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COMPLAINT – BREACH OF THE EEA RULES ON PUBLIC PROCUREMENT – PUBLIC SECTOR OCCUPATIONAL PENSION

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1. Introduction

Storebrand Livsforsikring AS (hereinafter referred to as *Storebrand*) hereby submit a complaint to ESA. The Authority is kindly requested to investigate further matters related to the purchase of county and municipal occupational pensions in Norway. (The counties and the municipalities

are hereinafter referred to as *municipalities*). In addition, the Authority is requested to investigate further issues related to the Regional health authorities' and Hospital trust's (Norwegian: *Regionale helseforetak* and *Helseforetak*) purchase of pensions in Norway. The Regional health authorities and Hospital trusts are hereinafter referred to as *RHFs* and *hospitals*. They are owned by and subordinated the Ministry of Health and Care Services (hereinafter referred to as *the Ministry,* unless otherwise stated in the text).

As Storebrand will return to in section 2.3.1, by an administrative decision in 1961, The Ministry of Labour and Social Inclusion, has decided that KLP shall manage the pension scheme for nurses. The Authority is requested to investigate the Ministry of Labour and Social Inclusion as well.

Storebrand are currently one of two private providers in the Norwegian market for insured public sector occupational pensions. The other private provider are Kommunal Landspensjonskasse Gjensidig Forsikringsselskap (hereinafter referred to as *KLP*). KLP are formally and effectively a private life insurance company that act on an equal footing with other financial groups in most banking and insurance markets.

The vast majority of municipalities, RHFs and hospitals currently purchase occupational pension services from KLP. This complaint concerns several municipalities' and the RHFs' and hospitals' failure to conduct competitions for occupational pensions. KLP were the only provider of insured occupational pensions in the period 2013 to 2018. However, only four competitions have been held since Storebrand re-established itself in this market in 2019. Storebrand's impression is that the RHFs and hospitals and several municipalities do not consider themselves obliged to follow the rules on public procurement when they buy occupational pensions.

There are no specific exceptions on the procurement of these contracts. As stated by the ECJ in case C-271/08 (referred to in section 2.3.3), the rules on public procurement shall in principle be followed when concluding agreements on occupational pensions. As Storebrand will explain below, the requirements for the content of the pension scheme that follow from the Norwegian collective agreement (SGS 2020) can be met in a procurement process.

Storebrand believe that there are three reasons why the rules on public procurement have been violated:

- The rules on public procurement limit the possibility of allowing indefinite contracts to run for a disproportionately long time. As Storebrand will return to in section 2.3.2 and section 3.2, both the Ministry of Health and Care Services and The Ministry of Reform, Administration and Church Affairs have stated that such contracts shall be terminated. However, neither the RHFs and hospitals nor the vast majority of the municipalities have complied with this duty.
- After 1994, several changes have been made to the municipalities', RHFs' and hospitals' pension agreements with KLP. Due to these changes in the pension scheme for municipal occupational pensions (which also apply to the RHFs and hospitals), existing contracts cannot be applied without illegal, substantial modifications to the contracts. According to directive 2014/24/EU article 72 paragraph 5, a new procurement procedure in accordance with the Directive shall be required for other modifications of the provisions of a public contract during its term than those provided for under article 72 paragraphs 1 and 2.

- Existing contracts cannot be applied by merged municipalities without illegal, substantial modifications. The requirement of conducting a new procurement procedure, according to the Directive article 72 paragraph 5, also applies to these modifications.

Storebrand kindly request that the Authority clarifies how Norway's obligations under the rules on public procurement are to be understood. More specifically, Storebrand kindly request that the Authority decides whether the rules on public procurement prevent the municipalities, RHFs and hospitals from continuing the contracts entered into with KLP instead of conducting competitions. Others claim that this practice is in accordance with procurement regulations. There is therefore a need for such an authoritative clarification.

Today, KLP have almost a monopoly in this market. Storebrand's aim is for the municipalities, RHFs and hospitals to align themselves in accordance with the rules on public procurement, by using their contractual right to terminate their contract and to enter into new contracts after procurement procedures with prior publication. Storebrand, on the other hand, do not request any sanction of the breaches of the rules. Storebrand therefore believe that there is no need to assess if any of the illegal contracts were entered into before time limits expire.

The Authority is also informed that the Norwegian Competition Authority has initiated an investigation related to possible abuse of dominant position by KLP in the market for occupational pensions in Norway.[1]

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In addition to the reasons given above, Storebrand mention that there are special financial ties between KLP and their customers.

Storebrand are organized as a public limited company, while KLP are a mutual life insurance company, where customers are also co-owners of the life insurance company. According to KLP's Articles of association, customers/owners must pay equity contributions when they become customers, and additional contributions if necessary (in practice every year). The mandatory equity contribution in KLP is an investment that the municipalities, RHFs and hospitals make in the company. As owners, the public customers contribute to the financing of KLP.

Norwegian municipalities, RHFs and hospitals have accumulated significant amounts of equity in KLP. Each year the municipalities must contribute between NOK 1 and 2 billion NOK in equity. This equity contribution is tied up and generates a profit in KLP.

The public customers and owners have not received a market-based return on the equity they are obliged to contribute to KLP. Instead, KLP have for a number of years kept all the profit itself, as so-called *«retained earnings»*. Return on retained earnings is also retained by KLP (as retained earnings).

Storebrand believe that the allocation of *retained earnings* to KLP may have contributed to the municipalities, RHFs and hospitals failure to comply with the rules on public procurement. The public owners do not receive their share of the retained earnings if they leave the company. This creates a lock-in effect that gives the municipalities, RHFs and hospitals an incentive to stay in KLP in order to avoid losing their access to the retained earnings.

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Storebrand recognize KLP as a competent and skilled provider and a strong competitor. The problem, however, is that neither Storebrand nor the other companies are allowed to compete

[1] Konkurransetilsynet har vært på razzia hos KLP | DN (Norwegian).

on equal terms with KLP today. The objective of the complaint is that the Authority contribute to facilitating effective competition on equal terms in this sector. Better competition will in turn facilitate lower price and better quality for the municipalities, RHFs and hospitals.

2. Background

2.1 Public occupational pension in Norway

The pension system in Norway consists of the National Insurance Scheme (Norwegian: *Folketrygden*), pension from the employer and any own pension savings. The pension from the National Insurance Scheme ensures the employees a pension that is in reasonable proportion to the earned income they have had during their working years. It is financed annually from the state budget. An employer's pension is called an occupational pension, and all employers, both public and private, are obliged to have occupational pension schemes for their employees. The schemes are set up by the employer, who is responsible for paying deposits and premiums, while the employees have the right and obligation to membership.

In the public sector, a collective agreement and specific legislation ensure all employees a so-called public occupational pension that has a savings level significantly above the statutory minimum level in Norway.

Since its inception with the first scheme in 1902, municipal occupational pensions have been organized and regulated, as fully funded traditional occupational pension schemes corresponding to occupational pensions in the private sector.

In the 1990s (and somewhat earlier), the pension scheme itself was standardized so that the premium and the pricing was regulated through collective agreements and legislation.

In a period, several life insurance companies were barred from offering compensation of pension costs through a joint scheme. In its judgment of 8 October 2002, the Labor Court ruled that such companies could therefore not offer pension schemes in accordance with the Main Collective Bargaining Agreement's requirements for premium equalization. In order to increase competition in the municipal occupational pension market, legislative amendments of the Norwegian Insurance Activities Act were implemented with effect from 1 January 2004, which allowed ordinary insurance companies to offer pension schemes in line with these requirements.

The purpose to facilitate competition on these services is for example expressed in the summary of the Ot.prp. nr 11 (2003-2004) chapter 01 (translated by Storebrand):

> *"The purpose of the proposals in Part I is to create orderly competition in the market for municipal pension schemes. To date, municipal pension schemes have not been subject to special legislation. The proposal contains rules on municipal pension products, and will help ensure that all life insurance companies can offer pension products to the municipal sector on equal terms."*

There are only small differences between the rules on municipal and private sector occupational pensions in the Norwegian Insurance Activities Act.

In addition, municipal occupational pensions are currently regulated in the central general special agreement on pension schemes, SGS 2020, in KS' area.

