EUROPEAN COMMISSION

Brussels, 29 June 2022
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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the **European Commission**, represented by Mislav Mataija, Petr Ondrůšek and Geert Wils, Members of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels and consenting to service by e-EFTA Court, in

Case E-4/22

Stendi AS, Norlandia Care Norge AS (Plaintiffs),

v

Oslo municipality (Defendant)

in which the Oslo District Court requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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I. INTRODUCTION

1. The European Commission (hereinafter: **"the Commission"**) divides its observations into several parts. After outlining the factual and legal framework of the present case (Section II), the Commission discusses in Section III the responses to questions referred to the EFTA Court by the Oslo District Court (hereafter: **"the referring court"**). The proposed responses are provided in the Conclusion (Section IV).

II. THE FACTUAL AND LEGAL FRAMEWORK

II.1. The factual framework

2. The Commission refers to the description of facts as set out in the ruling of the referring court seeking the advisory opinion of the EFTA Court (hereinafter: the "**reference order**")[1]. Nonetheless, the Commission considers it useful to highlight a number of facts mentioned by the referring court in the reference order.

3. Notably, at pages 8-9 of the reference order, the referring court makes it clear that pursuant to Article 3-2(1) of the Health and Care Services Act the municipalities are responsible for offering of the places in nursing homes to persons resident in Norway and, further, pursuant to Section 3-1(5) of that Act the municipalities may choose whether to provide these services (i.e., the nursing home services pursuant to the Health and Care Services Act, hereinafter also: **"the services at issue"**) themselves or *"through an agreement concluded by the municipality and other public or private service providers"*.

4. Under Section 11-1 of the Health and Care Services Act, the costs of the services at issue are borne by the municipalities. At the same time, however, both the municipalities and the private operators who operate pursuant to agreements with the municipalities may charge a fee (co-payment) to patients (service users), which cannot exceed the actual costs of the stay; in practice in 2020 the public

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[1] The Commission's submission is based on the English translation of the reference order provided by the EFTA Court. References to certain pages or parts of the reference order in the text of this submission are references to the English translation of the order.

financing and the co-payment were distributed in a ratio of approximately 80% (public) and 20% (co-payment) on average.[2]

5. If the provision of the services at issue is ensured by the means of agreements with external providers, the municipality (the defendant in this case) pays to such external providers "*a genuine and market-based remuneration determined through a reserved or open tendering procedure"*.[3]

6. Finally, some of the contracting authorities in Norway providing the services at issue via external providers award the contracts for such services to *commercial providers*, while others use the possibility provided in Section 30-2a(2) of the Norwegian Public Procurement Regulation and reserve the award of such contracts to *non-profit organisations* as defined in Norwegian law.[4] In the Oslo municipality most, and in future all, such contracts are to be reserved for non-profit organisations.[5]

II.2. The legal framework

7. 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.

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2 Reference order, page 9, third full paragraph.
3 Reference order, page 13, third paragraph.
4 Reference order, page 5, Section 3.2.1, 11, third paragraph and page 14, second paragraph.
5 Reference order, page 11, penultimate paragraph.

8. Pursuant to Article 2(1)(5) Directive 2014/24/EU on public procurement[6] (hereinafter: "**Directive 2014/24**" or the "**Directive**"):

'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.

9. Pursuant to Article 2(1)(9) of Directive 2014/24:

'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6.

10. The Commission refers to other relevant provisions of the Directive as appropriate in the course of the analysis below.

III. THE QUESTIONS REFERRED TO THE EFTA COURT

11. The referring court seeks an advisory opinion from the EFTA Court on the following questions:

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?

