JUDGMENT OF THE COURT
28 March 2023*

(*Freedom to provide services – Article 36 EEA – Notion of "services" – Article 37 EEA – Article 39 EEA – Article 32 EEA – Exercise of official authority – Public procurement – Directive 2014/24/EU – Public service contract – "ideelle organisasjoner"– Reservation of contracts – Exclusion of profit-making operators*)

In Case E-4/22,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in the case between

Stendi AS,
Norlandia Care Norge AS

and

Oslo kommune,

concerning the interpretation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in particular point (9) of Article 2(1) and Articles 74 to 77, and Articles 31, 32, 36 and 39 of the Agreement on the European Economic Area,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann, and Ola Mestad (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

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

having considered the written observations submitted on behalf of:

– Stendi AS ("Stendi") and Norlandia Care Norge AS ("Norlandia"), represented by Aksel Joachim Hageler and Lennart Garnes, advocates;

– Oslo kommune ("Oslo municipality"), represented by Ane Grimelid, advocate;

– the Norwegian Government, represented by Kristin Hallsjø Aarvik and Tone Hostvedt Aarthun, acting as Agents;

– the Icelandic Government, represented by Anna Jóhannsdóttir, Inga Þórey Óskarsdóttir and Hrafn Hlynsson, acting as Agents;

– the Spanish Government, represented by Juan Rodríguez de la Rúa Puig, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by Melpo-Menie Joséphidès, Ewa Gromnicka, Erlend Møinichen Leonhardsen and Kyrre Isaksen, acting as Agents; and

– the European Commission ("the Commission"), represented by Petr Ondrůšek, Mislav Mataija and Geert Wils, acting as Agents;

having regard to the Report for the Hearing,

having heard oral arguments on behalf of Stendi and Norlandia, represented by Aksel Joachim Hageler and Lennart Garnes; Oslo municipality, represented by Ane Grimelid; the Norwegian Government, represented by Kristin Hallsjø Aarvik; ESA, represented by Erlend Møinichen Leonhardsen; and the Commission, represented by Petr Ondrůšek and Mislav Mataija, at the hearing on 4 October 2022,

gives the following

Judgment

I Legal background

EEA law

1 Article 31 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches and subsidiaries by nationals of*

any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.

2 Article 32 EEA reads:

The provisions of this Chapter shall not apply, so far as any given Contracting Party is concerned, to activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority.

3 Article 36 EEA reads:

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.

4 Article 37 EEA reads:

Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.

Without prejudice to the provisions of Chapter 2, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

5 Article 39 EEA reads:

> *The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.*

6 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65, and EEA Supplement 2018 No 84, p. 556) ("the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 97/2016 of 29 April 2016 (OJ 2017 L 300, p. 49, and EEA Supplement 2017 No 73, p. 53) and is referred to at point 2 of Annex XVI (Procurement) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein, and Norway. The requirements were fulfilled by 14 November 2016 and the decision entered into force on 1 January 2017.

7 Recital 6 of the Directive reads:

> *It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.*
>
> *It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.*

8 Recital 114 of the Directive reads:

> *Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.*
>
> *Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.*
>
> *Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most*

appropriate. The rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services, published by the Social Protection Committee. When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 into account. In so doing, Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.

Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

9 Article 1(2) of the Directive, headed "Subject-matter and scope", reads:

Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

10 Article 2 of the Directive, headed "Definitions", reads, in extract:

1. For the purposes of this Directive, the following definitions apply:

...

(5) 'public contracts' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

(6) 'public works contracts' means public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

...

(9) 'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6;

...

11 Point (d) of Article 4 of the Directive, headed "Threshold amounts", reads:

This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.

12 Article 74 of the Directive, headed "Award of contracts for social and other specific services", reads:

Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of contracts is equal to or greater than the threshold indicated in point (d) of Article 4.

13 Article 75 of the Directive, headed "Publication of notices", reads:

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by any of the following means:

(a) by means of a contract notice, which shall contain the information referred to in Annex V Part H, in accordance with the standard forms referred to in Article 51; or

(b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

4. The notices referred to in this Article shall be published in accordance with Article 51.

14 Article 76 of the Directive, headed "Principles of awarding contracts", reads:

1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.

15 Article 77 of the Directive, headed "Reserved contracts for certain services", reads:

1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

4. The call for competition shall make reference to this Article.

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.

