# JUDGMENT OF THE COURT

10 December 2020*

*(Public procurement – Directive 2014/24/EU – Public service contract – Article 37 EEA – Notion of "services" – Upper secondary education)*

In Case E-13/19,

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 Public Procurement Complaints Committee (*Kærunefnd útboðsmála*) in a case pending before it between

**Hraðbraut ehf.**

and

**The Ministry of Education, Science and Culture,**

**Verzlunarskóli Íslands ses.,**

**Tækniskólinn ehf., and**

**Menntaskóli Borgarfjarðar ehf.,**

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, and in particular point (9) of Article 2(1) and Article 74 thereof,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur), and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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

- Hraðbraut ehf. (“Hraðbraut”), represented by Ólafur Haukur Johnson;

- Verzlunarskóli Íslands ses. (“the Commercial College”), represented by Ingi Ólafsson;

- Tækniskólinn ehf. (“the Technical College”), represented by Hildur Ingvarsdóttir;

- Menntaskóli Borgarfjarðar ehf. (“Borgarfjörður College”), represented by Bragi Þór Svavarsson;

- the Icelandic Government, represented by Jóhannes Karl Sveinsson, Brynja Stephanie Swan and Hrafn Hlynsson, acting as Agents;

- the Norwegian Government, represented by Kristin Hallsjø Aarvik, Magnus Schei and Janne Tysnes Kaasin, acting as Agents;

- the Spanish Government, represented by Sonsoles Centeno Huerta and Juan Rodríguez de la Rúa Puig, acting as Agents;

- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmsdóttir and Carsten Zatschler, acting as Agents; and

- the European Commission (“the Commission”), represented by Petr Ondrůšek and Luke Haasbeek, acting as Agents;

having received responses from Hraðbraut, represented by Ólafur Haukur Johnson; the Icelandic Government, represented by Jóhannes Karl Sveinsson, Brynja Stephanie Swan and Hrafn Hlynsson; the Norwegian Government, represented by Kristin Hallsjø Aarvik, Magnus Schei and Janne Tysnes Kaasin; the Spanish Government, represented by Sonsoles Centeno Huerta and Juan Rodríguez de la Rúa Puig; ESA, represented by Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmsdóttir and Carsten Zatschler; and the Commission, represented by Petr Ondrůšek and Luke Haasbeek, to the Measures of Organization of Procedure adopted pursuant to Article 49 of the Court’s Rules of Procedure (“RoP”) on 26 May 2020;

gives the following

## Judgment

## I Legal background

*EEA law*

1 Article 37 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*
>
> *'Services' shall in particular include:*
>
> *(a) activities of an industrial character;*
>
> *(b) activities of a commercial character;*
>
> *(c) activities of craftsmen;*
>
> *(d) activities of the professions.*
>
> *Without prejudice to the provisions of Chapter 2, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals*

2 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) ("the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 97/2016 of 29 April 2016 (OJ 2017 L 300, p. 49; and EEA Supplement 2017 No 73, p. 53) and is referred to at point 2 of Annex XVI (Procurement) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein, and Norway and fulfilled on 14 November 2016. The decision entered into force on 1 January 2017, and the time limit to implement the Directive expired on the same date.

3 Article 1 of the Directive, entitled "Subject-matter and scope", reads, in extract:

> *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.*

*…*

4 Article 2 of the Directive, entitled "Definitions", reads, in extract:

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

*…*

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

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

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

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

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

*…*

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

*…*

*National law*

5 Article 76(2) of the Constitution of the Republic of Iceland No 33/1944 (*Stjórnarskrá lýðveldisins Íslands nr. 33/1944*) ("the Constitution of Iceland") reads:

*The right to general education and suitable training shall by law be guaranteed to all.*

6 The Directive has been implemented in Iceland by way of Act No 120/2016 on Public Procurement (*lög nr. 120/2016 um opinber innkaup*) ("the Public Procurement Act").

7 Act No 92/2008 on Upper Secondary Education (*lög nr. 92/2008 um framhaldsskóla*) ("the Upper Secondary Education Act") applies to schooling at the upper secondary level.

8 Article 2 of the Upper Secondary Education Act concerns the role of upper secondary schools, which is to promote the all-round development of all pupils and their active participation in democratic society by offering studies suiting the needs of each pupil. Upper secondary schools shall prepare pupils for participation in working life and further studies. They shall strive to develop their pupils' proficiency in the Icelandic language, both spoken and written, reinforce their moral values, sense of responsibility, broadmindedness, initiative, self-confidence and tolerance, train them to apply disciplined, independent working methods and critical thinking, teach them to appreciate culture and encourage them to seek further knowledge.

