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Case No: 89254
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Royal Norwegian Ministry of Local Government and Regional Development
Postboks 8112 Dep
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Norway

Dear Sir or Madam,

Subject: Complaint against Norway regarding breaches of public procurement law in relation to contracts for pension services

1 Introduction and correspondence

1. On 31 August 2022, the EFTA Surveillance Authority ("the Authority") received a complaint concerning contracts for pension services.[1]

2. The complainant, a life insurance undertaking, referred to the very limited level of competition in the market for insured public sector occupational pension services in Norway. Allegations were made of various breaches of the procurement rules in respect of numerous contracts for these services between Norwegian contracting authorities and the main provider of pension services to the municipal sector, Kommunal Landspensjonskasse Gjensidig Forsikringsselskap ("KLP"), specifically:

    (a) unlawful direct awards of contracts;

    (b) the continuation of contracts without fixed terms for disproportionately long periods of time;

    (c) unlawful modifications of contracts due to:

        - extensions of contracts;

        - mergers of contracting authorities; and

        - changes to the services.

3. The complaint concerned contracts awarded by:

    - municipalities;

    - county authorities;

    - regional health authorities ("RHAs"); and

    - hospital trusts.

    For the purposes of this letter, these authorities will be referred to as the "Public Bodies".

4. At least one of the allegations made in the complaint is capable of applying to a large proportion of the contracts falling within the above scope which are still in force today. The Authority's Internal Market Affairs Directorate ("the Directorate") understands there to be 369 contracts which may have breached the rules in at least one way (from a total of 402 Public Bodies[2]). Whilst some Public Bodies have recently conducted competitive procedures to award contracts for pension services and others have their own pension funds and therefore do not enter into contracts for pension services, the complaint nevertheless amounts to an allegation that there have been breaches across a large proportion of the public sector pensions market, spanning the period from the entry into force of the EEA Agreement until today. It can be noted that most of the allegations made

[1] Document No 1309815.

[2] There are currently 356 municipalities, 11 county authorities and four RHAs in Norway. To this number, hospital trusts need to be added and the Directorate understands that KLP provides services to 31 hospital trusts, so this figure has been included in the total.

in the complaint appear to concern a much smaller number of contracts. The details and the specific scope of each alleged issue will be elaborated on in this letter.

5. According to the complainant, the market for public sector insured occupational pension services is almost entirely in the hands of KLP. As competitive procedures are not conducted in accordance with the procurement rules, it is practically impossible for competitors to pursue the market, which is essentially closed off.

6. The Norwegian Government was informed of the complaint by a letter dated 17 October 2022.[3] A meeting also took place between the Authority and the complainant on 17 October 2022. On 18 November 2022, the Authority received a further submission from the complainant.[4]

7. On 28 November 2022, the Authority's Internal Market Affairs Directorate ("the Directorate") sent a request for information to the Norwegian Government, enclosing a copy of the complaint.[5]

8. The Norwegian Government responded to the Directorate's letter on 24 March 2023[6] and a virtual meeting took place between the Authority and representatives of the Norwegian Government, KLP and the Norwegian Association of Local and Regional Authorities ("KS") on 5 May 2023. The case was also discussed at the Package Meeting which took place in Oslo on 26 and 27 October 2023.

9. Contact has also continued between the Authority and the complainant, including the sending of a third submission[7] by the complainant on 26 May 2023 and a fourth submission[8] on 20 June 2023.

10. On 21 December 2023, the Norwegian Government sent a further letter to the Directorate regarding (i) recent changes to insured public sector occupational pensions, (ii) the valuation of contracts for those services and (iii) the ability of providers to compete on premiums.[9] As those submissions were received after this letter was prepared, not all arguments made within them are explicitly addressed below, however, on the basis of an initial review of those submissions, the Directorate considers that these arguments do not fundamentally undermine its view as expressed in this letter.

11. Having considered the issues raised and Norway's letter of 24 March 2023, the Directorate's preliminary view is that it seems that numerous contracts for the provision of pension services may have been unlawfully awarded and/or amended in breach of EEA public procurement law, leading to a widespread lack of competition in the insured public sector occupational pension services market. This seems to be a general and consistent practice.

12. It should, however, be emphasised that this is a provisional conclusion, based on the input given by the complainant and the Norwegian authorities and the Directorate's current understanding of the relevant facts. The Directorate expects further exchanges with the Norwegian Government and further detailed consideration of the facts and issues raised.

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[3] Document No 1314949.
[4] Document No 1329844, with attachments.
[5] Document No 1327523.
[6] Document No 1363115; Your ref 22/6706-9.
[7] Document No 1375600.
[8] Document No 1380469.
[9] Document No 1427222.

13. For clarity, it should also be stated that the present case (Case No 89254) remains separate to that being dealt with by the Authority's Competition and State Aid Directorate concerning a complaint alleging unlawful state aid granted to KLP (Case No 89158).

2 Relevant EEA law

2.1 The EEA Agreement

14. The first paragraph of Article 37 of the EEA Agreement provides:

> *"Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."*

2.2 EEA public procurement directives

15. EEA public procurement law applies to contracts for works, goods and services awarded by the public sector. The current rules relevant to this complaint are set out in Directive 2014/24/EU on public procurement.[10] However, as the relevant rules for the award of a contract are those in force at the point at which the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued,[11] it is necessary to also take into account earlier legislation.

16. It is also relevant to note that, generally, EEA public procurement law does not apply to contracts where the award process commenced prior to the entry into force of the EEA Agreement.[12]

2.2.1 Directive 92/50/EEC

17. Directive 92/50/EEC[13] applied in the EEA from 1 July 1994 to 17 April 2007 (inclusive).[14]

18. Article 1(a) of Directive 92/50/EEC provides:

> *"public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of*
>
> *(ii) public supply contracts…. or public works contracts…;*
>
> *…*

[10] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, act referred to at point 2 of Annex XVI to the EEA Agreement (OJ L 94, 28.3.2014, p. 65).
[11] See judgment of the CJEU of 14 January 2021, Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, EU:C:2021:13, paragraph 23 and the case law cited.
[12] See judgment of the CJEU of 24 September 1998, C-76/97, *Tögel v Niederösterreichische Gebietskrankenkasse*, EU:C:1998:432, paragraph 54.
[13] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, act referred to at point 5b of Annex XVI to the EEA Agreement (OJ L 209, 24.7.1992, p. 1).
[14] Decisions of the EEA Joint Committee Nos 7/94 of 21 March 1994 (OJ L 160, 28.6.1994, p. 1) and 68/2006 of 2 June 2006 (OJ L 245, 7.9.2006, p. 22).

(vii) contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services;"

19. Article 3(1) of Directive 92/50/EEC provides:

"In awarding public service contracts or in organizing design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive."

20. As initially enacted, Article 7(1) of Directive 92/50/EEC provided:

"This Directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200 000."

21. As amended by Directive 97/52/EC,[15] which took effect in the EEA from 1 July 2000, Article 7(1)(a) of Directive 92/50/EEC provides:

"This Directive shall apply to:

— *…*

— *public service contracts concerning the services referred to in Annex I A with the exception of the services in category 8 and the telecommunications services in category 5 under CPC references 7524, 7525 and 7526:*

…

(ii) awarded by the contracting authorities listed in Article 1 (b) other than those referred to in Annex I to Directive 93/36/EEC [contracting authorities subject to the GATT Agreement on Government Procurement] and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 SDRs.

22. The above value converted to Norwegian kroner was updated approximately every two years. The table in section 2.3 below sets out the history of this threshold in Norwegian kroner.

23. Articles 7(4) and 7(5) of Directive 92/50/EEC provide:

"4. For the purposes of calculating the estimated contract value for the following types of services, account shall be taken, where appropriate:

— as regards insurance services, of the premium payable,

…"

"5. In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

[15] European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, act referred to at point 5b of Annex XVI to the EEA Agreement (OJ L 328, 28.11.1997, p. 1)

— in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;

— in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48."

24. Article 9 of Directive 92/50/EEC provides:

> *"Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16."*

25. Annex I includes in Annex I A *"Financial services: (a) Insurance services (b) Banking and investment services"* with CPC[16] Reference No 81. CPC 812 (Insurance (including reinsurance) and pension fund services) excludes compulsory social security services. Annex I B includes "Other services". CPC 913 (compulsory social security services) includes "government employee pensions schemes" as part of CPC 9132.

2.2.2 Directive 2004/18/EC

26. Directive 2004/18/EC applied in the EEA from 18 April 2007 to 31 December 2016 (inclusive).[17] It repealed Directive 92/50/EEC.

27. Article 1(2)(a) of Directive 2004/18/EC provides:

> *" 'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."*

28. Article 1(2)(d) of Directive 2004/18/EC provides:

> *"'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II."*

29. Article 7 of Directive 2004/18/EC provides:

> *"This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:*
>
> *…*
>
> *(b) EUR [ ]*
>
> *— for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV [being central government authorities],*
>
> *…"*

[16] Central Product Classification nomenclature of the United Nations.

[17] Decisions of the EEA Joint Committee Nos 68/2006 of 2 June 2006 (OJ L 245, 7.9.2006, p. 22) and 97/2016 of 29 April 2016 (OJ L 300, 16.11.2017, p. 49).

30. The value set out in Article 7(b) was amended approximately every two years. The table in section 2.3 below sets out the history of this threshold in Norwegian kroner.

31. Article 9(8) of Directive 2004/18/EC provides:

> *"With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:*
>
> *(a) for the following types of services:*
>
> *(i) insurance services: the premium payable and other forms of remuneration;*
>
> *…*
>
> *(b) for service contracts which do not indicate a total price:*
>
> *(i) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;*
>
> *(ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48."*

32. Article 16(d) of Directive 2004/18/EC provides:

> *"This Directive shall not apply to public service contracts for:*
>
> *…*
>
> *(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments…"*

33. Article 20 of Directive 2004/18/EC provides:

> *"Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55."*

34. Article 21 of Directive 2004/18/EC provides:

> "*Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).*"

35. Article 31(1)(b) of Directive 2004/18/EC provides:

> *"Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:*
>
> *(1) for public works contracts, public supply contracts and public service contracts:*
>
> *…*

> *(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator*

36. Article 38(1) of Directive 2004/18/EC provides:

> *"When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article."*

37. The second paragraph of Article 46 of Directive 2004/18/EC provides:

> *"In procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership."*

38. Annex II includes in Annex II A *"Financial services: (a) Insurance services (b) Banking and investment services"* with common procurement vocabulary codes from 66100000-1 to 66720000-3. Reference is also made to the CPC 81 where, as stated above, CPC 812 (Insurance (including reinsurance) and pension fund services) excludes compulsory social security services. Annex II B includes "Other services".

2.2.3 Directive 2014/24/EU

39. Directive 2014/24/EU entered into force in the EEA on 1 January 2017, repealing Directive 2004/18/EC.[18]

40. Article 1(1) of Directive 2014/24/EU provides:

> *"This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4."*

41. Article 2(1)(5) of Directive 2014/24/EU provides:

> *"'public contracts' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;"*

42. Article 2(1)(9) of Directive 2014/24/EU provides:

> *"'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6;"*

43. Article 4 of Directive 2014/24/EU provides:

> "*This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:*

[18] Decision of the EEA Joint Committee No 97/2016 of 29 April 2016 (OJ L 300, 16.11.2017, p. 49).

…

(c) EUR [ ] for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;…

…"

44. The value set out in Article 4(c) is amended approximately every two years. The table in section 2.3 below sets out the history of this threshold in Norwegian kroner.

45. Articles 5(13)(a) and 5(14) of Directive 2014/24/EU provide:

> "13. With regard to public service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:
>
> *(a) insurance services: the premium payable and other forms of remuneration"*
>
> *"14. With regard to public service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:*
>
> *(a) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;*
>
> *(b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48."*

46. Article 10(e) of Directive 2014/24/EU provides:

> *"This Directive shall not apply to public service contracts for:*
>
> *…*
>
> *e) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council (3), central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;"*

47. Article 12(3) of Directive 2014/24/EU provides:

> *"A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.*
>
> *(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;*
>
> *(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting*

authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of noncontrolling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person."

48. Article 18(1) of Directive 2014/24/EU provides:

> *"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*
>
> *The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."*

49. Title II of Directive 2014/24/EU sets out the procedures which are required to be followed where a public contract exceeding the relevant threshold is awarded. Article 26 falls within this Title. Article 26(1) provides:

> "*When awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 32, a call for competition has been published in accordance with this Directive.*"

50. Articles 32(1) and 32(2)(b)(ii) of Directive 2014/24/EU provide:

> *"1. In the specific cases and circumstances laid down in paragraphs 2 to 5, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication.*
>
> *2. The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:*
>
> *…*
>
> *(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:*
>
> *…*
>
> *(ii) competition is absent for technical reasons;*
>
> *…*
>
> *The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;*"

51. Article 47(1) of Directive 2014/24/EU provides:

> *"When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 27 to 31."*

52. The second paragraph of Article 58(2) of Directive 2014/24/EU provides:

> *"In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership."*

53. Article 72 of Directive 2014/24/EU provides:

> *"1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:*
>
> > *(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;*
> >
> > *…*
> >
> > *(c) where all of the following conditions are fulfilled:*
> >
> > > *(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;*
> > >
> > > *(ii) the modification does not alter the overall nature of the contract;*
> > >
> > > *(iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;*
> >
> > *…*
> >
> > *(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.*
>
> *…*

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1."

5*. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2."*

54. Article 74 of Directive 2014/24/EU provides:

"Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4."

55. Annex XIV of Directive 2014/24/EU includes CPV (common procurement vocabulary) code 75320000-5 which corresponds to "Government employee pension schemes" pursuant to the CPV regulation.[19]

2.3 The relevant thresholds

Dates	Threshold (NOK)	Legislative provision	Amending acts
1 July 1994 to 31 December 1995	1,623,764	Article 7(1) of Directive 92/50/EEC	Values of thresholds in the field of public procurement applicable during the period 1 July 1994 to 31 December 1995, OJ C 292, 20.10.1994, p. 14
1 January 1996 to 31 December 1997	1,661,500	Article 7(1) of Directive 92/50/EEC	Document No 136462[20]

[19] Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV), act referred to at point 6a of Annex XVI to the EEA Agreement, OJ L 340, 16.12.2002, p. 1.

[20] The Authority, as did the Commission, chose not to publish the thresholds in the Official Journal in 1996. This was due to the announced revisions of the thresholds due to the implementation of the revised GATT Government Procurement Agreement (GPA).

