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OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

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Your ref	Our ref	Date
89254 - 1366858	22/6706-127	14 June 2024

Complaint against Norway concerning breaches of public procurement law in relation to contracts for pension services – response to the preliminary assessments

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1 Introduction

Reference is made to the letter from the EFTA Surveillance Authority (the Authority) of 29 February 2024, in which the Authority gives its preliminary assessments of the complaint against Norway regarding breaches of public procurement law in relation to contracts for occupational pension services. Reference is also made to the digital meeting between the Authority and the Norwegian authorities on 29 April 2024, where certain aspects of the case were discussed.

As suggested by the Authority, the Norwegian authorities will in this response focus on the positions set out in section 6 to 11 in the Authority's letter. Information regarding factual circumstances of individual contracts will only to a small extent be dealt with in this response. The Norwegian authorities may assist with providing such information at a later stage.

As part of the work to respond to the Authority's letter, the Norwegian authorities have obtained information and input from KLP, KS (The Norwegian Association of Local and Regional Authorities), municipalities and county authorities and the Regional Health Authorities and Hospital Trusts.

2 Whether the procurement rules apply

The Norwegian authorities have previously replied to the application of the procurement rules to the contracts encompassed by the complaint. The Norwegian authorities maintain our previous positions on this matter, please see the letters of 24 March 2023 and 21 December 2023. The Norwegian authorities will, however, make additional comments on the "in-house" exemption, please see the section below.

3 The “in-house” exemption

The Authority contends that the “in-house” exemption set out in Article 12 (3) of Directive 2014/24/EU does not apply to the contracts with KLP.

As previously stated, the Norwegian authorities question whether the non-public members of KLP precludes the application of the “in-house” exemption, as the non-public members do not represent “private capital participation” within the meaning of Article 12(3) of the Directive. Considering the non-public members’ special nature and close connection to the public sector, questions can be raised as to whether their interests are other than safeguarding public interests. The “in-house” exemption does not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person because, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator an undue advantage over its competitors.[1] The non-public members of KLP are, however, not owners in KLP to achieve financial profit from KLP’s contracts and market activity, but (only) because they are customers of a service. Nether their participation in KLP nor KLP’s contracts provide the non-public members an undue advantage over their competitors.

Although the Authority is brief regarding the second condition of the in-house exemption, relating to the 80% activity rule, the Norwegian authorities would like to comment on the Authority’s legal stance in this regard.

The Authority states that it understands that the KLP group as a whole provides numerous financial services on the open market, giving rise to doubt that the second condition is met “given the links” between KLP and its subsidiaries.

The Norwegian authorities point out that the wording of Article 12(3)(b) is that *“more than 80 % of the activities of <u>that legal person</u> are carried out in the performance of tasks entrusted to it (…)” (our emphasis)*. Hence, the wording strongly suggests that the 80% activities rule is applied to each, individual legal person/on a company level, not on a group level. A company group [Nw.: Konsern] is not a separate legal person/entity, according to Norwegian law.

This literal interpretation is supported by Article 12(5), which stipulates rules on calculating companies’ activities in relation to 12(3)(b). This provision also consistently refers to “the relevant legal person”:

“For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred <u>by the relevant legal person</u> or contracting authority with

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[1] Recital 32 in the preamble to Directive 2014/24/EU

respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections" (our emphasis).

According to Norwegian Corporate Law, KLP and its subsidiaries are all separate legal persons. Consequently, according to the wording of Article 12(3)(b), the 80% activities rule must be applied to each individual company, not on a group level.

The Norwegian authorities are not aware of case-law from the CJEU or the EFTA Court that supports the Authority's interpretation of Article 12(3)(b). On the contrary, case C-360/96 *BFI Holding* suggests that procurement law issues must be addressed and resolved at a company level, not on a group level. In that case, the CJEU expressed that, when determining whether a company was a body governed by public law, it was irrelevant that another, separate legal person within the same group carried out commercial activities. That KLP's subsidiaries/other companies within the KLP group provide (other) financial services on the open market is, therefore, irrelevant.

4 The applicable rules and thresholds - pricing of the service

4.1 Introduction

The Norwegian authorities would like to comment on the Authority's preliminary view that the value of the contracts should be calculated on the basis of the total premiums payable. Reference is made to 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, which state that the basis for calculating the estimated value shall, where appropriate, for insurance services be the "premium payable and other forms of remuneration".

The Authority states that the Norwegian authorities argue that it is possible to use another approach by referring to the fact that the above-mentioned provisions are preceded by the words "where appropriate". The Norwegian authorities clarifies that our key point is that even though the word "premium" is specifically mentioned in Article 5(13), the reference to *"and other forms of remuneration"* suggest that this stipulation only applies insofar as the premiums qualify as remuneration. The Norwegian authorities' main line of argument is that the words "premium payable" must be read in its particular context, that being as a form of remuneration to the insurance company. Conversely, premiums that do not constitute remuneration shall be disregarded when calculating the estimated value of insurance contracts.

This approach is in the Norwegian authorities'' view *supported by* the words “where appropriate”. It seems inappropriate to calculate the value of insurance contracts pertaining to public occupational pension schemes based on premiums that do not constitute remuneration to the pension provider but remain the customers assets upon transfer and thus share the characteristics of bank deposits.

4.2 Settled case-law

In this regard, we recall that in accordance with settled case-law, when interpretating a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms a part. See among others case C-410/14 *Falk Pharma* paragraphs 34-42, C-9/17 *Tirkonnen* paragraphs 28-21 and C-303/22 *CROSS Zlin* paragraph 51. In the view of the Norwegian authorities, the Authority's reasoning does not take due consideration to this settled case-law. We especially note that, as explained above, Article 5(13) use the term “premium payable” in a particular context; that being as a form of remuneration to the insurance company. Instead of examining the premiums' true nature, the Authority focuses on the fact that all monetary transfers in Norwegian public occupational pension schemes are labelled “premiums”. This is not in line with the settled case-law referred to above pertaining to interpretation of a provision of EEA/EU law.

The EEA/EU rules on public procurement shall protect the (commercial) interests of economic operators established in a Member State who wish to offer goods or services in another Member State, cf. case C-410/14 *Falk Pharma* paragraph 35. All economic operators within the EEA shall thus be given the opportunity to compete for public contracts in so far as its subject matter is of a certain cross-border interest.

A public contract's commercial appeal depends on the possibility of making profits by delivering the goods or services in question. Profit is made through remuneration, which is consideration for the goods/services provided and at the economic operators' free disposal upon transfer. Remuneration is therefore intrinsically linked to the regulation of public contracts by Directive 2014/24 and, consequently, to the concept of “contract value” within the meaning of Article 5 of that Directive. All monetary transfers that represent remuneration must thus be included when calculating the value of a public contract to achieve the objectives pursued by the Directive.

Other kinds of monetary transfers that do not represent a direct economic benefit for the economic operators, on the other hand, fall outside the value of the contract within the meaning of the Directive. Such monetary transfers do not affect the commercial appeal of a public contract, and there is thus no need to include them when calculating the value of a public contract, in light of the context and objectives by Directive 2014/24.

Applying the same line of reasoning as in the above-mentioned case-law at the case at hand, premiums that do not affect the commercial appeal of contracts pertaining to public

occupational pension schemes must be disregarded when calculating the value of the contracts. Consequently, the ordinary annual premium, regulation premium and special single premium for benefits that cannot be determined in advance should in the Norwegian authorities' view not be included when calculating the value of the contracts.

4.3 The relevance of case C-271/08 Commission v. Germany

In paragraph 139 in the letter of 29 February 2024 the Authority refers to that in case C-271/08 *Commission v. Germany*, 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. According to the Authority, 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.

The Norwegian authorities consider that the Authority's presentation of Germany's line of argument is inaccurate. Germany did indeed argue that the value of contracts for pension services should be based on the management costs, not on the total amount of premiums paid. However, Germany's reasoning was that "*the latter amount is impossible to determine precisely at the time when the pension insurance contract is concluded",* cf. paragraph 85. This was the argument that CJEU rejected.

The Norwegian authorities point out that we have not argued that the value of contracts for public occupational pension schemes should be based on management cost because the total amount of premiums paid is impossible to foresee. The Norwegian authorities have argued that the value of these contracts should be based on management costs because only those premiums (administration premium, asset management premium and interest guarantee premium) constitute payment for the services provided, in addition to any identifiable profit margins added onto the premiums. The CJEU has not rejected such an argument in C-271/08 *Commission v. Germany*. On the contrary, as explained in the Norwegian authorities' letter of 21 December 2023 section 5.2, we consider that the CJEU's reasoning in that judgement supports this approach.

In paragraph 140 in the letter of 29 February 2024, the Authority states that it is not clear what the Norwegian authorities base the argument on when Norway has sought to distinguish the system in Norway from that in *Commission v Germany*. It is referred to that the opinion of the Advocate General and the judgment contain limited details about the workings of the scheme. The Authority 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. The Authority also notes 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.