Appendix 1: SGS 2020 (Norwegian)

All providers of municipal occupational pensions (e.g. KLP, own pension funds, Storebrand and other undertakings) are subject to the same legal regulation and collective agreement (SGS 2020). This standardization ensures that significant elements in the product's content and pricing are subject to regulation that is common to all providers. Thus, employees in the

municipalities, RHFs and hospitals receive the same pension, regardless of who provides this. However, the municipalities', RHFs' and hospitals' cost and the quality of the services provided may change, depending on who is the provider.

The *Pension Office* supervises the implementation of the applicable pension provisions laid down in SGS 2020. The members of the Pension Office are representing the parties and include those covered by the collective agreement in the KS area. This means that the members are all municipalities and county municipalities in KS 'sector (except Oslo), as well as all companies and enterprises that are members of KS Bedrift.

In addition to the supervision on SGS 2020, the Pension Office prepares an annual *Pension Guide* with guidance in connection with the selection of, and procurement of, municipal and county municipal occupational pensions. The Pension Office's Guide was first published in 2006 and has since been updated every year. The tenderers are given the opportunity to provide input to the revision of the Guide. From 2019 two companies provided municipal occupational pensions (KLP and Storebrand). This entailed an extensive process in preparing the Pension Guide for 2020, among others because the providers' different ownership models affect the terms of the services they offer.

Appendix 2: Pension Guide 2020 (Norwegian)

The Pension Guide for 2021 was further processed.

Appendix 3: Pension Guide 2021 (Norwegian)

The Pension Office have based their recommendations in the Guides 2020 and 2021 on KLP receiving an economic advantage by a lack of return on equity contributed to the company. The Pension Office have recommended that (parts of) this advantage must be taken into account when conducting competitions. Prior to 2020 no such recommendation was included in the Pension Guide.

2.2 Competition for municipal occupational pensions in Norway

2.2.1 The market and the competitive situation

Some municipalities have their own pension fund, but the majority buy occupational pensions from a life insurance company. There are currently two providers of public service pensions from life insurance companies, KLP and Storebrand. Of these two, KLP are by far the largest in this market.

Since 1949 when KLP were established, KLP have been a *mutual company*. KLP provide occupational pensions to 333 municipalities and eight county municipalities, in addition to four RHFs and a number of hospitals. As of the third quarter of 2021, KLP's total insurance liabilities were NOK 634.1 billion.[2]

In the period 2013 to 2018, KLP were the only provider of insured public occupational pensions. From 2019, Storebrand have also provided this service, while other companies, including DNB, have considered entering the market.[3]

The market for municipal occupational pension schemes can be considered mature. The number of customers in the market is more or less constant, given the number of municipalities and county municipalities, in addition to the RHFs and hospitals. New providers will be dependent on winning customers from a competitor.

[2] Cfr https://www.klp.no/om-klp/finans-og-ir/rapporter-og-presentasjoner (Norwegian)
[3] A more detailed explanation is provided in section 5.4.

Significant funds are managed within public sector occupational pensions. As of the third quarter of 2021, KLP Liv alone have around NOK 700 billion in total assets. Thus, this market is larger than private occupational pensions. Effective competition is important for the pensions of the future to be managed efficiently and reasonably.

Although the purchase of occupational pensions for municipalities, RHFs and hospitals is subject to the rules on public procurement, Storebrand experience that most public customers purchase these services without conducting competitions. It is illustrative in this context that in the period 2019 to 2021 (when Storebrand re-entered the market) a total of only four competitions were held: Øygarden municipality conducted a competition in 2019, Vestland county municipality conducted a competition in 2020, Øygarden municipality conducted a new competition in 2021 and Bjørnafjorden municipality also conducted a competition in 2021. In addition, four other competitions were initiated, but cancelled, in 2021 by Ålesund municipality, Ullensvang municipality, Strand municipality and Giske municipality.

Thus, in the period 2019 up to and including 2021, approximately 1% (!) of the municipalities have carried out competitions. The RHFs and hospitals have not carried out any competitions. According to information from the municipalities, one competition is planned in 2022 (Strand municipality).

When competitions are first held, the providers compete for the cost the public customer pay for their employees to be members of the pension scheme, as well as various qualitative elements of the service. The cost consists of the level of the pension premium (ie what prices the company charges for insurance risk), the asset management and administration.

2.2.2 The failure to conduct competitions

A survey conducted by Storebrand shows that a majority of the municipalities – including their Municipal Directors (Norwegian: *Kommunedirektør*) and mayors – believe that it is not necessary to carry out competitions on public occupational pensions.

> **Appendix 4:** Storebrand's survey (Norwegian)

Storebrand also presents an example of a statement from a Municipal Director as to why she believes that the rules on public procurement do not apply.

> **Appendix 5:** E-mail from Ellen Wibe 3rd February 2020 with attachement Anbudsplikt på pensjon er ikke hensiktsmessig • Kommunal Rapport (kommunal-rapport.no) (Norwegian)

It is Storebrand's understanding that KLP have assisted several of the municipalities with advice in these assessments.

The Norwegian Competition Authority has repeatedly - and over time - highlighted the lack of competition in the market for public sector occupational pensions.

> **Appendix 6:** The Norwegian Competition Authority's report *Konkurransen i markedet for offentlig tjenestepensjon* (2010) (Norwegian)
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> **Appendix 7:** Kommunepensjoner bør ut på anbud, DN, 20. desember 2018 (Norwegian)
>
> **Appendix 8:** Vil ha anbudsutsetting av kommunal tjenestepensjon – et marked på hundrevis av milliarder, anbud365, 9. oktober 2019 (Norwegian)

At the end of 2021, competitions for municipal occupational pensions were also debated in the newspaper *Dagens Næringsliv*. The debate was initiated by the Norwegian Competition

Authority, and KLP, municipalities, the Norwegian Union of Municipal and General Employees (NUMGE) and Storebrand contributed.

Appendix 9: Penger å spare på pensjon – så lenge konkurransen er der (Norwegian)

Appendix 10: Våkne kommuner har lite å spare på pensjon (Norwegian)

Appendix 11: Penger å spare på pensjon? (Norwegian)

Appendix 12: Skivebom om tjenestepensjon (Norwegian)

Appendix 13: Sovemedisin fra KLPs styreleder (Norwegian)

2.2.3 The Ministry of Reform, Administration and Church Affairs' interpretative statement

The Ministry of Reform, Administration and Church Affairs has issued an interpretative statement 24th February 2012 clarifying whether, and if so, how often, ongoing contracts on public occupational pensions shall be subject to competitions, in accordance with the rules on public procurement.

Appendix 14: Interpretative statement 24th February 2012 (Norwegian)

The Norwegian Competition Authority asked for this interpretative statement because the municipalities assumed that the rules on public procurement only apply if an ongoing agreement on occupational pension is terminated. Thus, the occupational pension contracts were only exposed to competition when a municipality wished to change contractor.

The Ministry stated that the municipalities shall act in accordance with the rules on public procurement when they enter into new agreements on occupational pensions. Further, the Ministry concluded that the municipalities are in principle obliged to terminate indefinite agreements on occupational pensions after a while, in accordance with the regulations on public procurement. The duty to terminate these agreements and conduct new competitions could not be fulfilled by instead examining the market trying to establish the market conditions.

In the Ministry's view, this duty applied to agreements entered into after 1994 and agreements entered into before 1994, which have been substantially modified after this time.

The Ministry in addition emphasized that even if a customer is not legally obliged to terminate "old" contracts that have not been substantially modified, this may still be appropriate in relation to, among other things, competition in the market and opportunities for better contracts. According to the Ministry, thus, the municipalities should regularly consider exposing such contracts to competition.

2.3 Pension schemes for employees in the RHFs and hospitals

2.3.1 KLP's management of pension schemes for employees in the RHFs and hospitals

The employees in the RHFs and hospitals receives public occupational pension. The schemes were previously subject to the county municipalities, which explains the link to the municipalities' contracts. As a result of various legal regulations and collective bargaining regulations, the employees are members of various schemes.

- *The Joint scheme* is the largest scheme and includes all employees who are not doctors or nurses.
- *The Pension scheme for hospital doctors* applies (with some exceptions) to doctors employed by RHFs and hospitals.

- *The Pension scheme for nurses* applies to all publicly approved nurses, regardless of employer affiliation.
- *The Pension scheme for pharmacists*

KLP provide the ***Joint scheme***. Initially, the scheme was part of the municipal joint scheme. When the RHFs were established 1 January 2002, ownership of the hospitals was transferred from the county councils to the state. The municipal joint scheme in KLP was then divided into three risk communities with separate finances, including the Joint scheme. This is explained further in section 2.3.2. The Joint scheme is provided pursuant to ordinary agreements, similar to the municipalities' contracts with KLP.

