SUPREME COURT OF NORWAY

On 16 December 2016, the Supreme Court delivered its judgment in

HR-2016-2554-P, (sak nr. 2014/2089), civil case, appeal against judgment,

Holship Norge AS	(Counsel: Nicolay Skarning)
Norwegian Business Association (accessory intervener)	(Counsel: Jan Erik Grundtvig Sverre – qualifying test case)
Confederation of Norwegian Enterprise (accessory intervener)	(Counsel: Kurt Weltzien)
v.	
Norwegian Transport Workers' Union	(Counsel: Lornts Nagelhus – qualifying test case)
Norwegian Confederation of Trade Unions (accessory intervener)	(Counsel: Håkon Angell)

Participating pursuant to Section 30-13 of the Dispute Act:
the State represented by Ministry of Justice and Public Security
(Attorney General
Counsel: Pål Wennerås)
(Attorney General
Of counsel: Ketil Bøe Moen)

V O T I N G :

(1) Justice **Skoghøy:** This case concerns an advance ruling regarding the lawfulness of a notified boycott against Holship Norge AS (Holship) by the Norwegian Transport Workers' Union (NTF), cf. Section 3, Subsection 1, of the Boycott Act.

(2) The boycott would prevent Holship staff from loading and unloading ships landing at the Port of Drammen. The purpose is to force Holship to enter into a collective agreement containing a priority of engagement clause, reserving loading and unloading work for dockworkers associated with the Administration Office for Dock Work in Drammen (the

Administration Office). In the existing collective agreement between the Confederation of Norwegian Enterprise (NHO) and the Norwegian Logistics and Freight Association on the one hand and the Norwegian Confederation of Trade Unions (LO) and the Norwegian Transport Workers' Union (NTF) on the other, this priority clause has been included in a special Framework Agreement (Clause 2, no. 1, of the Framework Agreement). This agreement is renewed every other year, and in the autumn of 2016 it was renewed for the period 2016–2018. Through this boycott, NTF intends to force Holship to enter into the Framework Agreement.

(3) Unloading and loading operations that fall within the scope of the agreement are limited to the transfer of cargo from the ship onto the quay or vice versa. Once the cargo has been transferred to the quay, port users may choose whether to engage dockworkers from the Administration Office to handle further transport of the cargo or use their own or third-party personnel. Similarly, any handling of the cargo once it has been brought onto the ship falls outside the scope of the priority clause of the Framework Agreement.

(4) The priority clause applies to vessels of 50 dwt and above. Pursuant to the wording of the Framework Agreement, the priority clause is limited to vessels "sailing from a Norwegian port to a foreign port or vice versa". However, it is the interpretation of the parties to the agreement that the priority clause also applies to the unloading and loading of ships sailing between Norwegian ports.

(5) Pursuant to Clause 3 of the Framework Agreement, the priority clause is administered by the Administration Office. The Administration Office is a non-profit-making entity. It has its own board consisting of three representatives of the employers (dock users) and two representatives of the employees. The board is tasked with employing the office's dockworkers.

(6) Pursuant to the Framework Agreement, Administration Office stevedores handle the loading and unloading for all port users at the Port of Drammen. The office currently has six stevedores in permanent employment. These are paid a fixed wage and may earn supplemental pay varying with each ship call. Additional personnel can be engaged when needed, and somewhere between 50 and 90 additional workers are affiliated with the office.

(7) Historically, priority of engagement was originally established to address the fact that dockworkers were casual workers with no guarantee of work or a consistent salary, and the priority clause is anchored in Article 3 of the ILO's Convention no. 137 Concerning the Social Repercussions of New Methods of Cargo Handling in Docks. In the collective wage negotiations in 1976, both employer and employee representatives agreed to establish a fixed pay scheme for dockworkers at the 13 largest ports in Norway, including the Port of Drammen.

(8) Registered dockworkers in 14 other ports also benefit from priority of engagement for unloading and loading under the same terms as provided for in the Framework Agreement, as provided by the Dock Work Agreement for Southern and Northern Norway. This agreement was entered into between the same parties as the Framework Agreement. These ports, however, have not established administration offices. Registered dockworkers in these ports are not employed in permanent positions, nor do they have a fixed pay scheme.

(9) Holship was established in 1996, and is wholly owned by the Danish forwarding group Holship Holding A/S. Its main activity in Norway is cleaning fruit crates. In addition, Holship is involved in some forwarding activities. The company has some 40 employees, 21 of whom are members of the Norwegian Union of General Workers (NAF).

(10) Holship has signed a separate agreement, affiliating with the collective agreement concerning onshore cleaning, which was established between LO and NAF on the one hand and NHO on the other. This agreement has also been applied to Holship employees who are not members of any trade unions. Holship is not a member of the NHO; it is a member of the Norwegian Business Association. This was a conscious choice on the part of Holship to avoid being bound by the Framework Agreement.

(11) Prior to 2012/2013, Holship used the services of the Administration Office as needed. At this time, Holship acquired a new customer, which entailed an increase in the company's activities at the Port of Drammen. Until then, Holship employed one terminal worker at the Port of Drammen, but around the start of 2013, the company employed four new workers to handle unloading and loading operations.

(12) Were Holship to affiliate with the Framework Agreement, it would be bound to observe the right of dockworkers employed by the Administration Office to priority of engagement for unloading or loading operations at ship calls. The Administration Office would decide whether it had the capacity to take on an assignment or whether Holship would be allowed to use its own employees. The Framework Agreement does not obligate Holship to make use of Administration Office employees for work unrelated to loading and unloading operations.

(13) Upon affiliating with the Framework Agreement, Holship would be required to pay for the unloading and loading assignments at applicable rates set by the Administration Office at any given time. However, the company would not be obligated to participate in the management of the Administration Office or to provide the Administration Office with funds.

(14) In a letter to Holship on 10 April 2013, NTF demanded that a collective agreement be established and that the Framework Agreement be respected. Holship did not respond. In a letter of 26 April 2013 NTF gave notice of a "boycott/blockade of the company". A second notice of boycott was made in a letter of 11 June 2013. Among other things, this letter reads:

> **"In that Holship has rejected all demands for a collective agreement from the Norwegian Transport Workers' Union, we maintain the notice of a blockade of any ship call to the Port of Drammen where Holship is involved in loading and/or unloading operations. The purpose of this blockade is to establish a collective agreement, including a formalisation of the principles of priority established by Clause 2, no. 1, of the regular Framework Agreement in relation to the loading and unloading activities under the direction of Holship at the Port of Drammen. As for the lawfulness of a blockade in such circumstances, we refer to the Supreme Court's decision in the Port of Sola case, cf. Rt. 1997, p. 337."**

(15) In the letter, NTF also stated that legal action would be brought to determine the lawfulness of the notified boycott.

(16) In a writ of summons of 12 June 2013, NTF brought a case before Drammen District Court against Holship, declaring that the boycott notified in the letter of 11 June 2013 was lawful.

(17) On 19 March 2014, the District Court delivered its judgment with the following conclusion:

> **"1. The boycott notified in the Norwegian Transport Workers' Union's letter of 11/06/2013 to Holship Norge AS is lawful.**
>
> **2. Holship Norge AS is ordered to compensate the Norwegian Transport Workers' Union for legal costs in the amount of NOK 513,725 within 14 days, with the addition of interest on late payments from the final date of payment until payment is made."**

(18) Holship appealed to Borgarting Court of Appeal, demanding a temporary injunction pursuant to Section 3, Subsection 3, of the Boycott Act against further boycotts until the case had been finally settled. On 14 May 2014, the Court of Appeal issued an injunction against NTF, preventing them from boycotting Holship until the lawfulness of the notified boycott had been determined. On 08 September 2014, Borgarting Court of Appeal delivered its judgment on the principal issue with the following conclusion:

> **"1. The appeal is dismissed.**
>
> **2. Holship Norge AS shall pay to the Norwegian Transport Workers' Union as compensation for legal costs NOK 450,938—four hundred thousand fifty thousand nine hundred and thirty eight kroner—within two weeks of the date of service."**

(19) At the same time, the Court of Appeal issued an order lifting the temporary injunction of 14 May 2014.

(20) Both the District Court and the Court of Appeal concluded that the right to priority of engagement under the Framework Agreement falls under the scope of the exemption for working and employment conditions pursuant to the competition rules of the EEA Agreement and Norwegian competition legislation, cf. Section 3, Subsection 1, of the Norwegian Competition Act. Furthermore, the appellate court found that the demand for a collective agreement does not conflict with the freedom of establishment pursuant to Article 31 of the EEA Agreement. This provision had not been invoked in proceedings before the district court.

(21) Holship appealed to the Supreme Court against the Court of Appeal's application of the law. On 14 January 2015, the Appeals Selection Committee of the Supreme Court granted leave to appeal.

(22) In a pre-hearing review on 02 March 2015, the justice assigned to prepare the case for hearing decided to request an advisory opinion from the EFTA Court. The request for an advisory opinion was sent on 05 June 2015.

(23) On 19 April 2016, the EFTA Court issued an advisory opinion concerning the interpretation of relevant provisions with the following conclusion:

"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."

(24) On 25 May 2016, under and pursuant to Section 30-14, Subsection 3, of the Dispute Act, the Appeals Selection Committee of the Supreme Court decided to limit the appellate proceedings before the Supreme Court to the "issue of whether the collective agreement exemption from competition law can be applied in this case, and whether the boycott is unlawful pursuant to the right to freedom of establishment established by Article 31 of the EEA Agreement, cf. Article 101 of the Constitution and Article 11 of the European Convention on Human Rights". Later that day, the chief justice decided that the case would be heard by the plenary of the Court, cf. Section 5, Subsection 4, of the Courts of Justice Act.

(25) In the proceedings before the Supreme Court, the Norwegian Business Association and NHO have acted as accessory interveners for Holship, whereas LO has acted as accessory intervener for NTF, cf. Section 15-7, Subsection 1, litra b), of the Dispute Act.