16 ESA Notice entitled "Threshold values referred to in Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC, expressed in the national currencies of the EFTA States" (OJ 2020 C 51, p. 16) ("the ESA notice on threshold values") reads:

Thresholds in EUR	Thresholds in NOK	Thresholds in CHF	Thresholds in ISK
80 000	771 036	91 563	10 429 009
139 000	1 339 676	159 091	18 120 403
214 000	2 062 522	244 931	27 897 599
428 000	4 125 045	489 863	55 795 199
750 000	7 228 467	858 404	97 771 961
1 000 000	9 637 957	1 144 539	130 362 615
5 350 000	51 563 071	6 123 288	697 439 993

National law and practice

17 The Directive has been implemented in Norwegian law by Act No 73 of 17 June 2016 on public procurement (*lov av 17. juni 2016 nr. 73 om offentlige anskaffelser* (*anskaffelsesloven*)) ("the Public Procurement Act") and Regulation No 974 of 12 August 2016 on public procurement (*forskrift av 12. august 2016 nr. 974 om offentlige anskaffelser* (*anskaffelsesforskriften*)) ("the Public Procurement Regulation").

18 Section 2-4(h) of the Public Procurement Regulation, reads:

The Public Procurement Act and the Regulation shall not apply to contracts for

(h) services involving exercise of official authority which are exempt from the EEA Agreement under Article 39, read in conjunction with Article 32.

19 Article 30-2a of the Public Procurement Regulation, reads:

(1) Contracting authorities may reserve the right to participate in tendering procedures for health and social services (as stated in Annex 3) to non-profit organisations (ideelle organisasjoner) if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency.

(2) Non-profit organisations (ideelle organisasjoner) shall not have a return on equity as their main objective. They shall endeavour solely for a social objective for the good of the community and reinvest any profits in activity that fulfils the organisation's social objectives. A non-profit organisation (ideell organisasjon) may, to a limited extent, engage in commercial activity that supports the business's social objectives.

(3) Notice of the tendering procedure shall refer to this provision.

20 In the Norwegian Act No 30 of 24 June 2011 on municipal health and care services etc. (*lov av 24. juni 2011 nr. 30 om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven*)) ("the Health and Care Services Act"), the municipalities are given the responsibility of offering necessary health and care services to persons staying in Norway, except for services assigned to the State or to the county municipalities (*fylkeskommunene*).

21 The fifth paragraph of Section 3-1 of the Health and Care Services Act provides that the necessary health and care services that are the responsibility of the municipality "*may be provided by the municipality itself or through an agreement concluded by the municipality and other public or private service providers*".

22 Point (6)(c) of Section 3-2, first paragraph, of the Health and Care Services Act provides that municipalities' responsibilities encompass, inter alia, offering "*place[s] in institutions, including nursing homes*".

23 Under Section 11-1 of the Health and Care Services Act, the individual municipality must cover the costs of the services for which it is responsible under that act, including places in nursing homes. Section 11-2 of that act nevertheless allows the municipalities to charge a fee to patients and users for care from the municipality's health and care service, including private businesses that operate pursuant to an agreement with the municipality, where provided for by law or regulation.

24 Chapter 4A of Act No 63 of 2 July 1999 on patient and user rights (*lov av 2. juli 1999 nr. 63 om pasient- og brukerrettigheter* (*pasient- og brukerrettighetsloven*)) ("the

Patient and User Rights Act") regulates the possibility of providing health care to persons without legal capacity to give consent and who are opposed to that health care. The objective is to ensure that the necessary health care can be provided in order to avoid serious harm to health and to prevent and limit the use of coercion.

25 Section 3 of Act No 64 of 2 July 1999 on Health Personnel (*lov av 2. juli 1999 nr. 64 om helsepersonell mv.* (*helsepersonelloven*)) provides that the term "health care" means "*any act that has a preventive, diagnostic, therapeutic, health-preserving, rehabilitative or nursing and care objectives and that is performed by health personnel*". The provision also provides that the term "health personnel" encompasses both personnel holding an authorisation or licence (including medical practitioner and general nurse) and personnel in the health and care service and pupils and students in training as health personnel who provide health care.

26 Section 4A-3 of the Patient and User Rights Act lays down the requirements for providing health care that the patient is opposed to. Under Section 4A-4 of that act, if the requirements of Section 4A-3 are fulfilled, health care may be carried out by force or by using other measures to avoid resistance from the patient. Coercive health care is to be assessed on an ongoing basis and stopped immediately once the requirements of that act are no longer met.

27 Decisions on health care under Chapter 4A of the Patient and User Rights Act may be adopted for up to one year at a time by the health personnel who are "*responsible for the health care*" in accordance with Section 4A-5 of that act. The County Governor (*statsforvalteren)* is the supervisory authority and it may reverse a decision to administer coercive health care following a complaint or on its own initiative.