KLP provide the ***Pension scheme for hospital doctors***. Senior and junior doctors had their own schemes, determined by collective agreements, until 1 January 1994. The schemes were completely separate, each with its own finances and certain nuanced differences in the rules. From 1 January 1994, these schemes were merged. All previous rights from the two predecessors were transferred to the new scheme. The employers enter into an agreement with KLP to agree to the scheme, similar to the municipalities' contracts with KLP.

KLP provide the ***Pension scheme for nurses***. The Act on pension scheme for nurses (*Lov om pensjonsordning for sykepleiere*) § 1 stipulates that all publicly approved nurses must be members of the pension scheme for nurses.[4] It follows from § 33 that (translated by Storebrand)

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

By a Royal resolution 22 June 1962 it was decided that this scheme was to be provided by KLP. The scheme was established in 1962, and KLP administers the scheme to this day in accordance with the Royal resolution.

The ***Pension scheme for pharmacists*** is administered by the State Pension Fund.[5]

Regarding the Joint scheme and the Pension scheme for hospital doctors, the RHFs and hospitals are not obliged to enter into contracts with KLP. Some RHFs and hospitals have their own pension funds (including *Pensjonskassen for helseforetakene i hovedstadsområdet*). However, KLP operates and manages schemes for *Helse Nord* (the northern RHF), *Helse Midt-Norge* (the middle-Norway RHF) and *Helse Vest* (the western RHF), and their underlying hospitals. In addition, KLP operates and manages schemes in region South-East, except the hospitals that are part of *OUS, Ahus, Vestre Viken* and *Sunnaas*.

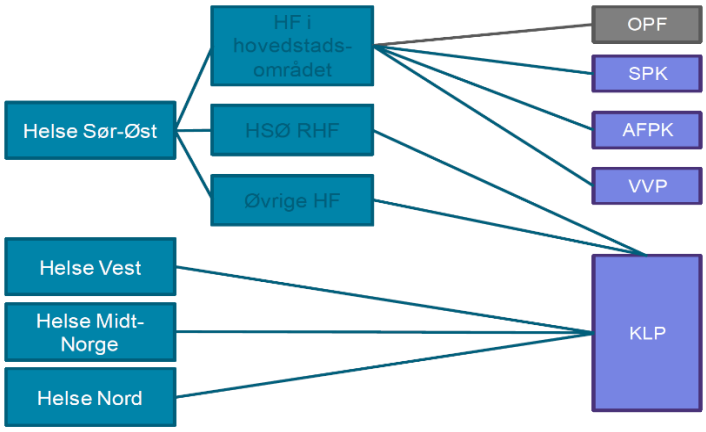
In the report *Pension provider for the health authorities* submitted by an internal working group in the Ministry of Health and Care Services, the situation was explained, and possible solution models were reviewed and assessed.

Appendix 15: Pensjonsleverandør for helseforetakene (Norwegian)

From the report, section 2.1.12 *Overview of pension providers to the health authorities*, it appears that at the beginning of 2010 KLP managed all or parts of the pension scheme for 25 of 27 health authorities, and the following graphic presentation was given:[6]

[4] Cfr. Lov om pensjonsordning for sykepleiere, 22 June 1962 nr 12.
[5] Cfr. the act on pension scheme for pharmacy business.
[6] In the presentation, *OPF* is an abbreviation for Oslo Pensjonsforsikring AS, while SPK is Statens Pensjonskasse, AFPK is Akershus fylkeskommunale pensjonskasse and VVP is Vestre Viken Pensjonskasse.

Figur 1 Dagens leverandørsituasjon



[5] Dette gjelder Psykiatrien i Vestfold, Sykehuset Vestfold HF Sykehuset Innlandet HF, Sykehuset Telemark HF, Sykehuset Østfold HF, Sørlandet Sykehus HF

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There have been changes after 2010, including the establishment of *Pensjonskassen for helseforetakene i hovedstadsområdet*.[7] From 2021, PKH have for example received members from KLP as a result of Kongsvinger Hospital being included under Akershus University Hospital HF.[8]

In 2022, however, KLP provides their services to the same health authorities (and hospitals) as in 2010, in addition to parts of *Helse Sør-Øst* as described above.

2.3.2 Historical background – and provisions on *freezing* from 2002

When the RHFs were established 1 January 2002, hospitals went from being owned by county municipalities to be owned by the state through Regional health authorities. In connection with the adoption of the Act relating to health authorities etc (Norwegian *Helseforetaksloven*), the question of pensions was raised. In Ot.prp. No. 66 (2000-2001) chapter 2.13.5, the Ministry of Social Affairs and Health stated that

> *"It [is] important that all employees are guaranteed the maintenance of pension rights by continuing the current pension schemes".*[9]

On the basis of this, the Ministry determined in the same section

> *"That it will be stipulated in the articles of association that the employees will be allowed to continue their pension schemes".*[10]

The Ministry's views on pension schemes were not implemented in legislation.

In Ot.prp. No. 66 (2000-2001) chapter 2.13.5, the Ministry also stated that there was a need for *"a closer assessment of the question of pension providers"* and of the competition between providers of pension services and questions in that regard.[11]

Pensions were also a topic in the collective agreement for RHFs and hospitals for the period 1 May 2002 to 30 April 2004, Part A1 (social provisions). The agreement was entered into

[7] When this pension fund was established, the owner's *retained earnings*, generated by their equity contributed to KLP, was retained by KLP. This retained earnings amounted to app. 50 000 000 NOK.
[8] Source: PKH Annual Report.
[9] Translated by Storebrand.
[10] Translated by Storebrand.
[11] Translated by Storebrand

between NAVO (now *Spekter*) and unions in LO, YS, SAN, Unio and *Akademikerne*. Clause 9 of the agreement states the following about pensions (Storebrand's translation):

> *"The parties' common goal is to agree on more detailed content and design of pension conditions for employees in health authorities and trusts, including the necessary harmonization of the current occupational pension schemes and the AFP scheme. Until this work is completed and the parties have agreed on another pension scheme, the parties agree to continue existing pension schemes for the employees, including the current scheme with regard to what is pensionable income."*[12]

As a result of the agreement, there was a *freeze* in assessments of changes to pension schemes for employees in RHFs and hospitals. The provision on the freezing of pension relationships has been continued in later agreements and is still in force. The freeze is thus anchored in a collective agreement and is considered to be binding on the parties. Following this *freezing* of the pension agreements in 2002, no competitions have been held within the health schemes.

2.3.3 The Working group's assessment of the significance of the procurement and State aid regulations for the RHFs' and hospitals' agreements

In the mentioned report *Pensjonsleverandør for helseforetakene (*"Pension provider for the health authorities"), the Ministry's working group gave its assessment of the rules on public procurement's and the State aid's requirements for the RHFs' and hospitals' agreements on occupational pensions.

In assessing the requirements of the procurement regulations, the working group reviewed the European Court of Justice's decision in case C-271/08.[13] In that case, the European Court of Justice of the European Union (hereinafter referred to as *ECJ*) ruled on whether exceptions could be made from the treaty provisions on the four freedoms (and thus also the procurement rules), in cases where superior collective bargaining parties by a collective agreement decide who is to be the pension provider. The Court concluded that Germany had breached its obligations under the Procurement Directives by awarding contracts for occupational pensions directly to the institutions and companies mentioned in the collective agreement, without conducting a competition in accordance with the procurement rules.

The Ministry's working group understood that this case was significant in questions of interpretation that also apply to Norwegian matters, and that the rules on public procurement shall in principle be followed when concluding agreements on occupational pensions. The working group then pointed out that the ECJ had stated that the choice of pension provider does not affect the core of the right to collective bargaining. The working group pointed out that the requirements for the content of the pension scheme that follow from the collective agreement can be met in a procurement process (for example by specifications, contract terms and qualification requirements). Neither could the so-called *freezing provision* provide a basis for deviating from the procurement regulations.

The working group concluded as follows (Storebrand's translation and emphases):

> *«**The procurement regulations can only be deviated from where this is justified specifically in social objectives that cannot be achieved through a procurement procedure.** This will depend on a specific assessment, and it cannot be ruled out that factual circumstances that differ from the circumstances in the German case may justify deviating from the procurement regulations.*

[12] Translated by Storebrand.
[13] Cfr *Pensjonsleverandør for helseforetakene* section 4.2.