1 January 1998 to 31 December 1999	1,629,580	Article 7(1) of Directive 92/50/EEC	Values of thresholds in the field of public procurement applicable during the period 1 January 1998 to 31 December 1999, OJ C 38, 5.2.1998, p. 18
1 January 2000 to 31 December 2001	1,670,000	Article 7(1) of Directive 92/50/EEC (to 30 June 2000) Article 7(1)(a)(ii) of Directive 92/50/EEC (from 1 July 2000)	Values of thresholds in the field of public procurement applicable from 1 January 2000, OJ C 91, 30.3.2000, p. 8
1 January 2002 to 31 December 2003	2,026,860	Article 7(1)(a)(ii) of Directive 92/50/EEC	Values of thresholds in the field of public procurement applicable from 1 January 2002, OJ C 7, 10.1.2002, p. 2
1 January 2004 to 31 December 2005	1,826,846	Article 7(1)(a)(ii) of Directive 92/50/EEC	Values of thresholds in the field of public procurement applicable from 1 January 2004, OJ C 51, 26.2.2004, p. 7
1 January 2006 to 17 April 2007	1,741,841	Article 7(1)(a)(ii) of Directive 92/50/EEC	Values of thresholds in the field of public procurement applicable from 1 January 2006, OJ C 14, 19.1.2006, p. 21
18 April 2007 to 14 March 2008	1,740,750	Article 7(b) of Directive 2004/18/EC	Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ L 333 20.12.2005 p. 28 Values of thresholds in the field of public procurement, OJ C 305, 14.12.2006, p. 33
15 March 2008 to 30 March 2012	1,654,298	Article 7(b) of Directive 2004/18/EC	Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ L 317 05.12.2007 p. 34 Values of thresholds in the field of public procurement, OJ C 125, 22.5.2008, p. 19
31 March 2012 to 16 May 2014	1,603,568	Article 7(b) of Directive 2004/18/EC	Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contracts, OJ L 319 02.12.2011 p. 43 Thresholds referred to in Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council, as amended by Commission Regulation (EU) No 1251/2011, expressed in the national currencies of the EFTA States, OJ C 314, 18.10.2012, p. 5
17 May 2014 to 5 February 2016	1,567,342	Article 7(b) of Directive 2004/18/EC	Commission Regulation (EU) No 1336/2013 of 13 December 2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract, OJ L 335 14.12.2013 p. 17 Thresholds referred to in Directive 2004/17/EC and Directive 2004/18/EC, as amended by

			Regulation (EU) No 1336/2013, expressed in the national currencies of the EFTA States, OJ C 227, 17.7.2014, p. 9
From 6 February 2016 to 9 February 2018	1,767,450	Article 7(b) of Directive 2004/18/EC (to 31 December 2016) Article 4(c) of Directive 2014/24/EU (from 1 January 2017)	Commission Regulation (EU) 2015/2342 of 15 December 2015 amending Directive 2004/18/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts, OJ L 330 16.12.2015 p. 18 Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts, OJ L 307 25.11.2015 p. 5 Thresholds referred to in Directives 2004/17/EC, 2004/18/EC and 2009/81/EC, as amended by Commission Regulations (EU) 2015/2341, (EU) 2015/2342 and (EU) 2015/2340, expressed in the national currencies of the EFTA States, 1.9.2016, p. 8
From 10 February 2018 to 7 February 2020	2,049,583	Article 4(c) of Directive 2014/24/EU	Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts, OJ L 337 19.12.2017 p. 19 Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States, OJ C 146, 26.4.2018, p. 7
From 8 February 2020 to 18 March 2022	2,062,522	Article 4(c) of Directive 2014/24/EU	Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests, OJ L 279 31.10.2019 p. 25 Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States, OJ C 51, 14.2.2020, p. 16
From 19 March 2022	2,246,520	Article 4(c) of Directive 2014/24/EU	Commission Delegated Regulation (EU) 2021/1952 of 10 November 2021 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests, OJ L 398 11.11.2021 p. 23 Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States, OJ C 143, 31.3.2022, p. 8

3 National law

56. The complainant does not allege deficiencies in the transposition of the above Directives into national law. Only the relevant provisions of national law governing the provision of insured occupational pensions will be referred to below.

57. Sections 1(1) to 1(3) of the Act of 21 December 2005 No 124 on Mandatory Occupational Pensions ("the Act on Mandatory Occupational Pensions")[21] provide:

> *"(1) This Act applies to enterprises that have:*
>
> *a. at least two people in the enterprise who both have a working time and salary that amounts to 75 per cent or more of a full-time position,*
>
> *b. at least one employee without an ownership interest in the enterprise who has a working time and salary in the enterprise that amounts to 75 percent or more of a full-time position, or*
>
> *c. persons in the enterprise who each have a working time and salary that amounts to 20 per cent or more of a full-time position, and who together perform work equivalent to at least two man-years.*
>
> *(2) A limited company, public limited company, general partnership, sole proprietorship and any other legal entity that has employees in its service is considered an enterprise.*
>
> *(3) The Act does not apply to enterprises that have a pension scheme in accordance with the law or a collective agreement for state or municipal employees."*[22]

58. Section 2(1) of the Act on Mandatory Occupational Pensions provides:

> *"(1) Enterprises as stated in the first paragraph of section 1 must have pension schemes in accordance with the Enterprise Pensions Act, the Defined Contribution Pensions Act or the Occupational Pensions Act which ensure for employees in the enterprise a retirement pension in accordance with the requirements of this Act;"*

59. Article 4-1 of the Act of 6 June 2005 No 44 on Insurance Activities ("the Insurance Activities Act")[23] provides:

> *"The provisions of this chapter apply to:*
>
> *a. pension schemes involving defined benefit pensions established in a life insurance undertaking or a pension fund by a municipal employer who is bound by a main collective bargaining agreement between the employer and worker organisations in the municipal sector, or by a collective bargaining agreement with corresponding pension scheme requirements for municipal employers,*
>
> *b. corresponding pension schemes for state health trusts and other state enterprises,*

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[21] *Lov om obligatorisk tjenestepensjon*, available at https://lovdata.no/dokument/NL/lov/2005-12-21-124

[22] Unless otherwise stated, all translations are the Directorate's.

[23] Lov om forsikringsvirksomhet (forsikringsvirksomhetsloven), available at https://lovdata.no/dokument/NL/lov/2005-06-10-44

c. corresponding pension schemes for undertakings in which a municipality has decisive influence or holds or has held a municipal ownership interest, or which are closely connected to a municipality."

60. Section 12-4(1) of the Act of 16 June 1989 No 69 on Insurance Contracts ("the Insurance Contracts Act") [24] provides:

> *"In the case of life insurance, the insurance company cannot cancel the insurance in cases other than those specified in section 13-3.*"

61. Section 2-13 of the Act of 10 April 2015 No 17 on Financial Institutions and Financial Groups ("the Financial Institutions Act")[25] provides:

> *"(1) A licence to operate as a life insurance undertaking confers the right to write insurance considered to be life insurance, as well as other personal insurance specified in the licence.*
>
> *(2) A life insurance undertaking which provides a defined benefit pension scheme for an institution or a group institution that forms part of a group pension scheme may also provide a defined contribution pension scheme with no insurance element for the same institution or for an institution that is part of the same group.*
>
> *(3) A life insurance undertaking may as a limited part of its business write reinsurance in the classes covered by its licence."*[26]

62. Section 1 of the Act of 22 June 1962 number 12 on the Pension Scheme for Nurses[27] ("the Nurses' Pension Act") provides:

> *"Officially approved nurses employed by private, county or state enterprises covered by the Act of 2 July 1999 No 61 on specialist health care services and the Act of 15 June 2001 No 93 on health enterprises shall be a member of the pension scheme for nurses.*
>
> *…*
>
> *Officially approved nurses employed in a position related to health and care services in accordance with the Health and Care Act shall be a member of the pension scheme for nurses.*
>
> *…"*

63. Section 33(1) of the Nurses' Pension Act provides:

> *"The King shall make provisions on how the day-to-day administration of the pension scheme is to be carried out."*

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[24] Lov om forsikringsavtaler (forsikringsavtaleloven), available at https://lovdata.no/dokument/NL/lov/1989-06-16-69

[25] Lov om finansforetak og finanskonsern (finansforetaksloven), available at https://lovdata.no/dokument/NL/lov/2015-04-10-17

[26] English translation available at https://lovdata.no/dokument/NLE/lov/2015-04-10-17

[27] Lov om pensjonsordning for sykepleiere (sykepleierpensjonsloven), available at https://lovdata.no/dokument/NL/lov/1962-06-22-12

4 Overview of the Directorate's assessment

64. In order to address the matters referred to in the complaint, the Directorate will structure its assessment as follows.

65. In section 5, the Directorate will set out its understanding of the general nature of the services and key events of relevance for the case.

66. In section 6, the Directorate will set out why it considers that the contracts between KLP and the Public Bodies fall within the scope of EEA public procurement law. This will involve addressing arguments made by the Norwegian Government (i) that contracts have been awarded prior to accession to the EEA Agreement, (ii) that the services are non-economic, (iii) that the contracts are excluded on the basis of being for financial services in connection with the issue, sale, purchase or transfer of financial instructions, and (iv) that the contracts are excluded on the basis of being "in-house" arrangements within the public sector. The Directorate will also present the evidence that a significant number of contracts for insured public sector occupational pension services have been entered into since the entry into force of the EEA Agreement.

67. In section 7, the Directorate will set out its preliminary view as regards which specific rules of EEA public procurement law apply based on the nature and the value of the services, concluding that the services are more aligned with the type of services falling within the standard provisions and are above threshold.

68. Having set out its view on the applicable legal framework, in sections 8, 9, 10 and 11 the Directorate will address the specific issues of whether contracts for insured public sector occupational pension services should have been awarded with competition in the period 2013-2019 (when it is claimed that there was only one supplier);whether contracts can be continued for a lengthy period and whether certain contracts have been unlawfully amended.

69. After summarising its view in section 12, the Directorate will set out in section 13 why it considers there may be a consistent and general practice and its evidence in this regard.

70. In section 14, the Directorate will explain why it has not included arrangements in respect of the pension scheme for nurses and changes in the health sector within the scope of its investigation.

71. Annex 1 to this letter is an excel file with details of the specific contracts referred to as evidence in this letter. It is referred to in this letter when details from it are used in the text.

5 The general nature of the services and timeline of key events

72. The services in question are insured public sector occupational pension services. These pensions are financed by the employer and are complementary to the state pension paid out by the National Insurance Scheme (*Folketrygden*).

73. All employers in Norway are required to provide for – and fund – occupational pensions for their employees. This obligation arises primarily from legislation[28] but in some instances where collective agreements already existed when the relevant legislation was enacted, the obligation arises from those collective agreements.[29] An employer can meet this

[28] The Act on Mandatory Occupational Pensions

[29] Section 1(3) of the Act on Mandatory Occupational Pensions

obligation by establishing their own pension fund or by engaging a service provider but there must be full cover for the pension obligations. In most cases, there is no obligation to use a specific provider.

74. The present case concerns insured occupational pensions to be provided by the Public Bodies which do not have their own pension fund but rely on a service provider. The services entail the Public Bodies paying premiums to service providers. In return, the service providers undertake to administer and pay out pensions to the relevant Public Body's employees in accordance with the relevant collective agreement.

75. The complaint concerns contracts for pension services relating to the following public sector occupational pension schemes:

- the municipal scheme (applying to municipalities and counties);
- the joint scheme (applying to staff in hospitals and regional health authorities other than doctors and nurses);
- the pension scheme for hospital doctors; and
- the pension scheme for nurses.

76. The Directorate understands all these schemes to be subject to collective agreement(s). The main collective agreement in the municipal sector is currently SGS 2020. It applies to all municipalities (except Oslo) and all counties. The Directorate understands it also applies to RHAs and hospital trusts, because employees of those Public Bodies are entitled to municipal pensions (under the municipal scheme and the joint scheme). It is not clear to the Directorate whether the pension schemes for doctors and nurses are subject to SGS 2020 but, in any event, the Directorate understands that the requirements of those schemes are the same as those which apply to the municipal and joint schemes. As such, despite the fragmentation of legal rules, the Norwegian Government refers to coordination between the different schemes providing for a "joint occupational pension scheme in the Norwegian public sector".[30] Directly or indirectly, the considerations in the present letter therefore apply invariably to all the Public Bodies. The only exception of relevance to the present case concerns nurses, where a specific pension provider was granted an exclusive right to provide these pension services prior to the entry into force of the EEA Agreement; the Directorate will comment on this exception in section 14.1 below.

77. The Directorate understands that SGS 2020 regulates many aspects of the services exhaustively, such as the calculation of the benefits. As such, there can be no competition on the amount of the pensions paid out. In addition, SGS 2020 provides for equalisation of most of the elements of the premiums between all the clients of a given service provider. By virtue of this equalisation principle, the service provider cannot differentiate "core" premiums between different clients but rather must adjust premiums in ongoing contracts so all clients pay the same. Nonetheless, competition on the level of premiums between service providers is still possible.[31] In addition, SGS 2020 includes provisions which facilitate competition between service providers, including the possibility for clients to terminate their agreements yearly.[32]

[30] Letter of 24 March 2023, Document No 1363115, page 7.
[31] See paragraph 141 below.
[32] See paragraph 98 below.

78. The market for insured public sector occupational pensions is mature: the list of Public Bodies to whom these services can be provided is finite. Three undertakings have historically provided these services to Public Bodies: KLP, DNB[33] and Storebrand[34]. In 2012 and 2013 respectively, Storebrand and DNB announced their intention not to pursue the market further. Most of their clients switched to KLP, some set up their own pension funds and one refused to terminate the contract. In 2019, considering the amendments to the pension services by SGS 2020, Storebrand decided to pursue the market actively again.[35]

79. Given the facts involved in the case are subject to the regulatory developments at national and EEA level, and cover a significant period of time, the Directorate summarises the key events below:

Date	Event
1949	KLP established and starts providing public sector occupational pension services
22 June 1962	Royal resolution establishing that KLP is to administer the pension scheme for nurses
1 January 1994	EEA Agreement enters into force
1 January 1994	Pension schemes for senior and junior doctors merge
1 July 1994	Directive 92/50/EEC applies in the EEA
1 January 2002	RHAs established[36]
2002	Previous joint municipal pension scheme divided into three risk communities (municipalities, counties and RHAs). RHA scheme known as the "joint scheme"
2002	Provisions in the collective agreement for RHAs and hospitals freeze pension provision in the sector, meaning no changes are made to the scheme or its provider.
18 April 2007	Directive 2004/18/EC applies in the EEA
2008	Providers required to distinguish between undertaking's assets and customer's assets
2011	Changes to collective agreements introduce longevity adjustments

[33] DNB Livsforsikring AS.
[34] Storebrand Livsforsikring AS.
[35] See page 19 of Storebrand's 2018 annual report and page 5 of their 2019 annual report (available at https://www.storebrand.no/en/investor-relations/annual-reports/_/attachment/inline/3d300c46-d0bc-478d-a04f-60da8d23426b:f00a8853373f0fcfaeeb804dea37c7972ac24532/2018-annual-report-storebrand-livsforsikring.pdf and https://www.storebrand.no/en/investor-relations/annual-reports/_/attachment/inline/ca1664bf-e795-4c6b-992f-814ba462ec86:f9b2c6e65d803f19d6d6a1756e3053f3022a9f93/2019-annual-report-storebrand-livsforsikring.pdf)
[36] Complaint, Document No 1309815, page 8.

December 2012	Storebrand announces its decision to "withdraw" from the market[37]
June 2013	DNB announces its decision to "withdraw" from the market[38]
1 January 2017	Directive 2014/24/EU applies in the EEA
2017 to 1 January 2020	Municipal mergers
3 March 2018	New collective agreement "SGS 2020" agreed[39]
26 April 2019	Storebrand responds to a voluntary ex ante transparency notice published by Fjell municipality which had a deadline of 26 April 2019[40] and thereby starts actively participating in the market for new business[41]
1 January 2020	SGS 2020 enters into force

6 Applicability of EEA public procurement law to the contracts encompassed by the complaint

80. The Norwegian Government has argued that (some of) the contracts with KLP for insured public sector occupational pension services do not fall within the scope of EEA public procurement law for four reasons:[42]

(i) a number of the contracts have been awarded prior to accession to the EEA Agreement and therefore fall outside of the temporal scope of that Agreement;

(ii) the services are non-economic;

(iii) the contracts are excluded on the basis of being for financial services in connection with the issue, sale, purchase or transfer of financial instructions; and

(iv) the contracts are excluded on the basis of being "in-house" arrangements within the public sector.

81. These points will be addressed in turn below.

6.1 Whether the contracts fall within the temporal scope of the EEA Agreement

[37] Pension Guide 2021 (Appendix 3 to the complaint), available at https://pensjonskontoret.no/wp-content/uploads/2021/06/Pensjonsveileder_2021_storfil.pdf , page 9.
[38] See footnote 37.
[39] Complaint, Document No 1309815, page 19.
[40] https://ted.europa.eu/udl?uri=TED:NOTICE:182219-2019:TEXT:EN:HTML&src=0
[41] Complaint, Document No 1309815, page 2; complainant's submission of 18 November 2022, Document No 1329844, page 3.
[42] Letter of 24 March 2023, Document No 1363115, sections 8.1, 8.2 and 8.3.