(26) The State, represented by the Ministry of Justice and Public Security has participated to safeguard the interests of the State, cf. Section 30-13 of the Dispute Act.

(27) Furthermore, *Dampskibsexpeditørenes Forening* submitted written pleadings pursuant to Section 15-8 of the Dispute Act.

(28) In summary, the appellant—*Holship Norge AS*—and its accessory intervener *the Norwegian Business Association* have submitted the following:

(29) The boycott is unlawful on several grounds.

(30) First, a boycott with the aim of procuring acceptance of the Framework Agreement, with the right to priority of engagement for loading and unloading work to employees of the Administration Office violates the freedom of establishment pursuant to Article 31 of the EEA Agreement. The restriction imposed by the priority clause on Holship's freedom to establish its own loading and unloading operations cannot be justified. The boycott consequently has an unlawful purpose, and is therefore unlawful pursuant to Section 2, litra a), first alternative, of the Boycott Act.

(31) Second, the boycott will effect unlawful acts, in that it will cause a breach of contract on the part of Holship against its customers, and the termination of Holship employees. Consequently, the boycott is therefore also unlawful pursuant to Section 2, litra a), second alternative, of the Boycott Act.

(32) Third, the boycott constitutes an undue and disproportionate intervention, which makes it unlawful pursuant to Section 2, litra c), second alternative, and Section 2, litra c), third alternative, of the Boycott Act. The boycott is in conflict with the freedom of establishment, competition law, negative freedom of association, and the rights of Holship and the company's employees and customers. Any consideration of disproportionality must take into account these factors collectively. The aim of the boycott, which is to safeguard permanent employment and a stable income for NTF's members, can be achieved by less burdensome means. In this context, reference is made to the fact that permanent employment is a guiding principle in the Working Environment Act.

(33) Boycott as a means of industrial action without a strike is not protected by Article 101 of the Constitution, Article 11 of the European Convention on Human Rights or any other human rights conventions. Insofar as boycott does enjoy such protection, it is, in any event, disproportionate in this case, given the consequences it has for Holship employees. There are no grounds on which to claim that Article 92 of the Constitution is an incorporative provision, implementing the ILO Conventions no. 87, 98 and 137, and the European Social Charter (revised) as equal in rank to the Constitution.

(34) The boycott is unlawful, in that the priority clause conflicts with the competition provisions of Articles 53 and 54 of the EEA Agreement. The Framework Agreement is not covered by the collective agreement exemption. In assessing the purpose of the collective agreement, NTF's local and central agencies and the Administration Office in Drammen must be identified with each other.

(35) Holship has submitted the following demand for judgment:

> **"1. The Supreme Court finds in favour of Holship.**
>
> **2. Holship Norge AS is awarded legal costs incurred in connection with proceedings before all court instances."**

(36) The Norwegian Business Association has submitted the following demand for judgment:

> **"The Norwegian Business Association is awarded legal costs incurred in connection with proceedings before the Supreme Court."**

(37) *The Confederation of Norwegian Enterprise*, which has acted as accessory intervener, largely supported Holship's and the Norwegian Business Association's submissions, and has particularly argued that the boycott is unlawful, as the system of priority rights in effect constitutes a regulation of the market, and that it is an outdated system. The Supreme Court must base its assessments on the advisory opinion of the EFTA Court. In the event the opinion leaves any doubts as to the interpretation of EEA law, a second opinion from the EFTA Court must be requested. The opinion does not, however, leave any such doubts.

(38) The Confederation of Norwegian Enterprise has submitted the following demand for judgment:

"The Confederation of Norwegian Enterprise (NHO) is awarded legal costs."

(39) In summary, the respondent—*the Norwegian Transport Workers' Union*—and its accessory intervener, *the Norwegian Confederation of Trade Unions*, have submitted the following:

(40) The boycott of Holship to procure acceptance of the Framework Agreement, granting priority of engagement rights to loading and unloading work for dockworkers associated with the Administration Office, is lawful. It has a lawful purpose, specifically to safeguard employment and standardised payment and working conditions for a vulnerable group of workers providing an atypical service in an atypical market.

(41) The Framework Agreement is not in conflict with the dockworkers', or Holship's, negative freedom of association. There is no compulsory association in the Port of Drammen or any other port where the right to priority of engagement follows from a collective agreement.

(42) Also, the boycott does not constitute an unlawful act against Holship's employees or the company's contract partners. The interests of Holship's employees can be protected through adjustment negotiations.

(43) From the position of NTF and LO, the boycott is neither undue nor disproportionate. The undue alternative of Section 2, litra c) of the Boycott Act is reserved for extraordinary circumstances involving misuse of the boycott agency. Disproportionality assessments pursuant to Section 2, litra c), are not limited to a strict assessment of necessity. The criterion, as established by Norwegian law, is misuse.

(44) In that Holship is already engaged in business activities in Norway, the priority of engagement does not restrict Holship's freedom of establishment pursuant to Article 31 of the EEA Agreement. The right to priority of engagement simply regulates the way in which Holship can conduct its business, and this regulation is identical, regardless of the undertaking's country of origin. In any event, any such restriction must be considered lawful, in that the right to priority of engagement pursues a lawful purpose and is a measure that is appropriate and necessary to safeguard said purpose. Considerations of strict (absolute) proportionality ("sensu stricto") are not relevant.

(45) The Framework Agreement is protected by competition law immunity pursuant to the collective agreement exemption from the competition rules, and therefore does not violate Article 53 or 54 of the EEA Agreement. By emphasising the effect of the agreement, the EFTA Court has applied an incorrect interpretation of the collective agreement exemption. The Court's assessment seems to be based on Advocate General Jacobs' opinion in the judgment of the European Court of Justice in Case C-67/96 *Albany*, but this opinion was not taken into account by the ECJ in its judgment of 21 September 1999. The decisive factor, pursuant to prevailing law, is an assessment into the nature and purpose of the agreement. The sole purpose of the Framework Agreement is to protect workers. In this context, further reference is made to the EFTA Court incorrectly concluding that the NTF can be identified with the Administration Office and that the office serves a business purpose.

(46) Any intervention in boycott rights would, in any event, constitute a violation of Article 101 of the Constitution, interpreted in light of Article 11 of the ECHR. These provisions protect the agency of boycott as an industrial action in circumstances where no other remedies will be effective. In any event, intervening in boycott rights in the present case would be disproportionate.

(47) Finally, it is submitted that Article 92 of the Constitution is an incorporative provision, implementing the ILO Conventions and the European Social Charter (revised) as equal in rank to the Constitution. Boycott as a means in industrial conflict is protected by the European Social Charter (revised), ILO Convention no. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Even if these conventions were not deemed equal to the Constitution in rank, the Boycott Act must, pursuant to the principle of presumption, be interpreted in accordance with the ILO conventions and the European Social Charter (revised).

(48) The Norwegian Transport Workers' Union has submitted the following demand for judgment:

> **"1. The appeal is dismissed.**
>
> **2. The Norwegian Transport Workers' Union is awarded legal costs incurred in connection with proceedings before the district and appellate courts, as well as before the Supreme Court."**

(49) The Norwegian Confederation of Trade Unions has submitted the following demand for judgment:

> **"The appellant and the appellant's accessory interveners are jointly and severally ordered to pay the legal costs incurred by the Norwegian Confederation of Trade Unions."**

(50) In summary, *the State, represented by the Ministry of Justice and Public Security* have submitted the following:

(51) There is no conflict between the EEA Agreement on the one hand and the Constitution/ECHR on the other. The State has not concluded on any of the main issues of this case, nor is the State prepared to submit a demand for judgment.

(52) The Supreme Court must conduct an independent assessment of EEA law in light of the EFTA Court's advisory opinion. However, great weight must be attached to this opinion. The interpretation of national law, assessment of evidence and application of the law to the facts fall within the scope of the Supreme Court's discretion.

(53) As for the freedom of establishment, one must consider which action constitutes the true restriction—the boycott as such or the sanction of the boycott by central authorities. Furthermore, one must consider whether the EFTA Court in its opinion has considered whether the boycott constitutes a restriction of Holship's freedoms when the company is already established in the realm.

(54) If such a restriction is found to have been imposed, the issue becomes whether such a restriction is justified. EU and EEA law safeguard fundamental rights. Collective bargaining and collective action enjoy protection as fundamental rights. In any assessment of whether a restriction is justified, one must therefore weigh considerations of the four freedoms on the one hand and fundamental rights on the other, with the aim of striking a "fair balance", cf. European Court of Justice judgments in Cases C-438/05 *Viking Line ABP et al.* C-341/05 *Laval* and C-112/00 *Schmidberger*. Considerations of strict proportionality ("sensu stricto") are not relevant.

(55) Furthermore, in considering whether the collective agreement exemption is applicable, decisive emphasis must be attached to whether the purpose of the Framework Agreement is to improve "working and employment conditions". A wide interpretation must be applied to this concept. The State refrains from concluding on this issue as well, but points out that it is unclear why the EFTA Court has included the boycott and the issue of identification between the NTF and the Administration Office in its considerations in this context.

(56) In that fundamental rights are covered by EEA law, there will be no conflict between the EEA Agreement on the one hand and the Constitution/ECHR on the other. In this regard, the State makes reference to Article 101 of the Constitution, which establishes protection in line with Article 11 of the ECHR. One must interpret Article 101 of the Constitution as implicitly authorising restrictions in line with Article 11, no. 2, of the ECHR.

(57) In the view of the State, Article 92 of the Constitution cannot be interpreted as an incorporative provision, elevating the ILO Conventions and the European Social Charter (revised) to a rank equal to the Constitution. Through the principle of presumption, it is not possible for boycott, as a means of industrial action, to enjoy stronger protection, as the ECHR and the EEA Agreement takes precedence over these conventions pursuant to the Human Rights Act and the EEA Act, respectively.

