EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

24 September 2015

Case Document No. 12

***Bedriftsforbundet* v. Norway**
Complaint No. 103/2013

ADDITIONAL INFORMATION FROM *BEDRIFTSFORBUNDET*

Registered at the Secretariat on 7 September 2015

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Oslo, 7 September 2015
Our ref.: ABE/18952-501

In charge:
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COLLECTIVE COMPLAINT NO. 103/2013: BEDRIFTSFORBUNDET VS. NORWAY

Reference is made to complaint no. 103/2013 and additional submissions to the complaint sent from the plaintiff on 5 February 2015.

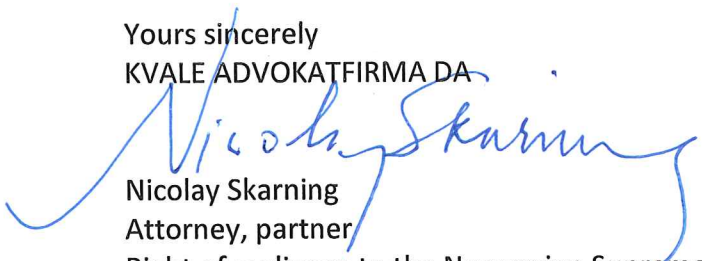
As previously informed, the legal dispute between Holship Norge and the Norwegian Transport Workers' Union is admitted into the Norwegian Supreme Court. In this connection, the Supreme Court has requested the EFTA Court to give an advisory opinion. Pursuant to Article 20 of the Statue of the EFTA Court, the European Commission and the EFTA Surveillance Authority have submitted their Observations. Both the European Commission and the EFTA Surveillance Authority concludes that the framework agreement is in infringement of the EEA Agreement.

Attachment 1:	Observations from the European Commission, dated 29 July 2015
Attachment 2:	Observations from the EFTA Surveillance Authority, dated 18 August 2014

The organizational duty has led to a situation with an abuse of a dominant position at Norwegian ports. Reference is made to the conclusion submitted by the European Committee in section 32 of their Observations:

> *"In the light of the above, it must be held that by carrying out picket lines against companies established in other EEA Member States in order to enforce priority-of-engagement rules set out in a collective agreement to the benefit of their own employees, the Administration Office breaches Article 54 of the EEA-Agreement".*

Yours sincerely
KVALE ADVOKATFIRMA DA



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Attachment 1

ORIGINAL

EUROPEAN COMMISSION

Brussels, 29 July 2015
sj.e(2015)3370836 MK/LM/as

Court procedural documents

To the Registrar of the EFTA Court
1, Rue du Fort Thüngen
L-1499 Luxembourg

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the European Commission, represented by Luigi Malferrari and Manuel Kellerbauer, Members of its Legal Service acting as Agents, with an address for service at the office of Merete Clausen, also Member of its Legal Service, Bâtiment BECH, 5 rue A. Weicker, L-2721 Luxembourg, who consent to service of all procedural documents via e-Curia, in

Case E-14/15

Norges Hoyesterett

concerning a request by Norges Hoyesterett (the Supreme Court of Norway) for an advisory opinion from the EFTA Court in Case N° 2014/20089 between Holship Norge AS (the appellant before the Supreme Court) and Norsk Transportarbeiderforbund (the respondent before the Supreme Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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1. INTRODUCTION

1. The case concerns an advance ruling pursuant to Section 3 of the Norwegian Act of 5 December 1947 No 1 relating to the lawfulness of notified boycotts (the "Boycott Act"). The Norwegian Transport Workers Union Norges Transportarbeiderforbund ("NTF") has given notice of a boycott of Holship Norge AS ("Holship Norge") in order to achieve acceptance of the claim for a collective agreement between Holship Norge and NTF. The boycott consists of using picket lines to prevent Holship Norge from using its own employees to load or unload goods in the Norwegian port of Drammen.

2. The collective agreement in question is called "Framework Agreement on a Fixed Pay Scheme for Dockworkers" (the "Framework Agreement"). It stipulates inter alia that Drammen dockworkers shall be given priority of engagement to carry out unloading and loading work in the port. In addition, it provides for fixed wages and supplements that vary with the ship calls. The Framework Agreement also establishes a dock work office (the "Administration Office"). All permanently employed dockworkers in the Port of Drammen are employed by the Administration Office. It administers the priority of engagement rule and fixes the applicable rates for the determination of the wages. The Administration Office is a non-profit organisation with legal personality. Its board consists of three representatives of the employers and two representatives of the workers.

3. The Framework Agreement has been negotiated between NTF on the employees' side and the Confederation of Norwegian Enterprise Naeringslivets Hovedorganisasjon ("NH") on the employers' side. It provides for the creation of Administration Offices with priority-of-engagement rules and fixed wages to the benefit of dockworkers in the 13 largest ports in Norway, including the Port of Drammen. Holship Norge is the subsidiary of a Danish company. Holship Norge's main activity consists of cleaning fruit cranes but it also receives some goods transported by ship.

4. Holship Norge is not a member of NH, nor are its employees represented by NTF. Holship Norge is party to a different collective agreement concluded between other social partners in Norway, which expressly covers services other than loading or unloading in ports. Holship Norge has however applied the collective agreement for cleaning workers also to the loading and unloading work carried out by its employees in the Port of Drammen. Under Norwegian law, a collective agreement has no general

validity but binds only those employers and employees who are members of the organisations concerned.[1]

5. The Framework Agreement has been considered by the referring court against the backdrop of International Labour Organisation ("ILO") convention no 137. The Norwegian government has ratified ILO convention no 137 and has stated that the Convention has been implemented through the Framework Agreement. Articles 1 to 3 of ILO convention no 137 state as follows:

Article 1

(1) This Convention applies to persons who are regularly available for work as dockworkers and who depend on their work as such for their main annual income.

(2) For the purpose of this Convention the terms dockworkers and dock work mean persons and activities defined as such by national law or practice. The organisations of employers and workers concerned shall be consulted on or otherwise participate in the establishment and revision of such definitions. Account shall be taken in this connection of new methods of cargo handling and their effect on the various dockworker occupations.

Article 2

(1) It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.

(2) In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.

Article 3

(1) Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

(2) Registered dockworkers shall have priority of engagement for dock work.

(3) Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.

6. It is unclear whether the boycott against Holship Norge has been organized or carried out by the Administration Office and/or by NH. Whereas the order for reference seems to indicate that it was organized by NH, the letter by which the EFTA Surveillance

[1] See Norwegian Act N° 1 of 5 May 1927 Relating to Labour Disputes.

Authority rejected a complaint by Holship Norge indicates that the picketing was carried out by the Administration Office.[2] The two statements do not necessarily contradict each other.

2. THE LEGAL QUESTIONS PUT TO THE EFTA COURT

7. The Norges Hoyesterett put the following questions to the EFTA Court:

A. On competition law:

A.1. Does the exemption from the competition rules of the EEA Agreement that applies to collective agreements, as this exemption is described inter alia in the advisory opinion of the EFTA Court in Case E-8/00 *Landsorganisasjonen i Norge and NKF* [2002] EFTA CT. Rep. 114, cover the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference of buying unloading and loading services from a separate administration office, rather than to use its own employees for the same work?

A.2. If not, should such a system be assessed under Article 53 and Article 54 of the EEA Agreement?

A.3. In that case, must the existence of an identical or corresponding system in other ports be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA?

B. On the freedom of establishment:

B.1. Is it a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading ad loading services from a separate administration office having the characteristics described in paragraphs 10 to 14 of the reference order rather than use its own employees for this work?

B.2. Would it be of significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic?

B.3. If a restriction exists: Is it of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work?

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[2] Letter of the EFTA Surveillance Authority of 3 March 2014, case n° 73856 (published at http://www.kvaleco.no/photoalbum/view2/P3NpemU9b3JnJmlkPTcwMTgzMA, visited on 20 July 2015).

3. THE ASSESSMENT UNDER COMPETITION LAW

3.1. Introduction

8. The first set of questions submitted to the EFTA Court concern the compatibility of the Framework Agreement with Articles 53 and 54 EEA. These provisions are identical in substance with the EU competition rules set forth in Articles 101 and 102 TFEU. According to Articles 6 EEA and 3(2) Surveillance and Court Agreement ("SCA"), the case-law of the Court of Justice of the European Union ("ECJ") is therefore relevant for the EFTA Court in its interpretation of Article 53 EEA. It is a fundamental objective of the EEA Agreement to achieve and maintain uniform interpretation and application of those provisions of the EEA Agreement that corresponding to provisions of the TFEU, and to arrive at equal treatment of individuals and economic operators as regards conditions of competition in the whole European Economic Area.

3.2. No exemption of collective agreements to the detriment of other employees

9. The boycott organised by the Administrative Office aims at enforcing a priority-of-engagement rule set forth in the Framework Agreement, which was negotiated between NTF and NH. As regards Articles 101 and 102 TFEU, the ECJ has acknowledged that certain restrictions on competition are inherent in collective agreements between organisations representing employers and workers. The social policy objectives of such agreements would be seriously undermined if made subject to EU competition rules when management and labour are seeking jointly to adopt measures to improve conditions of work and employment. It follows from an interpretation of the provisions of the TFEU as a whole that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be generally regarded as falling outside the scope of Article 101 (1) TFEU.[3]

10. In the first of the first set of questions **(A.1)** the national Court enquires about the scope of this exemption applying to collective agreements.[4] The national Court asks whether

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[3] See Case C-437/09 *AG2R Prévoyance*, EU:C:2011:112, paragraph 29; Case C-67/96 *Albany*, EU:C:1999:430, paragraphs 59 and 60; Joined cases C-115/97 to C-117/97 *Brentjens'*, EU:C:1999:434; Case C-219/97 *Drijvende Bokken*, EU:C:1999:437; Joined cases C-180/98 to C-184/98 *Pavlov*, EU:C:2000:428; and Case C-222/98 *van der Woude*, EU:C:2000:475.

[4] With regard to Articles 53 and 54 EEA, the exemption from competition rules applying to collective agreements was addressed in the advisory opinion of the EFTA Court in Case E-8/00 *Landsorganisasjonen i Norge and NKF*, [2002] EFTA CT. Rep. 114, to which the national Court's question refers.

that exception covers the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference of buying unloading and loading services from an entity (the Administration Office), rather than to use its own employees for the same work. In order to provide the national Court with a comprehensive answer to this question, the Commission considers that account should also be taken of all the circumstances of the case, inter alia of the fact that Holship Norge's employees do not benefit from the collective agreement in question but are covered by another collective agreement in force in Norway which has been applied to the loading and unloading they carried out in the Port of Drammen.

11. To date, the ECJ has not exhaustively defined the conditions under which collective negotiations between management and labour must, by virtue of their nature and purpose, be regarded as falling outside the scope of EU competition provisions. Indeed, the notion of "improving conditions of work and employment" remains rather vague. This notion must be interpreted in light of the fact that, as the EFTA Court held, the results arrived at by the ECJ in its case-law is based on the balancing of concerns relating to the effective functioning of the internal market with the pursuit of social policy objectives such as the importance of promoting a harmonious and balanced development of economic activities, and a high level of employment and of social protection.[5] Moreover, the ECJ's case law on this issue is not monolithic, as judgments such as Merci, Corsica Ferries and Raso show: in these cases the ECJ considered in substance that Article 86 of the EC Treaty (now 102 TFEU) in conjunction with Article 90 of the EC Treaty (now 106 TFEU) was applicable to the rules granting the exclusive right of providing compulsory piloting services in a port.[6] Even in the Albany string of case law the ECJ, when formatting the exemption at issue here, used the word "*generally*", which indicates *a contrario* that under certain circumstances clauses in collective agreements are not exempted from the application of the EU antitrust rules.

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5 See Case E-8/00 *Landsorganisasjonen i Norge and NKF* [2002] EFTA CT. Rep. 114, paragraph 37. It is also evident from the wording of the Treaty that the social objectives must be balanced *against* the functioning of the internal market that the competition rules aim to ensure; see in particular Article 151 TFEU ('... such a development [improved working conditions and an improved standard of living for workers] will ensue ... from the functioning of the internal market ...').

6 Cases C-179/90 *Merci Convenzionali Porto di Genova ("Merci")*, EU:C:1991:464; C-18/93 *Corsica Ferries*, EU:C:1994:195; and C-163/96 *Raso*, EU:C:1998:54.

12. Accordingly, collective agreements between management and labour must not always be sheltered from the competition rules.[7] As the EFTA Court pointed out, it is not sufficient to verify that the parties to the agreement are, respectively, a labour union and an employer or an association of employers, or that a collective bargaining agreement can generally be characterised as having the nature and purpose of a typical collective agreement, to conclude that a collective agreement falls outside the scope of application of EU competition rules.[8]

13. In order to delimit the scope of the collective bargaining immunity from competition rules Advocate General Jacobs suggested as one criterion "that the collective agreement must be one which deals with core subjects of collective bargaining such as wages and working conditions and which does not directly affect third parties or markets. The test should be whether the agreement merely modifies or establishes rights and obligations within the labour relationship between employers and employees or whether it goes beyond that and directly affects relations between employers and third parties, such as clients, suppliers, competing employers, or consumers."[9]

14. The Commission also considers that a collective agreement between management and labour to the disadvantage of third parties not participating in the negotiations should only exceptionally be exempted from the scope of EU competition rules. Otherwise, such collective agreements could be concluded to circumvent the application of Articles 101 and 102 TFEU by associations of undertakings or undertakings and ultimately be used as a vehicle to distort unfettered undertakings to the disadvantage in particular of customers or competitors of the undertaking(s) negotiating such agreements with its employees. It is true that the ECJ has concluded in individual cases that a collective agreement can fall outside the scope of application of EU competition rules although it was made compulsory to undertakings that were not parties to the collective agreement.[10] However, such rulings can only be understood in light of the fact that the collective agreements in

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7 See also opinion of Advocate General Jacobs in Case C-67/96 *Albany*, EU:C:1999:28, paragraph 186: "*antitrust immunity for collective agreements between management and labour should not be without limitations*".

8 See Case E-8/00 *Landsorganisasjonen i Norge and NKF* [2002] EFTA CT. Rep. 114, paragraph 50.

9 See opinion of Advocate General Jacobs in Case C-67/96 *Albany*, EU:C:1999:28, paragraph 193.

10 It would seem that in Case C-437/09 *AG2R Prévoyance*, EU:C:2011:112, and Case C-67/96 *Albany*, EU:C:1999:430, the Court accepted that affiliation to an insurance scheme/scheme for supplementary reimbursement of healthcare costs could be made compulsory for third parties who were not parties to the collective agreement.

question aimed at improving the working conditions also of employees whose undertakings were not party to the collective agreements.

15. In the present case, by contrast, whereas the Framework Agreement negotiated between NTF on the employees' side and NH on the employers' side ensures stable employment and decent pay to the benefit of Drammen dockworkers employed by the Administration office, workers employed by other companies might lose their jobs or see their working conditions otherwise deteriorate. Indeed, their employers might not be able to afford incurring double costs resulting from the employment of workers that are not allowed to load or unload goods in Norwegian ports. This marks a decisive difference from Case C_437/09, *AG2R Prévoyance* and Case C-67/96 *Albany* where the collective agreements in question contributed to improving the working conditions of all employees in the sectors concerned.

16. It needs to be pointed out that the Framework agreement provides for priority of engagement for the Drammen port stevedores regardless of whether their level of social protection under national law or collective agreements is higher or lower than the one afforded to employees rendering similar loading and unloading services. It cannot be argued that the Drammen dockworkers would generally merit greater protection than other employees rendering the same services in the port of Drammen. The Commission takes the view that the social objective of the Treaty cannot be invoked to shelter from competition rules collective agreements that aim at improving the working conditions of certain workers to the disadvantage of others where both work in the same sector and generally merit the same social protection.

3.3. The Administration Office is an undertaking

17. In the scenario that the Framework Agreement is not generally exempted from the application of competition rules, the national Court enquires, in the second of its first set of questions **(A.2),** whether the system established by the Framework Agreement should be assessed under Article 53 and Article 54 of the EEA Agreement.

18. As with Articles 101 and 102 TFEU, Articles 53 and 54 EEA only apply to undertakings. Even if a collective agreement is not generally exempted from the scope of application of these competition rules, the latter can only apply to the extent that the behaviour of an undertaking is at stake. According to settled case-law, the concept of an undertaking in

competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or way in which it is financed.[11] Hence, in order to assess the lawfulness under EU competition rules of a boycott organised by NTF or the Administration Office, it needs to be assessed whether these bodies are undertakings within the meaning of EU competition rules.

19. The employment relationship which dockworkers generally have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question for and under the direction of each of those undertakings. Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockworkers do not therefore in themselves constitute 'undertakings' within the meaning of EU competition law.[12] Furthermore, it follows from the case-law of the ECJ that a person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association.[13] Accordingly, the Norwegian Transport Workers Union NTF is not an undertaking within the meaning of EEA competition rules.

20. By contrast, the Administration Office is more than a mere association of workers given that it has legal personality and employs the dock-workers registered in Drammen rather than merely acting on their behalf in negotiations with employers. With regard to dock-work companies that employ stevedores and offer services to users of a port, the Court held that "[...] a dock-work undertaking enjoying the exclusive right to organize dock work for third parties, as well as a dock-work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State."[14]

21. The Commission considers that this case-law also applies to the present case. The fact that the Administration Office is a non-profit organisation is without relevance, given that also non-profit entities can offer goods or service on a market and hence be an

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[11] See, in particular, Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, EU:C:2000:428, paragraph 74.

[12] See Case C-22/98 *Becu*, EU:C:1999:419, paragraph 26.

[13] See Case C-22/98 *Becu*, EU:C:1999:419, paragraph 28; Case C-179/90 *Merci Convenzionali v Porto di Genova*, EU:C:1991:464, paragraph 13.

[14] Case C-179/90 *Merci Convenzionali Porto di Genova* ("Merci"), EU:C:1991:464, paragraph 9.

undertaking within the meaning of EU/EEA competition rules.[15] The Administration Office conducts economic activities in offering stevedore services against a fee, thereby competing with other actual or potential market players who might wish to offer similar services. Accordingly, it must be held that when rendering loading or unloading services against a fee, the Administration Office is an undertaking within the meaning of Articles 53 and 54 EEA.

3.4. Effect on Trade between Member States

22. As with Articles 101 and 102 TFEU, Articles 53 and 54 of the EEA Agreement require that the practices in question may affect trade between the Member States. In the third of its first set of questions **(A.3)**, the national Court enquires whether the existence of an identical or corresponding system in other ports should be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

23. The Courts of the European Union have consistently held that, in order to find that a practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[16] The effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. Moreover, the Courts of the Union have consistently held that the effect on trade should be appreciable, although they have specified that a potential effect suffices.[17]

24. In the present case, the Framework Agreement establishes a priority-of-engagement rule and fixed wages to the benefit of dockworkers employed by Administration Offices in all major ports in Norway. There seems thus to be a sufficient degree of probability that the practices applied in the context of the Framework Agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA-Member

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15 See Cases 209 to 215/78 *van Landewijk*, EU:C:1980:248, paragraph 88; C-41/90 *Höfner and Elser* v *Macrotron GmbH*, EU:C:1991:161,paragraphs 21-23; C-475/99 *Ambulanz Glöckner*, EU:C:2001:577, paragraph 67.

16 See Case C-238/05 *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, paragraph 34 and the case-law cited; Case C-439/11 P *Ziegler*, EU:C:2013:513, paras. 92 et seq.; joined Cases C-125/07 P *Erste Group Bank a.o*, EU:C:2009:576, para. 36., C-133/07 P *Raiffeisen Zentralbank Österreich AG*, C-135/07 P *Bank Austria Creditanstalt AG*, and C-137/07 P *Österreichische Volksbanken*, EU:C:2007:648.

17 Case C-219/95 *Ferriere Nord SpA*, EU:C:1997:375, paragraph 19.

States. The fact that trade of goods from other Member States is involved, as seems to be the fact in the present case, is also relevant for assessing this issue. Moreover, the parent company of Holship Norge is established in a different Member State (Denmark). Finally, the Port of Drammen seems to be one of the largest ones in Norway.[18] In other cases regarding ports of a significant size, the ECJ emphasised their importance for inter-state trade.[19]

25. Even if the Drammen Port as such were considered to be too small to be of importance for trade between Member States, the Commission submits that the cumulative effect of the priority-of-engagement-rules applying in all major ports in Norway in accordance with the Framework Agreement would still lead to the conclusion that the practices in question may affect trade between the Member States. Indeed, in order to assess whether several practices impede access to a market, the Union Courts have held that it is further necessary to examine the nature and extent of those practices in their totality, comprising all similar contracts.[20] It is clear from the case-law that the effect on trade between Member States of agreements between which a direct link exists and which form an integral part of a whole must be examined together.[21]

3.5. The boycott organised to enforce the Framework Agreement vis-à-vis Holship breaches Article 54 EEA-Agreement

26. Although the national Court does not directly raise the question whether the practices at hand breach Articles 53, 54 EEA-Agreement, the Court may give answers to issues relevant for the solution of the case pending before the national court.[22] Therefore, this question will be briefly addressed in the following.

27. As with Article 101 TFEU, Article 53 EEA-Agreement prohibits agreements between undertakings which have as their object the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement. In view of the collective agreement that aligns the behaviour of the different Administration Offices in

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18 See the rejection of complaint by the EFTA Surveillance Authority of 3 March 2014 (case n° 73856), p. 4.

19 See the cases *Merci*, cit., para. 41. See also *Raso*, cit., para. 26.

20 Case C-234/89 *Stergios Delimitis*, EU:C:1991:91, paragraph 19.

21 See Joined Cases T-259/02 to T-264/02 and T-271/02 Raiffeisen Zentralbank Österreich v Commission [2006] ECR II-5169, paragraph 168; Case T-77/94 VGB and Others v Commission [1997] ECR II-759, paragraphs 126, 142 and 143.

22 Case C-280/91 *Finanzamt Kassel-Goethestrasse* v *Viessmann*, EU:C:1993:103.

major ports in Norway, it would prima facie appear that the collective agreement is an agreement between undertakings which has as its object the distortion of competition by fixing prices, sharing markets and limiting or controlling markets. However, in order to establish a breach of Article 53 of the EEA Agreement resulting from horizontal agreements between the Administration Offices operating in different Norwegian ports, it would need to be examined whether the latter are actual or at least potential competitors. It would seem to the Commission that this is not the case. It would generate disproportionate additional costs for an Administration Office established in one port to render, through its registered dockworkers, loading or unloading services in another port. The relevant geographic market concerned by the priority-of-engagement-rules is thus local i.e. the individual Norwegian ports covered by the Framework Agreement.[23]

28. As with Article 102 TFEU, Article 54 EEA prohibits the abuse of a dominant position within the common market or in a substantial part of it. In the present case, the relevant product/services market consists of the provision of stevedoring services in port.[24]

29. Article 54 EEA requires in addition that undertakings abuse their dominant position within the territory covered by the EEA-Agreement or in a substantial part of it. The Commission considers that it can be left open whether the port of Drammen is in itself a substantial part of the territory covered by the EEA-Agreement.[25] The priority-of-engagement-rules applying in all major ports in Norway, which are linked through the

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[23] Cf. Case C-163/96 *Raso*, EU:C:1998:54, para. 26.

[24] The precise market definition could be more refined: The Commission has identified three separate stevedoring markets: it could be distinguished between three different product markets such as for deep-sea container cargos, bulk cargos and short-sea cargos (see, by analogy, Case n° COMP/M.5093 *DP WORLD / CONTI 7 / RICKMERS / DP WORLD BREAKBULK / JV*, Commission decision of 18 November 2008 regarding merger control). In one decision the Commission also identified a separate market for stevedoring services for break-bulk cargos. In that decision the Commission considered that delineation according to the type of break-bulk is not warranted since all break-bulk terminal services providers are, in principle, able to handle all types of break-bulk. The Commission did not have the opportunity to develop and to nuance further the product market definition in the bulk cargos sector. It could however be assumed that this sector could be differentiated according to types of cargo (e.g. liquids and solids) that require different port infrastructure for handling. In few antitrust cases the Commission identified a distinct product market for port facilities services for ferries carrying passengers and vehicles (See also Case n° IV/39.689 *Sea Containers* v *Stena Sealink*, Commission decision of 21 December 1993; Commission decision 94/119/EC of 21 December 1993, concerning a refusal to grant access to the facilities of the port of Rodby (Denmark). Compare to Case C-242/95 *GT-Links* v *DSB*, EU:C:1997:376).

[25] With regard to Article 102 TFEU, the ECJ held that depending in particular on the volume of traffic in a port and its importance in relation to maritime import and export operations as a whole in the Member State concerned, a port may in itself be regarded as constituting a substantial part of the internal market. See Case C-179/90 *Merci Convenzionali Porto di Genova*, EU:C:1991:464, paragraph 15; *Raso*, cit., para. 26.

Framework Agreement, have to be considered as covering cumulatively a substantial part of the common market.[26]

30. By its conduct, the Administration Office is trying to force a customer to take its services although it does not want and does not need them. This is to be considered abusive.[27] Moreover, given that the Administration Office's Board consists in majority of representatives of the employers i.e. the ship operators already based in the Port of Drammen, it finds itself in a situation of conflict of interests. Indeed, these ship operators are the direct competitors of undertakings such as Holship Norge. This conflict of interests may also be taken into account when establishing an abuse of a dominant position.[28]

31. The question should then be asked whether the behaviour by the Administration office could be objectively justified.[29] However, as explained before, in the Commission's view the social objective of the Treaty cannot be invoked in favour of rules that aim at improving the working conditions of certain workers to the disadvantage of others. If the national Court were to take a different view, the boycott carried out by the Administration Office and the priority of engagement rule in the Collective Agreement, which the boycott aims at enforcing, would still go beyond what is necessary to protect the legitimate rights of employees. This point will be elaborated in greater detail below in response to the national Court's second set of questions as to whether a restriction of the right of establishment could be justified (see below paras. 51 et seq.).

3.6. Conclusion

32. In the light of the above, it must be held that by carrying out picket lines against companies established in other EEA Member States in order to enforce priority-of-engagement rules set out in a collective agreement to the benefit of their own employees, the Administration Office breaches Article 54 of the EEA-Agreement.

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[26] See above paras. 22-23.

[27] See Case C-179/90 *Merci Convenzionali Porto di Genova*, EU:C:1991:464, paragraphs 19, 20;. cf. also Case C-41/90 *Höfner and Elser*, EU:C:1991:161.

[28] Case *Raso*, cit., para. 28; cf. also Case C-49/07 *MOTOE*, EU:C:2008:376, paras. 51-52.

[29] See Case C-209/10 *Post Danmark*, EU:C:2012:172, paras. 40-41 and case law cited therein.

4. THE ASSESSMENT UNDER FREEDOM OF ESTABLISHMENT RULES

4.1. The boycott falls within the scope of Article 31 of the EEA Agreement

33. Article 31 of the EEA Agreement guarantees the freedom of establishment of nationals of an EU Member State or an EFTA State in the territory of any other of these States. It is identical in substance to Article 49 TFEU. According to Articles 6 EEA and 3(2) SCA, the case-law of the ECJ regarding the freedom of establishment is therefore relevant for the EFTA Court in its interpretation of Article 31 EEA.

34. By the first of its second set of questions (**B.1**), the national Court is asking whether Article 31 of the EEA Agreement must be interpreted as meaning that collective action initiated by a trade union against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls within the scope of that article.

35. According to settled ECJ case-law, restrictions of the fundamental freedoms cannot only result from the actions of public authorities but also from rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.[30]

36. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application. In this regard, it must also be borne in mind that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.[31]

37. In the present case, the collective action at issue has been orchestrated by the trade union NH with a view to enforcing the engagement priority rule set out in a collective

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30 See C-438/05 *Viking Line* EU:C:2007:772, paragraph 33; Case C-36/74 *Walrave and Koch*, EU:C:1974:140, paragraph 17; Case C-13/76 *Donà*, EU:C:1976:115, paragraph 17; Case C-117/91 *Bosman*, EU:C:1991:382, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège*, EU:C:2000:199, paragraph 47; Case C-281/98 *Angonese*, EU:C:2000:296, paragraph 31; and Case C-309/99 *Wouters and Others*, EU:C:2002:98, paragraph 120.

31 See C-438/05 *Viking Line*, EU:C:2007:772, paragraph 35.

agreement, which in turn regulates the work in the sector of stevedoring in Norwegian ports. The present matter presents in that regard similarities with the ECJ's precedent *Viking Line*, where a collective action organised by Finnish trade unions was aimed at the conclusion of an agreement which was meant to regulate collectively the work of the employees of an undertaking (Viking Line) which wanted to benefit from the fundamental freedoms.[32] The ECJ held here that the freedom of establishment enshrined in the Treaty must be interpreted as meaning that, in circumstances such as those in that case, it may be relied on by a private undertaking against a trade union or an association of trade unions.[33] The ECJ, after having referred to judgments such as Commission v France ("Spanish strawberries") and Schmidberger,[34] held that:

"[t]here is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively."[35]

Accordingly, collective action such as that described in question **B.1** falls, in principle, within the scope of Article 31 of the EEA Agreement.

38. If instead the reasoning used by the ECJ in *Viking Line* summarized in paragraphs 36-37 were considered not to apply in the present case on the grounds that the collective action is a purely private action (*quod non*), an alternative line of reasoning could still lead to the conclusion that the Framework Agreements restricts the fundamental freedoms. Indeed, NTF sought to obtain by the national judge a declaration about the lawfulness of the notified boycott in accordance with the Norwegian Boycott Act. If this lawfulness were to be declared by a national judge, it could be argued that the national judge would *de facto* clear the way for enforcing the Framework Agreement by boycotting companies

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32 *Viking Line*, cit., paras. 60 et seq. See also C-341/05 *Laval*, EU:C:2007:809.

33 *Viking Line*, cit., para. 61.

34 *Viking Line*, cit., para. 62. Case C-265/95 *Commission* v *France ("Spanish strawberries")*, EU:C:1997:595; case C-112/00 *Schmidberger*, EU:C:2003:333.

35 *Viking Line*, cit., para. 65.

such as Holship Norge.[36] Such a judgment would go beyond the mere omission by the State to intervene against individuals that restrict the fundamental freedoms. Accordingly, it could be argued that a decision by a national judge authorising the enforcement by boycott of the Framework Agreement would be tantamount to a State measure falling within the scope of Article 31 of the EEA Agreement.

4.2. The boycott restricts the freedom of establishment

39. As with Article 49 TFEU, Article 31 of the EEA Agreement precludes restrictions on the freedom of establishment. The provisions prohibit any national measure which is liable to hinder or render less attractive the exercise by European Union nationals of the freedom of establishment guaranteed by the Treaty. The concept of restriction also covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-EU trade.[37]

40. The priority-of-engagement rule that the Administration Office intends to enforce through a boycott generates substantial extra costs for companies from other EEA Member States,[38] all the more so given that they have no influence whatsoever over the salaries that need to be paid to the dock-workers in question the fact that the economic activity underlying the establishment is made more difficult suffices to qualify the measure at issue as a restriction.[39] Moreover, it could be argued that companies that use Norwegian ports only occasionally are more likely to have their own employees at their disposal to do the loading and unloading than companies that exclusively operate in Norwegian ports and that are likely to have adapted to the omnipresent priority-of-engagement rules.

41. It would seem that the double costs imposed on undertakings like Horship Norge (which are able to carry out the loading and loading of goods through their own personnel) are

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[36] See, by analogy, Case C-265/95 *Commission* v *France ("Spanish strawberries")*, EU:C:1997:595; case C-112/00 *Schmidberger*, EU:C:2003:333.

[37] See Cases C-442/02 *Caixa Bank*, EU:C:2004:586, para. 12; C-89/09 *Commission* v *France*, EU:C:2010:772, paragraph 44; Case C-327/12 *Ministero dello Sviluppo economico*, EU:C:2013:827, paragraph 45; Case C-518/06 *Commission* v *Italy*, EU:C:2009:270, paragraphs 63 and 64, and Case C-577/11 *DKV Belgium*, EU:C:2013:146, paragraphs 31 to 33. See also *Laval,* cit.

[38] *Commission* v *Spain*, cit., para. 37.

[39] *Caixa-Bank*, cit., paras. 13-16*; Viking Line*, cit., paras. 70 et seq.;

significant. Nevertheless, the referring Court appears to consider that the burden imposed on foreign operators might be insignificant. By the second of its second set of questions **(B.2)**, the national Court is therefore asking whether it would be of significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

42. In this regard, it needs to be pointed out that there is no *de minimis* rule under which minor restrictions of the fundamental freedoms could escape from the prohibition laid down in the Treaty. According to the ECJ, a national measure cannot evade the prohibitions under the TFEU merely because the hindrance to the fundamental freedom is slight or because it is possible for the operators concerned to exercise these freedoms in other ways.[40]

43. In those circumstances, a priority of engagement rule enforced through boycotts organised by the Administration Office must be held to constitute a restriction on the freedom of establishment.

4.3. The Framework Agreement cannot be justified by an overriding reasons of public interest

4.3.1. Collective agreements for the protection of workers can generally be invoked to justify restrictions

44. A restriction on the freedom of establishment may in certain cases be justified where it serves overriding requirements relating to the public interest.[41]

45. The right to take collective action for the protection of workers is a legitimate interest which can justify a restriction of the fundamental freedoms guaranteed by the TFEU.[42] In this regard, it needs to be highlighted that the activities of the European Union are not limited to establishing an internal market. The European Union has not only an economic

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[40] See Case C-49/89 *Corsica Ferries*, EU:C:1989:649, paragraph 8, and Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov*, EU:C:2014:2011, paragraph 42; Case C-269/83, *Commission v French Republic*, EU:C:1985:115, paragraph 10; Joined Cases C-177/82 *Van de Haar and Another* and C-178/82 *Kaveka*, EU:C:1984:144. See also Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte e.a.*, EU:C:2001:564, points 36 et 37; C-315/13 *Declercq*, EU:C:2014:2408, para. 61.

[41] See Case C-327/12 *Ministero dello Sviluppo economico*, EU:C:2013:827, paragraph 59 and Case C-577/11 *DKV Belgium*, EU:C:2013:146, paragraph 39.

[42] See, inter alia, *Viking Line*, cit., para. 77. See also Joined Cases C-369/96 and C-376/96 *Arblade and Others*, EU:C:1999:575, paragraph 36; Case C-165/98 *Mazzoleni and ISA*, EU:C:2001:162, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others*, EU:C:2001:564, paragraph 33.

but also a social purpose and the rights under the provisions of the Treaty on the fundamental freedoms must be balanced against the objectives pursued by social policy, which include, as is clear from the Article 151 (1) TFEU, *inter alia*, improved working conditions, social protection and dialogue between management and labour.

46. By contrast, the need to ensure a public service, which was invoked in other cases,[43] cannot be invoked in the present case. As it can be inferred from the reference order, the stevedores of the Drammen Port are not obliged to offer their services at all times when required. The Administration Office can in fact reject a request for stevedoring services by a ship and it seems that this rejection can be done without further explanation. The order of reference does not mention that the stevedores must ensure the security of the port or a minimum service.

47. Furthermore, the Commission submits that ILO convention no 137 cannot be invoked to justify the usage of a priority-of-recruitment rule.[44]

48. Article 3(2) of that Convention regarding preference for port work for registered dockworkers is not intended to establish or facilitate a monopoly arrangement for performing the loading and unloading work for one company alone. This appears from a statement by the ILO regarding a "Direct Request" (CEACR), adopted in 1997 and published in association with Sweden's ratification:

"At the end of the discussions, the ILO Committee decided that the Convention did not imply introduction or maintenance of a monopoly. It decided that the Convention did not impede the establishment of more than one stevedore contractor in every port. Nor did it prevent an enterprise with another principle activity from carrying on connected activities in the ports".[45]

49. ILO convention n° 137 thus leaves open the question of how Member States ensure that dockworkers benefit from regular employment and decent income. Nowhere does the Convention authorise boycotts to enforce priority-of-engagement rules or otherwise call upon signatory states to enact or authorise restrictions of the freedom of establishment.

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43 *Commission v Spain*, cit., para. 51.

44 See, to this effect, *Commission v Spain*, cit., para. 41.

45 See Direct Request (CEACR) - adopted 1997, published 86th ILC session (1998) para. 2 available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:2161844.

Local dockworkers can be guaranteed a stable income throughout the year, whilst still allowing companies to have recourse to their own employees for loading or unloading in ports. Furthermore, there are examples of other EEA Member States that have signed ILO convention no 137 which show that the convention can be implemented without enacting a priority-of-engagement rule.[46]

50. In any event, a Member State cannot invoke an international agreement concluded with other countries to justify a violation of the fundamental freedoms.[47]

4.3.2. The protection of workers can generally not be invoked where one group of workers is protected to the detriment of others

51. Whilst the protection of workers can generally be invoked as a legitimate interest in order to justify restrictions of the freedom of establishment, the Commission submits that this legitimate interest cannot be invoked in favour of the Framework Agreement in the present case.

52. As explained before, in the Commission's view the social objective of the Treaty cannot be invoked in favour of rules that aim at improving the working conditions of certain workers to the disadvantage of others. Exceptions of this rule might be acceptable where (i) some workers merit special protection or; (ii) some employees are granted a certain level of social protection by their employer and other employers should be incentivised to achieve upward convergence. However, as will be shown in the following none of these exceptions applies in the present case.

53. First, the request for reference does not explain why the dock-workers registered with the Administration Office would merit special protection compared to other employees that might depend on the same jobs for their livelihood. In this regard, the Supreme Court of Norway merely states, in § 6 of the request for reference, that "*historically [...] dockworkers were originally casual workers with no guarantee for work and pay*". It can be questioned whether these precarious work conditions subsist under current Norwegian

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[46] For a detailed description of the situation in different EEA Member States that have signed ILO convention no 137 reference is made to the Study „Port labour in the EU" by Prof Dr Eric Van Hooydonk and commissioned by the European Commission, Volume II. The study is accessible at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2013-01-08-ec-port-labour-study-vol2.pdf.

[47] See Case C-475/98 *Commission* v *Republic of Austria*, EU:C:2002:630, paragraphs 130-144.

rules of social security and social protection.[48] Furthermore, the priority of engagement rule applies regardless of whether other employees whose working conditions might deteriorate because of the Framework Agreement have a social protection or employment conditions not as good as the ones applying to the stevedores employed by the Administration Office.

54. Furthermore, in determining whether the dockworkers registered with the Administration Office in Drammen merit special protection, account must be taken of the job opportunities that dockworkers can find in other ports of the EEA. In this regard, it is worthwhile pointing out that the Commission has successfully challenged comparable priority-of-engagement rules that foreclosed the labour market for dockworkers in certain Member States such as Spain.[49] Ensuring the mobility of dockworkers within the EEA could provide a better solution for the fluctuating demand for stevedoring in ports of EEA Member States than "recruit-local" requirements. This solution would also be in conformity with the policy pursued by the Commission: according to its communication COM(2007)616, rules on port workers should not be used to impair sufficiently qualified persons or undertakings to offer their services of loading/unloading goods in ports; nor should they be used to impose on undertakings work which they do not need.[50]

55. Second, it cannot be argued that the priority of engagement rule is intended to go against employers that do not respect the social standards that apply to the dockworker registered with the Administration Office, thereby forcing these employers to abstain from social dumping or to strive for upward convergence. In fact, this rule applies irrespective of the existence of collective agreements providing equal or even higher social protection to stevedores not covered by the Framework Agreement. Therefore, the following reasoning contained in the ECJ ruling *Viking line* can be applied by analogy in the present case:

"... as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is

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48 The Supreme Court of Norway does not clarify which epoch the word "historically" refers to. However, it would appear from § 8 of the request for an advisory opinion that the clause on priority of engagement was first incorporated into collective agreements in the year 1940. The ILO dockworking convention N° 137 dates from 1973.

49 See, for example, Case C-576/12 *Commission* v *Spain*, EU:C:2014:2430.

50 *Commission* v *Spain*, cit., para. 28.

registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State."[51]

56. It is also in the light of the ECJ's Viking case-law that the third of national Court's second set of questions (**B.3**) should be answered. The national Court asks whether it would be of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work. In other words: If Holship's employees are already protected by a collective agreement, albeit one that does not cover loading and unloading in ports, can a different collective agreement, namely the Framework Agreement, be invoked in order to justify restrictions of Holship's freedom of establishment?

57. The Commission submits that the fact that the priority-of-engagement rule to the benefit of dockworkers registered with the Administration Office applies irrespective of whether another collective agreement already ensures adequate social protection to the benefit of Holship's employees shows that the Framework Agreement does not serve the legitimate purpose of incentivising Holship to improve the working conditions of its employees. Rather, the Framework Agreement merely aims at improving the situation of one group of workers to the detriment of other workers. Therefore, the protection of workers cannot be invoked in favour of the Framework Agreement.

4.3.3. There are alternative but less restrictive means

58. Even if the national Court were to take the view that the protection of workers can be invoked as a legitimate aim to justify the restrictions of the freedom of establishment resulting from the Framework Agreement, it would still need to be examined whether the principle of proportionality is fully complied with.[52] As the ECJ has consistently held,

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[51] C-438/05 *Viking Line*, EU:C:2007:772, paragraph 89.

[52] Case C-255/04 *Commission* v *France*, EU:C:2006:401, point 44.

restrictions of the fundamental freedoms can be justified only if they do not go beyond that which is necessary in order to achieve that objective.[53] Hence, even assuming that the dockworkers registered with the Administration Office in Drammen merited special protection that could justify protecting them to the detriment of other workers (*quod non)*, it would still need to be examined whether other measures, which would be less restrictive than a priority-of-engagement rule, would be sufficient to achieve the same result.

59. First, a collective agreement could provide for minimum salaries that need to be paid to all employees rendering loading or unloading services in the Port of Drammen, irrespective of whether they are registered with the Administration office. This minimum salary could be high enough to ensure the livelihood of dockworkers throughout the year. Second, whilst still constituting a restriction of the freedom of establishment that would need to be justified with an overriding public interest, a less restrictive measure could consist of introducing a proportionate special levy that companies loading or unloading in the port of Drammen would need to pay, irrespective of whether they recruit local dockworkers or not. This levy would help set up a subsistence fund that is at the disposal of dockworkers in periods of low demand so as to ensure a stable income throughout the year, whilst still allowing companies to have recourse to their own employees for loading or unloading.[54]

4.3.4. Conclusion

60. The Commission considers that enforcing the Framework Agreement by boycott to the disadvantage of companies established in other EEA Member States and their employees results in a non-justifiable restriction of the freedom of establishment as guaranteed by Article 31 of the EEA Agreement.

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[53] See, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda*, EU:C:1991:323, paragraph 15 and Case C-518/09 *Commission* v *Portugal*, EU:C:2011:501, paragraph 65; Case C-169/07 *Hartlauer*, EU:C:2009:141, paragraph 55; Case C-384/08 *Attanasio Group*, EU:C:2010:133, paragraph 51.

[54] For a detailed description of such applicable rules in Member States see the Study „Port labour in the EU" by Prof. Dr Eric Van Hooydonk and commissioned by the European Commission, Volume II, pages 372 et seq. and in particular page 383 (paragraph 953). The study is accessible at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2013-01-08-ec-port-labour-study-vol2.pdf.

5. PROPOSED ANSWERS TO THE NATIONAL COURT'S QUESTIONS

61. The Commission proposes to answer the questions put by the Norges Hoyesterett to the EFTA Court as follows:

A. On competition law:

A.1. The exemption from the competition rules of the EEA Agreement that applies to collective agreements does not cover the use of a boycott against a port user in order to produce acceptance of a priority rule laid down in a collective agreement, when such acceptance entails that the port user must give preference of buying unloading and loading services from a separate entity, rather than to use its own employees for the same work.

A.2. The system referred to under A.1 should be assessed under Article 53 and Article 54 of the EEA Agreement.

A.3. The existence of an identical or corresponding system in other ports amongst others needs to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

B. On the freedom of establishment:

B.1. It is a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a priority rule laid down in a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate entity having the characteristics described in paragraphs 10 to 14 of the reference order rather than use its own employees for this work.

B.2. It is without significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

B.3. It is of importance for the assessment of whether the restriction described in question B.1 is lawful or not that the priority rule applies irrespective of whether the company that is to be prevented from using its own employees applies a different collective agreement which provides for equal social protection as the Framework Agreement.

Manuel KELLERBAUER Luigi MALFERRARI

Agents of the Commission

Attachment 2

Registered at the EFTA Court under N° E-14/15 -16
20 day of August 20 15

Brussels, 18 August 2015
Case No: 77550
Document No: 769100

ORIGINAL

EFTA SURVEILLANCE AUTHORITY

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by
Markus Schneider, Deputy Director,
Maria Moustakali and Øyvind Bø, Officers, and
Marlene Lie Hakkebo, Temporary Officer
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-14/15

Holship Norge AS

v

Norsk Transportarbeiderforbund

in which the Supreme Court of Norway (*Norges Høyesterett*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of the EEA Agreement, in particular of its Articles 31, 53 and 54.

Table of Contents

1 INTRODUCTION

1. The case before the Supreme Court of Norway concerns an advance ruling on the lawfulness of a notified boycott under Section 3 of the Act of 5 December 1947 No 1 relating to boycotts.[1] The aim of the boycott is to achieve acceptance of a collective agreement.

2. The legal issue under Norwegian law is whether the purpose of the boycott is unlawful or whether it cannot achieve its goal without causing a breach of the law. According to the national court, this matter depends on whether the boycott, or a ruling on the lawfulness thereof, would amount to a breach of EEA law. In that regard, the national court seeks guidance on issues of competition law and the freedom of establishment.

2 THE FACTS OF THE CASE

3. According to the Request for an Advisory Opinion ("the Request"), the salient facts are as follows:

4. The Norwegian Transport Workers Union (*Norsk Transportarbeiderforbund*) ("NTF") has given notice of a boycott of Holship Norge AS in order to achieve acceptance of a collective agreement between the latter and NTF. NTF is a member of the Norwegian Confederation of Trade Unions (*Landsorganisasjonen i Norge*) ("LO"), which represents the employee side in the collective agreement.

5. The collective agreement, the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere*) ("the Framework Agreement"), was initially concluded in 1976, but has subsequently been renewed every other year. The agreement aimed at ensuring a fixed pay scheme for the dockworkers in the 13 largest ports in Norway, who were originally casual workers.

6. The Framework Agreement established a legal entity called the Administration Office (*Administrasjonskontor*) in each port covered by the agreement. All dockworkers covered by the agreement are employed by these offices and they are paid a fixed wage in addition to supplements that vary with ship calls. Additional personnel is summoned when needed.

7. Section 2(1) of the Framework Agreement lays down a right to priority of engagement for the dockworkers to carry out unloading and loading work for certain vessels that sail between Norwegian and foreign ports. It provides as follows:

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[1] Lov 5. desember 1947 nr. 1 om boikott.

> "For vessels of 50 tonnes dwt and more sailing from a Norwegian port to a foreign port or vice versa, the unloading and loading shall be carried out by dockworkers. Exempted is all unloading and loading at the company's own facilities where the company's own workers carry out the unloading and loading."[2]

8. The priority of engagement right is administered by the Administration Office in each port. Accordingly, an undertaking will order dockworkers from the Administration Office and pay for the unloading and loading assignments according to rates set by the Administration Office. If the Administration Office does not have the capacity to carry out the operation, the work can be carried out by the undertaking's own employees or by others.

9. The Administration Office in each port has a board, which consists of three representatives of the employers and two representatives of the workers. The administration offices are non-profit organisations.

10. Holship Norge AS, a Norwegian subsidiary of a Danish company, is neither a member of the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*) ("NHO") nor its member association the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*), which together represented the employer side in the Framework Agreement. Instead, it is a member of the Norwegian Business Association (*Bedriftsforbundet*), which has concluded a collective agreement with the Norwegian General Workers' Union (*Norsk Arbeidsmandsforbund*). That agreement covers cleaning work, but Holship Norge AS applies it also to employees carrying out its unloading and loading work.

11. Holship Norge AS' main activity consists of cleaning fruit crates, but it also receives some goods transported by ships. Until the end of 2012, Holship Norge AS used the services of the Administration Office in the Port of Drammen, but after an increase in the company's activities it employed an own staff of four to handle the unloading and loading work.

12. At this point, NTF claimed that the Framework Agreement should apply to Holship Norge AS' activities, in particular so that the latter would have to respect the priority of engagement clause and give priority for its work to the Administration Office rather than to its own workers. Holship Norge AS did not accept NTF's claim. NTF therefore gave notice of a boycott of Holship Norge AS on 11 June 2013 and brought an action against the company, seeking an order that the notified boycott is lawful.

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[2] Translated as in the Request.

13. The Request highlights that the priority of engagement clause in the Framework Agreement has been regarded as part of the fulfilment of Norway's obligations under Article 3(1) and (2) of ILO Convention No 137.

14. The parties to the Framework Agreement have also concluded another collective agreement, which applies to 14 other ports in Norway and which confers a corresponding priority of engagement on registered dockworkers in those ports.[3]

3 EEA LAW

15. Article 31(1) of the EEA Agreement provides:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4."

16. Article 53 of the EEA Agreement provides:

> "1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings;
>
> - any decision or category of decisions by associations of undertakings;

[3] The dock work agreement for Southern and Northern Norway (*Losse- og lasteoverenskomsten for Sør- og Nord-Norge*).

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

17. Article 54 of the EEA Agreement provides:

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

Such abuse may, in particular, consist in:

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

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

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

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

4 NATIONAL LAW

18. Section 2 of the Boycott Act provides:

"Boycott is unlawful:

when its purpose is unlawful or when it cannot achieve its goal without causing a breach of the law

[...]"[4]

5 INTERNATIONAL LAW

19. Article 3 of International Labour Organisation ("ILO") convention No 137 provides:

"1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

[...]"

[4] As translated in the Request.

6 THE QUESTIONS REFERRED

20. The Supreme Court of Norway has referred the following two sets of questions to the EFTA Court:

> "A *On competition law:*
>
> A.1 Does the exemption from the competition rules of the EEA Agreement that applies to collective agreements, as this exemption is described inter alia in the advisory opinion of the EFTA Court in Case E-8/00 Landsorganisasjonen i Norge and NKF [2002] EFTA Ct. Rep. 114, cover the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate administration office as described in paragraphs 7 and 10 to 14 above, rather than to use its own employees for the same work?
>
> A.2 If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?
>
> A.3 In that case, must the existence of an identical or corresponding system in other ports be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA?
>
> B *On the freedom of establishment*:
>
> B.1 Is it a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate administration office having the characteristics described in paragraphs 10 to 14 above, rather than use its own employees for this work?
>
> B.2 Would it be of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic?
>
> B.3 If a restriction exists: Is it of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work?"

7 ANALYSIS OF THE QUESTIONS ON COMPETITION LAW

7.1 Introduction

21. The first set of questions (A) concerns competition law. By its first question (A.1), the referring court seeks to establish whether a boycott as that described in the Request is subject to the competition rules in the EEA Agreement. In the case of a negative reply, the second (A.2) and third questions (A.3) seek guidance on how such a boycott should be assessed under EEA competition law.

22. For good measure, the Authority notes that the Request does not explicitly address Article 59(1) EEA, which imposes certain obligations on the EFTA States in relation to undertakings they grant special or exclusive rights. The Authority submits that the EFTA Court should not address the provision either, as the Request by the referring court has not pointed to facts that would allow the conclusion that the administration offices have been granted any special or exclusive rights by the Kingdom of Norway.

7.2 Question A.1: The exclusion of collective agreements from EEA competition law does not apply to a boycott as that described in the Request

23. The first question concerns the scope of the exclusion of collective agreements from EEA competition law. The referring court asks whether the exclusion covers the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such an acceptance entails that the port user must give preference to buying unloading and loading services from a separate entity rather than using its own employees.

24. The exclusion of collective agreements from Article 101 TFEU[5] was first established by the Court of Justice in the seminal judgment in *Albany*[6], and later confirmed in a string of case-law.[7] The Court acknowledged that certain restrictions on competition are inherent in collective agreements between organisations representing employers and workers. It held that the social policy objectives of such agreements would be seriously undermined if made subject to Article 101 TFEU when management and labour are seeking jointly to adopt

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[5] At the time Article 85(1) EC.

[6] Judgment in *Albany International BV* v *Stichting Bedrijfspensioenfonds Textilindustri*, C-67/96, EU:C:1999:430, paragraph 60.

[7] Judgments in *Brentjens' Handelsonderneming BV* v *Stichting Bedrijftspensioenfonds voor de Handel in Bouwmaterialen*, Joined Cases C-115/97 to C-117/97, EU:C:1999:434, *Maatschappij Drijvende Bokken BV* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, C-219/97, EU:C:1999:437, *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98 to 184/98, EU:C:2000:428 and *Hendrik van der Woude* v *Stichting Beatrixoord*, C-222/98, EU:C:2000:475.

measures to improve conditions of work and employment. The Court of Justice therefore held that it follows from an interpretation of the Treaty as a whole that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 101 TFEU.

25. In *Landsorganisasjonen*[8], the EFTA Court held that the test developed by the Court of Justice for defining the scope of Article 81 EC (now Article 101 TFEU) in relation to collective agreements must likewise be applied with respect to the scope of Article 53 EEA.[9] The case-law of the Court of Justice on the exclusion of collective agreements is therefore relevant for the interpretation of the scope of EEA competition law.

26. The test developed by the Court of Justice excludes an agreement from the scope of Article 53 EEA where the following two conditions are fulfilled; firstly, the agreement must have been entered into in the framework of collective bargaining between employers and employees; and, secondly, the agreement must have been concluded in pursuit of the objective of improving conditions of work and employment.[10] Both conditions must be fulfilled for the agreement to fall outside the scope of Article 53 EEA.[11]

27. It is clear from the Request that the application of the first condition is not contentious in the present case. The Authority will therefore focus in the following on the second condition.

28. Neither the EFTA Court nor the Court of Justice has to date had the opportunity to consider a priority of engagement clause such as the one at issue in the main proceedings, but the Authority submits that case-law provides some general guidance on the matter.

29. In *Landsorganisasjonen i Norge*, the EFTA Court held that the term "conditions of work and employment" must be interpreted broadly.[12] However, there are certain limits to how broadly the term can be construed. In particular, it is not sufficient to consider merely whether the broad objective of a collective agreement seeks to improve the conditions of work and employment. The various provisions of an agreement must be assessed individually and if they are directed towards other purposes, those provisions will not fall

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[8] Case E-8/00 *Landsorganisasjonen i Norge* v *Kommunenes Sentralforbund and Others* [2002] EFTA Court Report 114.
[9] *Landsorganisasjonen*, paragraph 44.
[10] *Landsorganisasjonen*, paragraph 49, and *Albany*, EU:C:1999:430, paragraphs 59 and 60.
[11] *Landsorganisasjonen*, paragraph 50.
[12] *Landsorganisasjonen*, paragraph 53.

outside the scope of Article 53 EEA.[13] The EFTA Court has held that provisions pursuing objectives extraneous to that of improving conditions of work and employment, or that do not, in practice, operate to improve such conditions, may come within the scope of Article 53 EEA.[14]

30. In that assessment, the EFTA Court has held that account must be taken of the form and content of the agreement and its various provisions, the circumstances under which they were negotiated, the subsequent practice of the parties to the agreement and its actual effect.[15]

31. Applying this guidance in the present case, the Authority submits that the priority of engagement clause, as sought to be enforced by means of the proposed boycott notified by NTF to Holship Norge AS, with is not a party of the collective agreement at issue, does not fulfil the second condition for the following reasons.

32. Firstly, in the circumstances, the priority of engagement clause would effectively be extended to undertakings that do not have employees protected by the collective agreement at issue, the Framework Agreement. In turn, this would imply that the priority of engagement clause does not merely address the labour relationship between employer and employee, but that it would also have the effect of imposing obligations on third parties, such as Holship Norge AS.

33. This, the Authority submits, would distinguish the present case from previous situations considered by the Court of Justice. For example, in *Albany*, *van der Woude* and *AG2R Prévoyance,*[16] the Court of Justice considered collective agreements that were binding only for employers of workers who were protected by those agreements. The exclusion of those agreements from the EEA competition rules was justified because they ensured a balance between employers and their employees and because that balance should be established unimpeded by EEA competition law.[17] However, this justification does not apply where collective agreements apply to undertakings that do not employ workers who are protected by the agreements.

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[13] *Landsorganisasjonen*, paragraph 51.
[14] *Landsorganisasjonen*, paragraphs 51, 55, 56 and 59.
[15] *Landsorganisasjonen*, paragraph 52.
[16] Judgment in *AG2R Prévoyance* v *Beaudout Père et Fils SARL*, C-437/09, EU:C:2011:112.
[17] See *Landsorganisasjonen*, paragraphs 34 and 35.

34. The Authority would like to add that seeking to enforce a priority of engagement clause such as the one in the main proceedings by means of a boycott of a non-party to the collective agreement at issue would also not meet the test suggested by Advocate General Jacobs in *Albany*, who advised that the scope of the exclusion of collective agreements should be delimited on the basis of "whether the agreement modifies or establishes rights and obligations within the labour relationship between employers and employees or whether it goes beyond that and directly affects relations between employers and third parties, such as clients...".[18]

35. Secondly, extending the scope of the case law that excludes collective agreements to obligations imposed on third parties would carry a risk that trade associations could circumvent Articles 53 and 54 EEA by concluding collective agreements containing provisions that restrict competition, without there being any social policy justification for that restriction. The existence of a justification for a particular restriction on a third party should rather be taken into account in the assessment of that restriction under Articles 53 and 54 EEA.

36. Thirdly, even though the priority of engagement clause arguably benefits the employees of the Administration Office, it does so to the detriment of other workers such as those employed by Holship. Furthermore, rather than pursuing the objective of improving the conditions of work and employment between the employer, the Administration Office and its employees, the priority of engagement clause protects the market position of the employer, the Administration Office, and the jobs of its employees. The Authority submits that the exclusion for collective agreements from the scope of EEA competition law should not be extended to agreements that protect a limited group of workers to the detriment of other workers.

37. In this context the Authority notes that the referring court already held in in its judgment in *Port of Sola*[19] that the priority of engagement clause of the Framework Agreement at issue "*does not aim to improve the pay and working conditions of the employees of the undertaking, but to give priority of engagement to certain workers outside the undertaking for the execution of some of the operations of the undertaking*".[20]

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[18] Opinion in *Albany*, EU:C:1999:28, paragraph 193. See also *Landsorganisasjonen*, paragraph 53, in which the EFTA Court's examples of restrictions covered by the term "conditions of work and employment" included only provisions concerning the labour relationship between employers and their employees.
[19] Rt. 1997 p. 334.
[20] Quotation from the English translation of the Request.

38. For these reasons, the Authority submits that the exclusion of collective agreements from the scope of EEA competition law in so far as certain restrictions on competition are inherent in collective agreements between organisations representing employers and workers does not cover situations such as the one at issue in the main proceedings where a priority of engagement clause is sought to be imposed by means of a boycott on an economic operator that is not a party to the relevant collective agreement.

7.3 Questions A.2 and A.3: The assessment under Articles 53 and 54 EEA

39. By its second question, the referring court asks whether the collective agreement and boycott should be assessed under Article 53 EEA or Article 54 EEA. The third question concerns the requirement on an appreciable effect on trade between EEA States, which is one of the conditions of those provisions.

7.3.1 Assessment under Article 54 EEA

40. The main question under Article 54 EEA is whether the use of a boycott in a situation as that described in the Request is prohibited as incompatible with the functioning of the EEA Agreement. This would be the case if the such conduct constitutes an abuse by one or more undertakings of a dominant market position.

41. The assessment of the boycott under Article 54 EEA therefore depends on a number of conditions, including a definition of the relevant market in order to assess whether any of the potential players enjoys a dominant positon.

42. In the following analysis, the Authority will address each of the conditions of Article 54 EEA in turn.

7.3.1.1 The undertaking

43. Article 54 EEA applies to undertakings. Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[21] It is settled case-law that any activity consisting in offering goods and services on a given market is an economic activity.[22] Employees of an undertaking do not constitute undertakings, neither individually nor collectively.[23]

44. Providing dock work services is clearly an economic activity.[24] There is no information in the Request that suggests that NTF provides such services or carries out any other economic activity related to the boycott.

45. The question is thus whether the Administration Office as such renders those services.

46. The Court of Justice has held that "a dock-work undertaking enjoying the exclusive right to organize dock work for third parties, as well as a dock-work company having the exclusive right to perform dock work must be regarded as undertakings".[25] In the case examined by the Court of Justice, the exclusive rights were vested in companies, which hired personnel to carry out the work.

47. Equally, under the system established by the Framework Agreement, the right of priority of engagement to carry out unloading and loading work in the ports is vested in a separate legal entity, the Administration Office, to the benefit of the dockworkers it employs at any given time; it is thus not vested in individual workers. Furthermore, the employees of the Administration Office carry out unloading and loading assignments against fees set by and payable to the Administration Office upon orders placed with the Administration Office.

48. Accordingly, the Authority submits that the Administration Office as such provides dock work services and that it constitutes an undertaking. The fact that the Administration Office lacks a profit motive does not, according to case-law, affect that conclusion.[26]

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[21] Article 1 of Protocol 22 to the EEA Agreement and Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *EFTA Surveillance Authority* [2011] EFTA Court Report 16, paragraph 53 and further references therein.
[22] Judgment in *Pavlov*, EU:C:2000:428, paragraph 75 and Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *EFTA Surveillance Authority* [2011] EFTA Court Report 16, paragraph 54.
[23] Judgment in *Jean Claude Becu and Others*, C-22/98, EU:C:1999:419, paragraphs 26 and 27.
[24] See, for instance, Judgment in *Merci convenzionali porto di Genova SpA* v *Siderurgica Gabrielli SpA*, C-179/90, EU:C:1991:464, paragraph 9.
[25] Judgment in *Merci*, EU:C:1991:464, paragraph 9.
[26] Judgment in *Albany*, EU:C:1999:430, paragraph 85.

49. NTF refers to the judgment by the Court of Justice in *Becu*.[27]. However, in that case the exclusive rights had been vested in the individual dockworker, and the dockworkers were not "linked by a relationship of association or by any other form of organisation which would support the inference that they operate on the market in dock work as an entity or as workers of such an entity".[28] Accordingly, the Court held that the workers had an employment relationship with the undertakings for which they performed dock work. This system differs from the system set up by the Framework Agreement.

7.3.1.2 Dominant position in a substantial part of the territory covered by the EEA Agreement

50. Article 54 EEA applies only to undertakings that enjoy a position of dominance in the territory covered by the EEA Agreement, or in a substantial part thereof.

51. The assessment of the boycott under Article 54 EEA therefore requires, *inter alia*, a definition of the relevant market in order to assess whether any economic operator enjoys a dominant positon. It does not appear that the Request provides sufficient information for the EFTA Court to determine precisely how the relevant market should be defined in the main proceedings. In the absence of further information, the Authority will therefore provisionally assume, for the purposes of these observations, that the market is limited to the provision of stevedoring services in the Port of Drammen. However, this would be for the referring court to ascertain.

52. In that context, the national court would for instance have to determine whether or not the relevant product market also covers other services and is thus broader than the assumed market above, or whether or not specific stevedoring services form separate (narrower) relevant markets than the assumed market above. It would also need to examine the geographical scope of the relevant market and whether that constitutes the Port of Drammen alone or whether or not that extend to more than one port if, for example, a small and permanent relative price increase for stevedoring services in the Port of Drammen would lead port users to other ports and render the price increase unprofitable.[29]

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[27] Judgment in *Becu*, EU:C:1999:419, referred to by NTF according to the Request, paragraph 47.
[28] Judgment in *Becu*, paragraphs 23 and 29.
[29] See the Authority's Notice on the definition of the relevant market, paragraph 17 (Decision of the EFTA Surveillance Authority, No 46/98/COL of 4 March 1998 on the issuing of two notices in the field of competition on the definition of the relevant market for the purpose of competition law within the European Economic Area (EEA), and on agreements of minor importance which do not fall under Article 53(1) of the EEA Agreement, OJ L 200, 16 July 1998 and EEA Supplement No 28, 16.7.1998, p. 3).

53. As regards the notion of dominance, the Court of Justice has held that dominance "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[30]. In *AKZO*, the Court of Justice furthermore held that a market share of 50 % is, save in exceptional circumstances, evidence of the existence of a dominant position.[31]

54. Given the apparent lack of alternative sources of supply of the relevant stevedoring services in the Port of Drammen and the existence of the priority of engagement clause, the Administration Office may enjoy a dominant position on the assumed relevant market. However, this would be for the referring court to ascertain.

55. The question is whether that dominant position is held in a substantial part of the territory covered by the EEA Agreement.

56. That requirement is of a jurisdictional nature, excluding from the scope of Article 54 EEA situations which have no EEA interest. The term "substantial part thereof" does not exclusively refer to the geographical scope of the relevant market, but also to "the pattern and volume of the production and consumption of the said product as well as to the habits and economic opportunities of vendors and purchasers"[32]. In *Merci*, for instance, the Court of Justice held that a market limited to the Port of Genoa constituted a substantial part of the internal market, given the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in Italy.[33]

57. Furthermore, even though there may be no EEA interest in the conduct of an undertaking which enjoys a dominant position in a market that does not in itself reach the threshold, there may be an EEA interest in a situation involving a network of undertakings which enjoy dominance in markets that together constitute a substantial part of the territory covered by the EEA Agreement.

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[30] Judgment in *United Brands Company and United Brands Continentaal BV* v *Commission of the European Communities*, Case 22/76, EU:C:1978:22, paragraph 65.
[31] Judgment in *AKZO Chemie BV* v *Commission of the European Communities*, C-62/86, EU:C:1991:286, paragraph 60.
[32] Judgment in *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities*, Joined Cases 40/73 and others, EU:C:1975:174, paragraph 371.
[33] Judgment in *Merci*, EU:C:1991:464, paragraph 15.

58. This was the case in *Crespelle*, where a national act established a contiguous series of monopolies covering the entire State, and where the Court of Justice took all those markets into consideration in the assessment and concluded that the dominant position was held in a substantial part of the common market.[34] This approach corresponds to that taken by the Court of Justice in the assessment of the effect on trade between EU Member States, which will be discussed below. Also that rule is of a jurisdictional nature and the Authority submits that a similar approach should be taken to these two rules.

7.3.1.3 Abuse

59. The Request leaves open whether the Administration Office initiated or in any way has taken part in boycotts or in preparations thereof. This is a matter of fact, which must be appraised by the referring court. The EFTA Court may, however, provide guidance on how the boycott should be assessed, if this is the case.

60. The aim of the boycott is to make Holship Norge AS accept the priority of engagement clause. Acceptance of that clause would in reality oblige Holship Norge AS to purchase all, or most of, the stevedoring services it requires from the Administration Office.

61. Next, abuse of a dominant position under Article 54 EEA is a legal notion that must be examined in the light of economic considerations.[35]

62. That said, clauses with similar effects like those of the priority employment clause at issue here were already considered by the Court of Justice in *Hoffmann-La Roche*, in which it held that a dominant undertaking, which "ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102 TFEU], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."[36]

63. The Authority submits that if it constitutes an abuse to tie a customer by such a clause, it must also amount to an abuse for a dominant undertaking to initiate or employ a boycott against a purchaser in order to obtain acceptance by the purchaser of such a clause. This

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[34] Judgment in *Société Civile Agricole du Centre d'Insémination de la Crespelle* v *Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*, C-323/93, EU:C:1994:368, paragraph 17.
[35] Case E-4/05 *HOB-vín v The Icelandic State and Áfengis- og tóbaksverslun ríkisins* (the State Alcohol and Tobacco Company of Iceland) [2006] EFTA Ct. Rep. 4, paragraph 51; Case E-15/10 *Posten Norge* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 246, paragraph 126.
[36] Judgment in *Hoffmann-La Roche & Co. AG* v *Commission of the European Communities*, Case 85/76, EU:C:1979:36, paragraph 89.

must in particular apply where a substantial part of the market is already tied to the dominant firm and where acceptance of the clause by another undertaking would reinforce the foreclosure of the market.

64. The referring court must also examine whether the behaviour of the Administration Office can be objectively justified. In that regard, the Authority submits that based on the facts presented in the Request, it is unlikely that the anti-competitive behaviour at issue would be justified on the basis that the behaviour protects the workers of the Administration Office. The Authority refers in this regard to the discussion in paragraphs 32 to 37 above.

65. In that regard, the Authority submits that any anti-competitive behaviour by the Administration Office could not be justified on the basis that the Framework Agreement has been regarded as part of the fulfilment of Norway's obligations under ILO Convention No 137.

66. Article 3(2) of ILO Convention No 137 states that registered dockworkers shall have priority of engagement of dock work. However, this provision does not require the introduction of a de facto monopoly or prevent the introduction of competition on the market for stevedoring services. Such an interpretation of the provision would conflict with the position of the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR"), which is responsible for examining the application of ratified conventions. In a Direct Request to Sweden it stated:

> "At the end of the discussions, the ILO Committee decided that the Convention did not imply introduction or maintenance of a monopoly. It decided that the Convention did not impede the establishment of more than one stevedore contractor in every port. Nor did it prevent an enterprise with another principle activity from carrying on connected activities in the ports."[37]

67. Lastly, the Administration Office could not invoke Article 59(2) in its defence, as the stevedoring services it provides do not constitute services of a general economic interest within that provision.[38]

7.3.1.4 Effect on trade between Contracting Parties

68. Article 54 EEA is restricted to conduct or practices which "may affect trade between Contracting Parties". According to the standard test laid down by the Court of Justice, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of facts and points of law, that they may have an influence, direct or indirect, actual or

[37] Direct Request adopted by CEACR in 1997, published in the 86th ILC session (1998).
[38] Judgment in *Albany*, EU:C:1999:430, paragraph 27.

potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States.[39] That effect must not be insignificant.[40] Accordingly, the effect on trade between Contracting Parties will normally be the result of a combination of several factors which, taken separately, are not necessarily decisive.[41]

69. The third of the first set of questions concerns this assessment. The referring court asks whether it should take into account identical or corresponding systems in other ports in assessing whether there is an appreciable effect on trade between Contracting Parties.

70. The Authority submits that this question should be answered in the affirmative on the basis of the following considerations.

71. In *Hegelstad*, a single exclusive purchasing agreement was being considered under Article 53 EEA, but the EFTA Court held that the effect of an entire network of exclusive purchasing agreements should be taken into account when determining whether there was an appreciable effect on trade between the Contracting Parties.[42] This is in line with case-law from the Court of Justice, which has held that such agreements should be assessed in the context in which they occur and that "the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected".[43]

72. The system in the Port of Drammen forms an integral part of the larger system established by the Framework Agreement, which covers the administration offices and a right of priority of engagement in the 13 largest ports in Norway. The effect of this system as a whole may therefore be taken into account by the national court in its assessment of whether there is an appreciable effect on competition.

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[39] Forr instance judgment in *European Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 99.
[40] Ibid.
[41] Judgment in *Carlo Bagnasco and Others* v *Banca Popolare di Novara soc. coop. arl (BPN) and Others*, Joined Cases C-215/96 and 216/96, EU:C:1999:12, paragraph 47.
[42] Case E-7/01 *Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others* v *Hydro Texaco AS* [2002] EFTA Court Report 310, paragraph 40.
[43] Judgment in *Stergios Demilitis* v *Henninger Bräu AG*, C-234/89, EU:C:1991:91, paragraph 14. See also Opinion in *Erste Bank der österreichischen Sparkassen AG and Others* v *Commission of the European Communities*, Joined Cases C-125/07 P and Others, EU:C:2009:192, paragraphs 143 to 148 and further references therein.

73. The Request also refers to another system of priority of engagement established in 14 other ports in Norway by another collective agreement concluded between the same parties.[44] Also this agreement forms part of the economic context in which the Framework Agreement occurs, and should be taken into account, provided that it contributes to the restrictive effects on competition.

74. The threshold for meeting the test on effect on trade is not particularly high. In *GT-Link*, which concerned abusive charging practices by an owner and operator of a port, the Court of Justice held that "abusive practices which, like those at issue in the main proceedings, affect undertakings providing transport by sea between two Member States, may affect trade between Member States".[45]

75. Further, the Authority submits that also the criterion of "the pattern and volume of the production and consumption of the [...] product [at issue] as well as to the habits and economic opportunities of vendors and purchasers",[46] developed in the context of the condition that in order to fall under Article 54 EEA, any dominant position must held in a substantial part of the territory covered by the EEA Agreement, may be of use in assessing whether the behaviour at issue may affect trade between Contracting Parties. Reference is made to paragraphs 55 and 56 above.

76. In the present case, the Authority considers there to be a sufficient degree of probability to conclude that that clause may affect trade between EEA States, not least because of the fact that the 13 largest ports in Norway are covered by the priority of engagement clause and that it applies to all ships of 50 tonnes dwt and more sailing between one of those ports and a port in another EEA State.

77. The answer to the third of the first set of questions should consequently be that although this is not a necessary criterion, identical and corresponding systems in other ports may be taken into account in the assessment of whether there is an appreciable effect on trade between EEA States in the main proceedings.

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[44] See paragraph 9 of the Request.
[45] Judgment in *GT-Link A/S* v *De Danske Statsbaner (DSB)*, C-242/95, EU:C:1997:376, paragraph 45. See also Judgment in *Silvano Raso and Others*, C-163/96, EU:C:1998:54, paragraph 26.
[46] Judgment in *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities*, Joined Cases 40/73 and others, EU:C:1975:174, paragraph 371.

7.3.2 Assessment under Article 53 EEA

78. Article 53 EEA prohibits certain agreements between undertakings, decisions by associations of undertakings and concerted practices, which restrict competition. An apparent question in the case is whether the collective agreement could be caught by the prohibition.

79. An agreement falls within the scope of Article 53 EEA only if it has been concluded between undertakings. The trade union NTF does not constitute an undertaking within the meaning of the EEA competition rules, whereas the administration offices are not parties to the agreement. For the Framework Agreement to be caught by Article 53 EEA, it would therefore have to be appraised whether any other parties to that agreement constitute undertakings within the meaning of the provision. In this context the Authority submits that the referring court could examine whether the members of NHO and NHO Logistikk og Transport are parties to that agreement. Alternatively, the referring court could examine whether the decision by NHO and NHO Logistikk og Transport to conclude the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings.[47]

80. If one were to consider that the Framework Agreement falls under Article 53 EEA on the basis of one of the alternatives above, the referring court would then have to appraise whether the agreement has as its object or effect the prevention, restriction or distortion of competition. Based on the facts set out in the Request, the main question would be whether boycotting third parties forms part of the agreement between the employers. Given that there is no explicit basis for this in the Framework Agreement and that the employee side have initiated and carried out the boycott alone, it would however seem unlikely to find a breach of Article 53 EEA on this basis.

81. Finally, the Authority recalls that any restriction of competition under Article 53(1) EEA, even restrictions of competition by object, may be weighed against their claimed pro-competitive effects in the context of Article 53(3) EEA.[48] However, anyone who relies on

[47] See in this regard *Landsorganisasjonen*, paragraphs 68 to 70.
[48] See, to that effect, judgment in *European Night Services and Others* v *Commission*, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, EU:T:1998:198, paragraph 136.

that provision must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied.[49]

7.3.3 Conclusion on the questions on competition law

82. Accordingly, the Authority submits that the EFTA Court should reply to the first set of questions on competition law as follows:

A.1 The use of a boycott against a port user in order to produce acceptance of a collective agreement, which entails that the port user must give preference to buying unloading and loading services from a separate administration office in the port, rather than use its own employees for the same work, is not covered by the exclusion from the competition rules of the EEA Agreement of agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment.

A.2 The system of a collective agreement and a boycott as that described in point 1 may be assessed under Articles 53 and 54 EEA.

A.3 In the assessment under Articles 53 and 54 EEA of whether there is a noticeable effect on trade between Contracting Parties, account may be taken of the existence of identical or corresponding systems in other ports.

8 ANALYSIS OF THE QUESTION ON THE FREEDOM OF ESTABLISHMENT

83. The second set of questions from the referring Court concerns in essence whether the boycott constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA, and whether certain specific circumstances are significant for the assessment of whether the restriction exists, and if so, the assessment of whether that restriction is lawful.

84. Article 31 EEA prohibits restrictions on the freedom of establishment of nationals of an EEA State in the territory of any other of these States. The Article is identical in substance to Article 49 of the Treaty on the Functioning of the European Union (TFEU).[50]

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[49] See, to that effect, judgment in *GlaxoSmithKline Services* v *Commission*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 82.

[50] The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way, see for instance Case E-2/06 *EFTA Surveillance Authority* v *Norway* [2007] EFTA Court Report 164, paragraph 59.

85. The Authority recalls that it is settled case-law that any national measure, albeit applicable without discrimination on grounds of nationality, which is liable to hinder or render less attractive the exercise by EEA nationals of the freedom of establishment guaranteed by the EEA Agreement constitutes a restriction within the meaning of Article 31 EEA.[51]

86. The Authority will first examine question B.1 on whether the boycott in this case constitutes a restriction on the freedom of establishment and whether such restriction can be justified. The Authority will then examine whether a specific condition is significant for this assessment in accordance with question B.2. Finally, as the Authority argues that the boycott in this case amounts to a restriction, the Authority will examine question B.3 on whether a specific circumstance in this case is relevant for the assessment of the lawfulness of that restriction.

8.1 Question B.1: Whether the boycott constitutes a restriction pursuant to Article 31 EEA

87. By its question B.1, the referring Court is asking whether it constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott against a company whose parent company is based in another EEA State, in order to produce acceptance of a collective agreement, which contains a priority of engagement clause requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.

8.1.1 The boycott constitutes a measure within the scope of Article 31 EEA

88. In order to assess whether the boycott at issue in the present proceedings amounts to a restriction on the freedom of establishment, it is necessary to consider first whether the collective action, in this case the boycott, constitutes a measure within the scope of Article 31 EEA.

89. The Authority considers that it is not just actions by public authorities that constitute measures within the scope of Article 31 EEA. The Court of Justice has held that the fundamental freedoms would be compromised if the abolition of barriers of national origin

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[51] Case E-17/14 *EFTA Surveillance Authority v the Principality of Liechtenstein*, Judgment of 31 March 2015, not yet reported, paragraph 38, and Case E-7/07 *Seabrokers* v *Staten v/Skattedirektoratet* [2008] EFTA Court Report 172, paragraph 50 and the case-law cited therein. See also Judgments in *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411, paragraph 37, *Caixa-Bank France* v *Ministère de l'Économie, des Finances et de l'Industrie,* C-442/02, EU:C:2004:586, paragraph 11 and Case C-576/13 *European Commission v Spain*, EU:C:2014:2430, paragraph 36.

could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.[52]

90. In this regard, it is settled case-law of the Court of Justice that restrictions on the fundamental freedoms cannot only result from the actions of public authorities, but also from rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.[53]

91. Moreover, the Court of Justice has also held, in its judgment in *Viking Line*,[54] that a collective action fell within the scope of Article 43 TEC (Article 49 TFEU).

92. The judgment in *Viking Line* concerned a collective action initiated by a Finnish trade union against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which were liable to deter it from exercising the freedom of establishment.

93. The Court considered that limiting the application of the prohibitions laid down by the fundamental freedoms to acts of a public authority would risk creating inequality in its application, since "[...] the working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons."[55]

94. Moreover, the collective action in question had to be considered as inextricably linked to the collective agreement, the conclusion of which the trade union was seeking, thus the collective action had to be considered as a measure within the scope of Article 43 TEC.

95. Although the Court of Justice found in *Viking Line* that the right to take collective action must be recognised as a fundamental right which forms an integral part of the general

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[52] See Judgment in *B.N.O Walrave and L.J.N. Koch* v *Association Union cycliste internationale and Others*, Case 36/74, EU:C:1974:140, paragraph 18 and Judgment in *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet and Others*, C-341/05, EU:C:2007:809, paragraph 98 and the case-law cited therein.

[53] See Judgment in *International Transport Workers' Federation and Others and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, paragraph 33; Judgment in *Walrave and Koch*, EU:C:1974:140, paragraph 17; Judgment in *Gaetano Donà* v *Mario Mantero*, Case 13/76, EU:C:1976:115, paragraph 17; Judgment in *Bosman*, C-415/93, EU:C:1995:463, paragraph 82; Judgment in *Christelle Deliège* v *Ligue Francophone de Judo et Disciplines Associées ASBL and Others*, Joined Cases C-51/96 and C-191/97, EU:C:2000:199, paragraph 47; Judgment in *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, paragraph 31; and Judgment in *Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, EU:C:2002:98, paragraph 120.

[54] Judgment in *Viking Line,* EU:C:2007:772.

[55] Judgment in *Viking Line,* EU:C:2007:772, paragraph 34.

principles of Community law, the exercise of that right may however be subject to restrictions.[56]

96. The right to take collective action thus cannot be relied on when it is contrary to national or EEA law, in this case therefore when it is contrary to Article 31 EEA.

97. It follows that, in the Authority's view, Article 31 EEA should be interpreted as meaning that it confers rights on private undertakings, which may be relied on against a trade union in circumstances such as those in the main proceedings.[57]

98. Should the Court consider that the *Viking Line* case law does not apply in the present case, the Authority submits that if the referring Court determines that the notified boycott is lawful in accordance with national law, this may constitute in itself a "national measure" within the scope of Article 31 EEA.

99. The Authority refers to the judgment of the Court of Justice in *Premier League*[58], which concerned a restriction on the freedom to provide services, in which the Court held:

> "It is true that the actual origin of the obstacle to the reception of such services is to be found in the contracts concluded between the broadcasters and their customers, which in turn reflect the territorial restriction clauses included in contracts concluded between those broadcasters and the holders of intellectual property rights. However, as the legislation confers legal protection on those restrictions and requires them to be complied with on pain of civil-law and pecuniary sanctions, it itself restricts the freedom to provide services."[59]

100. If the notified boycott in the present case would be declared lawful by the referring Court, the Authority submits that such decision would then provide the collective action with legal protection under section 2 of the Norwegian Boycott Act and thus in itself be capable of restricting the freedom of establishment.

101. However, should one consider that the boycott in question constitutes private action rather than a national measure, the question would arise whether the measure can nevertheless fall within the scope of Article 31 EEA in the circumstances.

102. The Authority submits that Article 31 EEA may still be applicable in the present case, as the fundamental freedoms may also apply in circumstances where the State abstains

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[56] Judgment in *Viking Line* EU:C:2007:772, paragraph 44.
[57] See Judgment in *Viking Line* EU:C:2007:772, paragraphs 61 and 66.
[58] Judgment in *Football Association Premier League Ltd and Others* v *QC Leisure and Others and Karen Murphy* v *Media Protection Services Ltd*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631.
[59] Judgment in *Premier League*, EU:C:2011:631, paragraph 88.

from adopting the measures required in order to deal with obstacles to the fundamental freedoms which are not caused by the State.[60]

103. The Court of Justice already found that Member States are required to not merely themselves abstain from adopting measures or engaging in conduct liable to constitute an obstacle to the fundamental freedoms, but also to take all necessary and appropriate measures to ensure that the fundamental freedoms are respected on their territory.[61] As regards the free movement of goods, the Court of Justice recently held that failure by a Member State to adopt adequate measures to prevent barriers to that free movement which have been created, in particular, through the actions of traders but made possible by specific legislation that that State has introduced, is just as likely to obstruct intra-Community trade as is a positive act.[62]

104. It follows that actions by private individuals, economic operators and organisations on the territory of the EEA States, which are liable to obstruct undertakings from exercising the freedom of establishment, are just as likely to hinder or render less attractive the exercise of the fundamental freedoms as a positive act by the State.

105. The Authority therefore considers that in the present case, in the event that the referring Court were to find the boycott to be lawful under national law, Norway would not have taken the necessary measures in order to ensure that the freedom of establishment is fully respected.

106. In light of the above, the Authority submits that Article 31 EEA therefore applies in situations where the State has not adopted and ensured to effectively apply the appropriate measures in order to safeguard the freedom of establishment and prevent restrictions on this fundamental right in its territory.

8.1.2 The existence of a restriction on the freedom of establishment pursuant to Article 31 EEA

107. As mentioned above, the EFTA Court has already held that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom. According to the case law of the EFTA Court,

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[60] Judgment in *Commission* v *French Republic*, C-265/95, EU:C:1997:595, paragraph 30.
[61] Judgment in *Commission* v *French Republic*, EU:C:1997:595, paragraphs 31 and 32.
[62] Judgment in *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 74 referring, to that effect, to the judgments in *Commission* v *France*, C-265/95, EU:C:1997:595, paragraph 31 and in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 58.

such measures are an encroachment upon the fundamental freedoms requiring justification.[63]

108. Furthermore, it is established case law of the Court of Justice that a restriction on the freedom of establishment exists where a national measure affects the access to the market for undertakings from other Member States and thereby hinders trade between those States.[64]

109. The present case concerns a Danish company, which exercised its right to establishment by setting up a Norwegian forwarding agent, Holship Norge AS ("Holship"), wholly owned by that Danish parent company. Consequently, the case concerns an undertaking from another EEA State.

110. The Authority will thus assess whether the boycott in question is liable to pose an obstacle to operators from other EEA States to exercise the freedom of establishment, e.g. to conduct loading and unloading work in the port of Drammen.

111. In a recent case before the Court of Justice, *Commission v Spain*,[65] the Court considered whether a priority of engagement clause for dockworkers, similar to the obligation of the Framework Agreement in the present case, amounted to a restriction on the freedom of establishment.[66]

112. The Spanish legislation in question required companies to hire "SAGEP" workers under conditions which they did not control, and thus imposed an obligation on operators from other Member States which was liable to have economic consequences and negative effects on their function. In particular, the measure was found to be liable to force an alteration of the companies' existing employment structures and recruitment policies, which may entail serious disruption within companies and have significant financial consequences. The Court found that this could, in turn, discourage foreign companies from conducting such activity in the Spanish ports.

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[63] Case E-2/06 *EFTA Surveillance Authority* v *The Kingdom of Norway* [2007] EFTA Court Report 164, paragraph 64 and Case E-9/11 *EFTA Surveillance Authority v The Kingdom of Norway* [2012] EFTA Court Report 442, paragraph 82.

[64] Judgment in *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture* v *SOA Nazionale Costruttori - Organismo di Attestazione SpA*, C-327/12, EU:C:2013:827, paragraph 45 and the case-law cited therein.

[65] Judgment in Case C-576/13 *European Commission* v *Spain*, C-576/13, EU:C:2014:2430.

[66] Judgment in *European Commission* v *Spain*, EU:C:2014:2430, paragraph 38.

113. The Court held that even if the obligations imposed by the Spanish port regime apply equally to both operators established in Spain and those from other Member States, they could still lead to prevent the latter category of operators from establishing themselves in the Spanish ports in order to pursue the activity of cargo handling.[67]

114. The Authority also notes that it is established case law of the Court of Justice that restrictions on the freedom of establishment exist where measures can make it more difficult for undertakings from other Member States to carry out their economic activity and to compete more effectively with undertakings established on a stable basis in the Member State concerned.[68]

115. In the present case, the Authority considers that the priority of engagement clause contained in the Framework Agreement, which require companies to use the dockworkers of the Administration Office for cargo handling instead of their own employees, is liable to have economic consequences for economic operators such as Holship.

116. If the boycott successfully induces Holship to enter into the Framework Agreement, Holship will be obliged to give preference to buy unloading and loading services at the applicable rates set by the Administration Office. Moreover, Holship would be prohibited from using its own employees for this work, unless the Administration Office decides that it does not have the capacity to carry out the assignment. Holship will thus not have the opportunity to influence the conditions or costs for the services provided by the Administration Office or to use its own workers in order to cover its needs for cargo handling.

117. Such situation, where Holship would be required to give preference to buy cargo handling services while it still has the resources within the company to fulfil this need, would entail a double cost for Holship as it already employs workers in order to carry out this specific task.

118. The use of a boycott to impose the Framework Agreement on Holship under the circumstances may also lead to an alteration of the company's existing employment structures and recruitment policies, as some of Holship's current employees may become

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[67] Judgment in *European Commission* v *Spain*, EU:C:2014:2430, paragraph 37.
[68] See, by analogy, Judgment in *Ministero dello Sviluppo economico*, EU:C:2013:827, paragraph 57 and the case-law cited therein, and Judgment in *Laval un Partneri*, EU:C:2007:809, paragraph 99.

superfluous if Holship's unloading and loading work was carried out by the dockworkers of the Administration Office.

119. If Holship is forced to enter into the Framework Agreement and thereby required not to use its own workers in order to carry out its economic activity, this might be capable of rendering the exercise of the freedom of establishment less attractive.

120. In the Authority's view, the abovementioned conditions of the Framework Agreement, if imposed on Holship through the boycott, would be capable of having economic consequences for Holship and hindering that undertaking from competing more effectively.

121. On those grounds, the Authority considers that the boycott in the present case constitutes a restriction contrary to Article 31 EEA.

8.1.3 The restriction cannot be justified pursuant to Article 31 EEA or any overriding reasons relating to the public interest

122. According to settled case law, measures that are liable to hinder or make less attractive the exercise of the freedom of establishment may be justified on the basis of the public grounds listed in Article 33 EEA or any overriding reasons in the public interest developed under that Article, provided that the restrictions are appropriate for securing attainment of the objective pursued, and do not go beyond what is necessary for attaining that objective.[69]

123. Article 33 EEA provides that a restriction can be justified on grounds of public policy, public security or public health. NTF has not argued that any of these grounds apply in the present case.

124. NTF has however argued that there are overriding public interest grounds for the claim of acceptance of the Framework Agreement, namely to guarantee the pay and working conditions of permanently employed dockworkers. NTF further argues that this is in accordance with Article 3(2) of ILO Convention No. 137.

125. The Authority submits that with regard to the ILO Convention No. 137, EEA States must, when implementing international agreements, such as this Convention, ensure that

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[69] See Case E-17/14 *EFTA Surveillance Authority v the Principality of Liechtenstein*, judgment of 31 March 2015, not yet reported, paragraph 40 and E-7/14 *EFTA Surveillance Authority v The Kingdom of Norway* [2014] EFTA Court Report 840, paragraph 35. See also Judgment in *Gebhard*, EU:C:1995:411, paragraph 37, Judgment in *Viking Line*, EU:C:2007:772, paragraph 75 and Judgment in *Laval un Partneri*, ECLI:EU:C:2007:809, paragraph 101.

they comply with the obligations arising from the EEA Agreement. Moreover, as pointed out in paragraph 66 above, Article 3(2) of the Convention does not require the introduction of a de facto monopoly or prevent the introduction of competition on the market for stevedoring services. Indeed, the EFTA Court has already held that international law cannot be relied on as justification for derogations from obligations under EEA law where international law is permissive rather than mandatory.[70]

126. Compliance with ILO Convention No. 137 therefore cannot justify a restriction on the freedom of establishment in the present case.

127. As regards the aim of protecting the dockworkers, the Authority notes that the EFTA Court has already recognised that the social protection of workers may constitute an overriding reason relating to the public interest.[71]

128. The Authority submits that while it is in principle for the national court to ascertain whether the objectives pursued by NTF by means of the collective action which it initiated against Holship concern the protection of workers,[72] the EFTA Court may provide the referring court with guidance as regards the interpretation of this notion of EEA law in the circumstances.

129. The right to take collective action for the protection of workers has been considered by the Court of Justice to be a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.[73] The protection of workers is thus one of the overriding reasons of public interest recognised by that Court.

130. In this regard, the Court of Justice found in its judgment in *Laval*[74], that a blockading action by a trade union of the host Member State, which was aimed at ensuring that the workers terms and conditions of employment in that case were fixed at a certain level, in principle fell within the objective of protecting workers.

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[70] See Case E-1/02 *EFTA Surveillance Authority v The Kingdom of Norway,* [2003] EFTA Court Report 1, paragraph 58.

[71] See Case E-14/12 *EFTA Surveillance Authority v The Principality of Liechtenstein,* [2013] EFTA Court Report 256, paragraph 32 and Case E-2/11 *STX Norway Offshore AS m.fl.* v *Staten v/ Tariffnemnda,* [2012] EFTA Court Report 4, paragraph 81 and the case-law cited therein.

[72] See E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Court Report 330, paragraph 78, Case E-3/06 *Ladbrokes Ltd.* v *The Government of Norway, Ministry of Culture and Church Affairs and The Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, paragraph 43 and Judgment in *Viking Line* EU:C:2007:772, paragraph 80.

[73] Judgment in *Schmidberger Internationale Transporte und Planzüge* v *Republic of Austria,* C-112/00, EU:C:2003:333 paragraph 74, Judgment in *Viking Line,* EU:C:2007:772, paragraph 77 and the case-law cited therein and Judgment in *European Commission* v *Spain,* EU:C:2014:2430, paragraph 50.

[74] Judgment in *Laval un Partneri,* EU:C:2007:809.

131. However, the Court held that "[...] as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective."[75]

132. In the present case, NTF intends to use the boycott to impose the Framework Agreement on Holship AS, which entails that the dockworkers of the Administration Office are given preference to carry out Holship's unloading and loading work in Drammen port. The Framework Agreement consequently provides the workers of the Administration Office with an advantage over Holship's own employees.

133. In its Request for an Advisory Opinion, the referring Court mentions that Holship has hired four workers in order to carry out the company's unloading and loading work in Drammen port. There is no mention however of why the dockworkers of the Administration Office require better protection than these dockworkers employed by Holship.

134. Furthermore, both the dockworkers of the Administration Office and the employees of Holship are covered by different Norwegian collective agreements which protect the working conditions of those workers respectively. The boycott therefore does not appear to aim at securing the working conditions for workers who are not covered by a collective agreement and whose rights consequently are not protected.

135. In such circumstances, the Authority questions whether the collective action in this case actually pursues a legitimate aim. Instead of aiming at protecting the working conditions and guarantee pay for workers, it would on the contrary appear to aim at providing one group of workers with an advantage over another group of workers. Moreover, it would seem as the boycott may intend to protect one group of workers to the detriment of other workers, as the first group may, if Holship enters into the Framework Agreement, render the latter group superfluous to their employer.

136. The Authority doubts that this can be seen as protection of workers in a manner which is justifiable as an overriding reason relating to the public interest.

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[75] Judgment in *Laval un Partneri*, EU:C:2007:809, paragraph 107.

137. In light of the above, the Authority considers that the restriction on the freedom of establishment imposed by the boycott in the present proceedings cannot be justified by Article 33 EEA or any overriding reasons in the public interest developed under that Article.

8.1.3.1 The boycott is not appropriate to secure the attainment of the objective which it pursues and go beyond what is necessary in order to attain it

138. In the event that the Court were to consider that the boycott in question in the main proceedings is pursuing a legitimate aim, the measure still needs to be proportionate, in that it must be appropriate to secure the attainment of the objective which it pursues and do not go beyond what is necessary in order to attain it.[76]

139. In the present case, this entails that even if the Court were to consider that a boycott in order to force companies to enter into the Framework Agreement would be able to achieve the aim of protecting the social rights of workers, it still needs to be assessed whether this objective could not have been achieved by other more appropriate and less restrictive means.

140. According to the case law of the Court of Justice, it is common ground that a collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members.[77]

141. In accordance with the findings of the Court of Justice in *Viking Line*[78], the Authority submits that it is for the national court to examine whether or not NTF had other means at its disposal which were less restrictive of the freedom of establishment in order to induce Holship to enter into the Framework Agreement, and whether NTF had exhausted those means before initiating such action.

142. NTF claims that the boycott in the present case aims at protecting the working conditions and to guarantee pay for the dockworkers of the Administration Office, which historically have been casual workers without such guarantees. The key element of the Framework Agreement for ensuring both stable work and pay for these dockworkers is the priority of engagement clause.

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[76] See, for instance, Case E-14/12 *EFTA Surveillance Authority v The Principality of Liechtenstein*, [2013] EFTA Court Report 256, paragraph 32 and Case E-9/11 *EFTA Surveillance Authority v The Kingdom of Norway* [2012] EFTA Court Report 442, paragraph 83.

[77] Judgment in *Viking Line*, EU:C:2007:772, paragraph 86.

[78] Judgment in *Viking Line*, EU:C:2007:772, paragraph 87.

143. The Authority however considers that the aim of protecting the dockworkers of the Administration Office could be achieved by means that are less restrictive on the freedom of establishment.

144. As was successfully argued by the European Commission in the case of *Commission* v *Spain*, pooling arrangements where dockworkers are organised in entities in charge of recruiting and training port workers, should not be used to prevent suitably qualified individuals or undertakings from providing cargo-handling services, or to impose, on employers, workforce they do not need.[79]

145. In line with the Court's findings in that case, the dockworkers in Drammen port could be organised in a pool of dockworkers operating as a temporary work agency, from which the companies in Drammen port are free to hire workers permanently or temporary to cover their needs for unloading and loading services.

146. As was stated in the Request for an Advisory Opinion, most companies operating in Drammen port do not have the manpower required to carry out cargo-handling and are therefore dependent on the services provided by the dockworkers at the Administration Office.

147. The Authority therefore submits that the use of a boycott in order to induce Holship to enter into the Framework Agreement is not proportionate, as the aim of that boycott, namely to protect dockworkers' conditions, could have been achieved by other less restrictive means.

8.1.4 Conclusion

148. In light of the above, the Authority submits that the boycott in question in the main proceedings constitute a restriction on the freedom of establishment contrary to Article 31 EEA. This restriction cannot be justified by Article 33 EEA or any overriding reasons relating to the public interest developed under that Article. Furthermore, the boycott is not appropriate to secure the attainment of the objective which it pursues and go beyond what is necessary in order to attain it.

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[79] Judgment in *European Commission* v *Spain*, EU:C:2014:2430, paragraph 27, and the European Commission's Communication COM (2007) 616 final on a European ports policy referred to therein, page 11, available at:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0616:FIN:N:PDF

8.2 Question B.2: The volume of the unloading and loading services is not significant for assessing whether a restriction exists

149. By its question B.2, the referring Court is asking whether it is of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services is proved to be limited and/or sporadic.

150. The Authority submits that whether the measure has any, or very little, actual effect on the freedom of establishment does not change the fact that the measure constitutes a restriction which should be prohibited unless it is justified under Article 33 EEA (or any other overriding reason of public interest) and provided the principle of proportionality is respected.

151. In particular, there is no *de minimis* rule applying to the freedom of establishment. The Court of Justice has held that "[...] a restriction on freedom of establishment is prohibited by Article 43 EC, even if it is of limited scope or minor importance".[80]

152. This means that even if the collective action in question has no or little restrictive effect on the freedom of establishment, it is still an obstacle to the fundamental freedom unless justified on the grounds explained above.

153. Consequently, the Authority submits that it has no significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

8.3 Question B.3: It is of significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement

154. By its question B.3, the referring Court is asking whether it would be of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work.

155. The question is only relevant in case the Court replies to question B.1 in the affirmative, and thereby establishes that a restriction exists in the present case.

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[80] Judgment in *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industri,* C-170/05, EU:C:2006:783, paragraph 50 and the case-law cited therein.

156. In essence, the question concerns whether the boycott in question can be justified despite it being capable of restricting Holship's freedom of establishment, because Holship's own dockworkers are not covered by a collective agreement which concern unloading and loading work.

157. As regards the relevance of the other collective agreement for the assessment of the lawfulness of the restriction on the freedom of establishment, the Authority is of the view that it matters that in the circumstances, Holship's workers are already covered by another collective agreement.

158. The Authority considers that NTF cannot justify the boycott with reference to the protection of the workers conditions and pay as long as the priority of engagement clause applies regardless of whether the company is party to another collective agreement which may provide equal or even higher protection for its employees.[81]

159. As the Authority has already assessed in paragraphs 132 to 136, the boycott does not pursue a legitimate aim when that aim appears to be to provide one group of workers with an advantage over another group of workers.

160. Consequently, the Authority submits that it is of significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement even if that collective agreement concerns matters other than unloading and loading work.

8.4 Conclusion on the questions on freedom of establishment

161. Accordingly, the Authority submits that the EFTA Court should reply to the second set of questions on the freedom of establishment as follows:

B.1 It constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott against a company in order to produce acceptance of a collective agreement, which contains a priority of engagement clause requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.

B.2 It is not of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic.

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[81] See for comparison, Judgment in *Viking Line*, EU:C:2007:772, paragraph 89.

B.3 It is of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work.

9 CONCLUSION

162. On those grounds, the Authority respectfully proposes that the Court respond to the Request for an Advisory Opinion from the Supreme Court of Norway (*Høyesterett*) as follows:

A.1 The use of a boycott against a port user in order to produce acceptance of a collective agreement, which entails that the port user must give preference to buying unloading and loading services from a separate administration office in the port, rather than use its own employees for the same work, is not covered by the exclusion from the competition rules of the EEA Agreement of agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment.

A.2 The system of a collective agreement and a boycott as that described in point 1 may be assessed under Articles 53 and 54 EEA.

A.3 In the assessment under Articles 53 and 54 EEA of whether there is a noticeable effect on trade between Contracting Parties, account may be taken of the existence of identical or corresponding systems in other ports.

B.1 It constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott against a company in order to produce acceptance of a collective agreement, which contains a priority of engagement clause requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.

B.2 It is not of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic.

B.3 It is of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work.

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