9 Chapter III of the Upper Secondary Education Act is entitled "Other schools at the upper secondary level". Pursuant to Article 12, entitled "Accreditation", the Minister may grant accreditation to provide instruction at the upper secondary level. Such schools may operate as non-profit organisations, as companies limited by shares or take any other recognised legal form. The requirements for accreditation pertain, inter alia, to the role and objectives of the school; the school's governance and organisational structure; school curricula and study programme descriptions; teaching and learning arrangements; and qualification standards for academic staff. The accreditation of a school amounts to a confirmation that, at the time the accreditation is granted, the school is operated in compliance with the general conditions set out in the Upper Secondary Education Act and rules adopted pursuant to it. Article 12(3) of the Upper Secondary Education Act provides that accreditation under Article 12 entails neither a commitment to provide an accredited school with financial contributions from the State Treasury nor any responsibility for the school's obligations.

10 Article 32 of the Upper Secondary Education Act, entitled "Admission, right to education", provides, inter alia, that all those who have completed compulsory education, received equivalent basic education or reached the age of 16 shall have the right to be admitted to an upper secondary school. Article 32(2) of the Upper Secondary Education Act provides that each school is responsible for the admission of students, however, a contract between a school and the Ministry pursuant to Article 44 shall specify the obligations of an individual school regarding admission and the criteria used by that school for admitting students.

11 Article 43 of the Upper Secondary Education Act, entitled "Operational funding", reads:

> *Under this Act, operational funding for upper secondary schools receiving contributions under the Budget Act shall be provided by the State Treasury. Schools that receive contributions under the Budget Act include public upper secondary schools as well as any other upper secondary school with which the Minister concludes a service agreement to provide instruction at the upper secondary level, provided that it has been accredited pursuant to Article 12.*

*A separate contribution shall be provided under the Budget Act for each school. The Minister shall make proposals for budget contributions for each school to cover teaching costs and, where appropriate, the cost of other activities. Proposals shall be based on a calculation model laid down by the Minister in a Regulation. The calculation model shall be based on aspects including the projected number of students, the projected number of teaching hours, the study programmes offered, the costs resulting from the collective agreements of teachers and other staff, school housing, and any other factor judged relevant by the Minister.*

*Operational funding provided pursuant to the first paragraph is not intended to cover course, registration or enrolment fees collected, as the case may be, by other schools, including music schools, in relation to studies to be validated for credits at an upper secondary school. The Minister may, in a contract drawn up pursuant to Article 44, authorise upper secondary schools to enter into agreements regarding payments for such studies.*

12 Article 44 of the Upper Secondary Education Act, entitled "Contracts with upper secondary schools", reads:

*The scope of operation of upper secondary schools, to the extent to which they are funded through contributions from the State Treasury, shall be determined in the Budget Act.*

*Contracts signed between the Minister and individual upper secondary schools and having a period of validity of three to five years shall contain provisions on the key priorities for the school, its curriculum, the study programmes offered, teaching arrangements, evaluation and quality assurance, as well as any other matter as considered desirable by the parties. The implementation of such contracts shall be reviewed annually, including a revision of still valid contracts if deemed appropriate by the parties.*

*Service contracts signed with any party other than public upper secondary schools shall contain, in addition to the aspects listed in the second paragraph, provisions on students' legal status, the number of students, fees to be paid by students, and the cost of other services than those provided on the basis of the contract.*

13 Article 2 of Regulation No 426/2010 on the Accreditation of Private Upper Secondary Schools (*reglugerð nr. 426/2010 um viðurkenningu einkaskóla á framhaldsstigi*) ("the Regulation on accreditation") provides that the Minister may grant accreditation to private schools for providing education on the basis of the Upper Secondary Education Act and rules issued pursuant to that act.

14 Article 8 of the Regulation on accreditation, entitled “Financial Affairs”, reads:

> *Private schools cannot claim funding from public funds. If private schools receive a contribution of public funds, as decided by the Icelandic Parliament, a service contract shall be concluded between the Minister of Education and Culture and the school’s operator for the payment of financial contributions, as well as other conditions which the contribution is subject to in the opinion of the parties.*

## II Facts and procedure

15 The case before the Public Procurement Complaints Committee (“the Complaints Committee”) concerns a complaint by Hraðbraut alleging that contracts concluded separately between the Ministry of Education, Science and Culture (“the Ministry”) and the Commercial College, the Technical College and Borgarfjörður College were not put out to tender in accordance with the Public Procurement Act.

16 According to the request, the Ministry has concluded service contracts for upper secondary education with three privately operated colleges. The Commercial College, the Technical College and Borgarfjörður College have been granted accreditation to provide instruction at the upper secondary level in accordance with the Upper Secondary Education Act.

17 The Commercial College is a private institution and subject to Act No 33/1999 on Private Institutions that Engage in Commercial Activities (*lög nr. 33/1999 um sjálfseignarstofnanir sem stunda atvinnurekstur*). The Technical College, which is operated as a private limited liability company, is owned by Fisheries Iceland, the Federation of Icelandic Industries, *Samorka* (a federation of energy and utility companies) and the Reykjavík Craftsmen’s Association. Borgarfjörður College, which is operated as a private limited liability company, is owned by 157 shareholders, including the municipality of Borgarbyggð, which is the majority shareholder with 91.98 per cent of the share capital.

