



MINISTERIO
DE ASUNTOS EXTERIORES, UNIÓN EUROPEA
Y COOPERACIÓN

SECRETARÍA DE ESTADO
PARA LA UNIÓN EUROPEA

Abogacía del Estado ante el Tribunal
de Justicia de la Unión Europea

OBSERVATIONS OF THE KINGDOM OF SPAIN

IN CASE E- 4/22

STENDIAS AND NORLANDIA CARE NORGE AS

V.

OSLO KOMMUNE V/ORDFØREREN

TO THE EFTA COURT

THE KINGDOM OF SPAIN,

represented by Mr. Juan Rodríguez de la Rúa Puig, *Abogado del Estado*, Member of the Spanish Legal Service before the Court of Justice of the European Union, acting as Agent, and accepting that service is to be effected electronically via the e-EFTA Court system, under Article 20 of the Statute and Article 97 of the Procedural Regulations of the EFTA Court, within the deadline established by the EFTA Court in its communication dated 29 April 2022, respectfully submits the following **observations**:



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I) FACTS OF THE CASE¹

1. The Municipality of Oslo is obliged under the Norwegian Health and Care Services Act² to ensure the provision to its residents of the necessary health and care services in the municipality’s nursing homes (except for services assigned to the State or to the county municipalities). These nursing homes are long-term residential, health and care solutions (including both psychiatric and somatic) offered to persons who can no longer live in their own home. In practice, this means that the most seriously ill elderly persons are offered a long-term place in the municipality’s nursing homes.
2. The long-term nursing homes that are part of the nursing home services offered by the Municipality of Oslo are operated partly by the municipality itself and partly using private service providers under agreements with the municipality, of which the majority are non-

¹ Facts of the case are taken from the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, highlighting only those that are relevant to the observations made by the Kingdom of Spain in the present memorial.



profit organisations. In this regard, the Municipality of Oslo has currently adopted political objectives of increasing the use of non-profit operators for the provision of such services.

3. The Municipality of Oslo 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, in accordance with laws, regulations, and the municipality's own requirements for nursing homes and residential solutions providing day and night nursing and care.
4. Under 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. Nevertheless, the Act 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.
5. In this regard, the Regulation on co-payments for municipal health and care services³ 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. In any event, the co-payment must not exceed the actual costs of the stay nor certain amounts calculated on the basis of the National Insurance basic amount. In 2020, the distribution of public financing and the residents' co-payments were around 80% and 20%, respectively.
6. 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, published in November 2020. In particular, the part of the procurement relating to the provision of nursing home services envisages operating day and night nursing home places in long-term care homes with all necessary accompanying functions.
7. The tender specifications stipulate that the provider of nursing home services must be a non-profit organisation as defined in Section 30-2a of the Norwegian Public Procurement Regulation⁴. Further, the contracts for nursing home services are reserved for non-profit

² Lov av 24. juni 2011 nr. 30 om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven).

³ Forskrift av 16. desember 2011 nr. 1349 om egenandel for kommunale helse- og omsorgstjenester.

⁴ forskrift av 12. august 2016 nr. 974 om offentlige anskaffelser (anskaffelsesforskriften).



operators on the basis of Section 30-2a and Section 2-4(h) (on services involving exercise of public authority) of the Norwegian Public Procurement Regulation.