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[6] Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, OJ L94, 28.3.2014, p. 65); incorporated into the EEA Agreement by

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

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

On the reservation for non-profit organisations:

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

IV. THE ANALYSIS

IV.1. On whether the procurement at issue falls within the scope of Directive 2014/24 and whether the reservation of that procurement to non-profit organisations is compatible with that Directive

12. The Commission considers it useful to answer the first and the third set of questions together.

IV.1.1. On whether the contracts fall within the scope of Directive 2014/24

13. According to Article 2(1)(9) of Directive 2014/24, in order to qualify as a *"public service contract"*, it is necessary that the contract at issue has as its object the *"provision of services"*. The concept of *"services"* should be interpreted in light of Article 37 of the EEA Agreement and Article 57 TFEU, according to which services are, *inter alia*, activities of a commercial character *"normally provided for remuneration"*. The requirement of *"remuneration"* has been interpreted as entailing *"consideration for the service rendered"*.[7]

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).

[7] Advisory Opinion of the EFTA Court, *Hraðbraut ehf. v mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf*. (Case E-13/19) 2020/C 110/10, para. 91.

14. In the area of education provided under a national education system, the EFTA Court and the CJEU have found, to the extent that, 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; and second, that the system in question is, as a general rule, funded from the public purse and not by pupils or their parents, the requirement of remuneration is not met.[8] In the area of health, the CJEU has repeatedly found that medical treatment provided to a person in another Member State for consideration falls within the scope of the Treaty provisions on the freedom to provide services.[9] However, it has not ruled on "whether the provision of hospital treatment in the context of a national health service… is in itself a service."[10]

15. It might, therefore, be argued that services of nursing homes provided to users in the context of a State's health or social security systems, and largely funded by the State, are not "services" within the meaning of the Treaty. On this basis, it might further be argued that there is also no *"public contract"* within the meaning of Directive 2014/24. Indeed, the judgment of the EFTA Court in *Hraðbraut* seems at first sight to lend some support to such a reading.

16. The Commission, nevertheless, considers that such a reading of the judgement would be erroneous, for several reasons.

17. First of all, the circumstances of *Hraðbraut* can be distinguished, as the contracts at issue in that case essentially concerned grants to which a number of conditions were attached, related notably to the quality of the education and compliance with legal requirements.[11] As a result, therefore, there was essentially no process of selection among the colleges (recipients of the funds), in so far as they were able to fulfil the regulatory requirements. In this case, however, Norwegian law provides for a highly selective tendering process leading to the conclusion of specific and tailor-made agreements on the provision of services to the *municipality*, for payment. In such circumstances, the "service" relevant to the

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8 Case E-13/19, Hraðbraut, para. 92; judgment of 27 September 1988, *Belgian State v Humbel and Edel Humbel*, Case 263/86, EU:C:1988:451, para. 18.

9 Judgment of 16 May 2006, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, C-372/04, ECLI:EU:C:2006:325, para. 91; judgment of 5 October 2010, *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, C-173/09, ECLI:EU:C:2010:581., paras. 36 and 37.

10 Watts, C-372/04, para. 91. See also judgment of 17 June 1997, *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia*, C-70/95, ECLI:EU:C:1997:301, para. 32.

question of whether there is a public contract is not the "service" provided to individual nursing home users (which in itself may or may not, depending on the facts, be provided for remuneration), but rather the service of operating a certain number of nursing home places, which is provided by certain individually selected operators based on individually agreed remuneration to the municipality. In this organisation of the service, the nursing home users are the beneficiaries of the service organised for them by the municipality based on the individual selection/tendering procedure leading to the selection of a specific service provider.

18. The Commission therefore considers that the question of whether or not there is a service being procured for the purposes of the definition of 'public contract' should take into account the above elements.

19. This conclusion is also supported by the overall scheme of Directive 2014/24. Recital 6 of Directive 2014/24 recalls 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."* This makes it clear that the legislator considered that qualifying certain sectors as "economic" or "non-economic" depends on the way in which they are organised by the State. A reading that would completely exclude publicly financed health or social services from the scope of the procurement rules would, however, not be compatible with that approach.