18 On 19 December 2012, the Ministry and the Commercial College signed a contract covering instruction at the upper secondary level. The term of the contract was from 19 December 2012 and, with extensions, until 31 December 2019. On 23 January and 18 March 2013, the Ministry concluded separate contracts with Borgarfjörður College and the Technical College, respectively, covering instruction at the upper secondary level. The term of these contracts was later also extended to 31 December 2019. All of the contracts have since been updated to take account of legislative amendments.

19 According to the Complaints Committee, the three contracts concluded by the Ministry with the Commercial College, the Technical College and Borgarfjörður College (“the private colleges”) are comparable. According to the contracts, the private colleges are to provide pupils and teachers with the necessary services and facilities customary for instruction for the upper secondary school leaving certificate, the commercial

examination and the matriculation examination. Further, the contracts provide that the private colleges are responsible for ensuring that services provided to the pupils are in compliance with requirements regarding quality and are in accordance with law.

20 As provided for in the contracts at issue, the private colleges receive a contribution from the Icelandic State for their operation on the basis of an allocation of funds determined by the Icelandic Parliament in each year's budget legislation. Further, the funding is based on information provided in the preparation of budget proposals and an estimate for the year submitted by the private colleges. Each year's contributions are paid to the private colleges in 12 equal monthly payments. The private colleges submit a half-yearly statement to the Ministry together with audited accounts for the previous year.

21 The private colleges have received between 78 and 95 per cent of their income by way of public funding. The annual amount of such funding to each individual college ranged from approximately ISK 170 million to approximately ISK 3 437 million. Under the contracts at issue before the Complaints Committee, the private colleges must ensure that their income and expenses are proportionate. Income arising in connection with the contracts must be spent solely on services covered by the contract.

22 On 20 December 2018, the Complaints Committee received a complaint from Hraðbraut alleging that the contracts between the Ministry and the private colleges had not been put out to tender in accordance with the Public Procurement Act.

23 In its complaint, Hraðbraut seeks an order requiring the Minister to ensure that tenders are invited for the contracts at issue as soon as possible in accordance with the Public Procurement Act. Alternatively, the complainant seeks an order that the Minister bear financial liability. Furthermore, Hraðbraut requests that the Complaints Committee provide its opinion on whether the Ministry is liable for damages. Hraðbraut also seeks to recover costs incurred due to the proceedings.

24 By letter of 26 November 2019, the Complaints Committee informed the parties that it was considering seeking an advisory opinion from the Court as to whether State contributions to upper secondary schools under service contracts entailed an obligation to put such contracts out to tender under the Directive.

25 In these circumstances, the Complaints Committee took the view that resolution of the dispute before it depended on the interpretation of EEA law. The Complaints Committee thus decided to stay the proceedings and refer questions to the Court for an advisory opinion. The request, dated 18 December 2019, was registered at the Court on 23 December 2019.

26 The following questions were referred to the Court:

> 1. *Is a contract into which a ministry enters with an entity that is licensed to operate as an upper secondary school, by which the entity in question undertakes to provide pupils and teachers with services and facilities that are customary at the upper secondary level, and in which allowance is made for*

*financial contributions, to be considered as a public service contract in the sense of Directive 2014/24/EU (cf. in particular, Article 2(9))?*

2. *Do services of the type described in Question 1 constitute social services or other specific services in the sense of Article 74 of Directive 2014/24/EU, and if so, should the provisions of Chapter I of Title III of the Directive apply regarding the procurement regime?*

3. *Is it of significance, for the resolution of Questions 1 and 2, whether consideration for the services in question is determined in budget legislation from the Icelandic Parliament or in accordance with a decision by a minister on the basis of applicable domestic law and rules?*

4. *Is the Minister of Education, Science and Culture obliged to apply a procurement procedure based on Directive 2014/24/EU regarding the procurement of services covering the operation of schools and instruction at upper secondary level in return for financial contributions?*

27 On 4 May 2020, the Court informed the parties to the main proceedings and other interested parties that it intended to dispense with the oral hearing in light of the exceptional public health situation resulting from the outbreak of COVID-19. In the absence of an oral hearing, in order to provide the fullest possible opportunity to present arguments before the Court, parties would be provided with the opportunity to supplement the written procedure in response to Measures of Organization of Procedure prescribed in accordance with Article 49 RoP. The parties were given until 11 May 2020 to request a remote oral hearing. An extension of that deadline until 18 May 2020 was granted following a request by the Norwegian Government. None of the parties requested an oral hearing within the prescribed time limit.

28 On 26 May 2020, the Court decided to dispense with the oral hearing and adopted Measures of Organization of Procedure ("MoP") with an invitation to the parties to supplement the written procedure, in the absence of an oral hearing. The Parties were invited as follows:

*1. If necessary, please summarise the position in your written submissions.*

*2. Please give your views on the arguments set out in the other Written Observations submitted to the Court.*

29 The deadline to respond to the MoP expired on 22 June 2020. The Court received responses from Hraðbraut, the Icelandic Government, the Norwegian Government, the Spanish Government, ESA and the Commission.

## III Answer of the Court

*Observations submitted to the Court*

Hraðbraut

30 In its written observations, Hraðbraut asserts that the Ministry is obliged under the Public Procurement Act to put the service contracts in question out to tender in Iceland and in the EEA.

31 Hraðbraut contends that the contracts at issue constitute service contracts with undertakings. As an example, Hraðbraut highlights that if the number of pupils turns out to be lower than envisaged in the contract with the result that the provider of the service has been paid for teaching more pupils than it actually served, it would have to reimburse any amount that it has received in excess.

32 In Hraðbraut's view, the conduct of the Ministry intends to discriminate between entities by favouring particular entities at the expense of the public and to the detriment of Hraðbraut. Hraðbraut considers such conduct to be at variance with the purpose of the Public Procurement Act. In addition, Hraðbraut submits that the Icelandic parliamentary ombudsman has also set forth professional criticisms of the Minister's conduct in the present case.

33 In its response to the MoP, Hraðbraut submits that neither the Directive nor the Public Procurement Act mentions service contracts with privately-operated upper secondary schools or states that such contracts are to be excluded from the provisions of the Directive or the Public Procurement Act. Hraðbraut submits that the private colleges meet all the requirements for being considered profit-driven enterprises, which derive substantial income over and above that received from the Ministry. Hraðbraut submits that the private colleges do not fulfil the conditions of Article 12(1)(a) of the Directive and that the contracts are of cross-border interest.

Borgarfjörður College

34 Borgarfjörður College contends that there is no duty to put the contracts in the present case out to tender under Icelandic law or any regulation or directive incorporated into the EEA Agreement. Borgarfjörður College states that it agrees with the written observations of the Ministry before the Complaints Committee.

35 Borgarfjörður College highlights that since its establishment it has been clearly stated that its owners are not allowed to receive any dividends and that any profit should benefit the running of the school or other similar operations in the municipality of Borgarbyggð. Borgarfjörður College further submits that if different parties were allowed to bid on contracts, such as those in the present case, it would lead to poorer service for the community in Borgarbyggð, especially if the goal of running a college in the municipality was to pay out high dividends to the owners of the college.

The Commercial College

36 The Commercial College highlights that it is a non-profit organisation and that its charter states that profit shall only be allocated to strengthen the activities of the school and used in accordance with the school's objectives.

The Technical College

37 In its written observations, the Technical College states that it fully agrees with the written observations of the Ministry before the Complaints Committee and of the Icelandic Government before the Court. The Technical College highlights that it is a non-profit organisation, operated to promote the public interest and serve the community.

38 In addition, it observes that, at present, the Technical College has a five-year contract with the Ministry that has been extended for one year at a time, with renewal subject to the Technical College's performance. Changing operators, possibly every five years, would mean constant chaos and disruption to its operations, much to the pupils' disadvantage. The Ministry always has the option to either terminate the contract or not renew the contract, should the Technical College not perform to standard.

The Icelandic Government

39 In the submission of the Icelandic Government, which refers to recitals 6 and 7 of the Directive, activities which constitute non-economic services of general interest fall outside the scope of the Directive. The activities provided by the private colleges in the present case are of a non-economic nature and, therefore, fall outside the scope of the Directive.

40 To determine whether an activity constitutes a non-economic service of general interest, the Icelandic Government observes that helpful guidance can be sought from case law on State aid. The Icelandic Government submits that a proper market is a prerequisite for any economic activity and economic interest (reference is made to the judgment in *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 75). In the present case, such a market does not exist. Hence, the private colleges do not pursue economic interests.

41 The Icelandic Government emphasises that user fees (student contributions) are low and constitute a trivial part of the school funding. This bars the application of rules relating to undertakings within the State aid framework and, consequently, the public procurement rules (reference is made to the judgment in *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, EU:C:2006:8, paragraph 107).

42 The legal framework ensures that the State contribution is limited to the desired social purpose and objectives that are purely linked to the good of the community. In addition, the Icelandic Government submits that the private colleges all pursue an educational

role of general interest. This is evident from the articles of association of each school and is further strengthened through the accreditation system.

43 Further, the element of remuneration is a relevant criterion for the assessment. Most of the costs of the services at issue in the present case are borne by the public purse (reference is made to the judgments in *Humbel*, 263/86, EU:C:1988:451, paragraphs 17 and 18, and Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62).

44 The Icelandic Government argues that EEA States enjoy a wider margin of appreciation in policy decisions which involve matters of general public interest (reference is made to the judgment in *Spezzino and Others*, C-113/13, EU:C:2014:2440).

45 In any event, the Icelandic Government submits that the funding to the private colleges in the present case falls outside the scope of the Directive and refers, in that regard, to Article 12 of the Directive. Alternatively, the Icelandic Government submits that the activities constitute social services under Article 74 of the Directive.