II Facts and procedure

28 The main proceedings concern the procurement by Oslo municipality of long-term leasing and service agreements for up to 800 new long-term places in nursing homes. The part of the procurement relating to the operation of the nursing home places is reserved for a form of organisations, which in Norway is referred to as "*ideelle organisasjoner"*. According to the request, Section 30-2a (2) of the Public Procurement Regulation characterises *ideelle organisasjoner* as organisations which do not have a return on equity as their main motivation. They should endeavour solely for a social objective for the good of the community, reinvest any profits in activity that fulfils the organisation's social objectives, and may, to a limited extent, engage in commercial activity that supports the business's social objectives. The plaintiffs, Stendi and Norlandia, are not permitted to participate in the procurement procedure concerned because they are not *ideelle organisasjoner*.

29 Stendi is a Swedish-owned entity and is part of the Ambea Group that provides care-related services in Norway, Sweden and Denmark. Norlandia is part of Norlandia Health & Care Group AS, which is a group providing care and welfare services and is

involved in real property development in Norway, Sweden, Finland, the Netherlands, Germany and Poland.

30 Oslo municipality is Norway's largest municipality, in terms of the number of inhabitants. The procurement at issue in the main proceedings is administered by the municipality's internal Nursing Home Agency, which is the entity responsible for the municipality's nursing home services.

31 A call for tenders was published on 25 November 2020 by Oslo municipality to fulfil its obligation under the Health and Care Services Act to ensure the provision of the necessary health and care services, including places in nursing homes, to those who are staying in the municipality. The procurement consists of two parts: a real estate part consisting of long-term leasing agreements (30+10 years) for nursing home buildings, and a services part consisting of contracts (8+1+1 years) for the provision of nursing home services in the form of management of up to 800 long-term psychiatric- and somatic-related places. The total value for the real property part of the contract is calculated to be NOK 155 300 000 per year, while the total contract value for the part relating to nursing home services is estimated to be NOK 710 400 000 per year. The dispute in the main proceedings concerns the services part of the procurement.

32 The provider of nursing home services shall operate day and night nursing home places in long-term care homes (long-term places), including all necessary accompanying functions. Long-term care homes are long-term residential, health and care solutions offered to persons who can no longer live in their own homes. The procurement encompasses both psychiatric- and somatic-related long-term places. The psychiatric-related places are for patients whose main diagnosis is a psychiatric illness. The somatic-related places are occupied by patients with physical afflictions or illnesses and cognitive impairment and can in turn be divided into ordinary places and different types of shielded and reinforced places with individualised monitoring and care.

33 The tender specifications stipulate that the provider of nursing home services must be an *ideell organisasjon.* The contracts for nursing home services are reserved for *ideelle organisasjoner* on the basis of Section 30-2a of the Public Procurement Regulation and Section 2-4(h) on services involving the exercise of official authority.

34 Oslo municipality has adopted political objectives on increasing the use of *ideelle organisasjoner* for the provision of health and care services. The long-term nursing homes that are part of the nursing home services offered by Oslo municipality, are operated partly by the municipality itself and partly by private-sector service providers on the basis of agreements with the municipality. As of March 2022, 19 of a total of 37 long-term nursing homes were operated by the municipality itself, while the remaining 18 were operated by private operators under contracts. Of the 18 privately-operated nursing homes, 16 were operated by *ideelle organisasjoner* and two by commercial operators, namely Stendi and Norlandia. Both contracts with the commercial operators were concluded prior to the recent political decisions on increasing the number of *ideelle organisasjoner* in the health and care sector, and the contracts expire in 2022/2023.

35 The parties to the main proceedings disagree as to whether EEA law permits EEA States to introduce national legislation providing that public contracting authorities may reserve the procurement of contracts for health and social care services for *ideelle organisasjoner*.

36 Against this background, Oslo District Court decided to request an Advisory Opinion from the Court. The request, dated 14 March 2022, was registered at the Court on 30 March 2022. Oslo District Court has referred the following questions to the Court:

> *On whether the procurement comes within or falls outside the concept of service:*
>
> 1. *Is a contract for pecuniary interest providing for the provision of long-term places in nursing homes, the procurement of which is effected under the conditions described [in the request], to be regarded as a contract relating to the provision of "services" under point (9) of Article 2(1) of Directive 2014/24/EU?*
>
> *On the exception in Article 32 EEA for exercise of official authority:*
>
> 1. *Is a public contracting authority's ability to rely on the exception in Article 32 of the EEA Agreement, read in conjunction with Article 39, affected by whether;*
>
>   a) *the services in question have previously been the subject-matter of public service contracts between the contracting authority and both non-profit organisations (ideelle organisasjoner) and other (not non-profit) providers?*
>
>   b) *other public contracting authorities in the same State still opt to conclude contracts for equivalent services with both non-profit organisations (ideelle organisasjoner) and other (not non-profit) providers?*
>
>   c) *the power to take decisions to administer coercive health care in relation to persons without legal capacity to give consent who are opposed to that health care, is not placed directly with the contracting public authority's contractor, but rather with the health personnel working for the contractor?*
>
> 2. *How is the wording "even occasionally" in Article 32 of the EEA Agreement, read in conjunction with Article 39, to be construed?*
>
> *On the reservation for non-profit organisations (ideelle organisasjoner):*
>
> 1. *Do Articles 31 and 36 of the EEA Agreement and Articles 74 – 77 of Directive 2014/24/EU preclude national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for "non-profit organisations" (ideelle organisasjoner) on the terms laid down in the national legislative provision*

in question?

37 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

III Answer of the Court

First question

38 By its first question, the referring court essentially asks whether a contract for pecuniary interest providing for the provision of long-term places in nursing homes, as set out in the request, is to be regarded as a contract relating to the provision of "services" within the meaning of point (9) of Article 2(1) of the Directive.

39 A "public service contract" is defined in point (9) of Article 2(1) of the Directive as a public contract having as its object the provision of services other than those referred to in point (6) of Article 2(1).

40 The Court recalls that the Directive is designed to implement the provisions of the EEA Agreement relating to the freedom of establishment and the freedom to provide services. The notion of "services" within the meaning of point (9) of Article 2(1) of the Directive must be interpreted in light of the freedom to provide services enshrined in Article 36 EEA. Therefore, it is necessary to determine whether contracts, such as those at issue in the main proceedings, can be considered to have as their object the provision of "services" within the meaning of Article 37 EEA (see Case E-13/19 *Hraðbraut*, judgment of 10 December 2020, paragraphs 90 and 91 and case law cited, and compare the judgment in *ASADE*, C-436/20, EU:C:2022:559, paragraph 59 and case law cited).

41 According to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered (see *Hraðbraut*, cited above, paragraph 91 and case law cited, and compare *ASADE*, cited above, paragraph 60 and case law cited).

42 The Norwegian Government and Oslo municipality have submitted that the services at issue in the main proceedings, in the light of *Hraðbraut*, cited above, cannot be regarded as constituting "services" within the meaning of Article 37 EEA.

43 That argument must be rejected. In *Hraðbraut*, the Court held that the essential characteristic of remuneration is absent in the case of education provided under a national education system in situations where the State, in establishing and maintaining such a system, is fulfilling its duties towards its own population in the social, cultural, and educational fields, and when such a system is, as a general rule, funded from the public purse and not by pupils or their parents (see *Hraðbraut*, cited above, paragraph

92 and case law cited). Activities, such as those at issue in the main proceedings, are not conducted in a similar way within the framework of such a system. Accordingly, the reasoning in *Hraðbraut* is not applicable to such activities (compare the judgment in *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraphs 48–59).

44 It follows from settled case law that medical services provided for consideration fall within the scope of the provisions on the freedom to provide services (see Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 320, paragraph 42). A medical service does not cease to be a service within the meaning of Article 37 EEA because it is paid for by a national health service or by a system providing benefits in kind (compare the judgment in *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraph 103 and case law cited). It is not necessary that the service is paid for by those for whom it is performed (see Case E-6/16 *Fjarskipti hf.* [2016] EFTA Ct. Rep. 1084, paragraph 44 and case law cited).

45 As also confirmed in recital 6 of the Directive, only activities of an economic nature may be the subject of a public service contract within the meaning of point (9) of Article 2(1) of the Directive. Such an interpretation is supported by point (10) of Article 2(1) of the Directive, under which an economic operator is characterised by the fact that it offers the execution of works or a work, the supply of products, or the provision of services on the market. The fact that a contract is concluded with a non-profit-making entity does not preclude that entity from being able to carry out an economic activity within the meaning of the Directive. Furthermore, the pursuit of a social objective or the taking into account of the principle of solidarity in the context of the provision of services does not, as such, prevent the provision of these services from being regarded as an economic activity (compare the judgment in *ASADE*, cited above, paragraphs 61, 62 and 65 and case law cited).