(58) *My position on the case*

(59) The question is whether the boycott against Holship, notified by the NTF by way of a letter dated 11 June 2013, is lawful.

(60) The boycott entails preventing Holship personnel from loading and unloading ships calling on the Port of Drammen, transporting cargo Holship is receiving or sending. The purpose of the boycott is to force Holship to enter into a collective agreement with the NTF, under which dockworkers employed by the Administration Office of the Port of

Drammen enjoy the right to priority of engagement for unloading and loading operations at the port.

(61) Section 2 of the Boycott Act reads as follows:

> **"A boycott is unlawful:**
>
> **a) when it serves an unlawful purpose or when it cannot achieve its goal without effecting a breach of law;**
> **b) when it is executed or maintained by unlawful means or in an unnecessarily provocative or offensive manner, or by providing false or misguiding information;**
> **c) when it is harmful to the public interest or constitutes a disproportionate intervention, or when the interest promoted by the boycott is incommensurate with the harmful effects it will have; [or]**
> **d) when it is executed without giving the party against which the boycott is directed due notice, or when this party and those who are encouraged to participate in the boycott have not, in advance, been sufficiently informed of the grounds for the boycott."**

(62) Holship's principal submission is that the notified boycott has an unlawful purpose, in that it aims to force the company to accept that dockworkers from the Administration Office have a right to priority of engagement for loading and unloading work, which falls under the scope of Section 2, litra a), of the Boycott Act.

(63) Before I go on to consider whether the purpose of the boycott is unlawful, I will consider the rank of international human rights conventions in Norwegian law. This has been a contentious issue in this case.

(64) *What is the status of international human rights conventions?*

(65) Under and pursuant to Section 2, cf. Section 3, of the Human Rights Act, specific international human rights conventions shall have the "force of Norwegian law" and take precedence over other legislative provisions. Some conventions have been incorporated by other legislation. Conventions incorporated by law have, in principle, a rank equal to other acts.

(66) In the constitutional amendment of 13 May 2014, the Constitution got several new provisions concerning human rights. These new constitutional provisions naturally have a rank equal to the Constitution, and therefore take precedence over other statutory provisions.

(67) Section 92 of the Constitution, which got its current wording in the constitutional amendment of 13 May 2014, establishes that the authorities of the State "shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway". The wording is ambiguous, and in light of Proposal to the Storting no. 186 (2013–2014), p. 22, there has been some debate as to whether the provision is to be interpreted so as to elevate all international human rights conventions binding to Norway per 13 May 2014 to a rank equal to the Constitution, cf. Skoghøy, "*The status of human rights under the Constitution*", Lov og Rett 2015, p. 195–196.

(68) In the present case, NTF, with the support of LO, has submitted that Article 92 of the Constitution is an incorporative provision, elevating the European Social Charter (revised), ILO Convention no. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively to a rank equal to the Constitution. In support of this position, reference has been made to the majority opinion of the Standing Committee on Scrutiny and Constitutional Affairs in Proposal to the Storting no. 186 (2013–2014), p. 22, which specified that reference to international human rights conventions in Article 92 of the Constitution was intended to prevent "misunderstandings concerning which international human rights are equal in rank to the Constitution".

(69) This statement, however, does not reconcile with other statements made by the Standing Committee on Scrutiny and Constitutional Affairs' majority opinion, emphasising that "references to Norway's international commitments do not change the current state of the law". If Article 92 elevates all international human rights provisions binding for Norway per 13 May 2014 to a rank equal to the Constitution, the provision will not only make the Human Rights Act redundant, but also every other human rights provision incorporated into the Constitution by the constitutional amendment of 2014. Such an interpretation would definitely have changed the previous state of the law.

(70) In light of the above, I find that Article 92 of the Constitution clearly cannot be interpreted as an incorporative provision, but rather as a directive to the courts and other authorities to enforce human rights at the level at which they have been incorporated into Norwegian law.

(71) I will now move on to consider the issue of whether the purpose of the notified boycott is unlawful.

(72) *The Supreme Court's judgment in Rt. 1997, p. 334 (Port of Sola) and the advisory opinion of the EFTA Court*

(73) In Rt. 1997, p. 334 (Port of Sola), the Supreme Court concluded that a boycott, whose purpose was to effect a collective agreement granting dockworkers with the Loading and Unloading Office in Stavanger the right to priority of engagement for loading and unloading work, did not have an unlawful purpose, in that the right to priority of engagement was based on a collective agreement with a long-standing tradition in port cities. With support from the remaining four justices, the justice delivering the leading opinion wrote the following:

> **"Boycott has been used extensively in industrial conflicts, and is held as a lawful means of action in labour law. I interpret the Boycott Act and its preparatory works (Proposition to the Odelsting no. 70 for 1947), which, among other things, is based on legal practices from the interwar period, to mean that a boycott by a trade union for the purpose of establishing a collective agreement generally will be considered lawful. I cannot see how the fact that Stavanger Havnelager AS and the majority of its employees are not unionised, has any bearing on this interpretation. The purpose is not to force unionisation of the company or its employees.**
>
> **In this case, the purpose is not to secure acceptance of the collective agreement, but also to formalise Clause 2, no. 1, of the Framework Agreement or the principles established**

by this clause. This is, as previously mentioned, a special clause in the collective agreement. It does not aim to improve payment and working conditions for the company's employees, but rather to grant to certain workers outside the company preferential rights to some of the company's activities. However, I have found that this is not sufficient for the purpose of the boycott to be deemed unlawful, on the following grounds:

The Framework Agreement, and the provisions of its Clause 2, no. 1, is widely recognised and has a long-standing tradition in port cities. It is based on the unique circumstances dockworkers traditionally face. Historically, dockworkers were casual workers with no guarantee of work or a consistent wage. The background for the clause and the development of collective agreements for dockworkers have been described in more detail in the Court of Appeal's judgment. I add that the provisions of Clause 2, no. 1, of the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under ILO Convention no. 137 concerning Dock Work. Under and pursuant to Article 3 of the Convention, registered dockworkers shall have priority of engagement for dock work.

I cannot see how the company's references to competition law have any bearing on this issue. Working and payment conditions are exempt from this legislation, precisely because the system of collective agreements is predicated on restrictions on competition. As mentioned above, the loading and unloading offices are agencies established by the parties to enforce the provisions of the Framework Agreement. The offices make personnel available to handle loading and unloading operations in the port in question. The purpose is not for the offices to turn a profit; they operate at-cost."

(74) It follows from my quotes from this judgment that the Supreme Court at the time, without discussing it in detail, concluded that the right to priority of engagement for loading and unloading work for dockworkers with the Loading and Unloading Office in Stavanger fell under the scope of the collective agreement exemption from competition law, and that the scheme therefore did not violate competition law. In that case, it had not been submitted that the right to priority of engagement conflicted with the freedom of establishment pursuant to Article 31 of the EEA Agreement, and the Supreme Court therefore did not consider this issue.

(75) As previously mentioned in connection with the presentation of the case, the Supreme Court has requested an advisory opinion from the EFTA Court in the present case. In its advisory opinion of 19 April 2016, the Court concluded that 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". Concerning the issue of whether the right to priority of engagement for loading and unloading work for dockworkers with the Administration Office constitutes a restriction on the freedom of establishment under Article 31 of the EEA Agreement, the EFTA Court concluded as follows:

"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."

(76) It follows from Article 34, paragraph 1, of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice that the EFTA Court's opinions on the interpretation of the EEA Agreement are not binding for national courts, but rather "advisory". This entails that the courts of the EFTA States must independently consider how to interpret and apply EEA law.

(77) In their interpretation of EEA law, however, national courts shall attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law. The purpose of the EFTA Court is, according to the preamble of the Surveillance and Court Agreement, among other things, to "arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". The EFTA state's courts must therefore normally apply the EFTA Court's interpretation of EEA law, and cannot disregard an advisory opinion by the EFTA Court unless "special circumstances" so indicate, cf. Rt. 2013, p. 258, paragraphs 93–94, with reference to the plenary judgment of Rt. 2000, pp. 1811–1820. In order for the EFTA Court to fulfil its intended purpose, the court's interpretation of EEA law cannot normally be disregarded unless there are weighty and compelling reasons for doing so.

(78) The EFTA Court has jurisdiction to give advisory opinions on the interpretation of EEA law, cf. Article 34, paragraph 1, of the Surveillance and Court Agreement. The assessment of evidence falls under the jurisdiction of the courts of each EFTA State. The same normally applies to the application of the law to the facts, but there is no clear distinction here. How far the EFTA Court will go in describing EEA law in minute detail, will, among other things, depend on the questions posed by the EFTA State's court and the level of detail included in the request.

(79) *Is the boycott protected by Article 101, first paragraph, of the Constitution?*

(80) Under and pursuant to Article 101, first paragraph, of the Constitution, everyone "has the right to form, join and leave associations, including trade unions and political parties". This provision was included in the Constitution in the constitutional reform of 2014. NTF, with the support of LO, has submitted that boycotts are protected by the freedom of association established by this provision. If the boycott against Holship notified by NTF is indeed protected by Article 101, first paragraph, of the Constitution, any rights derived from the EEA Agreement must yield. I shall therefore address the interpretation of Article 101, first paragraph, of the Constitution before moving on to whether the boycott violates the freedom of establishment pursuant to Article 31 of the EEA Agreement.