46 With regard to the third question, the Icelandic Government argues that whether public funding is decided by budget legislation or the decision of a ministry does not appear to be decisive for the determination of whether activities are considered of non-economic interest.

47 The Icelandic Government considers the fourth question inadmissible and maintains, therefore, that it should be rejected. The question seeks an answer to the dispute in the present case. However, under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), the Court does not have the jurisdiction to determine the application of the EEA rule in the dispute before the referring body.

48 If the fourth question were to be deemed of a more general nature, the Icelandic Government submits that it must be dismissed since it is hypothetical (reference is made to the judgment in *Bosman*, C-415/93, EU:C:1995:463, paragraphs 55 to 67). Alternatively, the fourth question should be answered in the negative since the private colleges in the present case are not economic operators within the meaning of the Directive.

49 In its response to the MoP, the Icelandic Government states that it largely supports the legal analysis presented by the Norwegian Government, the Spanish Government, and ESA on the scope of the Directive vis-à-vis contributions to general educational purposes. All these parties argue that provision of state funds to services of general interest and of non-economic interest, such as the fulfilment of basic education to the public, fall outside the scope of the Directive and do not include a public service contract within the meaning of the Directive.

The Norwegian Government

50 The Norwegian Government submits that if the educational services at issue are non-economic services of general interest the Directive does not apply. An educational service is non-economic if it forms part of a system of public education and it is financed entirely or mainly by public funds (reference is made to the judgment in *Humbel*, cited above, paragraph 17). This is not altered by an EEA State's use of a third party to provide the service on behalf of the State.

51 Such non-economic educational services constitute neither an (economic) service provided against "remuneration" within the meaning of Article 37 EEA, in the context of the freedom to provide services, nor does the operator providing such non-economic educational service constitute an "undertaking" within the meaning of Article 61 EEA, in the context of EEA State aid law. There is no *lex specialis* definition of non-economic services of general interest or "service" in the Directive, nor in any other relevant secondary law instruments. In the view of the Norwegian Government, by reason of logic and legal hierarchy, the Directive does not apply to such non-economic services either.

52 The Norwegian Government, referring to recital 6 of the Directive and footnote 1 to Annex XIV to the Directive, argues that if an EEA State makes use of the freedom to organise its educational system as a non-economic service of general interest, the provision of services forming part of that system falls outside the scope of the Directive.

53 In the Norwegian Government's submission, it already follows from Article 1(2) of the Directive that the scope of the Directive is limited to economic services. In the absence of a *lex specialis* definition of the notion of a "service" in the Directive, the Norwegian Government submits that this must coincide with how the term service has been interpreted in case law on Article 37 EEA.

54 The Norwegian Government emphasises that the main purpose of the Directive is to set out provisions to coordinate national procurement procedures in order to ensure that the freedom to provide services is given practical effect. By reason of logic and legal hierarchy, the Directive could neither apply to such non-economic services, as that would entail an expansion of the reach of the general definition of services in Article 37 EEA, which is hardly conceivable (reference is made to the judgment in *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 73 and 74).

55 The Norwegian Government observes that the fact that pupils or their parents must sometimes make a certain contribution to the operating expenses of the system did not affect the classification of the activity as non-economic in *Humbel* (reference is made to the judgment in *Humbel*, cited above, paragraph 19). The private status of the school is not a relevant factor for that assessment (reference is made to the judgments in *Wirth*, C-109/92, EU:C:1993:916; *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492; *Zanotti*, C-56/09, EU:C:2010:288, paragraph 29; and *Commission* v *Spain*, C-114/97, EU:C:1998:519).

56 In the view of the Norwegian Government, the decision by an EEA State to make use of a third party (public or private entity) through the use of a contractual mechanism for the provision of a non-economic educational service does not entail that this service suddenly becomes economic and thus falls within the scope of the Directive. The mere financing of an activity does not fall within the scope of the Directive in the view of the Norwegian Government, which refers to recital 4 of the Directive.

57 The distinction between a "public contract" and the mere financing of an activity should be based on requirements set out in case law in respect of the concept of a public contract. This case law suggests that the existence of mutual obligations that are legally enforceable is a prerequisite for an arrangement to constitute a public contract under the Directive. These mutual obligations must be legally binding and their execution legally enforceable in accordance with the procedures laid down by national law (reference is made to the judgment in *Helmut Müller*, C-451/08, EU:C:2010:168, paragraphs 59, 60, 62 and 63). The Norwegian Government, referring to recital 4 of the Directive, submits that whether the contract provides for the funds to be repaid if the funds are not spent as intended should not be decisive for determining whether the contract is a "public contract".

58 The Norwegian Government considers that EEA States have a wide discretion in respect of management mechanisms. The State should, therefore, be free to decide whether to use a trust-based management system, for example with non-profit providers, and, as such, refrain from using the contract mechanism, if this is considered to be the best solution.