46 According to the request, the services at issue in the main proceedings are the provision of long-term places in nursing homes, which are being procured by a municipality and have an estimated value of NOK 710 400 000 per year. It must be held that payments such as those that will be made by the municipality in the main proceedings following the conclusion of the procurement procedure, constitute consideration for services such as those at issue and represent remuneration for the relevant service provider. Accordingly, services, such as those at issue in the main proceedings, must be considered as "services" within the meaning of Article 37 EEA. It follows that a public contract having as its object the provision of services such as those at issue in the main proceedings constitutes a "public service contract" within the meaning of point (9) of Article 2(1) of the Directive.

47 In the light of the foregoing, the answer to the first question must be that a contract for pecuniary interest providing for the provision of long-term places in nursing homes, in circumstances such as those of the main proceedings, constitutes a contract for the provision of services within the meaning of point (9) of Article 2(1) of the Directive.

Second question

48 By its second question, the referring court enquires, essentially, whether a contracting authority's ability to rely on the exception in Article 32 EEA, read in conjunction with Article 39 EEA, is affected by whether: (a) the services in question have previously been the subject-matter of public service contracts between the contracting authority and both *ideelle organisasjoner* and other providers, (b) other public contracting authorities in the same State still opt to conclude contracts for equivalent services with both *ideelle organisasjoner* and other providers, and (c) the power to take decisions to administer coercive health care is not placed directly with the contractor, but rather with the health personnel working for the contractor. In addition, the referring court enquires how the wording "even occasionally" in Article 32 EEA, read in conjunction with Article 39 EEA, is to be construed.

49 The Court finds it necessary to examine, first, whether activities such as those at issue in the main proceedings come within the scope of the exception contained in Article 39 EEA, read in conjunction with Article 32 EEA.

50 Oslo municipality has alleged that the nursing home services at issue in the main proceedings fall within the exception in Article 32 EEA as they entail the exercise of official authority. It has, in particular, been alleged that since health personnel in nursing homes have the authority to take decisions on and implement coercive health care, the activity of running a nursing home must be considered directly and specifically connected with the exercise of official authority.

51 Article 39 EEA makes the exception concerning the exercise of official authority contained in Article 32 EEA applicable to the freedom to provide services. Therefore, Article 39 EEA provides that the provisions on the freedom to provide services will not apply to activities which are connected, even occasionally, with the exercise of official authority. The interpretation of "exercise of official authority" must take account of the limits imposed by that provision on the permitted exceptions to the principle of freedom to provide services, so as to ensure that the effectiveness of the EEA Agreement is not frustrated by unilateral provisions of EEA States (compare the judgment in *Commission* v *Hungary*, C-392/15, EU:C:2017:73, paragraph 105).

52 Article 32 EEA as a derogation from a fundamental freedom must be construed in a way that limits its scope to what is strictly necessary for safeguarding the interests which it allows EEA States to protect (compare the judgment in *Commission* v *Hungary*, cited above, paragraph 106).

53 First, that exception must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority. Such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion (compare the judgments in *Commission* v *Hungary*, cited above, paragraph 107, and *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 78 and 79).

54 Second, the extension of that exception to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole (compare the judgment in *Commission* v *Germany*, C-404/05, EU:C:2007:723, paragraph 47 and case law cited).

55 The exception in Article 32 EEA does not extend to certain activities that are ancillary or preparatory to the exercise of official authority, or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact, or to certain activities which do not involve the exercise of decision-making powers, powers of enforcement or powers of coercion (compare the judgment in *Commission* v *Hungary*, cited above, paragraph 108, and case law cited).

56 A distinction must be made between activities of private bodies constituting simple preparatory tasks, and those having a direct and specific connection with the exercise of official authority. Where private bodies exercise the powers of a public authority, Article 32 EEA cannot be relied on where the applicable legislation lays down that those private bodies are to be supervised by a public authority. Private bodies, which carry out their activities under the active supervision of the competent public authority, which is responsible, ultimately, for inspections and decisions of those bodies, cannot be considered to be connected directly and specifically with the exercise of official authority (compare the judgment in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 37).

57 According to the request, coercive health care may be provided to persons without legal capacity to give consent and who are opposed to that health care if the requirements in the Patient and User Rights Act are fulfilled. The objective is to ensure that the necessary health care can be provided in order to avoid serious harm to health and prevent and limit the use of coercion. The authority to administer coercive health care is conferred on the individual authorised health personnel, who provide health care on the basis of their authorisation as health personnel, and not with regard to specific activities. A decision on coercive health care must be adopted by health personnel qualified to make such a decision. That authority does not derive from the contractual relationship between a supplier and the contracting authority. Any decisions on the use of coercive health care are taken by authorised health personnel, autonomously, and on the basis of professional health care assessments and conditions laid down in the relevant national legal framework.