82. Whilst some contracts with KLP for insured occupational public sector pension services may have been entered into prior to the entry into force of the EEA Agreement, evidence has been presented which supports the position that a significant number of such contracts have been awarded to KLP after that date:

- The complainant has stated that in the years 1996, 1997, 1998 and 2000, a total of 40 municipalities terminated their contracts with KLP.[43]

- The Norwegian Competition Authority has stated that 49 tenders were carried out in the period 2005 to 2009.[44]

- The complainant has provided evidence of 50 Public Bodies (and two intermunicipal companies[45]) which have published contract, contract award and/or voluntary ex ante transparency notices for the period from 2011 to 2014, suggesting that at least that number of contracts were entered into in that period.[46]

- Based on KLP's annual report, in 2011, 114 municipalities/counties did not have contracts with KLP (although some of these had their own pension fund).[47]

- The complainant has set out that 35 of the municipalities with which it had contracts between 2000 and 2020 have subsequently entered into contracts with KLP (five after first moving to DNB).[48]

- The complainant has asserted that DNB had 70 – 75 municipal and county customers in 2011/2012, virtually all of whom subsequently entered into contracts with KLP.[49]

- The Norwegian Government has stated that when Storebrand and DNB "withdrew" from the market in 2013, 93 municipalities and counties changed provider, most to KLP.[50]

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[43] Complaint, Document No 1309815, page 13; said to be based on KLP's annual reports (see letter of 20 June 2023, page 13).

[44] *"Konkurransen i markedet for offentlig tjenestepensjon*", appendix 6 to the complaint, Document No 1309902, section 5.6.

[45] The Directorate believes that intermunicipal companies are subject to a different collective agreement, however, it seems to the Directorate that some breaches are also capable of being committed by intermunicipal companies and therefore where the complainant has provided evidence relating to such companies, the Directorate has also referred to that evidence in this letter.

[46] See Annex 1, Table 1.

[47] See https://www.klp.no/om-klp/finans-og-ir/rapporter-og-presentasjoner/KLP%20konsern%20komplett_2011.pdf, page 9. The report states that KLP had 333 municipalities and counties as customers. The Directorate believes there to have been a total of 447 municipalities and counties at that point in time, relying on the figure of 428 municipalities stated as applying as of 2014 at https://www.regjeringen.no/no/tema/kommuner-og-regioner/kommunestruktur/utviklingen-av-den-norske-kommunestruktu/id751352/ , to which a total of 19 counties should be added.

[48] See the complainant's submission of 18 November 2022, Document No 1329844, page 2.

[49] See footnote 48.

[50] Letter of 24 March 2023, Document No 1363115, page 13.

83. Furthermore, the Directorate recalls that any contract which has been amended in breach of the public procurement rules since the entry into force of the EEA Agreement will also fall within its scope as the legislation in the light of which a modification must be assessed is that in force at the date of the amendment.[51] As will be set out in section 13.5, the Directorate believes that there may be 369 such contracts.

6.2 The economic nature of the services and whether the contracts constitute public service contracts

84. The scope of all three public procurement directives (Directives 92/50/EEC, 2004/18/EC and 2014/24/EU) is based on the concept of a "public contract" and, more relevantly for this case, the concept of a "public service contract." There are no material differences between the directives for this purpose. As such, the Directorate will only refer to Directive 2014/24/EU in this section but considers its position to be equally applicable to contracts awarded under both of the previous directives.[52]

85. Pursuant to its Article 1(1), Directive 2014/24/EU applies to public contracts exceeding the relevant financial threshold set out in Article 4.

86. Pursuant to Article 2(1)(5), a public contract is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.

87. Pursuant to Article 2(1)(9) a public service contract is a public contract having as its object the provision of services other than those referred to in Article 2(1)(6). The services referred to in Article 2(1)(6) are those which give rise to a public works contract and – in broad terms – comprise various construction services, therefore a public service contract is a contract for all other services as defined in EEA law.[53]

6.2.1 The object of the contracts

88. The Norwegian Government has argued that the services concerned are non-economic and are not services for the purpose of EEA law, meaning a contract for such services cannot fall within the scope of EEA public procurement law.[54]

89. In making its argument, the Norwegian Government has relied on the judgment of the EFTA Court in Case E-13/19 *Hraðbraut*.[55]

90. In *Hraðbraut*, the EFTA Court applied Article 37 EEA, which provides that only services normally provided for remuneration are to be considered services within the meaning of the EEA Agreement.[56] The Court held that the essential characteristic of remuneration is

[51] Judgment of the CJEU of 2 September 2021, Joined Cases C-721/19 and C-722/19, *Sisal*, EU:C:2021:672, paragraph 28.
[52] As regards Directives 92/50/EEC and 2004/18/EC see Articles 1(a), 3(1) and 7 of Directive 92/50/EEC and Articles 1(2)(a), 1(2)(d) and 7 of Directive 2004/18/EC.
[53] See judgment of the EFTA Court of 10 December 2020, *Hraðbraut*, E-13/19, paragraph 90.
[54] Letter of 24 March 2023, Document No 1363115, section 8.2.2.
[55] See judgment of the EFTA Court of 10 December 2020, *Hraðbraut*, E-13/19.
[56] Judgment of the EFTA Court of 10 December 2020, *Hraðbraut*, E-13/19, paragraph 91.

absent in the case of education provided under a national education system in situations where the State, in establishing and maintaining such a system, is fulfilling its duties towards its own population in the social, cultural, and educational fields, and when such a system is, as a general rule, funded from the public purse and not by pupils or their parents.[57]

91. According to the Norwegian Government, the pensions provided by KLP are a duty of the State towards its own population in the social field, and primarily funded from the public purse.

92. As is clear from the CJEU's case-law, in order to determine whether a given transaction falls within the scope of economic activity, it is necessary to analyse all the circumstances in which it is carried out.[58]

93. The Directorate however notes that the reasoning of the EFTA Court in *Hraðbraut* has, so far, only been applied to systems of compulsory education, despite both the CJEU and EFTA Court having dealt with somewhat similar issues in the subsequent cases of *ASADE*[59] and *Stendi*.[60]

94. In *ASADE*, the CJEU found that certain social services in the form of personal assistance could be regarded as being of an economic nature and, therefore, as constituting services within the meaning of Directive 2014/24/EU.[61] The CJEU stated that *"services provided for remuneration which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive, may be regarded as economic activities"*.[62] To this end, the CJEU reasoned by analogy to its judgment in case C-108/10 *Scattolon*,[63] where the grand chamber had recalled, referring to consistent case law from varying fields of EU law, that *"[t]he term 'economic activity' … covers any activity consisting in offering goods or services on a given market"*.[64]

95. In *Stendi*, the EFTA Court rejected an argument that nursing home services were non-economic on the basis that they were not conducted in a similar way as the services in *Hraðbraut* within the framework of a system such as that in *Hraðbraut*.[65] The Court concluded that the contracts in question entailed remuneration for the service provider and so were contracts for services within the meaning of Article 37 EEA.[66]

96. In that light, the Directorate is of the view that the present case cannot be compared to *Hraðbraut*. Like in *Stendi* and *ASADE*, there is remuneration for the services provided, and

[57] Judgment of the EFTA Court of 10 December 2020, *Hraðbraut*, E-13/19, paragraph 92.
[58] Judgment of the CJEU of 27 April 2023, *Fluvius Antwerpen v MX*, C-677/21, EU:C:2023:348, paragraph 44.
[59] Judgment of the CJEU of 14 July 2022, *Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE) v Consejería de Igualdad y Políticas Inclusivas*, C-436/20, EU:C:2022:559
[60] Judgment of the EFTA Court of 28 March 2023, *Stendi AS and Norlandia Care Norge AS vs Oslo commune,* E-4/22*.*
[61]Judgment of the CJEU of 14 July 2022, *ASADE*, C-436/20, paragraph 66.
[62] Judgment of the CJEU of 14 July 2022, *ASADE*, C-436/20, paragraph 63.
[63] Judgment of the CJEU of 6 September 2011, *Scattolon,* C-108/10, EU:C:2011:542.
[64] Judgment of the CJEU of 6 September 2011, *Scattolon,* C-108/10, paragraph 43.
[65] Judgment of the EFTA Court of 28 March 2023, *Stendi*, E-4/22, paragraph 43.
[66] Judgment of the EFTA Court of 28 March 2023, *Stendi*, E-4/22, paragraph 46.

like in *Scattolon*, the services are not the result of exercise of public powers, but provided on a market.

97. As regards remuneration, the Norwegian Government has accepted that some of the premiums constitute remuneration, which "may suggest that the Norwegian public occupational pension scheme is a contract for the provision of 'services' for the purposes of the Directive".[67] This structure is sufficient to give rise to an economic service under EEA law given the reference in Article 37 EEA to remuneration.

98. As regards provision on a market, it seems clear to the Directorate that the Norwegian Government has organised these services on a market.[68] In the preparatory works of the 2004 review of the Insurance Activities Act, the Norwegian Government indicated that the review had the purpose to "create orderly competition in the market for municipal pension schemes" by ensuring that "all life insurance companies can offer pension products to the municipal sector on equal terms."[69] In that regard, the Directorate notes that to provide these public occupational pension services, no special licence or authorisation is required, other than the general licence to offer life insurance services. Implicitly, the Government's wish to open these services to competition can also be deduced from the right of Public Bodies to terminate their contracts yearly to facilitate changes of provider,[70] and is corroborated by independent national authorities such as the Norwegian Competition Authority[71] and the Norwegian Pension Office.[72] The finding that occupational pensions can be services provided on a market is further corroborated by the fact that these pensions are regulated by an EEA Directive, adopted on the basis of the EU Treaty provisions on free movement of services and internal market approximation of laws.[73] In line with recital 6, that Directive is part of creating an internal market for occupational retirement provision organised on a European scale.

99. Finally, the fact that KLP operates as a mutual cannot preclude it from being able to carry out an economic activity. As the EFTA Court held in *Stendi*, the fact that a contract is concluded with a non-profit-making entity does not preclude that entity from being able to carry out an economic activity.[74] Furthermore, the EFTA Court and the CJEU have also held that the pursuit of a social objective or the taking into account of the principle of solidarity in the context of the provision of services does not, as such, prevent the provision of the services from being regarded as an economic activity.[75]

100. As such, the definition of "services" under Article 37 EEA appears to be satisfied.

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[67] See letter of 24 March 2023, Document No 1363115, page 16.
[68] See letter of 26 May 2023, Document No 1375600, section 2.
[69] Ot. Prp. Nr 11 (2003-2004) chapter 1.
[70] See letter of 24 March 2023, Document No 1363115, page 12.
[71] See https://konkurransetilsynet.no/wp-content/uploads/2018/08/rapport-_konkurransen-i-offentlig_tjenestepensjon.pdf and https://konkurransetilsynet.no/innlegg-penger-a-spare-pa-pensjon-sa-lenge-konkurransen-er-der/.
[72] See the 2023 "Pension Guide", which applies specifically to the services at issue in this letter. Chapter 6 is specifically dedicated to competition, https://pensjonskontoret.no/pensjonsveileder/pensjonsveileder-2023/.
[73] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs), act referred to at point 31d of Annex IX to the EEA Agreement (OJ L 354, 23.12.2016, p. 37). The Directive is adopted on the basis of Articles 53, 62 and 114(1) TFEU.
[74] Judgment of the EFTA Court of 28 March 2023, *Stendi*, E-4/22, paragraph 45.
[75] Judgment of the EFTA Court of 28 March 2023, *Stendi*, E-4/22, paragraph 45 and the case law cited.

6.2.2 The above analysis is not altered by application of principles arising from state aid law concerning management of social security schemes

101. The Norwegian Government has also questioned whether the services fall outside public procurement law on the basis of principles of state aid law that the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on the principle of solidarity and are subject to state supervision. In respect of the solidarity aspect, the Norwegian Government has referred to KLP's lack of a profit-making objective; the benefits provided under the schemes being independent of contributions made and not necessarily proportionate to the earnings of the relevant individual; and there being equalisation of premiums.

102. The Directorate considers that these arguments are not relevant from a public procurement perspective.

103. In the first instance, the Directorate notes that the fact that a service is somehow linked to a State's social security system is not sufficient to exclude it from the scope of the procurement directives. The CJEU ruled in *ASADE* that whereas "*the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on the principle of solidarity and those activities are subject to State supervision, […] that is not necessarily the case with specific social services which are provided by private operators, the cost of which is borne by either the State itself, or by those social security bodies.*".

104. Furthermore, the services are to be secured by the relevant employer. Whilst the Public Bodies are public sector employers, the system of which these services form part is based on requirements for all employers, public and private, to ensure pensions complementary to the compulsory national insurance pension for their employees. The standards which these pensions are required to meet are set out in different legislative provisions and collective agreements. There is therefore not one universal scheme or service level, and the specific obligations imposed on different employers vary. Moreover, the pensions are funded by the individual employers and it is left to those employers to determine the manner in which they choose to meet their obligations (by setting up their own pension fund or choosing a public or private provider from the market).

105. In other words, in procuring these services, the Public Bodies are not providing social security services as part of their official State function. They are merely fulfilling a legal obligation that rests on all employers, whether public or private. Consequently, if the Norwegian Government's argument were to prevail, it would appear to render all public and private sector occupational pension provision non-economic.[76]

106. As regards the non-profit making nature of KLP, the Directorate recalls its findings of the last section, that KLP is only one provider in a competitive, for-profit market. In any event, it is settled case law that a public contract can still exist where payment is on a cost-basis and/or a contract is concluded with a non-profit making body.[77]

107. As regards the benefits not being dependent on contributions and not necessarily being proportionate to earnings, the Directorate notes that the relevant transaction for the purposes of public procurement law is that between the Public Body and the service

[76] In this respect, it can also be noted that the complainant has stated that towards the OECD, Norway categorises occupational pensions as "private pensions" rather than social security (letter of 26 May 2023, Document No 1375600, page 10).

[77] See judgment of the EFTA Court of 28 March 2023, *Stendi*, E-4/22, paragraph 45 and the case law cited.

provider, not that between the employee and the service provider. The Public Body is required to pay contributions which are calculated by the provider to ensure that there are adequate funds available to meet the required payment obligations and to cover the provider's administrative costs and potential profit/other surplus.

108. As regards the solidarity aspect, the Directorate notes that the only equalisation required is between customers of one provider, there is no equalisation required across all customers, meaning that costs across the scheme as a whole are not equalised. In any event, the CJEU has already held that pooling of risk is not inherently irreconcilable with the application of a procurement procedure.[78]

109. On the basis of the above, the Directorate concludes that its position that the definition of "services" under Article 37 EEA appears to be met is not altered by the application of principles arising from the state aid sector concerning management of social security schemes.

6.2.3 Conclusion

110. The Directorate assumes that the remaining conditions of the definition of a public service contract are not contested. Therefore, as the services appear to fall within the scope of Article 37 EEA, contracts between the Public Bodies and KLP for the provision of insured public sector occupational pension services should be considered to be public services contracts subject to the provisions of Directive 2014/24/EU, provided they exceed the relevant financial thresholds.

6.3 Whether services are financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments

111. The Norwegian Government has also argued that the contracts are excluded from the scope of the procurement rules on the basis of Article 10(e) of Directive 2014/24/EU, which states that the Directive shall not apply to contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments.[79] Equivalent provisions were included at Article 1(a)(vii) of Directive 92/50/EEC and Article 16(d) of Directive 2004/18/EC.