(81) In considering the freedom of association established by Article 101, first paragraph, of the Constitution, one must also take into account the freedom of association established by Article 11 of the ECHR. Like Article 102 of the Constitution concerning the right to privacy, Article 101, first paragraph, is based on equivalent rights under the ECHR, cf. Document 16 (2011–2012) Report to the Presidium of the Storting from the Human Rights Committee concerning human rights in the Constitution, p. 163 ff., cf. Recommendation to the Storting no. 186 (2013–2014), pp. 26–27. The Supreme Court has already concluded that Article 102 of the Constitution concerning the right to privacy must be interpreted in light of the equivalent provision of the ECHR, cf. Rt. 2015, p. 93 (Maria), paragraphs 57 and 60, and Rt. 2015, p. 155 (Rwanda), paragraphs 40 and 44. I

find that the same clearly must apply to the freedom of association. This entails that, while Article 101, first paragraph, of the Constitution does not explicitly authorise restrictions on the freedom of association in line with Article 11, no. 2, of the ECHR, such authority must be considered implied.

(82) Under and pursuant to Article 11, no. 2, of the ECHR, restrictions on the freedom of association may be imposed if such restrictions are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". Similarly, it must be possible to impose restrictions on the freedom of association pursuant to Article 101, first paragraph, of the Constitution if the restriction is prescribed by law, justified by a legitimate purpose and necessary in a democratic society. The latter condition must be based on a comprehensive consideration of proportionality.

(83) As I shall return to below, it is not clear whether a boycott that is not the part of a strike is protected under Article 11 of the ECHR. In that the possible freedom to boycott under Article 101, first paragraph, of the Constitution, in any event must be made subject to a restriction of proportionality, I do not find it necessary to even consider whether the freedom to boycott falls under the scope of the provision.

(84) The freedom of establishment is established by Article 31 of the EEA Agreement, and its statutory authority is therefore undisputed, cf. Section 2 of the EEA Act. This right aims to safeguard the rights and freedoms of others and its justification is therefore also legitimate. The question thus becomes whether the potential restriction on the right to boycott – if protected by the Constitution – represented by the freedom of establishment is proportionate.

(85) The freedom of establishment, as established by Article 31 of the EEA Agreement, is a fundamental freedom in the EEA, and if the right to boycott is protected under Article 101, first paragraph, of the Constitution, these rights must be weighed against each other as part of a consideration of proportionality. This weighing of interests is similar in nature to the one carried out when restrictions are imposed on the freedom of establishment as a result of basic rights forming part of EU and EEA law: just as rights under the EEA Agreement can justify restriction of constitutional or conventional human rights, so can constitutional or conventional human rights justify restrictions of rights under the EEA Agreement.

(86) While the wording of the conditions for restricting human rights and rights under the EEA Agreement may differ, the nature of the considerations remains the same. One cannot, however, rule out the possibility that Article 101, first paragraph, of the Constitution in the future may be interpreted in a way that differs from the European Court of Human Rights' interpretation of Article 11 of the ECHR and the interpretations of the European Court of Justice and the EFTA Court of the freedom of association as a fundamental right in EU and EEA law. Furthermore, one cannot rule out that the considerations of the European Court of Human Rights in weighing the freedom of assembly against the freedom of movement within the internal market may come to differ from those of the European Court of Justice and the EFTA Court. I cannot see, however, that there are any grounds on which to argue that such differences exist today. In any event, if one uses the Constitution as one's starting point, weighing the rights that follow from it against rights

under the EEA Agreement, or if one uses the EEA Agreement as one's starting point, weighing rights under it against those that follow from the Constitution, one must try to strike a fair balance between the rights in question. The outcome of weighing the freedom of assembly against the freedom of establishment should not be dependent on the set of rules one uses as one's starting point.

(87) In considering whether a restriction on the freedom of establishment under the EEA Agreement is justified, I will address how to weigh the freedom of association under Article 11 of the ECHR against the freedom of establishment under Article 31 of the EEA Agreement. In this case, the weighing of the freedom of association pursuant to Article 101, first paragraph, of the Constitution against the freedom of establishment under the EEA Agreement must lead to the same result. I therefore move on to address the issue of whether the notified boycott constitutes a restriction on the freedom of establishment under Article 31 of the EEA Agreement.

(88) *Does the notified boycott constitute a restriction on the freedom of establishment under Article 31 of the EEA Agreement?*

(89) Article 31, no. 1 of the EEA Agreement establishes the following:

> **"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."**

(90) In order for the provisions concerning freedom of movement to apply, the enterprise must have a cross-border element. This condition has clearly been met. Holship is owned by a Danish company. The right to priority of engagement NTF is attempting to force Holship to accept therefore has a transnational effect.

(91) It follows from Article 31, no. 1, second paragraph, that persons and companies establishing themselves in a Member State must pursue business activities "under the conditions laid down for its own nationals by the law of the country where such establishment is effected". Under certain circumstances, the provisions of the EEA Agreement concerning freedom of establishment will therefore only protect against discriminatory national schemes, cf., for example, the European Court of Justice's judgment of 01 July 2010 in Case C-393/08 *Sbarigia*. How far the freedom of establishment merely constitutes a prohibition against discrimination is not a question that I need to address at a general level. In any event, it has been established that the freedom of establishment under Article 31, no. 1, first paragraph, is not generally to be understood as a mere prohibition against discrimination, cf. paragraph 115 of the EFTA Court's advisory opinion, with references. Restrictions on access to a market therefore fall under the scope of Article 31 even if the restrictions do not discriminate on the basis of nationality.

(92) NTF, with the support of LO, submitted that Holship cannot claim freedom of establishment under Article 31, in that the company is already established in Norway with another area of activity. This line of argument clearly cannot succeed. Holship is already established as an entity engaged in forwarding activities and the cleaning of fruit crates. Loading and unloading operations constitute another type of activity. The freedom to establish oneself in a market pursuant to Article 31, no. 1, first paragraph, must, necessarily, also apply to companies that are already established in the state in question with activities in another market. This follows indirectly from paragraph 111 of the EFTA Court's advisory opinion. It is not reasonable to demand that Holship establish a separate subsidiary to handle loading and unloading operations at the Port of Drammen in order to be able to demand access to this market.

(93) As maintained by the EFTA Court in paragraphs 115–116 of its advisory opinion, Article 31 of the EEA Agreement prohibits any restriction on the freedom of establishment within the EEA "even if it is of limited scope or minor importance". The scope of Holship's need for loading and unloading services therefore has no bearing on the assessment of whether a restriction on the freedom of establishment has been imposed.

(94) Article 31 of the EEA Agreement does not specify upon whom the provision imposes obligations. It has been established, however, that the provision not only protects against restrictions imposed by public authorities, but also against restrictions on the freedom of establishment sought implemented by collective means by, inter alia, trade unions, cf., for example, the European Court of Justice's judgment of 11 December 2007 in Case C-438/05 *Viking Line ABP et al.*, paragraph 33, with further references. This interpretation has also been applied in paragraph 113 of the EFTA Court's advisory opinion.

(95) Given the above, there can be no doubt that the right to priority of engagement for loading and unloading operations for dockworkers with the Administration Office at the Port of Drammen, which NTF is attempting to force Holship to accept, constitutes a restriction on the freedom of establishment under Article 31 of the EEA Agreement. Freedom of establishment under this provision is not absolute, however, and the issue thus becomes whether the right to priority of engagement can be justified by the exemptions that apply to the freedom of establishment.

(96) *Does the right to priority of engagement, as demanded by NTF, constitute a lawful restriction on the freedom of establishment under Article 31 of the EEA Agreement?*

(97) The practice of the European Court of Justice has been consistent in its application of the equivalent provision of Article 49 of the Treaty on the Functioning of the European Union; restrictions on the freedom of establishment applicable without discrimination on grounds of nationality can be justified by overriding reasons of general interest, provided that such restrictions are appropriate for achieving the objective pursued and do not go beyond what is necessary to achieve that objective, cf., inter alia, the European Court of Justice's judgment of 11 December 2014 in Case C-576/13 *Commission v Spain*, paragraph 47. It is generally accepted law to interpret freedom of establishment under Article 31 of the EEA Agreement as being subject to the same limitation, cf. the EFTA Court's advisory opinion, paragraphs 121–130.

(98) Whether a restriction on the freedom of establishment can be justified on grounds of an overriding reason of general interest must be interpreted in the light of fundamental rights

under EU and EEA law, cf. paragraph 123 of the EFTA Court's advisory opinion. These rights may justify restrictions on freedom of establishment. Also, restrictions on freedom of establishment can only be justified insofar as they are compatible with fundamental rights.

(99) Regardless of how far the protection of the right to boycott extends as a fundamental right under EU and EEA law, it has been established that the protection of workers has been recognised as an overriding reason of general interest that may justify restrictions on freedom of establishment, cf., inter alia, the European Court of Justice's judgment of 11 December 2014 in Case 576/13 *Commission v Spain*, paragraph 50. This interpretation is also accepted in paragraph 122 of the EFTA Court's advisory opinion. It follows from paragraph 125 of the EFTA Court's opinion, however, that a specific assessment of the measure at issue is required. An abstract assessment is not sufficient.

(100) I will first address the issue *of whether the notified boycott must be considered lawful in that it aims to protect the interests of workers.*

(101) I find that NTF and LO are correct in claiming that the ultimate objective of NTF, in demanding a collective agreement, under which dockworkers employed by the Administration Office of the Port of Drammen have the right to priority of engagement for loading and unloading operations at the port, is to protect the interests of workers. This is, however, not sufficient to justify the restriction on freedom of establishment imposed by this priority of engagement. In this regard, reference is made to, inter alia, the ECJ judgment of 11 December 2007 in Case C-438/05 *Viking Line ABP et al.*, where the European Court of Justice, in paragraph 81, established that while a collective action "could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat".

(102) The issue in the present case is whether NTF, by means of boycott, should be allowed to force Holship into accepting a right to priority of engagement for workers with the Administration Office for loading and unloading operations Holship wants to carry out using its own personnel.