> *Although there are certain factual differences between the German scheme and the scheme for the health authorities, the working group believes that there is much to suggest that the outcome of the proportionality test will be the same; that is, that the rules on public procurement must be followed.* ***The working group therefore assumes that a solution where the supplier is designated directly in the collective agreements or in another way is designated directly without exposure to competition will entail a significant process risk. On the basis of the legal uncertainty and the risk of litigation, the working group will therefore not recommend such a solution model****."* [14]

The working group concluded that the RHFs and hospitals have a duty to carry out competitions at regular intervals for agreements entered into after 1994 and for agreements entered into before 1994 where substantial changes have been made after that time.[15]

The working group gave a thorough review of the legal background of the rules on State aid, and stated that no State aid issues will occur if the RHFs and hospitals put their occupational pension agreements out to competition.

In addition, the working group assessed the continuation of agreements entered into before 1994 (translated and emphases by Storebrand):

> *"When ongoing (unlimited) agreements entered into before 1994 are continued* ***unchanged*** *after competition has arisen in the market, questions can be asked about how the price for the service at all times relates to the market price. This is the question of whether an economic advantage has been granted.*
>
> *It is obvious that the service must not always correspond to what could have been achieved by putting it out to competition. This is, for example, the case as long as the contract runs on normal terms of termination. However, it cannot be ruled out that aid is granted in these ongoing agreements. If you want to find out whether there is a aid element in these agreements, you must compare with similar agreements in the private market. Even if these ongoing agreements were to involve State aid, they could be considered existing aid that is not subject to notification, if the agreements were entered into before 1994.* ***The prerequisite is then that these agreements have essentially remained unchanged since 1994, with the exception of minor adjustments (for example formal or administrative changes) which have no bearing on the assessment of whether the measure can be considered to be compatible (approved) with the EEA Agreement****. ..."* [16]

As Storebrand will demonstrate, there have been significant changes of the contracts that the public customers have entered into with KLP.

The working group did not consider if the (municipalities',) RHFs' and hospitals' lack of ownership of the return on paid-in equity entails the allocation of illegal State aid. The working group, however, commented the lock-in effect created by the profit retained by KLP (translated by Storebrand):

> *"The working group point out that the Regional health authorities and their underlying health trusts as of the end of 2009 have a share in retained earnings in KLP of approx. NOK 925 million, excluding the Pension scheme for nurses, which is locked up and risks being lost if the undertakings move their pension agreements from KLP. The working*

[14] Cfr *Pensjonsleverandør for helseforetakene* section 4.2.3.
[15] Cfr *Pensjonsleverandør for helseforetakene* section 4.3.6.
[16] Cfr *Pensjonsleverandør for helseforetakene* section 4.6.2.3.

group believe that this lock-in effect is unfortunate if competition is to be developed in the market for public sector occupational pensions."[17]

…

«The working group believe that the lock-in effect is unfortunate if one is to develop a well-functioning market for the provision of public service pensions. The working group is assessing the model alternatives for the Regional health authorities with underlying trusts on the basis of existing practice in KLP. In the further work on a future solution model for pension providers, both KLP's legal and financial basis for this practice should be considered in more detail.

AFPK states that upon resignation [from AFPK], both paid-in and earned equity are distributed according to the premium reserve."[18]

3. Violation of the rules on public procurement by failing to conduct competitions for occupational pensions

3.1 Introduction

When the municipalities, RHFs and hospitals purchase services related to the management and administration of pensions, *mutually onerous agreements* are entered into, and *contracts* within the meaning of the rules on public procurement. Most of these contracts are of such value that they must be entered into based on prior competitions announced in the EEA market.[19]

There are no exceptions on these service contracts. As stated by the ECJ in case C-271/08 (referred to in section 2.3.3), the rules on public procurement shall in principle be followed when concluding agreements on occupational pensions. The requirements for the content of the pension scheme that follow from the Norwegian collective agreement (SGS 2020) can be met in a procurement process. Reference is made to the Working group's assessment (cfr appendix 15, described in section 2.3.3) and the Ministry of Reform, Administration and Church Affairs interpretative statement (cfr appendix 14, described in section 2.2.3). In addition, the Pension Office, which supervises on SGS 2020, describes conduction of competitions in their Pension Guides (cfr appendix 2 and 3, briefly described in section 2.1).

For the sake of clarity, Storebrand also mention that the Joint scheme, the Pension scheme for nurses and the Pension scheme for doctors, described in section 2.3, can be managed by other providers than KLP.

According to Storebrand's knowledge, the RHFs and hospitals and several municipalities have indefinite contracts with KLP. In this context, "indefinite" means without expiration date, but with a termination clause (by convenience).

Several of these contracts have run for decades. As stated in the article *Anbudsplikt på pensjon er ikke hensiktsmessig*, included in appendix 5 above, the Municipal Sector's organization, KS, and the Norwegian Union of Municipal and General Employees seem to believe that these contracts can run forever.[20]

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[17] Cfr *Pensjonsleverandør for helseforetakene* Summary (page 14).
[18] Cfr *Pensjonsleverandør for helseforetakene* Section 6.4.1.
[19] Cfr the Norwegian Regulation on Public Procurement § 5-1 and § 5-3.
[20] However, *KS Advokatene* (KS' lawyers) have provided a report where it is assumed that a failure to terminate an ongoing, indefinite contract may constitute an illegal direct award of contract, cfr *Kommunesammenslåing og forholdet til anskaffelsesregelverket* (2018) section 4. The report is available at Kommunesammenslåing og forholdet til anskaffelsesregelverket (ks.no).

As Storebrand return to below, Storebrand believe that there have been such material modifications in recent years that the municipalities', RHFs' and hospitals' agreements with KLP are altered substantially to meet the new needs. These substantial modifications mean that current service purchases cannot be anchored in older, indefinite contracts.

In this section 3, Storebrand will show that in any case the municipalities, RHFs and hospitals cannot relate to their indefinite contracts with KLP. The basic principle of competition limits the duration of contracts. This limitation is in addition to the prohibition of substantial modifications. If a municipality, RHF or hospital has entered into indefinite agreements with a termination clause, an obligation will eventually arise to terminate this agreement and carry out a competition for a new agreement. This duty is derived from the general principles of competition and proportionality. Thus, the problem is not if a contract is indefinite, but if a contract runs for a disproportionately long time or even forever.

3.2 Duty to terminate agreements municipalities have entered into with KLP after 1994

The EEA Agreement entered into force in Norway on 1st January 1994. KLP's annual reports show that a majority of the municipalities were customers and owners at that time, more than 90 percent of the municipalities in 1993 and 94 percent of the municipalities in 1994.

Appendix 16: KLP annual report 1993

Appendix 17: KLP annual report 1994

At the time there were 457 municipalities in Norway.

However, after 1994 a number of these municipalities have terminated their relationship with KLP to buy services from another provider, and then returned to the KLP a few years later.

As described by KLP in the annual report 2011, 60 percent of the municipalities were customers and owners this year. In 2011, there were about 430 municipalities in Norway. Consequently, more than 100 municipalities bought their pension services from a provider other than KLP in 2011.

Appendix 18: KLP annual report 2011, page 146 (page 147 of the pdf)

At that time, KLP's share of the municipality-market was reduced from 94 percent to 60 percent.

Storebrand provide the Authority with some additional information, which is not complete

- In 1996, two municipalities terminated their relationship with KLP
- In 1997, one municipality terminated its relationship with KLP
- In 1998, 11 municipalities terminated their relationship with KLP
- In 2000, 26 municipalities terminated their relationship with KLP

KLP were the only Norwegian provider from 2012 until 2019, and the municipalities returned to KLP. Thus, about 40 percent of the municipalities have entered into agreements with KLP without competition after the EEA agreement entered into force. These new contracts are covered by the rules on public procurement.

In addition, all contracts entered into with KLP in relation to the *Pension scheme for hospital doctors,* are entered into after 1st January 1994, as described in section 2.3.1. Storebrand also believe that the contracts entered into with KLP in relation to the *Joint scheme*, were entered into after the RHFs were established on 1st January 2002.

If any of these contracts (which were entered into without being put out to competition) were entered into in violation of the rules on public procurement, this breach shall be remedied by terminating the contract, by using the right to terminate by convenience. Case law of the European Court of Justice states that there is a breach of the EEA agreement if a contractual agreement entered into in violation of the procurement rules is continued, and that the breach persists as long as the agreement runs. Reference is made to case-law from the ECJ, ie case C-503/04. Both The Authority and the European Commission act in accordance with this case-law.[21]

In Norway, the Complaints Board for Public Procurement has on numerous occasions concluded that the contracting officer has an ongoing duty to terminate contracts entered into in breach of the rules on public procurement.[22]

However, if any of these contracts were entered into in accordance with the rules on public procurement, it may still be a duty to terminate them. Reference is made to the ECJ decision in case C-454/06 *Pressetext*. One of the questions decided by the ECJ, was if – and when – a waiver of a right to terminate a contract, could constitute a breach of the rules on public procurement. This is what the ECJ stated (emphasis by Storebrand):

> *«73 First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts.* ***Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts.***
>
> *74 Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period."*

The ECJ stated that the rules on public procurement do not exclude contracts which run for an unlimited period. However, the ECJ pointed out that over time such contracts will hinder the applications of the Community directives. Reference is also made to case C-451/08 paragraph 79:

> *"In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order, as stated by the Advocate General In points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 pressetext Nachrichtenagentur [2008] ECR I-4401, paragraph 73)."*

The ECJ's statements are understood so that a customer may have a duty to terminate long-term contracts. This duty is among others derived from the quoted excerpt, read in the light of the following excerpt from the Advocate General's opinion in case C-454/06:

> *"79. Secondly, in 2005 – subject to findings to be made by the Federal Procurement Office – there was no economic incentive for the Republic of Austria during the comparatively foreseeable period of the waiver of the right to terminate, that is to say until the end of 2008, to change to another service provider. As far as can be*

[21] Cfr The Authority's reasoned opinion in cases 69548 og 69656 and the European Commission's proposal COM/2000/0275 final/2

[22] Cfr for example the Complaints Boards decisions in the cases 2009/144, 2009/246, 2010/4, 2010/361, 2011/14, 2011/58, 2011/102, 2011/179, 2011/229, 2012/53.

ascertained, the contracting authority was able reasonably to assume that in the period until 2008 there would be no equivalent offers under more favourable conditions such as to justify the expenditure entailed by making a change.

80. According to the information available, the renewed waiver of the right to terminate agreed in 2005 for a three-year period therefore entailed no risk of a distortion of competition and is therefore not to be regarded as a material amendment to the basic agreement."

In contrast to the situation that the Advocate General described, there have been significant changes in the market conditions within municipal occupational pensions after 2019. A new pension scheme has been introduced, there is competition, KLP are no longer the sole Norwegian provider, and Storebrand have won a majority of the (few) competitions that have been conducted. This shows that the municipalities cannot reasonably assume that "*there would be no equivalent offers under more favourable conditions such as to justify the expenditure entailed by making a change".*

An obligation to terminate the contracts is in addition implemented in Norway.

In its guide to the rules on public procurement, the Ministry of Trade and Industry has stated that there is a duty to terminate indefinite contracts, and that such contracts (Storebrand's translation):

«may impede competition between potential service providers and the application of public procurement rules. Long-term contracts can establish a supplier monopoly in violation of the preconditions for public contracts to be subject to competition. Failure to terminate an ongoing, indefinite contract could therefore be an illegal direct acquisition ».[23]

As explained in section 2.2.3, The Ministry of Reform, Administration and Church Affairs has issued an interpretative statement 24th February 2012 clarifying that the municipalities shall act in accordance with the rules on public procurement when they enter into new agreements on occupational pensions. The Ministry concluded that the municipalities are in principle obliged to terminate indefinite agreements on occupational pensions after a while, in accordance with the regulations on public procurement, and that it is not sufficient to research the market. In the Ministry's view, this duty applied to agreements entered into after 1994 and agreements entered into before 1994, which have been substantially modified after this time.

In a Official Norwegian Report by a Committee which examined the rules on public procurement, NOU 2014:4, the Committee in section 15.3.3 stated a duty to terminate contracts with a disproportionately long duration. Reference was given to the interpretative statement 24th February 2012.

Further, a duty to terminate such contracts is also stated by the Norwegian Complaints Board for Public Procurement, as mentioned above. The Board has emphasized the following factors in assessing whether the customer is obliged to terminate a long-term agreement:

- Changes in the market situation: new companies are established as providers of the services, cfr cases 2009/144 and 2010/36 and/or lower price and/or better quality.

These factors apply to the contracts on occupational pension.

[23] Cfr the Ministry of Trade and Industry's guide to the rules on public procurement section 43.6.

3.3 Duty to terminate agreements municipalities have entered into with KLP before 1994

In the Ministry of Reform, Administration and Church Affairs' interpretative statement 24th February, the Ministry only applies the duty to terminate contracts to agreements entered into after 1994 and agreements entered into before 1994, which have been substantially modified after this time.

As Storebrand will demonstrate below, the contracts entered into before 1994 have been substantially modified. In addition, Storebrand understands the rules on public procurement so that the obligation to terminate agreements and carry out new competitions may apply regardless of whether the contract was entered into before Norway joined the EEA. The European Court of Justice's ruling in case C-454/06 concerned a contract entered into before Austria became a member of the EU. The Court's statements on long-term contracts being problematic, shall be read in the light of this.

In case 2009/144, the Norwegian Complaints Board for Public Procurement imposed an infringement fine to the municipality of Oslo of NOK 42,000,000 because the municipality had failed to terminate a contract that had been entered into before Norway joined the EEA. An infringement fine was imposed by the Board on the same basis in case 2011/65.

4. Modifications of existing contracts

Storebrand will show that the municipalities', RHFs' and hospitals' contracts with KLP are modified substantially.

If a contract is *substantially* modified during the contract period, according to the rules on public procurement a new agreement is entered into. According to the Directive article 72 paragraph 5, this new agreement shall be entered into following procedures described in the Directive.

The Norwegian Regulations on Public Procurement §§ 28-1 and 28-2 state the Norwegian rules on amendments of contracts. These rules are based on an assessment of the contractual relationship before and after the modification. The systematics of the regulations is that one first assesses whether changes are lawful according to § 28-1. If a change does not fall under any of the conditions that make the change lawfull according to § 28-1, it does not automatically lead to the change being substantial. The modifications shall in addition be assessed against the ban on substantial modifications in § 28-2.

Storebrand assume that the Authority is well acquainted with these provisions, so that it is unnecessary to give a thorough, general review of the ban on substantial modifications. Effects of this ban, with specific relevance to this case, are described below.

The ban on substantial modifications to contracts prevents that the municipalities/RHFs/hospitals and KLP agree on such substantial modifications during an otherwise legal contract period. A contract that changes substantially, is considered an illegal direct award. Thus, these violations of the rules on public procurement lead to an independent obligation to terminate the contracts, *in addition to* the duty to terminate indefinite contracts.

As mentioned in section 2.2, one competition was held for public sector occupational pensions in 2019, one in 2020 and two in 2021. This is despite changes in the pension schemes, including the introduction of a new pension scheme, and despite a comprehensive municipal reform has been implemented, where several municipalities and county municipalities have been merged.

Storebrand believe that many – if not all – contracts on public sector occupational pensions have changed substantially in recent years. This applies regardless of whether some of the contracts were entered into during a period when only KLP offered this service in Norway, so that the participation in or outcome of these processes would not have been affected by the

modifications. As mentioned, there are currently (at least) two Norwegian companies, which provide these services, KLP and Storebrand. It is likely that there would have been other providers as well if the municipalities, RHFs and hospitals had held competitions for their contracts. There are other Norwegian companies that are probably considering an investment in this market, see for example the discussion of DnB Liv in section 5.4. In addition, there is a market in most EEA countries, and foreign suppliers who will be able to provide such services to Norwegian public customers.

Storebrand believe that these conditions – separately and at least in connection – lead to the conclusion that there should have been far more competitions on public occupational pension contracts. If the municipalities, RHFs and hospitals are given permission to make fundamental modifications to existing contracts in order to keep the existing contract with KLP, the consequence will be that all other suppliers are kept out of the market. This is contrary to both the EEA Agreement and the rules on public procurement. Nor can it be assumed (without testing) that KLP regardless would have submitted the best tender in a new competition. On the contrary, Storebrand have won three of the four competitions that have been completed. The experience from the competitions that have been carried out also indicates that KLP's prices in competitions are lower than their renumeration in the contracts entered into directly with the public customers.

5. Amendments of the contracts

5.1 Amendments 1994-2020

5.1.1 Introduction

After 1994, several changes have been made to the municipalities', RHFs' and hospitals' pension agreements with KLP.

The provisions of the collective agreement change regularly, which in turn have affected the services that KLP have delivered under the service agreements, the allocation of risk and the renumeration KLP receive. The main features of the collective agreement, including the provisions on equalization of premiums, have for example been established after Norway entered into the EEA in 1994.

Below, Storebrand will describe some of the significant modifications of the contracts KLP have entered into with the municipalities, RHFs and hospitals. Both assessed separately and in connection, these modifications of the contracts are substantial.

5.1.2 Calculation of premiums

In the period around the legislative amendments in 2004, discussed in section 2.1, the calculation of premiums was changed.

Following the legislative amendments, for the regulatory premium, equalization for all practical purposes was prohibited. This was a premium element that constituted a significant part of the total annual premium. For one-off prizes, equalization was made optional.

Prior to this, KLP equalized all pension premiums on customers who participated in their (municipal) joint scheme (Norwegian: *Fellesordningen*), regardless of whether it was an ordinary annual premium, regulatory premium or one-off premiums related to early retirement or gross guarantee. This equalization is, for example, described in NOU 2003: 11 section 4.2.3 (translated by Storebrand):

> *"The rules on the calculation of the annual premium for pension schemes in the Joint Scheme are included in the Insurance Terms and Conditions for the Joint Scheme, section 5. This provision contains two principles:*

• the premiums from the pension schemes in the Joint Scheme shall be determined so that the total premiums added to the Joint Scheme are sufficient to cover the Joint Scheme's expenses according to the insurance technical average calculation, and

• the premium for the individual pension scheme is determined as a percentage of the pension base for the members of the pension scheme, ie full pensionable salary to the members of the pension scheme at all times.

...

(2) Pursuant to the Insurance Terms and Conditions for the Joint Scheme § 5 first paragraph, the total annual premium to be added to the Joint Scheme shall be distributed between the pension schemes in the Joint Scheme in accordance with the pension bases. Other factors that will normally be relevant when calculating premiums based on technical insurance principles, e.g. the distribution of employees in the pension schemes by sex and age, shall thus not be taken into account in the distribution. The background for this procedure is that the Main Collective Bargaining Agreement in the municipal sector for personnel policy reasons requires that the premium cost for the individual employees must be gender and age neutral, and that this can be achieved by distribution based on the pension basis.

...

The distribution rule in the Joint Scheme does entail not insignificant equalizing effects with regard to the premium level for the pension schemes in the Joint Scheme."

As stated, this equalization entailed a significant redistribution of costs. For example, a municipality with older employees would trigger significant regulatory costs in the event of a wage increase, but the cost was largely borne by municipalities with younger employees.

KLP's changed the premium calculation in 2003, prior to the legislative amendments. KLP changed to using the premium reserve as a distribution key. This meant a comprehensive narrowing of the equalization, and that each customer for all practical purposes bore its own regulatory costs.

Storebrand believe it is likely that the changes were implemented to meet the increased competition for these services. However, it is not necessary for the Authority to decide what was the purpose of the change.

What is relevant in the Authority's assessment, is that the change of calculation of premiums in the joint scheme led to extensive changes on each customer's pension costs, both customers that "earned" and "lost" on the equalization.

5.1.3 Lapse of insurance obligations following non-payment of premiums

In 2004, a statutory provision was introduced stating that non-payment of premiums resulted in the lapse of the insurance obligations that the unpaid premiums were to cover. Prior to this, KLP had been responsible to the employees for fulfilling non-insurable benefits, including gross guarantee and G-regulation. In cases where the employer was unable to pay the adjustment costs, it was assumed that KLP would still make payments.

The change that followed from the statutory provision entailed a significant reduction in KLP's insurance liability under the agreement, and it changed the distribution of risk and the change of economic balance in KLP's favor.

5.1.4 Longevity adjustments

In 2011, the municipal occupational pensions schemes introduced longevity adjustments. The size of the annual pension is determined on the basis of an estimated live expectancy for the relevant year group, ie which year the person who is to receive the pension was born. This longevity adjustment thus reduces the guaranteed benefit levels as life expectancy increases.

The purpose is that it is the pensioners themselves who will bear the financial costs of increasing the longevity of the population. In the event of increases, younger pensioners will get lower annual benefits, or they may have to work longer to obtain the same annual pension as older pensioners with lower life expectancy.

This introduction transferred substantial longevity risk from the pension provider to the individual members of the scheme and constituted a significant change in both the pension scheme and the contractual relationship between KLP and municipalities, RHFs and hospitals.

5.2 New pension scheme from 1st January 2020

On 3rd March 2018, the parties in the public sector entered into an agreement to establish a new occupational pension scheme and a new AFP scheme from 2020. In June 2019, the Norwegian parliament adopted amendments to the statutory occupational pension schemes in line with the agreement. Changes have also been made in the collective bargaining schemes in the relevant sectors.

As of 2020, all public employees born in 1963 or later have earned their pension according to new rules.[24]

The change entailed a comprehensive reorganization, and it was a result of lengthy and difficult negotiations between the employer and the employee sides.

In the old scheme, public occupational pensions are coordinated with the pension from the National Insurance Scheme. The sum of these pensions is a percentage of the employee's final salary.

The new occupational pension scheme is referred to as a supplementary scheme since this pension will be a supplement to the pension from the National Insurance Scheme. Instead of being coordinated, the two pensions are calculated independently. In the (new) supplementary scheme, the employees earn a pension portfolio throughout their years as employees, which at the time of withdrawal will be divided by remaining life expectancy. This is a completely different method of calculation, where the public sector occupational pension is earned as a share of the annual salary, and it is more similar to the pension in the National Insurance Scheme and in the private sector. The main purpose of changing to the new scheme is to benefit the employees who work at higher ages. In addition, the new scheme makes it easier to switch between working in the public or private sector, without losing pension.

The transition to a new scheme entails extensive changes to previous agreements on municipal occupational pensions. The pension scheme from 2020 creates new pension agreements, and each member is subject to new accrual rules. The systematic production of the occupational pension services changes, and the provider's risk changes. Furthermore, the employer (ie the municipalities, RHFs and hospitals) incurs other costs when purchasing occupational pension.

[24] The scheme applies to the years after it came into force. Everyone who has been a public employee before 2020, and continues in a position as a public employee, receives their pension accrual according to both the old and the new scheme.

The Government Pension Fund has prepared the following overview which shows the most important differences between the two schemes (translated by Storebrand): [25]

New pension scheme from 2020	Old pension scheme before 2020
Supplementary pension. This means that the pension is calculated on the basis of a pension portfolio that is based on annual earnings.	Gross pension. This means that the pension is based on a certain percentage of your final salary.
The pension shall be calculated independently of the National Insurance Scheme.	The pension shall be coordinated with the National Insurance Scheme.
All years of work up to the age of 75 provide pension earnings.	Full earnings are 30 years. (Between 30 and 40 years for those who do not work in a company with the right to a public service pension when they retire, but who have done so before and therefore have earned a pension right).
It must be possible to take out a public service pension from the age of 62 to 75. You can do the intervals 20, 40, 50, 60, 80 or 100 percent. The degree can be changed once a year, and you can stop withdrawing at any time or take out a full pension.	If you do not have a special age limit, you can take out a public service pension from the age of 67 at the earliest.
The pension can be combined with earned income without the pension being reduced.	Income from a position with membership in a public occupational pension scheme reduces your pension, but you can work somewhat with a pensioner's salary. You can work in a private company without affecting the public pension.
You earn a pension in a pension portfolio where you annually increase the portfolio by a basic rate of 5.7 per cent of salary for income between 0–12 G, and one of 23.8 per cent for income between 7.1–12 G.	The starting point for calculating your pension is 66% of the salary you have at the time you take out your pension.
Throughout the vesting period, the pension portfolio is regulated on the basis of wage and price growth.	The gross pension is based on final salary, ie it is based on your own salary development.
To find out what you will receive in the annual pension, we divide your pension portfolio by the division number you have at the time you withdraw your pension.	According to the old rules, we use both division figures and ratios to calculate your pension - depending on the year you were born.

[25] Obtained from Forskjellene på nytt og gammelt regelverk - Statens pensjonskasse (spk.no) (Norwegian).

Those who have a minimum of one year of service in a public enterprise are entitled to a public service pension.	You must have worked for at least three years in a public enterprise to be entitled to a public service pension.

These changes will necessarily have an impact on the municipalities', RHFs' and hospitals' contracts on the occupational pension. The two products are different, with different facilities and different price components. Thus, existing contracts could not be applied without renegotiations and modifications. All of these contracts, which have been renegotiated, have been entered into between the municipalities and KLP.

These modifications must be assessed against the prohibition of substantial modifications. In Storebrand's view, all – and at least in the vast majority – of the contracts have been substantially modified, due to the differences between the previous and the new public occupational pensions.

5.3 The modifications cannot be made pursuant to a (lawful) change clause

The Norwegian *Regulation on Public Procurement (Anskaffelsesforskriften)* § 28-1 clarifies how contracts may be modified without a new procurement procedure.[26] Only two of the alternatives seem to be relevant in this case a) modifications provided for in change clauses and b) so called *de minimis modifications* according to § 28-1 (1) b. Below, in this section 5.3, Storebrand demonstrate why these modifications cannot be provided for in change clauses in accordance with the rules on public procurement.

Storebrand do not have access to the contracts the municipalities, RHFs and hospitals have entered into with KLP. Storebrand assume that the Authority can get access to these documents. Under any circumstances, it appears impossible – and at least very unlikely – that any of the contracts contain change clauses that allow for the necessary modifications as described in section 5.1 and 5.2.

If any of the RHFs, hospitals or municipalities do have such a change clause in their contracts, such a change clause will be more far-reaching than what the Norwegian Regulation on Public Procurement § 19-1 (2) allow for.[27] According to this section, the change clauses shall define *clearly which modifications the contracting officer can do, to what extent and on what terms*. Furthermore, the change clause cannot allow for the overall nature of the contract to be altered. Storebrand find it impossible that a review clause that allows for the necessary modifications, can satisfy these requirements.

The consequences of a change clause being too far-reaching, are that the contracting parties are barred from using it on amendments that would otherwise have fallen under the wording of the clause. Case-law of the ECJ shows that the rules on public procurement prohibit such modifications, even if they would otherwise have been in accordance with the contract entered into between the parties.[28]

5.4 The de minimis-exception is not applicable

According to section 28-1 (1) b) of the Norwegian Regulation on Procurement, so-called *de minimis* modifications to the contract are allowed, when the overall nature of the contract is not altered.

[26] Cfr. directive 2014/24/EU article 72 paragraph 1 to 3.
[27] Cfr directive 2014/24/EU article 72 paragraph 1 a)
[28] Cfr ie Case C-91/08 and Case C-423/07.

It is defined what are de minimis modifications, namely modifications with a price increase (or reduction) that is below the threshold values and below 15 percent of the original contract amount.

However, the contract consists of more than the remuneration. The contractor's performance can change significantly even if the price is relatively equal. As the provision is to be applied to several different contracts, it has not been defined how large changes in the contractor's performance will be accepted. Instead, it appears that the de minimis-exception can only be applied if the overall nature of the contract is unaltered.

Storebrand assume that the transition from the old to the new pension scheme has led to a price increase of less than 15 per cent of KLP's remuneration. However, this is not sufficient for the exception to be invoked.

If this is the price consequence, it will be decisive whether the overall nature of the contract is altered. Both the Procurement Directive and the Norwegian Regulations state that the de minimis-exception cannot be invoked in such cases. The provision of the Directive (Article 72, second paragraph) stipulates that modifications, that meet the conditions of the corresponding provision of the Directive, may be implemented even if one or more of the conditions for substantial modifications are met.[29] At the same time, it is, however, specified that the prohibition against altering the overall nature of the contract must be respected.

There is no definition of when one is faced with such a change in the overall nature of the contract. According to what Storebrand are aware of, the content of the term has not been clarified, neither in Norway nor at EU level. However, it is clear that the right to make minor changes is not unlimited.

The exception rule cannot be used to circumvent the ban on substantial modifications. However, according to the Procurement Directive's preamble (recital 107) the prohibition against changing the overall nature of contract is more far-reaching than this (Storebrand's emphases):

> *«It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of* ***material changes*** *to the initial contract,* ***in particular to the scope and content of the mutual rights and obligations of the parties****, including the distribution of intellectual property rights.* ***Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure****.»*

Thus, changes with only small influence on the price, are prohibited if they are part of changes which *«renegotiate essential terms or conditions of that contract»*.

Read in the light of the preamble, the exception accepts price modifications (the customer's performance) within the specified interval, while the prohibition against substantial modifications still draws a mandatory framework for changes to the contractor's performance. The price changes will thus only be permitted if they are a consequence of lawful modifications of the contractor's performance.

[29] This clarification is not included in the Norwegian Regulations §§ 28-1 or 28-2. At the same time, there is no evidence that the intention is to provide stricter regulation in Norwegian law than in the Procurement Directive, neither in the text of the regulations nor in other authoritative sources.

This will also be in line with previous case-law, as referred to in the preamble.[30] This case-law concerning de minimis amendments is explained by Professor Sue Arrowsmith (Storebrand's emphasis):

> *«It is possible that there is also a de minimis rule that means that some small price changes are acceptable even if they alter the balance of the contract slightly in favour of the contracting partner, at least where there is a good reason to make such a change ... These changes, as the Court mentioned, were actually to the detriment of the contractor –* ***but the Court seemed to consider the minimal and justified nature of the changes*** *as an issue distinct from their effect on the economic balance in favour of the contractor.»*[31]

In Norway, the Ministry of Trade, Industry and Fisheries' guide on public procurement provides examples of legal and illegal de minimis modifications. The Ministry considers that this exception does not allow for a waiver of a requirement that food must be organic, or to buy cars instead of leasing them. Further, the Ministry states that the provision is primarily aimed at modifications where the customer orders more or less of the same product, or modifications of requirements which apply only to a minor part of the delivery.[32] These considerations are in accordance with the Norwegian Complaint Board's practice.[33]

As shown in section 5.1 and 5.2, the pension scheme has changed since 1994, including changes of the risk allocated to KLP, and introduction of a new pension scheme that entails a fundamental restructuring. New contracts have been entered into for a new service. If, for example, a contract for the previous pension scheme (also) can be used for the new scheme, it presupposes extensive changes in the contractor's performance and in the remuneration provisions that define the customer's performance. These changes implies that the parties must *"renegotiate essential terms or conditions of that contract"*. Thus, there is a change in the overall nature of the contract, and the exception for minor changes is not applicable. As Storebrand will demonstrate in section 5.5, the new scheme also attracts new suppliers.

5.5 The modifications of the contracts are substantial

Finally, Storebrand believe that the necessary amendments to the contracts are substantial, and thus illegal, cfr the Norwegian Regulation on Public Procurement section 28-2.

According to section 28-2, a change is not permitted if it leads to "the content of the contract being substantially different from the original contract". This section implements the Directive section 72 paragraph 4 which states that a modification of a contract shall be considered to be substantial, *"where it renders the contract [...] materially different in character from the one initially concluded"*.

Naturally, there is no unambiguous and exhaustive definition of when one is faced with such a modification. However, the preamble to the Directive recital 107, quoted in section 5.4 above, provides guidance.

For example, as Storebrand have demonstrated in section 5.2 above, the new pension scheme entails a fundamental restructuring. If a contract for the previous pension scheme (also) can be used for the new scheme, it presupposes extensive modifications in the service provided by the

[30] Cfr ie the ECJ cases C-454/06, C-549/14 og C-526/17 and European Commission: *Green Paper on Public-Private Partnerships and Community law on public contracts and concessions* COM 2004.
[31] Cfr Arrowsmith: *The Law of Public and Utilities Procurement* (2014) page 585-586.
[32] Cfr *Veileder til reglene om offentlige anskaffelser* section 40.2.2, available here Veileder til reglene om offentlige anskaffelser (anskaffelsesforskriften) - regjeringen.no
[33] Cfr ie The Board's decisions in case 2016/104 and case 2018/7.

contractor and in the remuneration provisions that define the customer's performance. These amendments are *«material changes»* and comprehensive changes of *«the scope and content of the mutual rights and obligations of the parties»*. Thus, the parties have *renegotiated essential terms or conditions of that contract*.

In addition, these modifications are to be assessed in connection with the changes described in section 5.1. Overall, these changes are substantial.

