracted by these schemes. Identical changes were then agreed in the collective agreements with the municipalities and other public employers and, subsequently, in the contracts with KLP and

all other public pension service providers. For a more detailed description of the amendments, we refer to our letter of 24 March 2023, section 9.3.4.

In the view of the Norwegian authorities these changes were clearly not substantial when assessed against the conditions in Directive 2014/24/EU Article 72 (1) c. The Norwegian authorities note that, formally, the Directive did not apply at the time. However, on the points discussed here, the Directive must be presumed to codify existing case law. For all practical purposes it is not meaningful to distinguish between the concepts of "material amendment" introduced in *Pressetext*, and "substantial modification" in Article 72 of Directive 2014/24. The longevity adjustment could not have been foreseen by a diligent contracting authority. Although it is foreseeable that the National Insurance Act will be amended over time, and that this may affect the specific features of the public occupational pension schemes, it is practically impossible to foresee specifically what kind of changes that will be adopted in a manner that makes it feasible to provide for these modifications in a functioning review clause. As ESA is well aware a review clause must be "clear, precise, and unequivocal," and must specify "the scope and nature of possible modifications or options as well as the conditions under which they may be used," cf. the Directive Article 72 (1) (a).

The lengthy process of adopting the legal amendments that formed the basis of the pension reform is indicative of the complexity and uncertainty that pertains to the scope of future changes in the public legal framework within this area. Identifying, discussing, proposing and adopting the exact changes took several years, and the proposals for the specific rules governing the new regime were amended on several occasions.

The Pension Commission was appointed in 2001 and presented its preliminary report in 2002. In 2004, the Pension Commission proposed a new national pension scheme.[22] There were, however, dissenting opinions on several issues. The report was subsequently presented to the public for a round of consultations.

Having reviewed the report and the comments from the consultation process, the new Government, Bondevik II, issued a white paper to the Storting.[23] A majority in the Storting agreed in principle on the main lines of the reform in 2005, but instructed the Government to amend the current proposal on certain areas. Several representatives raised critical remarks to the new proposal.

A third Government, Stoltenberg II, issued a new white paper to the Storting in 2006, based on the directions from the Storting in 2005. The Storting accepted the white paper but still instructed the Government to make certain changes. The Government's proposal for a new National Insurance Scheme was then published for a new round of consultations. Following the round of consultations, the new National insurance Scheme was passed as statutory law in 2009.

[22] NOU 2004: 1 "Modernisert folketrygd — Bærekraftig pensjon for framtida"
[23] Stortingsmelding nr. 12 (2004 – 2005) "Pensjonsreform – trygghet for pensjonene"

A full overview of the major milestones in the process can be found on the Government website (in Norwegian).[24]

As evident from the above, a broad politically negotiated settlement was necessary to secure support for the pension reform. The exact result of such settlements cannot be predicted in advance. Government and political alliances shift, as does the nature and level of involvement and pressure from various stakeholders. For third parties affected by these changes, it is simply impossible to foresee the precise scope of the outcome of such political negotiations before the changes have been adopted.

KLP's contracts contain a provision for changing the contracts in line with the applicable legal framework, including amendments to the applicable collective agreements. However, such a provision does not meet the requirements for change clauses in Article 72 (1) a. Therefore, the modifications must be assessed under Article 72 (1) c.

On this point, the Norwegian authorities recall that the vast majority of KLP's contracts for insured public occupational pension schemes were entered into before the Norwegian pension reform was even initiated.

Further, the overall nature of the contracts was not at all altered due to the longevity adjustment of 2011. KLP still delivered insurance and management of pensions and paid out the pension benefits in exchange for a premium. The risks related to longevity were allocated exactly as before as between the contracting parties, and the premiums were for all practical purposes unchanged, as already commented on in the letter from the Ministry 24 March 2023, section 9.3.4.

As a result of the pension reform, over time employees will have to work somewhat longer to earn a pension at the same level as earlier, but this did not in practice affect the nature of KLP's services vis-à-vis the contracting authorities. The change is reminiscent of the situation in C-454/06 *Pressetext* where Austria's accession to the Euro led to the remuneration under the contract in question being paid in Euros instead of the previous national currency stated in the contract. This led to a change in the contract provisions concerning payment, but did not change the overall nature of the agreement in a manner which amounted to a substantial modification within the meaning of procurement rules.

## 4. 3 Modifications under Article 72 (1) c must be assessed separately

In the package meeting, ESA brought up the possibility that the changes could be cumulated. Storebrand has expressed the same view.

In the view of the Norwegian authorities there is no legal basis for cumulating changes under Article 72(1) c. While it follows from the wording that successive changes shall be cumulated when assessing the applicability of Article 72 (2), the opposite solution is chosen in Article 72 (1) c. The Norwegian authorities note that it follows from the wording of Article 72 (1) c that

[24] Milepæler for pensjonsreformen - regjeringen.no

the assessment of whether the threshold for lawful price increases following unforeseen circumstances shall be made for each modification separately. This is not compatible with a position that unforeseeable changes may be cumulated. The wording of the Directive clearly provides for the opposite.