(103) The Administration Office is a separate legal person, and the type of collective agreement provision demanded by NTF is irregular in nature. The protection of working and payment conditions provided by the right to priority of engagement is relatively indirect. Priority of engagement for loading and unloading operations for dockworkers with the Administration Office will limit access to this market for other operators, in effect regulating the market. The jobs are protected by effectively shielding the company from outside competition.

(104) While the Administration Office is a not-for-profit entity, it does engage in business activities in a market to which other operators want access. Dockworkers are employed by the office, and the activities of the office are financed by fees imposed on loading and unloading operations, paid by the port's users. Priority of engagement for loading and unloading operations at the Port of Drammen for Administration Office employees limits the access of other operators to this market. It favours Administration Office personnel over other personnel, and through the right to priority of engagement, the Administration Office is shielded from competition from other entities.

(105) The primary effect of the notified boycott is that Holship, which is owned by a company in another EEA state (Denmark) are denied access to a market they want to enter. As such, this action differs from other collective actions whose purpose is to force an employer to improve the payment and working conditions for its employees or to prevent an employer from terminating its employees. As emphasized by the ECJ in its judgment of 28 March 1995 in Case C-324/93 *Evans*, paragraph 36, and judgment of 14 December 2006 in Case C-257/05 *Commission v Austria*, paragraph 31, the wish to safeguard the survival of an undertaking or to shield a Member State's undertaking from competition is not sufficient to justify restrictions on freedom of movement within the EEA. In considering the advisory opinion of the EFTA Court in light of these decisions, I find it, too, to be based on the same interpretation.

(106) In support of its position, NTF has submitted that the European Court of Justice, in its judgment of 11 December 2014 in Case C-576/13 *Commission v Spain* recognised a system similar to the system NTF seeks to implement at the Port of Drammen as a legitimate restriction on freedom of establishment. I disagree.

(107) In that case, the European Court of Justice considered the Spanish system for the organisation of dockworkers. Under this scheme, companies seeking to engage in loading and unloading operations had to contribute capital to a dedicated limited liability company for the management of dockworkers (SAGEP). They were also obligated to prioritise employment of dockworkers provided by this company, and to employ a minimum number of such workers. The European Court of Justice concluded that these obligations constituted an unlawful restriction on freedom of establishment, in that they would force foreign loading and unloading entities to implement adjustments that had the potential for considerable financial consequences and that would disrupt operations to such a degree that it would deter companies from other Member States from establishing operations in Spanish ports (paragraph 37).

(108) Spain argued that the restrictions on freedom of establishment sought to protect workers and ensure the stability, continuity and quality of port services (paragraph 49). The European Court of Justice did not consider in more detail whether these purposes, as manifested in this case, constituted legitimate grounds on which to restrict freedom of establishment, nor did it consider whether the actions were appropriate and proportionate. The Court limited its assessment to pointing out that Spain had not substantiated that these actions were necessary and proportionate restrictions on freedom of establishment and that there were other suitable actions available that were less restrictive. As examples of less restrictive actions, the Court mentioned that it would be possible to require loading and unloading companies to manage the employment agencies intended to provide them with labour, and that it would also be possible to establish a labour pool managed by private companies serving as staffing agencies, providing labour for the loading and unloading companies (paragraphs 54 and 55). I do not agree, however, that the European Court of Justice, by this statement, has accepted a system granting the right to priority of engagement for a group of workers like the one at issue in the present case.

(109) While the objective of the notified boycott is to protect the interests of workers, it cannot, given the above, be recognised as an overriding reason for restricting freedom of establishment.

(110) Next, I shall consider the issue of *whether the notified boycott is protected as a fundamental right under EU and EEA law, and, if so, whether it takes precedence over freedom of establishment*.

(111) Fundamental rights under EU and EEA law include, inter alia, the ECHR and other fundamental international human rights, cf., inter alia, the European Court of Justice's judgment of 18 June 1991 in Case C-260/89 *ERT*, paragraph 41, its judgment of 12 June 2003 in Case C-112/00 *Schmidberger*, paragraph 71 ff., its judgment of 18 December 2007 in Case C-341/05 *Laval*, paragraph 90, its judgment of 11 December 2007 in CaseC-438/05 *Viking Line ABP et al.*, paragraph 43 ff., and its judgment of 15 July 2010 i Case C-271/08 *Commission v Germany*, paragraph 37 ff. Since the enactment of the Treaty of Lisbon on 01 December 2009, this also follows from Article 6 of the Treaty on the European Union for EU countries. Amongst other things, this article establishes that the Charter of Fundamental Rights of the European Union shall have the same legal value as the treaties.

(112) One fundamental right under EU and EEA law can be derived *inter alia* from the freedom of assembly under Article 11 of the ECHR, is the right to collective bargaining and collective action. In Article 28 of the Charter of Fundamental Rights of the European Union, the right of collective bargaining and action is explicitly established by treaty.

(113) The right of collective action, however, is not absolute, but subject to a restriction of proportionality. For EU and EEA law, this follows, inter alia, from paragraphs 44–46 of the Viking Line judgment and paragraph 91 of the Laval judgment. As established by paragraph 46 of the Viking Line judgment and paragraph 94 of the Laval judgment, fundamental rights must be weighed against and sought reconciled with the requirements that follow from EU and EEA law and be in accordance with the principle of proportionality.

(114) Paragraph 24 of the ECtHR's judgment of 21 April 2009 *Enerji Yapi-Yol Sen v Turkey* establishes that the right to strike is protected by Article 11 of the ECHR. It has not been determined, however, whether the right to boycott under circumstances not related to a strike is protected under this provision. Whereas a strike normally entails a financial burden for the party initiating the action, a boycott does not normally entail any financial burden on the part of the party encouraging the boycott, or necessarily on the party initiating it, cf. Proposition to the Odelsting no. 70 (1947) concerning the Boycott Act, p. 7. Collective action in the form of boycotts therefore does not necessarily enjoy the same protection as the right to strike.

(115) In considering the issues of the present case, we need not consider whether the right to boycott is protected by Article 11 of the ECHR. If Article 11 of the ECHR is to be interpreted as protecting the right to boycott, this right is subject to the same restriction of proportionality as other rights protected by this provision, cf. Article 11, no. 2.

(116) As grounds for the lawfulness of the notified boycott, NTF, with the support of LO, has submitted that the right to boycott is protected by the European Social Charter (revised), ILO Convention no. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Insofar as these conventions do protect the right to boycott, they cannot, however, be interpreted as granting trade unions the

unrestricted right to use boycotting as a means of collective action. These conventions, too, must allow for specific considerations similar to those required for rights under Article 11, no. 2, of the ECHR. Concerning the European Social Charter (revised), I refer to Article G and the European Committee on Social Rights' decision of 03 July 2013 in complaint no. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, paragraphs 117–125.

(117) In considering whether a boycott satisfies the requirements for proportionality pursuant to the international instruments I have mentioned, the boycott must, amongst other things, be reconciled with the rights that follow from the EEA Agreement. Freedom of establishment under Article 31 of the EEA Agreement is one of the cornerstones of the European Economic Area, and in a consideration of proportionality one must seek to strike a fair balance between these rights.

(118) In the present case, boycott is being used as a means to force acceptance of a right to priority of engagement for loading and unloading operations at the Port of Drammen for workers with the Administration Office. The principal, and desired, effect is to limit the access of other operators to the market for loading and unloading services. As such, the boycott imposes considerable restrictions on freedom of establishment, and it also conflicts with the interests of other workers. If Holship were to be allowed to carry out loading and unloading services at the Port of Drammen, it will generate jobs within Holship. In a human rights perspective, it is hard to argue that these jobs carry less weight than the jobs at the Administration Office. And, as I return to in my considerations of ILO Convention no. 137 below, the aims that the right to priority of engagement is intended to protect, can also be protected by other means.

(119) Priority of engagement, as demanded by NTF, is not sufficiently justified and does not satisfy the requirement of striking a fair balance between freedom of establishment and a possible fundamental right to boycott.

(120) *Significance of ILO Convention no. 137*

(121) NTF, with the support of LO, has greatly emphasised that priority of engagement for dockworkers for loading and unloading operations is in accordance with ILO Convention no. 137 of 1973 concerning the Social Repercussions of New Methods of Cargo Handling in Docks, and that formalization of this priority clause has been Norway's way of fulfilling its obligations under this convention.

(122) Pursuant to Article 3, no. 1, of the ILO Convention, registers shall be established and maintained for all occupational categories of dockworkers, and Article 3, no. 2, establishes that "[r]egistered dockworkers shall have priority of engagement for dock work". It is, however, unclear how this conventional provision is to be interpreted.

(123) The purpose of ILO Convention no. 137 seems to be to orderly working and payment conditions for dockworkers, cf. Article 2 of the Convention. These considerations can be fulfilled by means other than granting priority of engagement for loading and unloading work to one group of workers. Pursuant to Section 14-9, no. 1, of the Working Environment Act, employees shall, as a general rule, be appointed permanently. Satisfactory wage conditions can be negotiated by collective agreements. Safety requirements can be met by training and certification of workers.

(124) Regardless of how Article 3 of ILO Convention no. 137 is interpreted, it must, under Article 2 of the EEA Act give precedence to freedom of establishment under Article 31 of the EEA Agreement. On this background, I do not find it necessary to conclude with regard to the appropriate interpretation of the priority clause under ILO Convention no. 137.

(125) My conclusion, given the above, is that the notified boycott is unlawful pursuant to Section 2, litra a), of the Boycott Act, in that it has an unlawful purpose.

(126) *The collective agreement exemption from the competition rules of the EEA Agreement*

(127) As further grounds for the unlawfulness of the boycott notified by NTF, Holship also invoked the competition provisions of Articles 53 and 54 of the EEA Agreement, arguing that the requirement of a collective agreement including a clause granting priority of engagement for loading and unloading operations to workers with the Administration Office does not fall under the scope of the exemption from these provisions, which, under European Court of Justice and EFTA Court practice, is applied to collective agreements.