8. The plaintiffs in the main proceedings (i.e. Stendi AS and Norlandia Care Norge AS) are companies that provide, amongst others, care-related services in Norway. In fact, they are already operating two nursing homes as part of the nursing home services offered by the Municipality of Oslo, although the relevant contracts were concluded prior to the current political decisions on increased non-profit operation in the health and care sector and expire in 2022/2023. However, these entities are precluded to participate in the tender examined in the main proceedings because they are not considered to be non-profit organisations.
9. The referring Court (Oslo District Court) entertains doubts on whether the relevant nursing home services constitute “services” for the purposes of the Agreement on the European Economic Area⁵ (hereinafter, the “**EEA Agreement**”), and thus whether the situation involves such “service contracts” as falling within the scope of point (9) of Article 2(1) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC⁶ (hereinafter, “**Directive 2014/24**”), read in conjunction with Article 1(2). In particular, it seeks clarification on whether the principles underlying EFTA Court case E-13/19 *Hraðbraut*, might also be applicable to the relevant nursing home services in order to assess whether they are to be considered “services” for the purposes of Directive 2014/24.
10. Additionally, the referring Court seeks clarification from the EFTA Court on whether the Municipality of Oslo may, given the provisions of the Norwegian Patient and User Rights Act⁷, avail itself of the exception from the provisions on freedom of establishment and freedom to provide services envisaged in Article 32, read in conjunction with Article 39, of the EEA Agreement for services involving the exercise of official authority.
11. Finally, the referring Court seeks clarification from the EFTA Court on the possibility under Directive 2014/24 of reserving procurement of health and social services for non-profit organisations, in accordance with Section 30-2a of the Norwegian Public Procurement Regulation.

⁵ OJ L 1, 3.1.1994, p. 3–522.

⁶ OJ L 94, 28.3.2014, p. 65–242.

⁷ Lov av 2. juli 1999 nr. 63 om pasient- og brukerrethigheter (pasient- og brukerrethighetsloven).



II) REFERRED QUESTIONS

12. The questions that were referred to the EFTA Court by the Oslo District Court were the following:

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

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

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

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

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

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

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

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

On the reservation for non-profit organisations:

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



III) LEGAL FRAMEWORK

III.1.- European legal framework

13. Article 1 of Protocol no. 26 (*on services of general interest*) to the Treaty on the Functioning of the European Union (hereinafter, “**Protocol No. 26**”):

“The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

— the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

(...)”.

14. Article 2 of Protocol No. 26:

“The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.”

15. Recital 5 of Directive 2014/24 indicates that:

“It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. The provision of services based on laws, regulations or employment contracts should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.”

16. Recital 6 of Directive 2014/24 sets forth that:

“It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a



mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.”

17. Recital 7 of Directive 2014/24 points out that:

“It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives. This Directive should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 on Services of General Interest annexed to the TFEU and to the Treaty on European Union (TEU). In addition, this Directive does not deal with the funding of services of general economic interest or with systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition.”

18. Article 1 (*Subject-matter and scope*), paragraph 4, of Directive 2014/24 sets forth that:

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

19. Article 2 (*Definitions*), paragraph 1, sub-paragraph (9) of Directive 2014/24 states:

“For the purposes of this Directive, the following definitions apply:

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

20. Article 74 (*Award of contracts for social and other specific services*) of Directive 2014/24 states that:

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



21. Article 76 (*Principles of awarding contracts*) of Directive 2014/24 foresees that:

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

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

22. Article 77 (*Reserved contracts for certain services*), paragraph 1, of Directive 2014/24 provides that:

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

III.2.- EEA legislation

23. In accordance with Article 31, paragraph 1, of the EEA Agreement:

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

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or



firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4..”

24. Article 36, paragraph 1, of the EEA Agreement sets forth that:

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

III.3.- Norwegian legal framework⁸

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

26. In particular, Section 30-2a of the Public Procurement Regulation contemplates the possibility for contracting authorities of reserving tendering procedures for health and social services for non-profit organisations “*if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency*”.

27. As regards non-profit organisations, the aforementioned provision does not impose any requirement of a specific organisational form, or that the services must be provided by volunteer/unpaid staff: it only states that they shall not have a return on equity as their main objective and that 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*”. This notwithstanding, a non-profit organisation may, to a limited extent, engage in commercial activity that supports the business’s social objectives.

⁸ Taken from the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022.