Another factor that shows that the modifications are substantial, is that new providers are interested in offering occupational pension services related to the new pension scheme. Storebrand presents an example that shows that DnB Livsforsikring (in the article referred to as *DnB Liv*) wanted to enter this market after the new pension scheme was introduced.

Appendix 19: Monopol gir mindre velferd (Norwegian)

The article states that DnB Livsforsikring only wanted to offer services related to the new pension scheme. The current collective agreement prevents separate acquisitions of services related to the new pension scheme. Nevertheless, the article shows that there are differences between the schemes that make the two schemes attract different parts of the supplier market. These differences are an independent argument to demonstrate that the changes are substantial, cfr the Directive article 72 paragraph 4 a), and the argument complements the arguments above.

Hence, in accordance with directive 2014/24/EU article 72 paragraph 5, a new procurement procedure is required for the substantial modifications in the municipalities', RHFs' and hospitals' contracts.

6. Amendments of the municipalities' contracts in the event of municipal mergers

In recent years, a number of municipalities and county municipalities have merged. Several of these have *"transferred"* previous contracts with KLP to the merged municipality.

Such a municipal merger means that the public customer in the agreement is changed. Storebrand believe that this change is not in itself a substantial modification or a breach of the duty of publication, of notice and of transparency.

Nevertheless, Storebrand believe that existing contracts cannot be applied by merged municipalities without illegal, substantial modifications. If the previous contract is to apply to the entire new municipality, it will also entail modifications of the parties' rights and duties. The number of people eligible under the pension scheme increases, the size of total assets increases, the scope of the contract increases, and the value of the contract increases. These changes constitute substantial changes of the contract that was originally entered into.

This will be the case even if all the previous municipalities, that are part of the merged municipality, had contracts with KLP. Such extensive volume changes will affect the parties' risk and cost related to the contract, and these are typical competitive parameters in public procurement procedures. Thus, it is likely that the significant volume changes *would have allowed for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure*.[34] Further, a modification will always be substantial if it expands the scope of the contract considerably.[35]

[34] Cfr The Norwegian Regulation on Public Procurement § 28-2 a) and the Directive article 72 paragraph 4 a).
[35] Cfr The Norwegian Regulation on Public Procurement § 28-2 c) and the Directive article 72 paragraph 4 c).

In addition, the modifications are of such a nature that they will change the economic balance of the contract in favor of the contractor in a manner which was not provided for in the initial contract.[36]

Separately and summarized, these characteristics demonstrate that the modifications are substantial. Thus, the requirement of conducting a new procurement procedure, according to the Directive article 72 paragraph 5, applies.

This is also the conclusion of Arntzen de Besche Law Firm's report *Municipal pension and public procurement*, submitted to the Pension Office on 9 January 2015.

Appendix 20: Arntzen de Besche Law Firm's report 9 January 2015 (Norwegian)

This report is publicly available, but neither the Pension Office nor the municipalities have complied with this. Despite the report being commissioned by the Pension Office, the conclusions are not reflected in the Pension Guide.

The failure to conduct competitions may be based on the Ministry of Local Government and Modernisation's interpretative statement of 28 February 2018.

Appendix 21: Interpretative statement *Kontrakts- og anskaffelsesrettslige spørsmål i forbindelse med kommunesammenslåing* (Norwegian)

In the interpretative statement, reference is made to the rules on *de minimis* modifications, cfr the Directive article 72 paragraph 2 and the Norwegian Regulation on Public Procurement § 28-1 (1) b). However, the Ministry does not question whether changes such as this entail changes in the overall nature of the contract, which precludes such modifications of minor value. The circumstances that demonstrate why the modifications are substantial, which have been reviewed at the beginning of this section 6, also demonstrate that the overall nature of the contract is altered.

In addition, the Ministry refers to the right to make necessary modifications brought about by circumstances that a diligent contracting authority could not foresee, cfr. the Directive article 72 paragraph 1 c) and the Norwegian Regulation on Public Procurement § 28-1 (1) d). The Ministry refers to a single decision from the Complaints Board for Public Procurement where changes to a contract as a result of a municipal merger have been dealt with. In this case – case 2017/56 – the Board accepted the modifications after a case-specific assessment.

However, there are crucial differences between the circumstances in case 2017/56 and the situation when municipalities want to "continue" previous agreements on occupational pensions after a municipal merger. Case 2017/56 concerned a contract valued NOK 660,000, carried out in accordance with the Norwegian Regulations on Public Procurement Part II, below the threshold amounts in the Directive article 4. The contracts for occupational pensions have a far greater value, well above the threshold amounts. Therefore, the municipalities have additional obligations under the Directive and the Norwegian rules on public procurement. One difference is that a diligent contracting authority is expected to anticipate a greater number of circumstances. Another difference is that the exception can not be invoked in cases above threshold amounts, where the overall nature of the contract is altered.

Further, a significant element in the Board's assessment in case 2017/56 was that the restructuring costs were far higher than the value of the contract in question. This will not be the case in contracts for occupational pensions. It is neither demanding nor expensive to conduct

[36] Cfr The Norwegian Regulation on Public Procurement § 28-2 b) and the Directive article 72 paragraph 4 b).

competitions for such services, and it is neither demanding nor expensive to change service provider. This applies when these costs are considered in isolation, and to an even greater extent when they are held up against the contract value.

7. Amendments of the contracts in the event of changes of schemes in the health sector

As described in section 3.2, Storebrand believe that the contracts entered into with KLP in relation to the *Pension scheme for hospital doctors* and the *Joint scheme*, were entered into after 1st January 1994.

In addition, Storebrand believe that these contracts are substantially modified.

Prior to the *Pension scheme for hospital doctors*, senior and junior doctors had their own schemes, determined by collective agreements. The schemes were completely separate, each with its own finances and certain nuanced differences in the rules. From 1 January 1994, these schemes were merged. Storebrand believe that this merger involved a substantial modification of the contracts, in the same way as with the municipal mergers. Reference is made to section 6, which apply accordingly here.

Initially, the *Joint scheme* was part of the municipal joint scheme. When the RHFs were established on 1 January 2002, ownership of the hospitals was transferred from the county councils to the state. The municipal joint scheme in KLP was then divided into three risk communities with separate finances, including the Joint scheme. These changes affected both volume and risk placement. Storebrand therefore believe that the changes were substantial.

8. Conclusive considerations and the need for the Authority to implement measures

According to Storebrand, the municipalities, RHFs and hospitals cannot anchor the purchase of occupational pensions (under a new scheme) in previous contracts. Furthermore, the municipalities cannot change their contracts with KLP to apply to merged municipalities. Thus, several contracts on these services have been entered into directly between the municipalities, RHFs and hospitals and KLP, in breach of the rules on public procurement.

Storebrand request that the Authority implement the necessary investigations and procedures to ensure that the rules on public procurement are complied with in the market for public occupational pension. Storebrand assume that the conditions for considering a contract ineffective and / or to impose a fine will be met in several of these cases. However, Storebrand do not request such sanctions to be imposed. What is important for Storebrand, on the other hand, is that the municipalities, RHFs and hospitals now put their contracts out to competition, as they are obliged to do according to the rules on public procurement.

Without being considered to be of decisive importance, Storebrand note that there are clear indications that these breaches of the rules of public procurement will not cease without an authoritative clarification that these contracts shall be entered into after procedures with prior publication. Storebrand refers in this regard to the review in section 2.2, where the reluctance to conduct competitions is demonstrated.

Storebrand add that KLP have taken a position as a legal advisor to the municipalities in assessing whether competition is necessary. KLP maintain – incorrectly – that it is neither necessary nor appropriate to conduct competitions. In addition to the contributions included in section 2.2, Storebrand present contributions from Storebrand's and KLP's lawyers on this topic in the magazine *Kommunerevisoren*.

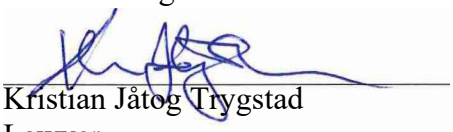
Appendix 22: Det er ikke alltid lettere med tilgivelse enn tillatelse (Norwegian)

Appendix 23: Det enkle er ikke alltid det beste – tilsvar til debattinnlegg (Norwegian)

9. Final remarks

Storebrand kindly request that the Authority investigates the circumstances described in this complaint. If the Authority wants further information and clarifications, Storebrand are at the Authority's disposal. In that case, it is up to the Authority whether information is to be provided in written submissions and / or (Teams) meetings.

Oslo 31. August 2022



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