58 At the hearing, the Norwegian Government stated that the authority to take decisions and implement coercive health care is provided to all health personnel, regardless of nationality or place of work, who are authorised under the relevant national legal framework.

59 Based on the information contained in the request, the Court observes, as was noted by the Commission at the hearing, that the authority to exert coercive health care does not lie with the economic operator being awarded the contract at issue, but with the health

personnel authorised because of their professional status under national law, who are employed by that economic operator. Furthermore, the Norwegian Government explained in its written observations, as was pointed out by the Commission, that a decision on coercive healthcare must necessarily be adopted by health personnel who are the persons with the medical qualifications necessary to make such a decision. Such authority must be considered as separate from a contract concerning the operation of a nursing home. Accordingly, the activity of operating a nursing home, in circumstances such as those of the main proceedings, is separate from any authority granted to its employees individually and independently under national law.

60 Furthermore, as also follows from the request, the provision of coercive health care under the Patient and User Rights Act is subject to supervision. Decisions regarding coercive health care may be adopted for up to one year at a time, and are to be assessed on an ongoing basis and stopped immediately once the requirements of that act are no longer met. Such decisions are subject to supervision by the County Governor, who may overturn a decision to administer coercive health care following a complaint or on its own initiative. In such circumstances, the authority to take decisions and implement coercive health care by health personnel cannot be regarded as being connected with the exercise of official authority.

61 It follows from the above that Article 39 EEA, read in conjunction with Article 32 EEA, does not apply to activities such as those at issue in the main proceedings. Accordingly, it is not necessary to answer the referring court's remaining sub-questions related to that exception.

62 In the light of the foregoing, the answer to the second question must be that the activity of operating nursing homes, in circumstances such as those of the main proceedings, even where coercive health care may need to be provided, within a legal framework such as that described in the request, cannot be regarded as being directly and specifically connected with the exercise of official authority. Accordingly, the exception in Article 39 EEA, read in conjunction with Article 32 EEA, does not apply to such activities.

Third question

63 By its third question, the referring court asks, in essence, whether Articles 31 and 36 EEA and Articles 74 to 77 of the Directive preclude national legislation allowing contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for *ideelle organisasjoner* on the terms laid down in that national legislation.

64 Articles 74 to 77 of the Directive lay down a simplified regime for the award of public contracts relating to the social and other specific services listed in Annex XIV to that directive. Articles 75 and 76 give expression to the principles of equal treatment and transparency, as developed in case law on the fundamental freedoms which remains relevant to the interpretation of those provisions (compare the judgment in *ASADE*, cited above, paragraphs 92 to 94).

65 Article 74 of the Directive provides that public contracts for social and other specific services listed in Annex XIV to the Directive shall be awarded in accordance with Chapter I of Title III of the Directive, where the value of the contracts is equal to, or greater than, the threshold indicated in point (d) of Article 4 of the Directive. Point (d) of Article 4 provides for a threshold of EUR 750 000 for such public service contracts. This threshold is expressed in NOK in the ESA notice on threshold values as NOK 7 228 467. According to recital 114 of the Directive certain categories of services continue by their very nature to have a limited cross-border dimension. The cross-border dimension is, however, predominantly also linked to the value thresholds. While such services with values below that threshold will typically not be of interest to providers from other EEA States, contracts above that threshold should be subjected to EEA-wide transparency and equal treatment as being of interest to providers from other EEA States.

66 According to the request, the services at issue in the main proceedings have an estimated value of NOK 710 400 000 per year. Accordingly, as the estimated value of the services at issue exceeds the threshold set out in point (d) of Article 4 of the Directive, the provisions of Chapter I of Title III of the Directive are applicable.

67 Article 77 of the Directive provides that EEA States may allow contracting authorities to reserve the right for economic operators meeting all the conditions of that provision to participate in procedures for the award of public contracts for the provision of a service referred to in Annex XIV to the Directive. However, that article does not cover, in an exhaustive manner, the cases in which such contracts may be reserved for certain categories of economic operators (compare the judgment in *ASADE*, cited above, paragraphs 81 and 82).

68 Article 76 of the Directive obliges EEA States to put in place national rules for the award of contracts subject to Chapter I of Title III in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. EEA States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question. EEA States shall ensure that contracting authorities may take into account the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users, and innovation (compare the judgment in *ASADE*, cited above, paragraph 84).

69 Recital 114 of the Directive confirms that the regime established by the Directive in Article 76 is characterised by the broad discretion enjoyed by EEA States to organise, in the way they consider most appropriate, the choice of the providers of the services listed in Annex XIV to the Directive. EEA States have broad discretion to commission services of general economic interest as closely as possible to the needs of the users.

70 It is therefore necessary to examine whether the principles of equal treatment and transparency, as referred to in Article 76 of the Directive, preclude national legislation that reserves the right to participate in procedures for the award of public contracts for

the operation of nursing home services for *ideelle organisasjoner* where they do not fulfil the conditions laid down in Article 77 (compare the judgment in *ASADE*, cited above, paragraph 86).

71 As regards the principle of equal treatment of economic operators, the fact that private profit-making entities are deprived of the possibility of participating in such procedures for the award of public contracts, constitutes a difference in treatment between economic operators which is contrary to that principle, unless that difference is justified by objective circumstances (compare the judgment in *ASADE*, cited above, paragraph 87, and case law cited).

72 In that regard an EEA State may, however, in the exercise of the powers it retains to organise its social security system, consider that a social welfare system necessarily implies, in order to achieve its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making (compare the judgment in *ASADE*, cited above, paragraph 88 and case law cited).

73 In that regard, earlier case law of the Court of Justice of the European Union providing that the principle of equal treatment does not preclude an EEA State from reserving the status of social welfare service provider to non-profit-making private operators, including those which are not strictly voluntary, remains relevant in interpreting Article 76 of the Directive (compare the judgment in *ASADE*, cited above, paragraphs 93 and 94, and case law cited).

74 It follows that the principle of equal treatment of economic operators, now enshrined in Article 76 of the Directive, authorises EEA States to reserve the right to participate in a procedure for the award of public contracts for social and other specific services for private non-profit entities, including those which are not strictly voluntary, provided that the following two conditions are satisfied (compare the judgment in *ASADE*, cited above, paragraph 95).

75 First, any profits resulting from the performance of those contracts are reinvested by those entities with a view to achieving the social objective of general interest which they pursue (compare the judgment in *ASADE*, cited above, paragraph 95).

76 Second, the exclusive recourse to private non-profit entities for the provision of such social and other specific services must be grounded both in the principles of universality and solidarity, which are inherent to a social welfare system, as well as in reasons of economic efficiency and suitability, insofar as it allows services of general interest to be provided in an economically balanced manner for budgetary purposes, by entities constituted, essentially, for the purpose of serving the public interest and whose decisions are not guided by purely commercial considerations. Where it is motivated by such considerations, the exclusion of private profit-making entities from procedures for the award of public contracts for the provision of social and other specific services is not contrary to the principle of equal treatment, provided that such exclusion actually contributes to the social purpose and the pursuit of the objectives of solidarity and

budgetary efficiency on which that system is based (compare the judgments in *ASADE*, cited above, paragraphs 90, 91 and 95, and *Spezzino*, C-113/13, EU:C:2014:2440, paragraph 60).

77 In order to meet those requirements, the private entities, for which contracts are reserved under the national legislation, may not pursue objectives other than those mentioned in the preceding paragraphs nor make any profit, even indirect, which is not reinvested with a view to achieving the social objectives of general interest which they pursue. Nor may they procure any profit, direct or indirect, for their members or owners (compare the judgment in *ASADE,* cited above, paragraph 92).

78 The Court recalls that Article 76 of the Directive precludes such public contracts from being awarded directly to a non-profit entity, other than a voluntary entity, without a competitive bidding process (compare the judgment in *ASADE*, cited above, paragraph 96).

79 Regarding the principle of transparency, the Court further recalls that that principle requires the contracting authority to provide an adequate degree of publicity, allowing, first, the opening-up to competition, and, second, the review of the impartiality of the award procedure to enable any interested operator to take the decision to tender on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (compare the judgment in *ASADE*, cited above, paragraph 97 and case law cited).

80 Article 75 of the Directive specifies the disclosure requirements that follow from the principle of transparency in respect of procedures for the award of public contracts falling within the scope of the simplified regime established in Articles 74 to 77 of that directive (compare the judgment in *ASADE*, cited above, paragraph 99).

81 In its question, the referring court refers specifically to Section 30-2a of the Public Procurement Regulation. According to the request, it follows from the wording of that provision that the contracting authorities may reserve the right to participate in tendering procedures for health and social services to *ideelle organisasjoner* if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency. The provision stipulates that *ideelle organisasjoner* shall not have a return on equity as their main objective. They shall endeavour, solely, for a social objective for the good of the community and reinvest any profits in activity that fulfils the organisation's social objectives. It further provides that an *ideell organisasjon* may, to a limited extent, engage in commercial activity that supports the business's social objectives.