IV)OBSERVATIONS

IV.1.- Introduction

- 28.** In accordance with the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, the Kingdom of Spain considers that there are three main issues to be examined in these proceedings (i) to determine the nature of the relevant nursing home services in Norway and whether such provision of services is included under the scope of Directive 2014/24; (ii) to determine whether the provision of said services entails an exercise of official authority and, therefore, is exempt from the EEA Agreement under Article 32, read in conjunction with Article 39 of said Agreement; and (iii) to determine whether Directive 2014/24 precludes reserving the procurement of said services for non-profit organisations in the manner permitted under national (Norwegian) law.
- 29.** The Kingdom of Spain will only deal in this memorial with the issues listed as (i) and (iii) in the preceding paragraph.
- 30.** In this regard, the Kingdom of Spain considers that the nature of the relevant nursing home services in Norway is that of non-economic services of general interest and that, therefore, provision of such services must not necessarily be put out to tender in accordance with Directive 2014/24. In order to reach that conclusion, the Kingdom of Spain will successively examine (i) whether such nursing home services may be considered a service of general interest; (ii) whether such nursing home services may be considered a non-economic service of general interest; and (iii) whether such nursing home services are subject to Directive 2014/24.
- 31.** In the alternative, the Kingdom of Spain considers that Directive 2014/24 does not preclude reserving the procurement of nursing home services for non-profit organisations in the manner permitted under Norwegian law. In particular, the procurement examined in the main proceedings apparently complies with the provisions contained in Article 76 of Directive 2014/24 and, in any event, Article 77 of Directive 2014/24 is not the only possible reservation concerning the provision of services.
- 32.** Prior to examining the issues at hand, it must be stated that it follows from Article 1(1) of the EEA Agreement that the aim of such agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties



with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.

33. Further, the EEA Agreement comprises several provisions with wording that is identical to that of provisions regarding the internal market set out in the TFEU, and certain of its stipulations aim to provide a homogeneous interpretation of these provisions with reference to the equivalent provisions in the European Union treaties. It follows from such provisions and stipulations, as well as from Article 3(2) of the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice⁹, that the EEA Agreement must be interpreted according to the Court of Justice of the European Union's case-law.
34. In this regard, the application of Directive 2014/24 to the states which are a party to the EEA Agreement stems from Article 65 and Annex XVI thereof, entitled "*Procurement*", which lists the provisions and arrangements relating to public procurement which, unless otherwise stated, apply to all products and services mentioned. Therefore, Annex XVI makes Directive 2014/24 applicable in the territory of the EEA and in accordance with the previous paragraph it must be interpreted by the EFTA Court in accordance with the Court of Justice of the European Union's case-law.

IV.2.- Nursing home services in Norway considered as services of general interest

35. The Kingdom of Spain believes that the nature of the relevant nursing home services in Norway, as described in the facts contained in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, is that of services of general interest.
36. Firstly, the Kingdom of Spain refers to Article 34 (*Social security and social assistance*), paragraph 1, of the Charter of Fundamental Rights of the European Union¹⁰, which sets forth that:

"The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices."

⁹ OJ L 344, 31.12.1994, p. 1-8.

¹⁰ OJ C 326, 26.10.2012, p. 391–407.



37. Secondly, in European Union law the concept of “services of general interest” is ostensibly broad and Member States play a leading role in their definition.
38. Thus, as regards the concept of “services of general interest”, in its Communication “*Services of general interest in Europe*”¹¹, the Commission underlined the important role services of general interest play in promoting social and territorial cohesion, highlighting that its concept was flexible and adaptable, evolving in line with the characteristics of the relevant sector and technological change.
39. In this regard, on its Green Paper of 21 May 2003 on services of general interest¹², the Commission pointed out that “*the reality of services of general interest which include services of both general economic and non-economic interest, is complex and constantly evolving*”, covering “*a broad range of different types of activities, from certain activities in the big network industries (energy, postal services, transport, and telecommunications) to health, education and social services, of different dimensions, from European or even global to purely local, and of different natures, market or non-market. The organisation of these services varies according to cultural traditions, the history and geographical conditions of each Member State and the characteristics of the activity concerned, in particular technological development*”.
40. Along these same lines, the importance of services of general interest was also highlighted by the Commission in its Communication “*Implementing the Community Lisbon programme: Social services of general interest in the European Union*”¹³, where it noted that they constituted pillars of the European society and economy. In addition, the Commission confirmed the respect for the subsidiarity principle and, as a consequence, that Member States were free to define what they meant by services of general economic interest, or in particular by social services of general interest, as well as the obligations and missions of general interest of these services, and how they were to be organised.
41. Specifically, the Commission noted in that Communication that services of general interest often present in practice one or more of the following organisational characteristics:
- They operate on the basis of the solidarity principle;

¹¹ OJ C 281, 26.9.1996, as amended by OJ C 17, 19.01.2001.