This is also in accordance with how the CJEU assessed unforeseeable changes prior to the adoption of the current Directive. In case C-454/06 *Pressetext* the Court conducts a separate assessment of the modifications, see respectively paragraphs 39 et seq., paragraphs 55 et seq., and paragraph 71 et seq. The approach of the CJEU is well-founded. Consecutive changes made by contracting parties to adapt the contract to consecutive unforeseeable circumstances, do not demonstrate "*the intention of the parties to renegotiate the essential terms of that contract"* cf. *Pressetext* paragraph 34.

## 4.4. The modifications are not substantial even if cumulated

Even if all the amendments that have been implemented in the contracts with KLP since the EEA Agreement entered into force were to be assessed collectively, they do not constitute substantial modifications of the contracts.

When assessing the changes in question the Norwegian authorities believe that it is vital to recognize that adjustments are inevitable in contracts regarding public occupational pension services. By its very nature a pension system is dynamic, but the exact scope and features of the changes that will be made are unforeseeable until adopted.

The amendments in question, even if taken together, have led to mere insignificant changes in premiums paid, and far below the threshold of 50 % of the contract values, cf. Article 72 (1) c. We refer to the above account as well as to previous correspondence.

The overall nature of each contract has not changed, and neither has the risk distribution between the parties. The purpose and functioning of the contracts for public occupational pension schemes is to always reflect the laws and collective agreements in force. KLP is still providing public occupational pension benefits in accordance with applicable laws and collective bargaining agreements.

# 5. AFP premiums

The Norwegian authorities have noted that the Authority welcomes additional information concerning changes to AFP premiums.

The reason why the Norwegian authorities brought up this as a separate issue during the package meeting was first and foremost that we had been made aware that the municipalities' costs relating to AFP premiums were expected to increase significantly over the next few years. We deemed it appropriate to bring this matter to the attention of the Authority as we wanted to avoid misunderstandings as to the nature and impact of these cost increases.

As explained during the meeting as well as in previous correspondence, the main purpose of the changes of the public occupational pension schemes in 2020 was to ensure necessary harmonization between these schemes and the National Insurance Scheme. It was not the parties' intension to increase or decrease the pensions for employees in the public sector, nor to transfer risk or altering the financial balance between the parties. However, the new regime did entail adjustments to the rules pertaining to calculation and accrual of pension benefits and costs. While these changes were not intended to alter the scope or costs related to said benefits, there have been certain changes of a practical nature.

On the one hand, new accrual rules entailed a change in when costs were accrued, leading to temporary changes in the overall premium reserves under the public occupational pension services contracts. For example, in 2020 approx. NOK 23 billion were released from the municipalities' premium reserves in KLP. While it was publicly known, and was made clear by KLP and others, that this was merely a change in accrual practice and that the funds would have to be repaid at a later stage, KLP considered that the funds had to be transferred to the municipalities' premium funds. In formal terms the municipalities hence were given access to substantial funds, but it was common knowledge that this would be levelled out by increased obligations in the future.

The changes in the rules concerning calculation of benefits and accrual of costs have had the opposite effect with respect to AFP. Following transitional rules agreed as part of SGS 2020 the municipalities have two different AFP schemes in their collective agreements. For employees born before 1963 AFP is a separate and independent pension benefit that aims to provide an effective substitute for the employees' income from the age of 62 and until the age of 67. The ordinary old age pension is paid out from the age of 67.

The new AFP for employees born 1963 and later is still a lifelong old age pension. However, rather than being a substitute for the employees' income between the age of 62 and 67, AFP is a supplementary old-age pension benefit that is added to the employees' income or ordinary old-age pension benefits. It may be activated from the age of 62 and, like the ordinary old-age pension benefits, lasts for the lifetime of the employees.

Both the new and the old AFP is a restricted benefit that is reserved for employees who meet certain criteria. None of the two schemes is prepaid or funded. Instead, they are to be financed by the employer when an employee activates the AFP. As a result of the transitional rules, in the period 2025-2029 the employers must finance both the new and the old AFP-benefits. Those born in 1962 will have the old AFP until they reach 67 years in 2029, and those born in 1963 can start with the new AFP in 2025. This will increase the premiums from the employers for the period 2025 to 2029.  Over time, however, the premiums are expected to be at the same level as before the changes. The higher premiums in this period must be viewed in connection with the abovementioned reduction in the premium reserve when the pension schemes changed in 2020, and the corresponding payments made to the employers' premium funds.

Hence, what may appear as increases in premiums is rather a consequence of changes in accrual rules. Over time it is expected that the overall premiums for public occupational pension will be at the same level as before.

If the Authority wishes to receive additional information about the nature and effect of the changes in accrual rules, we are happy to expand the information.

Yours sincerely

Ragnhild Spigseth
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Research Coordinator

*This document is signed electronically and has therefore no handwritten signature*

Appendix 1: Letter from the Ministry of Government Administration, Reform and Church Affairs to the Competition Authority dated 24 February 2012

Appendix 2: Report by the inter-ministerial working group regarding pension provider for the Hospital Trusts dated 20 May 2011

Appendix 3: Decision of The Procurement Complaints Board on 5 March 2012 in case 2011/179

Appendix 4: Decision of the Procurement Complaints Board 2 April 2023 in joined cases 2021/1132, 2021/1180, 2021/1181 and 2021/1182