The Norwegian authorities point out that we have detailed the elements that distinguish the Norwegian system from the German system in C-271/08 *Commission v. Germany*, with reference to the relevant paragraph of the judgement, in the letters of 24 March 2023 section 8.4.3 and 21 December 2023 section 5.2: In the German scheme, all premiums payable represent the principal consideration for the services provided. That is not the case in the Norwegian scheme, where a large proportion of the premiums payable are set aside for future pension benefit payments.

In any event, case-law must always be read in light of the facts and legal arguments that were presented to the court. Germany did not argue that only certain premiums should be taken into account because of the characteristics of the scheme and the premiums payable. Therefore, the Norwegian authorities consider that absence of information about the working of the scheme in case C-271/08 *Commission v. Germany*, cannot be interpreted as the court considering them irrelevant. It rather represents an argument in favour of not applying the principles of the judgement to other situations than those explicitly covered by the facts of the case.

4.4 Competition on the entire of the premiums

In paragraph 141 and 142 in the letter of 29 February 2024, the Authority expresses its understanding that the value of all elements of the premiums can vary between different providers. It is referred to that in calculating the premiums, providers must take into account their assessments of certain risks and their willingness to expose their own equity to risk. These assessments will differ between providers, meaning premiums will differ. In addition, the Authority states that 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. 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 Authority to be justified to only take certain elements into account in calculating the contract value.

The Norwegian authorities have a different approach to this issue than the Authority seems to have. As explained by the Norwegian authorities in our letter of 21 December 2023 section 5.1, we consider that the pivotal legal question is which of the premiums that constitute remuneration/consideration to the pension provider for the services provided. The fact that premiums may vary among the pension providers, is not equivalent to the premiums being remuneration/consideration to the pension provider for the services provided.

Furthermore, the Norwegian authorities would comment on the Authority’s understanding that the pension provider must consider their assessment of risks and willingness to expose their own equity to risk. The Norwegian authorities have thoroughly examined this issue in our letter of 21 December 2023 section 5.

The Insurance Activities Act §§ 3-3 to 3-7 and corresponding special provisions set out requirements for the pension provider's price tariffs. This includes among other things that the premiums must be in reasonable proportion to the risk assumed and the services provided. These provisions limit the pension providers discretion in structuring their price tariff used for premium calculation. The margin of discretion varies between the different categories of price tariffs/premiums. This is further commented below.

Pension providers possess the least flexibility when it comes to evaluating personal risk and structuring the associated price tariffs, even though this category accounts for the most substantial portion of the premium amount. This is due to the fact that all pension providers are subject to FSA's minimum requirements pertaining to base mortality rates in group pension insurance; K2013. K2013 stipulates the minimum life expectancy assumptions that pension providers may implement in their price tariffs. Pension providers cannot assess their risk statistics less conservative than the stipulations in K2013. Hence, in effect, pension providers cannot compete on risk related to life expectancy/mortality. In continuation of this, the only personal risk element pension providers exclusively assess based on its risk statistics is disability risk (including recovery risk).

When it comes to risks regarding administration, asset management and interest guarantee, and structuring the associated price tariffs, on the other hand, the pension providers are afforded more flexibility. Reference is made to the Norwegian authorities' letter of 21 December 2023 section 5.4. A change in the risk assumption would mean changing the calculation model or the corresponding parameters (assumptions) of the model, which is part of the price tariff. Being less or more conservative about a particular risk (within the limits permitted by the Insurance Activities Act), would therefore affect the price tariffs.

We further note that the ordinary annual premium, adjustment premium and special single premiums calculated in public tenders are non-binding estimates. In a public procurement procedure, the premiums are calculated based on the number of employees, wages and other relevant data from the preceding year. At the end of the initial year of the contract's term, these calculations are settled against the actual actuarially calculated premiums for that year and the customers must cover any shortfall, due to changes in wages, number of employees etc., regardless of the estimates provided by the (winning) pension provider in the preceding tender.

We also note that positive return on investments exceeding the interest guarantee will not as such constitute a parameter under the price criteria used in public tenders pertaining to Norwegian public occupational pension schemes. Nor will the size of the premium fund have any impact on the price tariffs. However, the level of investment risk borne by the pension provider would affect the price tariff for the interest guarantee premium.

5 Whether the sole supplier exemption applied in 2013-2019

5.1. Introduction

The Authority is of the preliminary view that contracts for public sector occupational pension services awarded directly in 2013-2019 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 and, even if there was a sole supplier, the contracts were not concluded for a sufficiently short term to enable future competition.

As an initial point, the Norwegian authorities concur that the sole supplier exemption relates to the state of the market at one particular time, which is no longer present. Storebrand has now re-entered the market and the sole supplier exemption is no longer used to justify award of contracts for public occupational pension scheme directly to KLP.

5.2. Storebrand and DNB withdrew from the market

As is well known, the reason why the exemption was considered applicable was that Storebrand and DNB in 2012/2013 officially announced their withdrawal from the market and that they would no longer pursue new contracts for public occupational pension schemes. We note that the Authority consistently uses quotation marks when mentioning that Storebrand and DNB withdrew from the market. Please note that this is the word used, at least by Storebrand. The English version of Storebrand's annual report from 2012[2] states the following:

> *"Storebrand Life Insurance decided to withdraw from the market for insurance-based defined-benefit occupational pensions in the public sector. (…) The winding up of this business is planned to take three years. (…) The decision to withdraw from the market for defined-benefit pensions in the public sector is due to several factors. (…)"*

Similarly, DNB refers to "discontinuing" its business for public occupational pension schemes in its annual report from 2013 (English version)[3]:

> *"In the spring of 2013, DNB Liv decided to discontinue its activities in the public sector by the end of 2016 due to low expected profits in this market in the coming years."*

The Authority seems to interpret Article 32(2)(b)(ii) of Directive 2014/24 ("competition is absent due to technical reasons") as only to apply when no other economic operator could ever perform the services in question. In its view, a hypothetical/theoretical chance that another economic operator might be interested in starting to provide the services is sufficient to determine that the sole supplier exemption stipulated therein is inapplicable. The mere existence of other potential service providers thus suffices to conclude that competition is not absent due to technical reasons. Commercial preferences or priorities among the potential service providers and the fact that there effectively is only one supplier in the market, on the other hand, seems irrelevant to the Authority.

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[2] See 2012-annual-report-storebrand-livsforsikring.pdf page 4.
[3] See annual-report-dnb-liv-2013.pdf page 3.

The Norwegian authorities question whether this interpretation is too narrow and in conflict with settled case-law pertaining to interpretation of provision of EEA/EU law:

- As explained in section 4.2 above, in accordance with settled case-law, when interpreting a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms a part.[4]

- The objective of Directive 2014/24 is to avoid the risk of preference being given to *national tenderers* or applicants whenever a public contract is awarded.[5] To achieve this objective, Directive 2014/24 prescribes that public contracts shall be exposed to competition, conducted in accordance with the detailed rules stipulated therein to control the actions of contracting authorities.

- If it is clear from the outset that only one economic operator offers the services in question, and thus will participate in a competition conducted in accordance with the detailed rules set forth in Directive 2014/24, there is no need to publish a call for competition: publication will not trigger more competition or a better procurement outcome. This applies equally to all situations where competition is absent, whether it is due to strict technical reasons or commercial preferences. In both scenarios, the outcome will be set in advance.

- In light of the context of and objectives pursued by the EEA public procurement rules, Article 32(2)(b)(ii) must, therefore, be interpreted as applicable in all situations where it is clear from the outset that only one economic operator offers the services in question, even though the absence of competition is due to commercial preferences rather than strict technical reasons. There is no objectively justifiable reason to limit the scope of the sole supplier exemption to situations where no other supplier could ever provide the services in question. The mere existence of other economic operators potentially able to start providing the services in question thus cannot render the sole supplier exemption inapplicable, especially when it seems obvious that none of these potential suppliers has a commercial interest in actually offering the services.

- As pointed out by the Authority in paragraph 154 of the letter of 29 February 2024, the CJEU has held that exceptions from the Directive's rules on publication must be interpreted strictly. Nevertheless, the CJEU has also pointed out that the principle of strict interpretation does not mean that the terms in which the exception is framed must be construed in such a way as to deprive that exception of its intended effect. On the contrary, consistent with the abovementioned case-law, exceptions must be construed in a manner consistent with the objectives that is pursues, cf. case C-19/13 *Fastweb* paragraph 40:

[4] See among others case C-410/14 *Falk Pharma* paragraphs 34-42, C-9/17 *Tirkonnen* paragraphs 28-21 and C-303/22 *CROSS Zlin* paragraph 51.
[5] See case C-410/14 *Falk Pharma.*

"Since Article 2d(4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d(1) of that directive, it must be interpreted strictly (see, by analogy, the judgment in Commission v Germany, C 275/08, EU:C:2009:632, paragraph 55 and the case-law cited). Nevertheless, the exception must be construed in a manner consistent with the objectives that it pursues. Thus, the principle of strict interpretation does not mean that the terms in which the exception is framed in Article 2d(4) of Directive 89/665 must be construed in such a way as to deprive that exception of its intended effect (see, by analogy, Future Health Technologies, C 86/09, EU:C:2010:334, paragraph 30 and the case-law cited)"

As the Norwegian authorities have expressed in the letter of 24 March 2023 section 8.5 (page 27), the objective pursued by the sole supplier exemption is to avoid unnecessary formalism and spill of resources where the result of a competitive procedure from the outset is given because only one economic operator will participate in the procedure. This is in line with the Directive's overriding objective to ensure the most efficient use of public funds, as discussed in the preamble section 2. The Authority's interpretation of the sole supplier exemption seems to directly contradict this objective. In the Norwegian authorities' opinion, it can result in unnecessary competition and a waste of public funds and resources, contrary to the objective of the sole supplier exemption. Therefore, although being an exception from the Directive's rules on publication, the Authority's overly strict approach is not in line with settled case-law pertaining to interpretive rules on provisions of EEA/EU law.