(128) In that I concluded that the boycott has an unlawful purpose, as it violates freedom of establishment under Article 31 of the EEA Agreement, I do not find it necessary to consider the scope of this collective agreement exemption. I will add, however, that, from my perspective, also on this point there are not sufficient grounds to set aside the advisory opinion of the EFTA Court.

(129) NTF, with the support of LO, has argued, amongst other things, that the EFTA Court must have misinterpreted the organisational structure of the Administrative Office at the Port of Drammen, as the Court, in paragraph 49 of its opinion, stated that "NTF participates in the management of the AO" and that the office, by way of its operation, has a "business objective". In my view, however, these observations are not sufficient to set aside the advisory opinion. It follows from paragraph 22 of the opinion that the EFTA Court has understood that the Administration Office is a "non-profit-making entity", and that its board consists of three employer representatives and two "representatives of the employees". I cannot see that that the employee representatives incorrectly being referred to as representatives of NTF in paragraph 49 has any bearing on the contents of the EFTA Court's considerations. In practice, the employee representatives are members of NTF. And while the Administration Office is a not-for-profit entity, it has been established that the office is engaged in business activities, and it does not seem unreasonable to characterise the entity as a "business".

(130) *Legal costs*

(131) Holship's appeal has been successful, and it has claimed compensation for legal costs incurred in connection with proceedings before all court instances, including the proceedings before the EFTA Court. The Norwegian Business Association and the Confederation of Norwegian Enterprise have served as accessory interveners in proceedings before the Supreme Court, and have claimed compensation for legal costs incurred in connection with these proceedings.

(132) The case has raised issues of principle, but as both parties have considerable resources at their disposal, I award compensation for legal costs to Holship, the Norwegian Business Association and the Confederation of Norwegian Enterprise in accordance with the main principle of Section 20-2 of the Dispute Act.

(133) LO has acted as accessory intervener for NTF in proceedings before the Supreme Court. In connection with proceedings before this court instance, LO is found to be jointly and severally liable with NTF for legal costs.

(134) Holship has claimed compensation for legal costs in the amount of NOK 283,000 for proceedings before the district court, NOK 410,380 for proceedings before the court of appeal, NOK 995,275 for proceedings before the EFTA Court, and NOK 4,827,056 for proceedings before the Supreme Court. The claims for legal costs for proceedings before the court of appeal and the Supreme Court include appeal fees in the amount of NOK 28,380 for the court of appeal and NOK 28,380 for the Supreme Court.

(135) The Norwegian Business Association has claimed compensation for legal costs in the amount of NOK 615,000 for proceedings before the Supreme Court, whereas the Confederation of Norwegian Enterprise has claimed compensation for legal costs in the amount of NOK 200,000 for proceedings before the Supreme Court.

(136) The case has been extremely comprehensive, and I find it appropriate to award Holship, the Norwegian Business Association and the Confederation of Norwegian Enterprise compensation for legal costs in accordance with the submitted statements, cf. Section 20-5 of the Dispute Act. Legal costs incurred in connection with the proceedings before the EFTA Court must be included in the legal costs related to proceedings before the Supreme Court. Given the above, Holship is awarded compensation for legal costs in the amount of NOK 283,000 for proceedings before the District Court, NOK 995,275 for proceedings before the Court of Appeal, and NOK 5,822,331 for proceedings before the Supreme Court.

(137) I vote in favour of the following

JUDGMENT:

1. The Court finds in favour of Holship Norge AS.

2. The Norwegian Transport Workers' Union is ordered to pay to Holship Norge AS compensation in the amount of NOK 283,000—two hundred and eighty three thousand kroner—for legal costs incurred in connection with proceedings before the District Court.

3. The Norwegian Transport Workers' Union is ordered to pay to Holship Norge AS compensation in the amount of NOK 995,275—nine hundred and ninety five thousand two hundred and seventy five kroner—for legal costs incurred in connection with proceedings before the Court of Appeal.

4. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to Holship Norge AS compensation in the amount of NOK 5,822,331—five million eight hundred

and twenty two thousand three hundred and thirty one kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

5. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to the Norwegian Business Association compensation in the amount of NOK 615,000—six hundred and fifteen thousand kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

6. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to the Confederation of Norwegian Enterprise compensation in the amount of NOK 200,000—two hundred thousand kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

7. Compensation for all legal costs shall be paid within 2—two—weeks of service of judgment.

(138) Justice **Indreberg:** I have concluded that the appeal must be dismissed.

(139) In summary, my position is that the notified boycott, as a means to ensure acceptance of a collective agreement, under which dockworkers at the Port of Drammen have the right to priority of engagement for loading and unloading operations, does not violate the EEA Agreement. Competition rules are not violated, in that the collective agreement exemption comes to apply, and the restriction on freedom of establishment is justified by overriding reasons of general interest. The boycott does not seek to enforce a closed-shop system, nor does it constitute undue or disproportionate intervention.

(140) Given my perspective on the relationship with EEA law, the issues of whether the boycott is protected by Article 101 of the Constitution or relevant human rights conventions, and whether it follows from Article 92 of the Constitution that the conventional provisions take precedence, are not relevant. I will therefore not address these issues in more detail, but I do, however, concur with the conclusions of the justice delivering the leading opinion that Article 11, first paragraph, of the Constitution must be interpreted in light of Article 11 of the ECHR, and that the rights that follow from Article 101, first paragraph, may be subject to restrictions in line with Article 11, no. 2, of the ECHR. I also concur with the leading justice's interpretation of Article 92 of the Constitution.

(141) In the following, I will, for the sake of simplicity, refer to the "dockworkers of the Administration Office" when I refer to the dockworkers who, under the Framework Agreement, have the right to priority of engagement for loading and unloading operations at the Port of Drammen. I emphasise, however, that it is the dockworkers, and not the Administration Office, that have been granted priority of engagement under Clause 2 of the Framework Agreement. The Administration Office is an "administrative agency", cf. Clause 3, no. 2, of the Agreement. The agency is managed by port users and dockworkers jointly. Port users, however, have the majority on the office board. The objective of the office is exclusively to manage dockworkers providing labour for all port users, and to ensure that the office employs an appropriate number of workers. The office operates at

cost.

(142) Concerning the advisory opinion of the EFTA Court, I refer to the review of the Supreme Court's previous conclusions, as described by the justice delivering the leading opinion of the court: The national court must independently consider how to interpret and apply EEA law. It shall, however, attach considerable importance to the opinions of the EFTA Court concerning the interpretation of EEA law. Only when special circumstances so indicate, can the Court's interpretation be disregarded. I also refer to paragraph 37 of the EFTA Court's advisory opinion, which reminds us that the procedure is intended as an instrument of cooperation between the EFTA Court and the national courts. It is the function of the EFTA 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.

(143) From this, I conclude that if the national court finds that the actual circumstances of the case differ from those considered by the EFTA Court in its opinion in relevant ways, the national court may arrive at a different conclusion than the EFTA Court. In the present case, this is relevant.

(144) The justice delivering the leading opinion did not find it necessary to consider the issue of competition law, even though he addresses it briefly. Given my perspective on the freedom of establishment, however, I have no choice but to consider it. Also, as the EFTA Court addresses this issue first in its advisory opinion, I find it beneficial to take the same approach.

(145) *The collective agreement exemption from the competition rules of the EEA Agreement*

(146) Article 53 of the EEA Agreement prohibits all agreements etc., which may affect trade between contracting parties and which have as their object or effect the prevention, restriction or distortion of competition. Article 54 prohibits undertakings from abusing their dominant position, insofar as it may affect trade between EEA States. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. The European Court of Justice and the EFTA Court, however, have found that the social policy objectives pursued by such agreements would be seriously undermined if such agreements were prohibited because of their inherent effects on competition, cf. paragraph 40 of the EFTA Court's opinion concerning the present case, including further references.

(147) The question put before the EFTA Court by the Supreme Court was whether the exemption of collective agreements "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", cf. paragraph 31 of the EFTA Court's opinion.

(148) The conclusion of the EFTA Court—Article 1 of the conclusion—was cited by the justice delivering the leading opinion above. The EFTA Court's clear recommendation is for the Supreme Court to base its considerations on the interpretation that the collective agreement exemption does not apply. The discussion leading up to this conclusion can be

summarised as follows:

(149) In order for the collective agreement exemption to apply, the agreement must pursue the objective of improving conditions of work and employment. It is not sufficient, however, for the objective of the agreement to be to seek to improve conditions of work and employment, if individual provisions are directed towards other purposes. When examining the provisions of the collective agreement, one must consider their aggregate effect.

(150) The EFTA Court then goes on to carry out a specific examination of the Framework Agreement. It points to the aggregate effect being that port users bound by the Framework Agreement must engage dockworkers employed by the Administration Office to unload or load cargo from or onto their ships. These provisions guarantee these employees permanent employment and a certain wage. The EFTA Court then goes on to say:

> **"(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)."**

(151) In my view, this must be based on a misinterpretation of the circumstances of the present case, which is relevant for the consideration of the purpose of the collective agreement. This applies even if the description of the Administration Office is correct in the opinion's presentation of the facts (paragraph 22). First, it is not correct to say that NTF participates in the management of the Administration Office. Local workers and local port users appoint representatives to the governing bodies, cf. Article 3 of the Framework Agreement. Also, there are no grounds on which to hold the Administration Office responsible for the notified boycott. Most critical, however, is the fact that the EFTA Court seems to base its consideration on the view that NTF and the Administration Office have a vested interest in preserving the market position of the Administration office, and that the interest of NTF goes beyond simply protecting the payment and working conditions of its members. I can see no basis on which such an interpretation can be supported. As previously mentioned, the purpose of the Administration Office is to coordinate and manage dockworkers who have a right to priority of engagement for loading and unloading work, including to ensure that the scope of this group is appropriately scaled to the Port's needs.

