OSLO DISTRICT
COURT

(Translated by Språkverkstaden, February 2017)

RULING

Issued: 6 January 2017 by Oslo District Court

Case no.:16-105341TVI-OTIR/04

Judge: District Judge Ingebjørg Tønnessen

Nature of the case: Claim for reimbursement of fund management fees

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Unitholders in the unit trust DNB Norge	Represented by Steinar Mageli and Jens-Henrik Lien
against	
Dnb Asset Management AS	Represented by Helge Lundestad and Lars Ekeland

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No public disclosure restrictions

RULING

Ruling on whether or not to allow a class action suit.

Brief background description

DNB has for many years offered a variety of products in the Norwegian market for equity funds. Currently its equity funds are managed by DNB Asset Management AS, which forms part of the DNB Group, and which hereafter will be referred to as simply DNB. DNB's Norwegian funds include an index fund (DNB Norge Indeks) and various actively managed funds, including DNB Norge.

In March 2015, The Financial Supervisory Authority of Norway ordered DNB to change the way in which it managed its equity fund DNB Norge. It considered that the fund had been passively managed, in spite of the fact that it was marketed and priced as an actively managed fund. The Financial Supervisory Authority ordered the bank to choose between changing the way it managed the fund to one that was genuinely active and/or adjusting its pricing of the fund to reflect its actual management regime. DNB expressed its disagreement with the Authority's view that the fund had been passively managed, but nevertheless responded to the order by increasing the fund's relative risk and reducing the management fee from 1.8% to 1.4%.

In the winter of 2015/2016, the Consumer Council of Norway brought a complaint against DNB, on behalf of the unitholders of DNB Norge, and of two funds that had been merged with it, Norge (I) and Avanse Norge (I). The complaint was based on the fact that unitholders had not received the service they had paid for, and demanded that DNB reimburse part of the management fees paid by the unitholders over the period 2005-2015. The part of the management fee to be reimbursed was set at 1.5%, on the basis that this was the difference between the management fees for DNB Norge and DNB Norge Indeks. DNB denied the allegations.

On 21 June 2016 the Consumer Council filed the unitholder's case with Oslo District Court as a class action. In its submission, the period for which reimbursement was claimed was reduced to 2010-2014. As well as the reimbursement of management fees, the Consumer Council demanded compensation for lost investment income on the amount to be reimbursed. In the complaint filed, the number of unitholders covered by the suit is estimated at 180,000, and the total value of the claim is put at NOK 690,761,112. Of this, NOK 536,481,754 relates to excess management fees paid, while the remaining NOK 154,279,359 relates to lost investment income. The average claim per unitholder is therefore just under NOK 4,000.

In its notice of intention to defend, DNB argued that it had no case to answer. The bank also argued that the suit should be rejected because the case did not fulfil the conditions required for a class action suit.

The court decided that the question of whether or not to allow a class action suit should be considered at a separate hearing. That hearing was held at Oslo District Court on 15 and 16 December 2016. The representatives of each side made their cases, and submitted the documentation listed in the court record. After the hearing further pleadings were exchanged, the last of which was the Consumer Council of Norway's pleading of 4 January 2017.

The main arguments of the Consumer Council of Norway are as follows:

If any case satisfies the legislative intent of the rules on class action, it must be this one. The complaint involves a very large number of unitholders, most of whom have such small claims that it would not be worth their while to bring a case individually. From society's point of view, there are many important reasons why this type of case should be heard by the court system, which is why the Consumer Council has chosen to bring this class action.

The conditions for a class action suit are met. The unitholders all have the same complaint, both factually and legally. They have all paid the same fees for the same advertised service, and the service provided by DNB – fund management – has also been the same for everyone. The main issue at stake is whether DNB provided the service – active management – for which the unitholders paid. If the court should decide that DNB did not manage the funds actively, the next question is whether the unitholders are entitled to have some of the management fees reimbursed. The Consumer Council cannot see any reason to make a distinction between the unitholders with respect to any of the above questions, regardless of whether the legal issue at stake is Section 11-1 of the Securities Trading Act, any contractual right to compensation, *condictio indebiti*, limitation of actions or compensation under consumer protection. The fact that any compensation payable would have to reflect the individual unitholder's investment is not an argument against bringing the case – it only involves performing simple arithmetic and does not raise any practical or legal problems.