Applied to the case at hand, given the market situation between 2013-2019, conducting competitive procedures in accordance with the detailed rules in Directive 2014/24 would have been unnecessary and a waste of public funds, as it was clear from the outset that only one supplier offered Norwegian public occupational pension schemes and would participate in such procedures. Conducting procurement procedures pertaining to public occupational pension schemes are linked to costs associated with drafting procurement documents, engage advisors etc. It would be pointless to incur these costs in a situation as the one at hand, where the only two competitors had announced they would no longer participate in such procurement procedures, and the Pension Office in its annual updated guidelines confirmed that there were no other providers.[6] Contracting authorities must be able to adopt a realistic and viable approach to the sole supplier exemption.

As regards recital 50 of the preamble to Directive 2014/24, we note that "technical reasons arising from near technical impossibility" is only mentioned as one out of many examples of situations where objective exclusivity occurs, and the sole supplier exemption applies. As is evident from recital 50's first subparagraph, the pivotal legal question is whether it is clear from the outset that publication will not trigger any more competition or better procurement outcomes.

[6] See, for instance, the 2014-gudielines: 01_veileder_orig_26_5.qx9_17x24 (pensjonskontoret.no)

The Norwegian authorities also find it difficult to envision a situation where no other economic operator could ever perform certain services. In principle, all economic operators represent potential providers of all services. Hence, by applying the Authority's approach, the sole supplier exemption is left without any substance.

The Authority 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. It argues that 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.

As pointed out above, in the Norwegian authorities' view, technical reasons and commercial priorities should be considered at an equal footing when determining whether the conditions for the sole supplier exemption are met in situations as the one present. The fact is that neither Storebrand (nor DNB) offered the services to new customers between 2013-2019. Hence, it was not an alternative for Public Bodies to receive public occupational pension schemes from Storebrand or other providers during 2013-2019 instead of KLP. The possibility of Storebrand changing its commercial priorities was purely theoretical and holds no legal relevance: Storebrand officially announced that it would withdraw from the market of public occupational pension schemes in 2012. The company also announced in its annual report from 2012 that it would consider re-entering the public sector pension scheme market should the framework conditions change. This did not happen during 2013-2019, and Public Bodies thus had no reason to believe that Storebrand's commercial priorities had changed, until Storebrand announced its return to the market in 2019.

Further, as far as the Norwegian authorities know, neither Storebrand nor any other suppliers did contest any of the ex-ante transparency notices that were published, which explicitly set forth the Public Bodies' intentions to enter into agreements with KLP without a prior competition and the reasons for doing so. Storebrand neither corrected the Pension Office's (or others') understanding of KLP being the only supplier in the market for public occupational pension schemes. The legislation prevented Storebrand from terminating its contracts for public occupational pension schemes. This explains why Storebrand kept providing occupational pension benefits to one Public Body, despite the company's decision to withdraw from the market.

5.3 Whether other pension providers could, at least potentially, start providing the relevant service

The Authority refers to the fact 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, and 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.

Even if there were more providers with a licence under section 2-13 of the Financial Institutions Act, partly because this licence applies to both public and private sector pension providers, such a licence is not sufficient to provide the relevant service. In addition to a licence under section 2-13 of the Financial Institutions Act, the following licences and other regulatory requirements were required to be fulfilled to provide the services in the period from June 2013 to April 2019:

- licence in insurance class I.b and I.c under section 2-11 of the Financial Institutions Regulation,
- submission of a product notification, cf. section 2-8 of the Life Insurance Regulation to the Norwegian Financial Supervisory Authority,
- the establishment of price tariffs, cf. section 3-3 of the Insurance Activities Act and notification of the price tariffs to the Norwegian Financial Supervisory Authority, cf. section 3-7 of the Insurance Activities Act and section 2-9 of the Life Insurance Regulation.

In addition to these regulatory requirements, the provider must enter into the agreement regarding transfer and coordination of pension rights in the public sector ("overføringsavtalen")[7].

Furthermore, all life insurance companies would have to fulfil certain practical conditions to provide public occupational pension schemes. On a more practical, but important, note, any life insurance company has to organise its operations in a prudent manner, assess all risks associated with its activities, adhere to all capital requirements, organise its customer services to comply with all obligations vis-à-vis both potential (advice, guidance on choice of product) and actual customers, etc.

For foreign life insurance companies with its headquarters in another EEA state, the relevant supervisory authority in its home state would have had to issue a certificate stating the information prescribed in section 5-2 of the Financial Institutions Act, instead of a licence under section 2-13.

In footnote 120 in the letter of 29 February 2024, the Authority makes a distinction between regulatory requirements that may be used as selection criteria within the meaning of Article 58(2) of Directive 2014/24 and conditions for performance of the contract. Whereas the former must be complied with upon participation of a procurement procedure, the latter could be satisfied at the point of performance. In the context of public occupational pension schemes, the Authority's view is that only a licence under section 2-13 of the Financial Activities Act can be used as a selection criterion. Other requirements, such as submitting a product report and price tariffs to the FSA, would constitute conditions for the performance of the contract in the view of the Authority, and is thus not required to participate in competitions pertaining to public occupational pension schemes.

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[7] Confer the letter of 24 March 2023 to the Authority, section 5.1 (page 7),

Although this distinction might be correct from a public procurement law perspective, we believe it is irrelevant in this context. The point is that pursuant to the Norwegian Insurance Activities Act, insurance companies are required to submit a product notification and price tariffs to the FSA, cf. Life Insurance Regulation section 2-8 and 2-9. A product notification shall, according to section 2-8, be submitted when a product for the first time is marketed or sold. The requirement to submit a product notification will therefore be established when the insurance company participates in public procurement procedures pertaining to public occupational pension schemes.

The Authority seems to perceive that the Norwegian authorities' arguments are based on there being insufficient time for a new entrant to fulfil licensing/registration requirements. In the Authority's view, this is something which should be taken into account in determining what it was permissible to award.

The Norwegian authorities have not argued along these lines in our previous letters. The Norwegian authorities have merely explained that the FSA did not receive any notices or applications from insurance undertakings expressing an interest to provide public occupational pension schemes in Norway between 2013-2019.

One must assume that all economic operators with an interest in providing public occupational pension schemes to Public Bodies in Norway subscribe to the relevant CPV codes or, at least, check TED regularly for relevant notices. Building on this assumption, all interested providers were thus aware of the voluntary ex-ante transparency notices. If competition was only absent because of insufficient time for registration/licencing requirements, one would expect that the interested providers raised objections to the voluntary ex-ante transparency notices. However, no such objections were raised. This demonstrates that the lack of competition was not attributable to Public Bodies' inability or unwillingness to allow sufficient time for a new entrant to fulfil licencing/registration requirements: it was absent because no other economic operator than KLP offered, or had the intention to start offering, Norwegian public occupational pension schemes.

5.4 The contracts were not concluded for a sufficiently short term to enable future competition

The Authority 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.

The Norwegian authorities fail to see that there is any legal basis for this reasoning. Article 32 govern the permissibility of entering into contracts without a prior call for competition and contract notice, not the legal duration of contracts. If the conditions for applying the sole supplier exemption are met, Article 32 of Directive 2014/24 is complied with and the contract

in question is legally entered into. That being the case, Public Bodies must be allowed to receive services under that contract until the end of its term. In case of service contracts without a pre-defined term, Public Bodies must be allowed to receive the services until the contracts are terminated.

This conclusion is not altered by the principle of proportionality. Whether the contracts should have been terminated and new procurement procedures should have been conducted following Storebrand's re-entry to the market, is a separate issue that should be evaluated as part of the subject-matter discussed in section 6 below.

6 Whether the contracts can be continued for a lengthy period

As pointed out by the Authority, Directive 2014/24 does not specifically govern the maximum duration of public service contracts. The Norwegian authorities note that the directive does not establish an obligation to terminate a contract due to the length of the contract. However, as also pointed out by the Authority, all public procurement activity must be in line with the general principles of EEA law. As already set out by the Norwegian authorities and referred to by the Authority in paragraph 170 and 171 in the letter of 29 February 2024, whether a contract could be continued for a lengthy period is subject to the Norwegian contracting authorities' discretion and must be assessed on a case-by-case basis, applying their procurement expertise within the framework of the fundamental procurement principles.