112. It seems clear to the Directorate that the object of the contracts is to provide insured public sector occupational pension services. The trading of any financial instruments is carried out by the provider in order to meet that requirement but the amount to be paid out to the pensioners is not linked to the performance of any investments. As such, any trading of financial instruments is ancillary to the service of providing pensions insurance.[80] Further support for this position is provided by the fact that the Norwegian Government has stated that investments must be liquidated upon transfer to a new pension provider.[81]

6.4 Whether the arrangements are excluded on the basis of the "in-house" exemption

[78] Judgment of the CJEU of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426, paragraph 58.
[79] Letter of 24 March 2023, Document No 1363115, section 8.2.3.
[80] As regards the object of a contract, see judgement of the EFTA Court of 21 March 2018, Case E-4/17, EFTA Surveillance Authority v Norway, paragraph 82 and case law cited.
[81] Letter of 24 March 2023, Document No 1363115, page 44.

113. The Norwegian Government's final argument is that the contracts are excluded on the basis of the "in-house" exemption, set out in Article 12(3) of Directive 2014/24/EU, which provides that contracts awarded to legal persons over which the relevant contracting authorities exercise joint control fall outside the scope of that Directive, provided that three conditions are met:

- there must be joint control similar to that which the contracting authorities exercise over their own departments;

- more than 80% of the activities must be carried out for the controlling authorities;

- there can be no direct private capital participation, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the EEA Agreement, which do not exert a decisive influence on the controlled legal person.[82]

114. There was no equivalent provision to Article 12 in Directive 92/50/EEC or Directive 2004/18/EC. However, Article 12 of Directive 2014/24/EU was based on case law of the CJEU applied in relation to those two directives.[83] Whilst the conditions set out in Article 12 are not identical to those applicable on the basis of the case law, the general position is very similar. The Directorate will therefore limit its comments in this section to the conditions of Article 12(3) of Directive 2014/24/EU but considers its conclusions also to apply to contracts awarded under the two directives preceding Directive 2014/24/EU.

115. In the present case, the Directorate contends that KLP cannot rely on Article 12(3) of Directive 2014/24 as there is private capital participation.

116. KLP is a mutual society, meaning that its members are both the customers and the owners of the company. It is open to new members who then become customers and co-owners.[84]

117. It is undisputed that KLP has a significant number of private members (2200, with an 11% share of the total premium reserve, according to the Norwegian Government[85]). These members comprise, as far as the Norwegian authorities have been able to verify, various non-profit organisations, trade unions, political parties, church entities etc., and also private undertakings who employ nurses.[86]

118. The Norwegian Government has not claimed that these entities are all contracting authorities but has contested that they represent "private capital participation" within the meaning of Directive 2014/24/EU and argued that their participation is in any event required

[82] Letter of 24 March 2023, Document No 1363115, section 8.3.
[83] See recital 31 and, as regards relevant case law, in particular the judgment of the CJEU of 18 November 1999, C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, EU:C:1999:562.*
[84] Letter of 24 March 2023, Document No 1363115, page 10.
[85] Letter of 24 March 2023, Document No 1363115, pages 20 and 21.
[86] Letter of 24 March 2023, Document No 1363115, page 21. Information provided by KLP directly also supports this position (see presentation of 19 September 2023, Document No 1401819, slide 54).

by national legislative provisions in conformity with the EEA Agreement, which would justify private capital participation.[87]

119. In the Directorate's view, these entities represent "private capital participation." The Directorate understands that all members of KLP, whether public or private, participate equally in the mutual[88] and must provide equity contributions.[89] Such contributions as part of membership clearly give rise to "capital participation" and, in so far as the entities concerned are not contracting authorities, they must be treated as "private". The fact that the private members may have (had) close connections to municipalities is irrelevant. Directive 2014/24/EU does not distinguish between different types of private entities and prior case law from the CJEU has held explicitly that entities in which private social solidarity institutions carrying out non-profit activities participated could not benefit from the in-house exemption on which Article 12 was based.[90]

120. Contrary to what the Norwegian Government seems to allege, these entities' participation is also not required by the national legislative provisions to which that Government refers. Article 4-1(c) of the Insurance Activities Act provides that undertakings in which a municipality has decisive influence or holds or has held a municipal ownership interest, or which are closely connected to a municipality may establish occupational pension schemes corresponding to municipal schemes. This provision therefore merely provides for a possibility for such entities to join KLP. However, aside from where the employees are nurses (see section 14 below), there is no legal requirement for these services to be provided by KLP specifically, and therefore no legal requirement for these entities to participate in KLP.[91] Indeed, the Norwegian Government does not contest that the services provided by KLP can legally be provided by other entities.

121. The Norwegian Government also refers to section 12-4 of the Insurance Contracts Act which prohibits KLP from unilaterally terminating the agreements with these entities, which would end their participation in KLP's capital. However, this does not amount to a legal requirement for these entities to participate in the capital: in conformity with SGS 2020, these entities have the right to terminate their agreements yearly.

122. The participation of private capital in KLP is therefore sufficient to preclude reliance upon the exemption under Article 12(3) of Directive 2014/24.

123. In addition, the Directorate also has doubts as to whether the first condition, relating to joint control, is met given the private members' participation in KLP's decision-making bodies. Those entities obey considerations particular to their private interests, which are different in nature from that of the objectives of public interest pursued by contracting authorities.

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[87] Letter of 24 March 2023, Document No 1363115, section 8.3.

[88] See the Norwegian Government's letter of 6 March 2023, Document No 1356993, Your ref 22/6706-9, sent in relation to Case No 89158 concerning alleged state aid to KLP, page 40.

[89] See section 2-3 of KLP's articles of association, Document No 1363123 and letter of 24 March 2023, Document No 1363115, page 10.

[90] Judgment of the CJEU of 19 June 2014, *SUCH*, C-574/12, EU:C:2014:2004, paragraphs 36 to 40.

[91] See the Norwegian Government's letter of 6 March 2023, Document No 1356993, Your ref 22/6706-9, sent in relation to Case No 89158 concerning alleged state aid to KLP, page 2.

For that reason, it seems the Public Bodies cannot exercise control over KLP similar to that which they exercise over their own departments.[92]

124. Finally, the Directorate understands that the KLP group as a whole provides numerous financial services on the open market, giving rise to doubt that the second condition (relating to the 80 % activity rule) is met given the links between KLP and its subsidiaries.[93]

6.5 Conclusion: the procurement rules apply

125. Having established that contracts have been awarded since the entry into force of the EEA Agreement; that the services appear to be economic services for the purposes of Article 37 EEA; that the services do not appear to be excluded under Article 10(e) of Directive 2014/24/EU; and that the services do not appear to be provided "in-house" for the purposes of Article 12(3) of Directive 2014/24/EU, the Directorate concludes that the procurement rules apply to contracts procuring these services.

7 The applicable rules and thresholds

126. In the previous section, the Directorate has set out why it considers that the public procurement rules apply. It must now be established which specific rules apply and whether the contracts exceed the relevant financial threshold.

7.1 Whether the services are "standard" services under the procurement rules

127. Directive 2014/24/EU sets out detailed procedural requirements for the award of public contracts. However, for the award of contracts for certain social and other services, its provisions are significantly less prescriptive and apply at a higher financial threshold. The so-called "light touch regime" for these services is set out in Articles 74 to 77 of the Directive. The Norwegian Government has argued that insured public sector occupational pension services fall under this light touch regime as "government employee pension services".[94] The Directorate considers that the services are more aligned with the type of services falling within the standard provisions of the Directive.

128. The light touch regime was established by Directive 2014/24/EU. Previously, contracts in respect of similar services were only subject to two specific articles of Directive 2004/18/EC or Directive 92/50/EEC (as applicable) and their award was subject only to general principles of EEA law, rather than the more detailed procedural requirements of those directives, provided the contract was of certain cross border interest.[95] The Directorate will comment further on the position under the other two directives below.

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[92] See the judgment of the CJEU of 19 June 2014, *SUCH*, C-574/12, EU:C:2014:2004, paragraph 36 and also the judgment of the CJEU of 11 January 2005, *Stadt Halle,* C-26/03, EU:C:2005:5, paragraph 49, although it should be noted that these judgments predate Directive 2014/24/EU and this point could now considered to be covered by the third condition of Article 12(3).

[93] In this respect, the Directorate notes that according to the complainant, the structure of the KLP group is due to regulatory requirements and KLP has injected significant amounts of capital into the subsidiaries, financed by KLP's equity.

[94] Letter of 24 March 2023, Document No 1363115, section 8.4.

[95] See Article 9 of Directive 92/50/EEC, Article 21 of Directive 2004/18/EC and judgment of the CJEU of 13 November 2007, C-507/03, *Commission v Ireland*, EU:C:2007:676, paragraph 26.

7.1.1 Directive 2014/24/EU

129. The services falling under the light touch regime are set out in Annex XIV of Directive 2014/24/EU with reference to the common procurement vocabulary ("CPV"). The CPV has a tree structure with an increasing degree of precision. The EFTA Court has held that the assessment of whether a public contract covers an activity must be based on the description of the relevant CPV code, as well as the title of the division of the CPV, within its tree structure, in which it is located.[96]

130. "Government employee pension schemes" are included within the scope of the light touch regime. However, those services (with CPV code 75320000-5) fall under a broader heading of the group of "Compulsory social security services" (CPV code 75300000-9), which itself falls under the division of "Administration, defence and social security services" (CPV code 75000000-6).

131. It is therefore only possible for the services to fall within "Government employee pension schemes" if they are consistent with the higher-level group of "Compulsory social security services".

132. As set out in section 6.2.2 above, in procuring these services, the Public Bodies are merely fulfilling a legal obligation that rests on all employers, whether public or private, to provide certain benefits for their employees. The services provided are therefore not, in the Directorate's view, "compulsory social security services" in the same way as other services in that group of the CPV, such as sickness, maternity and disability benefits. Furthermore, the explanatory notes to the CPV refer repeatedly to "administrative" and "operational" services in respect of the compulsory social services forming part of group 753.[97] This indicates that the group is intended to cover the administration of state social security, in contrast with the asset management and risk services involved in provision of insured occupational pension services.

133. In some instances, such as in respect of the occupational pension for central government employees in Norway, public sector pension schemes are unfunded, meaning current obligations are paid for by current tax revenue on a pay as you go basis. These services can be seen as much more similar to the other compulsory social security services referred to above and the services required in relation to such benefits are more administrative than financial.

134. Given the above, the Directorate has doubts as to whether the services fall under the light touch regime. In contrast, there is a CPV code for the category of "Group pension services" (66523000-2), falling under the class of "Pension services" (66520000-1), which falls under the group of "Insurance and pension services" (66500000-5), which is part of the division of "Financial and insurance services" (66000000-0). In the Directorate's view, this is a more appropriate code for the services in question. This CPV code does not fall within Annex XIV, therefore the Directorate's view is that the services should be considered to fall under the standard provisions of Directive 2014/24/EU and not the light touch regime set out in Articles 74 to 77.

7.1.2 Directives 92/50/EEC and 2004/18/EC

[96] Case E-7/19, *Tak – Malbik ehf. V the Icelandic Road and Coastal Administration and Þróttur ehf*., paragraph 52.

[97] CPV 2008 Explanatory Notes, available at https://simap.ted.europa.eu/documents/10184/36234/cpv_2008_explanatory_notes_en.pdf

135. Prior to the establishment of the light touch regime, "Government employee pension schemes" were excluded from the majority of the provisions of the procurement directives by Article 9 of Directive 92/50/EEC and subsequently by Article 21 of Directive 2004/18/EC. In line with the Directorate's reasoning above based on the categories and structure of the CPV, these exemptions did not apply, and the insured public sector occupational pension services therefore also fell under the standard provisions of Directive 92/50/EEC and Directive 2004/18/EC.[98] This is further corroborated by the judgment of the CJEU in *Commission v Germany* where it was common ground that the public occupational pension services in question fell under the standard provisions of those Directives.[99]

7.2 Whether the value of the services should be calculated on the basis of the total premiums

136. The procurement directives only apply to contracts the value of which exceeds a certain threshold. The Norwegian Government has argued that the value of contracts for insured pension services should be calculated in a way which excludes some of the payments made by the Public Bodies, hence potentially decreasing the number of contracts encompassed by the complaint.[100] The Directorate considers that the total premiums should be taken into account.

137. The basis for the Norwegian Government's argument seems to be that a large proportion of the premiums paid by the Public Bodies under contracts for insured public sector occupational pension services are assets of the customer and must be kept separate from the provider's assets. The customer's assets are those dedicated to covering their employees' pension benefits. The Norwegian Government has argued that the customer's assets cannot be viewed as consideration and the value of the services should be calculated using the value of the elements of the premiums which the provider is free to use as they like (such as the profit margin and asset management costs), rather than the total value of the premiums. This amount is said to be around 3%.[101]

138. Article 7(4) of Directive 92/50/EEC, Article 9(8) of Directive 2004/18/EC and Article 5(13)(a) of Directive 2014/24/EU all clearly refer to the value of contracts for insurance services comprising the premium payable and other forms of remuneration. The Norwegian Government refers to the fact that the provisions are preceded by the words "where appropriate" to argue that it is possible to use another approach.

139. In case *Commission v Germany,*[102] Germany similarly argued that the value of contracts for pensions services should be based on the management costs, not on the total amount of the premiums paid. The CJEU rejected that argument, relying on the wording of Article 7(4) of Directive 92/50/EEC and Article 9(8) of Directive 2004/18/EC. [103]

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[98] For completeness, the Directorate notes that the previous directives referred not (exclusively) to the CPV discussed in this section, but (also) the CPC nomenclature of the United Nations (see Annex I of Directive 92/50/EEC and Annex II of Directive 2004/18/EC). However, the arguments made in this section can also be applied to those previous regimes.

[99] Judgment of the CJEU of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426, paragraph 68.

[100] Letter of 24 March 2023, Document No 1363115, section 8.4.3.

[101] Letter of 24 March 2023 (Document No 1363115), page 11.

[102] Judgment of the CJEU of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426.

[103] Judgment of the CJEU of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426, paragraph 86.

140. The Norwegian Government has sought to distinguish the system in Norway from that in *Commission v Germany*.[104] It is not clear to the Directorate what Norway bases this argument on as the opinion of the Advocate General and the judgment contain limited details about the workings of the scheme. The Directorate therefore concludes that, in light of the clear wording of the provisions of the Directives, the CJEU considered the precise workings of the scheme to be irrelevant for the purposes of determining the value of the contract: in any case, the total amount of premiums needed to be taken into consideration. It can also be noted that like the pension services at issue in Norway, the premiums at stake in *Commission v Germany* were being "used to finance the ultimate occupational old-age pension benefits" and the CJEU still took them into account to establish the value of the contract.[105]

141. In any case, the Directorate understands that the value of *all* elements of the premiums in Norway can vary between different providers. In calculating the premiums, providers have to take into account their assessments of certain risks and their willingness to expose their own equity to risk.[106] These assessments will differ between providers, meaning premiums will differ. In addition, if a provider receives a positive return on investments, these returns can then be used by the customer to fund future premium payments, reducing – in effect – the amount the customer has to pay.

142. Given that the entire premium can vary between providers, and therefore that there can be competition on the total amount, it does not appear to the Directorate to be justified to only take certain elements into account in calculating the contract value. These factors also indicate that the "customer's assets" in an insured pensions arrangement are not equivalent to savings under a normal banking arrangement, as the Norwegian Government seems to argue.

143. The Directorate therefore takes the view that, based on both the wording of the Directives and the nature of the premiums, the value of the contracts should be calculated based on the total premiums payable.