¹² COM(2003) 270 final (OJ C 76 of 25.03.2004).

¹³ COM (2006) 177 final (not published in the Official Journal).



- They are comprehensive and personalised integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable;
- They are not for profit and, in particular, to address the most difficult situations and are often part of a historical legacy;
- They include the participation of voluntary workers, expression of citizenship capacity;
- They are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter;
- An asymmetric relationship between providers and beneficiaries that cannot be assimilated with a ‘normal’ supplier/consumer relationship and requires the participation of a financing third party.

42. Further, in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on “A single market for 21st century Europe” – “*Services of general interest, including social services of general interest: a new European commitment*”¹⁴, the Commission identified the essential principles which may be applied to services of general interest throughout the whole European Union, and clarified that it is for the public authorities at national, regional or local level to decide the nature and scope of such services of general interest, providing these services themselves or entrusting the responsibility of providing them to public or private entities.
43. Thirdly, in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, it is stated that, in accordance with the Health and Care Services Act, Norwegian municipalities’ responsibilities encompass, *inter alia*, offering “*place[s] in institutions, including nursing homes*”; and that the necessary health and care services are subject to the responsibility of the municipalities, to be provided by themselves or by other public or private service providers through an agreement entered into with the municipality. In particular, nursing homes are long-term residential, health and care solutions (including both psychiatric and somatic) offered to seriously ill elderly persons who can no longer live in their own home. In this regard, the part of the

¹⁴ COM(2007) 725 final (not published in the Official Journal).



procurement relating to the provision of nursing home services envisages “*operating day and night*” nursing homes with “*all necessary accompanying functions*”.

44. In accordance with the aforementioned Communications and the facts contained in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, the Kingdom of Spain considers that the relevant nursing home services in Norway may be considered a service of general interest, insofar as such social services constitute an essential contribution to the economic, social and territorial cohesion of the EEA.

IV.3.- Nursing home services in Norway considered as non-economic services

45. Once it has been substantiated that nursing home services in Norway may be characterized as a service of general interest, the Kingdom of Spain will determine whether it should be considered a service of general economic interest or a non-economic service, which implies different consequences as regards application of EU law.
46. Firstly, in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on "A single market for 21st century Europe" – “*Services of general interest, including social services of general interest: a new European commitment*”¹⁵, the Commission divides services of general interest into two categories which are governed by different European rules: on one hand, services of general economic interest, which are provided for remuneration and are subject to European internal market and competition rules, although derogations to these rules may be authorised in order to ensure that the general interest is respected; on the other hand, non-economic services, such as police, justice and statutory social security schemes, which are not subject to specific European legislation, nor to the internal market and competition rules.
47. Secondly, in its Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest¹⁶, the Commission position illustrates that where there is a structure which serves a social purpose, is almost entirely based on the principle of solidarity and is predominantly

¹⁵ COM(2007) 725 final (not published in the Official Journal).

¹⁶ 2012/C 8/02 (OJ C 8 of 11.1.2012, p. 4-14).



funded from State resources, it might be regarded as a structure providing non-economic services, be it health care¹⁷, social security¹⁸ or educational¹⁹ services. The fact that such services pursue a social purpose and not merely a profit (with due regard to its financial infrastructure), and are supervised by the State are key elements to determine their non-economic nature.