First, as regards the nature of insured public sector occupational pension services, the Authority 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. 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 Authority's view, the nature of the services provides less justification for a longer contract period.

At the same time, practice demonstrates that Public Bodies, like private entities, do not exercise their right to terminate contracts annually but continue their contracts for a long period of time. A reasonable margin of discretion for the Public Bodies to decide when it is commercially sound to conduct a new procurement procedure allows for the pension providers to adapt to this practice and invest in long-term assets, providing a greater return on investments to their customers. Even though the contracts may be terminated annually, they might not be terminated until for example after 20 years, making it possible for pension providers to invest in assets with an investment horizon of 20 years.

By applying the Authority's approach on the other hand, where contracts may not be continued for more than ten years, it will not be possible for pension providers to invest in assets with an investment horizon of more than ten years. Then, the pension providers must anticipate that their contracts will be terminated after ten years of service, which presumably will affect the return on investments in a negative manner.

Many of the inputs to this letter from municipalities and health organizations emphasize why they consider it necessary to have long-term contracts for occupational pension services, also contracts that extend beyond a 10-year duration. Among other things, the need for certainty that the pension provider will continue to deliver the pension service for a long time to come, and that the size of the premiums will remain at a fairly stable level, is pointed out. In order to ensure the latter, they have emphasized the importance of being sure that the supplier has good capital management and does not take too great a risk in managing the funds.

7 Whether the contracts have been unlawfully modified

7.1 Changes due to mergers of municipalities

The Authority’s preliminary view is that changes made in the contracts due to mergers of municipalities were not foreseeable at the point of award, and that changes therefore are unlawful if the number of employees covered by the contract is increased by more than 50% compared to the number of employees in the original contract(s), pursuant to Article 72(1)(c).

At the outset, we point out that when determining whether the total number of employees in the post-merger municipality exceeds 50% of the number of employees in the former municipalities, the largest of the former municipality must be used as a starting point, not the smallest one.

Moreover, the Authority seems to have somewhat misunderstood the number of employees’ relevance to the value of the contracts. According to the Authority's reasoning, the contract value is the sum of all premiums. Premiums are calculated based on the Public Bodies’ pension basis and premium reserve. The Public Bodies’ number of employees itself, on the other hand, is not of decisive importance. That being the case, the value of the post-merger contract will depend on the pre-merger municipalities’ pension basis and premium reserves, not the number of employees.

The Authority’s assertion of a direct correlation between the number of employees and the value of the contract is thus inaccurate. A direct correlation between the increased number of employees in the post-merger Public Body and the increased amount of total premiums / value of the post-merger contract presupposes that the pre-merger Public Bodies had the same average pension basis and the same average proportion of the premium reserve. In all other cases, the increased number of employees does not coincide with the increased value of the contract. As far as we are aware, the abovementioned prerequisites for presuming a direct correlation between the number of employees and the value of contracts were not present for any of the merged municipalities. Consequently, to properly assess any price increases resulting from the municipal mergers, one must examine the premiums actually paid before and after the mergers. One cannot apply the Authority’s approach with only examining the number of employees, as there is not a one-to-one correlation between

number of employees and the levels of premiums, which presumably reflect the value of the contract. For completeness, we mention that premiums are not equalized on number of employees but on wages and premium reserve (adjustment premium).

If Article 72(1)(c) cannot be relied upon by reason of the price being over 50% higher, the Authority 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. It argues that 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 Authority’s view, two independent smaller contracts should not be considered to be the same as one larger contract.

The Norwegian authorities state that the typical situation where Article 72(4)(c) applies is where additional deliveries are included in an existing contract. That is not the case when all the pre-merger authorities had contracts with KLP prior to the merger. In that case, KLP's deliveries remains exactly the same – both in quantity and quality – as before the merger. The only difference post-merger is the practical management of the schemes: the pension schemes are governed by one contract document instead of two documents. Therefore, Article 72(4)(c) is not applicable. The situation would be the same in case of a division of a municipality; the new municipalities would obviously be allowed to continue the existing contract entered into by the former municipality as the scope of the contract and its overall value remain unchanged.

The Authority states that the 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. It argues that 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.

Although this could be a valid reasoning in other markets than the market for public occupational pension schemes, the Norwegian authorities question whether this is the case for the market for public occupational pension schemes. There is no evidence to suggest that the size of the contract is a relevant parameter to the pension providers when deciding whether to submit a tender. Based on the historical market situation, it seems like pension providers submit tenders regardless of the size of the contracts.

In paragraph 78 in the letter of 29 February 2024, the Authority states that historically only three companies have offered public occupational pension schemes: KLP, Storebrand and DNB. To the best of the Norwegian authorities’ knowledge, all of these three companies participated in all of the procurement procedures that were conducted. Hence, there is no reason to believe that a larger contract would have attracted additional participants: all interested pension providers already participated.

Moreover, larger contracts require larger amounts of capital to fulfil regulatory capital requirements than smaller contracts. Hence, a direct correlation between larger contracts and greater commercial interest cannot be assumed in the market for public occupational pension schemes, especially not among new entrants. To new entrants, smaller contracts can be more attractive because they would not require and tie up the same amount of capital.

7.2 Changes in the health sector

The Norwegian authorities agree with the Authority's assessment in paragraph 271 of the letter of 29 February 2024 that the establishment of the RHAs in 2002 does not give rise to a material change.

In response to the Authority's request for an overview of the ongoing contracts KLP has with Public Bodies, cf. paragraph 230 of the Authority's letter of 29 February 2024, we refer to **Annex 1** which provides an overview of how the existing contracts for Health Trusts and Regional Health Authorities relates to contracts entered into by the counties prior to 01.01. 1994.

7.3 Changes due to the pension reform/SGS 2020

7.3.1 Introduction

The Authority's current view is that the changes in the contracts for public occupational pension due to SGS 2020 constitute substantial modifications for the purpose of Article 72(4) of Directive 2014/24, requiring new procurement procedures for the contracts affected by these changes.

The Norwegian authorities respectfully disagree with this assessment and have given reasons for this in the letters of 24 March 2023 and 21 December 2023. Reference is therefore made to the explanations in these letters. In this reply, we will repeat some main points from previous argumentation, as well as comment on matters that the Authority particularly points to in its preliminary assessment.

7.3.2 SGS 2020 – a part of the pension reform, but not the pension reform as such

At the outset, it is noted that neither the Norwegian authorities nor the Authority always refer to the meaning and content of SGS 2020 in a completely correct manner. In order to contribute to clarity and prevent possible misunderstandings, the contents and significance of SGS 2020 are explained below. To a large extent, this is also explained by the Norwegian authorities previously in our letters of 24 March and 21 December 2023.

On 3 March 2018, the Ministry of Labour and Social affairs, the public employee organisations and public employer organisations entered into the Pension Agreement. The agreement's objective was to ensure that public occupational pension benefits were more

closely aligned with the National Insurance Scheme following the pension reform, and other integral components of the pension system. The main objective was to maintain a uniform and consolidated pension system within the public sector, with lifelong pension benefits and equal rules for men and women.

In short, the agreement stipulated an obligation for the parties to introduce different accrual rules for old-age pension benefits from 1 January 2020 ("add-on model" instead of a "gross pension model"), to introduce flexible withdrawal of old-age pension (as was already introduced to the National Insurance Scheme through the 2009-amendments in the National Insurance Scheme Act), and to convert AFP into a lifelong benefit, for employees born from 1963 and onwards. The intention was that the aggregated effect of the amendment would provide for approximately the same level of pension benefits as before, and the same proportional life of retirement. The changes were only introduced for employees born from 1963 and onwards, and to these employees' accrual of pension from 2020 onwards.

For state employees and nurses, the agreed revisions were implemented through amendments in the Norwegian Public Service Pension Fund Act and the Act on Pension Scheme for Nurses respectively.

In the municipal sector, on the other hand, the agreed revisions had to be implemented through amendments in the prevailing collective bargaining agreements. This resulted in the conclusion of SGS 2020 on 19 June 2019 (this was in fact after Storebrand re-entered the market for public occupational pension), not in March 2018. Although the process of amending the public occupational pension took several years, it is not correct to claim that the negotiations on SGS 2020 took several years.

The SGS 2020 agreement is renegotiated every two years, most recently for the period 1 January 2024 to 31 December 2025.

The pension scheme for hospital doctors and other staff in hospitals/hospital trusts and RHAs are governed by separate collective agreements. However, these collective agreements presume that the same provisions as in SGS 2020 apply.

Prior to SGS 2020, the provisions regarding pension in the municipalities and county authorities were part of the Main Collective Agreement within the municipal sector, which regulated, among other things, wages and allowances, working hours, the possibility of local negotiations on wages and provision on pensions. In principle, the revisions necessary due to the Pension Agreement of 2018 could have been implemented by merely amending the Main Collective Agreement and accompanying TPO-statues. However, for practical reasons, the collective bargaining parties decided to extract all the pension provisions included in the Main Collective Agreement and incorporate them into a separate document, the SGS 2020 (in Norwegian SGS is an abbreviation for "sentral generell særavtale").

The main part of the pension provisions that were transferred to the SGS 2020 agreement are the same as under the previous Main Collective Agreement. In addition, the contracting parties agreed on some new elements as a follow-up of the Pension Agreement. These new elements only apply to pensions for employees born from 1963 and later, and only to these employees' accrual of pension from 2020 onwards.

The SGS 2020 contain all provisions regarding pension in the municipal area. SGS 2020 therefore contain both provisions for pension benefits for employees born before and after 1963. Although pensions for employees born before 1963 are not affected by the new elements at all, they are still regulated or governed by SGS 2020.

Although the SGS 2020 only apply in the municipal sector, we will use the changes in this agreement to illustrate the changes in public occupational pension from 2020 below, since approximately the same applies to other parts of the public sector.

7.3.3. New elements in public occupational pension from 2020

7.3.3.1 Different accrual rules for old-age pensions accrued from 1 January 2020

The Norwegian authorities have outlined the differences between the old-age pension accrual rules that applied under the Main Collective Agreement and the accrual rules that were introduced by SGS 2020 in our letter to the Authority of 24 March 2023 section 9.4.2 and in the letter of 21 December 2023 section 4.4. The central elements from the letters are repeated below, including how they did and did not affect the contractual relationship between the municipalities and KLP.

The Insurance Activities Act section 4-1 prescribes that public occupational pension schemes must provide for defined pension benefits (explained as "benefit-based" pension schemes in our letter to the Authority of 24 March 2023). This involves that the employees are guaranteed a fixed, lifelong benefit, with guaranteed adjustments of the yearly benefits in line with the growth in the National Insurance basic amount (Nw.: Folketrygdens Grunnbeløp. Normally referred to as "G"), regardless of financial fluctuations in the pension portfolio.

<u>Accrual rules under the Main Collective Agreement</u>
Under the Main Collective Agreement, the defined old-age pension benefits were expressed through a gross pension model. The gross pension model involved that the total old-age pension benefits corresponded to 66% of the employee's final salary, provided that the employee had been a member of an occupational pension scheme for 30 years and still was a member at the time of withdrawal. If the employee left the public occupational pension scheme during the accrual period, the employee would still qualify for public occupational old-age pension benefits but would have to work longer (maximum 40 years instead of 30 years) to accrue the maximum benefit level (66% of final salary).

If an employee withdrew before the accrual period of 30/40 years was reached, the old-age pension benefits would be reduced proportionally. Being a member of an occupational pension scheme for more than the 30/40 years, on the other hand, did not result in greater old-age pension benefits, unless the employee's salary increased during those years.

- Coordination with the National Insurance Scheme benefits did not represent a risk or liability for the pension provider

Upon retirement, the employee's yearly old-age pension benefits would be coordinated with old-age pension benefits from the National Insurance Scheme, ensuring that the aggregated old-age pension benefits amounted to 66% of the employee's final salary. Hence, in reality, the occupational pension benefits constituted a limited addition to the National Insurance Scheme benefits.

The Norwegian authorities note that when calculating the customers' annual premiums (the customers' own savings) the anticipated benefits from the National Insurance Scheme were taken into account by the pension provider. A discrepancy between the anticipated benefits and the actual benefits from the National Insurance Scheme upon retirement was invoiced as a special single premium. The Norwegian authorities recall that the special single premium refers to non-insurable benefits. Consequently, if the National Insurance Scheme benefits were lower than anticipated, the public employer had to cover the difference. Correspondingly, if the National Insurance Scheme benefits were higher than anticipated, the employer would get the difference refunded. That being the case, the coordination between old-age pension benefits from the National Insurance Scheme and occupational pension scheme benefits did not represent an insurance risk taken on by the pension provider, or any other type of contractual risk assumed by the pension provider.

- The size of the employee's final salary did not represent a risk or liability for the pension provider

The Norwegian authorities agree that the scheme under the Main Agreement guarantees a pension amounting to 66 per cent of final salary, and that it is not known what the final salary will be. However, the pension provider does not make any assumptions and does not take any risk relating to salary development (including the final salary). Ordinary annual premiums pertaining to salary development (including the final salary) are calculated on the basis of the actual development in the employees' wages and invoiced to the customer as additional ordinary annual premiums when the development in the employees' wages is known to the pension providers, cf. section 4-5 of the Insurance Activities Act and section 9-1(2) of the Life Insurance Regulation.

In practice, this means that when an employee who has had a salary increase that is not taken into account in the annual premium payments (for example because he/she had a salary increase just before retirement) retires, the difference between the size of paid premiums and the premium-size if it had been calculated on the basis of the final salary is invoiced as a special single premium.

- Life expectancy adjustment upon retirement

Subsequently, upon retirement, the employee's yearly old-age pension benefits would be adjusted to remaining life expectancy. Simplified, the adjustment was made by dividing the gross pension portfolio (66 % of final salary) on a defined ratio, which was adjusted in accordance with the evolution in societal life expectancy. The ratio for each cohort was set by the Norwegian Labour and Welfare Organisation 1 July the year in which the cohort reached the age of 61.

New accrual rules under SGS 2020

Under SGS 2020, the accrual rules described previously and under section 4.4.2 in the letter of 21 December 2023 still apply in their entirety for employees born before 1963. They also still apply to old-age pension benefits that were accrued before 1 January 2020 by employees born in 1963 and later. Consequently, SGS 2020 stipulates that public occupational pension schemes still must provide old-age pension benefits in line with the accrual rules that were operative under the Main Collective Agreement.

However, commencing from 1 January 2020, employees born in 1963 and later accrue old-age pension benefits under different rules than under the Main Collective Agreement. Public occupational pension schemes must provide old-age pension benefits in line with these accrual rules in addition to those that were operative under the Main Collective Agreement. SGS 2020 does not permit public occupational pension schemes that are exclusively based on the new accrual rules.

As a result, the immediate impact of SGS 2020's additional accrual rules is limited. First, disbursements of old-age pension benefits in accordance with these additional rules will not commence until 2025. Second, pension providers who seek to offer Norwegian public occupational pension schemes must disburse old-age pension benefits and calculate annual premiums in accordance with the former accrual rules (in parallel with the new) for many years to come. As an illustration, according to KLP, only 8.7% of the total old-age pension premium reserve is accrued in accordance with the new accrual rules that were introduced by SGS 2020 per 31 December 2022.

- Defined benefits expressed through an add-on model

As explained in section 9.4.2 of our letter to the Authority of 24 March 2023, the new accrual rules under SGS 2020 imply that each employee annually accrues old-age pension benefits corresponding to a certain percentage of his/her earnings. In that regard, each employee accrues a "basic rate" of 5.7% in the interval between 0-12 G and an "additional rate" of 18.1% in the interval between 7.1-12 G. All years of work up until the age of 75 accrue old-age pension benefits. The total accrued old-age pension benefits are for accounting purposes collected in a pension portfolio. Upon retirement, the calculated pension portfolio is divided by the defined remaining life expectancy number prevailing at the retirement date and added onto the National Insurance Scheme in its entirety. The additional accrual scheme introduced by SGS 2020 is therefore often referred to as an add-on model as opposed to a gross pension model.

The Norwegian authorities emphasise that also the add-on model provides for lifelong defined pension benefits. Unlike private occupational pension schemes, the public employees' pension portfolios are not affected by financial fluctuations in the investments made with the pension funds and will continue until the employee deceases. The public employees are entitled to a pension portfolio amounting to 5.7% (and potentially an additional rate of 18.1%) of their annual income throughout their working years, extending up to the age of 75, irrespective of the pension portfolio's actual value at the time of retirement. Moreover, the yearly benefits will run as long as the employees live, regardless of the actual value of the pension portfolio. Consequently, the employees are still guaranteed a fixed, lifelong old-age pension benefit under the additional accrual scheme that was introduced by SGS 2020. The defined pension benefits are just expressed differently.

The Norwegian authorities note that the same conclusion can be drawn from the fact that the Insurance Activities Act section 4-1 defines public occupational pension schemes as pension schemes that involve defined pension benefits.

Considering that the add-on model also provides for defined pension benefits, the Norwegian authorities submit that the pension providers' insurance risk remains the same as under the gross pension model. The pension providers must still ensure that the customers' premiums cover the fixed, lifelong old-age pension benefits that the company has undertaken to disburse on behalf of the customer. Extending from this, the pension providers must consider the same personal risks when structuring the price tariffs as under the Main Collective Agreement; life expectancy, mortality, disability, assumptions on having a spouse, assumptions on having children, etc. Consequently, the add-on model did not introduce any new insurance risk elements for the pension providers. Neither did it remove any of the pre-existing insurance risk elements.