20. In this context, it further appears appropriate to recall that the Union legislator also stated in the Directive that *"[T]he Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract."* (Recital 4, first subparagraph). In particular, *"the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules"* (Recital 4, second subparagraph, emphasis added). Next, as

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[11] Case E-13/19, Hraðbraut, paras. 16 – 21.

the Union legislator noted in Recital 114 of the Directive, the situations described in the preceding sentence may occur in particular in the field of *"services to the person, such as certain social, health and education services"*. In this sensitive area – the sensitivity of which was acknowledged by the Union legislator itself (Recital 114, second subparagraph) – in particular, *"Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate"* (Recital 114, second subparagraph). The Union legislator explained in this context that *"Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination"* (Recital 114, third subparagraph).

21. This again implies that publicly funded social or health "services", like those at issue in this case, could be the subject of public contracts. Basing the assessment of whether or not there is a "public contract" on the existence of remuneration between the provider and the user would, however, seem to exclude the possibility of "public contracts" in sectors like educational, health, and social services, at least where they are predominantly funded by the State.

22. It further appears useful to recall that if certain services fall under Directive 2014/24, they are subject to the all rules of the Directive, unless listed in Annex XIV to the Directive. In contrast, pursuant to Article 74 of the Directive, public contracts for social and other specific services listed in Annex XIV are merely subject to the so-called *'light regime'* laid down in Articles 74 – 76 of the Directive (and the award of these services may under some conditions be reserved to only certain operators in accordance with Article 77 of the Directive).

23. The services listed in Annex XIV to the Directive are defined in that Annex exhaustively through references to the Common Procurement Vocabulary (the CPV-nomenclature). Based on the factual description of the services at issue in the reference order, the Commission bases itself on the presumption that the

services at issue fall under the CPV codes listed in Annex XIV and corresponding in particular to health, social and related services.[12]

24. The fact that Annex XIV of the Directive covers health, social and related services makes it clear that the legislator envisaged the possibility of public contracts which have as their object the provision of such services.

25. The preceding explanations make it clear that it is not the subject matter of a particular service as such (eg, health, social services, education, etc.) which by itself determines whether such a service falls or does not fall within the Directive. Rather, it is the manner in which the provision of such services is organised which determines whether the arrangement in which the services at issue are secured by the authorities falls under the Directive. Likewise, such services should not be excluded from the Directive simply because State funding might be considered as pointing to the absence of remuneration. Indeed, public procurement entails by definition payments by the *State* in consideration for services (whose beneficiaries are very often the citizens or persons residing in a particular area, and not directly the State itself). This is another reason why, in the circumstances of this case, the issue of "public contract" should be assessed from the point of view of the State as a recipient of a service.

26. In accordance with Recitals 4 and 6 and Article 1 of the Directive, the Directive applies to acquisition of services by means of a *public contract*. In accordance with Article 2(1), point 5, 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 their object the execution of works, the supply of products or the provision of services*;

27. It appears clear from the present case that neither the referring court nor any of the parties questions the existence of a (written) contract between a public authority on the one hand and an economic operator on the other the subject of which is the provision of services.[13] It should however be considered whether the contract is *"for pecuniary interest"* within the meaning of Directive 2014/24.

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[12] 85000000-9, 85323000-9 Health and social services, etc. Theoretically, there might also be certain services at issue which fall within Directive 2014/24 *ratione materiae* but which are not listed in Annex XIV (i.e., services which are not subject to the light regime). Given the descriptions provided by the referring court, this does not seem very probable, however.

[13] Reference order, page 2, last paragraph.

28. It should be recalled that the pecuniary nature of a public contract means that there is *quid pro quo*, i.e., the public authority receives *a service* (or good) in exchange for *a consideration*.[14] It follows that both sides of the equation, i.e., both the *quid* and the *quo* have to be sufficiently certain and defined, so that the contract can be performed according to the agreed specifications.