48. This same view was again stated by the Commission in its Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest²⁰, where it offers examples of non-economic activities of a purely social nature.
49. This view is also shared by the Court of Justice of the European Union, albeit related to educational schemes²¹. In this regard, the relevant criteria are to determine (i) whether the State, by establishing and maintaining a particular service, 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) whether the services are, as a general rule, funded from the public purse and not the beneficiaries themselves. In this last regard, the fact that the beneficiaries might have to pay some kind of fee in order to make a certain contribution to the operating expenses of the system does not affect by itself the nature of the activity.
50. The Court of Justice has consistently maintained the same case-law in further cases, albeit again related to educational schemes²².
51. Moreover, the EFTA Court has also analysed the nature of non-economic services and has reached similar conclusions as those of the Court of Justice. In this regard (concerning schooling at the upper secondary level in Iceland), in Case E-13/19 Hraðbraut the EFTA Court established that remuneration, characterised as consideration for the service

¹⁷ Ibid. paragraphs 22 to 23.

¹⁸ Ibid. paragraphs 17 to 20.

¹⁹ Ibid. paragraphs 26 to 28.

²⁰ Commission Staff Working Document, Brussels, 29.4.2013 SWD(2013) 53 final/2, https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf, section 3.2.1.

²¹ Judgements of 27 September 1988, *Belgian State v Humbel and Edel*, C-263/86, ECLI:EU:C:1988:451, paragraphs 15 to 19; of 7 December 1993, *Wirth*, C-109/92, ECLI:EU:C:1993:916, paragraphs 15 to 19; and of 11 September 2007, *Commission/Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68.

²² Judgement of 11 September 2007, *Schwarz and Gootjes – Schwarz*, C-76/05, ECLI:EU:C:2007:492, paragraphs 38 to 40; of 18 December 2007, *Jundt*, C-281/06, ECLI:EU:C:2007:816, paragraphs 28 to 30; of 20 May 2010, *Zanotti*, C-56/09, ECLI:EU:C:2010:288, paragraphs 28 to 32; of 27 June 2016, *Congregación de*



rendered, was absent in the (educational) services examined insofar as 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 the system in question “*is, as a general rule, funded from the public purse and not by pupils or their parents*”. In this last regard, the nature of the activity is not affected by the fact that beneficiaries must sometimes pay fees in order to make a certain contribution to the operating expenses of the system²³.

52. The fact that the aforementioned case-law relates to educational schemes, does not preclude it from being applied to services which share a similar nature insofar as they are also part of the welfare services a State must provide in accordance with its national laws and regulations (that is why the case-law refers, in general, to the States fulfilling their duties -in broad terms- “*in the social, cultural, and educational fields*”). In this sense, as mentioned in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, the reason why a certain 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. Therefore, the requirements set out in the case-law are equally applicable to Norwegian nursing home services.
53. Along these same lines, in its Opinion termed “*Private not-for-profit social services in the context of services of general interest in Europe*”²⁴, the Economic and Social Committee stated that “*Private not-for-profit social services of general interest do not belong exclusively to either the public or profit-making domain. However they are intimately linked to the public domain by their dialogue procedures and the financial resources allocated to them*”. Therefore, it is acknowledged that non-profit organisations may provide social service in accordance with the applicable national regulations.
54. Thirdly, and in line with the above, the EFTA Surveillance Authority Decision in Case 68123 of 12 October 2011 on alleged aid granted to Nasjonal digital læringsarena (Norway) is specially clarifying, as after analysing the aforementioned case-law, states in paragraph 36 three conditions which must be cumulatively fulfilled in order to consider

Escuelas Pías Provincia Betania, C-74/16, ECLI:EU:C:2017:496, paragraphs 46 to 50; and of 4 July 2019, Kirschstein, C-393/17, ECLI:EU:C:2019:563, paragraphs 52 and 53.

²³ Judgement of 10 December 2020, *Hraðbraut ehf. v mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf.*, E-13/19, paragraphs 90 to 93.