7.3 Which contracts for insured public sector occupational pensions exceed the relevant financial threshold

144. The Directorate has limited information about the value of the contracts awarded. However, in accordance with the conservative calculations below, it appears that a contract for insured public sector occupational pension services for 10 employees on average salary, running for four years or longer, would exceed the relevant threshold. The Directorate thinks it unlikely that there would be Public Bodies with less than 10 insured employees and it seems most contracts have been awarded for at least four years. Therefore, the

[104] Letter of 24 March 2023, Document No 1363115, page 25.
[105] Judgment of the CJEU of 15 July 2010, *Commission v Germany*, C-271/08, EU:C:2010:426, paragraph 87.
[106] The Directorate understands that providers can determine how much of any positive return on investments is allocated to a buffer fund to cover any future losses before the company must cover those losses from its own equity, and how much is allocated to customer's premium fund to fund future premium payments. Whilst the Directorate is aware that the buffer fund in its current form was only introduced in 2022, the Directorate's understanding is that it was still possible to protect equity in a similar way (although to a lesser extent as caps applied) under the previous system.

Directorate concludes that all contracts for insured public sector occupational pension services must be above threshold and thus caught by the procurement rules.

145. The value of contracts without a fixed term or those with a term of more than four years should be calculated on the basis of the monthly value multiplied by 48.[107] The Directorate considers this calculation will be applicable to the majority of contracts as it has only been presented with evidence of four contracts where the advertised term was less than four years.[108]

146. The Norwegian Government has provided an example of KLP's premiums for 2022.[109] This sets out that their "standard" equalised premium was a total of [redacted] of the salary base. On top of this, the interest guarantee premium and premiums which cannot be determined in advance must be added. The total annual premium for the customer equates to [redacted] of the salary base.

147. Applying this contribution rate to data from Statistics Norway concerning the basic monthly salary/earnings in local government,[110] and applying the Norwegian consumer price index (CPI)[111] for years with missing data, indicates that to reach the threshold going back to 1994, a Public Body would only need to have **[**a maximum of 9/**<10]** employees – see the table below.

Year	Threshold applicable on 31/12/xxxx (NOK)	Threshold per month over 48 months (NOK)	Average basic monthly salary /earnings (NOK)	Assumed contribution rate	Average monthly contribution per employee (NOK)	No of employees to reach threshold
2022	2,246,520	46,803	45,430	[redacted]	[redacted]	[redacted]
2020	2,062,522	42,969	42,300			
2018	2,049,583	42,700	40,590			
2016	1,767,450	36,822	38,660			
2014	1,567,342	32,653	39,500			
2012	1,603,568	33,408	37,200			
2010	1,654,298	34,465	34,200			
2008	1,654,298	34,465	31,400			
2006	1,741,841	36,288	26,567			
2004	1,826,846	38,059	24,419			

[107] Article 7(5) of Directive 92/50/EEC; Article 9(8) of Directive 2004/18/EC and Article 5(14) of Directive 2014/24/EU. The nature of insured public sector occupational pension services is such that a contract cannot have a total price.
[108] See Annex 1, Table 2. The contract with Kristiansund was, in fact, awarded without a fixed term.
[109] Annex 1 of the letter of 24 March 2023, Document No 1363115.
[110] https://www.ssb.no/en/statbank/table/11418/ using basic monthly salary; average value; all occupations; local government; both sexes; all employees; https://www.ssb.no/en/statbank/table/07819/ using basic monthly salary and https://www.ssb.no/en/statbank/table/05577/ using monthly earnings.
[111] https://www.ssb.no/en/priser-og-prisindekser/konsumpriser/statistikk/konsumprisindeksen

2002	2,026,860	42,226	23,726	[redacted]
2000	1,670,000	34,792	22,761	
1998	1,629,580	33,950	21,555	
1996	1,661,500	34,615	20,560	
1994	1,623,764	33,828	19,807	

148. The above is based on the 2022 contribution rate from one example customer and average salaries/earnings, and data does not appear to be available from Statistics Norway concerning the average basic monthly salary or earnings in the years prior to 2003 so these values have been based on the 2008 figure and the Norwegian CPI. However, the number of employees needed to exceed the threshold is very small. Consequently, the Directorate considers it reasonable to assume that all contracts awarded by Public Bodies for insured public sector occupational pension services since the entry into force of the EEA Agreement will have exceeded the relevant threshold.

8 Breaches of the procurement rules: introduction

149. Having set out its preliminary view that the contracts fall within the scope of public procurement law, that the standards provisions of the relevant directives are applicable and that all contracts exceed the relevant monetary threshold, the Directorate will now assess the specific alleged breaches of the directives. It is recalled that these relate to:

(a) unlawful direct awards of contracts;

(b) the continuation of contracts without fixed terms for disproportionately long periods of time;

(c) unlawful modifications of contracts due to:

- extensions of contracts;
- mergers of contracting authorities; and
- changes to the services.

9 Whether the sole supplier exemption applied in 2013-2019

150. The first potential breach arises from contracts having been awarded without competition, something which is only lawful in limited circumstances.

151. The Norwegian Government appears to accept that contracts were awarded without competition, at least in the period from 2012 to 2019,[112] but argues that this was justified on the basis of rules effectively allowing a direct award where there is only one supplier (the "sole supplier exemption"). The Pension Office's guide states that DNB did not announce its withdrawal from the market until June 2013.[113] In April 2019, Storebrand started actively pursuing new business in this market. As such, the Directorate will only

[112] See pages 26 to 28 of the letter of 24 March 2023, Document No 1363115.
[113] Pension Guide 2021 (Appendix 3 to the complaint), available at https://pensjonskontoret.no/wp-content/uploads/2021/06/Pensjonsveileder_2021_storfil.pdf , page 9.

address the sole supplier argument in respect of the period from June 2013 to April 2019 as it is clear it could not have been applied before or after that period.

152. The Directorate's preliminary view differs from the Norwegian Government's position.

9.1 Legal framework

153. The relevant period spans that covered by Directive 2004/18/EC and Directive 2014/24/EU. As such, it is necessary to consider the provisions of both directives when assessing whether the award of contracts without competition was lawful.

154. Article 31 of Directive 2004/18/EC allowed for an award of a contract without competition when, for technical reasons, the contract could be awarded only to a particular economic operator. The CJEU has held that this type of exemption must be interpreted strictly, and that the burden of proof lies on the person seeking to rely on it.[114]

155. Article 32 of Directive 2014/24/EU contains a similar provision, allowing for an award without competition where the services can be supplied only by a particular economic operator because competition is absent for technical reasons, subject explicitly to there being no reasonable alternative or substitute and the absence of competition not being the result of an artificial narrowing down of the parameters of the procurement.

156. Reference can also be made to recital 50 of Directive 2014/24/EU which states that the exception in Article 32 should be limited to cases "where it is clear from the outset that publication would not trigger more competition or better procurement outcomes". Recital 50 to Directive 2014/24/EU also gives examples of situations in which there is only one possible supplier. These relate to technical reasons arising from near technical impossibility for another economic operator to achieve the required performance, the necessity to use specific know-how, tools or means which only one economic operator has at its disposal or specific interoperability requirements. In those situations, it is unlikely that any other operator *could ever* perform the service.

9.2 Assessment

157. The Norwegian Government relies on the fact that other providers of insured public sector occupational pension services, DNB and Storebrand, "withdrew" from the market in 2012/2013 and that the Norwegian Financial Supervisory Authority did not receive any notices or applications from other entities with an interest in providing public occupational pensions in Norway during the period from 2012 to 2019.[115] This also reflects statements made in voluntary ex-ante transparency notices published by some Public Bodies in that period.[116]

158. At the outset, the Directorate notes that these reasons relate to the state of the market at one particular time and the fact that obtaining a licence would take some time, but do not demonstrate that no other operator could ever perform these services. The situation is therefore different from the examples given in Recital 50 to Directive 2014/24.

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[114] Judgment of the CJEU of 18 May 1995, *Commission v Italy*, C-57/94, EU:C:1995:150, paragraph 23

[115] Letter of 24 March 2023, Document No 1363115, page 26.

[116] See appendices 11 and 12 to the complainant's second submission of 18 November 2022, Document Nos 1329797 and 1329799.

159. The Directorate has doubts as to how a Public Body could have concluded that there would be no competition and that it was clear from the outset that publication would not have triggered more competition or better procurement outcomes. In the Directorate's view, doubts are raised as to whether KLP was ever a sole supplier, and even if it was, whether the contracts which appear to have been awarded comply with other requirements of EEA public procurement law.

160. First, the Directorate notes that there is reason to believe that KLP was never a sole supplier. Between 2013 and 2019, Storebrand retained a licence for the relevant services and indeed continued to provide them to at least one Public Body.[117] This indicates that there was no technical reason why Storebrand could not provide the service, merely a commercial preference not to do so, which could be changed at any time.

161. In addition, the Directorate understands that all life insurance companies with a licence under section 2-13 of the Financial Institutions Act can provide occupational pension schemes to employers in the private and public sectors.[118] The Directorate understands that companies other than Storebrand, DNB and KLP have operated in the private sector,[119] which would suggest that there were more providers with the necessary registrations and licences to, at least potentially, start providing the relevant services to the Public Bodies at any point in time.[120] The presence of other (potential) service providers would suffice to conclude that the conditions of Article 31 of Directive 2004/18/EC or Article 32 of Directive 2014/24/EU were not met.

162. Second, concerning compliance with other requirements of EEA law, it seems to the Directorate that the Norwegian Government's argument is based on there being insufficient time for a new entrant to fulfil licensing/registration requirements.[121] In the Directorate's view, this is something which should be taken into account in determining what it was permissible to award.

163. Even if KLP was effectively the only supplier on the market having the required licences and registrations, in awarding a contract under Article 31 of Directive 2004/18/EC or

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[117] Askøy, see page 3 of the complainant's second submission, Document No 1329844.

[118] See attachment to the complainant's fourth submission, Document No 1380469, page 53.

[119] See, for example, Finanstilsynet's annual report for 2015 which states "At the end of 2015 13 life insurers, 60 non-life insurers (including 15 fire insurers) and nine marine insurance associations were licensed to operate in Norway. A further 13 branches of Norwegian insurers were operating abroad and 32 branches of foreign insurers in Norway. 102 insurance intermediaries, 49 private pension funds and 39 municipal pension funds held a licence at year-end." (page 52, https://www.finanstilsynet.no/contentassets/0a0ffda632804c91a4501e7f87beeea9/annual_report_2015.pdf)

[120] In this respect, see Article 46 of Directive 2004/18/EC and Article 58(2), which provide that insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, they can be required to prove that they hold such authorisation or membership as a selection criterion. In the context of insured public sector occupational pension services, the Directorate's view is that this would entail the tenderer having authorisation to act as a life insurance company or pension fund. A requirement to comply with further requirements relating to the specific product required for performance of the contract would appear to the Directorate to constitute a condition for performance of the contract which could be satisfied at the point of performance, See judgment of the CJEU of 8 July 2021, *Sanresa' UAB v Aplinkos apsaugos departamentas prie Aplinkos ministerijos,* C-295/20, paragraphs 44, 52 and 62.

[121] The voluntary *ex ante* transparency notices referred to in footnote 116 also support this.

Article 32 of Directive 2014/24/EU, the Public Bodies were still required to comply with general principles of EEA law, including proportionality,[122] and the explicit requirement in Article 32 of Directive 2014/24 that the exemption can only be applied if no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

164. In the Directorate's view, those principles require that if it is not possible to allow sufficient time for registration/licencing requirements to be fulfilled,[123] the duration of a contract concluded in reliance upon there being insufficient time for such action should be limited to enable a future competition to be conducted with sufficient time for other providers to register or obtain the necessary licences. If this is not the case, a contracting authority could repeatedly close the market on the basis of a lack of competition attributable in part to its inability or unwillingness to allow sufficient time for a new entrant to fulfil licencing/registration requirements.

165. Storebrand started actively pursuing the market again in April 2019, a date which is at the time of issuing this letter almost five years ago. Given this is a relatively long period,[124] the Directorate is of the view that any contracts entered into directly in the period from June 2013 to April 2019 and which are still in force could be considered to have been insufficiently short term to comply with the principle of proportionality and the requirement in Article 32 of Directive 2014/24/EU that no reasonable alternatives should exist and therefore would still constitute breaches of EEA law.

166. The Directorate is therefore of the preliminary view that contracts for insured public sector occupational pension services awarded directly on the basis of Article 31 of Directive 2004/18/EC or Article 32 of Directive 2014/24/EU are unlawful as:
    - there was more than one supplier;
    - even if there was a sole supplier, the contracts were not concluded for a sufficiently short term to enable future competition.

10 Whether the contracts can be continued for a lengthy period

167. The second alleged breach relates to contracts being awarded without a fixed term and being continued for a disproportionate period.

168. At the outset, it should be noted that there is no specific limit on the length of a public services contract under Directive 2014/24/EU,[125] nor was there such a limit under Directives 92/50/EEC or 2004/18/EC. Furthermore, all three directives explicitly envisage

[122] See Recital 2 of Directive 2004/18/EC and Article 18 of Directive 2014/24/EU.
[123] See Article 38(1) of Directive 2004/18/EC and Article 47(1) of Directive 2014/24/EU. Whilst these provisions concern deadlines for tenders and requests to participate, the Directorate considers that they are expressions of the principle of proportionality which can equally be applied to the lead-in period for a contract.
[124] Most contracts advertised in the period from 2011 to 2014 were for a maximum of four or five years and those advertised from 2019 to 2023 were for a maximum of five years.
[125] This can be contrasted with position for concessions and framework agreements which are subject to specific provisions on duration – see Article 33(1) of Directive 2014/24/EU and Article 18 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, act referred to at point 6f of Annex XVI to the EEA Agreement.

the award of a contract without a fixed term.[126] As such, the absence of a fixed term cannot in itself give rise to a breach of EEA law.

169. However, all public procurement activity must respect general principles of EEA law, including proportionality[127] and it can be noted that one of the aims of EEA public procurement law is to open public procurement to competition.[128] In that regard, it is noteworthy that the Norwegian Government acknowledges the possibility that the continuation of a contract without a termination date for a long period could arguably give rise to a breach of EEA law.[129]

170. As far as Norwegian law is concerned, the Norwegian Government has stated that they "believe that there exists – in general – an obligation under Norwegian law to expose contracts without a fixed term to competition". However, the Norwegian Government considers that the time limit within which this obligation arises is subject to the contracting authorities' discretion and must be assessed on a case-by-case basis. In that respect, according to the Norwegian Government, a contract's nature, complexity and specificities should be taken into account, as well as the possibility to achieve better terms and conditions through competition and the contracting authority's needs.[130]

171. The Directorate considers 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 could constitute a breach of EEA law if the duration becomes disproportionate.[131] Contracting authorities are therefore required, when exercising their discretion to determine when to expose contracts without a fixed term to competition, to comply with the fundamental rules of EEA law in general, and the principle of proportionality in particular.[132] The Directorate agrees that all contracting authorities have a certain level of discretion in terms of what, when and how they wish to contract for services, and therefore should have discretion to decide that they do not want to tender on a frequent basis. The Directorate acknowledges that the factors referred to by the Norwegian Government can, to some extent, be taken into account in this regard.

172. First, as regards the nature of insured public sector occupational pension services, the Directorate agrees that the long-term vision of investments of pension premiums can plead in favour of longer contract periods. However, in the present case it is relevant that all contracts for insured public sector occupational pension services can be terminated annually on three months' notice.[133] As such, service providers in Norway have to be prepared to liquidate their investments on an annual basis. In light of that regulatory context, in the Directorate's view, the nature of the services provides less justification for a longer contract period.