29. As regards the financial arrangement at issue in the present case, it appears that both the *quid* and the *quo* is clearly, specifically and conclusively determined. As regards the *"quid"*, the exact scope of the services that the operators that are awarded the contract is described[15]. As regards the *"quo"*, it follows from the reference order that the amount of the financial contribution to be given to the nursing home services providers is also clearly set in the contract and reflects the best result achieved in the competitive procedure for the award of the contract.[16]

30. From the description by the referring court it is not entirely clear whether the payment to be received by the service provider includes any business profit. However, the absence of profit does not necessarily mean that the relationship between the public authority and the economic operator is free of pecuniary interest. As pointed out by the referring court, the Court of Justice already clarified in case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* that *"as is clear from the usual and ordinary meaning of the phrase 'pecuniary interest', a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service."*[17] Similarly, in case C-386/11 *Piepenbrock* the Court of Justice stated that *"a contract must be considered as being 'for pecuniary interest', within the meaning of Article 1(2)(a) of Directive 2004/18 even if the remuneration provided for remains limited to reimbursement of the expenditure incurred to provide the agreed service"*.[18]

31. Based on the preceding explanations, it should therefore be concluded that the contacts that are awarded in the case at hand are public contracts within the

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14 Judgement of the Court of Justice of 25 March 2010 in case C-451/08 *Herbert Mueller*, ECLI:EU:C:2010:168, para 48; judgement of the Court of Justice of 18 October 2018 in Case C-606/17 *IBA Molecular*, ECLI:EU:C:2018:843, para 28.

15 Reference order, page 11, second and last paragraphs.

16 Reference order, page 13, third paragraph.

17 Judgement of the Court of Justice of 19 December 2012 in case C-159/11 *Lecce*, ECLI:EU:C:2012:817, para 29.

meaning of Art. 2(1)(5) of the Directive, or, more precisely, public service contracts within the meaning of Art. 2(1)(9) of the Directive.

32. With the above considerations in mind, it should now be analysed whether the remaining conditions for the application of Directive 2014/24 are fulfilled and, if so, what regime is applicable to the contracts at issue.

33. Given that, as noted above, the services at issue seem to fall within Annex XIV to the Directive, it should be recalled that in accordance with art. 4(d) of the Directive, the Directive applies where the value of the contracts is equal or higher than the threshold of EUR 750 000. On the basis of the information provided in the reference order, it is not clear what the value of each individual service contract to be awarded would be. Given, however, that the total contract value for the part relating to nursing home services is estimated to NOK 710.4 million per year (over EUR 68 million at current exchange rates), it appears safe to assume that the value of at least some, if not all, of the individual service contracts would surpass the threshold in point (d) of Article 4 of Directive 2014/24/EU.

34. As a consequence, in accordance with Article 75 of Directive 2014/24 contracting authorities are therefore obliged to advertise the contract opportunity in the Official Journal of the European Union using a contract notice or prior information notice (and to publish a contract award notice). These requirements are linked to the principle of transparency, expressed in Article 76(1) of the Directive. It is the understanding of the Commission that such a publication occurred also in the present case.[19]

IV.1.2. Limitation of the right to tender for the contracts at issue to non-profit organisations as defined in national law

35. Directive 2014/24 aims to ensure that procurement is opened up to competition and to ensure that effect is given to principles of the Union law, in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (Recital 1 of the Directive).

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[18] Judgement of the Court of Justice of 13 June 2013 in case C-386/11 *Piepenbrock*, ECLI:EU:C:2013:385, para 31.

[19] See the contract notices for services available at: https://ted.europa.eu/udl?uri=TED:NOTICE:576523-2020:TEXT:EN:HTML&src=0

36. Furthermore, in accordance with Article 18(1) of the Directive the contracting authorities shall treat economic operators equally and without discrimination. In this regard, it should be underlined that Article 76(1) makes it clear that the principles of equal treatment and transparency also fully apply to the national rules that the Member States may adopt for the award of contracts subject to the "light regime".

37. In accordance with Directive 2014/24, participation in procurement may be reserved for certain economic operators only in the situation laid down in Article 77 (and that laid down in Article 20, which however is not at issue in the present case). Reserving contracts for certain economic operators constitutes a restriction on the freedom of establishment and the freedom to provide services, and, in particular, is inconsistent with the principle of equal treatment. Reservations must therefore be considered as an exception to the Directive given both its aims and its explicit requirements in relation to equal treatment. In that context, given the existence of the explicit exemptions to that principle (in Articles 20 and 77) in the Directive on the one hand, and the requirement to adhere to the principles of equal treatment and non-discrimination on the other hand, it must be concluded that the possibility of restricting the rights of tenderers was carefully considered by the legislator and that the legislator deliberately did not want to extend the possibility of limiting the award to certain operators beyond the options in Articles 20 and 77. Moreover, and in any event, in accordance with case law of the Court of Justice the only permitted exceptions to the application of the EU procurement directives are those which are expressly mentioned in the directives[20].

38. To summarise, Articles 74 to 77 of the Directive are intended to fully regulate the award of contracts for social and other specific services that fall within the scope of the Directive and Articles 20 and 77 are intended to be exhaustive of the circumstances in which it is possible to reserve contracts falling within the scope of the Directive for certain organisations.

39. Therefore, the reservation of a right to tender in procedures for the provision of health and social services of a value equal to or above the threshold to non-profit organisations, in a way that is not compliant with Article 77 of Directive 2014/24, does not appear to be compliant with that Directive. It is incompatible with the

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[20] Judgment of the Court of Justice of 18 January 2007 in Case C-220/05, *Auroux*, EU:C:2007:31 para 59 and the case law referred to.

Directive's purpose of opening up public procurement to competition and the principle of equal treatment and thus in contradiction with Articles 18(1) or 76(1) of the Directive.

40. The Commission understands that in the present case, the Oslo municipality did not act pursuant to Section 30-2 of Norwegian Public Procurement Regulation, although that Section (30-2) allows for the reservation of award of contracts concerning the provision health and social services to non-profit organisations under certain strictly defined conditions, which seem to reflect those laid down in Article 77 of Directive 2014/24.[21] Instead, as the reference order specifies, the Oslo municipality adopted the reservation of the right to tender for the services at issue pursuant to Section 30-2a of the Norwegian Public Procurement Regulation. Section 30-2a lays down the following:

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

41. The Commission understands that given that Section 30-2a of Norwegian Public Procurement Regulation does not seem – in contrast to Section 30-2 thereof – to make the reservation to non-profit organisations subject to (all) the conditions in Art. 77 of the Directive, the referring court inquires about the compatibility of Section 30-2a as such with the EEA law.

42. The reference order further does not seem to contain any argumentation or explanation allowing to conclude that Section 30-2a fulfils the conditions laid down in Art. 77(2) and (3) of the Directive.

43. To the contrary, from the information available in the order it appears clear that the contracts at issue, awarded on the basis of Section 30-2a, do not fulfil the

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[21] For a text of Section 30-2 in Norwegian, see https://lovdata.no/dokument/SF/forskrift/2016-08-12-974?q=FOR-2016-08-12-974

condition laid down in Article 77(3), as the contracts at issue are concluded for 8+1+1 years (reference order, page 8, penultimate paragraph), whereas that provision allows for a maximum duration of 3 years. Likewise, the reference order does not contain any information allowing to conclude that the contracting authority was, when acting under Section 30-2a, obliged to apply some of the other remaining conditions laid down in Article 77(2) (such as those in letters (c) and (d) thereof).

44. As a consequence, the Commission considers that the national legislation at issue is contrary to Articles 18(1) and 76(1) of the Directive.