(152) That is the purpose of the priority clause, which one must take into account.

(153) As accounted for by the leading justice above, the Supreme Court's Port of Sola judgment showed that the priority clause is based on the unique circumstances dockworkers

historically faced as casual workers with no guarantee of work or a consistent wage. Also, the Supreme Court emphasised that the priority clause of the Framework Agreement has been regarded as part of the fulfilment of Norway's obligations under ILO Convention no. 137.

(154) The purpose of ILO Convention no. 137 is to ensure permanent or regular employment for dockworkers in so far as practicable, thereby guaranteeing them a stable income, cf. Article 2 of the convention. The convention's core means by which to achieve this is to grant registered dockworkers priority of engagement for dock work, cf. Article 3. This must be seen in light of the unique labour needs associated with dock work. The needs of individual port users, including freight forwarders, terminal operators and ship owners, for dockworkers vary according to ship calls in each individual port. By giving a limited group of registered workers priority of engagement for loading and unloading operations, one ensures stable employment for this group of workers. In line with this, one must take into account that the purpose of the priority clause was, and is, to ensure stable employment conditions and orderly payment and working conditions for this group of workers.

(155) The EFTA Court, however, emphasises that the system protects one group of workers to the detriment of other workers (paragraph 51). The Court points out that if a boycott is implemented and successful, the latter may even lose their employment.

(156) In this context one must consider, however, that NTF plans to implement transfer schemes, or similar measures, to protect the interests of the no more than three workers Holship reports that they may have to terminate if forced to accept the Framework Agreement. Circumstances were similar in the Port of Sola, and I cannot see any grounds on which not to build on that conclusion, cf. the Port of Sola judgment, p. 342. One must also take into account the justification for the collective agreement exemption. This provision was put in place to prevent the social policy objectives pursued by collective agreements from being undermined by the requirement of competition. Given the unique nature of dock work, the parties have sought to reduce wage and employment insecurities by collectively agreeing that dockworkers are to be given permanent employment by an administration office and have priority of engagement for that type of work. One consequence of this type of agreement must necessarily be a restriction on competition for this type of work.

(157) As the Supreme Court concluded in the Port of Sola judgment, it involves a special collective agreement. Its sole purpose is to safeguard the payment and working conditions of workers. Its aggregate effects affect others, but I cannot see how that alone is sufficient to exclude the agreement from the scope of the exemption. Nor can I see that the EFTA Court has expressed views in support of this interpretation.

(158) It is my opinion that the collective agreement sought implemented by the boycott is covered by the collective agreement exemption.

(159) *Freedom of establishment*

(160) I shall now move on to examining the relationship with freedom of establishment under Article 31 of the EEA Agreement.

(161) The leading justice concluded, in line with the EFTA Court, that the boycott and its purpose constitutes a restriction on freedom of establishment under Article 31 of the EEA Agreement. I can see no grounds on which to contradict this interpretation. The issue thus becomes whether such a restriction is justified.

(162) I refer to the leading opinion for an account of the conditions for justification. The question to consider is whether the restriction can be justified on grounds of overriding reasons of general interest. One requirement is that it pursues a legitimate objective, is appropriate for achieving the objective pursued and does not go beyond what is necessary to achieve that objective.

(163) The conclusion of the EFTA Court's opinion does not address whether or not the restriction is justifiable. That is for the national court to determine, taking into account all the facts and circumstances before it and the guidance provided by the Court (paragraph 131). The Court does, however, discuss whether the restriction pursues a legitimate objective, and I shall address this issue first.

(164) As emphasised by the leading justice, as well as the EFTA Court, the right to collective bargaining and action is recognised as a fundamental right in EEA law. The protection of workers has therefore been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment (paragraph 122 of the EFTA Court's opinion).

(165) The leading justice also finds that the ultimate objective of NTF, in demanding a collective agreement including a priority clause, is to protect the interests of workers. Whether this restriction on freedom of establishment can be considered legitimate, however, must be considered specifically in each case. His position is that the protection of working and payment conditions provided by the right to priority of engagement is relatively indirect. In reality, the priority clause constitutes a type of market regulation, and the principal, and desired, effect of the boycott is to prevent Holship from gaining access to a market the company intends to enter. Therefore, the boycott cannot be accepted as an overriding reason for restricting freedom of establishment.

(166) This position is related to the questions addressed by the EFTA Court in paragraph 125 of the present case, but seems to go beyond this issue. According to the EFTA Court, it is not sufficient for a measure of industrial action to pursue 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. If not, one 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.

(167) I interpret the EFTA Court's statement to mean that if one can ascertain that the action exclusively aims to protect workers, the action would be deemed to have a legitimate purpose.

(168) Concerning such a specific assessment, the EFTA Court states that "[i]t 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" (paragraph 126).

(169) This wording is virtually identical to the Court's statements in paragraph 50 concerning why the Framework Agreement falls outside the scope of the collective agreement exemption from the competition rules of the EEA Agreement. As I pointed out in that regard, this conclusion is based on the interpretation that the Administration Office has a business objective beyond safeguarding the payment and working conditions of workers. And, as previously expressed, I find this view of the Administration Office problematic. From my perspective, it is clear that the true purpose of establishing administration offices was to strengthen the payment and working conditions of dockworkers, and that this remains the sole purpose of the offices.

(170) Also, I do not agree that the effect of the boycott on the payment and working conditions of Administration Office personnel is too indirect. Their employment contracts are based on the premise that port users use their services. For port users, the priority clause entails that they are obligated to make use of entitled workers for unloading and loading operations, but the system also guarantees that they have access to qualified labour. This is achieved without the use of costly intermediaries, as the Administration Office is not designed to turn a profit. Furthermore, there have been no indications that the Administration Office has been unable to provide port users like Holship with the services they need. As regards the effect on other workers, I refer to the discussion of whether the collective agreement exemption from the competition provisions of EEA law comes to apply.

(171) In considering whether the restriction pursues a legitimate objective, I also find reason to examine the background for why EU law recognises that the interests of workers may justify restrictions on, inter alia, freedom of establishment. Paragraphs 78 and 79 of the European Court of Justice's judgment of 11 December 2007 in Case C-438/05 Viking Line reads as follows:

> **"It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.**
>
> **Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour."**

(172) Similar considerations have been included in the European Court of Justice's judgment of 18 December 2007 in Case C-341/05 Laval, paragraphs 104 and 105. The subsequent development of EU treaties, including the establishment that the Charter of Fundamental Rights of 01 December 2009 shall have the same legal value as the treaties, has not weakened the significance of social policy considerations discussed here.

(173) The ECJ case that most closely parallels the present case is the judgment in Case C-576/13 *Commission v Spain*, which was delivered on 11 December 2014. This case, too, involved restrictions on freedom of establishment concerning dock work as explained more in detail by the justice delivering the leading opinion. Spain argued that the port system sought to protect workers and ensure the stability, continuity and quality of port services. Without discussing the issue in further detail, the European Court of Justice found that these purposes were recognised as overriding reasons of general interest that could justify restrictions on freedom of establishment, cf. paragraphs 50 through 52. However, the Court still found that the Spanish system was in conflict with the freedom of establishment, in that the restriction was deemed to go beyond what was necessary to achieve its objective (paragraph 56). It follows from this judgment that Spain had made no attempts to substantiate that the restriction was necessary or proportionate, and the Court found that there were less restrictive alternatives available.

(174) The judgment makes no indication that the restriction on freedom of establishment in this case conflicted so strongly with the fundamental principle of the internal market that this, in itself, would constitute an illegitimate purpose. On the contrary, the ruling is clearly based on the premise that considerations of worker protection could justify restrictions on freedom of establishment in ports.

(175) From my perspective, one must take into account that the priority clause of the Framework Agreement is regarded as fulfilling the requirements of ILO Convention no. 137, whose express purpose is to safeguard the working conditions of workers. Article 3 of this convention calls for the establishment of registers for dockworkers, and these dockworkers "shall have priority of engagement for dock work". This is relevant, even though it follows from Section 2 of the EEA Act that the EEA Agreement takes precedence over the collective agreement in the event of conflict. There is no real conflict here; the question is whether the restriction on freedom of establishment can be justified.

(176) I have noted that several other EU countries have established systems of priority of engagement for registered dockworkers in line with ILO Convention no. 137. The status of EU ports and the situation of dockworkers have long been the subject of extensive debate in and between various EU bodies. In 2001 and 2004, the European Commission proposed directives that would have entailed massive changes in the established priority rights of dockworkers. The proposals did not gain the support of the European Parliament. The debate revealed that the parliament found that the needs of dockworkers had not been sufficiently met.

(177) In 2013, the Commission introduced a new proposal, this time for a regulation (2013/0157 COD). Based on the previous rounds through the European Parliament, this proposal did not attempt to regulate the organization of loading and unloading work. Even for services covered by the Commissions proposal, considerations for workers were emphasised.

(178) The European Commission's proposal from 2013 has been revised through the standard procedure, involving the Commission, the Council and the European Parliament. The proposal for a new regulation is currently up for review by the European Parliament. The proposal entails that the part of port activities covered can still be organised in ways that, in some ways, allow for the restriction of freedom of establishment and competition. This is particularly true of Article 6 concerning restrictions on the number of service providers

in the port, Article 9 concerning access for the port to offer certain services itself, and Article 8, which, among other things, allow for restricting work inside the port to companies offering their services on a continuous basis to all port users.

(179) Safeguarding worker interests has undoubtedly been critical to the process leading up to this proposal for a new regulation, and these considerations also characterise the proposal.