In this context, the Norwegian authorities note that according to KLP, the introduction of the additional add-on model did not affect the specific assumptions KLP had incorporated in its price tariffs prior to SGS 2020. According to the Norwegian Life Insurance Regulation section 2-8, changes to an existing pension product must be reported to the Norwegian Financial Supervisory Authority. Correspondingly, amendments to the price tariffs and the assumptions made in that regard must be reported pursuant to the Norwegian Life Insurance Regulation section 2-9. Accordingly, following the conclusion of SGS 2020, KLP reported the additional accrual rules introduced by SGS 2020 to the Norwegian Financial Supervisory Authority on 11 December 2019. In that letter, KLP also stated that SGS 2020 did not entail a reassessment of its price tariffs or risk assumptions in that context:

"For the sake of good order, it should be mentioned that the restructuring of the public service pension does not in itself trigger a reassessment of the company's price tariffs in terms of the interest, mortality and disability assumptions that underpin the price tariffs and the insurance provisions. Any changes to these will be reported on an ongoing basis in accordance with the current regulations."

The Norwegian authorities believe that this product report confirms that the add-on model introduced by SGS 2020 did not alter the original insurance risk taken on by the pension providers through the contracts pertaining to public occupational pension schemes. Otherwise, this should have been reported to the Norwegian Financial Supervisory Authority pursuant to the Insurance Activities Act and the accompanying Norwegian Life Insurance Regulation.

- Non-coordination with the National Insurance Scheme benefits does not alter the overall risk profile

As explained above and in section 9.4.2 of our letter to the Authority of 24 March 2023, the old-age pension benefits under the additional accrual rules introduced by SGS 2020 are calculated independently of and added onto the pension benefits provided by the National Insurance Scheme in their entirety. However, as explained above, the coordination between old-age pension benefits from the National Insurance Scheme and occupational pension scheme benefits that was performed under the gross pension model did not represent an insurance risk taken on by the pension provider through the contracts; discrepancies between the anticipated benefits and the actual benefits from the National Insurance Scheme were invoiced as special single premium for benefits that cannot be determined in advance. Stemming from this, the introduction of an add-on model, where the old-age pension benefits are calculated independently of pension benefits provided by the National Insurance Scheme, could not (and did not) alter the pension providers' insurance risk; this element was never incorporated into the insurance risk undertaken by the pension providers and remains so.

- No changes in the providers' s risk associated with the size of the employee's final salary

As the add-on model does not guarantee pension benefits corresponding to a specific percentage of the employees' final salary, the uncertainty of the size of the final salary no longer matters. Nonetheless, this does not affect the product's risk profile as the uncertainty associated with the employees' final salary has never been a contractual risk borne by the pension providers, cf. the explanation above.

7.3.3.2 Different AFP rules

As the Authority has noted, SGS 2020 introduced different AFP rules compared to the Main Collective Agreement. As with the additional accrual rules introduced to ordinary old-age pension benefits, SGS 2020 only altered the content of AFP benefits for employees born in 1963 and later. For employees born in 1962 and earlier, AFP benefits remain the same as before.

AFP under the Main Collective Agreement

Under the Main Collective Agreement, AFP is a separate and independent pension benefit that is supposed to provide an effective substitute for the employees' income from the age of 62 and until the age of 67. The termination date is set at the age of 67 because at this age

the employees would receive (ordinary) old-age pension benefits from the National Insurance Scheme and their public occupational pension schemes. Consequently, AFP and the old-age pension benefits complement each other under the Main Collective Agreement. AFP is thus often referred to as an early retirement benefit.

AFP benefits are non-insurable. From the age of 62 to 65, the yearly AFP benefits correspond to the level of old-age pension benefits that the employee would be eligible to receive from the National Insurance Scheme at the age of 67, plus an “AFP-addition” corresponding to NOK 20 400, limited to 70% of the employee's final salary. These AFP benefits are financed through a pay-as-you-go system. Consequently, the pension provider does not assume any risk regarding AFP benefits towards employees between 62 and 65. All pension benefits would be invoiced directly to the customers.

From the age of 65 to 67, the yearly AFP benefits correspond to either 66% of the employee's estimated annual salary at the age of 67 or calculated AFP. The pension provider invoices these AFP benefits as a special single premium upon activation. The Norwegian authorities recall that the special single premiums refer to non-insurable benefits.
Unlike the ordinary old-age pension benefits, the AFP benefits are not life expectancy adjusted. This must be seen in light of the fact that AFP under the Main Agreement is an early retirement benefit for a limited amount of time.

AFP is a restricted benefit that is reserved for employees who meet certain criteria. Employees who qualify for AFP has the flexibility to choose either full or partial benefit coverage. Full AFP coverage requires that the employee has terminated his/her employment. To receive partial AFP, on the other hand, the employee only has to reduce the level of employment with at least 10% and remain in a position that corresponded to no less than 60% of a full position. Consequently, a full-time employee can choose to receive early retirement benefits in intervals of 10-40%, or 100%. If the employee receives an income of more than NOK 15,000, the AFP benefits will be reduced correspondingly. The Main Collective Agreement thus arrange for flexibility.

The Authority has questioned what the AFP premiums in the table starting on page 19 of the Norwegian authorities’ letter of 21 December 2023 constitute:

“AFP 62-64” pertains to the pay-as-you-go solution described in section 4.5.2.2 of the letter. The pay-as-you-go solution involves a provisional rate [Nw.: à konto-sats] for employers who are equalizing AFP as an early retirement benefit and shall finance payment of AFP before the age of 65. “AFP 62-64” are the premiums rates used the respective years.

“Tidligpensjon (85-årsregelen og AFP 65-66)” is also an equalized provisional rate [Nw.: à konto-sats] for the respective years and shall finance the special single premiums required from the Public Bodies each time additional employees withdraw of AFP after the age of 65, the “85-year rule” and other early retirement benefits.

The table include premiums until 2023. Employees born from 1963 will not be eligible to AFP benefits until 2025, when they will turn 62. Thus, special single premiums for these AFP benefits are not included in the table on page 19 of the Norwegian authorities' letter of 21 December 2023.

New AFP rules for employees born after 1963

Under SGS 2020, AFP is still a restricted benefit that is reserved for employees who meet certain criteria. However, AFP is no longer an early retirement benefit that will be replaced by ordinary old-age pension benefits from the age of 67. Instead of being a substitute for the employees' income between the age of 62 and 67, AFP is a supplementary old-age pension benefit that adds onto the employees' income or ordinary old-age pension benefits. It may be activated from the age of 62 and, like the ordinary old-age pension benefits, lasts for the rest of the employees' lives.

The lifelong AFP benefits introduced by SGS 2020 correspond to a rate of 4.21% of annual earnings, up to 7.1 G. Consequently, income exceeding the 7.1 G threshold does not accrue AFP benefits. Moreover, only working years between 13 and 61 are taken into account when calculating the AFP benefits.

Upon activation, the yearly AFP benefits are calculated by dividing the total amount of collected AFP benefits on the defined remaining life expectancy number prevailing at the activation date. An early activation of the AFP benefits (for instance at the age of 62) will thus result in reduced yearly benefits, as the remaining life expectancy number will be correspondingly higher.

Conditional service pension (Nw.: Betinget tjenestepensjon) is a new addition to ordinary old-age pension benefits for employees that do not qualify for AFP benefits. Conditional service pension is accrued by 3% of annual earnings up to 7.1 G. This is however not the premium, but yearly accrued pension benefits, of which there is calculated a premium

It is yet to be decided by the parties to SGS 2020 how AFP benefits for employees born from 1963 will be financed. However, it is assumed that these benefits will be financed through special single premiums upon retirement. It is also assumed that premium paid to cover conditional service pension will be deducted/set-off when this special single premium is calculated.

The Norwegian authorities thus submit that the overall risk profile remains the same, even though AFP is converted from an early retirement benefit to a lifelong supplement. The financial liability related to funding the AFP benefits remains completely at the hand of the customer.

7.3.3.3 The size of the premiums

The Norwegian authorities have argued that the fact that the premiums have not changed significantly indicate that the content of the contracts have not changed significantly. The

Authority points out that even if the resulting premium is more or less the same, the overall change in the economic balance in favour of the contractor is only one ground on which a modification can be found to be unlawful.

The Norwegian authorities agree with the Authority in the assessment that an overall change in the economic balance in favour of the contractor is only one ground on which a modification can be found to be unlawful. However, the Authority seems to have misunderstood the Norwegian authorities' reasoning at this point: The price tariffs "define" and reflect the contractual risks assumed by the pension providers under contracts for insured public occupational pension schemes, cf. Insurance Activities Act section 3-3. Hence, the fact that the price tariffs applied by pension providers remain the same demonstrates that the original distribution of contractual risks remain the same. The providers price their services on the basis of the actual risk they take. The Norwegian authorities have extensively explained this in our letter of 21 December 2023.

7.3.3.4 New IT system

The Authority points out that the complainant has stated that there was need for new IT systems to handle the changes after SGS 2020. As far as the Norwegian authorities understand, the logic of the argument is that the changes introduced by SGS 2020 were of such a magnitude that KLP had to invest in a completely new administration system.

According to KLP, the new elements introduced by SGS 2020 could have been implemented by merely modifying the existing administration system, thereby being able to offer a complete public occupational pension scheme (i.e. both for employees born before and after 1963). Software changes are not a particular feature for SGS 2020. Notwithstanding that; any change to the scheme would necessitate changes in the existing software, especially in relation to new legislative provisions.

However, KLP has stated that they considered that the time was right for a more comprehensive overhaul so as to increase overall efficiency in its administrative system. Like any other enterprise, life insurance companies continuously make adjustments to their IT systems to ensure optimal performance and to satisfy the customers' needs, given the evolving expectations of what such systems should deliver. Naturally, pension providers will customise their administration systems to the applicable requirements pertaining to public occupational pension schemes. Therefore, when SGS 2020 introduced an additional accrual scheme for old-age pension benefits, a different AFP scheme and more flexibility for the withdrawal of old-age pension benefits, KLP has stated they viewed it as natural and necessary to modify their administration systems accordingly.

The Norwegian authorities question the relevance of the above for the assessment of whether substantial modifications have been made pursuant to Article 72 of the Directive. Except merely stating that this adds to the substantial nature of the changes, the legal relevance of a different IT system has not been addressed by the Authority at all.

7.3.3.5 Longevity adjustment introduced in 2011

The pension providers risk pertaining to life expectancy is not affected by the longevity adjustment that was introduced in 2011. The pension providers took the risk pertaining to life expectancy prior to 2011, and this is still the case. Under the Main Collective Agreement, the employee’s yearly old-age pension benefits upon retirement are adjusted for remaining life expectancy. The adjustment is made by dividing the total pension portfolio on the defined remaining life expectancy number prevailing at the retirement date. The additional accrual rules that were introduced by SGS 2020 involve the same kind of life expectancy adjustment as the gross pension model stipulated by the Main Collective Agreement.

The longevity adjustment, which was introduced in 2011, is merely a method of calculating the employees yearly old-age pension benefits, based on remaining life expectancy upon retirement. It was introduced to ensure that the Norwegian pension system remained sustainable after people started to live longer than anticipated when the pension system was constructed. It shall ensure that people get the same amount of pension benefits disbursed over the same amount of time as previous generations.

To achieve this objective, people must either work longer (as the total life of retirement then corresponds to previous generations life of retirement, given that they lived shorter) or get their yearly old-age pension benefits reduced (as the yearly amount will be paid over more years than previous generations, which lived shorter). Therefore, upon retirement, when calculating the yearly old-age pension benefits, the yearly pension benefits are divided on a life expectancy divisor, which (simplified) represents Statistics Norway's assumptions pertaining to remaining life.

Notwithstanding this longevity adjustment of yearly pension benefits, each employee is entitled to pension benefits until they actually die. This risk is placed at the hand of the pension provider, through the price tariffs and life expectancy/mortality assumptions incorporated therein. The pension providers must make their own life expectancy/mortality assumptions and incorporate them into their price tariffs; the price tariffs are not coupled to Statistics Norway's life expectancy divisor.

According to KLP, the risk of life expectancy/mortality that KLP assumes through its price tariffs is based on the FSA's minimum requirements for mortality basis in collective pension insurance (K2013), which all life insurance companies must meet, with modifications based on KLP's own experience regarding expected life/mortality rate. These are the price tariffs used to calculation of premium in the contractual relationship between KLP and its customers.

7.3.4 The changes do not constitute substantial modifications to the contracts

With regard to the question of whether there have been any substantial modifications of the contracts for public occupational pension schemes between Norwegian contracting authorities and KLP, the Norwegian authorities repeat from our letter of 24 March 2023 that the purpose of these contracts is to provide an occupational pension scheme in accordance

with the applicable laws and collective agreements in force at all times and reflect the pension rights and obligations set out therein. Amendments to these underlying laws and collective agreements are an inherent aspect of contracts for public occupational pension schemes. The modifications referred to in the complaint, are the result of changes in the underlying legislation and collective agreements governing the scheme. Without corresponding modifications to the contracts, they would no longer fulfil their purpose; to provide an occupational pension scheme to public employees in accordance with the provisions of law and collective agreements in force at all times.

Furthermore, the modifications mainly affect the employees' rights and obligations under the scheme. The practical and financial balance between the contracting authorities and the pension provider is only marginally altered, if at all. Therefore, the modifications are not substantial for the purpose of the public procurement rules. The Norwegian authorities also note that the scope of the Norwegian public occupational pension schemes is a result of management and labour exercising their fundamental right to collective bargaining. The public procurement rules on modification of contracts must be interpreted and applied in light of this context and strike a fair balance between the respective interests involved, cf. case C-271/07 *Commission v. Germany* paragraph 52. In the view of the Norwegian authorities, it would not be in line with the principle of striking a fair balance if existing contracts for public occupational pension schemes would have to be terminated and tendered out every time the organisations representing public employers and employees renegotiate the specific elements of the schemes. This would cause considerable practical challenges and costs for the public employers and would presumable hinder sensible pension reforms being bargained collectively. As an example, the parties to the SGS 2020 agreement renegotiate it every other year.

Further to this point, the Norwegian authorities emphasise that the risk of alterations to the employees' pension benefit levels have always been placed at the hand of the Public Bodies:

- If the collective bargaining parties agree that public occupational pension schemes shall provide for a greater amount of pension benefits, the pension providers may (and must) collect additional premiums from the Public Bodies. Conversely, if the collective bargaining parties agree to reduce the amount of pension benefits provided under public occupational pension schemes, the pension providers must collect less premiums.

- If the employees’ wages rise during the year, the pension providers may collect additional premiums from the Public Bodies. This is the case both under the gross pension model and under the add-on model.

- Consequently, changes to the amount of money to be disbursed under Norwegian public occupational pension schemes, do not alter the risk taken on by the pension providers through the respective contracts.

The alteration of risk due to SGS 2020

In paragraph 213 – 217 in the letter of 29 February 2024, the Authority considers that the risks for the provider have been altered by SGS 2020. The Authority refers to that under the previous regime (the gross pension model) it was not certain when the employee would retire, what the final salary would be or how long the pension would be payable for. It is then argued that under the new regime (the add-on model), there is limited uncertainty as regards the amount which will be paid out, and there is no longer a risk relating to when an employee retires. The risk due to the uncertainty of how long the pension will be payable for, still remains.

The Norwegian authorities believe this perception largely is based on misconceptions about risk factors that are present under the gross pension model and not under the add-on model, which are corrected above. In addition, when it comes to the question of uncertainty regarding the time of retirement, the Norwegian authorities confirm that a full pension was (and still is) earned after 30 years under both models. However, employees cannot start drawing old-age pension benefits from the public occupational pension scheme before the age of 67 under the Main Collective Agreement/the gross pension model. It is therefore not clear what the uncertainty about time of retirement, which the Authority refers to, consists of.

According to the reasoning above, the Norwegian authorities do not share the Authority's view that the add-on model "no longer" imposes a risk relating to when an employee retires. As pointed out above, this was never a risk to the pension providers. If the employees retire earlier under the gross pension model, the pension providers will simply collect additional premiums through the AFP scheme.

The option of claiming AFP benefits as an early retirement benefit does not alter this position. AFP benefits as an early retirement benefit are financed through a pay-as-you-go system (62-65) and a special single premium for benefits that cannot be determined in advance (65-67). Hence, the option for early retirement by claiming AFP benefits does not make it uncertain when public employees will start drawing their (ordinary) old-age pension benefits.

Under the add-on model, the pension providers do not carry any risk related to the individual salary development of the employees throughout the year. The accrual rates for old-age pension benefits are tied to the employees' actual annual earnings. It is correct that under the add-on model for old-age pension benefits introduced by SGS 2020, pensions must keep pace with general wage growth. Pension providers do not make any assumptions about this wage growth. Instead, an additional ordinary annual premium is calculated and invoiced the customer when the general wage growth is known to the pension provider. Consequently, the pension providers do not carry any risk related to the general wage growth.

The Norwegian authorities agree on the last-mentioned point from the Authority, regarding that the risk remains for how long the pensions will be payable. This is due to the fact that both the gross pension model and the add-on model have lifelong pension payments.

The Norwegian authorities also note that changes introduced in SGS 2020 only affect the accrual scheme for old-age pension benefits. SGS 2020 did not affect the other social security benefits included in the Norwegian occupational pension schemes, such as disablement pension benefits.

Furthermore, the transition to SGS 2020 is made gradually over a long period of time. For employees born before 1963, the previous scheme applies in its entirety. For employees born from 1963, their pension benefits accrued before 1 January 2020 still follow the previous accrual scheme. Immediate effect of SGS 2020 on the benefits provided under the Norwegian public occupational pension scheme is thus limited but will increase gradually over time.