A class action is not only the best approach to this complaint, it is the only realistic approach. The Consumer Council doubts that test cases would solve much more than individual cases. Moreover, DNB has not said that it is willing to accept the precedent set by any test case.

If a class action is brought, an opt-out class action is the most appropriate option. The legal conditions for the opt-out option are met.

The Consumer Council has made the following submission:

Principally:

1. Case 16-105341TVI-OTIR/04 is being filed as a class action pursuant to Section 35-7 of the Dispute Act.
2. The scope of the claims that may be included in the class action is:

   "All private individuals or artificial persons who at any time during the period 1 January 2010 to 31 December 2014 owned units in the unit trusts DNB Norge (previously Postbanken Norge), DNB Norge (I) or Avanse Norge (I)."
3. The Consumer Council of Norway is appointed to represent the claimants.

Subordinately:

1. Case 16-105341TVI-OTIR/04 is being filed as a class action pursuant to Section 35-6 of the Dispute Act.
2. The scope of the claims that may be included in the class action is:

   "All private individuals or artificial persons who at any time during the period 1 January 2010 to 31 December 2014 owned units in the unit trusts DNB Norge (previously Postbanken Norge), DNB Norge (I) or Avanse Norge (I)."
3. The Consumer Council of Norway is appointed to represent the claimants.
4. The deadline for joining the action is 1 March 2017.
5. The individual class members are not liable for the legal expenses associated with the case.

The main arguments of DNB are as follows:

The Consumer Council has attempted to present its arguments in such a way that the case will meet the strict conditions needed to bring it as a class action. However, the truth is that the case raises many factual and legal questions that may need to be dealt with in different ways for the around 180,000 unitholders who could be covered by the process.

When assessing whether the claims are factually and legally equivalent, the court cannot only take into account to the plaintiff's arguments, it must also consider the defendant's objections.

DNB has several objections to the claims, and they require the complaints of the unitholders to be dealt with individually or in smaller groups. For example, the information given to the unitholders may affect whether the bank failed to provide the service that it had promised to its clients. Some unitholders knew more than others about the nature of the service for which they were paying, and some may have deliberately chosen a low-risk product. Clients who received the service they wanted will have little justification for demanding reimbursement of management fees paid. Some unitholders have also made a good profit on the type of management they paid for – compared with an index fund – and it is hard to see how they will be entitled to any reimbursement. The point here is that some assessments relate to individual unitholders, while others relate to groups defined by the period of their investment and the fund(s) they invested in. These kinds of individual assessments are not just relevant to assessing whether there has been any failure to provide the service promised, they also affect other questions such as eligibility for compensation under consumer protection and any limitation of actions.

If a class action is brought, unitholders who in principle are in different factual and legal positions, will necessarily be treated equally. With respect to several points, the Consumer Council has accepted that the claims of all of the unitholders be assessed on the basis of the option that is least favourable to the claimants. This will not be in all of the unitholders' interest, and it is yet another argument against bringing the case as a class action.

As well as the fact that the condition of equivalence is not met, a class action is not the best approach to dealing with the claims of the claimants. DNB has attempted to agree on one or more test cases with the Consumer Council, but unfortunately this approach has been rejected by the Consumer Council. While there are many objections to a class action, DNB finds it difficult to see any objections to bringing test cases. There is no reason to believe that the bank will not scrupulously apply the outcome of a final judgement to other unitholders in an equivalent position.

The conditions for an opt-out class action are significantly stricter than those for an opt-in action, and we do not consider them to be met.

DNB has made the following submission:

1. Case 16-105341TVI-OTIR/04 should be rejected.
2. DNB Asset Management AS should be awarded its district court expenses.

The court's assessment

Background information about the rules on class actions

Rules on class actions were introduced into Norwegian law by the Dispute Act of 2005. In the legislative history of the Act, the introduction of class actions was justified on several important grounds, cf. Proposition No. 51 (2004-2005), sentence 25.4.3.1:

"Controlling legal expenses is important to both individuals and society. Both complainants and defendants will often have an interest in there being a single court case to hear and decide on questions that affect a number of parties. This will generally be far cheaper than hearing the same question multiple times at separate court cases. If joint issues are dealt with as part of a single case rather than in many separate ones, greater resources can be put into that case than would be the possible for many smaller cases. Sometimes it will only be possible to take legal action if it can be done collectively, for instance where the individual claims are so small that they would not justify individual lawsuits."

In sub-section 25.4.5.2 the Ministry continues:

"The Ministry is of the opinion that procedural law must keep pace with changes in society in general. Procedural law must be adapted to meet the need to make mass claims in typical consumer protection cases. Access to the court system generally helps to guarantee due process for individuals. This must also be the aim for claims that cannot be heard individually provided that it is possible to find an efficient and appropriate way of hearing the claims collectively. Class actions will allow more consumers and other people to defend their rights by giving them genuine access to the court system. This form of legal action will also help to ensure that substantive law is enforced: The greater the likelihood of an infraction actually being brought before the courts, the stronger the incentive for businesses to comply with substantive law. Moreover, it will significantly strengthen the negotiating position of consumers as a whole: Business will be more likely to respect decisions by conflict resolution boards or in test cases and apply them to equivalent disputes if the alternative is class action. It is also important for legal disputes to actually reach the court system and for a ruling to be issued. Greater compliance with substantive law may prevent untrustworthy businesses from gaining market share at the expense of trustworthy ones. Class actions also use civil law to enforce substantive law, potentially reducing the need for administrative or criminal proceedings.

[...]

"Nor does the Ministry agree with those consulted who argued that the ability to bring trivial claims before the courts will overload the court system and reduce people's trust in courts. It is misleading to only focus on the fact that the individual claim is too small and trivial to be worth a court hearing. Claims must be seen collectively when assessing whether or not to allow legal action. Individually small claims may collectively amount to a significant sum. In the so-called interest rate adjustment case, where the Consumer Council and the banking industry disagreed on how to interpret the stipulations of the Financial Contracts Act on deadlines for notifying consumers of changes to interest rates, we understand that an amicable settlement saw several banks return a total of NOK 53 million to approximately 122,000 customers. This is an example of the kind of case where class action would have been an option had the parties not reached an out-of-court settlement. For the individual bank customer, the amount at stake was so small that it would not have been worth taking legal action individually. The banks could therefore have made a large profit at the expense of consumers. Furthermore, a situation in which consumers have to accept that it is impossible for them to enforce their legitimate rights, may lead to distrust in the court system and a lack of respect for substantive law."

In the present case, the class action is being brought on behalf of around 180,000 unitholders, with an average individual claim against DNB of just under NOK 4,000. Consequently, there are many legal persons with small claims whose claims collectively represent a significant sum to DNB. In view of the above extracts from the legislative history of the Act, the court agrees with the Consumer Council that the circumstances surrounding the present case are close to what the legislators probably had in mind when they decided to introduce rules on class actions into Norwegian law.

Nevertheless, while many of the circumstances appear to fit in with the legislative intent of the rules, the decisive question remains whether or not the case fulfils the conditions stipulated by the law for class actions. In the present case, one of the key disputes is over whether the unitholders have claims "whose factual or legal basis is identical or substantially similar", cf. Dispute Act, Section 35-2 (1) a, and whether "class procedure is the most appropriate way of dealing with the claims," cf. Dispute Act, Section 35-2 (1) c. The court will discuss these conditions below.

<u>The condition that claims must be equivalent, cf. Dispute Act, Section 35-2 (1) a</u>

DNB has argued that there are big differences between the 180,000 unitholders who could be covered by the case: They have invested in three separate funds, and there are differences between the funds in terms of the general information given to unitholders. Moreover, the general information given about each fund has varied over time. In addition, the bank can document that a large amount of personal advice has been given by the bank to individual unitholders.

There may also be other information available that sheds light on why individuals may have chosen a particular form of investment. DNB has also emphasised that there are big variations with respect to the returns achieved by the various unitholders on their investments. Of the 180,000 unitholders, around 10,000 achieved an excess return – over the index – greater than the extra fees that they paid for active management. According to DNB, the unitholders are distinguished by so many factual and legal axes of difference that it is hard to find relevant subgroups pursuant to the Dispute Act, Section 35-10 (2).

The Consumer Council has argued that differences in circumstances are of little legal significance, since throughout the period in question the funds were marketed and priced as actively managed funds. According to the Consumer Council, there were only minimal differences in the general information given about the funds, and the individual circumstances of unitholders cannot have any legal effect. The same applies to the returns achieved by individual unitholders, as the complaint relates to failure to provide the promised service, and not any promised return on investment. In a pleading of 23 December 2016, the Consumer Council argued:

"The Consumer Council considers that the fund manager has an ongoing duty to manage the fund in accordance with an objective interpretation of the rules in force at any given time, including relevant laws, regulations, articles of association, the prospectus and the key information document, regardless of when the individual bought units or what he or she believed to be the nature of the service offered. If the court should decide that there were real differences between the nature of the service offered at different times or for different funds, we accept that the case be assessed collectively on the basis of the information for investors that is the least favourable to the complainants.

[...]

"The Consumer Council considers [...] that the fact that some unitholders may have achieved higher returns by being unitholders in the DNB Norge funds than they would have achieved by investing an equivalent amount in a hypothetical index fund over the same period of time is legally irrelevant to the calculation of their losses in this case. They still paid for a service that they didn't receive.

[...]

"The Consumer Council has already accepted that the claims of the class action must be rejected if the court agrees with DNB that losses cannot be calculated in the way proposed by the Consumer Council. If the alternative return on investment available to individuals is considered relevant, the case cannot be brought as a class action."

When assessing whether or not the requirement for the claims to be identical or substantially similar is met, in principle the court shall not examine the factual basis of the complaint or of the plaintiff's submissions. However, this does not mean that only the plaintiff's arguments should be taken into account. The court must also assess whether the objections raised by the defendant to the complaint could make it necessary to make distinctions between the members of a class action. As can be seen from the above, the Consumer Council sees the case as being about the unitholders collectively, and in several areas it has accepted that if there are any differences between the unitholders, their cases must be examined collectively based on the least favourable position. In the court's view, this does not mean that the parties or court need to assess in advance whether one position is in fact less favourable than the others, but the approach does mean that the claims of individual unitholders will ultimately be examined as if their "factual or legal basis is identical or substantially similar", cf. Dispute Act, Section 35-2 (1) a. Although this has the potential to be disadvantageous to some unitholders, the court considers that, under Section 35-9 of the Dispute Act, the representative of the group is authorised to take this kind of tactical decision, as long as the class members are kept continuously informed of the basis on which legal action is being taken. If the representative at a later stage in the process wishes to change the claims being made and their justification – thereby changing the basis for the legal action – any decision to allow a class action may be reversed pursuant to Section 35-4 (3) of the Dispute Act.

To assess in greater detail whether the unitholders' claims are all equivalent, the court has chosen to look at three potential areas of difference: Differences in the general information provided about the funds, individual differences in the circumstances of unitholders and differences in the return on investment achieved by individual unitholders.

In terms of the general information, the Consumer Council has accepted that if there were any real differences between the nature of the service offered at different times or for different funds, the case should be assessed collectively on the basis of the information for investors that is the least favourable to the complainants. In view of this allowance by the Consumer Council, although it does not apply to all kinds of general information, nor to information provided before 2010, the court believes that the requirement for the claims to be legally and factually equivalent must be considered to have been met with respect to this kind of potential difference.

The Consumer Council has also argued that individual circumstances are not relevant to the court's assessment of the claims. DNB disagrees with this. The court cannot rule out that it will find in favour of DNB and that the individual circumstances of the unitholder at the time of his or her investment may affect its examination of the claims. These circumstances may be any individual advice given by the bank and/or other special circumstances relating to the unitholder.

However, to date no such individual circumstances have been documented, and we have not been informed of any specific relevant evidence that will be presented. The Consumer Council has stated in court that it will not present any evidence of individual circumstances, while DNB has stated that it has a large volume of logs and correspondence with unitholders that it may wish to review and present to the court. The court considers that evidence relating to any individual advice given will only of interest if it elaborates on or deviates from the general information provided. Given that the case affects around 180,000 unitholders with average claims of under NOK 4,000, the court assumes that DNB will also have to assess to what extent it is worth reviewing individual cases with the aim of discovering whether any relevant individual advice that can be demonstrated to have been given in court. Currently it is very unclear to what extent evidence relating to individual circumstances will be presented. Section 35-10 of the Dispute Act allows the court to decide that the provisions on class actions shall not apply to the hearing of matters of dispute that only relate to a limited number of class members, or that a subgroup should be established for a large number of class members. The court considers that it may be possible to deal with any differences between the unitholders based on individual circumstances by hearing their cases separately pursuant to Section 35-10 once it has been established what evidence DNB intends to present in relation to individual circumstances. In view of this possibility, the court cannot see that any factual or legal differences between the class members' individual circumstances prevent the case from being brought as a class action.

DNB has also argued that there are big variations between the unitholders with respect to the return on investment they made, and that this may be relevant to the court's examination of their claims. The Consumer Council, meanwhile, has argued that the complaint relates to the failure to provide the promised service, and that the results or return on investment achieved by individuals is irrelevant to any examination of the claims. Moreover, the Consumer Council has said that it accepts that the claims of the class action must be rejected if the court disagrees with it on this approach. With that in mind, the court cannot see any reason why individual differences between the unitholders in terms of their return on investment are relevant to the factual or legal examination of the case as submitted.

Overall, the court considers that the unitholders in the current class action are presenting claims whose "factual or legal basis is identical or substantially similar", and that the requirement in Section 35-1 (1) a) of the Dispute Act is therefore met.

The condition that class action must be the most appropriate approach, cf. Dispute Act, Section 35-2 (1) c

The condition that a class action must be the most appropriate approach requires an overall assessment of the whole case, where it is particularly relevant to carry out a comparison with other collective or individual methods of bringing the claims.

DNB has argued that it would be most appropriate to deal with the claims covered by this case through one or more test cases, pointing out that the bank has attempted to reach an agreement with the Consumer Council on this. DNB has argued that bringing test cases means that you don't have to deal uniformly with cases that differ from one another, and has stated that the bank will naturally implement what it considers to be the logical consequences of the final decision(s) in the pilot case(s).

The court considers that several circumstances imply that test cases could be an equally good approach to a class action. On the basis that DNB is a trustworthy company, the court believes that the bank will act upon any obligations imposed on it. The comments in the legislative history about the need to enable many parties to enforce their claims against untrustworthy businesses is therefore not an important consideration in this case. Moreover, the court strongly believes that it will be possible to find unitholders willing to bring test cases against DNB for relatively small amounts, provided that they are guaranteed full financial and practical support from the Consumer Council.

Nevertheless, the court has concluded that a class action is the most appropriate way of dealing with the claims, primarily due to the big disagreement between DNB and the Consumer Council as to whether or not the unitholders' claims are equivalent. DNB has argued strongly that the unitholders' claims are distinguished by many legal and factual axes of difference. With this in mind, the court considers it likely that the bank and the Consumer Council/unitholders will disagree on the implications of any judgements in one or more pilot cases. If there is a great deal of dispute over the implications of a judgement, it may often be – as pointed out in the legislative history cited above – more efficient to put greater resources into a single class action, rather than negotiating on many individual cases, and potentially bringing lawsuits in relation to them, after the initial judgement. In general, applying the court's statements on a pilot case to issues that the court was not aware of is an inferior option to a class action in which the court can be presented with the various issues and examine them directly.

In view of the above, the court considers the condition that class action must be the best approach – cf. Dispute Act, Section 35-2 (I) c) – to be met. Consequently, the class action may be brought before the court.

Framework for the proceedings and next steps

Once the court has decided to allow a class action, it shall in its decision also establish a framework for the proceedings, cf. Dispute Act, Section 35-4 (2).

The scope of the claims that may be included in the class action, cf. Section 35-4 (2) a), have been discussed in detail above. It can be summarised as:

Claims for the reimbursement of management fees charged by DNB Asset Management AS brought by all private individuals or artificial persons who at any time during the period 1 January 2010 to 31 December 2014 owned units in the unit trusts DNB Norge (previously Postbanken Norge), DNB Norge (I) or Avanse Norge (I).

The Consumer Council of Norway is appointed to represent the claimants, and is therefore authorised to act on behalf of them in the action pursuant to the first three sub-sections of section 35-9 of the Dispute Act.

The court shall also decide whether the action shall be brought as an opt-in or opt-out class action. In the court's view, there is little doubt that the most appropriate course of action in this case is the opt-out option, cf. Dispute Act, Section 35-7. In reaching this conclusion, the court has given particular weight to the large number of unitholders who may be covered by the case and the relatively small amount of their claims, cf. Section 35-7 (1) a. Although the legislative history implies that the opt-in option should be the general rule, there are also comments in the legislative history to suggest that this kind of class action should use the opt-out option. For instance, in NOU 2001:32A sentence 17.5.3.4.1 the drafting committee for the Dispute Act states:

"In the case of small claims, society's interest in ensuring that rules actually influence conduct may to some extent favour judgements being considered binding regardless of whether everyone with a claim has opted in, precisely because such claims would otherwise not be pursued. This is particularly true in cases where a judgement in favour of the class can be implemented without any action by the individual class member. This may for instance apply to a judgement that an increase in call charges has been implemented too soon, or insufficient notice has been given of a general increase in the interest rates charged by a bank.

[...]

"Practical examples of actions where it may be appropriate for the affected parties to have to opt out if they don't want to be bound by the judgement, include actions relating to the implementation date of general increases in interest rates on bank loans and the timing of increases in call charges. If the class action is successful, the bank or telecommunications company in question will be ordered to reimburse the excess interest or call fees that it has charged during a given period. The companies will themselves have the necessary information about their customers, and will hence be in a position to implement the judgement with respect to the class members. Within the limits set by the committee for class actions based on the opt-out principle, the committee cannot see any significant fundamental objections to their use."

The court considers that this case meets the stricter conditions for equivalence of the claims that can be inferred from Section 35-7 (1) b. The legislative history, cf. Proposition No. 51 (2004-2005) p. 496, makes it clear that this condition can be met even if the "outcome for individuals may differ when compensation is calculated based on the judgement". As the court understands the legislative history, the main aim of the stricter condition is to avoid opt-out class actions where individual assessments and evidence are required in relation to the areas of dispute. In view of the discussion of the condition that claims be equivalent above, the court assumes that there will be little need to present individual evidence, given the Consumer Council's approach to the case.

In view of the above, the court finds that the case should be brought as an opt-out class action, cf. Dispute Act, Section 15-7.

Section 35-5 (1) of the Dispute Act requires the court to send notifications, make an announcement or by some other means ensure that the class members under Section 35-7 are made aware of the class action. Page 106 of the Høgetvedt Berg/Nordbys annotated edition of the Act suggests that as a general rule the court should ask the parties to jointly draft a notification letter that includes the elements highlighted in Section 35-5 of the Dispute Act, and sets out the scope of the action being taken. The court finds it appropriate to follow this general rule here. The court wishes to clarify that the notification letter in this case should not just set out the scope of the claims that may be included in the class action; the unitholders should also be informed of the Consumer Council's explanation of the claims and their justification. The court assumes that in this case it will be most natural to use DNB's records to notify unitholders, but it is also happy for the parties to jointly propose some other approach.

The court asks the parties to submit a joint proposal for how they intend to proceed and the contents of the letter to announce that a class action has been approved within two weeks of the ruling approving the class action becoming final. The court is willing to discuss the details with the parties' representatives, particularly with respect to the information provided about the opt-out register, etc. If the Consumer Council and DNB are unable to reach agreement on a joint proposal, the court requests each party to submit a separate proposal.

As follows from the discussion above, the court will assess whether the rules on class action will not be applied to all of the class members, or if subgroups should be established, once DNB has submitted any evidence that it wishes to present in relation to the circumstances of the individual unitholders. DNB's deadline for submitting the relevant documentation and/or informing the court of which witnesses it wishes to call in relation to individual circumstances is set at 1 month from this ruling becoming final.

CONCLUSION

1. The class action may be brought.

2. The scope of the claims that may be included in the class action is:

   "Claims for the reimbursement of management fees charged by DNB Asset Management AS brought by all private individuals or artificial persons who at any time during the period 1 January 2010 to 31 December 2014 owned units in the unit trusts DNB Norge (previously Postbanken Norge), DNB Norge (I) or Avanse Norge (I)."

3. The case shall be brought as an opt-out class action.

4. The Consumer Council of Norway is appointed to represent the claimants.

5. The parties are to draft a notification letter and agree on how to notify the affected unitholders within 2 weeks of this ruling becoming final.

6. DNB shall submit the relevant documentation and/or notify the court of any other evidence it intends to present in relation to individual circumstances within 1 month of this ruling becoming final.

The court is adjourned

Ingebjørg Tønnessen