(180) Based on my review of the Framework Agreement and of EU and EEA law, I have concluded that the boycott in the present case must be deemed to pursue a legitimate purpose in relation to the freedom of establishment. From my perspective, the true purpose of the priority clause, its effect, and thereby also the effect of the boycott, has been to promote safe and acceptable working conditions for dockworkers. It follows from the statements in the Viking Line judgment that EU law permits restriction on freedom of establishment in order to safeguard the payment and working conditions of workers. The process of developing new dock regulation by the European Parliament and others show that the working conditions of dockworkers is a prioritised topic. I cannot see that there are any special considerations concerning the payment and working conditions of dockworkers at the Port of Drammen that would prevent application of social policy aims recognised by the EU/EEA law in the present case.

(181) The issues that remain in a consideration of whether the restriction imposed on freedom of establishment can be justified include the issues of whether the priority clause—and boycott as a means to preserving this clause—is appropriate for safeguarding the working and employment conditions of dockworkers, and whether forcing Holship to respect the priority clause by affiliating with the Framework Agreement, go beyond what is necessary to safeguard the interests of workers.

(182) In this context, I would first like to point out that both the Viking Line judgment and the Laval judgment concerned the use of boycott/blockade. Neither the European Court of Justice nor the EFTA Court have expressed that boycott is unacceptable as a collective action to promote an overriding reason of general interest recognised by European Court practices. Boycott actions as such, are recognised as a legitimate collective action to achieve acceptance for a collective agreement. In the present case, boycott is the collective action available to the dockworkers. It is appropriate, and I cannot see that it, on its own, goes beyond what is necessary.

(183) Nor have there been any indications that the Framework Agreement is not appropriate for safeguarding payment and working conditions for dockworkers entitled to priority of engagement under the agreement.

(184) The Norwegian Business Association has pointed out that there are no more than six permanent employees at the Administration Office at the Port of Drammen, but a pool of somewhere between 50 and 90 temporary workers is frequently used. It has been argued that a system replacing Holship's permanent employees with temporary workers is not appropriate for safeguarding the payment and employment conditions of dockworkers.

(185) As previously mentioned, up to three of Holship's employees may be terminated. There are plans to resolve this in a reasonable manner in connection with negotiations for Holship's affiliation with the Framework Agreement. In general, if the priority clause must be respected, port users and others who may want to engage in loading and

unloading work will have to adjust their workforce accordingly. Also, one should note that the considerable use of temporary workers at the Port of Drammen is attributable to the port's unique need for drivers to drive cars ashore from car ships. Calling attention to the large number of temporary workers therefore misrepresents how work at the port is organised.

(186) Given the above, I have concluded that the priority clause is an appropriate means by which to safeguard the payment and working conditions for dockworkers.

(187) The issue then becomes whether the system of a priority clause goes beyond what is necessary, i.e. whether it would have been possible to achieve the same results using less restrictive means. In considering this issue, I must take into account that port activities have undergone considerable changes, both before and after the Framework Agreement was first signed. Cargo handling is largely mechanised, including container lifts. In addition, shipping, cargo handling, storage and delivery are often integrated processes. It has become easier to predict ship calls and plan accordingly. Developments have led to a reduced need for dockworkers, and an increased need for qualified personnel with the necessary technical competence to handle the loading and unloading operations. Furthermore, employers find it beneficial when the personnel handling the loading and unloading are also qualified to handle other types of jobs.

(188) The claim that ILO Convention no. 137 is outdated is not shared by the European Parliament, as described above, as the Parliament has twice rejected proposals for directives that would have limited rights to priority of engagement for dockworkers. Nor is this view shared by ILO's expert committee, which, in a comprehensive report presented at the 90th session of the International Labour Conference in 2002, stated the following (paragraph 235):

> **"The three major principles of permanent or regular employment, of a minimum income and of the system of registration prescribed by the Convention, have proven to be relevant, even in countries which have a highly developed mechanised port system requiring only a small number of dockworkers."**

(189) Circumstances have hardly changed too much; these claims are likely still relevant.

(190) With reference to the pleadings of Dampskibsexpeditørenes Forening, the Norwegian Business Association argued that an alternative to the system of priority of engagement would be for individual port users to hire permanent employees to handle their loading and unloading operations.

(191) I noted that Tommy Mangrud, shop steward of the Drammen Dock Workers' Association, pointed to several reasons why this was not a viable alternative in his statement before the Supreme Court. He stated:

> **"No. First, there will not be enough work to justify full-time stevedore positions. Second, some port users have no non-administrative personnel. These users would need to hire additional personnel for ship calls anyway. Third, the need for dockworkers in connection with ship calls will be higher than the number of dockworkers any one port user can provide. Fourth, hiring one's own personnel will be more expensive due to the irregularity of ship calls, which would require shift work. Port users would have to organise their activities in an entirely new way to be able to have enough personnel to**

fill several shifts."

(192) His first argument could perhaps be countered by pointing out that the workers in question could perform other jobs in addition to unloading and loading. Even so, based on the above and the other evidence presented in the case, I cannot see that it is a real alternative for the current loading and unloading needs at the Port of Drammen, currently met by Administration Office personnel, to be handled by personnel employed by port users.

(193) If that is the case, what is the consequence of not having to respect the priority clause? If there is no alternative solution, I am forced to conclude that the only outcome is the potential weakening of employment and payment security of dockworkers. NTF have argued that the only real alternative is to have low-paid mariners handle the loading and unloading. Employers have argued that the collective agreements of mariners prohibit this. I will not discuss this further, but nevertheless conclude that the employment situation for the permanently employed dockworkers with the Administration Office would become a lot less secure if the priority clause is not respected. The basis for permanent employment may disappear.

(194) In the European Court of Justice's case of Commission v Spain, Spain justified the restriction on freedom of establishment by referring to ILO Convention no. 137 (paragraph 41). In response, the ECJ described a less restrictive arrangement than the Spanish system at the time, translated into [English] as follows (paragraph 55):

> **"As such, it would be possible, in line with the Commission's proposal, to require loading and unloading companies, who would be free to hire permanent or temporary workers, to manage the employment agencies intended to provide them with labour, to organise the training of these workers, or to establish a labour pool managed by private companies serving as staffing agencies, providing labour for the loading and unloading companies.**

(195) This statement shows that both the European Commission and the European Court of Justice believe that it is possible to establish a "pool" of dockworkers, safeguarding their rights under ILO Convention no. 137, without violating freedom of establishment, cf. paragraph 44. The systems described here are similar to the one established by the Framework Agreement.

(196) I cannot rule out that there may be other alternatives that potentially preserve the considerations the priority clause of the Framework Agreement is intended to protect, nor that developments at the ports could make it preferable to develop good alternatives. I cannot see, however, that there are other alternatives today that safeguard the interests of dockworkers at the Port of Drammen equally well.

(197) Given the above, I have concluded that the boycott, as a means to ensure that Holship respects the right of dockworkers to priority of engagement, does not go beyond what is necessary to achieve its purpose. The restriction on freedom of establishment has thus been justified.

(198) *Other submissions*

(199) Holship submitted that the boycott, in light of its underlying purpose of forcing affiliation with the Framework Agreement, violates the negative freedom of association, cf. Section 101 of the Constitution and Article 11 of the ECHR. That is, in my view, not correct. In this regard, I find it sufficient to refer to the Court of Appeal's judgment, pages 12–13, with which I concur.

(200) Holship also submitted that the boycott is inappropriate and disproportionate, cf. Section 2, litra c), second and third alternatives, of the Boycott Act. This argument was also presented in the Port of Sola case, and I cannot see any grounds on which to conclude differently in the present case. Section 2, litra c), of the Boycott Act primarily addresses the abuse of boycott actions. That is not the case here. It also follows from my discussion of EEA law that I do not find that the boycott will have inappropriate effects, nor do I find that the objective it is pursuing is disproportionate to the detrimental effects it will have.

(201) Given the above, I vote that the appeal be dismissed, and that NTF and LO be awarded compensation for legal costs incurred in connection with proceedings before the Supreme Court.

(202) Justice **Stabel:** I agree with the justice delivering the second opinion, Justice Indreberg, in all material aspects and with her conclusion.

(203) Justice **Tønder:** Likewise.

(204) Justice **Endresen:** Likewise.

(205) Justice **Webster:** Likewise.

(206) Justice **Noer:** Likewise.

(207) Justice **Arntzen**: Likewise.

(208) Justice **Matningsdal:** I agree with the justice delivering the leading opinion, Justice Skoghøy, in all material aspects and with his conclusion.

(209) Justice **Utgård:** Likewise.

(210) Justice **Bårdsen:** Likewise.

(211) Justice **Matheson:** Likewise.

(212) Justice **Normann:** Likewise.

(213) Justice **Bull:** Likewise.

(214) Justice **Bergsjø:** Likewise.

(215) Justice **Ringnes:** Likewise.

(216) Chief Justice **Øie:** Likewise.

(217) Following the vote, the Supreme Court rendered the following

JUDGMENT:

1. The Court finds in favour of Holship Norge AS.

2. The Norwegian Transport Workers' Union is ordered to pay to Holship Norge AS compensation in the amount of NOK 283,000—two hundred and eighty three thousand kroner—for legal costs incurred in connection with proceedings before the District Court.

3. The Norwegian Transport Workers' Union is ordered to pay to Holship Norge AS compensation in the amount of NOK 995,275—nine hundred and ninety five thousand two hundred and seventy five kroner—for legal costs incurred in connection with proceedings before the Court of Appeal.

4. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to Holship Norge AS compensation in the amount of NOK 5,822,331—five million eight hundred and twenty two thousand three hundred and thirty one kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

5. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to the Norwegian Business Association compensation in the amount of NOK 615,000—six hundred and fifteen thousand kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

6. The Norwegian Transport Workers' Union and the Norwegian Confederation of Trade Unions are ordered to pay, one for both and both for one, to the Confederation of Norwegian Enterprise compensation in the amount of NOK 200,000—two hundred thousand kroner—for legal costs incurred in connection with proceedings before the Supreme Court.

7. Compensation for all legal costs shall be paid within 2—two—weeks of service of judgment.

True transcript certified: