



E-4/22-20

REPORT FOR THE HEARING

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 municipality (*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.

I Introduction

1. By letter of 14 March 2022, registered at the Court on 30 March 2022, Oslo District Court requested an Advisory Opinion in the case pending before it between Stendi AS (“Stendi”) and Norlandia Care Norge AS (“Norlandia”) and Oslo municipality.

2. The case before Oslo District Court concerns the procurement by Oslo municipality of long-term leasing and service agreements for up to 800 new, long-term places in nursing homes, published in November 2020. Participation in the procurement procedure relating to the operation of the nursing home places was reserved for non-profit organisations (*ideelle organisasjoner*). This prevented Stendi and Norlandia, two commercial operators, from participating in the procurement procedure.

II Legal background

EEA law

3. 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.

4. Article 32 of the EEA Agreement 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.

5. Article 36 of the EEA Agreement 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.

6. Article 37 of the EEA Agreement 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.

7. Article 39 of the EEA Agreement reads:

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

8. 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 Norway, Iceland and Liechtenstein. The requirements were fulfilled by 14 November 2016 and the decision entered into force on 1 January 2017.

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. 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.

12. 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.

13. 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.

14. 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.

National law and practice

15. 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”).

16. 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.

17. 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 if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency.

(2) Non-profit organisations 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 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.

18. 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 resident in Norway, except for services assigned to the State or to the county municipalities (*fylkeskommunene*).

19. 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*”.

20. 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*”.

21. 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.

22. 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 prevent and limit the use of coercion.

23. Section 3 of Act No 64 of 2 July 1999 on Health Personnel (*lov av 2. juli 1999 nr. 64 om helsepersonell mv. (helsepersonelloven)*) (“the Health Personnel Act”) 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.

24. 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.

25. 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 relevant State official is the supervisory authority and it may reverse a decision to administer coercive health care following a complaint or on its own initiative.

III Facts and procedure

26. Stendi is Swedish-owned and 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.

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

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 call for tenders was published on 25 November 2020. 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 psychiatry- and somatic-related places.

29. The total contract value for the real property part is calculated to be NOK 155.3 million per year, whilst the total contract value for the part relating to nursing home services is estimated to be NOK 710.4 million per year. The dispute in the main proceedings concerns the services part of the procurement.

30. The provider of nursing home services shall operate day and night nursing home places in long-term care homes (long-term places) with all necessary accompanying functions. Long-term homes are long-term residential, health and care solutions offered to persons who can no longer live in their own home. The procurement encompasses long-term places within both somatic and psychiatry.

31. The tender specifications stipulate that the provider of nursing home services must be a non-profit organisation as defined in Section 30-2a(2) of the Public Procurement Regulation. The contracts for nursing home services are reserved for non-profit operators 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.

32. The procurement is conducted as part of the municipality’s 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. Oslo municipality has adopted political objectives of increasing the use of non-profit operators for the provision of such services.

33. 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 using private-sector service providers under agreements with the municipality. As of March 2022, 19 of a total of 37 long-term nursing homes were operated by the municipality itself, whilst the remaining 18 were operated by private operators under contracts. Of the 18 privately-operated nursing homes, 16 were operated by non-profit organisations and two by commercial operators (Stendi and Norlandia). Both contracts with the commercial operators were concluded prior to the current political decisions on increasing non-profit operators in the health and care sector, and the contracts expire in 2022/2023.

34. Due to the reservation for non-profit organisations, Stendi and Norlandia are not permitted to participate in the procurement procedure as they are not considered to be non-profit organisations.

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 procurement of contracts for health and social care services for non-profit organisations.

36. Against this background, Oslo District Court considered it necessary to refer 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 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 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:

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” on the terms laid down in the national legislative provision in question?

IV Written observations

37. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Stendi and Norlandia, represented by Aksel Joachim Hageler and Lennart Garnes, advocates;
- 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 Ewa Gromnicka, Erlend Møinichen Leonhardsen, Kyrre Isaksen, and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Petr Ondrůšek, Mislav Mataija and Geert Wils, acting as Agents.

V Proposed answers submitted

Stendi and Norlandia

38. Stendi and Norlandia propose that the questions referred be answered as follows:

A contract for pecuniary interest, providing for the provision of long-term places in nursing homes, awarded based on a procurement procedure, as described by the Request, shall be regarded a contract for the provision of “services” under point (9) of Article 2(1) of Directive 2014/24/EU.

The fact that non-ideal providers have already been admitted to perform the “activit[y]” in question and currently and in the future are and will be admitted to the “activit[y]” via ongoing and future public nursing home service contracts awarded to non-ideal providers by Norwegian municipalities, precludes the application of Article 32 EEA in this relevant context. The fact that it is the health personnel working for the service provider and not the service provider itself who is vested with the relevant coercive powers, precludes the application of Article 32 in this relevant context. The wording of “even occasionally” should be disregarded or at least not emphasised. Article 32 should instead be understood in the same manner as Article 28(4), in the sense that it shall be construed to require that the alleged exercise of official authority must take place on a regular basis.

The final question put forward by the Request shall be answered in the affirmative, meaning that Article 76 of the Directive precludes “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” on the terms laid down in the national legislative provision in question”.

Oslo municipality

39. Oslo municipality proposes that the questions referred be answered as follows:

Contracts providing for the provision of long-term places in nursing homes with characteristics such as those described in the request, do not have as their object the provision of “services” within the meaning of Directive 2014/24/EU and thus do not constitute public service contracts according to point (9) of Article 2(1) of that Directive.