²⁴ 2001/C 311/08 (OJ C 311, 07.11.2001, p. 33–38).



that certain activities do not constitute an “offering of goods and services on a given market” (i.e. an economic service):

- i. Objective: “*the State, in establishing and maintaining the entity in question, does not seek to engage in gainful activity but is rather seeking to fulfil its duties towards its population*”.
- ii. Principle of Solidarity: “*the way in which the service is provided is based on the principle of national solidarity to the extent that the activity is funded by the public purse and not provided against remuneration, i.e. there is no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity*”.
- iii. State control: “*in cases in which the activity is carried out by entities other than the State itself, it is necessary to establish that the entity in question merely applies the law and cannot influence the statutory conditions of the service (i.e. the amount of the contributions, the use of assets and the level of benefits)*”.

55. Applying the EFTA Surveillance Authority criteria set out in the previous paragraph to our case, the Kingdom of Spain considers all three cumulative requirements are met.

56. As regards the objective, the Kingdom of Norway, by providing nursing home services, albeit through private operators, is not seeking to engage in gainful activity but is rather seeking to fulfil its duties towards its population. This is immediately deduced from the facts contained in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, in particular that Norwegian municipalities’ responsibilities include the provision of nursing home services and these are targeted to the most seriously ill elderly persons who can no longer live in their own home²⁵.

57. As regards the principle of solidarity, according to the facts contained in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022 nursing home services are funded by the municipalities themselves and that, although a fee (with specific limitations) may be imposed to residents, contributions from the municipalities represent the vast majority of the operators’ incomes, without any actual connection between the costs of the service provided and the fee paid. In this

²⁵ Vid. paragraphs 1 and 2 of this memorial.



regard, in 2020 the distribution in nursing home services between public financing and the residents' co-payments were around 80% and 20%, respectively..

58. As regards state control, according to the facts contained in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022 the operators who provide nursing home services limit themselves to apply the requirements set out by law, regulations and the municipalities themselves, which monitor the quality of the nursing home services, irrespective of whether they are provided by private operators or the municipalities themselves. Hence, the operators cannot influence the statutory conditions of the service.
59. Therefore, the Kingdom of Spain considers that Norwegian nursing home services might be construed as non-economic services, as they seem to be based on the principle of solidarity, do not have a clear profit-making purpose, are predominantly public financed and are monitored by the public authorities, which determine the services to be provided and the contributions to be received.

IV.4.- Nursing home services in Norway are not subject to Directive 2014/24

60. The Kingdom of Spain considers that nursing home services in Norway are not subject to Directive 2014/24 as such services have been substantiated as being services of general interest but of a non-economic nature.
61. Firstly, as regards services of general interest, Article 1 of Protocol no. 26 contemplates the “wide discretion” of public authorities in “*providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*”²⁶. Further, Article 1(4) of Directive 2014/24, establishes that Member States are free to define, in accordance with Union law, what they consider to be services of general economic interest, how those services should be organised and financed²⁷. Similarly, Recital 7 of Directive 2014/24 acknowledges the power of national, regional and local authorities to provide, commission and finance services of general economic interest²⁸.

²⁶ Vid. paragraph 13 of this memorial.

²⁷ Vid. paragraph 18 of this memorial.

²⁸ Vid. paragraph 17 of this memorial.



62. Secondly, as regards services of general interest of a non-economic nature, Article 2 of Protocol no. 26 specifies that in the case of non-economic services of general interest, the provisions of the Treaties do not affect the competence of the Member States to provide, commission and organise such services²⁹.
63. In this same regard, Recital 6 of Directive 2014/24 establishes that Member States are free to organise the provision of other services as non-economic services of general interest, which shall not be subject to said Directive³⁰.
64. Incidentally, the importance of volunteer work in the EEA must be stressed, in accordance with Regulation (EU) 2018/1475 of the European Parliament and of the Council of 2 October 2018 laying down the legal framework of the European Solidarity Corps and amending Regulation (EU) No 1288/2013, Regulation (EU) No 1293/2013 and Decision No 1313/2013/EU³¹, and, subsequently, Regulation (EU) 2021/888 of the European Parliament and of the Council of 20 May 2021 establishing the European Solidarity Corps Programme and repealing Regulations (EU) 2018/1475 and (EU) No 375/2014³², whereby “solidarity” is understood as a sense of individual and collective responsibility for the common good, expressed through concrete action. If nursing home services in Norway were included in the scope of Directive 2014/24 this would in effect exclude any volunteer activities in this area and would go against the Union’s policies in matters of solidarity.
65. Thirdly, nursing home services in Norway are not subject either to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market³³ (hereinafter, “**Directive 2006/123**”).
66. In this regard, Recital 27 of Directive 2006/123 foresees that it “*should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State*”. Consequently, Article 2(j) of Directive 2006/123 excludes from its scope “*social services relating to social housing, childcare and support of families and persons permanently or temporarily*

²⁹ Vid. paragraph 14 of this memorial.

³⁰ Vid. paragraph 16 of this memorial.

³¹ OJ L 250, 4.10.2018, p. 1–20.

³² OJ L 202, 8.6.2021, p. 32–54.

³³ OJ L 376, 27.12.2006, p. 36–68.



in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State". In any event, Article 2(a) of Directive 2006/123 excludes from its scope "*non-economic services of general interest*".

67. Fourthly, according to the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, Norwegian nursing home services are regulated by the Norwegian Health and Care Services Act and, as regards its financial structure, more specifically by the Regulation on co-payments for municipal health and care services³⁴.
68. In this regard, Recital 5 of Directive 2014/24 clearly states that the provision of certain services to the community (e.g. nursing home services) based on laws, regulations or employment contracts should not be covered by such Directive³⁵.
69. As a consequence of the above, the Kingdom of Spain considers that nursing homes services in Norway are not to be regarded as "services" for the purposes of sub-paragraph (9) of Article 2(1) of Directive 2014/24, as such services are services of general interest of a non-economic nature which are out of the scope of such Directive.

IV.5.- Directive 2014/24 does not necessarily preclude reserving the procurement of nursing home services for non-profit organisations

70. In the alternative, the Kingdom of Spain considers that Directive 2014/24 does not necessarily preclude reserving the procurement of nursing home services for non-profit organisations in the manner permitted under Norwegian law. In particular, the tender examined in the main proceedings complies with the provisions contained in Article 76 of Directive 2014/24 and, in any event, Article 77 of Directive 2014/24 is not the only possible reservation concerning the provision of services.
71. Firstly, in accordance with Recital 114 of Directive 2014/24, certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of

³⁴ Vid. paragraphs 1, 4 and 5 of this memorial.

³⁵ Vid. paragraph 15 of this memorial.



the service providers in the way they consider most appropriate, respecting in any event the basic principles of transparency and equal treatment.

72. Regarding certain social services, Directive 2014/24 deals with such matters in Articles 74 to 77.
73. Secondly, Article 76 (*Principles of awarding contracts*) of Directive 2014/24, foresees that Member States may establish the relevant procedure rules for the award of contracts, respecting the principles of transparency and equal treatment, and shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.
74. In particular, the principle of equal treatment (and the correlated principle of non-discrimination) has been interpreted by the Norwegian legislator in accordance with the case-law of the Court of Justice in these matters (vid. judgments of 17 June 1997, *Sodemare and Others v Regione Lombardia*, C-70/95, EU:C:1997:301; of 11 December 2014, *Azienda sanitaria locale n. 5 “Spezzino” and Others*, C-113/13, EU:C:2014:2440; or 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56). In this regard, the Court of Justice has established that a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making, so it may be possible to tender contracts for nursing home services reserving them for non-profit organizations³⁶.
75. To this effect, the Kingdom of Norway, in line with Article 76 of Directive 2014/24, established in Section 30-2a of the Public Procurement Regulation the possibility for contracting authorities to reserve the right to participate in tendering procedures for health and social services to non-profit organisations “*if the reservation contributes to the attainment of social objectives, the good of the community and budgetary efficiency*”.
76. As stated in the Request for an Advisory Opinion issued by the Oslo District Court (*Oslo Tingrett*) dated 14 March 2022, in the Norwegian Government’s consultation paper

