Case

# E-14/15

## Holship Norge AS

=V=

## Norsk Transportarbeiderforbund

*(Articles 31, 53 and 54 EEA – Competition law – Collective agreements – Collective action – Freedom of establishment)*

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# Summary of the Judgment

1 A collective agreement falls outside the scope of the EEA competition rules if it fulfils two requirements. First, it has to have been entered into following collective bargaining between employers and employees, and secondly, it must pursue the objective of improving conditions of work and employment.

2 As regards the second requirement, account must be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The agreement must not go beyond the improvement of conditions of work and employment.

3 When examining the collective agreement's provisions, their aggregate effect must be considered. Even if individually the provisions would not lead to any certain resolution of the status of the collective agreement in relation to the applicability of Articles 53 and 54 EEA, their aggregate effect may bring the agreement within the scope of those Articles.

4 For an entity to be regarded as an undertaking within the meaning of Articles 53 and 54 EEA it must be engaged in an economic activity. The provision of stevedore services is an economic activity, since it consists in the offering of a service on a market where the service provider actually or potentially competes with other providers. It is for the national court to assess to whom the provision of stevedoring services is attributable.

5 Articles 53 and 54 EEA apply to conduct which may have an appreciable effect on trade between EEA States, be it direct or indirect, actual or potential. Articles 53 and 54 EEA may apply separately or jointly.

6 Pursuant to Article 54 EEA, the national court must determine the relevant geographic market. If it considers that the entity in question holds a dominant position, it would need to determine whether that position covers a substantial part of the EEA territory. A single port may be regarded as a substantial part of the EEA territory.

7 Should the national court find that the port in question cannot be regarded as a substantial part of the EEA territory, it would have to take into account identical or corresponding systems which may exist in other ports.

8 As for the question of abuse, the national court has to assess whether the entity in question obliges purchasers to obtain all or most of their requirements for stevedoring services from it, charges disproportionate prices, or refrains from the use of modern technology.

9 The exemption of collective agreements from EEA competition rules does not cover a clause whereby a port user is obliged to give priority to another company's workers over its own employees, or the use of a boycott in order to procure acceptance of the collective agreement containing that clause.

10 As regards the interpretation of Article 31 EEA, a boycott that aims at procuring acceptance of a collective agreement which includes a priority clause such as the one at issue constitutes a restriction on the freedom of establishment.

11 Restrictions on the freedom of establishment may be justified either by Article 33 EEA or by overriding reasons of general interest, such as the protection of workers. Those justifications must be interpreted in the light of fundamental rights, as unwritten principles of EEA law.

# Judgment of the Court

## 19 April 2016[1]

*(Articles 31, 53 and 54 EEA – Competition law – Collective agreements – Collective action – Freedom of establishment)*

In Case E-14/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

**Holship Norge AS**

and

**Norsk Transportarbeiderforbund**,

concerning the interpretation of the EEA Agreement, and in particular Articles 31, 53 and 54,

## The Court

*composed of:* Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

*Registrar:* Gunnar Selvik,

1 Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

having considered the written observations submitted on behalf of:

– Holship Norge AS ("Holship"), represented by Nicolay Skarning, Advocate;

– Norsk Transportarbeiderforbund (the Norwegian Transport Workers' Union – "NTF"), represented by Håkon Angell and Lornts Nagelhus, Advocates;

– the Norwegian Government, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Director, Maria Moustakali, Officer, Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Luigi Malferrari and Manuel Kellerbauer, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Holship, represented by Nicolay Skarning and Kristin Valla, Advocates; NTF, represented by Håkon Angell and Lornts Nagelhus; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Carsten Zatschler; and the Commission, represented by Luigi Malferrari and Manuel Kellerbauer, at the hearing on 11 November 2015,

gives the following

# Judgment

## I LEGAL BACKGROUND

### EEA LAW

1 Article 31(1) EEA reads as follows:

*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.*

2 Article 34 EEA reads as follows:

*Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.*

*'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons*

*governed by public or private law, save for those which are non-profit-making.*

3 Article 53 EEA reads as follows:

*1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

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

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

*2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

*3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

*– any agreement or category of agreements between undertakings;*

– *any decision or category of decisions by associations of undertakings;*

– *any concerted practice or category of concerted practices;*

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

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

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

4 Article 54 EEA reads as follows:

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

*Such abuse may, in particular, consist in:*

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

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

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

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

5 Article 59(2) EEA reads as follows:

*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

## NATIONAL LAW

6 Section 2 of the Norwegian Boycott Act of 5 December 1947 No 1 ("the Boycott Act") lays down several conditions for a boycott to be lawful. The condition relevant for the present case is Section 2(a), according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without causing a breach of the law. Pursuant to Section 3, legal action may be instigated to determine whether a notified boycott is lawful.

## THE FRAMEWORK AGREEMENT

7 The collective agreement relevant to this case is the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere* – "the Framework Agreement"). Initially entered into in 1976 and subsequently renewed every other year, it was created to address the fact that dockworkers were originally casual workers with no guarantee of

work or a consistent salary. The Framework Agreement establishes a fixed pay scheme for certain dockworkers in the 13 largest ports in Norway, including the Port of Drammen.

8 The parties to the Framework Agreement on the employee side are the Norwegian Confederation of Trade Unions (*Landsorganisasjonen i Norge* – "LO"), which is the largest labour organisation in Norway, and its member union NTF, which represents the interests of dockworkers *inter alia* in Drammen. The parties on the employer side are the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon* "NHO"), which is the largest employers' organisation in Norway, and its member association, the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*).

9 Clause 2(1) of the Framework Agreement, the so-called priority of engagement clause ("the priority clause"), reads as follows:

*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.*

10 Unloading and loading operations that fall within the scope of the priority clause are limited to the transfer of cargo from the ship onto the quay and vice versa. For the handling of goods from and to the quay, the port users may choose whether to engage the dockworkers or use other workers.

11 In accordance with clause 3 of the Framework Agreement, the Administration Office for Dock Work in Drammen (*Administrasjonskontoret for havnearbeid i Drammen* –"the AO") was established.

## ILO CONVENTION NO 137

12 Norway is a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the ILO Convention"), which entered into force on 24 July 1975. The priority clause in the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention.

13 Article 2 of the ILO Convention reads as follows:

> 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.*

14 Article 3 of the ILO Convention reads as follows:

> 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.*

15 Article 7 of the ILO Convention reads as follows:

> *The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.*

## II FACTS AND PROCEDURE

16 By a letter of 5 June 2015, registered at the Court on 11 June 2015, the Supreme Court of Norway made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Holship and NTF.

17 The case before the Supreme Court concerns an advance ruling pursuant to Section 3 of the Boycott Act regarding the lawfulness of a notified boycott. NTF gave notice of a boycott of Holship in order to procure its acceptance of the Framework Agreement giving priority of engagement for stevedore work to dockworkers registered at the AO at the Port of Drammen.

18 Holship is a Norwegian forwarding agent wholly owned by a Danish company. Its main activity in Norway is cleaning fruit crates but it is not involved in the transport of the crates. In addition, Holship handles certain goods transported by ships. Holship is neither a party to the Framework Agreement nor a member of NHO or the Norwegian Logistics and Freight Association. Rather, it is a member of the Norwegian Business Association (*Bedriftsforbundet*).

19 Holship has signed a collective agreement with the Norwegian General Workers' Union (*Norsk Arbeidsmandsforbund*), a union that, like NTF, is a member union of LO. The collective agreement covers cleaning work (referred to as onshore cleaning), which corresponds to the main business of the company. Therefore, there is no conflict between the matters covered by that agreement and the Framework Agreement. However, Holship has chosen to apply the collective agreement also to unloading and loading work.

20 Registered dockworkers in 14 other ports benefit from priority of engagement for unloading and loading under the same terms as provided for in the Framework Agreement, but they do not have a

fixed pay scheme. This is provided for in the the dock work agreement for Southern and Northern Norway (*Losse- og lasteoverenskomsten for Sør- og Nord-Norge*), entered into between the same parties as the Framework Agreement.

21 The priority of engagement is administered by the AO, which was established under clause 3 of the Framework Agreement. All permanently employed dockworkers in the Port of Drammen are engaged by the AO, which currently employs eight dockworkers. They are paid a fixed wage and may earn supplemental pay varying with each ship call. The dockworkers work under a rota managed by the AO. Additional personnel can be engaged when needed.

22 The AO is a non-profit-making entity and a legal person *sui generis*. It has its own board consisting of three representatives of the employers and two representatives of the employees. It is one of the board's tasks to employ the AO's dockworkers. Ships arrive 24 hours a day, and most port users rely upon AO's dockworkers to carry out unloading and loading operations.

23 Were Holship to affiliate to the Framework Agreement, it would be bound to observe the right of dockworkers employed by the AO to priority of engagement for unloading or loading operations at ship calls. The AO would decide whether it had the capacity to take on an assignment or whether Holship would be allowed to use its own employees. Holship would not be obliged to participate in the management of the AO or to provide the AO with funds. It would be required to pay for the unloading and loading assignments at the applicable rates set by the AO.

24 Holship has previously used the services of the AO. At the turn of the year 2012/2013, Holship acquired a new customer, which entailed an increase in the company's activities in the Port of Drammen. Until then, Holship employed one terminal worker. Now it employs five workers to handle the unloading and loading work. The parties disagree on the extent of Holship's unloading and loading activities in the Port of Drammen and on its relevance for determining whether the freedom of establishment has been restricted.

25 Following the company's increased activities in the Port of Drammen and its practice of using its own terminal workers for unloading and loading work, NTF sent a letter to Holship on 10 April 2013 demanding that Holship respect the Framework Agreement. Holship did not respond. NTF sent further letters requesting a response and eventually gave notice of a boycott in letters dated 26 April and 11 June 2013. In the latter, NTF stated that a declaration from the competent national court would be sought to determine whether the notified boycott was lawful. NTF brought a case before Drammen District Court (*Drammen tingrett*) on 12 June 2013, seeking an order declaring that the boycott notified in the letter of 11 June 2013 was lawful.

26 On 19 March 2014 Drammen District Court ruled that the notified boycott was lawful. On appeal, Borgarting Court of Appeal (*Borgarting lagmannsrett*) reached the same conclusion in a judgment of 8 September 2014.

27 Both the District Court and the Court of Appeal found that the priority of engagement provided by the Framework Agreement was exempted from EEA competition law and Norwegian competition law as it relates to conditions of work and employment. Furthermore, the Court of Appeal held that the fact that Holship was compelled to accept the terms of the Framework Agreement did not conflict with Article 31 EEA. Article 31 EEA was not at issue in the proceedings before the District Court.

28 Holship challenged the judgment of the Court of Appeal before the Supreme Court of Norway. Leave to appeal was granted by decision of 14 January 2015.

29 On 5 June 2015, the Supreme Court of Norway decided to make a request to the Court under Article 34 SCA and posed the following questions:

On competition law:

**(A1) 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 [of the Request], rather than to use its own employees for the same work?**

**(A2) If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?**

**(A3) 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 appreciable effect on cross-border trade within the EEA?**

On the freedom of establishment:

**(B1) 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 [of the Request], rather than use its own employees for this work?**

**(B2) 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?**

**(B3) 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?**

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

## III ANSWERS OF THE COURT

### QUESTION A1

31 By its first question concerning competition law, the Supreme Court seeks to establish whether the exemption of collective agreements from EEA competition law applies to the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from an administration office in place of using its own employees for the same work.

## OBSERVATIONS SUBMITTED TO THE COURT

32 Holship, ESA and the Commission, mainly relying on the conditions set out in the judgment of the Court of Justice of the European Union ("ECJ") in *Albany* (C-67/96, EU:C:1999:430) and the Court's judgment in *LO* (Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. 114) ("*LO*"), claim that the priority clause goes beyond the objective of improving conditions of work and employment and therefore is not exempted from the application of the EEA competition rules. ESA and the Commission argue that the notion of improving conditions of work and employment remains vague and that, in light of the *LO* judgment in particular, there are limits on how broadly it can be construed. Additionally, according to ESA, it does not suffice to consider merely whether the general objective of a collective agreement is to improve the conditions of work and employment, instead each provision must be assessed individually.

33 In relation to the case at hand, ESA and the Commission argue that the Framework Agreement imposes obligations on third parties and is detrimental to the interests of other workers, such as those employed by Holship. A general exclusion of collective agreements from competition rules carries a risk that trade associations will be able to circumvent those rules with provisions that restrict competition without having to establish a social policy justification for such restrictions.

34 NTF and the Norwegian Government accept that provisions of a collective agreement that do not improve conditions of work and employment may come within the scope of the EEA competition rules. However, they argue that, according to the case law of the Court, the concept of conditions of work and employment must be interpreted broadly and include various matters related to improving the situation of workers (reference is made to *LO*, cited above, paragraph 53).

35 NTF concludes that the priority clause pursues social policy objectives and contributes to securing and improving conditions of work and employment for dockworkers. Therefore, the clause is not subject to the EEA competition rules.

36 On the question whether the provisions of the Framework Agreement fall outside the EEA competition rules, the Norwegian Government argues that it is for the Supreme Court to examine the purpose of the priority clause and to decide whether it pursues social objectives by improving work and employment conditions for dockworkers. In this regard, the Norwegian Government refers to the Supreme Court's judgment of 5 March 1997 in *Sola Havn* and notes that the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention and that its objective is to give dockworkers security of employment and pay by setting up dock work offices providing dockworkers with terms of permanent employment and minimum rates of pay, both of which are implemented by granting dockworkers priority of engagement.

## FINDINGS OF THE COURT

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

38 The law governing the creation, application and interpretation of agreements concluded in the process of collective bargaining between management and labour has not been the subject of

harmonisation within the EEA. However, both national law and collective agreements must comply with EEA law.

39 Fundamental differences distinguish the labour market from the markets for goods, services and capital. Industrial societies have recognised the need to establish a balance between employers and workers by enacting labour laws that authorise unions of workers to conclude collective agreements with employers or associations of employers.

40 It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if such agreements were prohibited because of their inherent effects on competition (see *LO*, cited above, paragraphs 36 to 44, and case law cited; and for comparison, the ECJ in *Albany*, cited above, paragraph 59; and the Opinion of Advocate General Poiares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* ("*Viking Line*"), C438/05, EU:C:2007:292, point 27).

41 Yet, to exclude all collective agreements from the reach of competition law would go too far. It would create a legal environment where collective agreements containing provisions restricting competition could be concluded, without there being any judicial review of such restrictions.

42 According to established case law, the following conditions must each be satisfied for a collective agreement to fall outside the scope of competition law: the agreement must have been entered into following collective bargaining between employers and employees, and it must pursue the objective of improving conditions of work and employment (see *LO*, cited above, paragraphs 49 and 50).

43 The first requirement, that the agreement must have been entered into after collective bargaining between employers and employees, is fulfilled in the present case.

44 With regard to the second requirement, the Court notes that the term "conditions of work and employment" must be interpreted broadly (see *LO*, cited above, paragraph 53 and case law cited). It relates to core elements of collective agreements, such as wages, working hours and other working conditions. Further elements may concern, *inter alia*, safety, the workplace environment, holidays, training and continuing education, and consultation and co-determination between workers and management.

45 In determining whether the second requirement is fulfilled, account must be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The subsequent practice of the parties to the agreement may be of importance, as may be the effect, in practice, of its provisions. It is not sufficient that the broad objective of a collective agreement is recognised as seeking to improve conditions of work and employment, as individual provisions may be directed towards other purposes (see *LO*, cited above, paragraph 51).

46 When examining the collective agreement's provisions, their aggregate effect must be considered. Even if individually the provisions would not lead to any certain resolution of the status of the collective agreement in relation to the applicability of Articles 53 and 54 EEA, their aggregate effect may bring the agreement within the scope of those Articles (see *LO*, cited above, paragraph 57).

47 Clause 3 of the Framework Agreement provides for the establishment of the AO in the Port of Drammen, and clause 2(1) is the priority clause for dockworkers employed by the AO.

48 It follows from the request that the aggregate effect of the two clauses is that port users bound by the Framework Agreement must

engage dockworkers employed by the AO to unload or load cargo from or to their ships, unless the AO has decided that it has insufficient capacity to take on an assignment. Consequently, these provisions appear to benefit workers employed by the AO, in the sense that they guarantee the employees of the AO permanent employment and a certain wage.

49 It follows further from the request that the boycott seeks to protect the effect of this system, by compelling Holship to observe the terms of the Framework Agreement. As a rule, a trade union's industrial action is initiated to promote only the interests of its members. The Framework Agreement established the AO in the Port of Drammen. NTF is a party to that agreement. It follows from the request that NTF participates in the management of the AO. It is in NTF's and the AO's common interest to preserve the market position of the AO. This combination of a business objective with NTF's core tasks as a trade union becomes possible when a trade union engages in the management of an undertaking, such as it turns out in the present case. In this situation, NTF acts in support of the AO. The boycott must therefore also be attributed to the AO, although it was NTF, which notified the boycott.

50 The effects of the priority clause and the creation of the AO appear therefore not to be limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition (see *LO*, cited above, paragraph 55).

51 Moreover, the Court notes that the AO system in the present case protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing

the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

52 Consequently, the collective agreement in the present case appears to differ from those at issue in the *Albany* line of case law and, for the reasons set out above, cannot generally be exempted from the scope of the EEA competition rules.

53 Therefore, the answer to Question A1 must be that the exemption from the EEA competition rules applicable to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of a boycott against a port user in order to procure 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 company, such as the AO, in place of using its own employees for the same work.

## QUESTIONS A2 AND A3

54 By its second question concerning competition law, the referring court essentially asks whether the system under consideration should be assessed under Article 53 or 54 EEA. By its third question concerning competition law, it asks further whether the existence of an identical or corresponding system in other ports must be taken into account in the assessment of whether there is an appreciable effect on cross-border trade within the EEA. These questions will be assessed together.

## OBSERVATIONS SUBMITTED TO THE COURT

55 Holship contends that the exclusive right to carry out an economic activity conferred upon the AO and the workers employed there is

contrary to Article 53 EEA, as this goes beyond the aim of improving working and employment conditions.

56 Furthermore, Holship claims that the imposition of a duty to hire personnel regardless of actual need constitutes an abuse of a dominant position contrary to Article 54 EEA, in the sense that payment is demanded for services that have not been requested and are not required.

57 ESA argues in relation to Article 53 EEA that NTF does not constitute an undertaking within the meaning of the EEA competition rules. Furthermore, although the AO is an undertaking, it is not a party to the Framework Agreement and therefore not a party to an agreement for the purposes of Article 53 EEA. Hence, for there to be a breach, there would have to be another party to the Framework Agreement constituting an undertaking within the meaning of the provision. Alternatively, ESA suggests that the referring court could examine whether the decision by NHO and the Norwegian Logistics and Freight Association to conclude the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings. Should the Framework Agreement fall under Article 53 EEA, ESA contends that, in any event, a breach is unlikely given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone initiated the boycott in question.

58 In relation to Article 54 EEA, ESA submits that it is for the Supreme Court to determine whether the AO as an undertaking holds a dominant position on the relevant market, which – in ESA's view – is the provision of stevedoring services in Drammen. In this respect, ESA refers to the ECJ's judgment in *Merci* (C-179/90, EU:C:1991:464), which held that even a market limited to a single port can constitute a substantial part of the internal market. ESA also cites the ECJ's judgment in *Crespelle* (C-323/93, EU:C:1994:368), which held that there may be an EU interest in a situation that involves a network of

undertakings enjoying dominance in markets, which together may constitute a substantial part of the territory covered by the internal market. ESA submits that, by analogy, it must amount to an abuse for an undertaking in a dominant position to initiate or employ a boycott against a purchaser in order to compel the purchaser to accept a priority clause. Reference is made to the ECJ's judgment in *Hoffmann-La Roche* (102/77, EU:C:1978:108). Therefore, the referring court should consider whether the AO initiated the boycott or was involved in its preparation.

59 Finally, ESA considers there to be sufficient evidence to conclude that the priority clause may affect trade between EEA States, not least because of the fact that it covers the 13 largest ports in Norway and applies to all ships of 50 tonnes dwt and more sailing between one of those ports and a port in another EEA State.

60 The Commission notes that Articles 53 and 54 EEA apply only to undertakings. Neither the dockworkers themselves nor NTF qualify as an undertaking. However, in the Commission's view, the AO constitutes an undertaking.

61 With regard to the cartel prohibition laid down in Article 53 EEA, the Commission contends that it must be examined whether the AOs in various Norwegian ports are actual or potential competitors. In the Commission's view, this cannot be the case as it would generate disproportionate additional costs for an AO established in one port to provide registered dockworkers to ship calls in another port. Thus, for the assessment of the priority clause, the relevant geographic market is local.

62 As regards Article 54 EEA, the Commission argues that it is unnecessary to determine whether the Port of Drammen is in itself a substantial part of the territory covered by the EEA Agreement. This is because the priority clause that applies in all major ports in Norway should be considered cumulatively to cover a substantial part of the internal market. The Commission considers the conduct of the AO to constitute an abuse in that it seeks to force a customer to take its services although the customer does not want or need them. Moreover, the behaviour of the AO cannot be justified and, in any case, goes beyond what is necessary to protect the rights of employees.

63 Like ESA, the Commission submits that, even if the Port of Drammen is considered too small to be of importance for trade between EEA States, the cumulative impact of the priority clause applying in all major ports in Norway in accordance with the Framework Agreement still leads to the conclusion that trade between EEA States may be affected.

64 NTF, with reference to the judgments in *Albany* (cited above) and *Becu and Others* (C-22/98, EU:C:1999:419), argues that neither itself, nor the employers represented by NHO, can be regarded as undertakings. Therefore, the present case does not give rise to an agreement between undertakings for the purposes of Article 53 EEA. Furthermore, NTF claims that, whether or not the AO can be regarded as an undertaking, it cannot be held that any form of concerted practice exists.

65 With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an undertaking. In the view of NTF, the AO is rather to be regarded as an administrative body for what is characterised as a "pool agreement". The priority clause has been granted to the individual dockworkers and not to the AO. NTF claims that although the workers are formally employed with the AO, they are subject to

the port user's instructions in the same way as if they were employed by the user. Finally, NTF argues that the AO cannot be described as abusing a dominant position since its activity is the hiring out of dockworkers and not the provision of dock work services. Therefore, the AO does not, in the view of NTF, offer unloading and loading services in the Port of Drammen and consequently does not operate on the market for unloading and loading services. Furthermore, NTF observes that the collective agreement system in Norwegian ports does not establish a monopoly, but only a priority clause, which means that the labour capacity is not restricted, as port users are free to use other labour where demand cannot be met by the AO.

66 NTF adds that the third question concerning competition law must be answered in the affirmative, provided that the other conditions are met.

## FINDINGS OF THE COURT

### Notion of an undertaking

67 The application of Articles 53 and 54 EEA requires that the actors involved are undertakings.

68 Under the 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 (see Article 1 of Protocol 22 to the EEA Agreement, and *LO*, cited above, paragraph 62).

69 Any activity consisting of offering goods or services in a given market is an "economic activity" (see, in particular, Joined Cases E-4/10, E-6/10 and E-7/10 *REASSUR and Swisscom* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54).

70 In the present case, the relevant activity under consideration is the offering and performance of stevedore work by the AO, a legal person *sui generis*. The referring court must assess, in light of the system established under the Framework Agreement, whether this activity is attributable to the AO.

71 The stevedore services offered and provided by the AO are an economic activity as this involves offering a service on a market. The customers in this market are all undertakings requiring stevedore work at the Port of Drammen, whether or not they are bound by the Framework Agreement. The AO competes with other actual or potential market players who offer such stevedore services. Furthermore, the fact that the AO is organised as a non-profit entity is of no relevance in the assessment whether the AO is to be considered an undertaking (compare the ECJ in *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraphs 19 to 22).

72 Accordingly, an entity such as the AO will constitute an undertaking within the meaning of Articles 53 and 54 EEA provided that the conditions which the Court has set out above are fulfilled. It is for the referring court to assess whether that is the case in the present proceedings.

73 For the sake of order, the Court recalls that a trade union is normally not considered an undertaking when it acts as an agent of its members and is solely an executive organ of an agreement between its members (compare the ECJ in *Becu and Others*, cited above, paragraph 28). However, a trade union will be considered an undertaking with respect to activities where it is acting in its own right, independent to a certain extent of the will of its members, and not merely operating as an executive organ of an agreement between its members (compare the Opinion of Advocate General Jacobs in *Albany*, C-67/96, EU:C:1999:28, points 222 and 224). With regard to trade union activities a two-stage approach is therefore necessary. It must be asked, first, whether a certain activity is attributable to the

trade union itself and, if so, second, whether that activity is of an economic nature.

## Effect on trade between EEA States

74 Article 53 EEA prohibits certain agreements between undertakings "which may affect trade between Contracting Parties". Similarly, Article 54 EEA prohibits the abuse by an undertaking of a dominant position "in so far as it may affect trade between Contracting Parties". The concept of an agreement or an abuse of a dominant position which "may affect trade between Contracting Parties" is intended to define the boundary between the areas covered respectively by EEA law and national law. It is only to the extent to which the agreement or the abuse may affect trade between EEA States that the deterioration in competition it causes falls under the prohibition laid down in Articles 53 or Article 54 EEA (compare the ECJ in *Consten and Grundig* v *Commission*, Joined Cases 56/64 and 58/64 EU:C:1966:41).

75 It is sufficient for the purposes of Articles 53 and 54 EEA that trade between EEA States "may" be affected. For this condition to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that the practices under consideration may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraphs 48 and 49).

76 Moreover, Articles 53 and 54 EEA apply only to agreements and abuses of a dominant position whose effect on trade between EEA States may be appreciable. In that assessment, account must be taken of the position and the importance of the parties on the market for the goods or the services concerned. However, an agreement or an

abuse of a dominant position confined to the territory of an EEA State, or to part of that territory, is capable of appreciably affecting trade between EEA States.

77 Whether the requirement is fulfilled in the present case, is an issue for the referring court to determine on the basis of all the facts before it. As mentioned above, indirect and potential effects on trade are to be taken into account alongside direct and actual effects. In particular, regard may be given to foreseeable market developments.

## Article 54 EEA

78 As part of the assessment under Article 54 EEA the relevant market needs to be defined.

79 First, the referring court has to determine the relevant product market (compare the ECJ in *Raso and Others*, C-163/96, EU:C:1998:54, paragraph 54). That market comprises all products that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use. Depending on the circumstances, supply-side substitutability must also be taken into account (see Case E-7/01 *Hegelstad and Others* [2002] EFTA Ct. Rep. 310, paragraph 29).

80 Second, the referring court must consider the geographical scope of the market. The relevant area is the area in which the undertakings concerned are involved in the supply and demand of products and in which the conditions of competition are sufficiently homogeneous, and it can be distinguished from neighbouring areas because the conditions of competition are appreciably different (see *Hegelstad and Others*, cited above, paragraph 30).

81 In the present case, the referring court must assess whether the relevant market is limited geographically to the Port of Drammen. However, the possibility that the relevant market includes other ports cannot be ruled out. Therefore, the national court must also consider in its assessment and determination of the geographical scope of the market whether the AO's potential customers include undertakings who currently use other ports for their unloading and loading needs.

82 The referring court must then assess whether the AO holds a dominant position on the relevant market. A dominant position relates to the economic strength enjoyed by an undertaking. That economic strength 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 (compare the ECJ in *United Brands*, 27/76, EU:C:1978:22, paragraph 65).

83 A market share of 50% or more is in itself, save in exceptional circumstances, evidence of the existence of a dominant position (compare the ECJ in *AKZO Chemie* v *Commission*, C-62/86, EU:C:1991:286, paragraph 60).

84 It follows from the information before the Court that the majority of undertakings operating in the Port of Drammen are members of NHO, and are covered by the Framework Agreement. The referring court must assess whether this fact, taken together with other facts of the case, leads to a dominant position of the AO in the market in question.

85 If the referring court comes to the conclusion that the AO holds a dominant position, it must assess further whether that position covers a "substantial part" of the EEA territory, as required by Article 54 EEA (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraph 38). In that respect, one port may be regarded as a

substantial part of the EEA, depending on the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the EEA (compare the ECJ in *GT-Link*, C-242/95, EU:C:1997:376, paragraph 37, and case law cited).

86 If the Port of Drammen is considered not to cover a substantial part of the EEA, the referring court would have to assess the extent to which comparable AO systems exist in other ports. In the case at hand, it appears that on the basis of the Framework Agreement a series of AOs linked by that agreement were established in the largest ports of Norway. Thus, when assessing whether a substantial part of the EEA territory is covered, due account may be taken of the system established by the Framework Agreement.

87 The notion of abuse of a dominant position is a legal notion that must be examined in the light of economic considerations (see Cases E4/05 *HOB-vín* [2006] EFTA Ct. Rep. 4, paragraph 51, and E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126). Moreover, Article 54 EEA must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.

88 Article 54 EEA does not prohibit an undertaking from acquiring, on its own merits, a dominant position in a market. However, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (see *Posten Norge* v *ESA*, cited above, paragraph 127).

89 The concept of abuse of a dominant position, prohibited by Article 54 EEA, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from

those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see *Posten Norge* v *ESA*, cited above, paragraph 130).

90 The referring court needs to assess different types of abuse that may exist in the present case: in particular, first, where an undertaking enjoying a dominant position obliges purchasers to obtain all or most of their requirements from that undertaking, it will be abusing its dominant position (compare the ECJ in *Hoffmann-La Roche & Co.* v *Commission*, 85/76, EU:C:1979:36, paragraph 89). As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

91 Second, it constitutes abuse to charge disproportionate prices or to grant price reductions to certain consumers and to offset such reductions by an increase in the charges to others (compare the ECJ in *Merci*, cited above, paragraphs 19 and 20).

92 As for charging disproportionate prices, it follows from the information before the Court that if Holship were to affiliate to the Framework Agreement, it would be subject to the pay rates fixed by the AO for using dockworkers in the Port of Drammen.

93 Third, the priority clause may reduce incentives for the AO to employ modern technology. Were this the case, it could imply higher costs for stevedore services in the Port of Drammen.

94 The referring court must determine on the basis of a full assessment of the facts, whether the AO abused a dominant position on the relevant market in breach of Article 54 EEA.

95 If abuse of a dominant position exists, it is open to a dominant undertaking to provide justification for conduct otherwise caught by the prohibition under Article 54 EEA.

96 An undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, for comparison, the ECJ in *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 41, and case law cited). In the present case, it appears difficult to conclude that the conduct of the AO was objectively necessary, or that the exclusionary effect produced can be counterbalanced or outweighed by advantages or efficiencies.

97 Finally, the Court notes for the sake of completeness that, contrary to the claim made in NTF's pleadings, the AO cannot rely upon Article 59(2) EEA, since it appears from the file that the AO cannot be considered an undertaking entrusted with the operation of services of general economic interest. It suffices to recall in that regard that the AO has the possibility to decline requests to use their services.

## Article 53 EEA

98 As regards the application of Article 53 EEA to the system in the present case, the referring court must assess whether the 13 AOs are

parties to an agreement or whether there is any concerted practice between them.

99 The information before the Court is not sufficient in order to give guidance on whether there is an agreement between the AOs themselves or a concerted practice that needs to be assessed under Article 53 EEA.

100 The answer to the second competition law question is therefore that Articles 53 and 54 EEA may apply separately or jointly to the system under consideration. The answer to the third competition law question is that, should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding AO systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or of a substantial part of it.

## QUESTIONS B1 TO B3

101 By the fourth to six question, the referring court essentially seeks guidance on whether it constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA when a trade union uses a boycott against a company in order to procure acceptance of a collective agreement, when the collective agreement entails that the company must give preference to buying unloading and loading services from an administrative office in place of using its own employees. The referring court further seeks clarification on whether specific circumstances are relevant for the existence of a restriction and, if a restriction exists, whether it may be lawful. It is appropriate to assess these questions together.

## OBSERVATIONS SUBMITTED TO THE COURT

102 Holship, ESA and the Commission submit that the boycott at issue entails a restriction on the freedom of establishment under Article 31 EEA.

103 Upon a question from the bench, the Commission put forward arguments at the oral hearing on the basis of the judgment of the European Court of Human Rights ("ECtHR") in *Sørensen and Rasmussen* v *Denmark* [2008] 46 EHRR 29. In that case, the ECtHR held that a closed shop arrangement, whereby a specific employment was contingent on the workers joining a trade union with which the employer had a special relationship, infringed Article 11 of the European Convention on Human Rights ("ECHR").

104 The Commission contends that, with regard to the negative freedom of association, employers such as Holship are in an analogous position to the applicants in *Rasmussen* in so far as the priority clause means that they are not permitted to provide a service unless they agree to a collective agreement, which they were not involved in negotiating. Moreover, a collective agreement that restricts the freedom of establishment cannot be justified by reason of the protection of workers where, in reality, that agreement amounts to a closed shop arrangement.

105 ESA and the Commission submit further that the restriction imposed on the freedom of establishment cannot be justified by any overriding reason of public interest and that the boycott is disproportionate. Furthermore, there is no *de minimis* rule applying to the freedom of establishment and it is thus irrelevant whether the collective action in question has only little restrictive effect.

106 NTF argues that the priority clause must be respected whether the undertaking needing unloading and loading services is based in Norway or a different country and that Holship is not prevented from

gaining access to the market. Therefore, NTF argues that there is no restriction on the freedom of establishment. NTF further maintains that an undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction on the right of other workers to demand a collective agreement or to pursue such a demand through industrial action. Finally, it contends that, as the AO is a non-profit undertaking, it falls outside the scope of Article 34 EEA.

107 The Norwegian Government contends that it is for the national court to determine whether the use of a boycott in the present case constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA. The right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the EEA Agreement.

## FINDINGS OF THE COURT

108 If EEA competition law is found not to be applicable with regard to an agreement or an activity, the rules on free movement may still apply, as the two sets of provisions are based on different conditions (compare, to that effect, the ECJ in *Viking Line*, C438/05, EU:C:2007:772, paragraph 53).

109 According to settled case law, the right of establishment is intended to enable an EEA national to participate, on a stable and continuous basis, in the economic life of an EEA State other than his State of origin and to profit from that participation, thus contributing to the economic well-being of the EEA (see, to this effect, Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 94).

110 The freedom of establishment under Article 34 EEA entails the right for companies, formed in accordance with the law of an EEA State

and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a subsidiary established there (compare Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 58).

111 According to the facts presented to the Court, Holship, founded in 1996 and wholly owned by a Danish company, is established on a stable and continuous basis in Norway and may rely on the provisions on freedom of establishment.

112 The Court recalls that the provisions on the fundamental freedoms also extend to rules of any nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (compare the ECJ in *Viking Line*, cited above, paragraph 33 and case law cited).

113 Working conditions in the different EEA States may be governed by provisions laid down by law or regulation, or by collective agreements and other acts concluded or adopted by private persons. Consequently, there would be a risk of creating inequality in the application of the prohibitions set out in the fundamental freedoms if their scope were limited to acts of a public authority (compare the ECJ in *Viking Line*, cited above, paragraph 34 and case law cited).

114 In the present proceedings, the organisation of collective action by trade unions must be regarded as covered by the legal autonomy, which those organisations enjoy pursuant to the trade union rights accorded to them by national and other sources of law. Collective action, which may be the trade unions' last resort to ensure the success of their claim to regulate work, must be considered inextricably linked to the collective agreement the conclusion of which is sought in the case at hand (compare the ECJ in *Viking Line*, cited above, paragraphs 35 and 36).

## Existence of a restriction

115 Article 31 EEA prohibits all restrictions on the freedom of establishment within the EEA. Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality, are an encroachment upon these freedoms requiring justification (compare Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64, and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 82).

116 With regard to question B2 it is important to recall that a restriction on the right of establishment is prohibited by Article 31 EEA, even if it is of limited scope or minor importance. No form of *de minimis* rule exists in that regard. It is thus of no significance for the assessment whether a restriction on the freedom of establishment exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

117 In the present case, a boycott aiming at protecting the priority clause is at issue. According to the referring court, the boycott is intended to compel Holship to affiliate to the Framework Agreement, as a result of which Holship would be obliged to resort by way of priority to the dockworkers engaged by the AO in order to carry out unloading and loading operations. As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

118 Under the Framework Agreement, Holship would be bound by the priority clause, as administered by the AO, which employs all permanently employed dockworkers in the Port of Drammen. The AO would decide whether it has the capacity to take on an assignment or whether Holship is allowed to use its own employees. Although Holship would not be obliged to participate in the AO or provide it

with funds, it would be obliged to pay the fees for the unloading and loading assignments that are carried out by AO's employees.

119 As has been submitted by ESA and the Commission, it appears that Holship may even encounter additional costs, since it may need to maintain resources to carry out unloading and loading operations itself if the AO declines an assignment for unloading and loading operations.

120 In light of the preceding considerations, the Court holds that a boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.

## Justification

121 It is settled case law that restrictions on the freedom of establishment may be justified either by Article 33 EEA or, if applicable without discrimination on grounds of nationality, by overriding reasons of general interest (compare, for example, the ECJ in *Commission* v *Spain*, C576/13, EU:C:2014:2430, paragraph 47 and case law cited).

122 Collective bargaining may involve sensitive issues of balancing social policy objectives, such as protection of workers, with an effective functioning of the market. Collective bargaining and collective action are recognised as fundamental rights. The protection of workers has therefore been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment (see Case E-2/11 *STX Norway and Others* [2012] EFTA

Ct. Rep. 4, paragraph 81, and compare the ECJ in *Commission* v *Spain*, cited above, paragraph 50 and case law cited).

123 Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23). The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. Thus the national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see *Olsen and Others*, cited above, paragraph 226). It is for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 ECHR and the case law of the ECtHR (compare, for example, the ECtHR in *Sørensen and Rasmussen* v *Denmark*, cited above, paragraphs 54 and 58).

124 Whether a restrictive measure aims at protecting workers needs to be answered in light of these considerations. When determining the aim pursued by the boycott, the national court must therefore take into account the objective pursued by the overall system established through the collective agreement in question. In that regard, the boycott cannot be viewed in isolation from the agreement of which it seeks to procure acceptance.

125 The Court notes further that it is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers. The absence of

such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States (see, for comparison, AG Poiares Maduro in his Opinion in *Viking Line*, cited above, point 67 et. seq.).

126 It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition. The AO system protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

127 The right to collective action also covers situations where workers take collective measures in order to support other workers in their labour disputes with a view to promoting their interests in establishing a system of fair conditions of work and pay. However, from the information before the Court, there is nothing to suggest that some kind of labour dispute between Holship and its employees exists and that the boycott imposed aims at improving the working conditions of Holship's employees. The boycott is even to the detriment of Holship's employees and may touch upon fundamental rights of Holship, such as the negative right to freedom of association, and possibly that of its employees. Thus, it is of no significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement in relation to its own dockworkers.

128 NTF and the Government of Norway have argued that the priority clause must be considered part of the fulfilment of Norway's obligations under the ILO Convention. However, it follows from Protocol 35 to the EEA Agreement that, in case of a conflict between national law implementing EEA law and other national provisions not implementing EEA law, the EFTA States shall introduce a statutory provision to the effect that national law implementing EEA law shall prevail. Therefore, a Contracting Party cannot make rights conferred by Article 31 EEA subject to the ILO Convention or other international agreements (see, to that effect, Case E1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 31).

129 In the present case, the conflicting provision does not follow from national legislation. It is part of a collective agreement. Consequently, EEA law applicable in this case must in any event prevail.

130 For the sake of completeness, it is recalled that for a restriction to be justified it does not simply suffice that it pursues a legitimate aim. A restrictive measure must be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (compare the ECJ in *Commission* v *Spain*, cited above, paragraph 53 and case law cited).

131 It is for the referring court to determine, having regard to all the facts and circumstances before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified.

## IV COSTS

132 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

## The Court

In answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **The exemption from the EEA competition rules that applies to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of a boycott against a port user in order to procure 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 company, such as the administrative office at issue, in place of using its own employees for the same work.**

2. **Articles 53 and 54 EEA may apply separately or jointly to a system such as the one at issue.**

3. **Should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding administrative office systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or a substantial part of it.**

4. **A boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.**

5. **It is of no significance for the assessment whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.**

6. **In a situation such as that in the main proceedings, it is of no significance for the assessment of the lawfulness of the restriction that the company, upon which the boycott is imposed, applies another collective agreement in relation to its own dockworkers.**

**Carl Baudenbacher** **Per Christiansen** **Páll Hreinsson**

*Delivered in open court in Luxembourg on*
***19 April 2016**.*

**Gunnar Selvik**
*Registrar*

**Carl Baudenbacher**
*President*

# Report for the Hearing

in Case E-14/15

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (Norges Høyesterett), in a case pending before it between

**Holship Norge AS**

v

**Norsk Transportarbeiderforbund**,

concerning the interpretation of the EEA Agreement, and in particular Articles 31, 53 and 54.

## I INTRODUCTION

1 Norsk Transportarbeiderforbund (the Norwegian Transport Workers Union or "NTF") has notified a boycott of Holship Norge AS ("Holship") in order to procure its acceptance of a collective agreement, a provision of which grants priority of engagement for stevedore work to dockworkers registered at the Administration Office ("AO") at the Port of Drammen. Before the national court, NTF seeks an advance ruling as to the lawfulness of the boycott.

2 By a letter of 5 June 2015, registered at the Court as Case E-14/15 on 11 June 2015, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between NTF and Holship. By its request, the Supreme Court refers six questions.

3 The first three questions (A1, A2, and A3) seek to establish: (1) whether the exemption from the competition rules of the EEA Agreement for collective agreements extends to 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 instead of using its own employees for the same work; (2) if the exemption does not so extend, whether such a system should be assessed under Article 53 or Article 54 EEA; and (3) if the exemption does not so extend and such a system should be assessed under Article 53 or Article 54 EEA, whether the existence of an identical or corresponding system in other ports is to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

4 The other three questions referred (B1, B2, and B3) seek to establish: (1) whether it is a restriction on the freedom of establishment pursuant to Article 31 EEA 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 instead of using its own employees for this work; (2) whether, for the purpose of an assessment of whether a restriction exists, the fact that the company's need for unloading and loading services proves to be very limited and/or sporadic is relevant; and (3) if a restriction exists, whether it is of significance for the assessment of the lawfulness of that restriction that the company, in relation to its own dockworkers, applies another collective agreement negotiated between social partners in the State where the port is located when that collective agreement concerns matters other than unloading and loading work.

# II LEGAL BACKGROUND

## EEA LAW

5 Article 31(1) EEA reads as follows:

> *1. 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.*

6 The second paragraph of Article 34 EEA reads:

> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

7 Article 53 EEA reads as follows:

> *1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention,*

*restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

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

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

*2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

*3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

*– any agreement or category of agreements between undertakings;*

*– any decision or category of decisions by associations of undertakings;*

*– any concerted practice or category of concerted practices;*

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

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

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

8 Article 54 EEA reads as follows:

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

*Such abuse may, in particular, consist in:*

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

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

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

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

9 Article 59(2) EEA reads as follows:

*2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of*

*the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

## NATIONAL LAW

### THE BOYCOTT ACT

10 Section 2 of the Norwegian Boycott Act of 5 December 1947 No 1 ("the Boycott Act") lays down several conditions for a boycott to be lawful. The condition relevant for the present case is Section 2(a), according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without causing a breach of the law. Pursuant to Section 3, legal action may be instigated to determine whether a notified boycott is lawful.

### THE FRAMEWORK AGREEMENT

11 The collective agreement relevant to this case is the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere*) ("the Framework Agreement"). Initially entered into in 1976 and subsequently renewed every other year, it establishes a fixed pay scheme for dockworkers in the thirteen largest Norwegian ports, including the Port of Drammen.

12 Clause 2(1) of the Framework Agreement, the so-called priority of engagement clause, reads as follows:

*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.*

## ILO CONVENTION NO 137

13 Norway has been a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the Convention") since it entered into force on 24 July 1975.

14 Article 2 of the Convention reads as follows:

> *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.*

15 Article 3 of the Convention reads as follows:

> *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.*

16 Article 7 of the Convention reads as follows:

> *The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.*

# III FACTS AND PROCEDURE

## BACKGROUND

17 Holship is a Norwegian forwarding agent wholly owned by a Danish parent company. Its principal activity is the cleaning of fruit crates. Previously, Holship had utilised the services of the AO. Holship acquired a new customer around the beginning of 2013, leading to an increase in the company's activities in the Port of Drammen. As a result, Holship added four further terminal workers to its existing sole terminal worker.

18 Holship is party to a collective agreement with Norsk Arbeidsmandsforbund (the Norwegian General Workers Union). The scope of that collective agreement includes cleaning work, the principal activity of Holship. Holship has elected to apply the collective agreement for cleaning workers to its unloading and loading workers.

19 In the light of Holship's increased activity and use of its own terminal workers for unloading and loading work in the Port of Drammen, NTF sent a letter to Holship on 10 April 2013, demanding that the Framework Agreement be applied. Holship did not reply. NTF sent reminders and eventually gave notice of a boycott in letters of 26 April 2013 and 11 June 2013, the latter gave notice that legal action would be taken to obtain a decision regarding the lawfulness of the notified boycott.

20 NTF brought a case before Drammen District Court (Drammen tingrett) on 12 June 2013, seeking an order that the boycott notified in the letter of 11 June 2013 was lawful. On 19 March 2014, Drammen District Court gave a declaration that the notified boycott was lawful. Borgarting Court of Appeal (Borgarting lagmannsrett) reached the same conclusion in its judgment of 8 September 2014. Both the District Court and the Court of Appeal found that the

priority of engagement clause under the Framework Agreement fell within the exemption relating to conditions of work and employment under EEA and Norwegian competition rules. Furthermore, the Court of Appeal found that the claim for a collective agreement did not conflict with Article 31 EEA (Article 31 EEA had not been invoked before the District Court).

21 Holship submitted an appeal to the Supreme Court. By decision and order of 14 January 2015, the Appeal Committee of the Supreme Court (*Høyesteretts ankeutvalg*) granted leave to appeal. On 11 June 2015, the Court received a request from the Supreme Court for an Advisory Opinion.

## IV QUESTIONS

22 The following questions were referred to the Court:

*On competition law:*

**(A1) 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 [of the Request], rather than to use its own employees for the same work?**

**(A2) If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?**

**(A3) 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?**

*On the freedom of establishment:*

**(B1) 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 [of the Request], rather than use its own employees for this work?**

**(B2) 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?**

**(B3) 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?**

## V WRITTEN OBSERVATIONS

23 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Holship, represented by Nicolay Skarning, Advocate;
- NTF, represented by Håkon Angell and Lornts Nagelhus, Advocates;
- The Norwegian Government, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;
- The EFTA Surveillance Authority ("ESA"), represented by Markus Schneider, Deputy Director, Maria Moustakali, Officer, Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- The European Commission ("the Commission"), represented by Luigi Malferrari and Manuel Kellerbauer, Members of the Legal Service, acting as Agents.

## VI SUMMARY OF THE ARGUMENTS SUBMITTED AND PROPOSED ANSWERS

### HOLSHIP

24 Annexed to the written observations is a report by Professor Erling Hjelmeng (Attachment 1), which was excluded as evidence by the Supreme Court, and a presentation of Professor Hjelmeng's credentials (Attachment 2). Professor Hjelmeng's assessment and conclusion is endorsed.

### QUESTIONS A1 - A3

25 Reliance is placed entirely upon the assessment and conclusion in Professor Hjelmeng's report. His conclusion is that: (i) the present

organisation of loading and unloading services confers an exclusive right upon the AO that is contrary to Article 53 EEA; and (ii) the imposition of a duty to hire personnel regardless of the need must be deemed to constitute an abuse of a dominant position contrary to Article 54 EEA.

## QUESTIONS B1 - B3

26 Holship submits that the organisation of Norwegian ports is contrary to Article 31 EEA.

## PROPOSED ANSWERS

27 Holship does not propose any specific answers to the questions referred.

## NTF

28 Although the referring court has not posed any question concerning the applicability of Article 59(2) EEA, NTF finds it appropriate to submit observations on this provision, as its applicability will determine whether it is necessary to answer the questions referred.

29 NTF submits that Article 59(2) EEA applies. First, the AO is an undertaking of the kind defined in Article 59(2) EEA. The AO provides a service of general economic interest. The Framework Agreement has been entered into with undertakings located in the largest ports in Norway, which are important traffic junctions and serve most of the cargo to and from Norway that is transported by sea. A number of the functions of a port have been characterised by both the Court of Justice of the European Union ("the ECJ") and the Commission as services of general economic interest.

30 Second, the AO has been entrusted with the task of providing the service. Article 2 of the Convention imposes an obligation on States to assure dockworkers of a certain minimum income or minimum periods of employment, and Article 3(2) gives registered dockworkers a priority of engagement for dock work. Under the Convention, if the situation established by the Framework Agreement regarding priority of engagement cannot be maintained, this must be established by legislation or other public authority resolution.[1] The AO must be regarded as part of the services offered by the port to meet the requirements for safe and efficient port services, and, in this regard, acceptance of the Framework Agreement is a prerequisite.

31 Third, the AO's provision of the service is obstructed by the rules of the EEA Agreement. If priority of engagement is regarded as contrary to EEA law, there will no longer be a basis for maintaining permanently employed dockworkers who are given the necessary courses and training. The supply of assignments will be random, and the dockworkers will lose their basis for achieving predictable pay and employment conditions.

## QUESTION A1

32 NTF argues that it is established EU and EEA law that, as a general rule, agreements between employer and employee organisations, even though they may entail restrictions of competition, fall outside the scope of the competition rules.[2] However, provisions of a collective agreement that pursue other, extraneous objectives or that

1 Reference is made to Section 40 of the Norwegian Act 19 of 2009 relating to Ports and Fairways.

2 Reference is made to Case E-8/00 *Landsorganisasjonen i Norge and and Others* v *Kommunes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 44, as regards the EEA EFTA States, and Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paragraphs 59 to 64.

do not, in practice, improve conditions of work and employment may come within the scope of Article 53 EEA.[3]

33 According to NTF, there is no doubt that the Framework Agreement is a collective agreement entered into between social partners. It argues further that the content of a provision in a collective agreement must constitute a "suitable measure" in order to provide immunity under competition law.[4] Moreover, the Court has specified that the concept of conditions of work and employment "must be interpreted widely".

34 According to NTF, there is no doubt that the priority of engagement clause in the Framework Agreement pursues social policy objectives and contributes to securing and improving conditions of employment and work for dockworkers by providing them with stable working conditions and regulated pay and employment conditions. Moreover, the priority of engagement clause also ensures Norway's compliance with its international law obligations under the Convention.

35 NTF concludes with respect to Question A1 that the Framework Agreement's priority of engagement provision does not constitute an infringement of EEA competition rules.

## QUESTION A2

36 With respect to Article 53 EEA, NTF limits itself to the submission that the circumstances of the present case do not give rise to an agreement between undertakings or any form of concerted practice

3 Reference is made to *Landsorganisasjonen i Norge*, cited above, point 1 of the operative part of the judgment, and Case C-413/13 *FNV Kunsten Informatie en Media* v *Staat der Nederlanden*, judgment of 4 December 2014, published electronically, paragraph 22 et seq.

4 Reference is made to *Albany*, cited above, paragraphs 59 and 60.

as specified in that Article. Neither the workers, nor the NTF nor the employers can be regarded as undertakings for the purposes of that provision.[5] Moreover, a concerted practice of the type that Holship contends cannot be said to exist.[6]

37 With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an "undertaking" as defined therein and that, in any circumstance, the AO has not abused a dominant position.

38 According to NTF, the priority of engagement that follows from clause 2(1) of the Framework Agreement has been granted to individual dockworkers and not to the AO, which has been set up to manage and regulate the workforce in the port. The workers are formally employed at the AO. Furthermore, both the Staff Committee, which, pursuant to the Framework Agreement, has the authority to decide questions, and the administrative body, which is to handle the practical implementation, are composed of representatives of the employees and employers who are bound by the Framework Agreement. These same employers are also users of the services offered, and they are also generally referred to as employers in the collective agreement. In relation to the performance of the work, the dockworkers are subject to the port users' instructions in the same way as if they were employed there. The AO is therefore to be regarded as an administrative body for what is characterised as a "pool arrangement" in the Commission's Communication on a European Ports Policy.[7]

5 Reference is made to Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraphs 26 and 27, and to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 201 et seq.

6 Reference is made to Professor Hjelmeng's assessment annexed to Holship's written observations, p. 5.

7 Reference is made to the Commission's Communication on a European Ports Policy of 18 October 2007 (COM(2007) 616 final), paragraph 4.5.

39 NTF argues that the present case has significant similarities with *Becu*, in which the ECJ held that a statutory priority of engagement for recognised stevedores to perform dock duties did not entail that special or exclusive rights had been granted to "undertakings".[8] Nor is it significant that the Belgian priority of engagement scheme at issue in *Becu* was not designed so that the dockworkers were formally employed by an employer other than the one for which the dock work was performed, nor that the scheme in *Becu* was statutory, unlike the situation in the present case where the arrangement follows from the Framework Agreement. There is also a similarity, though not as obvious, between the present case and *Porto di Genova*.[9] In that case, the exclusive rights were expressly granted to undertakings and not to dockworkers.

40 NTF contends that, as a consequence, the AO cannot be regarded as an "undertaking" and thus Article 54 EEA cannot have been infringed.

41 Further, NTF submits that a finding of an infringement under Article 54 EEA is conditional upon the abuse of a dominant position. In the assessment of whether there is any abuse, the market on which the AO has a dominant position must be defined, and it must be determined whether, in such a case, the performance of the activity can be regarded as constituting abuse. The AO hires out dockworkers, but does not itself provide stevedore services. Consequently, the AO does not operate on the market for loading and unloading services. This distinguishes the AO's activities from those of the dock work company in the judgment in *Silvano Raso*, where the

8 Reference is made to *Becu*, cited above, paragraphs 26 to 31.

9 Reference is made to Case C-179/90 *Merci convenzionali porto di Genova SpA* v *Siderurgica Gabrielli* SpA [1992] ECR I-5889.

importance of distinguishing between the market for labour and the market for services in the port was emphasised.[10]

42 NTF refers to *Silvano Raso* and *Höfner and Elser* as regards the question whether exclusive rights may, in themselves, constitute abuse.[11] It observes that the collective agreement system in Norwegian ports does not, however, establish a monopoly, but a priority of engagement. This means that labour capacity is not restricted, as port users are free to use other labour where the demand cannot be met by the AO.

43 NTF maintains that other elements specified in the Framework Agreement, such as the requirement for a minimum number of hours, the regulation of meal breaks and the obligation that a minimum of one dockworker must be assigned, fall outside the competition rules as they are not imposed by an undertaking.

## QUESTION A3

44 NTF submits that this question must be answered in the affirmative, provided that the other conditions are met.

## QUESTION B1

45 In relation specifically to Question B1, NTF argues that the referring court is imprecise on the point that the priority of engagement is not given to the AO, but to the dockworkers. The dockworkers thus have a priority of engagement to perform unloading and loading work independently of the AO. The task of the AO is to manage the

10 Reference is made by contrast to Case C-163/96 *Silvano Raso and Others* [1998] ECR I-533.
11 Reference is made to *Silvano Raso*, cited above, paragraph 27, and Case C-41/90 *Höfner and Fritz Elser* v *Macrotron GmbH* [1991] ECR I-1979.

priority of engagement, but it does not derive any rights from the Framework Agreement.

46 NTF submits that the present case has clear similarities with the subject-matter in *Becu*, in which it was found that the exclusive right for dockers to perform dock work did not constitute a special right or an exclusive right for an undertaking, as the right was granted to the workers.[12] Moreover, NTF argues that the AO must be considered a non-profit-making company and hence not included within the definition of "companies and firms" for the purposes of Article 34(2) EEA.[13]

47 NTF argues, therefore, that there is no restriction on the freedom of establishment or on the right to provide services.

## QUESTION B2

48 NTF submits that Article 31 EEA does not prevent "nationality-neutral" regulation of business activities based on minimum intervention. In this regard, the Framework Agreement applies equally to all undertakings that carry on activities in Norwegian ports.

49 NTF argues that the priority of engagement clause did not limit Holship's opportunity to establish itself in Norway when it commenced its business activities in 1996. The priority of engagement rule does not prevent Holship from offering unloading and loading services, or from providing these services itself, as long as the priority of engagement for dockworkers is respected. Holship thus has access to the market for unloading and loading services.

12 Reference is made to *Becu*, cited above.

13 Reference is made to Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, and Case C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others* v *San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus*, judgment of 11 December 2014, published electronically.

50 NTF also submits that EEA States can regulate the performance of business activities and market access, without such regulation being regarded as a restriction under Article 31 EEA.[14] The work that is covered by the priority of engagement is very limited, as further handling of the cargo, after it has been put down onto the quay, is not covered. Consequently, only the most risky work operations are subject to the priority of engagement. The priority of engagement does not prevent Holship from gaining access to the market under effective and normal conditions, given that by far the main part of the work tasks connected with cargo handling are not covered by the priority of engagement.

51 NTF therefore concludes that this question has to be answered in the affirmative.

## QUESTION B3

52 NTF maintains that the fact that Holship has entered into a collective agreement for another occupational group can hardly be of relevance in assessing the lawfulness of a restriction. Were the collective agreement for cleaning workers to be regarded as relevant to the assessment and also found to be of significance, the assessment of the lawfulness of collective agreements would differ depending on whether or not the undertaking is bound by a collective agreement. Such an effect would be contrary to fundamental rights, including the freedom of organisation and the right to take industrial action. The validity of those rights cannot be weakened by other occupational groups. Such an effect would be contrary to the principles of the collective agreement system and bargaining model that governs Norwegian working life. The

14 Reference is made to Case C-565/08 *Commission* v *Italy* [2011] ECR I-2101, paragraphs 50 and 51 and the case law cited.

Norwegian collective agreement system is based on and corresponds to the freedom of organisation rooted in international conventions and human rights. An undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction of the right to demand a collective agreement or to pursue such a demand via industrial action. Finally, NTF submits that the collective agreement entered into by Holship does not have regard to the special considerations contained in the Framework Agreement.

53 Based on the above, NTF submits that the question is to be answered in the negative.

## PROPOSED ANSWERS

54 NTF proposes that the Court should provide the following answers to the questions referred:

*(A1) The demand for a collective agreement and the notice of the use of a boycott, where acceptance of the collective agreement entails that the port user must give preference to hiring labour in the form of dockworkers, fall under the exemption from the competition rules of the EEA Agreement as this exemption has been defined in, inter alia, the advisory opinion of the EFTA Court in Case E-8/00.*

In the alternative, and if Question A1 is answered in the affirmative, NTF proposes that the Court should answer Question A2 as follows:

*(A2) Articles 53 and 54 are not applicable.*

In the further alternative, and only if Questions A1 and A2 are both answered in the affirmative, NTF proposes that the Court should answer Question A3 as follows:

*(A3) In the assessment of whether there is a noticeable effect on cross-border trade within the EEA, the existence of an identical or corresponding system in other ports must be taken into account.*

On the freedom of establishment, NTF proposes the following answer:

*(B1) The claim for a collective agreement and the subsequent notice of a boycott to produce acceptance of the collective agreement do not constitute a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement.*

In the alternative, and if Question B1 is answered in the affirmative, NTF proposes that Questions B2 and B3 should be answered as follows:

*(B2) It will be of significance for the assessment of whether a restriction exists that the company's need for unloading and loading services is limited and/or sporadic, and, moreover, it is for the referring court to assess whether the restriction meets the conditions stated in the grounds of this judgment.*

*(B3) It is without 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 when that collective agreement concerns matters other than unloading and loading work.*

## THE NORWEGIAN GOVERNMENT

### QUESTIONS A1 - A2

55 In relation to the right of collective action, the Norwegian Government notes that that right is recognised in various international instruments and has been characterised by the ECJ as a

fundamental right, forming an integral part of the general principles of EU law.[15]

56 The Norwegian Government maintains that collective agreements are excluded from the scope of Article 53 EEA subject to the satisfaction of two conditions. The first condition requires that the agreement is entered into within the context of collective bargaining between employers and employees.[16] It appears that this criterion is fulfilled in the present case.

57 The second condition requires that the agreement is intended to improve work and employment conditions.[17] In *Landsorganisasjonen i Norge* it was held that the protection of a collective agreement from the effect of Article 53 EEA cannot be upheld where the practical implementation of that agreement is intended to further extraneous interests.[18] In *Landsorganisasjonen i Norge* it was also held that the term "conditions of work and employment" must be interpreted broadly and that these broad categories included various matters improving the situation of workers.[19] A finding that a collective agreement contributes to improving work and employment conditions

15 Reference is made to Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paragraphs 43 to 45, 77 to 79, and 86, and Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I11767, paragraphs 90 and 91.

16 Reference is made to *Albany*, cited above, paragraphs 59 and 60; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 67; Case C-222/98 *Hendrik van der Woude* v *Stichting Beatrixoord* [2000] ECR I-7111, paragraph 22; Case C437/09 *AG2R Prévoyance* v *Beaudout Père et Fils SARL* [2011] ECR I-973, paragraph 29, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

17 Reference is made to *Albany*, cited above, paragraphs 59 and 60; *Pavlov*, cited above, paragraph 67; *van der Woude*, cited above, paragraph 22; *AG2R Prévoyance*, cited above, paragraph 29; *FNV*, cited above, paragraph 23, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

18 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 56 and 59.

19 Ibid., paragraph 53.

is not called into question by the fact that it designates a single entity administering the system in question, thereby excluding any possibility of affiliation to competing service providers.[20] As long as the contested provisions actually pursue the objective that places them outside of the scope of Article 53 EEA, any resulting restriction of competition is accepted.[21] The Norwegian Government finally alleges that the judgment in *Albany* did not take into account the third condition that is to be found in the Opinion delivered in that case.[22]

58 On that basis, the Norwegian Government submits that it is for the national court to examine the purpose of the Framework Agreement and whether it pursues social objectives by improving work and employment conditions for dockworkers or other objectives. The referring court draws attention to clause 2(1) of the Framework Agreement on priority of engagement and states that that clause has been regarded as fulfilling Norway's obligations under the Convention, in particular Article 3(2) thereof. The aims and content of the Convention thus provides relevant context. Norway refers in particular to preamble, its first, fourth and fifth recitals and Articles 2(1) and 3(2) of the Convention. Moreover, Article 7 clarifies that the obligations laid down in the Convention may be implemented *inter alia* by collective agreements. Report III (Part 1B) of the International Labour Organisation (2002) sheds further light on the relevant provisions of the Convention.[23] In this context, the Norwegian Government observes

20 Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

21 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 73.

22 Reference is made to Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, the Opinion of Advocate General Mengozzi in *AG2R Prévoyance*, cited above, point 43; and the Opinion of Advocate General Fenelly in *van der Woude*, cited above, point 32.

23 Reference is made to Report III (Part 1B) of the International Labour Organisation, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 90th Session 2002, paragraphs 130 to 133, 137, and 139.

that EU and EEA law recognise requirements concerning minimum income and stable employment as directly contributing to the improvement of conditions of work and employment.[24]

59 The Norwegian Government notes that the request refers to the judgment of the referring court in *Sola Havn*.[25] According to that judgment, the Framework Agreement aims to give dockworkers security of employment and pay by setting up dock work offices that provide the dockworkers with terms of permanent employment and minimum rates of pay, both of which are facilitated by granting dockworkers priority of engagement. Moreover, it appears that the criteria for employment are non-discriminatory and any dockworker is eligible to apply for employment in the dock work offices.

60 The Norwegian Government maintains further that it is for the national court to undertake the examination whether or not the provisions of the Framework Agreement fall outside of Article 53 EEA.[26] In its submission, a finding that the Framework Agreement and the priority of engagement provided for in clause 2(1) contribute to improving conditions of work and employment for dockworkers and fall therefore outside the application of Article 53 EEA would not be called into question by the fact that the priority of engagement for dockworkers, administered by the AO as designated by the collective agreement, restricts port users from carrying out loading and unloading themselves or acquiring such services from other entities.[27]

24 Reference is made to Case C-212/04 *Konstantinos Adeneler and Others* v *Ellinikos Organismos Galaktos* [2006] ECR I6057, paragraphs 61 and 64; Case C-268/06 *Impact* v *Minister for Agriculture and Food and Others* [2008] ECR I-2483, paragraph 85 and 86; Joined Cases C-378/07 to C-380/07 *Kiriaki Angelidaki and Others* v *Organismos Nomarchiakis Autodioikisis Rethymnis* and *Charikleia Giannoudi* v *Dimos Geropotamou* [2009] ECR I-3071, paragraphs 104 and 105, and Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I9981, paragraph 64.

25 Reference is made to the judgment of the Supreme Court in Rt. 1997 p. 334 (*Sola Havn*).

26 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 58.

27 Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

61 Moreover, the Norwegian Government claims that the exemption from Article 53 EEA should also apply in relation to Article 54 EEA. It concedes that there is case law which could imply that Article 54 EEA can apply to undertakings set up under a collective agreement even though the agreement itself is exempt from Article 53 EEA. The facts of these cases, however, call into question the general applicability of that case law. All but one of the cases decided thus far have concerned collective agreements rendered universally applicable through State intervention.[28] In *van der Woude*, a case which did not concern the conferral of special or exclusive rights within the meaning of Article 106 of the Treaty on the Functioning of the European Union ("TFEU"), claims were nevertheless entertained that Article 102 TFEU had been infringed.[29] But that judgment did not shed much light on the applicability of Article 102 TFEU.[30] Further, the ECJ noted that the issue of whether unfair pricing or trading conditions *de facto* occurred and whether that would constitute an abuse of a dominant position fell outside of the scope of those proceedings.[31] These observations are directly transposable to the present proceedings.

62 The Norwegian Government submits further that a boycott action aimed at compelling a company to become affiliated to a collective agreement, such as that at issue in the present proceedings, could only raise questions with regard to Article 54 EEA if the entity concerned, merely by exercising the rights conferred upon it by the collective agreement, is led to abuse its dominant position or where

28 Reference is made to *Albany*, cited above; Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV* v *Stichting Bedrijftspensioenfonds voor de Handel in Bouwmaterialien* [1999] ECR I-6025; *Drijvende Bokken*, cited above, and *AG2R Prévoyance*, cited above.

29 Reference is made to *van der Woude*, cited above.

30 Ibid., paragraph 31.

31 Ibid.

such rights are liable to create a situation in which that undertaking is led to commit such abuses.[32] Such questions could perhaps arise if the entity concerned is manifestly incapable of satisfying the demand prevailing on the market for such activities.[33]

63 The Norwegian Government argues further that the present case, as in *van der Woude*, does not invite an in-depth assessment of the potential applicability of Article 54 EEA. The request does not disclose any information indicating that the system laid down in the Framework Agreement has induced the AO to abuse any dominant position it might have or that services provided by it do not meet the needs of the port users. With regard to the former aspect, dock work offices are non-profit bodies jointly set up by the organisations representing management and labour. In relation to the second aspect, the request states that a key element of the collective agreement is to ensure priority of engagement for dockworkers, which would suggest that it only applies insofar as the dock work offices have capacity to fulfil the assignments in question.

## QUESTION B1

64 The Norwegian Government notes that an agreement or activity being excluded from the scope of EEA competition rules does not entail that it also falls outside the scope of the four freedoms.[34] The present case concerns a company established in 1996 which is wholly owned by a Danish parent company. Insofar as the Danish company is involved on a continuous basis in the economic life of Norway, the

32 Reference is made to *Albany*, cited above, paragraph 93; *van der Woude*, cited above, paragraph 30, and *AG2R Prévoyance*, cited above, paragraph 68.

33 Reference is made to *Albany*, cited above, paragraph 95, and *AG2R Prévoyance*, cited above, paragraph 69.

34 Reference is made to *Viking Line*, cited above, paragraphs 53, 54 and 60 to 66.

situation falls within the provisions on freedom of establishment, and not those concerning services.[35]

65 The Norwegian Government contends that it is for the national court to determine whether the use of a boycott constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

## QUESTION B3

66 The Norwegian Government notes that, despite the Commission's proposals, there is no secondary legislation that harmonises market access to port services.[36] In a rather recent proposal, the Commission has, this time, steered clear of cargo handling in the port, which is expressly excluded from the proposed regulation.[37]

67 In relation to the application of Article 31 EEA, the Norwegian Government argues that a mechanical application of the reasoning in *Commission* v *Spain* must be ruled out.[38] It maintains that the contested rules in *Commission* v *Spain* went beyond protection of workers insofar as they required a cargo handling undertaking to participate in, and contribute to the share of capital of, a public limited company for the management of port cargo handlers. The cargo handling undertakings were also required to take workers from the port cargo handlers into employment, which was exacerbated by

35 Reference is made to *Sodemare*, cited above, paragraph 24 and the case law cited.

36 Reference is made to the proposal for a directive on market access to port services of 13 February 2001 (COM(2001) 35 final), and to the proposal for a directive on market access to port services of 13 October 2004 (COM(2004) 654 final). Reference is also made to the Report of the European Parliament (A6-0410/2005), Compromise 13 at p. 17.

37 Reference is made to the proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports of 23 May 2013 (COM(2013) 296 final), in particular Article 11.

38 Reference is made to Case C-576/13 *Commission* v *Spain*, judgment of 11 December 2014, published electronically.

requirements to employ a certain number of workers regardless of need. Furthermore, the contested rules formed part of a general statutory framework regulating national ports and a predominant objective of those rules was to ensure the consistency, continuity, and quality of port services, which in turn was deemed necessary to ensure security in the ports.[39] The nature and purpose of the contested rules indicated that the relevant provisions had not been drafted with worker protection in mind. By contrast, the present case concerns conditions of work and employment laid down by organisations representing management and labour and regarded as fulfilling Norway's commitments under the Convention. The nature and purpose of the contested rules are thus different.

68 The Norwegian Government claims that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the EEA Agreement and further that the protection of workers is an overriding reason of public interest.[40] It is for the national court to ascertain whether the objectives pursued by NTF concern the protection of workers.

69 The Norwegian Government argues that even if collective action taken by a trade union could reasonably be deemed to fall within the objective of protecting workers, such a view would no longer be tenable if it is established that the jobs or conditions of employment at issue are not jeopardised or under serious threat.[41] This would be the case, in particular, if it transpired that the application of another collective agreement referred to by the national court in Question B3 was, from a legal point of view, as binding as the terms of the

39 Ibid., paragraph 55.
40 Reference is made to *Viking Line*, cited above, paragraphs 77 to 79, and *Laval*, cited above, paragraphs 40, 42, 90 and 91.
41 Reference is made to *Viking Line*, cited above, paragraph 81.

collective agreement to which the collective action relates and if it was of such a nature as to provide a guarantee that the terms of that collective agreement would be maintained.[42]

70 The Norwegian Government contends that it appears that the collective agreement Holship entered into as a party does not concern conditions of work and employment for dockworkers, but concerns cleaning work. It follows that, on becoming a party to that agreement, Holship did not enter into legal commitments relating to conditions of work and employment for dockworkers. Holship, of its own accord, has chosen to employ the conditions of that collective agreement to employment relationships outside of its scope. It therefore appears that the application of another collective agreement referred to by the national court in Question B3, from a legal point of view, is not as binding as the terms of the collective agreement to which the trade union seeks to induce Holship to become a party.

71 As for the second part of the question, the Norwegian Government submits that the collective agreement to which Holship is party concerns, in particular, minimum rates of pay. The Framework Agreement, however, covers not only minimum rates of pay but also conditions concerning permanent employment for dockworkers, both of which are intrinsically linked to priority of engagement for employed dockworkers. Hence, even if the commitment undertaken by Holship were to be considered legally binding, its undertaking is in any event not of a nature as to provide a guarantee that the terms of the Framework Agreement would be maintained.

42 Reference is made to *Viking Line*, cited above, paragraph 82; on the nature of collective agreements reference is made to Case C-45/09 *Gisela Rosenbladt* v *Oellerking Gebäudereinigungsges. mbH* [2010] ECR I-9391, paragraph 41 and the case law cited; and on the flexibility available to the parties to a collective agreement reference is made to Joined Cases C-297/10 and C298/10 *Sabine Hennings* v *Eisenbahn-Bundesamt* and *Land Berlin* v *Alexander Mai* [2011] ECR I7965, paragraph 66 and the case law cited.

72 Further, the Norwegian Government notes that it remains to be ascertained within the context of the broad discretion enjoyed by the social partners in the field of social and employment policy and the importance attached to collective agreement in the regulation of work and employment conditions whether the means used to achieve the protection of dockworkers are suitable and necessary.

73 In relation to the appropriateness of the action taken by NTF for attaining the objective pursued, the Norwegian Government notes that, according to settled case law, collective action is one of the main ways in which trade unions protect the interests of their members.[43] The European Court of Human Rights has held that, alongside the right to negotiate and enter into collective agreements,[44] collective action is also protected by Article 11 of the European Convention on Human Rights.[45]

74 On the question whether the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, the Norwegian Government claims that it is for the national court to examine, first, whether, under the national rules and law on collective agreements applicable to that action, NTF had other means at its disposal less restrictive of the relevant freedom to successfully conclude collective negotiation with Holship and, if so, whether it exhausted such means before giving notice of boycott action.[46]

43 Reference is made to *Viking Line*, cited above, paragraph 86.

44 Reference is made to the judgment of the European Court of Human Rights of 12 November 2008 in Case *Demir and Baykara* v *Turkey* [GC], no. 34503/97, ECHR 2008-V.

45 Reference is made to the judgments of the European Court of Human Rights of 21 April 2009 in *Enerju Yapi-Yol Sen* v *Turkey,* No. 68959/01, unreported, and 27 November 2014 in *Hrvatski lijecnicki sindikat* v *Croatia*, No.36701/09, unreported.

46 Reference is made to *Viking Line*, cited above, paragraph 87.

75 With regard to the necessity of the boycott action aimed at inducing affiliation to a collective agreement in order to protect the conditions of work and employment of its members,[47] the Norwegian Government maintains that the national court must assess whether there are less restrictive measures which, in an equally effective manner, could achieve the acknowledged aim. This assessment must take into account, consistent with the commitment of the undertaking concerned,[48] whether any alternative measure is of a nature as to provide a guarantee that the terms of the collective agreement would be maintained.

## PROPOSED ANSWERS

76 The Norwegian Government proposes that the Court should provide the following answers to the questions referred:

*(1) Articles 3, 53, and 54 EEA do not preclude a decision by a national court recognising the lawfulness of a boycott action aimed at inducing accession to a collective agreement, such as that at issue in the main proceedings, if the collective agreement contributes to improving work and employment conditions.*

*(2) It is for the national court to determine, on the basis of all the relevant factual circumstances and the legal considerations [set out in the Norwegian Government's written observations], whether it constitutes a restriction within the meaning of Article 31 EEA for a trade union in an EEA State, through boycott actions, to attempt to compel a subsidiary of an undertaking established in another EEA State to accede to a collective agreement and to apply the terms set out in that agreement.*

47 For the acknowledgment that such aim falls within the objective of protecting workers reference is made to *Viking Line*, cited above, paragraphs 80 to 84.

48 Ibid., paragraphs 81 and 82.

*(3) A restriction within the meaning of Article 31 EEA may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. It is immaterial in this context whether the company concerned applies a different collective agreement outside of its material scope, unless it thereby has undertaken a commitment which is, from [a] legal point of view, as binding as the terms of the collective agreement to which the collective action relates and if it is of such a nature as to provide a guarantee that the terms of the latter collective agreement are maintained.*

## ESA

### QUESTION A1

77 At the outset, ESA notes that the request does not explicitly address Article 59(1) EEA and contends that the Court should not address the provision either, as the request by the referring court has not identified any facts allowing the conclusion that the AOs have been granted any special or exclusive rights by the Norwegian Government.

78 In relation to Question A1 and the exclusion of collective agreements from Article 101 TFEU and Article 53 EEA, ESA refers to the findings in *Albany*[49] and *Landsorganisasjonen i Norge*[50] and the conditions set

49 Reference is made to *Albany*, cited above, paragraph 60; *Brentjens'*, cited above; Case C-219/97 *Maatschappij Drijvende Bokken BV* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] I-6121; *Pavlov*, cited above, and *van der Woude*, cited above.

50 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 44.

out therein.[51] Both conditions must be fulfilled for the agreement to fall outside the scope of Article 53 EEA.[52] ESA submits that the application of the first condition is not contentious in the present case and it will focus on the second condition.

79 ESA submits that neither the Court nor the ECJ have, to date, had the opportunity to consider a priority of engagement clause such as that at issue in the main proceedings but case law may offer some general guidance.[53]

80 Since there are certain limits on how broadly the notion "conditions of work" can be construed, it is not sufficient to consider merely whether the broad objective of a collective agreement seeks to improve the conditions of work and employment. Instead, ESA maintains that the provisions of an agreement must be assessed individually and, if they are directed towards other purposes, those provisions or those that do not, in practice, operate to improve such conditions, may fall within the scope of Article 53 EEA.[54] In that assessment, account must be taken of the form and content of the agreement and its various provisions, the circumstances under which they were negotiated, the parties to the agreement, and its actual effect.[55]

81 Applying this guidance to the present case, ESA claims that the priority of engagement clause, as sought to be enforced by means of the proposed boycott notified by NTF, does not fulfil the second condition for three reasons. First, the priority of engagement clause would effectively be extended to undertakings that do not have

51 Reference is made to *Landsorganisasjonen i Norge*, paragraphs 49 and 50, and *Albany*, cited above, paragraphs 59 and 60.
52 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.
53 Ibid., paragraph 53.
54 Ibid., paragraphs 51, 55, 56 and 59.
55 Ibid., paragraph 52.

employees protected by the Framework Agreement. In turn, the priority of engagement clause would not merely address the labour relationship, but would, in contrast to previous cases,[56] also impose obligations on third parties, such as Holship. The earlier cases dealt with collective agreements that were binding only on employers of workers protected by those agreements. Their exemption from EEA competition law was justified because they ensured a balance between employers and their employees because that balance should be established unimpeded by such rules.[57] However, this justification does not apply where collective agreements apply to undertakings that do not employ workers protected by the agreements.[58]

82 Second, ESA claims that to extend the strand of case law that excludes collective agreements from Articles 53 and 54 EEA carries a risk that trade associations could circumvent those articles by concluding collective agreements containing provisions that restrict competition, without there being any social policy justification for that restriction.

83 Third, ESA contends that, although the priority of engagement clause is arguably of benefit to the employees of the AO, it is detrimental for other workers, such as those employed by Holship. In this regard, the exclusion of 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.[59]

56 Reference is made to *Albany*, cited above; *AG2R Prévoyance*, cited above, and *van der Woude*, cited above.

57 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 34 and 35.

58 Further reference is made to the test set out by Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, and to *Landsorganisasjonen i Norge*, cited above, paragraph 53.

59 Reference is made to the judgment of the Supreme Court of Norway in *Sola Havn*, cited above.

## QUESTIONS A2 AND A3

84 ESA argues that the main question in relation to Article 54 EEA is whether the use of a boycott in a situation such as the present case constitutes an abuse of a dominant market position.

85 In its assessment for the purposes of Article 54 EEA, ESA submits first that the AO constitutes an undertaking.[60] A dock work undertaking enjoying the exclusive right to organise dock work for third parties, as well as a dock work company having the exclusive right to perform dock work must be regarded as an undertaking.[61] 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 AO, to the benefit of the dockworkers it employs and thus not vested in individual workers. Furthermore, the employees of the AO carry out loading and unloading assignments against fees set by and payable to the AO upon orders placed with the AO. The fact that the AOs lacks a profit motive does not, according to case law, affect its status as an undertaking.[62]

86 As regards the assessment of the existence of a dominant position in a substantial part of the EEA territory, ESA provisionally assumes, in the absence of adequate information from the referring court, that the market is limited to the provision of stevedoring services in the Port of Drammen. However, this is ultimately for the referring court to determine. ESA argues, given the apparent lack of alternative

60 Reference is made to Article 1 of Protocol 22 EEA, and Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54.
61 Reference is made to *Porto di Genova*, cited above, paragraph 9.
62 Reference is made to *Albany*, cited above, paragraph 85.

sources of relevant stevedoring services in the port of Drammen and the existence of the priority of engagement clause, that the AO may enjoy a dominant position on the assumed relevant market. It observes, however, that the crucial question is whether that dominant position is held in a substantial part of the territory covered by the EEA Agreement. In that regard, ESA makes reference to case law according to which the notion of a "substantial part thereof" refers 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".[63] Moreover, even if a dominant company does not reach the threshold itself, 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.[64]

87 As regards the notion of abuse for the purposes of Article 54 EEA, ESA submits that the request leaves open the question whether the AO has initiated or taken part in boycotts. This is a matter of fact which must be appraised by the referring court. However, the Court may provide guidance on how a boycott ought to be assessed.

88 ESA submits that abuse is a legal notion that must be examined in light of economic considerations.[65] It maintains that clauses with

63 Reference is made to Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Coöperatieve Vereniging "Suiker Uni" UA and Others* v *Commission* [1975] ECR 1663, paragraph 371, and *Porto di Genova*, cited above, paragraph 15.

64 Reference is made to Case C-323/93 Société Civile Agricole du *Centre d'insémination de la Crespelle* v *Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, paragraph 17.

65 Reference is made to Case E-4/05 *HOB-vín* v *The Icelandic State and Áfengis- og tóbaksverslum rikisins (the State Alcohol and Tobacco Company of Iceland)* [2006] EFTA Ct. Rep. 4, paragraph 51, and Case E15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126.

similar effects to the priority engagement clause at issue here were already considered in *Hoffmann-La Roche*.[66] Consequently, if it constitutes an abuse to tie a customer by means of such a clause, it must also amount to an abuse for a dominant undertaking to initiate a boycott against a purchaser in order to obtain acceptance by the purchaser of such a clause. This must apply in particular 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.

89 ESA stresses further that the referring court must also examine whether the behaviour of the AO can be objectively justified and submits that, in the present case, it is unlikely that the anti-competitive behaviour at issue could be justified on the basis that the behaviour protects the workers of the AO. In this regard, ESA relies on its observations relating to collective agreements seeking to protect workers employed by other undertakings. Further, the anti-competitive behaviour by the AO could not be justified on the basis that the Framework Agreement is regarded as fulfilling Norway's obligations under the Convention.[67] Nor could the AO invoke Article 59(2) EEA in its defence, as the stevedoring services it provides do not constitute services of a general economic interest within the meaning of that provision.[68]

66 Reference is made to Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 215, paragraph 89.

67 Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, published in the 86th Session of the International Labour Conference (1998).

68 Reference is made to *Albany*, cited above, paragraph 27.

90 As regards the assessment of whether there is an effect on trade between the EEA States,[69] ESA contends that the referring court should take account of identical or corresponding systems in other ports.[70] The system at the Port of Drammen forms an integral part of the larger system established by the Framework Agreement. 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. The request also refers to another system of priority of engagement established in fourteen other ports in Norway by another collective agreement concluded by the same parties. This agreement also forms part of the economic context in which the Framework Agreement exists, and should be taken into account, provided that it contributes to the restrictive effects on competition.

91 ESA submits further that the threshold for meeting the test on effect on trade is not particularly high.[71] Further, the criterion referred to in *Coöperatieve Vereniging "Suiker Unie"* v *Commission*[72] in another context may be of use in the assessment at hand. In the present case, there is a sufficient degree of probability to conclude that the clause may affect trade between EEA States, not least because of the fact

69 Reference is made, for example, to Case C-440/11 P *Commission* v *Stichting Administratiekantoor Portielje*, judgment of 11 July 2013, published electronically, paragraph 99; Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others* v *Banco Popolare di Novara soc. coop. arl (BPN) and Others* [1999] ECR I-135, paragraph 47, and Case E7/01 *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others* v *Hydro Texaco AS* [2002] EFTA Ct. Rep. 310, paragraph 40.

70 Reference is made to *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others*, cited above, paragraph 40, and Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, paragraph 14. Further reference is made to the Opinion of Advocate General Bot in Joined Cases C125/07 P, C133/07 P, C135/07 P and C137/07 P *Erste Group Bank AG and Others* v *Commission* [2009] ECR I-8681, points 143 to 148 and the case law cited.

71 Reference is made to Case C-242/95 *GT-Link A/S* v *De Danske Statsbaner* [1997] ECR I-4449, paragraph 45, and *Silvano Raso*, cited above, paragraph 26.

72 Reference is made to *Suiker Unie*, cited above, paragraph 371.

that the thirteen largest ports in Norway are covered by the priority of engagement clause and that it applies to all ships of fifty tonnes dwt and more sailing between one of those ports and a port in another EEA State.

92 Accordingly, ESA argues that, although it is not mandatory to do so, 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 the EEA States.

93 As regards the application of Article 53 EEA in the case at issue, ESA notes that for the Framework Agreement to be covered it has to be determined whether any other parties to that agreement constitute an undertaking within the meaning of the provision. The referring court could examine whether members of the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*) ("NHO") and the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*) ("NHO Logistics and Freight") are parties to that agreement. Alternatively, the referring court could examine whether the decision by NHO and NHO Logistics and Freight to conclude that the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings.[73]

94 If the Framework Agreement is considered to fall within Article 53 EEA on the basis of one of the alternatives above, it is then for the national court to appraise whether the agreement has as its object or effect the prevention, restriction, or distortion of competition. In the present case, ESA contends that a breach of Article 53 EEA seems unlikely, given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone have initiated the boycott.

73 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 68 to 70.

95 ESA contends, moreover, that any restriction of competition under Article 53(1) EEA may be weighed against its claimed pro-competitive effects in the context of Article 53(3) EEA.[74] In that regard, those who seek to rely upon that provision must demonstrate that the conditions for obtaining an exemption are satisfied.[75]

## QUESTION B1

96 ESA submits that 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. It asserts that under *Viking Line* the right to take collective action is restricted and cannot be relied upon when it is contrary to national or EEA law, in this case, therefore, when it is contrary to Article 31 EEA.

97 It follows, in ESA's view, that 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. Should the Court consider the *Viking Line* case law not to apply in the present case and the national court holds the notified boycott to be lawful under national law, the boycott itself may constitute a "national measure" within the scope of Article 31 EEA.[76]

74 Reference is made to Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136.

75 Reference is made to Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services* v *Commission* [2009] ECR I-9291, paragraph 82.

76 Reference is made to Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others* v *QC Leisure and Others* and *Karen Murphy* v *Media Protection Services Ltd* [2011] ECR I-9083, paragraph 88.

98 However, if the boycott in question is regarded as private action and not a national measure, ESA maintains that Article 31 EEA may still be applicable, as the fundamental freedoms may also apply in circumstances where the State abstains from adopting the measures required in order to deal with obstacles to the fundamental freedom which are not caused by the State.[77] It follows from case law[78] that actions by private individuals, economic operators, and organisations in 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. Therefore, if the referring court finds the boycott lawful under national law, in ESA's view, this implies that Norway has not taken the measures necessary to ensure that the freedom of establishment is fully respected.

99 As regards the existence of a restriction on the freedom of establishment,[79] ESA submits that the present case concerns a Danish company, which exercised its right of establishment by setting up a Norwegian forwarding agent (Holship). It must therefore be assessed whether the boycott in question is liable to pose an obstacle to operators from other EEA States to exercise their freedom of establishment.

77 Reference is made to Case 269/83 *Commission* v *France* [1985] ECR 837, paragraphs 30 to 32.

78 Reference, in relation to the free movement of goods, is made to Case C-573/12 Ålands vindkraft AB v *Energimyndigheten*, judgment of 1 July 2014, published electronically, paragraph 74.

79 Reference is made to Case E-2/06 *ESA* v *Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 64 and Case E-9/11 *ESA* v *Kingdom of Norway* [2012] EFTA Ct. Rep. 442, paragraph 82; in addition, reference is made to Case C-327/12 *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e furniture* v *SOA Nazionale Costruttori*, judgment of 12 December 2013, published electronically, paragraph 45 and the case law cited.

100 ESA submits that the recent case of *Commission* v *Spain*[80] addressed the issue whether a priority of engagement clause for dockworkers, similar to the obligation in the Framework Agreement in the present case, amounted to a restriction on the freedom of establishment.[81] It was held that although the obligations imposed by the port regime applied equally both to national operators and to those from other Member States, they could still hinder the latter category of operators in establishing themselves in Spanish ports to pursue the activity of cargo handling.[82]

101 ESA argues further that restrictions on the freedom of establishment exist where measures can make it more difficult for undertakings from other EEA States to carry out their economic activity and to compete more effectively with undertakings established on a stable basis in the EEA State concerned.[83] In the present case, the priority of engagement clause contained in the Framework Agreement is liable to have economic consequences for economic operators such as Holship. If the boycott successfully induces Holship to enter the Framework Agreement and to buy unloading and loading services at the applicable rates set by the AO, this would entail a double cost for Holship, as it already employs workers for this purpose. The use of a boycott to impose the Framework Agreement on Holship under the circumstances may also result in changes to the company's existing employment structures and recruitment policies. If Holship is forced to join the Framework Agreement then this may render the exercise of the freedom of establishment less attractive. The boycott thus constitutes a restriction contrary to Article 31 EEA. As regards a possible justification of the restriction, ESA submits that NTF has

80 Reference is made to *Commission* v *Spain*, cited above.
81 Ibid., paragraph 38.
82 Ibid., cited above, paragraph 37.
83 Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 57 and the case law cited, and *Laval*, cited above, paragraph 99.

not argued that any of the grounds listed in Article 33 EEA or any overriding reason in the public interest applies in the present case. NTF argues, however, that there are overriding public interest grounds for the claim that Holship should accept the Framework Agreement, namely to guarantee the pay and working conditions of permanently employed dockworkers. NTF argues further that this is in accordance with Article 3(2) of the Convention.

102 With regard to the Convention, ESA contends that EEA States must, when implementing international agreements, such as the Convention, ensure that they comply with the obligations arising from EEA law. Moreover, 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. The Court has already held that international law cannot be relied upon as a justification for derogations from obligations under EEA law where international law is permissive rather than mandatory.[84]

103 As regards the aim of protecting dockworkers, ESA submits that the Court has already recognised that the social protection of workers may constitute an overriding reason in the public interest.[85] While it is, in principle, for the national courts to ascertain whether the objectives pursued by NTF via collective action concern the protection of workers,[86] the Court may provide guidance on the interpretation of this notion of EEA law in the circumstances.

84 Reference is made to Case E-1/02 *ESA* v *Kingdom of Norway* [2003] EFTA Ct. Rep. 1, paragraph 58.

85 Reference is made to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-2/11 *STX Norway Offshore AS m.fl.* v *Staten v Tariffnemnda* [2012] EFTA Ct. Rep. 4, paragraph 81 and the case law cited.

86 Reference is made to Case E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, paragraph 78; Case E-3/*06 Ladbrokes Ltd* v *The Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Ct. Rep. 86, paragraph 43, and *Viking Line*, cited above, paragraph 80.

Moreover, according to ESA, it follows from *Laval*[87] that the right to take collective action can be a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms.[88] However, it was also found in *Laval* that, as regard the specific obligations linked to the signature of the collective agreement for the building sector which the trade unions sought to impose on undertakings established in other Member States by way of collective action such as that at issue in the case, the obstacle which that collective action forms cannot be justified with regard to such an objective.[89]

104 ESA contends that NTF intends to use the boycott to impose the Framework Agreement on Holship. Holship has four employees for loading and unloading. However, the request does not explain why dockworkers at the AO require greater protection than Holship's dockworkers. Furthermore, the employees of Holship are covered by a different collective agreement, which protects the working conditions of those workers. The boycott does not, therefore, aim at securing the working conditions for workers who are not covered by a collective agreement and whose rights are not protected.

105 In light of the above, ESA contends that the restriction imposed on the freedom of establishment by the boycott in the present case cannot be justified by Article 33 EEA or any overriding reason in the public interest.

106 ESA is also doubtful that the collective action in this case actually pursues a legitimate aim as it appears to aim at protecting the working conditions and pay of one group of workers with an

87 Reference is made to *Laval*, cited above.

88 Reference is made to Case C-112/00 *Schmidberger Internationale Transporte und Planzüge* v *Republic of Austria* [2003] ECR I-5659, paragraph 74; *Viking Line*, cited above, paragraph 77 and the case law cited, and *Commission* v *Spain,* cited above, paragraph 50.

89 Reference is made to *Laval*, cited above, paragraph 107.

advantage over another group of workers. Moreover, the boycott may intend to protect one group of workers to the detriment of other workers, since if Holship enters into the Framework Agreement it may render their own loading and unloading workers unnecessary.

107 ESA adds that if the Court considers the boycott in question to pursue a legitimate aim, the measure still needs to be proportionate.[90] It is established that collective action may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members.[91] In accordance with *Viking Line*,[92] 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 the Framework Agreement, and whether NTF had exhausted those means prior to initiating such action.

108 ESA argues that the boycott is not proportionate, as the aim of protecting dockworkers could be achieved by means that are less restrictive on the freedom of establishment. The dockworkers in the Port of Drammen could be organised in a pool of dockworkers operating as an agency for temporary work, from which the companies in the port are free to hire workers permanently or temporarily to cover their needs for unloading and loading services.[93] Furthermore, according to the request, most companies operating in the port are dependent on the services of the AO.

90 Reference is made, for example, to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-9/11 *ESA* v *Kingdom of Norway*, cited above, paragraph 83.
91 Reference is made to *Viking Line*, cited above, paragraph 86.
92 Ibid., paragraph 87.
93 Reference is made to *Commission* v *Spain*, cited above, paragraph 27.

## QUESTION B2

109 ESA submits that whether the measure has any, or only 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 respects the principle of proportionality. There is no *de minimis* rule applying to the freedom of establishment.[94] As such, 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. It follows that it has no significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proves to be very limited and/or sporadic.

## QUESTION B3

110 ESA contends that the fact that Holship's workers are already covered by another collective agreement is relevant for the assessment of the lawfulness of the restriction on the freedom of establishment. NTF cannot justify the boycott with reference to the protection of 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.[95] The boycott does not pursue a legitimate aim when that aim appears to provide one group of workers with an advantage over another. Hence, it is of significance for the assessment of the lawfulness of the restriction that Holship

94 Reference is made to Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949, paragraph 50 and the case law cited.

95 Reference is made to *Viking Line*, cited above, paragraph 89.

applies another collective agreement even if that collective agreement concerns matters other than unloading and loading work.

## PROPOSED ANSWERS

111 ESA proposes that the Court should provide the following answers to the referred questions:

*(A1) 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 AO 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.*

*(A2) The system of a collective agreement and a boycott as that described in point 1 may be assessed under Articles 53 and 54 EEA.*

*(A3) 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.*

*(B1) 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 requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.*

*(B2) 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.*

*(B3) 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 between social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work.*

## THE COMMISSION

### QUESTIONS A1 – A3

112 The Commission submits 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 of Article 101(1) TFEU.[96]

113 The Commission argues that, in relation to Question A1, account should be taken of all the circumstances of the case, *inter alia*, of the fact that Holship's employees do not benefit from the collective agreement in question, but are covered by another collective agreement which has been applied to loading and unloading workers.

114 The Commission submits further that 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 rules. The notion of improving conditions of work and employment remains vague. This notion must be interpreted in light of the fact that, as the Court has held, the result arrived at by the ECJ in its case law is based on the balancing of concerns relating to the effective

96 Reference is made to *AG2R Prévoyance*, cited above, paragraph 29; *Albany*, cited above, paragraphs 59 and 60; *Brentjens'*, cited above; *Drijvende Bokken*, cited above; *Pavlov*, cited above, and *van der Woude*, cited above.

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 social protection.[97] Further, the ECJ's case law is not monolithic.[98] Even in the *Albany* line of case law, the ECJ, when formulating the exemption at issue, used the term "generally". This indicates that, under certain circumstances, clauses in collective agreements are not exempted from EU competition rules.

115 The Commission argues that it follows that collective agreements between management and labour must not always be sheltered from competition rules.[99] The Court has also stated that it is not sufficient that the parties to the agreement are 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 purposes of a typical collective agreement, to conclude that a collective agreement falls outside the scope of application of competition rules.[100] Moreover, the Commission draws attention to one criterion suggested by Advocate General Jacobs for the delimitation of the collective bargaining immunity from competition rules.[101]

116 The Commission submits that a collective agreement between management and labour to the disadvantage of third parties not participating in the negotiation should only exceptionally be exempted from the scope of EEA competition rules. Otherwise, such

97 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 37, and to Article 151 TFEU.

98 Reference is made to *Porto di Genova*, cited above; Case C-18/93 *Corsica Ferries* v *Corpo dei piloti del porto di Genova* [1994] ECR I-1783, and *Silvano Raso*, cited above.

99 Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 186.

100 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.

101 Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 193.

collective agreements could be concluded to circumvent the application of Articles 53 and 54 EEA and, respectively, of Articles 101 and 102 TFEU 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 agreement with it employees. The Commission acknowledges that in individual cases collective agreements have been found to fall outside the scope of application of competition rules although their rules were applied on a mandatory basis to undertakings not parties to the collective agreement.[102] However, such rulings can only be understood in light of the fact that the collective agreements in question also aimed at improving the working conditions of employees whose employers were not party to the collective agreements. In the present case, and by way of contrast, the Framework Agreement negotiated between NTF, on behalf of employees, and the employers' confederation NHO ensures stable employment and decent pay to the benefit of Drammen dockworkers employed by the Administration Office but 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 the double costs resulting from the employment of workers that are not allowed to load or unload goods in Norwegian ports. This is a crucial difference between the present case and the line of case law where the collective agreements contributed to improving the working conditions of all employees in the sectors concerned.[103] Moreover, the Commission argues that the social objective of the Treaty or the EEA Agreement cannot be invoked to shelter from competition rules collective agreements that aim at

102 Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above, in which, in the Commission's assessment, the ECJ accepted that affiliation to an insurance scheme/schemes for supplementary reimbursement of healthcare costs could be made compulsory for third parties who were not parties to the collective agreement.

103 Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above.

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.

117 If it is determined that the Framework Agreement is not generally exempted from the application of competition rules, the Commission observes in relation to Question A2 that Articles 53 and 54 EEA apply only to undertakings.[104] Since dockworkers are, for the duration of the relationship for which they perform dock work, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockworkers do not themselves constitute an undertaking within the meaning of EU competition law.[105] Furthermore, 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.[106] Accordingly, NTF is not an undertaking within the meaning of EEA competition rules. By contrast, the AO is more than a mere association of workers, given that it has legal personality and employs the dockworkers registered in Drammen and does not simply act on their behalf in negotiation with employers. With regard to dock work companies that employ stevedores and offer services to users of a port, the ECJ has found that a dock work undertaking enjoying the exclusive right to organise 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.[107]

104 Reference is made to *Pavlov*, cited above, paragraph 74.
105 Reference is made to *Becu*, cited above, paragraph 26.
106 Reference is made to *Becu*, cited above, paragraph 28, and *Porto di Genova*, cited above, paragraph 13.
107 Reference is made to *Porto di Genova*, cited above, paragraph 9.

118 The Commission submits that the above case law applies to the present case and that the non-profit character of the AO is irrelevant, given that non-profit entities can offer goods or services on a market and hence can be an undertaking within the meaning of the competition rules.[108] The AO 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, the Commission claims that, when rendering loading or unloading services against a fee, the AO is an undertaking within the meaning of Articles 53 and 54 EEA.

119 In relation to Question A3 and the "effect on trade",[109] the Commission claims, in the present case, given that the Framework Agreement establishes a priority of engagement rule and fixes wages to the benefit of dockworkers employed by AOs in all major ports in Norway, there seems to be a sufficient degree of probability that the practices applied in the context of that agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States. The fact that trade in goods from other EEA States is involved in the present case is also relevant in the assessment of this issue. Moreover, the parent company of Holship is established in a different EEA State (Denmark). Finally, the Port of

108 Reference is made to Joined Cases 209/78 to 215/78 *Heintz van Landewyck SARL and Others* v *Commission* [1980] ECR 3125, paragraph 88, *Höfner and Elser*, cited above, paragraphs 21 to 23, and Case C-475/99 *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz* [2001] ECR I-8089, paragraph 67.

109 Reference is made to Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia* y *Crédito, SL* v *Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, paragraph 34 and the case law cited; Case C439/11 P *Ziegler SA* v *Commission*, judgment of 11 July 2013, published electronically, paragraph 92 et seq; *Erste Group Bank and Others*, cited above, paragraph 36, and Case C-219/95 Ferriere Nord SpA v Commission [1997] ECR I-4411, paragraph 19.

Drammen is one of the largest in Norway.[110] In other cases regarding ports their importance for inter-state trade has been emphasised.[111]

120 The Commission adds that even if the Port of Drammen were considered to be too small to be of importance for trade between EEA States, 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 EEA States. Indeed, in order to assess whether several practices impede access to a market, it is also necessary to examine the nature and extent of those practices in their totality, comprising all similar contracts.[112] It is clear from the case law, the Commission adds, that the effect on trade between EEA States of agreements between which a direct link exists and which form an integral part of a whole must be examined together.[113]

121 The Commission contends that the Court may give answers to issues relevant for the solution of the case pending before the national court,[114] such as whether certain practices infringe Articles 53 and 54 EEA.

122 With respect to Article 53 EEA, the Commission claims that the collective agreement appears to be an agreement between

110 Reference is made to ESA's letter of 3 March 2014 rejecting the complaint in Case No 73856, p. 4.

111 Reference is made to *Porto di Genova*, cited above, paragraph 41, and *Silvano Raso*, cited above, paragraph 26.

112 Reference is made to *Stergios Delimitis*, cited above, paragraph 19.

113 Reference is made to Joined Cases T-259/02 to T-264/02 and T271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II5169, paragraph 168, and Case T77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraphs 126, 142 and 143.

114 Reference is made to Case C-280/91 *Finanzamt Kassel-Goethestrasse* v *Viessmann KG* [1993] ECR I971.

undertakings which has as its object the distortion of competition by fixing prices, sharing markets, and limiting or controlling markets. In order to establish a breach of Article 53 EEA resulting from horizontal agreements between AOs in different Norwegian ports it would need to be examined whether the latter are actual, or at least potential, competitors. Other AOs could not be said to be competitors as it would generate disproportionate additional costs for an AO 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 (the individual Norwegian ports covered by the Framework Agreement).[115]

123 As regards Article 54 EEA, the Commission submits that the product/services market consists of the provision of stevedoring services in ports. It leaves open the question whether the Port of Drammen in itself constitutes a substantial part of the territory covered by the EEA.[116] Rather, the priority of engagement rules applying in all major ports of Norway, which are linked through the Framework Agreement, have to be considered as covering cumulatively a substantial part of the common market.

124 The Commission argues that, by its conduct, the AO is trying to force a customer to take its services although it does not want and does not need them, and that this behaviour is abusive.[117] Moreover, given that the majority on the AO's Board are representatives of the employers (the ship operators already based in the Port of Drammen), the AO finds itself in a situation of conflicting interests.

115 Reference is made to *Silvano Raso*, cited above, paragraph 26.

116 Reference is made to *Porto di Genova*, cited above, paragraph 15, and *Silvano Raso*, cited above, paragraph 26.

117 Reference is made to *Porto di Genova*, paragraphs 19 and 20, and to *Höfner and Elser*, cited above.

These ship operators are the direct competitors of Holship. In the Commission's view, this may be taken into account when establishing an abuse of a dominant position.[118]

125 The Commission submits that the question that ought to be asked is whether the behaviour of the AO can be objectively justified.[119] The social objective of the Treaty cannot be invoked in favour of rules that aim to improve the working conditions of certain workers to the disadvantage of others. Even if the national court takes a different view, according to the Commission, the boycott carried out by the AO and the priority engagement rule in the Framework Agreement that the boycott seeks to enforce still go beyond what is necessary to protect the rights of employees.

## QUESTIONS B1 - B3

126 The Commission argues, with reference to case law, in particular to *Viking Line*,[120] that the boycott, i.e. the collective action in question, falls, in principle, within the scope of Article 31 EEA. If the

118 Reference is made to *Silvano Raso*, cited above, paragraph 28, and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio* [2008] ECR I-4863, paragraphs 51 to 52.

119 Reference is made to Case C-209/10 *Post Danmark A/S* v *Konkurrencerådet*, published electronically, paragraphs 40-41 and the case law cited.

120 Reference is made to *Viking Line*, cited above, paragraphs 33, 35, 60 to 62, and 65, and to *Laval*, cited above; Case 36/74 *B.N.O. Walrave and L.J.N. Koch* v *Association Union Cycliste Internationale and Others* [1974] ECR 1405, paragraph 17; Case 13/76 *Gaetano Donà* v *Mario Mantero* [1976] ECR 1333, paragraph 17; Case C-117/91 *Jean-Marc Bosman* v *Commission* [1991] ECR I4837, paragraph 82; Case C265/95 *Commission* v *France* [1997] ECR I-6959; Joined Cases C-51/96 and C-191/97 *Christelle Deliège* v *Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I2549, paragraph 47; Case C281/98 *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA* [2000] ECR I4139, paragraph 31; Case C309/99 *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I1577, paragraph 120; and *Schmidberger*, cited above.

reasoning of the ECJ in *Viking Line* is considered not to apply in the present case on the grounds that the collective action is a purely private action, an alternative line of reasoning could still lead to the conclusion that the Framework Agreement restricts the fundamental freedoms. In this regard, the Commission observes that the NTF sought to obtain from the national court a declaration of the lawfulness of the notified boycott, in accordance with the Boycott Act. It contends that if a national court declares the boycott lawful, this *de facto* clears the way for enforcement of the Framework Agreement by boycotting companies such as Holship.[121] A declaration of that kind would go beyond the mere omission by the State to intervene against individuals who restrict fundamental freedoms. Accordingly, a decision by a national court authorising the enforcement of the Framework Agreement by boycott could be regarded as tantamount to a State measure falling within the scope of Article 31 EEA.

127 The Commission contends further that the boycott restricts the freedom of establishment.[122] The priority of engagement rule that the AO intends to enforce through a boycott generates substantial extra costs for companies from other EEA States,[123] all the more so given that they have no influence whatsoever over the wages to be paid to the dockworkers in question. The fact that the economic activity underlying establishment is made more difficult suffices to

121 Reference is made to Case C265/95 *Commission* v *France*, cited above, and *Schmidberger*, cited above.

122 Reference is made to Case C-442/02 *Caixa Bank France* v *Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I8961, paragraph 12; Case C89/09 *Commission* v *France* [2010] ECR I-12941, paragraph 44; *SOA Nazionale Costruttori*, cited above, paragraph 45; Case C518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraphs 63 and 64; Case C-577/11 *DKV Belgium* v *Association belge des consommateurs Test-Achats ASBL*, judgment of 7 March 2013, published electronically, paragraphs 31 to 33; and *Laval*, cited above.

123 Reference is made to *Commission* v *Spain*, cited above, paragraph 37.

qualify the measure at issue as a restriction.[124] Moreover, companies that use Norwegian ports only occasionally are arguably more likely to have their own employees at their disposal to carry out loading and unloading work than companies that exclusively operate in Norwegian ports, which are likely to have adapted to the omnipresent priority of engagement rules. It appears that the double costs imposed on undertakings such as Holship (which are able to carry out the loading and unloading of goods using their own personnel) are significant.

128 In relation specifically to Question B2, the Commission notes that there is no *de minimis* rule under which minor restrictions on the fundamental freedoms can escape the prohibition. According to the ECJ, a national measure cannot evade the prohibition 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.[125]

129 The Commission submits that the need to ensure a public service, invoked in other cases,[126] cannot be invoked in the present case as an overriding reason in the public interest[127], as it can be inferred from the request that the stevedores of the Port of Drammen are not

124 Reference is made to *Caixa Bank France*, cited above, paragraphs 13 to 16, and *Viking Line*, cited above, paragraph 70 et seq.

125 Reference is made to Case C-49/89 *Corsica Ferries France* v *Direction générale des douanes françaises* [1989] ECR 4441, paragraph 8; Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov and ACO Industries Tábor* v *Odvolací finanční ředitelství*, judgment of 19 June 2014, published electronically, paragraph 42; Case 269/83 *Commission* v *France*, cited above, paragraph 10, and Joined Cases 177/82 and 178/82 *Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797. In addition, reference is made to Joined Cases C-49/98, C-50/98, C-52/98 to C54/98, and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Lda and Others* v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I7831, paragraphs 36 and 37, and to Case C315/13 *Edgard Jan De Clercq and Others*, judgment of 3 December 2014, published electronically, paragraph 61.

126 Reference is made to *Commission* v *Spain*, cited above, paragraph 51.

127 Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 59, and *DKV Belgium*, cited above, paragraph 39.

obliged to offer their services at all times when required. In fact, the AO can reject a request for stevedoring services and seemingly without further explanation.

130 The Commission submits further that the Convention cannot be invoked to justify the use of a priority of engagement rule.[128] Article 3(2) of the Convention, is not intended to establish or facilitate a monopoly arrangement for performing the loading and unloading work for one company alone.[129] The Convention 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 on the freedom of establishment. 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 States that have signed the Convention which show that the Convention can be implemented without a priority of engagement rule.[130] In any event, an EEA State cannot invoke an international agreement to justify a violation of a fundamental freedom.[131]

131 The Commission argues that whilst the protection of workers can generally be invoked as a legitimate interest in order to justify

128 Reference is made to *Commission* v *Spain*, cited above, paragraph 41.

129 Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, cited above, paragraph 2.

130 For a detailed description of the situation in different EEA Member States that have signed the Convention, reference is made to the study commissioned by the Commission and authored by Eric Van Hooydonk, *Port Labour in the EU* (Volume II).

131 Reference is made to Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraphs 130 to 144.

restrictions on the freedom of establishment,[132] this legitimate interest cannot be invoked in favour of the Framework Agreement in the present case. The protection of workers generally cannot be invoked where one group of workers is protected to the detriment of others. Exceptions to this rule may be acceptable where some workers merit special protection or some employees are granted a certain level of social protection by their employer and other employers should be incentivised to achieve upward convergence. Neither of these exceptions applies in the present case for two principal reasons.

132 First, the Commission argues that the request does not explain why the dockworkers registered with the AO merit special protection compared to other employees that might depend on the same jobs for their livelihoods. It questions whether precarious work conditions for dockworkers subsist under current Norwegian social security and social protection rules. It notes that the priority of engagement rule applies whether or not other employees whose working conditions might deteriorate because of the application of the Framework Agreement have social protection or employment conditions as good as that applying to the stevedores employed by the AO. Furthermore, in determining whether the dockworkers registered with the AO in Drammen merit special protection, account must be taken of the job opportunities that dockworkers can find in other ports of the EEA.

132 Reference is made to *Viking Line*, cited above, paragraph 77. In addition, reference is made to Joined Cases C-369/96 and C-376/96 *Jean Claude Arblade and Others* [1999] ECR I-8453, paragraph 36, Case C-165/98 André *Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, paragraph 27, and *Finalarte and Others*, cited above, paragraph 33.

The Commission observes that it has successfully challenged comparable priority of engagement rules that foreclosed the labour market for dockworkers in certain Member States such as Spain.[133] Ensuring the mobility of dockworkers with the EEA could provide a better solution for the fluctuating demand for stevedoring in ports of EEA States than "recruit-local" requirements. This solution would also be in conformity with the policy objective pursued by the Commission in this area.[134]

133 Second, the Commission continues, it cannot be argued that the priority of engagement rule is intended to target employers that do not respect the social standards applicable to the dockworkers registered with the AO, thereby forcing these employers to abstain from social dumping or strive for upward coverage. This rule applies irrespective of the existence of a collective agreement providing equal or even higher social protection to stevedores not covered by the Framework Agreement. The reasoning of the ECJ in *Viking Line* can be applied, by analogy, in this respect.[135]

134 In relation to Question B3, the Commission suggests that it should be answered in the light of the *Viking Line* case law. The fact that the priority of engagement rule applies to the benefit of the dockworkers registered with the AO and 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. Instead, the Framework Agreement merely aims at improving the situation of one group of

133 Reference is made to *Commission* v *Spain*, cited above, paragraph 28.
134 Ibid.
135 Reference is made to *Viking Line*, cited above, paragraph 89.

workers to the detriment of other workers. Thus, the protection of workers cannot be invoked in favour of the Framework Agreement.

## PROPOSED ANSWERS

135 The Commission proposes that the Court should provide the following answers to the questions referred:

*(A1) 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 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.*

*(A2) The system referred to under A1 should be assessed under Article 53 and Article 54 of the EEA Agreement.*

*(A3) The existence of an identical or corresponding system in other ports amongst other needs to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.*

*(B1) 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.*

*(B2) 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/sporadic.*

*(B3) It is of importance for the assessment of whether the restriction described in question B1 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.*

**Carl Baudenbacher**
*Judge-Rapporteur*