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[126] Article 5(12) and (14) of Directive 2014/24/EU, Article 9(6) and (8) of Directive 2004/18/EC and Article 7(5) of Directive 92/50/EEC.
[127] This general principle is explicitly reflected at Article 18(1) of Directive 2014/24/EU.
[128] Recital 20 of Directive 92/50/EEC, Recital 2 of Directive 2004/18/EC and Recital 1 of Directive 2014/24/EU.
[129] Letter of 24 March 2023, Document No 1363115, pages 42 and 43.
[130] Letter of 24 March 2023, Document No 1363115, pages 42 and 43.
[131] In this respect, see judgment of the Court of Justice of 19 June 2008, Case C-454/06, *pressetext Nachrichtenagentur*, EU:C:2008:351, paragraph 73.
[132] See, by analogy to withdrawing an invitation to tender for a public service contract, judgment of the CJEU of 18 June 2002, C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, EU:C:2002:379, paragraph 47.
[133] SGS 2020, section 8-1.

173. Second, as regards the potential gains of tendering, as set out in section 7.2 above, the Directorate understands that there can be competition on all of the premiums due to different assessments of risk, so it is not merely a question of competition on approximately 3% of the total premium.[134] Equalisation also does not provide an argument against tendering as not all elements of the premiums are equalised. The complainant has indicated that some of the Public Bodies which have conducted tenders in recent years have achieved savings of between one and 10 million NOK per year, a factor which the Directorate considers other Public Bodies could be expected to take into account.[135] In any event, whilst potential gains are relevant from a commercial perspective and may affect how frequently a competition is conducted, it should be emphasised that the perceived absence or limited nature of any such gains cannot give rise to an exemption from the obligations under procurement law to run a competitive process.

174. The Directorate notes that in the period from 2011 to 2014, advertised contracts for insured public sector occupational pension services were generally for a maximum of four or five years[136] and that all of the contracts awarded since 2019 were advertised with terms of a maximum of five years.[137] The Directorate therefore assumes that a contract period of five years has been considered by a number of Public Bodies to be sufficient for them to obtain a service of a sufficient quality and benefits which outweigh the costs of tendering.

175. Nevertheless, given that contracting authorities should have a significant degree of discretion concerning appropriate contract lengths and frequency of procurement, the Directorate does not consider that the practice of these Public Bodies to award five-year contracts is sufficient grounds to conclude that anything exceeding that length is disproportionate. However, taking into account that the services do require providers to be prepared to liquidate assets on an annual basis, significantly longer contracts also do not appear to be justified by the nature of the services. To be more concrete, the Directorate questions whether a contract term of more than around ten years could be justified.

176. The Directorate acknowledges the margin of discretion awarded to contracting authorities and that there could be circumstances which might justify longer tendering periods, and therefore invites the Norwegian Government to provide further information and proof of such circumstances, both in relation to the services in general and any specific contracts where a significantly longer period is considered justified**.**

11 Whether the contracts have been unlawfully modified

177. The complainant has also alleged that multiple changes made to the pension schemes and other terms of the contracts constitute unlawful modifications.[138] The Directorate will first recall the legal provisions and case-law applicable to modifications of contracts, before assessing the different changes below.

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[134] As regards the 3%, see section 7.2 above.
[135] Letter of 26 May 2023, Document No 1375600, page 25.
[136] See Annex 1, Table 3.
[137] See https://ted.europa.eu/udl?uri=TED:NOTICE:551448-2022:TEXT:EN:HTML&src=0 , https://ted.europa.eu/udl?uri=TED:NOTICE:325056-2020:TEXT:EN:HTML , https://ted.europa.eu/udl?uri=TED:NOTICE:440920-2021:TEXT:EN:HTML&src=0 , https://ted.europa.eu/udl?uri=TED:NOTICE:526292-2021:TEXT:EN:HTML&src=0 , and https://ted.europa.eu/udl?uri=TED:NOTICE:204191-2023:TEXT:EN:HTML&src=0
[138] Complaint, Document No 1309815, sections 4 to 7.

11.1 Legal framework on contract modifications

178. Under EEA public procurement law, a procurement procedure leads to an agreement on the essential terms of a contract award, including the identity of the contracting authority and of the tenderer, the definition and quality of goods/services/works to be provided, the price, etc. These essential terms condition the award: if they would have been different, the contract might not have been awarded to the same tenderer, or on different terms. Therefore, material amendments to the essential terms of the contract after the award essentially give rise to a new contract, different from the one awarded, which must then be subject to a new procurement procedure in accordance with the relevant directive.[139] This means that if the change is made without a new procedure, it is equivalent to an unlawful direct award.

179. The legislation in the light of which a modification must be assessed is that in force at the date of the amendment.[140] This type of breach is therefore also capable of applying to contracts which were awarded prior to the entry into force of the EEA Agreement.

180. In respect of modifications to be assessed under Directive 2014/24/EU, the relevant law is set out in Article 72 of that Directive. Articles 72(1) and (2) set out the conditions under which contracts can lawfully be modified. Any other changes which are "substantial" pursuant to Article 72(4) give rise to an obligation to conduct a new procurement procedure.

181. A modification is "substantial" where it renders the contract materially different in character from the one initially concluded. Article 72(4) goes on to list some specific situations in which a modification is considered to be substantial, these include:

    (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

    (b) the modification changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract; and

    (c) the modification extends the scope of the contract considerably.

182. There was no equivalent of Article 72 of Directive 2014/24 in Directive 2004/18/EC, however, the CJEU dealt with this matter in *pressetext,* holding:

> *"In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 Commission v France [2000] ECR I-8377, paragraphs 44 and 46).*

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[139] Judgment of the CJEU of 19 June 2008, C-454/06, *pressetext,* EU:C:2008:351, paragraph 34 and Article 72(5) of Directive 2014/24/EU.

[140] Judgment of the CJEU of 2 September 2021, Joined Cases C-721/19 and C-722/19, *Sisal*, EU:C:2021:672, paragraph 28.

An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.

An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract."[141]

183. The concepts of "material amendment" for the purposes of the CJEU's judgment in *pressetext*, and "substantial modification" for the purposes of Article 72 of Directive 2014/24 therefore overlap to a large extent.

184. In *Finn Frogne*, the CJEU clarified that the reference in *pressetext* and other case law to the deliberate intention of the parties to renegotiate the terms of that contract was not a decisive factor.[142]

185. In the following sections, the Directorate will assess the different changes the contracts underwent against the legal test of Article 72 of Directive 2014/24 and *pressetext*.

11.2 Extensions of contract durations

186. An extension of a contract where this was not initially provided for can constitute an unlawful change.

187. The complainant has made the Directorate aware of 35 contracts which were awarded pursuant to procedures in which it was stated that the contract would have a fixed duration:[143]

- 32 of these contracts would have expired between approximately 2015 and 2018;[144]
- three would have expired at the end of 2022;[145]
- two of the relevant municipalities are now part of authorities with their own pension funds;[146]

[141] Judgment of the CJEU of 19 June 2008, C-454/06, *pressetext,* EU:C:2008:351, paragraphs 34 to 37.
[142] Judgment of 7 September 2016, *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation*, C-549/14, EU:C:2016:634, paragraphs 31 to 33.
[143] The details of these terms are set out in Annex 1, Table 3.
[144] See Annex 1, Table 4.
[145] See Annex 1, Table 4.
[146] Klæbu and Songdalen. See Annex 1, Table 3.

- the Directorate is not aware of any of the rest of these contracts having been subsequently exposed to competition in accordance with public procurement law.

188. As such, the Directorate assumes that 30 contracts must have been extended by between approximately five and eight years. Given the fact the original contract durations were between one and six years, these are clearly large changes in duration.

189. Assuming these contracts have indeed been extended and were extended towards the end of their original term, the extensions will have taken place under both Directive 2004/18/EC and Directive 2014/24/EU.

190. As regards the nature of these changes, a longer-term contract is generally more attractive than a shorter-term contract. Furthermore, a longer contract term changes the economic balance in favour of the contractor by giving them significant additional scope for profit.

191. With the exception of those the contracts which expired in 2022, the extensions the Directorate is aware of range between almost doubling the contract duration (a 6-year term extended by almost 6 years),[147] and extending the contract by almost eightfold the initial contract duration (one-year contracts extended for 8 years).[148] The Directorate's view is that increases to contract durations of these magnitudes could have attracted additional participants and change the economic balance in favour of the contractor.

192. As such, the Directorate is of the preliminary view that all the 30 contract extensions effected between 2015 and 2018 should be considered to constitute material amendments under the rules established in *pressetext,* and substantial modifications pursuant to Article 72(4) as they render the contracts materially different in character from those initially concluded and fall the situations listed under Article 72(4)(a) and (b) as entailing substantial modifications. These extensions therefore appear to constitute breaches of EEA law.

11.3 Mergers of municipalities

193. The complainant has also alleged that mergers of Norwegian municipalities have resulted in unlawful modifications to contracts. Between 2017 and 2020, 119 municipalities merged to become 47, and 15 counties merged to become 7.[149] These changes fall to be assessed under Directive 2014/24/EU.

194. The Norwegian Government has referred to the unforeseeability of the municipal mergers and therefore the potential to apply Article 72(1)(c) of Directive 2014/24/EU, which allows for certain changes in unforeseeable circumstances.[150]

195. The Directorate accepts that it may have been the case that the mergers were not foreseeable at the point of award. However, Article 72(1)(c) requires the price increase to not exceed 50% and the modification not to alter the overall nature of the contract. The Norwegian Government has stated that "the overall increase in volume did not exceed 50% in any of the cases known to the Norwegian authorities.[151]"

[147] Karasjok and Lier, see Annex 1, Table 5.
[148] Eide, Kristiansund and Vågsøy, see Annex 1, Table 5.
[149] See https://www.ks.no/om-ks/ks-in-english/local-government-reforms-in-norway and appendix 4 to the letter of 24 March 2023 (Document No 1363117).
[150] Letter of 24 March 2023, Document No 1363115, page 48.
[151] Letter of 24 March 2023, Document No 1363115, page 48.

196. Whilst the Directorate understands that in many instances, the mergers entailed one or more smaller municipalities merging with one larger one, this does not appear to be universal. In the event that the total number of employees in the post-merger authority was more than 50% higher than that in the original contract, then Article 72(1)(c) cannot be relied upon given that the equalisation of premiums should give rise to a direct correlation between the number of employees and the value of the contract.

197. If Article 72(1)(c) cannot be relied upon by reason of the price being over 50% higher, the Directorate is of the view that the change would be substantial pursuant to Article 72(4)(c), which provides that a modification is substantial if it extends the scope of the contract considerably. An increase of more than 50% is clearly "considerable". Even if all the pre-merger authorities had contracts with KLP, from a commercial perspective, in the Directorate's view, two independent smaller contracts should not be considered to be the same as one larger contract.

198. The third definition of "substantial" under Article 72(4)(a) would also be applicable: had a significantly larger contract been put out to tender, it is likely to have attracted additional participants. This is even more so given that entering the market would entail relatively high start-up costs and therefore a larger contract is likely to have been more attractive to a new entrant.

199. The Norwegian Government has argued that the changes were not substantial because contracts for insured public sector occupational pension services are meant to be dynamic, in terms of encompassing all employees employed at any one time.[152] However, the Directorate considers there is a significant difference between, on the one hand, normal fluctuations in staff due to natural changes in headcount or a municipality taking on more tasks within its geographical area and, on the other hand, staff numbers increasing more than 50% due to the geographical size of the municipality significantly increasing, as is the case when a whole other municipality (or more than one municipality) merges with another.

200. On the basis of the above, the Directorate's preliminary view is that changes made due to mergers are unlawful if the number of staff increased by more than 50%.

11.4 Changes to due to SGS 2020

201. The complainant has also argued that changes to the pension schemes have resulted in unlawful modifications to contracts. In particular, the complainant has argued that changes introduced in 2020 under the SGS 2020 collective agreement fundamentally changed the nature of the pension scheme and therefore that contracts which have been continued after its introduction have been unlawfully modified.

202. The complainant has also described a number of changes which were made to the Public Bodies' pension schemes in the period between 2003 and 2020. The Directorate's current understanding is that the changes made due to SGS 2020 were more wide-reaching and therefore the Directorate has chosen to focus on these changes. This is without prejudice to the Authority's ability to revert to the pre-2020 matters at a later stage.

11.4.1 Changes made by SGS 2020

203. SGS 2020 is the current collective agreement in the municipal sector and governs pension provision by municipalities, counties, RHAs and hospital trusts. It was agreed on 3 March 2018 and has applied since 1 January 2020. The Directorate understands it

[152] Letter of 24 March 2023, Document No 1363115, page 48.

applies to the municipal and joint schemes but, as noted above, it is not clear to the Directorate whether the pension scheme for doctors is also subject to SGS 2020. In any event, the Directorate understands that the requirements of the doctors' scheme are the same as those which apply to the municipal and joint schemes. As such, the arguments and conclusions set out in this section are considered to apply to arrangements in respect of the doctors' scheme, even if that scheme is not subject to SGS 2020 as such.

204. The process to introduce SGS 2020 was the result of almost 10 years of negotiation. The Norwegian Government has described it as "an inherent part of a broad pension reform for all public employees".[153]

205. The Directorate's understanding is that the biggest change introduced by SGS 2020 was in respect of retirement pensions. SGS 2020 changed the defined benefit under the scheme from being based on the employee's final salary (66% of final salary) to being based on a "pension pot", accrued on an annual basis at a rate of 5.7% of annual salary under 7.1G and 18.1% of annual salary between 7.1 and 12G.[154] Under SGS 2020, the eventual pension is the product of an employee's salaries over the course of their working life and not their final salary. The Directorate's understanding is that this change did not entail the scheme becoming a defined contribution scheme where the ultimate pension pot is dependent on the return on investment from fixed contributions. Rather, the scheme became one where each year an employee effectively accrues a certain proportion of their then-current salary in a (notional) individual pension pot, with that pot then being adjusted for wage growth.

206. The Directorate understands that further changes to retirement pensions were also made by SGS 2020. Previously, coordination with the national insurance pension was required, meaning that the amount a pensioner received from the occupational pension would complement the amount received from the national insurance pension to obtain the required percentage of the final salary (66% for full entitlement). The amounts paid by the occupational pension provider were therefore dependent on the national insurance pension received. SGS 2020 changed the method of calculating the occupational pension entirely. The calculation of the occupational pension no longer depends on the national insurance pension. Furthermore, changes were made to make the scheme more flexible, by allowing pensions to be drawn at different ages and in different proportions; by allowing people to continue working at the same time as drawing a pension without their pension being reduced; and by rights accruing after one year of work instead of three.

207. In addition, under the new scheme, "AFP" (contractual pension), has been changed from an early retirement pension to a lifelong benefit.

208. The Directorate understands that the changes introduced by SGS 2020 only apply to employees born in 1963 or later and the accrual changes only apply in respect of their pension entitlement after its introduction, i.e. people born in 1963 or later who started working in the public sector before 2020 will have rights under both schemes.

11.4.2 Whether the changes made by SGS 2020 are "substantial modifications"

209. The changes took place on 1 January 2020 and therefore fall to be assessed under Directive 2014/24/EU.

[153] Letter of 26 March 2023, Document No 1363115, page 36.
[154] G being an amount in Norwegian kroner used to calculate certain benefits, including the national insurance pension

210. The Directorate's current view is that the changes made by SGS 2020 constitute substantial modifications for the purposes of Article 72(4) of Directive 2014/24, requiring new procurement procedures for the contracts affected by these changes.

211. It should be noted that the Norwegian Government has made detailed submissions on SGS 2020 in its letter of 21 December 2023. As noted in section 1 above, those arguments are not all explicitly addressed below, however, this section provides a summary of the Directorate's current position.

212. The Norwegian Government has argued that changes resulting from SGS 2020 do not give rise to a breach of Directive 2014/24/EU,[155] primarily on the basis that the changes essentially affect the employees' rights and entitlement to receive benefits from the pension scheme, not the contractual relationship between the pension providers and the Public Bodies.[156]

213. The Directorate has doubts about that approach. The service provider under a contract for insured occupational pension services takes on the Public Body's obligation to pay its employees a pension in the future. If what an employee is entitled to receive is altered, the obligations on the service provider will therefore necessarily also be altered.