59 In its response to the MoP, the Norwegian Government refers to the judgment in *Commission* v *Dôvera* (Joined Cases C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 61). The Norwegian Government submits that this judgment supports the view that as long as a system is considered to be applying the principle of solidarity under State supervision, the mere recourse to competition as a means to choose the service provider is not capable of changing the non-economic character of educational services that constitute services of general interest.

The Spanish Government

60 The Spanish Government considers that upper secondary school services in Iceland are not subject to the Directive as such services are services of general interest but of a non-economic nature. Specifically, having regard to Article 1(4) and recitals 4 to 7 of the Directive, a contract which a ministry enters into with an entity that is accredited to operate as an upper secondary school, by which the entity in question undertakes to provide pupils and teachers with services and facilities that are customary at the upper secondary level, and in which allowance is made for financial contributions, cannot be considered a public service contract under the Directive.

61 The Spanish Government considers that the services described in the first question do not constitute social services or other specific services within the meaning of the Directive as they are services of general interest of a non-economic nature, which are

outside the scope of that directive. Hence, the provisions of Chapter I of Title III of the Directive do not apply.

62 In relation to the fourth question, the Spanish Government submits that the Ministry is not obliged to apply a procurement procedure based on the Directive regarding the procurement of services covering the operation of schools and instruction at the upper secondary level in return for financial contributions.

63 In its response to the MoP, the Spanish Government submits that it, together with the Icelandic Government, the Norwegian Government, ESA and the Commission conclude that the services examined in the case at hand do not fall under the Directive, in so far as the financing provided is expressly excluded from the Directive and the services concerned appear to be services of general interest of a non-economic nature.

ESA

64 In its written observations, ESA submits, as regards the first, second and third questions referred, that the central issue is whether the contract at issue represents a transaction in the form of a synallagmatic bargain for consideration, or rather the framework for managing certain flows of funds in the context of a financing mechanism, as envisaged by recital 4 of the Directive. ESA submits that contracts such as those at issue do not fall within the scope of the Directive as set out in Article 1(1), in essence, because they are not contracts "for pecuniary interest" and, thus, do not constitute "public contracts" as defined under point (5) of Article 2(1) of the Directive.

65 The notion of "pecuniary interest" requires that the service provided by the economic operator is subject to some kind of remuneration obligation on the part of the contracting authority. It also requires, in addition to participation by two parties, reciprocity in the form of the material exchange of consideration.

66 ESA submits that the contracts at issue appear to have all the hallmarks of precisely the sort of financing mechanisms, which the legislative bodies sought to exclude from the scope of application of the Directive.

67 In ESA's view, the second question raised by the Complaints Committee is irrelevant. The contracts at issue do not qualify as a public service contract under the Directive. Hence, Article 74 of the Directive does not apply to such contracts.

68 ESA submits that the answer to the fourth question from the Complaints Committee should be that the competent ministry is not obliged to apply a procurement procedure based on the Directive before entering into such contracts and must merely comply, to the extent that a selection between different providers is envisaged, with the general principles of EEA law applicable.

69 In its response to the MoP, ESA submits that the Commission's approach reflects its own. The Commission analyses whether the arrangements are public contracts and reaches the conclusion that they are not; rather, they comprise public financing provided

by the State in order to achieve broader policy aims in the field of education. ESA disagrees with the approach taken by the Icelandic Government, the Norwegian Government and the Spanish Government as regards non-economic services of general interest. Whether a service is a non-economic service of general interest may involve an assessment of a number of matters. It is not possible to assess in the abstract whether a service is a non-economic service of general interest.

70 ESA submits that the notion of "economic activity" is a complex one of central relevance in a range of EEA law contexts, as *Dôvera*, cited above, illustrates. ESA therefore urges the Court to refrain from giving guidance regarding this concept without also considering the other contexts where it is relevant, which would significantly expand the ambit of this case.

71 In ESA's submission, if there is no service being provided for remuneration, there is no pecuniary interest and there is no public contract.

72 ESA disputes the contention that a decision to externalise results in a service becoming economic. As is apparent from both its own and the Commission's analysis and conclusions, it is possible for services to be provided by third parties without engaging the procurement rules. It is only if a service is provided for pecuniary interest, i.e. for remuneration, that the procurement rules will be engaged. ESA notes that the main cases relied upon by the three governments do not concern public procurement. ESA cautions against applying principles from other areas of law in a situation such as that in the present case in which the question posed can be answered entirely with reference to an established concept of procurement law, namely whether or not there is a public contract.

The Commission

73 In the Commission's view, the key legal issue arising in the present case is the question of whether the financial arrangements in the present case constitute a public service contract within the meaning of point (9) of Article 2(1) of the Directive.

74 In answering the first question referred, the Commission argues that the financing arrangement at issue is clearly outside the scope of the Directive. This is because, in the statements made in recitals 4 and 114 of the Directive, the legislative bodies explained that while "public action", in the words of the first sentence of recital 4, may be complex and take many diverse forms, it was only envisaged to regulate in the Directive those actions which take the form of a public contract, as defined in point (5) of Article 2(1). Moreover, the legislative bodies signalled, in particular, that the EEA States enjoy a large freedom of organisation with respect to the sensitive "services to the person", such as educational services, and that the forms of financing other than a public contract may be frequent in this area.

75 The Commission considers that the financial arrangements at issue in the present case are not to be considered a public service contract within the meaning of point (9) of Article 2(1) of the Directive. Furthermore, the Commission considers that the analysis

of the financial arrangements in the area of educational services must be undertaken with particular caution, bearing in mind that other forms of financing may often exist here and that the policy area itself is of a highly sensitive nature.

76 The pecuniary nature of a public contract means that there is a *quid pro quo*, that is, the public authority receives a service (or good) in exchange for a consideration (reference is made to the judgments in *Helmut Müller*, cited above, paragraph 48, and *IBA Molecular*, C-606/17, EU:C:2018:843, paragraph 28). It follows that both sides of the equation have to be sufficiently certain and defined so that the contract can be performed according to the agreed specifications. The Commission submits that the contracts at issue are not based on a *quid pro quo*.

77 The Commission submits that the fact that the financial arrangement at issue is formally called a "*service contract*" does not mean that there is a public contract within the meaning of the Directive.

78 The Commission also notes that it is a matter of settled case law that "*in establishing and maintaining such a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population*". In that case, the Court of Justice of the European Union ("ECJ") also held that "*it is possible that a single establishment may carry on a number of activities, both economic and non-economic*" (reference is made to the judgment in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 50 and 51).

79 The Commission, referring to recital 6 of the Directive, also notes that it is not possible to say that activities in the sphere of education will always fall outside the scope of the Directive. Consequently, should the Court choose to focus on the nature of the services at issue, it would not be sufficient to conclude that the services at issue are secondary educational services. The Court would have to examine, in accordance with the case law, whether the educational services form part of the national education system. Two principal conditions have to be fulfilled, namely (i) that the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields and (ii) that the system in question is, as a general rule, funded from the public purse and not by pupils or their parents (reference is made to the judgments in *Humbel*, cited above, paragraphs 17 and 18; *Wirth*, cited above, paragraphs 15 and 16; *Schwarz and Gootjes-Schwarz*, cited above, paragraph 39; and *Congregación de Escuelas Pías Provincia Betania*, cited above, paragraph 50).

80 Based on the elements included in the request and the submissions made in the case, the Commission contends that there appear to be strong arguments in favour of the view that the financing arrangements at issue indeed finance non-economic services of general interest. It highlights the fact that the services seem to be organised within the public national educational system funded and supervised by the State, where both public and private schools are subject to the same legislation, quality standards and State

supervision. The services are financed entirely or mainly by public funds. The private colleges in the present case receive 78 to 95 per cent of their income by way of State funding, appropriated through the State budget. The services are not provided against remuneration. The fees paid by pupils seem to be a contribution to the service and are not such that they seem to affect the public nature of the service.

81 In summary, the financial arrangement at issue comprises public financing provided by the State in order to achieve broader policy aims in the field of education (education in the broad sense), rather than the delivery of any particular specific service(s), whose performance would, if necessary, be contractually precisely defined, remunerated and enforced.

82 Given its answer to the first question, the Commission considers that an answer to the second question is unnecessary. However, for the sake of completeness, the Commission considers, in relation to the second question, that the services falling within Articles 74 to 76 of the Directive are defined exhaustively through references to the Common Procurement Vocabulary. Referring to recital 114 of the Directive, it emphasises, however, that this is without prejudice to the discretion of EEA States to organise the choice of the service providers in the way they consider most appropriate.

83 According to the Commission, the provisions of Chapter I of Title III of the Directive would apply to the procurement of such services only in so far as the EEA States or public authorities decide to organise the provision of such a service by means of a public contract within the meaning of point (5) of Article 2(1) and not through other forms of financing, such as grants, not falling within its remit.

84 Given the response of the Commission to the first question, it considers a separate response to the third question unnecessary. The amount of financing that the colleges receive may be increased or decreased in accordance with the financial needs and budgetary constraints as determined every year by the budgetary authority following a decision from the Icelandic Parliament. The Commission submits that this constitutes one of several very strong factual elements suggesting that the financial arrangement discussed in the present case is not a public contract under the Directive.

85 The Commission considers that it is not necessary to answer the fourth question, as it appears to be hypothetical. For the sake of completeness, the Commission submits that the Ministry would be obliged to apply a procurement procedure in so far as it decided to organise the provision of the relevant services by means of a public contract within the meaning of point (9) of Article 2(1) of the Directive.

86 In its response to the MoP, the Commission observes that some of the submissions before the Court appear to equate the notion of "non-economic activity", as that notion has been interpreted by the ECJ for the purposes of the application of the internal market and competition rules, and the reference to "non-economic services of general interest" in the Directive. In this regard, it refers to the Opinion of Advocate General Bobek in *Kirschstein*, C-393/17, EU:C:2018:918, point 60 et seq.

*Findings of the Court*

87 The issue of the admissibility of the request for an advisory opinion has not been raised. However, it is pertinent to recall that the Court has previously found that the Complaints Committee constitutes a "court or tribunal" within the meaning of Article 34 SCA (see Case E-7/19 *Tak – Malbik*, judgment of 16 July 2020, paragraph 43).

The first and third questions

88 By its first and third questions, the Complaints Committee asks whether contracts such as those at issue in the case before it are to be considered as public service contracts within the meaning of point (9) of Article 2(1) of the Directive, and whether it is of significance for that assessment that the consideration for the service in question is determined in budgetary legislation from the Icelandic Parliament or in accordance with a decision by a minister on the basis of domestic law and rules. The Court finds that it is appropriate to answer these questions together.

89 As set out in point (5) of Article 2(1) of the Directive, a "public contract" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services. A "public service contract" is defined in point (9) of Article 2(1) of the Directive as a public contract having as its object the provision of services other than those referred to in point (6) of Article 2(1).

90 It is appropriate to examine, first, whether contracts such as those in the main proceedings, may be regarded as having as their object the provision of services within the meaning of the Directive. To that end, it must be borne in mind that the Directive is designed to implement the provisions of the EEA Agreement relating to the freedom of establishment and the freedom to provide services (compare the judgment in *Commission* v *Germany*, cited above, paragraphs 73 and 74). Accordingly, it is necessary to determine whether contracts, such as those at issue in the main proceedings, can be considered to have as their object the provision of "services" within the meaning of Article 37 EEA.

91 According to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered (see *Private Barnehagers Landsforbund*, cited above, paragraph 81 and case law cited).

92 That characteristic is, however, absent in the case of education provided under a national education system in situations where the following two conditions are satisfied. First, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural, and educational fields. Second, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents (compare the judgment in *Humbel*, cited above, paragraph 18). In this regard, it is not of significance whether

that public funding is determined in an act of parliament or a decision of a minister adopted on the basis of domestic law and rules.

93 The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the national education system (compare the judgment in *Humbel*, cited above, paragraph 19).

94 According to the request, the present case concerns three separate contracts between the Ministry and the private colleges concerning the provision of upper secondary education to pupils. That activity is conducted in accordance with Icelandic law, including the Upper Secondary Education Act, which provides, inter alia, for the right to study at an upper secondary school. The Court notes, as has been pointed out by the Icelandic Government and ESA, that the right to general education and suitable training is provided for in Article 76(2) of the Constitution of Iceland. Furthermore, the educational activity of the private colleges under the contracts at issue is, as described in the request, predominantly funded by the public purse.

95 In circumstances such as those of the main proceedings, it is evident that the State, in establishing and maintaining such a system of national education, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural, and educational fields (compare the judgment in *Congregación de Escuelas Pías Provincia Betania*, cited above, paragraph 50 and case law cited). In cases where an admission fee constitutes only a fraction of the true costs of the upper secondary education provided, it cannot be qualified as a *quid pro quo* vis-à-vis the educational establishment concerned, but only as a contribution to a national education system which is predominantly funded by the public purse (see *Private Barnehagers Landsforbund*, cited above, paragraph 83).

96 The provision of upper secondary education provided under a national education system in such circumstances cannot be regarded as a "service" for the purposes of Article 37 EEA.

97 It follows that contracts with characteristics such as those described in the request cannot be regarded as having as their object the provision of "services" within the meaning of the Directive. Accordingly, such contracts would not constitute "public service contracts" within the meaning of point (9) of Article 2(1) of the Directive. It is for the Complaints Committee to determine, in the light of the facts of the case in the main proceedings, whether the contracts at issue have those characteristics and whether they constitute public service contracts under point (9) of Article 2(1) of the Directive.

98 In the light of the foregoing, the Court finds that the answer to the first and third questions must be that contracts, such as those at issue in the main proceedings, which do not have as their object the provision of services within the meaning of the Directive, do not constitute public service contracts within the meaning of point (9) of Article 2(1) of the Directive.

The second and fourth questions

99 Having regard to the Court's answer to the first and third questions, there is no need to answer the second and fourth questions referred.

## IV Costs

100 The costs incurred by the Norwegian Government, the Spanish Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Complaints Committee, any decision on costs for the parties to those proceedings is a matter for that body.

On those grounds,

THE COURT

in answer to the questions referred to it by the Public Procurement Complaints Committee hereby gives the following Advisory Opinion:

**Contracts with characteristics such as those described in the request, which do not have as their object the provision of services within the meaning of Directive 2014/24/EU, do not constitute public service contracts within the meaning of point (9) of Article 2(1) of that directive.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 10 December 2020.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President