³⁶ Judgment of 17 June 1997, *Sodemare and Others v Regione Lombardia*, C-70/95, EU:C:1997:301, paragraphs 32 and 35.



relating to the provision it was considered that non-profit operators, as opposed to commercial operators, do not have profit as an objective, but have another basis for their business beyond the production of services and financial motives, focused on a social objective (e.g. alleviating social needs in the society or providing assistance to certain vulnerable groups). They provide a value-add in and confer advantages on the society beyond the provision of the relevant health and social services, insofar as they are concerned with the users' participation at the individual and system levels; have had a tradition of creating new services to offer; and have a culture of cooperating with other operators and of making use of volunteers, which entails that the users, in certain service areas, are followed-up through different offers and forms of contact, including after the provision of services, facilitating rehabilitation after the institutional stay in a manner that prevents or postpones costly readmissions.

77. In this sense, in its Communication “*Social Business Initiative: Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation*”³⁷ the Commission acknowledged the importance of social enterprises, which answer to diverse political, economic and social choices, while identifying certain common principles related to such business (i) for which the social or societal objective of the common good is the reason for the commercial activity, often in the form of a high level of social innovation; (ii) where profits are mainly reinvested with a view to achieving this social objective; and (iii) where the method of organisation or ownership system reflects their mission, using democratic or participatory principles or focusing on social justice.
78. Thirdly, as for Article 77 of Directive 2014/24, it establishes a very strict reservation in favour of certain entities and specific contracts related to health, social and cultural services.
79. From a systematic and finalistic approach, it might be considered that EEA States have the possibility to establish a reservation other than that envisaged in Article 77 of Directive 2014/24, insofar as the limits established in the Court of Justice's case-law (i.e. mainly that the reservation is proportional to the social objective pursued and that it contributes to attain the objectives of solidarity and budgetary efficiency) are respected.

³⁷ COM (2011) 682 final.



- 80.** 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 Directive 2014/24 and recognised in EEA law as legitimate considerations in the field of welfare services (including, *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).
- 81.** In this regard, national authorities consider that the services offered by non-profit organisations are important to achieve such central and overall qualitative objectives and the reservation in their favour was introduced as a principal means of fulfilling that objective, which are acutely relevant for the nursing home services concerned. Moreover, commercial and non-profit providers of such services are not in comparable situations for the reasons stated above³⁸. Thus, there is no infringement of the principle of equal treatment in Article 76 of Directive 2014/24.
- 82.** Therefore, the Kingdom of Spain considers in the alternative that the Norwegian Public Procurement Regulation establishes a reservation, different to that established in Article 77 of Directive 2014/24, and in accordance with Article 76 of the same Directive with due respect to the principles established therein, including the principle of equal treatment, as interpreted by the case-law of the Court of Justice.
- 83.** In accordance with the above, the Kingdom of Spain considers in the alternative that Articles 31 and 36 of the EEA Agreement and Articles 74 to 77 of Directive 2014/24 do not necessarily preclude national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for non-profit organisations on the terms laid down in the national legislative provision in question.

³⁸ Vid. paragraphs 76 and 77 of this memorial.



V) CONCLUSIONS

84. The Kingdom of Spain respectfully submits that the Court should answer the questions referred to it as follows:

- i. Nursing homes services in Norway are not to be regarded as “services” for the purposes of sub-paragraph (9) of Article 2(1) of Directive 2014/24, as such services are services of general interest of a non-economic nature which are out of the scope of that Directive.
- ii. In the alternative, Articles 31 and 36 of the EEA Agreement and Articles 74 to 77 of Directive 2014/24 do not necessarily preclude national legislation allowing public contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for non-profit organisations on the terms laid down in the national legislative provision in question.

Madrid, 24 June 2022.

AGENT FOR THE KINGDOM OF SPAIN
JUAN RODRÍGUEZ DE LA RÚA PUIG