If the activities subject to a public service contract is sufficiently concerned with the exercise of official authority to fall within the exception in Articles 32 and 39 of the EEA Agreement, a public contracting authority's ability to rely on that exception is not subject to a control of the consistent application of that exception. Consequently, the contracting authority's choice with regard to, first,

whether to invoke the exception in Articles 32 and 39 EEA, and second, how to organise a tender procedure where the exception is invoked, is not affected by, inter alia, whether the same or other contracting authority/authorities previously have chosen or still choose to invoke the exception for equivalent activities.

As long as the power to adopt coercive measures forms an integral part of the subject-matter of the contract and is not separable from the private provider's contractual obligations, a contracting authority's reliance on Articles 32 and 39 EEA is not affected by the fact that the power of coercion lies with the personnel who are employed by the provider.

The term “even occasionally” in Articles 32 and 39 of the EEA Agreement shall be construed to mean that it is sufficient for the exception to apply that the activities in question involves the exercise of official authority “from time to time” or “now and then”. The quantitative requirement set out in case C-47/02 Anker (para. 63) with regard to Article 28(4) EEA do not apply to the exception in Articles 32 and 39 EEA.

Articles 31 and 36 of the EEA Agreement and Articles 74 - 77 of Directive 2014/24/EU must be interpreted as not precluding a national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to nursing home services for “non-profit organisations”, provided that that the regulation complies with the principles of equal treatment and transparency as reflected in Articles 75 and 76 of the Public Procurement Directive.

The Norwegian Government

40. The Norwegian Government proposes that the questions referred be answered as follows:

The contract for the provision of long-term places in nursing homes should not be regarded as having as its object the provision of “services” within the meaning of Directive 2014/24/EU, since the provision of such services takes place as an integral part of a national health and care system where the municipality is not seeking to engage in gainful activity, but is fulfilling its obligation towards its own population based on the principle of solidarity, and where that system is primarily financed by the public purse. As such, the contract does not constitute a public service contract within the meaning of point (9) of Article 2(1) of that directive.

The exception in Article 32 EEA applies to activities which, in themselves, are directly and specifically connected with the exercise of official authority. If so, States may rely on it in respect of such activities without any verification of whether it is consistently invoked. Further, the application of the exception is not

limited to activities where official authority is exercised on a frequent or regular basis, as this would run counter to the wording “even occasionally”.

The provision of long-term places in nursing homes is directly and specifically connected with the exercise of coercive health care in respect of residents in such homes. That the power to adopt a decision on coercive health care under national legislation lies with the health personnel employed by the provider of places in nursing homes, rather than the provider itself, does not affect the applicability of Article 32 EEA.

Articles 31 and 36 of the EEA Agreement and Articles 74–77 of Directive 2014/24/EU do not preclude national legislation pursuant to which contracting authorities may reserve the right to participate in a tender procedure for contracts for the provision of health and social services to non-profit organisations, provided that the reservation complies with the principles of transparency and equal treatment as set out in Articles 75 and 76 of Directive 2014/24/EU. As such, an EEA state may, in the exercise of the power it retains to organise its social welfare system, reserve the right to participate in a tender procedure for the provision of long-term places in nursing homes, with a view to obtaining its social objectives, to non-profit organisations.

The Icelandic Government

41. The Icelandic Government proposes that the first question be answered in the negative, as the activities provided by the non-profit organisations in providing nursing home services are of non-economic nature and therefore fall outside the scope of the Directive. The Icelandic Government does not propose any specific answers to the other questions referred.

The Spanish Government

42. The Spanish Government proposes that the questions referred be answered as follows:

i) Nursing homes services in Norway are not to be regarded as “services” for the purposes of sub-paragraph (9) of Article 2(1) of Directive 2014/24, as such services are services of general interest of a non-economic nature which are out of the scope of that Directive.

ii) In the alternative, Articles 31 and 36 of the EEA Agreement and Articles 74 to 77 of Directive 2014/24 do not necessarily 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 on the terms laid down in the national legislative provision in question.

ESA

43. ESA proposes that the questions referred be answered as follows:

1. 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], is to be regarded as a contract relating to the provision of “services” under point (9) of Article 2(1) of Directive 2014/24/EU.

2. Articles 74 to 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 must be interpreted as precluding national legislation which allows contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for “non-profit organisations” on the terms laid down in the national legislative provision in question.

3. Health care activities and the decisions to perform them, with or without consent, under the Patients’ Rights Act are not even occasionally, connected with the exercise of official authority within the meaning of Article 32, which therefore cannot be relied on in connection with a public contract concerning services pursuant to the Patients’ Rights Act.

The Commission

44. The Commission proposes that the questions referred be answered as follows:

On whether the procurement comes within or falls outside the concept of service:

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], is 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 reservation for non-profit organisations:

Articles 18(1) and 74 to 76 of Directive 2014/24/EU preclude national legislation allowing contracting authorities to reserve the right to participate in tendering procedures relating to the health and social services at issue in the present case to non-profit organisations on the terms laid down in the national legislative provision in question, to the extent that the requirements in Article 77 of that Directive are not met.

On the exception in Article 32 EEA for exercise of official authority:

Article 32 of the EEA Agreements should be interpreted as not applying to the activities of the contractors of the public authorities or their health personnel in

circumstances such as those in the main proceedings, regardless of whether the activities of those contractors or other similar contractors in the same State are engaged in for profit or on a non-profit basis.

Páll Hreinsson
Judge-Rapporteur