E-8/19-25

REPORT FOR THE HEARING

in Case E-8/19

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 the Complaints Board for Public Procurement (*Klagenemnda for offentlige anskaffelser*), in the case between

Scanteam AS

and

The Norwegian Government, represented by the Ministry of Foreign Affairs

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, as adapted to the Agreement on the European Economic Area.

I Introduction

1. By letter of 18 October 2019, registered at the Court as Case E-8/19 on the same day, the Complaints Board for Public Procurement (*Klagenemnda for offentlige anskaffelser*) ("the Complaints Board") requested an Advisory Opinion in the case pending before it between Scanteam AS ("Scanteam") and the Norwegian Government.

2. The case before the Complaints Board concerns a complaint lodged by Scanteam against an award decision made by the Royal Norwegian Embassy in Luanda (Republic of Angola) ("the Norwegian Embassy in Luanda"). In that decision, the Norwegian Embassy in Luanda announced that the contract at issue had not been granted to Scanteam but to another tenderer. The complaint lodged by Scanteam with the Complaints Board claims that the award decision is unlawful as the contract notice was not published in the Tenders Electronic Daily database.

II Legal background

EEA law

3. Article 65(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads as follows:

> *1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.*

4. Article 126(1) EEA reads as follows:

> *1. The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.*

5. Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

> *The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*
>
> *An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.*

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 2016 No 27, p. 1057 (Icelandic), and 2018 No 84, p. 556 (Norwegian)) ("the Directive") was incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 of 29 April 2016 (OJ 2017 L 300, p. 49, and EEA Supplement 2017 No 73, p. 53) ("Decision No 97/2016") and is referred to at point 2 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in November 2016. Consequently, Decision No 97/2016 entered into force on 1 January 2017, and the time limit to implement the Directive expired on the same date.

7. Recital 1 of the Directive reads as follows:

The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

8. Recital 10 of the Directive reads as follows:

The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive ratione personae should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for 'the most part' means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.

9. Article 1 of the Directive reads as follows:

1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. 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.

3. The application of this Directive is subject to Article 346 TFEU.

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.

6. Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.

10. Points (1) to (5) of Article 2(1) of the Directive read as follows:

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

(1) 'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

(2) 'central government authorities' means the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities;

(3) 'sub-central contracting authorities' means all contracting authorities which are not central government authorities;

(4) 'bodies governed by public law' means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

(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;

11. Article 74 of the Directive reads as follows:

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

12. Article 75(1) of the Directive reads as follows:

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.

13. Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76, and EEA Supplement 2013 No 37, p. 256 (Icelandic), and 2017 No 55, p. 3 (Norwegian)) ("Directive 2009/81/EC") was incorporated into the EEA Agreement by Joint Committee Decision No 129/2013 of 14 June 2013 (OJ 2013 L 318, p. 31, and EEA Supplement 2013 No 67, p. 36) and is referred to at point 5c of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in December 2013. Consequently, Decision No 129/2013 entered into force on 1 February 2014, and the time limit to implement Directive 2009/81/EC expired on the same date.

14. Recital 29 of Directive 2009/81/EC reads as follows:

> *In the event that armed forces or security forces from Member States conduct operations beyond the borders of the Union, and when imposed by operational requirements, authorisation should be given to contracting authorities/entities deployed in the field of operations not to apply the rules of this Directive when they award contracts to economic operators located in the area of operations, including with respect to civilian purchases directly connected to the conduct of those operations.*

15. Article 13 of Directive 2009/81/EC reads as follows:

> *This Directive shall not apply to the following:*
>
> ...
>
> *(d) contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations;*
>
> ...

16. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243, and EEA Supplement 2016 No 73, p. 1235 (Icelandic), and 2018 No 84, p. 636 (Norwegian)) ("Directive 2014/25/EU") was incorporated into the EEA Agreement by Joint Committee Decision No 97/2016 and is referred to at point 4 of Annex XVI to the EEA Agreement. Constitutional requirements were indicated and fulfilled in November 2016. Consequently, Decision No 97/2016 entered into force on 1 January 2017, and the time limit to implement Directive 2014/25/EU expired on the same date.

17. Article 19(1) of Directive 2014/25/EU reads as follows:

> *This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.*

18. Appendix 1 to Annex XVI to the EEA Agreement, as amended by Decision No 97/2016, listing the central government authorities referred to in point 2 of Article 2(1) of the Directive, reads as follows:

> ...
> *III. In NORWAY:*

Statsministerens kontor	*Office of the Prime Minister*
Arbeids- og sosialdepartementet	*Ministry of Labour and Social Affairs*
Barne-, likestillings- og inkluderingsdepartementet	*Ministry of Children, Equality and Social Inclusion*
Finansdepartementet	*Ministry of Finance*
Forsvarsdepartementet	*Ministry of Defence*
Helse- og omsorgsdepartementet	*Ministry of Health and Care Services*
Justis- og beredskapsdepartementet	*Ministry of Justice and Public Security*
Klima- og miljødepartementet	*Ministry of Climate and Environment*
Kommunal- og moderniseringsdepartementet	*Ministry of Local Government and Modernisation*
Kulturdepartementet	*Ministry of Culture*
Kunnskapsdepartementet	*Ministry of Education and Research*
Landbruks- og matdepartementet	*Ministry of Agriculture and Food*
Nærings- og fiskeridepartementet	*Ministry of Trade, Industry and Fisheries*
Olje- og energidepartementet	*Ministry of Petroleum and Energy*
Samferdselsdepartementet	*Ministry of Transport and Communication*
Utenriksdepartementet	*Ministry of Foreign Affairs*

> *Agencies and Institutions subordinate to these Ministries*

19. Point 2 of the Sectoral Adaptations in Annex XVI to the EEA Agreement reads as follows:

2. When the acts referred to in this Annex require the publication of notices or documents the following shall apply:

(a) the publication of notices and other documents as required by the acts referred to in this Annex in the Official Journal of the European Communities and in the Tenders Electronic Daily shall be carried out by the Office for Official Publications of the European Communities;

(b) notices from the EFTA States shall be sent in at least one of the Community languages to the Office for Official Publications of the European Communities. They shall be published in the Community languages in the S-Series of the Official Journal of the European Communities and in the Tenders Electronic Daily. EC notices need not be translated into the languages of the EFTA States.

National law

20. The Directive is implemented into Norwegian law by Act of 17 June 2016 No 73 on Public Procurement (*lov 17. juni 2016 nr. 73 om offentlige anskaffelser*) ("the Public Procurement Act") and Regulation of 12 August 2016 No 974 on Public Procurement (*forskrift 12. august 2016 nr. 974 om offentlige anskaffelser*) ("the Public Procurement Regulation").

21. Section 2 of the Public Procurement Act reads as follows:

The act applies when contracting authorities mentioned in the second paragraph enter into goods, services or works contracts, including concession contracts, or carry out planning or design contests, with an estimated value equal to or exceeding NOK 100 000 excluding value added tax.

The act applies to the following contracting authorities:

a) state authorities,

b) county and municipal authorities,

c) bodies governed by public law,

d) associations with one or more contracting authorities mentioned in points a to c,

e) public undertakings that carry out supply activities as defined in international agreements which Norway is bound by and

f) other undertakings that carry out supply activities on the basis of exclusive or special rights as defined by international agreements which Norway is bound by.

The act does not apply to procurement that may be exempted by Article 123 of the EEA Agreement. The Ministry can by regulation determine further exemptions from the scope of the act.

The Ministry can by regulation determine that the act shall apply to works contracts and associated service contracts that contracting authorities mentioned in points a to d have not entered into themselves, but to which they provide a direct subsidy of more than 50 per cent.

The Ministry can by regulation determine that the act shall apply to Svalbard and lay down special rules with regard to local conditions.

22. Section 11 of the Public Procurement Act reads as follows:

The King can establish a body for the resolution of disputes concerning rights and obligations under the act and regulations issued in accordance with the act. Contracting authorities that are covered by the act are obligated to participate in proceedings before the body.

The Ministry can issue a regulation on the case handling procedure of the body.

The Freedom of Information Act applies to the dispute resolution body's activities.

23. Section 3 of the Regulation of 15 November 2002 No 1288 on the Complaints Board for Public Procurement (*forskrift 15. November 2002 nr. 1288 om klagenemnd for offentlige anskaffelser*) ("the Regulation on the Complaints Board for Public Procurement") reads as follows:

Members of the Complaints Board are appointed by the King for four years at a time. In special circumstances a member may be appointed for a shorter period. The maximum term is eight years. Members may exceptionally be reappointed after eight years. The King appoints a chair among the members. The Ministry of Trade, Industry and Fisheries may appoint an ad hoc chair if the chair is disqualified. Members cannot be dismissed or suspended during the period of appointment unless a special reason exists.

24. Section 5 of the Regulation on the Complaints Board for Public Procurement reads as follows:

> *The King cannot instruct members of the Complaints Board or the secretariat on neither the interpretation of law, the exercise of discretion, decisions in individual cases nor case handling.*

25. The second paragraph of Section 15 of the Regulation on the Complaints Board for Public Procurement reads as follows:

> *The members of the Complaints Board act independently of their profession, employer and position. They cannot be instructed on substance by the Ministry, the secretariat, or the other members, including the chair of the Complaints Board.*

III Facts and procedure

Background

26. On 27 March 2017, the Norwegian Embassy in Luanda published a voluntary tender procedure notice on Doffin[1] for the procurement of consulting services in connection with the planning, management and implementation of a human rights project in Angola (Angola Human Rights Training Project 2017-2021). In the tender procedure notice, the value of the contract was estimated at NOK 20 500 000 and it was stated that the time limit for submitting tenders was 25 April 2017. The notice was published under "foreign affairs and other services" with the Common Procurement Vocabulary code 75210000.

27. The tender specifications stated that the procurement procedure was divided into two phases. The first phase would include planning and preparation of a project document, including detailed objectives and relevant indicators for achieving objectives, inputs and risk management. The second phase would involve the execution of the project. It was further stated that the maximum budget was NOK 500 000 for phase 1 and NOK 20 000 000 for phase 2.

28. The tender specifications stated that the contract would be awarded to the most economically advantageous tender with the following weightings: "proposed solution" (30 per cent); "competence and experience" (40 per cent); and "hourly rate" (30 per cent) being applied. The tenderers' proposed solutions had to contain the following components as a minimum: a detailed timetable, and management structure for phase 1; a risk factor assessment; a discussion of the relevant approaches for capacity building and training projects; and proposals for a management structure and follow-up for phase 2.

[1] Doffin: Database for public procurement – the Norwegian national notification database for public procurement (*Database for offentlige innkjøp – den nasjonale kunngjøringsdatabasen for offentlige anskaffelser*).

29. In connection with the "competence and experience" criterion, tenderers were requested to describe the relevant competence and experience of the key staff they would use. Furthermore, a CV was to be attached for each member of the key staff. It was stated that up to five key staff could be included in the tender. Particular emphasis would be placed on whether overall the key staff included in the tender had the following competence and experience: knowledge of the political, social and economic situation in Angola and the region; knowledge of Norwegian aid policy and Norwegian interests in Angola; legal expertise in the field of human rights; teaching experience; experience with project management, objective management and risk management from countries with high levels of corruption; and written and spoken Portuguese, English and Norwegian.

30. Three tenders were received within the time limit. Those tenders were from Scanteam, KPMG AS / Bjørknes Høyskole AS ("KPMG") and the Governance Group AS ("the Governance Group").

31. By letter of 23 May 2017, the Norwegian Embassy in Luanda announced that the contract had been awarded to the Governance Group. The award letter stated that the successful tenderer had obtained a total score of 9.91 points, compared to 8.47 points awarded to KPMG and 7.60 points awarded to Scanteam. For the criteria "proposed solution" and "competence and experience", the successful tenderer had obtained a full score (10 points), compared to 7 and 8 points for Scanteam and KPMG, respectively. Scanteam offered the lowest hourly rate and thus obtained 10 points for the price criterion, compared to 8.56 and 9.71 points awarded to KPMG and the Governance Group, respectively.

32. By letters of 2 and 15 June 2017, Scanteam lodged objections to the award decision. The Norwegian Embassy in Luanda replied to the complaint by letter of 3 July 2017 and upheld the award decision. On 5 July 2017, Scanteam submitted a fresh complaint against the award decision. In that complaint, it was claimed that the procurement procedure had not been carried out in accordance with the rules governing public procurement and that the tendering procedure therefore had to be cancelled. By letter of 7 July 2017, a reply was given to that complaint and the claim for cancellation was dismissed. On 14 July 2017, the Norwegian Embassy in Luanda entered into a contract with the Governance Group.

33. On 7 May 2018, Scanteam lodged a complaint with the Complaints Board, which claimed, inter alia, that the procurement procedure was an unlawful direct procurement.

The dispute before the Complaints Board

34. The dispute in the main proceedings concerns whether the tender procedure carried out by the Norwegian Embassy in Luanda was unlawful as the notice had not been published in the official EU database for notices (Tenders Electronic Daily) pursuant to Section 8-17(4) of the Public Procurement Regulation. In particular, the decisive question

is whether the Norwegian Embassy in Luanda was under an obligation to publish the tender procedure pursuant to Section 8-17(4) of the Public Procurement Regulation.

35. The Complaints Board notes that both the Public Procurement Act and the Public Procurement Regulation are silent as to their geographical scope. Furthermore, that issue is not addressed in the preparatory works of the Public Procurement Act.

36. The Complaints Board observes that the most apparent approach is to construe Norwegian legislation as not having been intended to have a broader scope than required under EEA law. Therefore, in the view of the Complaints Board, the issue of whether the Norwegian public procurement rules are applicable to a procurement procedure undertaken by a Norwegian foreign mission outside the EEA cannot be answered until it has been ascertained whether EEA public procurement law applies.

37. The Complaints Board notes that it is apparent from the facts of the case, that the tender procedure in the present case had the particular feature that practically all potential suppliers were domiciled in the EEA. At the same time, the service being procured was to be provided primarily in a third country outside the EEA. The Complaints Board further notes that it is not aware of any case law of the Court of Justice of the European Union ("ECJ") or the Court clarifying the question of whether EEA public procurement law is applicable to a tender procedure undertaken by a foreign mission of an EEA State in a non-EEA State.

38. On 5 July 2019, the Complaints Board wrote to the parties to the case and stated that it was considering the possibility of requesting an advisory opinion from the Court in order to have the geographical scope of EEA public procurement law clarified. On 11 September 2019, the Complaints Board was informed of the views of the parties to the case. On the same day, the Complaints Board received a letter from the Norwegian Government, which questioned whether the Complaints Board was eligible to request an advisory opinion under Article 34 SCA.

39. In relation to the admissibility of the request for an advisory opinion, the Complaints Board refers to Section 11 of the Public Procurement Act and the Regulation on the Complaints Board for Public Procurement, as well as the case law of the Court relating to the "court or tribunal" criterion under Article 34 SCA.[2] The Complaints Board states that the present case involves an allegedly unlawful direct procurement procedure, and that, in such cases, the Complaints Board has jurisdiction to adopt decisions on administrative fines. Such decisions are not subject to further administrative appeals. In addition, the Complaints Board notes that an interpretation of Article 34 SCA that would render the Complaints Board ineligible to make a reference will significantly restrict the possibility

[2] Reference is made to the judgment in Case E-5/16 *Municipality of Oslo* [2017] EFTA Ct. Rep. 52, paragraphs 35-42.

of referring EEA law questions involving, in particular, unlawful direct procurement procedures to the Court.

40. In these circumstances, the Complaints Board took the view that resolution of the dispute before it depended on the interpretation of EEA law. The Complaints Board thus decided to stay the proceedings and refer a single question to the Court for an advisory opinion.

41. The following question has been referred to the Court:

> **Is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country (outside the EEA)?**

IV Written observations

42. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

— Scanteam, represented by Tor Arne Solberg-Johansen, lawyer;

— the Norwegian Government, represented by Janne Tysnes Kaasin and Helge Røstum, Ministry of Foreign Affairs, acting as Agents;

— the Austrian Government, represented by Dr Michael Fruhmann, acting as Agent;

— the French Government, represented by Esther de Moustier and Cyrielle Mosser, acting as Agents;

— the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Ewa Gromnicka and Erlend M. Leonhardsen, members of its Department of Legal & Executive Affairs, acting as Agents; and

— the European Commission ("the Commission"), represented by Petr Ondrůšek, Luke Haasbeek and Markéta Šimerdová, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

Scanteam

43. In its written observations, Scanteam states that the terms of the tender documents presumed that the successful tenderer would be a non-State organisation registered in the

Kingdom of Norway. It is further stated that Scanteam was one of three Norwegian companies that submitted offers in the tender procedure.

44. As to the admissibility of the request for an advisory opinion, Scanteam states that it supports the view of the Complaints Board that it is eligible to request an advisory opinion from the Court. Scanteam refers to the Court's judgment in *Municipality of Oslo*[3] and submits that both the establishment and permanence of the Complaints Board, its independence and the requirements with regard to the appointment of its members support the Complaints Board being regarded as a court or tribunal within the meaning of Article 34 SCA. Moreover, Scanteam supports the Complaints Board's assertion in the request for an advisory opinion that the ineligibility of the Complaints Board to request an advisory opinion on the interpretation of relevant questions of EEA law would significantly restrict the possibility of bringing such questions before the Court. This would deprive private parties of an effective remedy with regard to questions pertaining to EEA law, as the costs of bringing the matter before the ordinary courts would, in most cases, seem prohibitive compared with the potential gains of such proceedings, particularly in the case of unlawful direct procurement procedures.

45. As to the substance of the case, Scanteam states that it disagrees with the Norwegian Government that the reference to territory in Article 126 EEA is to be understood as excluding the application of the EEA Agreement to an embassy of an EEA State situated in a third country. Scanteam considers the scope of application of the EEA Agreement to extend to the States that are party to the EEA Agreement and to the European Union ("the EU") itself. References to territories in the EEA Agreement merely address the scope of application where a special status needs to be determined for certain territories such as those referred to in Article 126(2) EEA, Protocol 40 to the EEA Agreement or those listed in Article 355(1) to (6) of the Treaty on the Functioning of the European Union ("TFEU").

46. Scanteam submits that the application of the EEA Agreement cannot be limited as such with regard to foreign missions based on a reference to the principle of territoriality in the Vienna Convention on Diplomatic Relations and under public international law. The sending State, in the sense of the Vienna Convention on Diplomatic Relations, must have sovereignty over activities such as entering into service contracts. Scanteam considers that the case law of the ECJ supports this view,[4] and that in a number of cases, the ECJ has held that the application of EU law is not limited to the territories of EU Member States.

47. Scanteam considers that the principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EU Treaties are to be construed in the same way, but that there may be certain differences in the scope of the EU Treaties and the EEA Agreement which may

[3] Reference is made to the judgment in Case E-5/16 *Municipality of Oslo*, cited above.
[4] Reference is made to the judgments in *Boukhalfa*, C-214/94, EU:C:1996:174, paragraph 14, and *Salemink*, C-347/10, EU:C:2012:17 and the opinion of Advocate General Léger in Boukhalfa, C-214/94, EU:C:1995:381, point 27.

under certain circumstances lead to a different interpretation.[5] Scanteam submits that the principle of homogeneity on which the EEA Agreement is based would be jeopardised should the geographical scope of the EEA Agreement be interpreted differently between EU Member States and EFTA States. In the light of this, Scanteam submits that Article 126 EEA cannot be read so as to exclude the application of the EEA Agreement to activities carried out in its official function by a Norwegian embassy situated in a third country.

48. Should the Court find that the foreign mission of an EEA State in a third country outside the EEA falls outside the territorial scope of the EEA Agreement, Scanteam contends that the Norwegian Embassy in Luanda is nevertheless obliged to comply with the Directive and with the adaptations that follow from Decision No 97/2016. Scanteam submits that the Directive does not define a geographical scope of application, but refers with regards to its coverage to a scope *ratione personae*. In the view of Scanteam, it is the contracting authority's relation to the EEA as such that determines whether a tender procedure falls within the scope of the Directive. The fact that a contracting authority is geographically located elsewhere is not relevant in that regard.

49. Scanteam argues that the Directive makes no distinction between contracting authorities or entities within a contracting authority, based on their geographical location. The determining factor in the Directive is merely whether an entity is a contracting authority as defined by the Directive or not.[6] Furthermore, the activities of the Norwegian Embassy in Luanda are funded by the Norwegian State budget. Scanteam considers that the principle of effectiveness of public spending is relevant with regard to the contracts concluded by the Norwegian Embassy in Luanda. Scanteam asserts, in the light of this, that contrary to the view expressed by the Norwegian Government, EEA public procurement rules, including the Directive, must apply to all contracting authorities of an EEA State, as defined by those rules, regardless of the physical location of that contracting authority.

50. With regard to the standing of the Norwegian Embassy in Luanda and its relation to the Norwegian Ministry of Foreign Affairs ("the Ministry of Foreign Affairs"), point 2 of Article 2(1) of the Directive defines "central government authorities" as the contracting authorities listed in Annex I to the Directive. Norway has listed its "central government authorities" in Article 6 of the Annex to Decision No 97/2016. This list, which is reflected in Appendix 1 to Annex XVI to the EEA Agreement, includes the Ministry of Foreign Affairs and agencies and institutions subordinate to that Ministry. Scanteam submits that Norwegian foreign missions, including embassies, are subordinate to the Ministry of Foreign Affairs. The ties of the Norwegian Embassy in Luanda to the Ministry of Foreign Affairs include, *inter alia*, the funding of and budgeting for that embassy, the employment

[5] Reference is made to the judgment in Case E-2/06 *EFTA Surveillance Authority* v *the Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 59.
[6] Reference is made to point 1 of Article 2(1) of the Directive.

of its personnel, and the right to instruct the Norwegian Embassy in Luanda in the performance of its official duties.

51. In any case, Scanteam submits that all Norwegian embassies are subordinate entities of the Ministry of Foreign Affairs and only exercise delegated authority granted by the Ministry of Foreign Affairs, including for all procurement matters as regulated through annual activity letters issued by the Ministry of Foreign Affairs. Scanteam considers that the ties between the Norwegian Embassy in Luanda and the Ministry of Foreign Affairs are of such a nature that, for the purposes of the Directive, the two must be viewed as the same contracting authority, based within the EEA geographical area. In the light of the above, Scanteam considers that there can be no doubt that the Norwegian Embassy in Luanda is covered by the scope *ratione personae* of the Directive.

52. Moreover, Scanteam submits that the very purpose of the Directive also supports the view that foreign missions and the Ministry of Foreign Affairs must be viewed as the same contracting authority, or at least, contracting authorities subject to the same EEA rules on public procurement. Should the foreign missions, which are subordinate to and receive funding through the Ministry of Foreign Affairs, be exempt from the application of EEA public procurement law, it would imply that the formal denomination of a foreign mission as the contracting authority is sufficient to avoid the application of the directives on public procurement. Allowing such a practice could potentially undermine the purpose and effectiveness of EEA public procurement law. As such, the Norwegian Embassy in Luanda, both in its own right as a publicly funded entity, and by its association with and subordination to a central government authority geographically located within the EEA, is a contracting authority in the meaning of the Directive.

53. Should the Court find that the public procurement directives do not generally apply to foreign missions of EEA States situated in third countries, Scanteam argues that the application of such rules must apply where the contract in question has a link with the EEA or has the potential to affect trade within the EEA.

54. Scanteam submits that the ECJ has consistently held that provisions of EU law apply to activities taking place outside the EU, provided that the activity in question maintains a sufficiently close link with the EU.[7] Scanteam contends that the principle that EU law applies to professional activities pursued outside the territory of the EU provided those activities have a sufficiently close link to the EU must similarly apply with regard to public procurement, so that EEA public procurement law must apply to the award of contracts that maintain a sufficiently close link to the EEA.

55. Scanteam submits that the tender procedure in question concerned a contract with obvious links to the EEA. A contract notice was published in Norwegian on the Norwegian official website for public procurement notices, Doffin. The tender documents, including

[7] Reference is made to the judgment in *Boukhalfa*, cited above, paragraphs 15 and 17.

the tender invitation and two contracts to be used were in Norwegian. The language requirement for tenders was Norwegian. The services to be rendered under the contract were obviously of a nature suitable to economic operators established in the EEA. The responding tenderers were all Norwegian companies. The sole qualification requirement was a Norwegian tax certificate. Remuneration for the contract is taken from the budget of the Ministry of Foreign Affairs, either directly or channelled through the Norwegian Embassy in Luanda. Furthermore, according to the tender documents, it is the Ministry of Foreign Affairs itself that approves, controls and signs the agreement with the successful tenderer for phase 2 of the scope of work under the contract, which amounted to more than 97% of the value of the contract.

56. Scanteam states that while the language requirements and provision of a tender invitation and contracts in Norwegian are all permissible under EEA public procurement law, they clearly indicate a close link of the contract to be awarded to the EEA market. The nature of the contract notice and the fact that it was published on Doffin demonstrate that the tender procedure and contract have a sufficiently close link to Norway, and, hence, to the EEA. In addition, Scanteam submits that the close involvement of the Ministry of Foreign Affairs with regard to the contract in question reinforces the close link of the procurement procedure in question to the EEA.

57. Scanteam submits that the object, value and nature of the contract in question are likely to have attracted the interest of economic operators within the EEA. The contract, therefore, has considerable cross-border effect, as opposed to contracts for local goods and services for which economic operators established in the EEA are unlikely to wish to compete.

58. Scanteam considers that it follows from recital 1 of the Directive that a primary aim of the Directive is to secure, *inter alia*, the freedom to provide services and the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. An important instrument to achieve transparency and non-discrimination is the obligation to ensure the publication of a contract notice with Tenders Electronic Daily. The very essence of the publication requirement with Tenders Electronic Daily is to ensure that all contractors within the EEA are given the opportunity to compete for public contracts within the EEA. By its very nature, the failure to comply with the obligation to publish contract notices in accordance with the provisions set forth in the Directive potentially has a cross-border effect on trade within the EEA, as it prevents or limits the ability of non-Norwegian competitors to compete for public contracts with Norwegian public authorities. Accordingly, Scanteam considers that the failure to comply with the obligation to publish a contract notice with Tenders Electronic Daily constitutes discrimination of non-Norwegian suppliers within the EEA, regardless of where the contract entered into is executed, provided that the contract has a sufficiently close link to the EEA.

59. Scanteam proposes that the Court should answer the question referred as follows:

> *The Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is applicable to public procurement procedures undertaken by a foreign mission of an EEA State in a third country (outside the EEA).*

The Norwegian Government

60. As to the admissibility of the question from the Complaints Board, the Norwegian Government submits that the question should be dismissed as inadmissible, as the Complaints Board does not meet the criterion of a "court or tribunal" within the meaning of Article 34 SCA.

61. The Norwegian Government argues that the Court has established that the notion of court or tribunal in Article 34 SCA must be given an autonomous interpretation. The purpose of Article 34 SCA is to establish cooperation between the Court and national courts and tribunals, as a means of ensuring homogenous interpretation of EEA law.

62. The Norwegian Government submits that in its early case law, the Court considered that the reasoning which had led the ECJ to its interpretation of the same expression in Article 267 TFEU was relevant, but that the Court was not required by Article 3(1) SCA to follow that reasoning.[8] In more recent cases, the Norwegian Government argues, the Court seems to have recognised that the principle of homogeneity also applies to procedural law.[9]

63. The Norwegian Government considers that the case law of the Court and the ECJ does not seem to be fully harmonised, in particular as regards the application of the criterion of independence. It is the view of the Norwegian Government that the Complaints Board does not meet the criterion of "court or tribunal" as this standard has been interpreted by the ECJ. For that reason, and for the sake of legal certainty, the Norwegian Government invites the Court, in the context of the present case, to further clarify that criterion, and, subsequently to determine whether the Complaints Board fulfils that criterion.

64. The Norwegian Government submits that the Complaints Board does not fulfil the criterion of independence for the purposes of Article 34 SCA. While the Norwegian Government concedes that the Complaints Board does meet some of the criteria set out in the case law of the Court, the Norwegian Government submits that the Complaints Board

[8] Reference is made to the judgment in Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 24.

[9] Reference is made to the judgment in Case E-14/11 *DB Schenker* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 1178, paragraph 77 and case law cited.

does not meet the level of independence necessary in order to be accorded the status of "court or tribunal."

65. In the first place, the Norwegian Government argues that the Complaints Board does not enjoy the specific guarantees which are necessary in order for a referring body to be considered a "court or tribunal." The members of the Complaints Board are appointed by the King in the Council of State, which also has the power to dismiss the members. They are appointed for a period of four years and may be reappointed once. In accordance with Section 3 of the Regulation on the Complaints Board for Public Procurement, members of the Complaints Board may only be dismissed if there is a special reason. The Norwegian Government argues that it follows that the members of the Complaints Board do not enjoy the specific guarantees against dismissal as judges, who may only be dismissed following a trial and by an order of a court. Therefore, the Norwegian Government submits that the Complaints Board is in a situation comparable to the referring body in *TDC*.[10]

66. In the second place, the Norwegian Government submits that as the Complaints Board would have the status of a defendant, should a decision of the Complaints Board be appealed before the ordinary courts,[11] it does not have the necessary independence to act as a third party in relation to the parties to the proceedings. The Norwegian Government, referring to the judgments in *MT Højgaard and Züblin*[12] and *TDC*,[13] argues that the reasoning of the ECJ in those cases clearly indicates that if the referring body would have the status of a defendant in the event of an appeal against its decisions before the ordinary courts, it does not meet the criterion of independence. The Norwegian Government argues that, as in the case of rules on dismissal, this aspect is not just part of an overall assessment of the independence of a referring body, but that the language used by the ECJ indicates that the status of a defendant is not compatible with the concept of a "court or tribunal."[14]

67. In addition to the above, regarding other aspects of the Complaints Board's procedure relevant to the assessment of admissibility, the Norwegian Government states that the manner in which the Complaints Board handles cases is not an *inter partes* process, as is the case for procedures before the ordinary courts. There is no requirement as to legal standing when making a complaint to the Complaints Board in cases concerning unlawful direct awards. Anyone may file a complaint concerning unlawful direct awards as regards any public procurement. Moreover, administrative fines that the Complaints Board may impose on a contracting authority are an administrative sanction and entail the application of the Public Administration Act. Additionally, if a case is brought before the Complaints Board, it has the competence to issue administrative fines on unlawful direct awards at its own initiative. Thus, the Complaints Board's tasks in cases concerning unlawful direct

[10] Reference is made to the judgment in *TDC*, C-222/13, EU:C:2014:2265.
[11] Reference is made to Section 1-5 of the Act of 17 June 2005 No 90 on mediation and procedure in civil disputes (*lov 17 juni 2005 nr. 90 om mekling og rettergang i sivile tvister*).
[12] *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347.
[13] *TDC*, cited above.
[14] Reference is made to the judgment in *TDC*, cited above, paragraph 37.

awards are related to the disclosure of any unlawful procurement procedures, as well as being a dispute settlement mechanism, aimed at settling disputes concerning legal claims.

68. The Norwegian Government submits that the procedure of the Complaints Board obviously differs from legal proceedings before the ordinary courts, where a claimant must have a legal claim and must demonstrate a genuine need to have that claim decided against a defendant. The competence to issue administrative fines on its own initiative further underlines the administrative nature of the Complaints Board.

69. As to the question referred by the Complaints Board, the Norwegian Government submits that the answer lies in Article 126(1) EEA, which sets out the geographical scope of the EEA Agreement as applying to the territories of the EFTA States. The Norwegian Government argues that it is well-established international law that, in accordance with Article 22(1) of the Vienna Convention on Diplomatic Relations, foreign missions are established on the territory of the receiving state. Accordingly, Norwegian embassies abroad are not a part of Norwegian territory, but are established on the territory of the receiving state.

70. The Norwegian Government submits that the geographical application of the EEA Agreement is worded differently than under the EU Treaties, as Article 126(1) EEA refers to the application of the EU Treaties and the conditions contained therein. The geographical scope of EU is set out in Article 52 of the Treaty on European Union ("TEU") and Article 355 TFEU. The Norwegian Government argues that the wording of Article 52 TEU and Article 355 TFEU are not identical to the reference to the territories of the EFTA States in Article 126(1) EEA. In fact, the term "territory" is not decisive when it comes to the geographical scope of application of the EU Treaties and the EEA Agreement for the EU Member States. Accordingly, the Norwegian Government submits that the geographical scope of application of the EEA Agreement is the sum of the area covered by the EU Treaties, plus the territory of the EFTA States.

71. The Norwegian Government argues that the wording of Article 126(1) EEA was a conscious choice, as the term "territory" has a well-established meaning in international law. In accordance with well-established international law, "territory" includes land territory, internal waters and the territorial sea of a State, as well as the air space above those areas; that is to say the area over which the State has sovereignty. The Norwegian Government states that territory does not include the continental shelf or the exclusive economic zone, over which a State only has sovereign rights. The Norwegian Government states that this interpretation of the geographical scope of the EEA Agreement has been the consistent view of the Norwegian Government since the EEA Agreement was signed and is reflected in the information provided to the Norwegian Parliament in the parliamentary process leading to the ratification of the EEA Agreement.

72. The Norwegian Government submits that the EEA Agreement was never intended to have the same scope as the EU, which is a comprehensive cooperation in many respects. The Norwegian Government argues that in the light of this, as well as the very clear legal meaning of the term "territory" and the consistent State practice of Norway, there is nothing in the text of the EEA Agreement nor in its object and purpose, which indicates a wider interpretation of the word "territory" in Article 126(1) EEA and thus an expansion of the geographical application of the EEA Agreement.

73. The Norwegian Government submits that the principle of homogeneity is not relevant when interpreting the scope of the EEA Agreement. Firstly, the Norwegian Government argues that the principle of homogeneity cannot be used as a tool to define the very scope of the EEA Agreement. Secondly, while the principle of homogeneity leads to a presumption that provisions that are framed in the same way in the EEA Agreement and EU law are to be construed in the same way,[15] it is clear that the wording of Article 126(1) EEA differs substantially from the wording of the TEU and TFEU as regards the geographical scope. Accordingly, Article 126(1) EEA must not be interpreted in conformity with the rulings of the ECJ on the geographical application of the TEU and TFEU. Rather, the interpretation of Article 126(1) EEA must be based on customary rules of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

74. As to the relationship between Article 126 EEA and the legal acts contained in the Annexes to the EEA Agreement, the Norwegian Government submits that the geographical scope of the EEA Agreement defines the geographical area where the EEA Agreement applies, and, thus, frames the physical borders of the EEA cooperation. The Norwegian Government argues that this means that even if a legal act has provisions where application outside the territory of an EEA State may be relevant, it will, for the EFTA States, only apply within the geographical scope of the EEA Agreement as defined in Article 126(1) EEA.

75. The Norwegian Government submits that the provisions setting out the scope of the EEA Agreement, both the material and the geographic scope, cannot be interpreted in a dynamic way.[16] A dynamic interpretation of the scope of the EEA Agreement would encroach upon the treaty making powers of the State.

76. The Norwegian Government submits that the principle of functional (extraterritorial) application of EU law cannot be extended to the EEA. A functional approach to the geographical scope of application of EEA law would, in the view of the Norwegian Government, be contrary to the EEA Agreement. Firstly, as the wording of Article 126(1) EEA clearly defines the geographical scope as the territory of the EFTA

[15] Reference is made to the judgment in Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259, paragraph 28.
[16] Reference is made to the judgment in Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 28.

States, it leaves no room for an interpretation of its geographical scope that goes beyond that of the "territory" of the EFTA States. Secondly, while the EU Member States have transferred substantial powers to the EU, including regarding external relations, this is not true for the EEA, which remains an economic partnership that revolves around the participation of the EFTA States in the internal market of the EU. New obligations are not introduced automatically, but based on agreement between the contracting parties on the incorporation of new legal acts into the EEA Agreement. Thirdly, the objective of a homogenous internal market is not without limits. In the view of the Norwegian Government, it is not always possible to bridge the differences between EU law and EEA law. The functional application of EU law is one of the special features of EU law that cannot be extended to the EEA.

77. As an alternative line of argument, which is entirely without prejudice to the Norwegian Government's primary position set out above, the Norwegian Government submits that the Directive is not applicable to the tender procedure of the Norwegian Embassy in Angola at issue in the present case. The Norwegian Government submits that while the Directive does not explicitly address its geographical application, it is clear from a number of provisions in the Directive, as well as the design of its rules, that there is a clear underlying intention of applying the rules in the internal market only.[17] Furthermore, the Norwegian Government argues that there is no indication in the Directive that it is intended to regulate its own geographical scope of application. The reason for this, in the Norwegian Government's view, is that the geographical scope of both the EU Treaties and the EEA is set out in the respective instruments and secondary legislation applies within the borders set out in those instruments. As further noted above, in essence, the Norwegian Government argues that the interpretation of Article 126 EEA is decisive for the geographical scope of application of the Directive.

78. The Norwegian Government considers that the application of the Directive to procurement procedures conducted by embassies throughout the world could interfere with foreign policy considerations, which is an area that falls outside the scope of the EEA Agreement.

79. The Norwegian Government submits that the operationalisation of Norwegian foreign policy is the main objective of its embassies. Procurement processes are an interlinked part of this objective and cannot be separated from foreign policy concerns. The Norwegian Government submits that it is undisputed that the foreign policy of the EFTA States are not a part of the EEA Agreement. Therefore, in the view of the Norwegian Government, it would not sit well with the objectives and design of the EEA Agreement to interpret the Directive to the effect that it must be applied to tender procedures undertaken by the embassies of the EFTA States in third countries outside the EEA.

[17] Reference is made to recitals 52, 73, 80, and 134 of the Directive, as well as the second subparagraph of Article 59(3), Article 69(4), the fifth subparagraph of Article 83(3) and Articles 86(3), and 92 of the Directive.

80. Finally, the Norwegian Government considers that the exemption of procurement procedures conducted by embassies from the scope of the EEA Agreement cannot constitute a circumvention of the principles of the EEA Agreement, as it represents no breach of Articles 1 or 4 EEA to adhere to the defined geographical scope of the EEA Agreement.

81. In the light of the above considerations, the Norwegian Government submits that the request for an advisory opinion in the present case is inadmissible. Should the Court find that it has jurisdiction, the Norwegian Government proposes that the Court should answer the question referred as follows:

> *Directive 2014/24/EU on public procurement is not applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country outside the EEA.*

The Austrian Government

82. The submissions of the Austrian Government are based on the presumption that the Directive is applicable to the case at hand and that the Norwegian Embassy in Luanda is part of the Norwegian State administration because it forms part of the Ministry of Foreign Affairs.

83. The Austrian Government submits that the application of EU law to situations outside of the geographical area of the European Union is no new concept. The ECJ had already held in *Boukhalfa* that Community law applied to a national of an EU Member State who was permanently resident in a third country and was employed by another EU Member State in its embassy in that third country.

84. The Austrian Government submits that in the light of the case law of the ECJ,[18] embassies or missions which form part of an EU Member State's ministry are contracting authorities falling within the scope of the Directive. Therefore, the award of public contracts by such embassies or missions is governed by the provisions of the Directive since no provision of the Directive explicitly excludes such awards from its scope of application.

85. Furthermore, the Austrian Government argues that the aim of the Directive is to guarantee the respect of the fundamental principles of EU law, namely equal treatment, non-discrimination, proportionality and transparency, when awarding public contracts by or on behalf of EU Member States' authorities and to open up such procedures for competition.[19] The Austrian Government notes that the Complaints Board itself points to

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[18] Reference is made to the judgments in *Commission* v *Belgium*, C-323/96, EU:C:1998:411, paragraphs 27 and 28, and *Beentjes*, C-31/87, EU:C:1988:422, paragraphs 11-13.

[19] Reference is made to the judgment in *Tedeschi*, C-402/18, EU:C:2019:1023, paragraph 33, and recital 1 of the Directive.

the fact that practically all potential suppliers are domiciled in the EEA. In the light of this, it would be in conformity with the aim and the *effet utile* of the Directive to submit the procedure in question to the rules as set out in the Directive. Furthermore, the Austrian Government points out that the Directive neither refers to the location (seat) of a contracting authority nor to the place of the performance of the contract. In this connection, the Austrian Government notes that already in 2002, the Commission had expressed the view that embassies or national bodies located in third countries would be covered by the public procurement directives.[20]

86. The Austrian Government submits that, contrary to other procurement directives, the Directive does not contain any exception for procurement procedures conducted or executed by contracting authorities outside of the geographical area of the EU. The Austrian Government refers to Article 13(d) of Directive 2009/81/EC, which it submits explicitly addresses such situations and contains a "specific exclusion" for "contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations." In this regard, the Austrian Government also refers to recital 29 of Directive 2009/81/EC. The Austrian Government argues that the reason for this exclusion was that EU Member States and the Commission considered it inappropriate to apply EU public procurement rules in such a situation. However, it clearly follows from the existence of this provision that the procurement directives were based on the assumption that they apply to all procurement procedures of contracting authorities regardless of the place where the execution of the contract takes place. Otherwise, the exclusion under Article 13(d) of Directive 2009/81/EC would not have been necessary. The Austrian Government further submits that, in a similar vein, it can also be concluded from Article 19 of Directive 2014/25/EU that the geographical scope of the procurement directives is not limited to the geographical area of the European Union.

87. The Austrian Government recognises that its legal position implies problems of conflict of laws and practical problems of application. However, it emphasises that it is necessary to distinguish between the award procedure, which is governed by the Directive, and the law applicable to the awarded contract. The Directive only concerns the tender procedure.

88. The Austrian Government proposes that the Court should answer the question referred as follows:

> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is applicable to procurement procedures*

[20] Reference is made to Communication from the Commission to the Council and to the European Parliament - Untying: Enhancing the effectiveness of aid, COM(2002) 639 final, paragraph 34.

undertaken by a foreign mission of an EFTA State in a third country (outside the EEA).

The French Government

89. The French Government submits that the question referred by the Complaints Board should be answered in the negative. This conclusion follows both from the wording and the objectives of the Directive, as well as of the EEA Agreement.

90. The French government argues that it follows both from primary law and the Directive itself that the Directive only applies to tender procedures awarded and carried out in the territory of EU Member States and EEA States. As regard EU primary law, its scope is defined by Article 52 TEU, which refers to Article 355 TFEU, which itself refers to Article 345 TFEU. Article 52 TEU lists the 28 EU Member States based on their constitutional names. In this way, the EU respects the EU Member States' territorial structure as defined by their own constitutions, in compliance with the constitutional self-governance of the EU Member States, which is part of the national identities protected by Article 4(2) TEU. Thus, the definition of the territorial scope of the EU treaties relies on the definition of their territory given by each EU Member State. In this regard, the French Government states that the ECJ has had occasion to note that the territorial scope of the EU Treaties is primarily defined by reference to the national provisions of EU Member States.[21]

91. The French Government submits that the EEA Agreement defines its territorial scope with reference to the constitutional names of EEA States. The French Government submits that, contrary to what appears to be suggested in paragraph 40 of the request for an advisory opinion, the answer to the question referred should not differ based on whether the question at issue concerns the applicability of public procurement law in EU Member States or EFTA States. In the view of the French Government, the stipulations of Article 126 EEA should be interpreted in the same way as those of the EU Treaties and the EEA Agreement should be considered to apply to the territories of EU Member States and EFTA States, as defined in their constitutional provisions.

92. As regards secondary legislation, the French Government considers that it should be clarified that the respective territorial scope of primary law and secondary law are not necessarily identical. While secondary legislation may have a territorial scope that differs from that of the EU Treaties, secondary legislation does not always define its territorial scope.[22] The French Government considers that in the absence of detailed provisions on this issue, the scope of a particular legal act must be determined on the basis of Articles 52 TEU and 355 TFEU. The French Government notes that the ECJ has already had occasion to state that secondary legislation applies, in principle, to the same area as the EU Treaties

[21] Reference is made to the judgment in *Hansen* v *Hauptzollamt Flensburg*, C-148/77, EU:C:1978:173, paragraph 9.
[22] Reference is made to the judgment in *Parliament* v *Council*, C-132/14 to C-136/14, EU:C:2015:813, paragraph 75.

themselves and applies automatically in that area.[23] In this regard, the Directive does not set out in its provisions its territorial scope. Thus, it must be considered that its scope is that of primary law. Similarly, the French Government submits that the Directive applies in the territory of EFTA States as set out in their constitutional provisions.

93. The French Government submits that diplomatic representations located in third countries are not included in the definition of national territory. In this regard, the French Government argues that, under public international law, it is considered that diplomatic missions abroad do not benefit from the principle of extraterritoriality. In the absence of a specific provision in the Directive extending its territorial scope, the French Government submits that public procurement procedures responding to the needs of diplomatic missions from EU Member States and EFTA States located in the territory of a third country do not fall within the scope of the Directive. In the view of the French Government, this conclusion is substantiated by a teleological interpretation of the provisions of the Directive.

94. The French Government submits that the geographical scope of the EU Treaties depends on the territory of the EU Member States, and that it follows, more specifically, that the application of EU law depends on the geographical location of certain elements within the territory of the EU Member States.[24] A survey of the case law of the ECJ reveals that the application of EU law presupposes an adequate link to the territory of the EU. In that way, the basic principle of territoriality under public international law is observed. Nevertheless, the French Government notes, that it is not unusual for a State or an international organisation to also take into account, in the exercise of its sovereignty, circumstances that occur or have occurred outside its territorial jurisdiction.[25]

95. As regards competition law, the French Government considers that it follows from the existing case law of the ECJ that EU law operates with a requirement that there be an adequate link to the territory of the EU, be it in the form of the presence of a subsidiary or the implementation of anti-competitive conduct within that territory.[26] Thus, for example, as in *Ahlström Osakeyhtiö and Others* v *Commission*, the ECJ held that the Commission could sanction companies under EU competition law, despite the fact that their headquarters were located outside the EU, because the behaviour at issue took place within the territory of the EU.[27] The French Government considers that this reasoning can easily be transposed to public procurement law. Thus, only public procurement which is awarded and carried out within the territory of the EU or EEA or with a sufficient connection to this

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[23] Reference is made to the judgment in *Parliament* v *Council*, cited above, paragraphs 76 and 77.
[24] Reference is made to the opinion of Advocate General Léger in *Ingmar GB*, C-381/98, EU:C:2000:230, points 24 and 25.
[25] Reference is made to the opinion of Advocate General Wahl in *Intel* v *Commission*, C-413/14 P, EU:C:2016:788, point 284.
[26] Reference is made to the opinion of Advocate General Wahl in *Intel* v *Commission*, cited above, point 285.
[27] Reference is made to the judgment in *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120.

territory can be subject to EU public procurement law, and in particular the Directive. Conversely, a public procurement procedure set up to meet the specific needs of a foreign mission of an EU Member State or an EFTA State located in the territory of a third country and taking place in this third country, does not present a sufficient connection to the territory of the EU such that it would justify the application of EU law, having regard to its objectives.

96. In that regard, the French Government argues that, firstly, public procurement law helps to implement the internal market, freedoms of movement and free competition, and secondly, the EEA Agreement aims to extend the internal market to the territories of the EFTA States. The aim of the Directive is to set out public procurement rules consistent with the principles of the TFEU, especially the freedom of establishment and free movement of services, in order to guarantee equal treatment among economic operators and to ensure free competition. In other words, the objective of the Directive is to ensure the principle of non-discrimination and the harmonisation of competitive procurement conditions for economic operators within the internal market. The French Government submits that public procurement outside the territory of EU Member States and EFTA States is not likely to impact intra-EU trade and thus distort equal treatment and competition between economic operators within the EU internal market, as extended to the EFTA States.

97. The French Government submits that it should be noted that the application of the Directive in the territory of third countries would undoubtedly expose contracting authorities to diplomatic, legal and practical difficulties. The French Government states that diplomatic missions accredited in a third country are, with the exception of the privileges and immunities granted to them, subject to the law of the State on whose territory they are located. Consequently, the provisions of the Directive could run contrary to local public procurement legislation. For example, a law in a third country could require that the principle of local preference be applied to all public procurement taking place on its territory. Yet, such a rule would be incompatible with the provisions of the Directive. As a result, applying the Directive in the territory of such a third country could lead to a conflict of norms.

98. Furthermore, the French Government argues that a number of the Directive's provisions are directly linked to compliance with stipulations in the TFEU and internal market rules. For example, an abnormally low offer must be rejected if it is the result of State aid which is incompatible with the internal market under Article 107 TFEU. The French Government considers that such a mechanism could not be applied outside the internal market since it is not possible to monitor abnormally low offers for State aid granted by third countries which are not subject to the same requirements. Thus, in the view of the French Government, applying the public procurement rules of the Directive outside the scope of the internal market is not justified and in certain instances could even prove impossible in practice.

99. The French Government proposes that the Court should answer the question referred as follows:

> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is not applicable to procurement procedures undertaken by a foreign mission of an EFTA State in a third country outside the EEA*

ESA

100. As to the admissibility of the request for an advisory opinion, ESA submits that the Complaints Board is a court or tribunal for the purposes of Article 34 SCA and that the request is therefore admissible. ESA argues that this conclusion is supported both by the applicable law and by the interpretation given to the terms "court or tribunal" by the Court and the ECJ.[28]

101. ESA submits that the Court has held in numerous cases that requests from various appeals bodies are admissible because the requesting body must be considered to be "a court or tribunal."[29] Furthermore, the ECJ has on numerous occasions considered requests from public procurement appeals bodies admissible.[30] In this regard, ESA refers to the judgment of the Court in *Municipality of Oslo,*[31] in which the Court concluded that the Norwegian Board of Appeal for Industrial Property Rights fulfilled to a sufficient degree the factors established in the Court's case law. This conclusion was based on the fact that the Norwegian Board of Appeal for Industrial Property Rights was established by law, had a permanent existence, exercised binding jurisdiction and applied the rule of law.

102. ESA submits that the Complaints Board, which is a body established by law, satisfies the conditions enumerated above. Section 11 of the Public Procurement Act provides for the establishment of the board for resolving disputes concerning rights and duties pursuant to the Public Procurement Act and regulations issued pursuant to that act.

103. As to the question of independence, ESA submits that the Complaints Board satisfies the criteria identified in *Municipality of Oslo*. Firstly, while the chair and deputy of the Complaints Board do not have to qualify as judges, all members are appointed by

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[28] Reference is made to the judgment in Case E-5/16 *Municipality of Oslo,* cited above, paragraph 35.

[29] Reference is made to the judgments in Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark,* cited above, paragraphs 7-31, Case E-9/17 *Edmund Falkenhahn AG* v *the Liechtenstein Financial Market Authority* [2018] EFTA Ct. Rep 151, Case E-5/16 *Municipality of Oslo,* cited above, Joined Cases E-8/94 and E-9/94 *Forbrukerombudet* v *Mattel Scandinavia A/S and Lego Norge A/S* [1994-1995] EFTA Ct. Rep. 113, paragraph 15, and Case E-4/04 *Pedicel,* cited above, paragraphs 20 and 21.

[30] Reference is made to the judgments in *Montte,* C-546/16, EU:C:2018:752, paragraphs 20-25, *Medisanus,* C-296/15, EU:C:2017:431, paragraphs 32-38, *Consorci Sanitari del Maresme,* C-203/14, EU:C:2015:664, paragraphs 17-31, *Forposta and ABC Direct Contact,* C-465/11, EU:C:2012:801, paragraph 18, and *MT Højgaard and* Züblin, cited above, paragraphs 22-33.

[31] Reference is made to the judgment in Case E-5/16 *Municipality of Oslo,* cited above, paragraph 40.

the King in Council. Secondly, members of the Complaints Board are protected directly by the Regulation on the Complaints Board for Public Procurement, which states that the appointed members cannot be dismissed or suspended during their nomination period unless a special reason exists. Finally, ESA contends that the independence of the Complaints Board is ensured by Section 5 of the Regulation on the Complaints Board for Public Procurement. This provision states that neither the Complaints Board nor its secretariat can be instructed by the Government whether concerning legal interpretation, exercise of discretion, decisions in individual cases or case handling. Section 15-2 of that regulation contains additional safeguards for the independence of the individual members of the Complaints Board, as it states that members of the Complaints Board cannot be instructed by a ministry, the secretariat of the Complaints Board or any other member of the Complaints Board, including the head of the Complaints Board.

104. ESA states that in line with Section 11-1 of the Public Procurement Act and Section 2 of the Regulation on the Complaints Board for Public Procurement, contracting authorities are obliged to participate in proceedings before the Complaints Board. The Public Procurement Act empowers the Complaints Board to adopt decisions on infringements of public procurement rules. It can also issue administrative fines which cannot be appealed. Legal proceedings involving the decisions of the Complaints Board must be instituted within two months of the parties to a case receiving a decision. Ordinary courts of law may review all aspects of a case. State authorities and bodies may also bring legal proceedings.

105. ESA states that it agrees with the Complaints Board's assessment that the case law of the ECJ referred to by the Norwegian Government cannot be relied on to deny the Complaints Board the right to request an advisory opinion, as the case law cited concerns an appeal body's status as a party in a dispute.[32] In view of these considerations, ESA submits that the Complaints Board satisfies the criteria to be considered a "court or tribunal" for the purposes of Article 34 SCA.

106. As to the substance of the case, ESA submits that the Directive applies to all bodies falling within the scope of the notion of a contracting authority within the meaning of point 1 of Article 2(1) of the Directive regardless of the place of the performance of the contract. ESA argues that, according to ECJ case law, once the value threshold under the Directive is met, there is a presumption that there is a cross-border interest.[33] ESA observes that the Directive itself is silent as to any limitations, or indeed relevance, of its territorial scope. ESA states that it is not aware of any case law from the Court or the ECJ that directly addresses this issue.

[32] Reference is made to the judgment in *TDC*, cited above, paragraph 37.

[33] Reference is made to the judgment in *RegioPost*, C-115/14, EU:C:2015:760, paragraph 51, and *Michaniki*, C-213/07, EU:C:2008:731, paragraph 30.

107. ESA submits that considering the purpose and wording of the Directive, the question of its scope of application must be addressed from the perspective of *ratione personae* rather than from a perspective of *ratione loci*, which ESA considers to have been the emphasis in the position of the Norwegian Government reflected in the request for an advisory opinion.

108. Accordingly, ESA submits that the question referred by the Complaints Board should be answered to the effect that EEA State bodies are bound by the Directive irrespective of whether they are based inside or outside EEA territory and irrespective of whether what they are procuring is to be performed or delivered inside or outside EEA territory.

109. ESA Submits that diplomatic missions forming part of a ministry of foreign affairs have to be considered as contracting authorities for the purposes of applying the Directive, as it is evident that they form an integral part of the State administration in formal terms. ESA notes that a ministry of foreign affairs is one of the central government authorities listed by all EEA States. In Appendix 1 to Annex XVI to the EEA Agreement, Norway has listed the Ministry of Foreign Affairs among the central government authorities, as well as agencies and institutions subordinate to those ministries. ESA argues that in the case pending before the Complaints Board, it is indisputable that the diplomatic mission forms part of the State.

110. As to the meaning of "State" in this context, ESA argues that the notion has from the very beginning been understood by the ECJ broadly and interpreted functionally.[34] Therefore, it does not matter whether the given body is formally part of the administration or organisationally independent. To establish whether a body falls within the notion of the State it has to be assessed whether the body fulfils the task of a public authority and what its functioning rules are, especially as regards its composition and financing.[35]

111. ESA submits that diplomatic missions perform functions associated with the executive powers of the State. Furthermore, such missions generally operate under the control of a State's ministry of foreign affairs and are funded through its budget. ESA, therefore, considers it clear that diplomatic missions have to be classified as contracting authorities for the purposes of the application of the procurement directives, not only because they form an integral part of the State administration in formal terms, as they are subordinate to a State's ministry of foreign affairs, but also because they fall within the notion of the State in functional terms.

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[34] Reference is made to the judgment in *Beentjes*, cited above, paragraph 12, and the opinion of Advocate General Darmon in *Beentjes*, C-31/87, EU:C:1988:226, point 10 et seq.

[35] Reference is made to *Beentjes*, cited above, paragraphs 11 and 12, and the opinion of Advocate General Darmon in *Beentjes*, cited above, points 10 and 12.

112. ESA therefore submits that the Directive is applicable *ratione personae* to diplomatic missions forming part of a ministry of foreign affairs of an EEA State, and, in any event, in the circumstances outlined in the request for an advisory opinion from the Complaints Board.

113. Although ESA considers that the Directive applies *ratione personae*, it submits that if the Court were to base its judgment on considerations regarding *ratione loci*, the result would be the same, as the Norwegian Embassy in Luanda would be bound by the Directive as there is a sufficiently close link with EEA territory.

114. ESA states that it agrees with the submissions of the Norwegian Government in the case before the Complaints Board that the Norwegian Embassy in Luanda is, as a matter of international law, not located in the territory of Norway. However, it argues that for the purposes of the present case, the mere conclusion that the Norwegian Embassy in Luanda is not located in Norway is, on its own, inconclusive as, according to well-established principles, the EEA Agreement and the legal acts incorporated therein, apply outside the territory of an EEA State by virtue of another factor, namely that the issue at hand is sufficiently closely linked to the EEA.

115. ESA submits that territoriality is established where there is a sufficiently close link to the EEA. The question is not whether an act takes place in EEA territory, but whether it has effects in EEA territory. In this regard, ESA refers to the case law of the ECJ concerning the application, within the limits of international law, of the EU treaties and secondary legislation outside the territories of EU Member States.[36] In support of its submissions, ESA refers to its own practice on the applicability of the EEA Agreement outside the "territory" of the EFTA States.

116. ESA submits that the Directive may apply outside the "territory" of Norway within the meaning of Article 126 EEA. The relevant test, under the *ratione loci* approach, is whether the obligation in question has a sufficient link to the EEA. For the purposes of the Directive, ESA submits that the factors present in the request from the Complaints Board serve to establish a sufficient link *ratione loci* in the case at hand. The procurement procedure was carried out by the Norwegian State in order to enter into a contract using Norwegian public money and governed by Norwegian law, the subject matter and value of which can be considered to give rise to cross-border interest in the EEA. ESA notes that the Ministry of Foreign Affairs appears, pursuant to the tender documents in the case pending before the Complaints Board, to be named as the party and signatory to the second phase, which it also appears to have directly funded. Furthermore, the Ministry of Foreign Affairs was also identified on Doffin as the buyer. It was therefore deeply involved in the procurement process, over which it exercised decisive influence and control.

[36] Reference is made to the judgments in *Boukhalfa*, cited above, paragraphs 14 and 15, *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, and *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 62.

117. ESA argues that the fact that the tender was actually published in Doffin and prompted Norwegian companies, registered and established in Norway, to bid for the project, indicates that Norway was the area where the actual effects on the market took place, certainly not Angola. ESA further contends that the service in question is not intrinsically linked to the territory of Angola either.

118. ESA submits that the effect on the internal market in procurement cases like the present one is established by reference to the nature of the procuring body and the value of the services to be procured. Therefore, the link test referred to in *Boukhalfa*[37] will similarly be fulfilled once the threshold and the contracting authority criteria are fulfilled.

119. Finally, ESA argues that since the Norwegian Embassy in Luanda is part of the State, to treat different parts of the State differently would not be compatible with the purpose of the Directive. It would also make it possible to avoid the application of the Directive by tendering through a diplomatic mission outside the EEA. ESA contends that any EEA State could then simply set up an entity in such a territory and thereby completely escape the application of the Directive. In the view of ESA, that cannot be the case.

120. ESA proposes that the Court should answer the question referred as follows:

> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement must be interpreted to the effect that EEA State bodies which qualify as contracting authorities within the meaning of its Article 2(1)(1) are bound by the Directive irrespective of whether they are based inside or outside EEA territory, and irrespective of whether what they are procuring is to be performed or delivered inside or outside EEA territory.*

The Commission

121. The Commission submits that the Directive applies to public procurement by foreign missions of EU Member States for the following reasons.

122. First, the Commission submits that missions, embassies, consulates or delegations of EU Member States in third countries constitute State authorities and, thus, fall within the definition of contracting authorities set out in Article 2 of the Directive. Furthermore, the Commission notes that neither Section 3 of Chapter I of the Directive, entitled Exclusions, nor Section 4 thereof, entitled Specific situations, which list numerous situations exempted from the scope of the Directive or having a specific treatment, nor any other provision of the Directive, exclude public procurement by embassies from the scope of the Directive. Accordingly, the Commission contends that embassies fall within the personal scope of the Directive. The Commission considers that this is further confirmed by the fact that some EU Member States, such as the Kingdom of Sweden and the Kingdom

[37] Reference is made to the judgment in *Boukhalfa*, cited above.

of the Netherlands, explicitly include their embassies among the central government authorities, listed in accordance with point 2 of Article 2(1) of the Directive, in Annex I to the Directive.

123. Secondly, the Commission notes that when defining the scope of the Directive, contracting authorities were not excluded from the scope based on whether the seat of those authorities was within an EU Member State or in a third country. The Commission considers it evident that the seat of the contracting authority does not play any role in a consideration of whether a given authority is or is not a contracting authority within the meaning of the Directive. Furthermore, the Commission argues that if the seat of a contracting authority of a EU Member State in a third country played a role, and embassies were not to be considered as contracting authorities, there would be considerable possibility to circumvent the Directive.

124. Thirdly, the Commission argues that the place of the performance of a contract does not play any role when considering whether the contract is to be regarded as a public contract.[38] In fact, the Commission observes, it can be assumed that many contracting authorities, especially central government authorities, enter into public contracts that are partially or entirely performed in third countries (such as humanitarian aid programmes, etc.).

125. Fourth, the Commission does not exclude that in certain very specific situations, which do not apply in the present case, the need for local expertise or local input for an envisaged procurement may be so high that the practical usefulness of a publication of the tender in accordance with the Directive in the Official Journal may be limited or may even lead to unnecessary delays. However, the Commission considers that such situations would still not justify the non-application of the Directive as such. In such situations, the Directive applies, but embassies are, of course, free to rely on the exceptional provisions in the Directive, where applicable, such as those in Article 32 of the Directive, allowing the use of a negotiated procedure without publication.

126. Finally, as a matter of principle, the Commission considers it necessary to distinguish between the law governing the procurement procedure (i.e. the tender) and the law applicable to the contract. The application of the Directive to the first phase (i.e. the tender) does not at all exclude a full or partial application of the local law to the awarded contract and its performance. In this way, the Commission considers that the need for "middle-ground solutions" would not seem to arise.

127. As to whether the Directive applies to public procurement by foreign missions of EEA States in third countries, the Commission points out that the Directive was incorporated into the EEA Agreement without specific adaptations related to the key provisions of the Directive. The Commission considers that nothing in the EEA Agreement

[38] Reference is made to Article 1(2) and point 5 of Article 2(1) of the Directive.

indicates that the Directive should apply differently in EU Member States and the EFTA States. Therefore, the Commission is of the view that the considerations outlined above on the application of the Directive by embassies of EU Member States in third countries are also relevant for the application of the Directive in EFTA States.

128. The Commission submits that it follows from point 2 of the Sectoral Adaptations provided for in Annex XVI to the EEA Agreement that the publication of notices from EEA States in Tenders Electronic Daily and the S-Series is carried out by the Publication Office of the European Union. No special rules related to the publication of the notices from EEA States have been foreseen.

129. As to Article 126 EEA, the Commission is of the view that the assessment of "territoriality" under that provision cannot be limited to the consideration of the seat of the contracting authority alone. The seat of the contracting authority is just one of many elements in the assessment. Moreover, the Commission considers that putting an emphasis, when assessing the application of public procurement rules, on that single element would be artificial. It should be borne in mind that the key obligation under the Directive, which is also at issue in the present case, namely the requisite publication of the tender in Tenders Electronic Daily, occurs in the EEA. Moreover, and perhaps even more importantly, the public funds, the most efficient use of which the Directive seeks to safeguard,[39] and the spending of which is at issue in the present case, are raised and administered in the EEA. Finally, an embassy, as a contracting authority, is an integral branch of the Norwegian State, i.e. the Ministry of Foreign Affairs, located in Norwegian territory and fully subject to the Directive. The Commission considers that these elements prevail in the assessment of territoriality and make it clear that the application of the Directive to public procurement by foreign missions of EEA States in third countries is compatible with Article 126 EEA.

130. The Commission argues that the Norwegian Government seems to introduce a new criterion for the consideration of whether a contract is a "public contract" within the meaning of the Directive, when it maintains that the main rule in all procurement procedures undertaken by foreign missions is that it is the local connection that is predominant. The Commission considers that the contract at issue is a contract through which the Norwegian Embassy in Luanda seeks to achieve certain objectives which, although relating to the human rights situation in Angola, are also in the public interest of Norway. In this regard, the Commission observes that the services to be purchased under the contract are services which concern tasks that the Norwegian Embassy in Luanda would otherwise have to exercise itself in order to achieve those objectives. Therefore, the contract is of a direct economic benefit to the Norwegian Embassy in Luanda, as the contracting authority at issue, and the circumstances pointed out by the Norwegian Government, such as the fact that there are no physical deliveries to the Ministry of Foreign Affairs, do not affect this conclusion. The Commission argues that considering such issues

[39] Reference is made to recital 2 of the Directive.

as being relevant for determining whether a contract falls within the scope of the Directive risks undermining the concept of a "public contract" as defined by the Directive and relevant case law.

131. The Commission observes that, in the present case, the fact that the tender was published by the Norwegian Embassy in Luanda in the Norwegian tender database Doffin and that all the participating tenderers seem to be incorporated in Norway would seem to indicate a rather strong connection of the procurement at issue to Norway. Therefore, even if the criterion of the degree of connection of the procurement to the EEA State were to be of any importance, this criterion would clearly be fulfilled in the present case.

132. Furthermore, the Commission submits that if the subject matter of the procurement was such that the embassy considered it in any event appropriate to publish the tender in Doffin, there does not seem to be any factual reason for why the same subject matter could not have been published in accordance with the Directive in the Tenders Electronic Daily supplement to the Official Journal.

133. The Commission proposes that the Court should answer the question as follows:

> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is applicable to procurement procedures undertaken by a foreign mission of an EEA State in a third country outside the EEA.*

Páll Hreinsson
Judge-Rapporteur