OSLO TINGRETT

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EFTA Court
1 Rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

Your reference	Our reference	Date
	21-021791TVI-TOSL/01	14.03.2022

Request for an Advisory Opinion

1 Introduction

Pursuant to Section 51a of the Norwegian Courts of Justice Act (*lov om domstolene*), read in conjunction with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Oslo District Court (*Oslo tingrett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 21-021791TVI-TOSL/01.

The parties to the case and their legal counsels are as follows:

Plaintiff 1:	Stendi AS Lilleakerveien 2A, 0283 Oslo
Plaintiff 2:	Norlandia Care Norge AS Munkedamsveien 35, 0250 Oslo
Counsel:	Advokat Aksel Joachim Hageler Advokat Lennart Garnes SANDS Advokatfirma DA P.O. Box 1829 Vika, 0123 Oslo
Defendant:	Oslo municipality, represented by the Mayor (*Oslo kommune v/ordføreren*) Rådhuset, 0037 Oslo
Counsel:	Advokat Ane Grimelid Oslo City Legal Department (*Kommuneadvokaten i Oslo*) City Hall (*Rådhuset*), 0037 Oslo

The main proceedings before Oslo District Court concern the procurement by Oslo municipality of long-term leasing and service agreements for up to 800 new, long-term places in nursing homes, published in November 2020.

That part of the procurement relating to operation of the nursing home places ("the nursing home services") is reserved for non-profit organisations. The plaintiffs, Stendi AS and Norlandia Care Norge AS, are not permitted to participate in the tender because they are not considered to be non-profit organisations.

The defendant, Oslo municipality, has put forward three legal bases for why the procurement may be reserved for non-profit organisations, which may be briefly described as follows:

- Principally: the procurement of the nursing home services must be considered procurement of "non-economic services of general interest" falling outside the scope of the EEA Agreement and the Public Procurement Directive.
- In the alternative: the procurement is exempt from the EEA Agreement under Article 32 read in conjunction with Article 39, because it involves services entailing an exercise of official authority.
- In the further alternative: the Public Procurement Directive does not preclude reserving the procurement of the nursing home services for non-profit organisations in the manner permitted under national law.

The plaintiffs, Stendi AS and Norlandia Care Norge AS, disagree with all of Oslo municipality's abovementioned submissions. The parties' submissions will be discussed in greater detail below in part 5.

Oslo District Court considers that it is necessary to refer questions of interpretation to the EFTA Court relating to the three legal arguments put forward by Oslo municipality in support of its position that the procurement of the nursing home services may be reserved for non-profit organisations. The parties have also wanted such a reference. The questions are set out in the last part of this order for reference, in part 6.

2 The need for a reference

2.1 The concept of "service" under the Public Procurement Directive

It is undisputed that contracts in the sense of contracts for "pecuniary interest" are to be concluded, see point (5) of Article 2(1) of the Public Procurement Directive, between Oslo municipality and the selected providers of nursing home services. The parties disagree, however, on whether the nursing home services constitute "services" for the purposes of EEA law and public procurement law, and thus whether the situation involves such "service

contracts" as falling within the scope of point (9) of Article 2(1) of the Public Procurement Directive, read in conjunction with Article 1(2).

In Case E-13/19 *Hraðbraut*, the EFTA Court discussed how the concept of "service" in the Public Procurement Directive is to be construed. That case concerned the field of education and the parties disagree on the implications of that case for the present case, which concerns nursing home services. Oslo District Court seeks clarification from the EFTA Court as to whether the same principles apply to the determination of whether the nursing home services at issue in the main proceedings are to be considered "services" for the purposes of the Public Procurement Directive.

2.2 The exception in Article 32 EEA, read in conjunction with Article 39, for services involving exercise of official authority

Article 32 EEA, read in conjunction with Article 39, exempts "*activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority …*" from the provisions on freedom of establishment and freedom to provide services.

There are a number of judgments from the European Court of Justice on the interpretation of that exception. Those judgments, however, seem to relate to situations that in some degree differ from the case pending before this Court. Oslo District Court accordingly deems it necessary to refer questions to the EFTA Court on the interpretation of the exception for exercise of official authority.

First, it is a question whether Oslo municipality is precluded from availing itself of the exception because commercial providers of nursing home services were previously permitted to participate in the municipal's tendering procedures for the procurement of such services, or because other public contracting authorities have opted not to rely on the exception. In other words, the exception is not utilised in all procurements. Neither the European Court of Justice nor the EFTA Court seems previously to have adopted a position on the scope of the European Court of Justice's statements in Case 152/72 *Sotgiu* (paragraphs 2 – 6), which may have implications for the determination of this question.

Second, it is a question whether the application of the exception for exercise of official authority in the main proceedings is affected by the fact that the competence to exercise coercive powers to persons without legal capacity to give consent, are not placed directly with the public contracting authority's contractor, but rather with the health personnel working for the contractor.

Third, it is a question how the requirement of "occasionally" in Article 32 EEA is to be construed. This includes whether there is a lower quantitative limit for the application of the exception and, if so, what relevance the European Court of Justice's case-law relating to the exception in Article 28(4) EEA (exemption from free movement of workers for employment

in the public service) has for the determination of such, see, inter alia, the European Court of Justice's case C-47/02 *Anker*.

2.3 The possibility of reserving procurement of health and social services (helse- og sosialtjenester) for non-profit organisations, Section 30-2a of the [Norwegian] Public Procurement Regulation

Norwegian authorities have considered that the European Court of Justice in the Cases C-113/13 *Spezzino* and C-50/14 *CASTA* established a possibility for national authorities to adopt legislative provisions providing that procurements of health and social services within the scope of Annex B to the former Public Procurement Directive (Directive 2004/18/EC) could/should be reserved for non-profit organisations. Following the entry into force of the new Public Procurement Directive, Directive 2014/24/EU, Norwegian authorities have considered whether it is still possible to make reservations and concluded that it is. Against that background, the legal basis for reservations in Section 30-2a of the Public Procurement Regulation (*anskaffelsesforskriften*) was introduced in February 2020, see part 3.2 below.

Oslo District Court's understanding is that it has not been legally clarified whether, following the entry into force of the current Public Procurement Directive, it is still possible for the EEA States to introduce national legislation providing that public contracting authorities may reserve procurement of contracts for health and social services for non-profit organisations. Neither the European Court of Justice nor the EFTA Court has thus far ruled on the question, and Oslo District Court accordingly seeks the EFTA Court's Advisory Opinion on the matter.

3 Relevant national legislation

3.1 Implementation of the EEA Agreement and Directive 2014/24/EU in Norwegian law

Directive 2014/24/EU (the Public Procurement Directive) has been implemented in Norwegian law by Act No 73 of 17 June 2016 on public procurement ("the Public Procurement Act") (*lov av 17. juni 2016 nr. 73 om offentlige anskaffelser (anskaffelsesloven)*) and Regulation No 974 of 12 August 2016 on public procurement ("the Public Procurement Regulation") (*forskrift av 12. august 2016 nr. 974 om offentlige anskaffelser (anskaffelsesforskriften)*).

The following provisions of the Public Procurement Regulation are particularly relevant to the case before the Oslo District Court:

- Section 2-4(h) of the Public Procurement Regulation, which provides that "*[t]he Public Procurement Act and the Regulation shall not apply to contracts for (h) services involving exercise of official authority which are exempt from the EEA Agreement under Article 39, read in conjunction with Article 32.*"
- Section 30-2a of the Public Procurement Regulation, referred to as the legal basis for reservations (so called *reservasjonshjemmelen*), see part 3.2 below.

3.2 The national provision allowing tendering procedures to be reserved for non-profit organisations – Section 30-2a of the Public Procurement Regulation

3.2.1 The provision and its background

In Section 30-2a of the Public Procurement Regulation, a separate provision is included, giving contracting authorities the possibility of reserving tendering procedures for health and social services for non-profit organisations. The provision was added to the Public Procurement Regulation, which entered into force in February 2020, and is worded as follows:

> *(1) Contracting authorities may reserve the right to participate in tendering procedures for health and social services (as stated in Annex 3) to non-profit organisations if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency.*
>
> *(2) Non-profit organisations shall not have a return on equity as their main objective. They shall endeavour solely for a social objective for the good of the community and reinvest any profits in activity that fulfils the organisation's social objectives. A non-profit organisation may, to a limited extent, engage in commercial activity that supports the business's social objectives.*
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> *(3) Notice of the tendering procedure shall refer to this provision.*

In the Norwegian Government's consultation paper relating to the provision, it was, inter alia, stated the following about the background for it:

> *The Government has a wish to facilitate matters so that non-profit operators are able to offer health and social services and that tendering procedures for procurements of such services may be reserved for those operators. That wish is connected with the non-profit organisations' qualities and character and the wish to preserve these. …*
>
> *The non-profit operators provide a value-add in the society and confer advantages on the society beyond the provision of the relevant health and social services. Non-profit organisations and businesses are concerned with the users' participation at the individual and system levels and have had a tradition of creating new services to offer. Non-profit organisations also have a culture of cooperating with other operators and of making use of volunteers. This entails that the users, in certain service areas, are followed-up through different offers and forms of contact, including after the provision of services. That access to follow-up, activities and social community makes the transition from an institutional setting to daily life capable of building on the rehabilitative effect after the institutional stay in a manner that prevents or postpones costly readmissions.*

Experience has shown that the non-profit operators have difficulty succeeding in traditional tendering procedures. The difficulties are, inter alia, linked to the non-profit providers' historical pension costs. Another reason is that it is difficult for a party ordering the services to be specific on the non-profits' qualitative advantages. This is linked to the fact that the non-profit operators confer qualitative and financial benefits on the society going beyond the benefits they generate in the provision of the specific service and falling outside the contracting authority's area of responsibility, which is thus difficult to weight in traditional tendering procedures. Societal benefits such as these are related to what is mentioned above, for example the fact that the non-profit operators reinvest their profits or contribute by means of volunteer follow-up of user groups, including after their stay at an institution.

Advantages and disadvantages of allowing reservations were also discussed in the consultation paper:

The possibility of making reservations is intended to safeguard non-profit organisations and the aforementioned particularities, which are considered to be at risk of being undermined in traditional tendering procedures. Non-profit operators are perceived as being important contributors to the provision of welfare services, in addition to the public sector and commercial operators. By facilitating the provision of good welfare services by non-profit operators, it is assumed that a greater breadth and variation will be created in the overall offer of welfare, a "welfare mix". This may also provide a more adapted range of services offered to different groupings in the society, which can contribute towards having a balanced and available range of high-quality health services offered. Greater freedom of choice, and thus greater co-determination for the users of publicly funded welfare services, will potentially be perceived as a societal asset.

On the other hand, the introduction of a provision in a regulation allowing for reserving tendering procedures for health and social services for non-profit operators will be a form of regulation that leads to less competition in the award of public contracts. The proposal will have negative consequences for commercial private industry operators who provide health and social services, as they will no longer be able to participate in certain tendering procedures. This may affect conditions of competition and economic adaptations by private providers.

The operators who benefit from the possibility of making reservations will potentially be able to obtain a monopolistic or oligopolistic advantage, which may lead to higher prices and poorer quality for the welfare services provided to society, compared to if they did not have such a competitive advantage. A lack of competition may also lead to the public sector's having to pay more for their contracts for the provision of health and social services, compared with whether the delivery is exposed to a competitive

pressure without the benefit of special advantages. This may ultimately lead to a greater burden for taxpayers. On the other hand, there will still have to be competition between the non-profit operators, with the result that the provision of services will nevertheless be exposed to a certain level of competitive pressure.

It is also pointed out that the provision is a "may provision" and that contracting authorities should consider whether a reservation is appropriate in the individual case.

3.2.2 The "non-profit organisations" requirement in Section 30-2a of the Public Procurement Regulation

The definition of non-profit organisations in the second paragraph of the provision does not impose any requirement of a specific organisational form, or that the services must be provided by volunteer/unpaid staff. In the consultation paper from the Government, it is, inter alia, stated the following concerning the determination of what a non-profit organisation is:

As regards the organisation's objectives, non-profit businesses differ from commercial businesses in that they do not have profit as an objective but that they rather have another basis for their business. Non-profit businesses thus have a business concept that goes beyond the production of services and is characterised by idealism because it is operated without financial motive and in order to alleviate social needs in the society or to provide assistance to certain vulnerable groups. The organisation contributes, for example, to the pursuance of a social objective and endeavours for the good of the society. When assessing what the organisation's objectives are, the objectives laid down in its articles of association may offer some guidance. However, statements about objectives in the articles of association are not sufficient on their own to establish an organisation as non-profit, and its essence as a non-profit must be determined specifically in the individual case. The proposal for the definition indicates that the organisation's efforts must be directed solely at the social objective. This means that if the organisation offers services on the market other than health and social services, that activity must be limited and support the performance of the non-profit business by profits' not being taken out of the organisation. …

As regards any "profits", the key point is that profits or available resources must not be directed from the non-profit business to members, owners or anyone else, beyond what is required to cover operating costs. The business must be organised in such a way that it is independent of financial interests, and any earnings derived from the organisation's operations must therefore be reinvested in social objectives that are consistent with the business's objectives.

3.2.3 Further requirements for making use of the possibility of making reservations

Section 30-2a (1) provides that it is a requirement that the reservation must "*[contribute] to the attainment of social objectives, the good of the community and budgetary efficiency*".

In the consultation paper it is mentioned that the contracting authorities must undertake an overall assessment in each case. Further, it is, inter alia, stated the following:

> *The assessment that the contracting authority must undertake relates not only to benefits of using non-profit operators in the specific procurement in the narrow sense, but also to how the use of the non-profits can contribute towards ensuring service quality and attaining social objectives, the good of the community and budgetary efficiency more generally. …*
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> *The Ministry sees it as a fundamental requirement that the service in question for which the tendering procedure is to be reserved must relate to health and social services intended to contribute to social purposes and be founded on the principle of solidarity. This will include services regulated by legislation in relation to which a public authority is required to take care of a specified range of services being offered …*

The following is stated in the consultation paper regarding the requirement of budgetary efficiency:

> *There is accordingly a presumption that non-profit operators contribute to budgetary/economic efficiency, economise on resources for the State and avoid waste, provided that they do not operate with a profit-making objective and direct any profits back towards the services or social objectives.*

3.3 Other relevant national provisions

3.3.1 The municipalities' responsibility for offering health and care services – the Health and Care Services Act

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

Point (6)(c) of Section 3-2(1) of the Health and Care Services Act provides that municipalities' responsibilities encompass, inter alia, offering "*place[s] in institutions, including nursing homes*". Section 3-2 a of the Act lays down more detailed rules on

municipalities' responsibility for offering places in nursing homes or equivalent housing specifically designed for day and night services.

Section 3-1(5) of the Health and Care Services Act provides that the necessary health and care services are subject to the responsibility of the municipalities, as they "*may be provided by the municipality itself or through an agreement concluded by the municipality and other public or private service providers*".

Under Section 11-1 of the Health and Care Services Act, the individual municipality must cover the costs of the services for which it is responsible under the Act, including places in nursing homes. Section 11-2 of the Act nevertheless allows the municipalities to charge a fee to patients and users for care from the municipality's health and care service, including private businesses who operate pursuant to an agreement with the municipality, where provided for by law or regulation. More detailed rules for charging a fee (co-payment by the user) (*egenandel*) are laid down in Regulation No 1349 of 16 December 2011 on co-payments for municipal health and care services (*forskrift av 16. desember 2011 nr. 1349 om egenandel for kommunale helse- og omsorgstjenester*).

Section 1 of that regulation provides that the municipality may charge a "co-payment" for a stay in an institution, including a nursing home, when the municipality covers all or part of the expenses of staying at such an institution, or has provided security for the stay. The maximum amount of the co-payment for long-term stays at an institution is laid down in Section 3. The co-payment must not exceed the actual costs of the stay. Within that framework, the municipality may charge a co-payment equal to 75% of the patient's/user's income up to the National Insurance basic amount (*grunnbeløpet*) (NOK 106 399), reduced by an allowance (*fribeløp*) of NOK 9 100 per year, and up to 85% of the income exceeding the National Insurance basic amount. In 2020, the distribution of public financing and the residents' co-payments were around 80% and 20%, respectively.

3.3.2 The possibility of providing coercive health care – the Patient and User Rights Act

Chapter 4A of Act No 63 of 2 July 1999 on patient and user rights ("the Patient and User Rights Act") (*Lov av 2. juli 1999 nr. 63 om pasient- og brukerrettigheter (pasient- og brukerrettighetsloven)*) regulates the possibility of providing health care to persons without legal capacity to give consent who are opposed to that health care. The objective is to ensure that necessary health care can be provided in order to avoid serious harm to health and prevent and limit the use of coercion.

The term "health care" means "*any act that has a preventive, diagnostic, therapeutic, health-preserving, rehabilitative or nursing and care objectives and that is performed by health personnel*", see Act No 64 of 2 July 1999 on Health Personnel ("the Health Personnel Act") (*lov av 2. juli 1999 nr. 64 om helsepersonell mv. (helsepersonelloven)*). The term "health personnel" encompasses both personnel holding an authorisation or licence (including

medical practitioner and general nurse) and personnel in the health and care service and pupils and students in training as health personnel who provide health care, see Section 3 of the Health Personnel Act.

Section 4A-3 of the Patient and User Rights Act lays down the requirements for providing health care that the patient opposes to. Under Section 4A-4, if the requirements of Section 4A-3 are fulfilled, health care may be carried out by force or by using other measures to avoid resistance from the patient. The provision sets out examples such as that the patient may be held back in a health institution if necessary in order to get the health care, and that measures restraining the patient's movement may be applied. Coercive health care is to be assessed on an ongoing basis and stopped immediately once the requirements of the Act are no longer met.

Decisions on health care under Chapter 4A may be adopted for up to one year at a time by the health personnel who is "*responsible for the health care*", see Section 4A-5. The relevant State official is the supervisory authority and may reverse a decision to administer coercive health care following a complaint or on the State official's own initiative.

4 Relevant facts

4.1 The parties

Stendi AS is Swedish-owned and part of the Ambea Group that provides care-related services in Norway, Sweden and Denmark. Norlandia Care Norge AS is part of Norlandia Health & Care Group AS, which is a group providing care and welfare services and is also engaged in real property development in Norway, Sweden, Finland, the Netherlands, Germany and Poland.

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

4.2 More details on the procurement

The main proceedings concern the procurement by the Municipality of Oslo of long-term leasing and service agreements for up to 800 new, long-term places in nursing homes. The call for tenders was published on 25 November 2020. The procurement consists of two parts: a *real estate part* consisting of long-term leasing agreements (30+ 10 years) for nursing home buildings, and a *services part* consisting in contracts (8 + 1 + 1 years) for the provision of nursing home services in the form of management of up to 800 long-term psychiatry- and somatic-related places.

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

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

The tender specifications stipulate that the provider of nursing home services must be a non-profit organisation as defined in Section 30-2a(2) of the Public Procurement Regulation. The contracts for nursing home services are reserved for non-profit operators on the basis of Section 30-2a of the Public Procurement Regulation and Section 2-4(h) on services involving exercise of public authority.

The procurement is being administered as part of the municipality's obligation under the Health and Care Services Act to ensure the provision of necessary health and care services, including places in nursing homes, to the residents of the municipality. Oslo municipality has adopted political objectives of increasing the use of non-profit operators for the provision of such services.

4.3 More details on the long-term places in Oslo municipality's nursing homes (long-term care homes)

4.3.1 Agreements with private service providers for the operation of municipal nursing homes

The long-term nursing homes that are part of the nursing home services offered by Oslo municipality are operated partly by the municipality itself and partly using private service providers under agreements with the municipality. As of March 2022, 19 of a total of 37 long-term nursing homes were being operated by the municipality itself, whilst the remaining 18 were being operated by private operators under contracts. Of the 18 privately-operated nursing homes, [16] were operated by non-profit organisations and two by commercial operators (the plaintiffs). The two contracts with commercial operators (the plaintiffs) were concluded prior to the current political decisions on increased non-profit operation in the health and care sector and expire in 2022/2023.

Oslo municipality imposes the same minimum requirements for and monitors the quality of the nursing home services, irrespective of whether they are provided by private operators or the municipality itself. The municipality requires, inter alia, that the services must fulfil all requirements provided for by law or regulation, and also Oslo municipality's own adopted

substantive- and quality-related requirements for nursing homes and residential solutions providing day and night nursing and care.

4.3.2 Places and residents in long-term care homes

There are different types of long-term places in nursing homes. The main distinction is drawn between *somatic and psychiatry places*. The psychiatry-related places are for patients whose main diagnosis is a psychiatric illness. The somatic-related places are occupied by patients with corporeal (physical) afflictions/illnesses and cognitive impairment and can in turn be divided into ordinary places and different types of shielded and reinforced places with adapted monitoring and care.

It is an objective that as many as possible of Oslo's inhabitants, by means of accommodation at home, shall be given the opportunity to live in their own homes for the duration of their lives. A consequence of this is that only the most seriously ill elderly persons are offered a long-term place in the municipality's nursing homes. Residents at Oslo municipality's nursing homes are on average around 85 years old, and roughly 85% of them have been found to be suffering from cognitive impairment/varying degrees of dementia. That proportion is expected to increase further in the coming years.

4.4 The extent of coercive health care in Oslo municipality's nursing homes

Since 2014, the Nursing Home Agency and Oslo municipality have kept statistics on the number of formal decisions on coercive health care taken by health personnel in municipal nursing homes, pursuant to Chapter 4A of the Patient and User Rights Act. Those statistics show that, in 2021, 221 decisions (for 200 residents/patients) were taken on coercive health care, whilst in 2020, 2019 and 2018 respectively there were 198, 187 and 196 decisions taken on coercive health care.

As explained above, a decision on coercive health care may be adopted for up to one year at a time. For decisions spanning a longer period of time, it may be necessary to exercise the relevant form of coercive health care frequently, e.g., on a daily basis. Hence, the number of formal decisions does not in itself indicate the frequency with which employees at the nursing homes perform coercive health care pursuant to the decisions.

The municipality has received signals to the effect that the administrative burden of adopting formal decisions on coercive health care may lead to a situation where there is some degree of coercive health care performed even in the absence of a decision. The municipality shall return to this point in its discussion of the proceedings going forward before the national court.

5 The parties' EEA law submissions

5.1 The principal aspects of the plaintiffs' EEA law submissions

5.1.1 Whether the procurement comes within the concept of "services"

The plaintiffs submit that the services being procured come within the concept of "services" as set out in Article 37 EEA, and hence also within the concept of "services" as set out in point (9) of Article 2(1) of the Public Procurement Directive.

In support of its submission, the [plaintiffs] refer to the judgments of the European Court of Justice and EFTA Court in C-263/86 *Humbel*, E-13/19 *Hraðbraut* and E-5/07 *Private Barnehagers Landsforbund*. In those three cases related to the education sector, however, public and private schools and municipal kindergartens received various forms of financial subsidies from public budgets in order to be part of the public's offer of school and kindergarten services to the population. The subsidy was financed directly from public budgets and not a market-based remuneration for a detailed-regulated contractual performance. Instead, those schools and kindergartens operated their activities in accordance with public law and planning framework governing the substantive content of the school and kindergarten services offered.

The situation is different for the services at issue in the main proceedings. There, the defendant shall pay a genuine and market-based remuneration determined through a reserved or open tendering procedure. In the absence of external provisions of services, the defendant would have to produce those services itself, with the accompanying costs. In that sense, the defendant has an obvious financial interest in the contractual services furnished by the providers. On this background, it cannot be decisive:

- that the municipality's payment of remuneration is financed through funds granted from public budgets;

- that nursing home residents – as the ultimate "end users" benefiting from the services procured by the defendant – only pay a co-payment that is not a market-based remuneration, and hence does not necessarily reflect the true cost of providing the service; or

- that, by offering nursing home services to its residents, the municipality does not intend to engage in gainful activity, but is merely fulfilling its obligations under public law legislation towards its residents.

In support of their submissions, the plaintiffs also refer to Case C-281/06 *Jundt*, paragraphs 28 to 31, where the last paragraph is of particular interest.

5.1.2 The exception in Article 32 EEA for the exercise of official authority

5.1.2.1 Principal submission

The plaintiffs submit principally that, once a service provider (or a category of service providers) have been granted access to an "*activity*" that allegedly involves "*exercise of official authority*", Article 32 EEA may not be relied on to discriminate against that service provider as compared to other service providers or other categories of service providers as regards the framework conditions for the exercise of that "*activity*" to which the service provider already long ago was granted access to.

In the main proceedings, the discrimination lies in reserving certain procurements for one category of service providers ("non-profit organisations") whilst excluding another category of service providers (commercial providers) from reserved procurements, even though both categories of service providers have for many years had and will continue to have access to the "*activity*", that is to say, contracts for the provision of nursing home services, including the aspect that health personnel working for both non-profit and commercial providers have equal authority to administer coercive health care, subject to certain conditions. To the extent that the defendant, under the current political management, does not wish to award any more contracts for nursing home services to commercial providers, other contracting authorities continue to award contracts for nursing home services with comparable coercive powers to commercial providers.

That Article 32 EEA cannot be used to justify discriminatory framework conditions for different categories of service providers long after the relevant category of service providers have been given access to the "*activity*" and the alleged exercise of official authority can be inferred from Case 152/73 *Sotgiu* (paragraphs 4 and 6) and Case 225/86 *Commission* v *Italy* (paragraph 11 and the Advocate General's Opinion in point 27 in fine [sic]).

Both the European Court of Justice's case-law and legal theory suggest that Article 28(4) and Article 32 pursue the same purposes and must be construed identically in so far as appropriate. Thus, the fact that *Sotgiu* concerned the EU Treaty provision corresponding to Article 28(4) EEA does not lessen the transferability of the reasoning in *Sotgiu* to the facts of the present case.

The reasoning in *Sotgiu* must also apply for discrimination not based on nationality. This can logically be inferred from Case C-438/08 *Commission* v *Portugal*, where the European Court of Justice held that, since Article 31 EEA [Article 43 EC] also encompasses restrictions not based on nationality, then the exception under Article 32 EEA [Article 45 EC] must also encompass measures that do not discriminate on the basis of nationality. In turn, the logical implication of this is that the narrowing of the scope of the exception in Article 32 indicated by the reasoning in *Sotgiu* must also extend to discrimination not based on nationality between different categories of economic operators.

The reasoning in *Sotgiu* also confirms that, in the determination of whether Article 32 EEA applies, one cannot merely examine the nature and substantive content of the alleged exercise of official authority. Reliance on Article 32 EEA must also be subject to a "consistency check" in the manner prescribed in paragraph 4 of the judgment in *Sotgiu*. In other words, the exception in Article 32 cannot be viewed as a purely objective limitation of the scope of the EEA Agreement beyond the competence of judicial review of the courts and the EU/EEA surveillance bodies, as the defendant seems to argue. It should also be noted in that connection that the question of the application of Article 32 to a given "*activity*" arises only if the reliance on Article 32 entails a restriction on the principle of equal treatment/freedom of establishment or the Public Procurement Directive. Only then must it be determined whether Article 32 can justify the restriction in question. As far as the plaintiffs are aware, the European Court of Justice is yet to conclude that there has been an exercise of official authority in the cases that have been before it.

5.1.2.2 Submission put forward in the alternative

In the alternative, the plaintiffs submit that the authorised use of coercive health care that may occur at Norwegian nursing homes is not as qualified, extensive and frequent to fulfil the European Court of Justice's strict criteria for the application of Article 32.

That the relevant use of force cannot be considered to be qualified can, inter alia, be inferred from the fact that it is the health personnel working for the service provider who are given the competence to exercise forced health care, in the service provider as the contracting authority's contractor[sic]. This applies irrespective of whether or not the provider is "non-profit". In other words, the authority to administer coercive health care is conferred on authorised health personnel pursuant to relevant sectoral legislation and does not derive from the contractual relationship between a supplier and contracting authority. Any decisions on the use of coercive health care are taken by authorised health personnel, autonomously and on the basis of the conditions laid down in the law and professional health care assessments.

Thus, in accordance with paragraph 47 in Case 2/74 *Reyners*, the alleged exercise of official authority by the health personnel's powers to administer coercive health care is considered separable from the nursing home service providers' contractual services provided to the defendant and other contracting authorities. Only the health personnel's "*activity*" may potentially be directly and specifically connected with the alleged exercise of official authority, see *Reyners*, paragraph 45. Otherwise, the exception in Article 32 that is relied on would be given "*a scope which would exceed the objective for which this exemption clause was inserted*", see *Reyners*, paragraph 43.

Viewed in relation to the number of nursing home places and bed days, very few decisions on coercive health care are adopted. In Case C-47/02 *Anker* (paragraph 63) it is stated that "[i]t is also necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities." With support from legal theory, the plaintiffs submit that the view taken in *Anker* is fully transferable to Article 32, even though *Anker* concerned the derogation for workers under Article 28(4) EEA [Article 39(4) EC], and

even though the wording of Article 32 EEA [Article 45 EC] contains the terms "even occasionally".

5.1.3 The legal basis for reservations in Section 30-2a of the Public Procurement Regulation

5.1.3.1 Principal submission

The plaintiffs submit principally that the reservation for non-profit organisations is an unjustified infringement of the principle of equal treatment/freedom of establishment. The plaintiffs submit that the new Public Procurement Directive has had an influence on the relationship between the Public Procurement Directive and primary law. The new Public Procurement Directive abolished the former directive's distinction between so-called prioritised (Annex II A services) and unprioritised (Annex II B services) services and introduced a separate chapter with specific rules for "*social and other specific services*" (Articles 74 to 77 of the Public Procurement Directive), and also specific legal bases for reservations in Articles 10(h) and 77. In paragraph 8 of the judgment in *Spezzino*, it is observed that the form of "emergency ambulance" services at issue in that case would have come within the scope of Article 10(h) of the at that point adopted new Public Procurement Directive 2014/24.

In the chapter on health and social services, Article 76 provides not only that the EEA States "*shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators*", see Article 76(1). Article 76(2) confirms that the substantive requirements for the services (requirement specification) and the service providers (qualification requirements and award criteria) may be drawn up in such a way that qualitative and social, non-economic considerations are safeguarded to the extent desired by the contracting authority. The award criteria may be drawn up in such a way that greater weight is accorded to qualitative considerations than to price. If desirable, a fixed price may be set for the provision of the services, so that the providers compete solely on the basis of such qualitative and social considerations as listed in Article 76(2). With the flexibility and opportunity to attach weight to qualitative and social considerations as confirmed by Article 76(2), the plaintiffs do not see how a requirement to be a "non-profit organisation" can be justified. Such a requirement will not, for example, have a sufficient connection to the subject-matter of the contract. The requirement that an award or qualification criterion must have a sufficient connection to the subject-matter of the contract derives precisely from the principle of equal treatment.

In the light of Article 76(1) and (2), specific reference is also made to Articles 18 and 19 of the Public Procurement Directive. Article 18 of the Directive sets out the general principle of equal treatment and, the first paragraph provides specifically that procurements must not be designed to narrow the competition artificially. Article 19 lays down a broad-ranging definition of "*economic operator*", under which, inter alia, participation in public

procurements may not be made contingent on factors such as legal corporate form or structure. Specific reference is made in that connection to Case C-219/19 *Parsec*, which confirms that discrimination as between "*economic operators*" may not be based on wholly general presumptions to the effect that certain categories of "*economic operators*" have certain qualities not possessed by other categories.

The plaintiffs submit that this aspect from *Parsec* is entirely applicable also to procurements of health and social services contracts. Both since Articles 18 and 19 of the Public Procurement Directive also apply to health and social services contracts (together with Articles 74 to 77), and since the doctrine of justification's requirements of proportionality based on appropriateness, consistency and necessity also apply in respect of restrictions/infringements of the principle of equal treatment in connection with procurements of health and social services contracts, see, inter alia, Case C-169/07 *Hartlauer* (paragraphs 29, 30, 41, 44 to 63).

Following the introduction of the new Public Procurement Directive, it would be disproportionate to operate with "non-profit" as a qualifying criterion. The considerations relied on as justification for the legal basis for reservations may be safeguarded sufficiently through award criteria based on Article 76(2) applied in procurements open for all "*economic operators*". In other words, the plaintiffs submit that the introduction of the new Public Procurement Directive has narrowed the "fairness discretion" of the principle of equal treatment/primary law, with the result that there is no longer any room left for national specific exceptions such as allowed by Section 30-2a of the Public Procurement Regulation.

5.1.3.2 Submission put forward in the alternative

In the alternative, the plaintiffs submit that, even if *Spezzino* and *CASTA* still express the prevailing state of the law (contrary to the plaintiffs' principal submission), the criteria for reservations as set out in *Spezzino* and *CASTA* are in any event not fulfilled.

The foregoing discussion of relevant national legislation indicates that contracting authorities may base themselves on general presumptions about satisfying the criteria for making reservations. For the procurement at issue in the main proceedings, the defendant's tender specifications do not provide any justification for why the defendant potentially considers that relevant criteria are met.

Spezzino and *CASTA* require, however, that favouring "*voluntary associations[.] must actually contribute to*" the safeguarding of the allegedly legitimate considerations being relied on, including "*budgetary efficiency*". Moreover, in *Spezzino*, it was held that the awarding of the ambulance service contracts in question to "*voluntary associations"* "*may help control costs relating to those services*", since it is a requirement that the voluntary organisations that are favoured "*do not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide [the services]*".

This puts the "*budgetary efficiency*" requirement set out by the European Court of Justice in *Spezzino* and *CASTA* directly at odds with the acknowledgement in the preparatory works for the regulation that the use of the possibility of making reservations "*may lead to higher prices and poorer quality for the welfare services provided to society*" (referred to above). The limitation on "*commercial activity*" provided for by the wording of Section 30-2a(2) of the Public Procurement Regulation also seems to be of little practical importance for Norwegian non-profit organisations. As stated above, it is not a requirement that the performance of the contract shall be based on voluntary/unpaid labour at all. Rather, non-profit providers are permitted to include a calculation for a profit for themselves from the contracts with public contracting authorities. Extensive related commercial activity, usually in the form of real property investments, is also permitted. In reality, there is nothing distinguishing Norwegian non-profit organisations from commercial providers, other than the requirement in Section 30-2a(2) of the Public Procurement Regulation that any profits must be reinvested. The actual situation for Norwegian "non-profit organisations" is thus fundamentally different from the stringent conditions imposed on Italian "*voluntary organisations*" in *Spezzino* and *CASTA*. With reference to the Public Procurement Regulation's requirement that reservations must contribute to the attainment of "*social objectives*" and "*the good of the community*", it is observed that there is no proof for qualitative differences between "non-profit" and other providers (see above).

Hence, in the plaintiffs' submission, the criteria for reservations as set out in *Spezzino* and *CASTA* are in any event not fulfilled, neither for the legal basis for reservations in Section 30-2a of the Public Procurement Regulation nor the actual procurement at issue in the main proceedings. Thus, in connection with public procurements of health and social contracts as well, restrictions infringing the principle of equal treatment and primary law will be subject to a genuine proportionality test, see the reference above to *Hartlauer*.

5.2 Principal aspects of the defendant's EEA law submissions

5.2.1 Whether the procurement comes within the concept of "services"

The municipality submits principally that the relevant services in the form of nursing home operation covered by the procurement at issue in the main proceedings, does not come within the scope of the Public Procurement Directive or the provisions of the EEA Agreement on freedom of establishment and freedom to provide services. In the municipality's view, the contracts for nursing home operation concern "non-economic services of general interest", which, according to recital (6) in the preamble to the Public Procurement Directive, falls outside the scope of that directive.

The municipality submits that the criteria set out by the EFTA Court in the judgment in Case E-13/19 *Hraðbraut* paragraphs 90 – 93 can be applied to establish that also in the present case there are no contracts pertaining to (economic) "services" for the purposes of the Public Procurement Directive, see point (9) of Article 2(1) of the Public Procurement Directive. In

that case, the EFTA Court ruled on whether three contracts between public education authorities in Iceland and private schools offering upper secondary education constituted "service contracts" under the Directive. The EFTA Court applied the criteria derived from, inter alia, *Humbel* and *Private Barnehagers Landsforbund* and concluded that the contracts did not concern "services" and were thus not "service contracts". The decisive factors for the EFTA Court were that the services were funded predominantly from the public and that the Icelandic authorities' objective in establishing and maintaining the public education system was not to engage in profit seeking activity, but rather to fulfil its educational obligations towards its population.

The municipality submits that the legal principles applied by the EFTA Court in Case E-13/19 *Hraðbraut* must apply equally to other welfare services than educational services, having the same characteristics. According to relevant case-law, the reason why this type of service is "non-economic" is not solely because it concerns education, but rather is attributable to the organisational and financial framework for the services.

In Oslo municipality's view, EEA case-law other than the judgment in Case E-13/19 *Hraðbraut* does not preclude an interpretation of the notion of "services" in point (9) of Article 2(1) of the Public Procurement Directive in the manner suggested by the municipality. It is observed, inter alia, that the European Court of Justice's judgment in Case C-281/06 *Jundt* was not considered an impediment for either the European Court of Justice's judgment in Case C-74/16 *Congregación* or the EFTA Court's judgment in *Hraðbraut.*

The nursing home services in the main proceedings have the same characteristics as the educational services discussed in the case-law and are, on average, over 80% publicly financed.

5.2.2 The exception in Article 32 EEA for exercise of official authority

Oslo municipality submits that the exception in Article 32 EEA, read in conjunction with Article 39, for "*activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority*" applies to the contracts relating to nursing home services in the main proceedings. Hence the contracts are not reviewable in the light of the provisions of the EEA Agreement on freedom of establishment and freedom to provide services.

Article 32 EEA, read in conjunction with Article 39, is an autonomous provision providing an exception that restricts the scope of both the EEA Agreement's rules on freedom of establishment and freedom to provide services and the Public Procurement Directive (the latter arising from the former provisions). In the municipality's view, a necessary consequence of this is that the public contracting authority's choice relating to the completion of a procurement falling within the scope of the exception may not be the subject-matter of a review under EEA law or a "consistency check". In the municipality's view, the European

Court of Justice's judgment in Case 152/73 *Sotgiu* may not be applied to the facts of the present case.

The municipality submits that the activity at the municipal nursing homes must be considered "*directly and specifically connected*" with a "*sufficiently serious*" exercise of official authority. Subject to detailed requirements, health personnel in nursing homes have authority to take decisions on and implement coercive health care in relation to the residents. The power to administer coercive health care forms part of the core of the exercise of official authority falling within Article 32 EEA, read in conjunction with Article 39. Taking a decision on and implementing coercive health care is an integral part of the activity at nursing homes and an integral part of the subject-matter of the contract when the municipality concludes contracts with private operators for the provision of nursing home services on behalf of the municipality, see, by way of comparison, Case 2/74 *Reyners*.

The municipality submits that the quantitative standard for exercise of official authority to come within the scope of Article 32 EEA, read in conjunction with Article 39, must be based on a natural reading of the wording of the provision, on "occasional" exercise, that is to say, "from time to time" or "now and then". There is no case-law supporting the position that the more stringent quantitative requirement that the European Court of Justice has set out for the exception in Article 28(4) EEA [Article 39(4) EC], see Case C-47/02 *Anker*, is to apply equally to Article 32 EEA [Article 45 EC], read in conjunction with Article 39 – contrary to the wording of the latter provision. The municipality is however of the view that the coercive health care provided in its nursing homes is sufficient in scope, irrespective of which quantitative standard is applied.

5.2.3 The legal basis for reservations in Section 30-2a of the Public Procurement Regulation

Oslo municipality submits that the reservation of the procurement of nursing home services for non-profit organisations in the main proceedings is not contrary to the Public Procurement Directive or Articles 31 and 36 EEA. In the municipality's view, Section 30-2a of the Norwegian Public Procurement Regulation, which is the legal basis for the reservation, is consistent with the discretion under EEA law deriving from the Public Procurement Directive and the specific regime for social and other specific services (Articles 74 – 77 of the Directive, "the light regime"), and Articles 31 and 36 EEA. Furthermore, the national definition of "non-profit organisations" is in line with the substantive content given to the notion of "non-profit organisations" in the European Court of Justice's case-law, as are the stated requirements for reservations. Lastly, the municipality submits that the specific decision to reserve the nursing home services in the procurement in the main proceedings for non-profit organisations complies with the requirements of Section 30-2a of the Public Procurement Regulation and EEA law.

In Oslo municipality's view, the question of the compatibility under EEA law of the legal basis for reservations in Section 30-2a of the Public Procurement Regulation must be assessed

on the basis of the general parameters for EEA States' discretion in Article 76 of the Public Procurement Directive. Oslo municipality submits that the legal basis for reservations is in conformity with Article 76, at least as regards nursing home services, see the European Court of Justice's judgment in Case C-70/95 *Sodemare*.

The municipality is of the opinion that the Public Procurement Directive must not generally be regarded as a "total harmonisation directive", but rather viewed as a "minimum harmonisation directive". Especially as regards "the light regime" in Articles 74 – 77 of the Directive, the municipality submits that it is not reasonable to interpret Article 77 as exhaustively regulating the States' competence to introduce rules on contracts for health and social services on the basis of specific assessments. Nor is it appropriate to assume a strict interpretation of Article 76. This would not be compatible with the EEA States' discretion to decide themselves on the organisation and funding of their welfare services, as recognised in EEA case-law.

Article 76(1) of the Public Procurement Directive provides that national provisions on the award of contracts for health and social services subject to "the light regime" must be in compliance with the principles of equal treatment and transparency. The national rules must also make it possible for public contracting authorities to take into account the specificities of the relevant services, including such considerations and quality objectives as referred to in Article 76(2).
Both Section 30-1 of the Norwegian Public Procurement Regulation and the legal basis for reservations in Section 30-2a are intended to contribute to the attainment of such quality objectives for welfare services as referred to in Article 76(2) of the Directive and recognised in EEA law as legitimate considerations in the field of welfare services. The latter includes, inter alia, the objective of having an adapted range of services offered to different groups in society, which in turn can contribute to having a balanced and available high-quality health service. National authorities consider that the services offered by non-profit organisations are important to achieve such central and overall qualitative objectives and it is accordingly desirable to retain the non-profit operators as contributors in the provision of health and social services. The legal basis for reservations in Section 30-2a of the Public Procurement Regulation was introduced as a principal means of fulfilling that wish, and it is intended to soften the challenges faced by non-profit organisations in succeeding in traditional (open) tendering procedures under the procurement rules. The mentioned objectives are acutely relevant for the nursing home services concerned by the reservation at issue in the main proceedings.

Reservations of tendering procedures for the provision of health and social services, including nursing home services, is a measure directed at non-profit organisations aimed to fulfil overall objectives related to the public's offer of welfare services to which non-profit operators contribute. Oslo municipality accordingly submits that commercial and non-profit providers

of the services are not in comparable situations. Thus, there is no infringement of the principle of equal treatment in Article 76(1) of the Public Procurement Directive.

In any event, in the municipality's view, any potential discrimination between commercial and non-profit providers must be considered an objectively justified and proportionate measure for attaining social and welfare policy objectives through the relevant services.

Lastly, the municipality submits that the principle of transparency in Article 76(1) of the Public Procurement Directive has also been complied with, since the tendering procedure at issue in the main proceedings was published in accordance with the Section 30-2a(3) of the Public Procurement Regulation, read in conjunction with Section 30-5.

6 Questions of interpretation referred to the EFTA Court

On this background, Oslo District Court requests the EFTA Court's answers to the following questions of interpretation relating to the parties' three principal submissions:

<u>On whether the procurement comes within or falls outside the concept of service:</u>

1. Is a contract for pecuniary interest providing for the provision of long-term places in nursing homes, the procurement of which is effected under the conditions described [in the request], to be regarded as a contract relating to the provision of "services" under point (9) of Article 2(1) of Directive 2014/24/EU?

<u>On the exception in Article 32 EEA for exercise of official authority:</u>

1. Is a public contracting authority's ability to rely on the exception in Article 32 of the EEA Agreement, read in conjunction with Article 39, affected by whether:

    a) the services in question have previously been the subject-matter of public service contracts between the contracting authority and both non-profit organisations and other (not non-profit) providers?

    b) other public contracting authorities in the same State still opt to conclude contracts for equivalent services with both non-profit organisations and other (not non-profit) providers?

    c) the power to take decisions to administer coercive health care in relation to persons without legal capacity to give consent who are opposed to that health care, is not placed directly with the contracting public authority's contractor, but rather with the health personnel working for the contractor?

2. How is the wording "*even occasionally*" in Article 32 of the EEA Agreement, read in conjunction with Article 39, to be construed?

On the reservation for non-profit organisations:

1. Do Articles 31 and 36 of the EEA Agreement and Articles 74 – 77 of Directive 2014/24/EU preclude national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for "non-profit organisations" on the terms laid down in the national legislative provision in question?

Oslo District Court

Eirik Aass
District Court Judge