214. The nature of a contract for insured public sector occupational pension services is, like other insurance contracts, that one party pays a certain sum of money and the service provider commits to paying out another amount of money if a certain event occurs (in this case, if an employee draws a pension). Whilst the service provider also has to carry out various administrative tasks, the nature of the core service is one of risk allocation.

215. A provider of insured public sector occupational pension services performs certain calculations to assess what amount of money needs to be paid by a Public Body each year to fund the eventual pay outs to its employees. The provider is required to price in line with the risks which it assumes.[157] The Public Body therefore takes on certain risks by the provider feeding those risks into its pricing and – as far as the Directorate understands – the provider takes on the burden that the risk levels taken into account in calculating the premiums do not adequately reflect the eventual reality. The assumption of risk is therefore a fundamental part of the product and the risks have been altered by SGS 2020.

216. Under the previous regime, employees had a right to receive a proportion of their final salary for each year of their retirement, subject to certain adjustments, including taking into account life expectancy, and the need for the amount of the pension to be coordinated with the national insurance pension. It was not certain when the employee would retire (a full pension was earned after 30 years), what the final salary would be, or how long the pension would be payable for.

217. Under the new regime, the employee is entitled to receive their already accrued pension pot, again subject to certain adjustments, including taking into account life expectancy. It seems to the Directorate that although it remains the case that it is not certain how long the pension will be payable for, there is limited uncertainty as regards the amount which will be paid out, because it is accrued on an annual basis, rather than only crystallising at the point of retirement. There is also no longer a risk relating to when an employee retires as if they retire earlier, their pot will simply be smaller. In seems to the Directorate that these factors must have a direct impact on the way providers price their services: the assessment which

[155] See letter of 24 March 2023, Document No 1363115, section 9.4.
[156] See letter of 24 March 2023, Document No 1363115, page 35.
[157] See the Insurance Business Act, *Lov om forsikringsvirksomhet (forsikringsvirksomhetsloven)*, LOV-2005-06-10-44, section 3-3.

a provider must carry out to ensure a pot keeps pace with wage growth is very different to that required to ensure the provider can fund a percentage of an undefined final salary.

218. Furthermore, "AFP" being changed from an early retirement pension to a lifelong benefit entails a new longevity risk for the provider.

219. The Directorate also understands that the increased flexibility in when pensions can be drawn and the proportion in which they can be drawn, as well as the new possibility to draw a pension whilst still retaining an employment income have altered the calculations which providers have to make at the point a pension is paid. According to the complainant, this requires different IT systems to those which can be used for the pre-2020 scheme.[158] In the Directorate's view, these add to the substantial nature of the changes.

220. On the basis of the above, the Directorate's current view is that the changes to the pension entitlement seem to have altered the nature of the risk assumed by the pension providers and the Public Bodies to an extent which renders any contract continued after these changes materially different in character from the one initially concluded, and therefore the changes are substantial under Article 72(4) of Directive 2014/24/EU.

221. This position is further supported by the fact that the changes introduced by SGS 2020 resulted in Storebrand actively pursuing the market. According to the complainant, DNB also considered re-entering the market because of the changes brought about by SGS 2020.[159] This demonstrates that the specific scenario set out as the third option under subparagraph (a) of Article 72(4) is applicable: had the modifications been part of the initial procurement procedure, they would have attracted additional participants.

222. The Directorate's preliminary view is therefore that the continuation of a contract awarded prior to SGS 2020 after its introduction constitutes a breach of EEA law, unless the contract explicitly provided for the specific changes introduced by SGS 2020.

223. For completeness, it should also be noted that the Directorate is of the preliminary view that the tariffs applied by a provider to calculate premiums remaining the same is not sufficient to preclude the existence of a substantial modification. In the Directorate's view, the key factor is whether there have been material changes to the factors which are used to apply those tariffs, something which the Directorate understands to apply in respect of the changes introduced by SGS 2020. This means that even if the resulting premium is in fact more or less the same, the overall change can still be substantial. In this respect, the Directorate notes that a change in the economic balance in favour of the contractor is only one ground on which a modification can be found to be unlawful.

224. Furthermore, the Directorate does not consider the above positions to be altered by the fact that subsequent to SGS 2020, providers have to provide both the old scheme (in respect of already acquired rights) and the new scheme (in respect of rights from 1 January 2020). The fact that the new scheme has become part of the required service is sufficient for the above arguments to be applicable.

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[158] See page 28 of the letter of 26 May 2023, Document No 1375600, and page 10 of the letter of 20 June 2023, Document No 1380469.

[159] Complaint, Document No 1309815, p. 24.

11.4.3 Additional arguments made by the Norwegian Government

225. As part of its arguments, the Norwegian Government has stated that because the modifications arising from SGS 2020 were a result of changes in law and the relevant collective agreement, they were not the result of changed priorities or a subjective desire to renegotiate the contracts for insured public sector occupational pension services.[160] However, as noted above in section 11.1, the fact that the changes were made in order to comply with SGS 2020 and not simply to renegotiate the terms of the agreement is not decisive.

226. The Norwegian Government has also argued that Article 72(1)(c), which allows for changes due to unforeseeable circumstances, can be applied.[161] One condition for that provision to be applied is that the need for the modification must have been brought about by circumstances which a diligent contracting authority could not foresee. As pointed out by the complainant, the overall process to amend the occupational pension regime in Norway can be said to have commenced in 2001[162] and changes were made to the national insurance pension in 2011. Whilst the *exact* details of SGS2020 were yet to be determined, in the Directorate's view, changes were foreseeable and so Article 72(1)(c) cannot be relied upon.

12 Summary of the Directorate's position and the scope of the potential breaches identified

227. The above analysis leads to the provisional conclusion that the following may constitute breaches of EEA public procurement law. As breach of procurement law continues whilst a contract is in force and continues to produce effects,[163] any contracts to which any breaches apply which are still in force can be subject to enforcement action by the Authority.

i. The direct award of a contract for insured occupational public sector pensions in respect of which the award process was commenced[164] in the period from June 2013 – April 2019.[165]

ii. The continuation for more than 10 years of contracts without a fixed term in respect of which the award process was commenced on or after 1 January 1994.[166]

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[160] Letter of 24 March 2023, Document No 1363115, page 37.
[161] Letter of 24 March 2023, Document No 1363115, section 9.4.3.
[162] https://www.regjeringen.no/no/tema/pensjon-trygd-og-sosiale-tjenester/pensjonsreform/Milepaler-for-pensjonsreformen/id752762/
[163] Judgment of the CJEU of 10 April 2003, joined cases C-20/01 and C-28/01, *Commission* v *Germany*, EU:C:2003:220, paragraph 36.
[164] "commencement of the award process" is used to refer to the point at which the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued.
[165] A breach of Article 20 of Directive 2004/18/EC, read in conjunction with Articles 23 to 55 of that directive or Article 1(1) of Directive 2014/24/EU, read in conjunction with Title II of that Directive due to a failure to fulfil the conditions of Article 31 of Directive 2004/18/EC (or, in the alternative, failure to comply with the principle of proportionality) or Article 32 of Directive 2014/24/EU.
[166] A breach of Article 18 of Directive 2014/24/EU or the principle of proportionality.

iii. Contracts awarded with original durations of between one and six years being extended by at least 92% of their initial term.[167]

iv. Contracts being extended on or after 1 January 2017 to an extra municipality or municipalities due to municipal mergers where the increase in staff was more than 50%.[168]

v. Contracts being continued after the introduction of SGS 2020 unless such contracts explicitly provided for the specific changes introduced by SGS 2020.[169]

13 Whether there is a consistent and general practice

228. The Directorate is of the view that the practices which it considers may constitute individual infringements of the public procurement rules could demonstrate the existence of a consistent and general practice consisting in the failure, by the Public Bodies, to observe EEA public procurement law with regard to the award and/or modification of contracts concerning insured public sector occupational pension services potentially from the entry into force of the EEA Agreement to the present day.

229. In what follows, the Directorate will set out examples which, in its preliminary view, prove the existence of a consistent and general practice of failing to comply with the public procurement rules in the award and/or modification of contracts for insured public sector occupational pension services.

230. The Directorate only has partial information on many of the contracts on which this letter is based. Even if it is possible that some of the contract awards might, due to circumstances specific to those contracts, be justified, the Directorate considers that it would be most effective for forthcoming exchanges between the Directorate and the Norwegian Government to focus on the positions set out in sections 6 to 11 above. If the Norwegian Government wishes to disprove the facts alleged in this section at this stage, the Directorate invites the Norwegian Government to consider providing an overview, if necessary in consultation with KLP, of the ongoing contracts KLP has with Public Bodies, including details on the date on which each Public Body became a client of KLP, the term of the contract, contract extensions, links to notices on Doffin or Tenders Electronic Daily, and potential reasons for direct awards, extensions, contract terms exceeding 10 years, or other situations described in this letter.

231. As will be detailed below, and supported by the information in Annex 1,on the basis of the information currently available, the Directorate has reason to believe that:

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[167] A breach of Article 20 of Directive 2004/18/EC, read in conjunction with Articles 23 to 55 of that directive or Article 72(5) of Directive 2014/24/EU, read in conjunction with Article 1(1) and Title II of that Directive due to such changes being material or failing to meet the conditions of Article 72(1) or (2) of Directive 2014/24/EU, or, in the alternative, by such changes made in the period between June 2013 and April 2019 not being sufficiently short term to enable future competition and therefore failing comply with the principle of proportionality or Article 32 of Directive 2014/24/EU .

[168] A breach of Article 72(5) of Directive 2014/24/EU, read in conjunction with Article 1(1) and Title II of that Directive due to a failure to meet the conditions of Article 72(1) or (2) or, in the alternative, by such changes being made prior to April 2019 and not being sufficiently short term to enable future competition and therefore failing to fulfil the conditions of Article 32 of Directive 2014/24/EU.

[169] A breach of Article 72(5) of Directive 2014/24/EU, read in conjunction with Article 1(1) and Title II of that Directive due to a failure to meet the conditions of Article 72(1) or (2) or, in the alternative, by such changes being made prior to April 2019 and not being sufficiently short term to enable future competition and therefore failing to fulfil the conditions of Article 32 of Directive 2014/24/EU.

a) 18 contracts may have been unlawfully awarded to KLP without competition upon the competitors' withdrawal from the market;

b) up to 275 contracts may have been continued for more than 10 years;

c) 30 contracts may have been unlawfully extended;

d) 10 contracts may have been unlawfully amended due to municipal mergers;

e) 369 contracts may have been unlawfully amended due to SGS 2020.

These numbers are based on the information currently available to the Authority. In the cases of (a) and (c), the real figures seem likely to be higher. In the case of (b), the number of contracts awarded since the entry into force of the EEA Agreement seems likely to be lower.

232. The Directorate further considers that the examples provided are not isolated infringements of the procurement rules, but rather representative of a general and persistent practice by Public Bodies of incorrectly applying these rules when entering into contracts for insured occupational pension services. In this regard, the Directorate recalls that all the contracts concern, in essence, the same service, increasing the comparability of each example to other instances. In addition, the Directorate adduces proof of a relatively high number of examples for each of the issues identified in sections 8, 9 and 10. Furthermore, all of these practices lead to the same result: the market is, in fact, reserved to KLP. Finally, the consistently low number of procurements by Public Bodies for these services corroborates that there is a general and persistent lack of application of the procurement rules.

13.1 18 contracts may have been awarded without competition after competitors' withdrawal from the market

233. As set out above, the Directorate considers the period in which contracts may have been awarded without competition in reliance upon a sole supplier position to be June 2013 to April 2019.

234. The complainant has provided copies of voluntary ex ante transparency notices in respect of 13 entities (12 Public Bodies plus one intermunicipal company[170]) indicating an intention to award a contract directly to KLP. One of these Public Bodies appears to have subsequently carried out a competitive procedure.[171] It therefore appears that further 11 Public Bodies and one intermunicipal company may have entered into contracts with KLP without competition.[172]

[170] Eide, Farsund, Hordaland, Kristiansund, Kvam Herad, Osterøy, , Rana, Risør, Rødøy, Skedsmo, Tana, Vågsøy and BIR AS. See Annex 1, Table 6.
[171] Hordaland.
[172] Eide, Farsund, Kristiansund, Kvam Herad, Skedsmo, Osterøy, Rana, Risør, Rødøy, Tana, Vågsøy and BIR AS. See Annex 1, Table 6. It can also be noted that Skedsmo merged to become Lillestrøm which awarded a further contract directly.

235. In addition, after June 2013, Storebrand stopped providing pension services to 13 Public Bodies not included in the above figures.[173] The complainant has provided information about notices published by seven of these Public Bodies either announcing a competitive procedure or indicating a competitive procedure had been conducted.[174] It therefore appears that at least an additional six Public Bodies may have entered into contracts with KLP without competition.[175]

236. The Directorate has further details of two of the above contracts.

237. Kristiansund municipality entered into a contract in 2014 with effect from 1 January 2015. This contract was preceded by a voluntary ex ante transparency notice which referred to there only being one provider because no other provider could obtain a licence in time and indicated that a one-year contract would be awarded.[176] The contract was in fact awarded without a termination date.[177]

238. Lillestrøm municipality entered into a contract directly with KLP in 2018 on the basis of technical reasons meaning the contract could only be awarded to a particular economic operator. The contract has no fixed term.[178]

239. The total number of contracts in respect of which the Directorate has some evidence of a potential award without competition and which may still be in force is therefore 18.

13.2 Up to 275 contracts may have been continued for more than 10 years

240. As set out in section 10 above, the Directorate questions whether a contract for insured public sector occupational pension services in Norway without a fixed term could be continued for more than 10 years without breaching the principle of proportionality. If not, a breach would arise for contracts without a fixed term:

- in respect of which the award process was commenced on or after 1 January 1994; and

- which commenced more than 10 years ago;

- unless such contracts were awarded pursuant to a competitive procedure (in compliance with the relevant EEA law on public procurement) in which it was stated that the contract term would be in excess of 10 years.

241. In its letter of 28 November 2022, the Directorate asked the Norwegian Government whether any contracting authorities had indefinite contracts with KLP which were still in force.[179] The Norwegian Government disputed the terminology of “indefinite” given that the

[173] Bø, Eidsberg, Hobøl, Kongsvinger, Ørskog, Os, Øvre Eiker, Skodje, Storfjord, Strand, Trysil, Vikna and Voss. See Annex 1, Table 7.
[174] Kongsvinger, Os, Øvre Eiker, Storfjord, Bø, Ørskog and Vikna. See Annex 1, Tables 7 and 8.
[175] Eidsberg, Hobøl, Skodje, Trysil and Voss. See Annex 1, Table 9.
[176] https://www.doffin.no/notice/details/2014-264359.
[177] Appendix 3 to the letter of 24 March 2023, Doc no 1363119.
[178] Appendix 3 to the letter of 24 March 2023, Doc no 1363119.
[179] Document No 1327523.

contracts can be terminated and did not provide any data about the number of contracts without a fixed term.[180]

242. According to the Norwegian Government, as of 31 December 2021, KLP provided insured public sector occupational pension services to 375 Public Bodies, namely 332 municipalities and eight county municipalities, four RHAs and 31 hospital trusts[181] and approximately 93 of these became customers after DNB and Storebrand announced they would leave the market in 2013.[182]

243. The Directorate has been provided with some information regarding contract awards around 2013[183] but assumes that these relate to Public Bodies falling within the 93 referred to in the previous paragraph. The Norwegian Government has stated that no competitions were held between 2013 and 2018.[184]

244. According to evidence provided by the complainant, supplemented by research and information available to the Directorate, in the period 2018 to October 2023, only seven Public Bodies carried out public procurement procedures for insured public sector occupational pension services.[185]

245. For 275 contracts with KLP the Directorate has no information of contract awards since 2013,[186] which seems to indicate they may have been in force for more than 10 years, although some of these may have been awarded with a fixed term[187] and the Directorate acknowledges that others are likely to have been awarded prior to 1994.