The authority does not consider the fact that providers must deliver both the old scheme (for already acquired rights) and the new scheme (for rights from 1 January 2020) as decisive for the assessment of whether substantial modifications of the contract have taken place. The fact that the new scheme has become part of the required service is sufficient.

According to Article 72(4) of Directive 2014/24, the pivotal legal question is whether a modification renders the contract *materially different* in character from the one initially concluded. To answer this question, one must first compare the original contract to the modified contract and identify the contractual differences. Second, one must analyse how the differences affect the contractual relationship between the parties. Step two cannot be performed without taking all the continued contractual elements into account. If most parts of the contract remain the same, the bar for rendering its character materially different is higher. The Authority disregards this aspect, concentrating solely on the new elements without considering their impact on the contract as a whole. The new elements only constitute a small proportion of the total amount of contractual obligations towards the Public Bodies; most elements remain the same. Reference is made to the Norwegian authorities' letter of 21 December 2023, in particular section 4.8.4.

The significance of Storebrand's re-entry into the market

The Authority expresses that the fact that Storebrand re-entered the market underpins their assessment of the contracts being significantly changed. The Norwegian authorities question this approach as it effectively grants pension providers the authority to determine which modifications are substantial and which are not.

In our opinion, the Authority's approach does not coincide with the wording of subparagraph (a) of Article 72(4). According to the wording, the relevant subject matter is whether the modifications would have attracted additional participants, if they had been part of the initial procurement procedure. One must thus evaluate a hypothetical situation during the public procurement procedure leading up the original contract: Had the modifications in question been included in the contract from the outset, would a greater number of providers have participated in the original procurement procedure?

Providers' decision to re-enter the market / renewed desire to participate in future procurement procedures is not mentioned in subparagraph (a) of Article 72(4). We refer to Caranta and Sanchez-Graells, European Public Procurement: Commentary on Directive 2014/24/EU, (2021) 72.70-72.74 (page 793-795) for further guidance in this regard. It is noteworthy that in 72.73, the authors argue that "the burden of proof rests on the contractor", i.e. Storebrand.

To the knowledge of the Norwegian authorities, both Storebrand and DNB participated in all published competitions pertaining to public occupational pension scheme contracts prior to 2013, even though the new element introduced by SGS 2020 were not part of the contracts. If one imagines the new elements introduced by SGS 2020 as part of the procurement procedures conducted prior to 2013, it would not have attracted Storebrand and DNB as additional participants. Both providers were already participating, regardless of whether SGS 2020 was part of the initial procurement procedure or not. Furthermore, both providers knew that changes would be introduced to the scheme, just not what or when.

The complainant has not presented any evidence to suggest that the new elements introduced by SGS 2020 would have attracted additional participants beyond Storebrand (and potentially DNB). Consequently, the Authority's line of reasoning can – at best – be applied to contracts concluded after 2013.

According to Storebrand's annual report from 2012, several factors reasoned the company's decision to withdraw from the market for Norwegian public occupational pension schemes; no firm timetable for the future switch to new pension solutions in the public sector, continuing of the basis of the prevailing framework conditions in the public sector required a level of investment that was considered too high, and new capital requirements would tie up a substantial amount of capital with long-term interest rate guarantees.

Absence of new pension solutions in the public sector is one of the mentioned factors that reasoned Storebrand's withdrawal from the market. That being the case, it seems unlikely that SGS 2020 alone can explain the company's decision to re-enter the market. Based on Storebrand's annual report from 2012, it appears equally plausible that the company's re-entry into the market stems from an improved capital situation within the company, making the new capital requirements and necessary level of investments less daunting. This perception is supported by Storebrand's letter to Kvam herad, dated 29 June 2012[8], which cites the new capital requirements as the reason necessitating Storebrand to raise its prices. Another factor that supports this perception is the fact that Storebrand did not pay dividends to its shareholders between 2011 and 2016. Instead, Storebrand built up equity to comply with the new capital requirements.

The same applies to DNB. According to its annual report from 2013, the company chose to discontinue its business in the public pensions' sector due to low expectations of profits. This

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[8] The letter is enclosed as **Annex 2**. It was also presented to the Authority during a meeting with KLP on 19 September 2023.

is no different under SGS 2020, which is illustrated by the fact that DNB still has not returned to the market.

The application of Article 72(1)(c)

The Norwegian authorities have argued that Article 72(1)(c), which allows for changes due to unforeseeable circumstances, can be applied. One condition for that provision to apply is that the need for the modification must have been brought about by circumstances which a diligent contracting authority could not foresee. The Authority refers to the statement by the complainant, that the overall process to amend the occupational pension regime in Norway can be said to have commenced in 2001 and changes were made to the national insurance pension in 2011. Whilst the exact details of SGS 2020 were yet to be determined, it is the Authority's view that changes were foreseeable and so Article 72(1)(c) cannot be relied upon.

Our understanding is that the reasoning behind this restriction ("the modification must have been brought about by circumstances which a diligent contracting authority could not foresee") is that if the modification was foreseeable, contracting authorities should provide for the possibility to perform the relevant modification in the original contract by means of a review clause. By expressly providing for that option and setting the rules for the application thereof in the original contract, the contracting authorities ensure that all economic operators interested are aware of that possibility from the outset and are therefore on an equal footing, see C-549/14 *Finn Frogne* paragraph 37.

That being the case, which circumstances a diligent contracting authority could not foresee must be determined in light of its ability to provide for a review clause encapsulating the relevant modification in the original contract. According to Article 72(1)(a) of Directive 2014/24, review clauses must be "clear, precise and unequivocal", and must state "the scope and nature of possible modifications or options as well as the conditions under which they may be used".

The Norwegian authorities have difficulties in understanding how the relevant contracting authorities could have had the prerequisites to formulate clear and precise change clauses in advance of the changes that took place from 2020.

As regards relevant facts and lines of reasoning, it is pointed out that:

- The majority of KLP's contracts for insured public occupational pension schemes were entered into before 1994. It is evident that neither of these Public Bodies could have provided for a review clause in the original contract encapsulating the new elements introduced by SGS 2020 from 1 January 2020, in accordance with the abovementioned requirements. Hence, Article 72(1)(c) applies to these contracts.

- The same line of reasoning applies to contracts concluded between 1994 and 2001. As the Authority itself points out, the earliest point in time which the overall process to

amend the Norwegian public occupational pension system can be said to have commenced is in 2001. Hence, Article 72(1)(c) also applies to these contracts.

- The same line of reasoning also applies to contracts entered into between 2001 and 2018. Even though the pension reform was initiated by the Norwegian government in 2001, its specific content and impact on occupational pension schemes in the municipal sector was not foreseeable until the Pension Agreement was concluded in 2018. Prior to the conclusion of the Pension Agreement, Public Bodies could not have provided for clear, precise and unequivocal review clauses in the original contract encapsulating the new element introduced by SGS 2020. Hence, our view is that Article 72(1)(c) also applies to these contracts.

For completeness, the Norwegian authorities recall that it has always been a common understanding between the contractual parties / a presumption that contracts pertaining to public occupational pension schemes will implement changes that stem from law and collective agreements. This is also reflected in KLP's insurance agreement, which codifies this practice.

8 Additional remarks

In conclusion, the Norwegian authorities will mention some further points in relation to the case.

Several of the alleged breaches relate to a particular factual situation that is no longer present. During 2013-2019, the sole supplier exemption was applied to award contracts directly to KLP because Storebrand and DNB withdrew from the market. This factual situation is no longer present and, consequently, Norwegian Public Bodies no longer award contracts directly to KLP pursuant to the sole supplier exemption. Further, the assessments pertaining to the sole supplier exemption were made on an individual basis, by the individual Public Body. Some seem to have conducted procurement procedures. Some published ex-ante transparency notices, some did not.

The alleged modifications of contracts due to the municipal mergers are also tied to a particular factual situation, which is no longer present, and the same line of reasoning applies to the alleged modifications of contracts due to the pension reform/SGS 2020. These conditions should be taken into account in an assessment of the alleged existence of a consistence and general practice of non-compliance of EEA Public Procurement law.

The Norwegian authorities have invited municipalities, county councils and health institutions to comment and give input on matters relating to the complaint. Among other things, the submissions point to the need to have a long-term scheme for managing occupational pensions. For instance, the submission from the Regional Health Authorities and the Health Trusts reads: *It is therefore crucial that schemes are put in place that support safe and secure management of pensions, so that the statutory and collectively agreed schemes have*

guarantees and security for future obligations far into the future. Pensions constitute a significant cost for the healthcare institutions, and predictability and stability in cost levels are very important.

Yours sincerely

Cathrin Sætre
Director General

Tonje Areng Skaara
Research Coordinator

This document is signed electronically and has therefore no handwritten signature

Enclosures:

Annex 1 : Overview of how the existing contracts for Health Trusts and Regional Health Authorities relates to contracts entered into by the counties prior to 01.01.1994.

Annex 2 : Storebrand's letter to Kvam herad, dated 29 June 2012.