82 Stendi and Norlandia have in their written observations and at the hearing alleged that it is possible for private investors to own *ideelle organisasjoner* for which contracts are reserved under the relevant legal framework. It has further been alleged that the owners of *ideelle organisasjoner* are free to earn profits from renting real property to the *ideelle organisasjoner* or offering them various services, such as manning or management support services as well as selling the *ideelle organisasjoner* to other economic

operators.

83 At the hearing, Oslo municipality stated that it was, in principle, possible for private investors to own an *ideell organisasjon*, although most of the *ideelle organisasjoner* were organised as self-owned foundations. As to whether *ideelle organisasjoner* could be sold by their owners, Oslo municipality noted that there were examples of *ideelle organisasjoner* being founded and then sold by the owner after a public service contract had ended.

84 On the other hand, the Norwegian Government stated that *ideelle organisasjoner* could not be owned by private investors, given the latter's definition as profit-making. However, the Government did not exclude the possibility of natural persons owning *ideelle organisasjoner*. The Government further stated that profit from an *ideell organisasjon* cannot be diverted to its members or owners, referring in this respect to the Norwegian Government's consultation paper, the legal value of which was disputed by some of the parties attending the hearing. The Norwegian Government also submitted that the requirement under Norwegian law that the owner of an *ideell organisasjon* must also be non-profit means that they cannot sell the *ideell organisasjon* to anyone else and that there is a specific assessment of whether there are measures in place to prevent this.

85 It is for the referring court to determine the extent to which Section 30-2a of the Public Procurement Regulation fulfils the requirements set out above. In order to satisfy those requirements, the possibility of generating profit and, for example, disbursing that profit, directly or indirectly, to a profit-making owner, whether by direct payments after the public contract has ended or through selling the *ideelle organisasjon* to another operator, must be excluded. Reserving contracts for purported *ideelle organisasjoner*, which are, in essence, merely vehicles to provide profit to their profit-making owners, would be at variance with the requirements flowing from EEA law. In addition, as set out above the reservation for *ideelle organisasjoner* must actually be grounded by the principles of universality and solidarity, as well as in reasons of economic efficiency and suitability, and contribute effectively to that purpose and objective.

86 In the light of the foregoing, the answer to the third question must be that Articles 74 to 77 of the Directive must be interpreted as not precluding national legislation which reserves for organisations such as those at issue in the main proceedings (*ideelle organisasjoner*) the right to participate in a procedure, involving a competitive bidding process, for the award of public contracts for the provision of social or other specific services listed in Annex XIV to the Directive, even where those organisations do not satisfy the requirements laid down in Article 77, provided that the following two conditions are fulfilled. First, in order to comply with the principle of equal treatment, as set out in Article 76 of the Directive, the legal and contractual framework within which the activity of those organisations is carried out must actually be grounded in the principles of universality and solidarity, which are inherent to a social welfare system, as well as in reasons of economic efficiency and suitability, and contribute effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that system is based. Second, that the principle of transparency, as specified in Articles 75

and 76 of the Directive, is respected.

IV Costs

87 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court gives the following Advisory Opinion:

1. **A contract for pecuniary interest providing for the provision of long-term places in nursing homes, in circumstances such as those of the main proceedings, must be regarded as a contract relating to the provision of services within the meaning of point (9) of Article 2(1) of Directive 2014/24/EU on public procurement.**

2. **The activity of operating nursing homes, in circumstances such as those of the main proceedings, even where coercive health care may need to be provided, within a legal framework such as that described in the request for an advisory opinion, cannot be regarded as being directly and specifically connected with the exercise of official authority. Accordingly, the exception in Article 39 EEA, read in conjunction with Article 32 EEA, does not apply to such activities.**

3. **Articles 74 to 77 of Directive 2014/24/EU must be interpreted as not precluding national legislation which reserves for organisations such as those at issue in the main proceedings (*ideelle organisasjoner*) the right to participate in a procedure, involving a competitive bidding process, for the award of public contracts for the provision of social or other specific services listed in Annex XIV to Directive 2014/24/EU, even where those organisations do not satisfy the requirements laid down in Article 77 of that directive, provided that the following two conditions are fulfilled. First, in order to comply with the principle of equal treatment of economic operators, as set out in Article 76 of that directive, the legal and contractual framework within which the activity of those organisations is carried out must actually be grounded in the principles of universality and solidarity, which are inherent to a social welfare system, as well as in reasons of economic efficiency and suitability, and contribute effectively to the social**

purpose and objectives of solidarity and budgetary efficiency on which that system is based. Second, that the principle of transparency, as specified in Articles 75 and 76 of that directive, is respected.

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 28 March 2023.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President