13.3 30 contracts may have been unlawfully extended

246. As referred to in section 11.2 above, the complainant has supplied Doffin notices in respect of 35 contracts which were awarded pursuant to procedures in which it was stated that the contracts would have a fixed duration. The Directorate believes 30 such contracts may have been extended unlawfully and still be in force, relating to 29 Public Bodies and one intermunicipal company.[188]

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[180] Letter of 24 March 2023, Document No 1363115, page 40.
[181] Letter of 24 March 2023, Document No 1363115, page 20.
[182] Letter of 24 March 2023, Document No 1363115, page 13.
[183] See section 13.6 below.
[184] Letter of 24 March 2023, Document No 1363115, page 13.
[185] Complaint, Document No 1309815, page 6; fourth submission, Document No 1380469, page 12. As regards the supplementary information, the Directorate has located four further contract notices https://ted.europa.eu/udl?uri=TED:NOTICE:551448-2022:TEXT:EN:HTML&src=0, https://ted.europa.eu/udl?uri=TED:NOTICE:406689-2023:TEXT:EN:HTML&src=0, https://ted.europa.eu/udl?uri=TED:NOTICE:382234-2023:TEXT:EN:HTML&src=0 and https://ted.europa.eu/udl?uri=TED:NOTICE:432127-2023:TEXT:EN:HTML&src=0. The relevant municipalities/counties were Vestland (two competitions), Øygarden (two competitions), Bjørnafjorden, Strand, Austevoll, Askøy and Ulstien.
[186] 375 (contracts in 2021) – 93 (new customers in 2013) – 7 (competitions in the period from 2018-2023) = 275 contracts before 2013.
[187] See Annex 1, Table 10 for the examples regarding which the Directorate has evidence of a fixed term.
[188] Ås, Bø, Eide, Frøya, Gravin Herad, Hadsel, Hitra, Holmestrand, Inderøy and Mosvik, Karasjok, Kristiansund, Kvinnherad, Lier, Lødingen, Mandal, Narvik, Notodden, Nøtterøy, Ofoten, Interkommunale Brann og redningsvesen IKS, Ørskog, Randaberg, Rogaland county, Røyken, Sørreisa, Sortland, Sør-Varanger, Ullensaker, Vågsøy, Vikna and Volda. See Annex 1, Table 11.

247. The Directorate has further details of two of these contracts, namely those entered into by Kristiansund, with effect from 1 January 2015 which was in fact entered into without a fixed term (see paragraph 237 above) and Rogaland County, with effect from 1 January 2012. The Rogaland contract has been extended for over six and a half years beyond its original five year maximum term. The extension took place during the period in which the Norwegian Government claims that a direct award to KLP was lawful on the basis of them being the sole supplier in the market, and this is also the reason given by the county.[189]

13.4 10 contracts may have been unlawfully amended due to municipal mergers

248. As noted above, between 2017 and 2020, 119 municipalities merged to become 47, and 15 counties merged to become 7.[190] Three of these post-merger municipalities have conducted competitive procurement procedures[191] and eight have their own pension fund. This leaves 43 Public Bodies which have contracts with KLP which the Directorate assumes are some form of continuation of previous arrangements.

249. Of these 43, the Directorate has identified 10 where, based on the population sizes of the pre-merger authorities and an assumption of a proportional relationship between population, employees and value, the Directorate has doubts as to whether the 50% limit in change of value is met.[192]

13.5 369 contracts may have been unlawfully amended due to SGS 2020

250. As set out above, according to the Norwegian Government, as of 31 December 2021, KLP provided insured public sector occupational pension services to 375 Public Bodies. The Directorate understands Storebrand had two customers at this point: Vestland and Øygarden.

251. The Directorate understands that SGS 2020 was agreed on 3 March 2018. As such, only contracts in respect of which competition was opened or reopened after that date can have taken its terms into account.

252. Again, as set out above, the Directorate understands only seven Public Bodies carried out public procurement procedures for insured public sector occupational pension services after 3 March 2018.

253. The Directorate believes Vestland county, one of the seven Public Bodies which conducted a competition, changed from KLP to Storebrand prior to 31 December 2021 so is already not included in the eight counties referred to above in paragraph 242 as being customers of KLP.

254. Based on the above information, the Directorate understands there to be 326 municipalities, eight counties, four RHAs and 31 hospital trusts which have contracts with KLP which pre-date SGS 2020 and therefore a total of 369 contracts which have been materially amended by the introduction of the SGS 2020 changes.

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[189] Appendix 3 to the letter of 24 March 2023, Document No 1363119.
[190] See https://www.ks.no/om-ks/ks-in-english/local-government-reforms-in-norway and appendix 4 to the letter of 24 March 2023, Document No 1363117.
[191] Vestland, Øygarden and Bjørnafjorden.
[192] Indre Østfold, Norde Follo, Holmestrand, Alver, Ørland, Nærøysund, Viken, Innlandet, Agder and Vestfold og Telemark.

13.6 The low number of public tenders corroborates the existence of a consistent and general practice

255. The Directorate does not have complete data on all the competitions conducted by all the Public Bodies. Nonetheless, some indications are given as to the number of competitions conducted by municipalities from 2006 onwards.

256. In 1994, there were 457 municipalities in Norway. In 2011, there were about 430.[193] Today, there are 356 municipalities.[194] The Directorate believes that 22 of these have their own pension fund.[195] To provide for a generous error margin, the Directorate will take the lowest of these figures, and subtract 56 municipalities to account for those with their own pension fund and those which might have reasons to conduct tenders less frequently. This leaves 300 municipalities. If those municipalities were to tender out these contracts at least once every 10 years (in line with the Directorate's current view of what is a proportionate contract duration – see section 10 above), we would see on average 30 competitions each year.

257. The actual number of competitions is considerably lower. The Norwegian Government has indicated that from 2006 until 2012, each year around 10-15 municipalities conducted tenders, and has stated that from 2013 until 2019 no public tenders were conducted.[196] However, the complainant has provided five contract award notices which indicate competitions were held in 2013, one which indicates a competition was held in 2014[197], and based on information from the complainant, the Directorate has located two prior information notices which indicate two further competitions may have been held in 2013.[198] The complainant has indicated that in 2019, one municipality held a competition, in 2020, one county held a competition and in 2021, two municipalities held a competition whereas four municipalities initiated competitions but cancelled them. [199] One competition was held in 2022.[200]

258. Even with a generous margin of error, the number of competitions held is therefore *manifestly* below what the Directorate would expect. At no point in time since 2006 has the number of competitions come anywhere near the expected average of 30 competitions per year. At most, the competitions were only half of the expected average.[201]

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[193] Complaint, Document No 1309815, page 13

[194] Letter of 24 March 2023, Document No 1363115, page 3.

[195] As of 31 December 2021, the Directorate understands KLP provided services to 332 municipalities and Storebrand provided services to two, leaving 22.

[196] Letter of 24 March 2023, Document No 1363115, page 13.

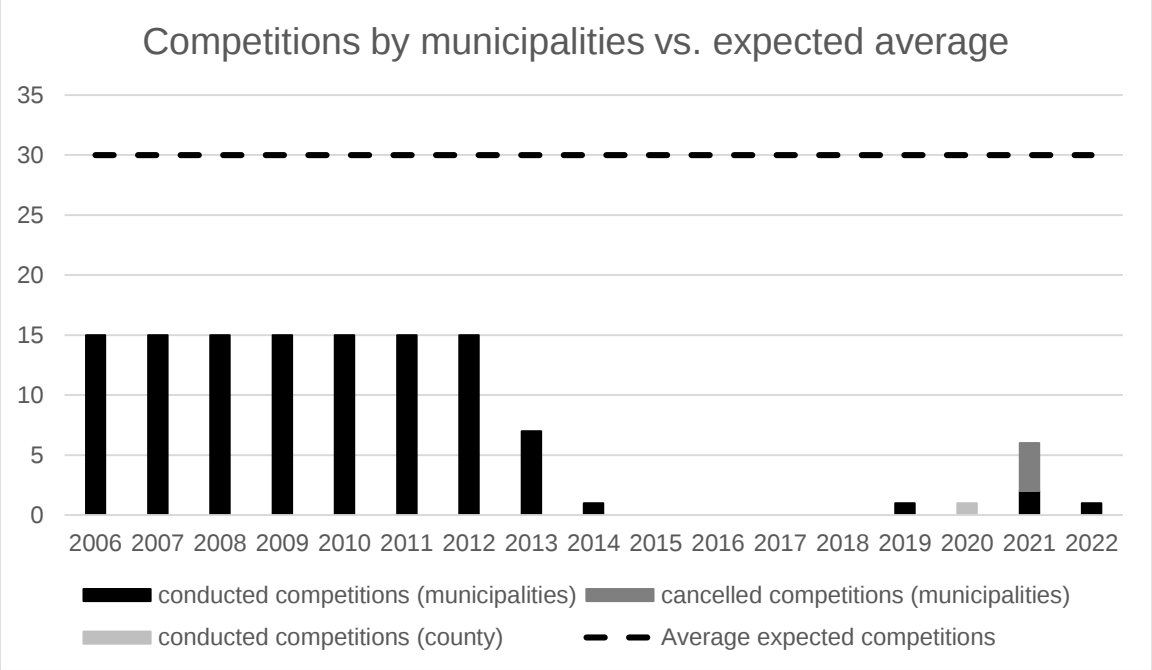
[197] Letter of 18 November 2022, Document No 1329785, appendices 22 to 27.

[198] Letter of 18 November 2022, Document No 1329785, pages 4-5; https://www.doffin.no/Notice/Details/2013-295993 and https://www.doffin.no/Notice/Details/2013-296648

[199] Complaint, Document No 1309815, page 6.

[200] Strand municipality. Four further competitions were carried out in 2023 (Austevoll, Askøy, Ulstien and Vestland) but these are not included in this section given the year was not yet complete when this letter was prepared.

[201] Whilst this data is primarily in respect of municipalities, the one county competition conducted in 2020 has also been included in the table.



259. It is notable that the situation has not changed in the last four years in which Storebrand has pursued this market again. Regardless of whether the sole supplier exception could have been applied between 2013 and 2019, the problem is therefore more structural: there appears to be a widespread understanding in the Norwegian municipalities that these services need not be tendered out.[202]

260. Furthermore, no competitions have been conducted in the health sector since 2002 and therefore the conclusion that the number of competitions is manifestly below the expected average also applies to the RHAs and hospital trusts. Whilst the Directorate currently has limited data concerning county authorities, the Norwegian Government has also not provided any information to the contrary. The Directorate therefore considers that the conclusion that the number of competitions held by municipalities is below the expected average, can probably be extrapolated to county authorities.

261. The Directorate recalls the case law of the CJEU, according to which the fact that a very limited number of contracts for public services were awarded in accordance with EEA law is not sufficient to disprove the existence of a consistent and general practice, but rather corroborates the existence of a practice that goes beyond the individual cases.[203]

14 Comments on the nurses' scheme and changes in the health sector

262. The complainant has raised concerns about the pension scheme for nurses and changes to the pension schemes in the health sector. For the reasons set out below, the Directorate does not intend to pursue these concerns at this point in time. This is, however, without prejudice to the Authority's ability to revert to these matters in light of further evidence or developments in EEA or EU law.

[202] See Appendix 4 to the complaint (Document No 1309899): details of a survey conducted by Storebrand where only 37% of respondents agreed that pension services had to be put out to tender and at least 26% actively disagreed.
[203] See, to that effect, judgment of the CJEU of 29 April 2010, *Commission* v. *Germany*, C-160/08, EU:C:2010:230, paragraphs 105 to 111.

14.1 The nurses' scheme

263. Pursuant to Section 1 of the Nurses' Pension Act, nurses must be members of the pension fund for nurses.

264. Section 33(1) of the Nurses' Pension Act states that the day-to-day administration of the pension scheme shall be regulated by Royal Decree. This competence was exercised by adoption of the Royal Decree of 22 June 1962 on the management of the occupational pension fund for nurses ("the Nurses Pension Royal Decree"), in which the duty of carrying out the day-to-day administration of the pension scheme was assigned to KLP.

265. Through the Royal Decree, Norway awarded KLP the exclusive right to provide occupational pension services to nurses. In 2011, NHO Service, the National Federation of Service Industries, lodged a complaint with the Authority alleging that this law infringed the freedom to provide services.

266. In 2013, the Authority closed that complaint case, accepting that the exclusive right did not infringe the freedom to provide services and the principle of transparency.[204]

267. The Authority held that the specificities of the pension scheme, which was limited to nurses, constituted a justified restriction of the freedom to provide services and the freedom of establishment. The Authority relied on the solidarity aspects of the scheme, which, it can be noted, differ to those applicable to the municipal scheme because the exclusive right ensures full equalisation.

268. The Authority also made some statements regarding the appointment of KLP as the service provider without any competitive tendering.[205] The Authority recalled that the principle of transparency requires contracts to be opened up to competition. Given that the award, by law of 1962, fell outside the temporal scope of application of the EEA Agreement, the principle of transparency did not apply to that award. However, the Authority recalled that it might envisage a new assessment of the case in the light of the principle of transparency if the scope of the exclusive right granted were to be substantially altered or a renewal thereof were to take place.

269. Whilst the Directorate understands that the details of the nurses scheme have been altered since the Authority's decision of 2013, the assessment undertaken by the Authority in 2013 was as to whether the exclusive right was proportionate. The Directorate considers that the Authority's assessment in 2013 remains applicable.

14.2 Changes to pension schemes in the health sector

270. The complainant has also argued that the changes made by the merger of the pension schemes for senior and junior doctors constitute a material change. However, these changes took place on 1 January 1994 and arrangements presumably had to be made in advance of this date. As such, the relevant point for determining the application of the EEA procurement law occurred prior to the entry into force of the EEA Agreement and therefore EEA procurement law did not apply to the making of those changes.[206]

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[204] Decision No 459/13/COL; Document No 682675.

[205] Section 3.3 of the Decision.

[206] See judgment of the CJEU of 24 September 1998, C-76/97, *Tögel v Niederösterreichische Gebietskrankenkasse*, paragraph 54.

271. The Directorate also does not consider the establishment of the RHAs in 2002 (therefore under Directive 92/50/EEC) to give rise to a material change. As the Directorate understands it, this restructuring resulted in contracts for pension services held by the counties (for both medical and non-medical staff) to be novated in part to the new RHAs. Such a restructuring did not change the terms of the contracts, other than to reduce their scope. Given the nature of the services, the Directorate is of the view that such a change would render the contract less attractive and so would not have affected who bid for the contract, nor would it have altered the economic balance in favour of the contractor. Thus, the conditions for the existence of a material change as stated by the CJEU in *pressetext* are not met.

15 Next steps

272. In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by 29 April 2024. The Directorate is aware that the Norwegian Government's letter of 21 December 2023 addresses some of the points made in this letter but notes that the Norwegian Government is of course welcome to send further submissions on the points raised.

273. Whereas it is entirely up to the Norwegian Government to decide how to respond to this letter, as set out in section 13 above, the Directorate considers that it would be most effective for forthcoming exchanges to focus on the positions set out in sections 6 to 11 above and therefore invites the Norwegian Government to focus on addressing those issues, rather than the factual circumstances of individual contracts at this stage.

274. Furthermore, the Directorate would welcome further discussions with the Norwegian Government on the matters addressed in this letter, both prior to and after the Norwegian Government's written response.

275. After the deadline for a response to this letter, the Authority may consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Jonina Sigrun Larusdottir
Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Jonina S. Larusdottir.

Enclosures

Annex 1: Excel file summarising data provided by the complainant (Document No 1373711)