45. Finally, the Commission notes that arguments have been made before the referring court that, in the light of the judgements of the Court of Justice in cases C-113/13 *Spezzino* and C-50/14 *CASTA*, there is a possibility for national authorities to adopt legislative provisions providing that procurements of health and social services within the scope of Annex B to the former Public Procurement Directive (Directive 2004/18/EC) could/should be reserved for non-profit organisations.[22]

46. The Commission disagrees with these views. It should be first noted that those two judgments concerned very specific services (ambulance services) which are not concerned in the present case. In the new public procurement Directive 2014/24, which *inter alia* aimed to react to the developments in case law, the legislator reacted to the judgements in *Spezzino* and *CASTA* cases and provided, on the one hand, for a specific legal framework applicable to the award of contracts for the ambulance services concerned (see in particular Article 10 (h) of the Directive), and, on the other hand, a new light regime applicable to all the health and social services concerned, including the possibility of a derogation from the principle of equal treatment under certain conditions (Article 77 of Directive 2014/24). As such, the judgments in *Spezzino* and *CASTA* cannot be relied upon to establish that a reservation of contracts to non-profit organisations, such as that at issue in the present case, is compliant with Articles 18(1) and 76(1) of the Directive, irrespective of whether the conditions of those cases are met.[23]

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22 See reference order, page 16, first full paragraph, and page 17, section 5.1.3.2.

23 The fact that the approach taken by the Court of Justice in the *Spezzino* and *CASTA* cases is no longer pertinent in the context of Article 10(h) of Directive 2014/24 is demonstrated also by the fact that the Court of Justice does not refer to that case law any more in its judgement in case C-465/17 *Falck*,

IV.1.3. Conclusion

47. Based on the above, the Commission proposes to reply to the first and third set of questions posed by the referring court as follows:

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

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

IV.2. On the exception in Article 32 EEA for exercise of official authority

48. The second set of questions concerns the official authority exception of Article 32 of the EEA Agreement, which corresponds to Article 51 TFEU.

49. It is settled case law that this derogation must be interpreted in a way which limits its scope to what is strictly necessary to safeguard the interests that it allows the Member States to protect.[24] It is limited to activities that constitute direct and specific participation in the exercise of the public authority[25]. This excludes, in particular, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority[26], as well as activities intended to merely facilitate the accomplishment of the tasks for which State authorities are responsible.[27]

ECLI:EU:C:2019:234, concerning Article 10(h), despite the fact that the referring court and the parties in that case referred to that caselaw extensively (as reflected in paras 18 and 23 of that judgement).

24 Judgment of 1 December 2011, Commission / Netherlands, C-157/09, EU: C: 2011: 794, para. 57.

25 Judgment of 15 March 2018, *European Commission v Czech Republic*, C-575/16, ECLI:EU:C:2018:186, paras. 101-102 ; judgment of 1 December 2011, Commission / Netherlands, C-157/09, ECLI:EU:C:2011:794.4, para. 58.

26 Judgment of 13 July 1993, Thijssen, C - 42/92, EU: C: 1993: 304, para. 22.

27 Judgment of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori*, C-451/03, ECLI:EU:C:2006:208, para. 47.

50. In that context, it has been considered relevant that, while certain activities may entail a contribution to the functioning of public authorities, they leave intact their discretion and decision-making powers.[28] The fact that the activity is performed under oversight or supervision by State authorities also tends to suggest that it is not, in itself, taken in the exercise of official authority.[29] This is true even where such activities are undertaken in order to implement provisions of national law (e.g. through inspections), including the exercise of certain powers as to the consequences to be drawn from that implementation.[30] For example, it has been held that the activities of private security undertakings and their staff are not covered by Article 51 TFEU, even though they contribute to the objective of public security and are in some circumstances called upon to assist public security forces.[31]

51. So-called "coercive health care" may, in the abstract, entail the exercise of official authority. This refers, especially, to any decisions concerning the legal capacity of individuals and their freedom of consent to medical procedures. The Commission understands, however, that such decisions are not in the first place the responsibility of nursing homes or their staff. Instead, the staff of nursing homes (such as nurses) is only exceptionally called upon to exercise coercive health care towards a patient who does not have legal capacity to give consent or who might be even opposed to that heath care. Such actions would be taken merely in order to comply with a judicial decision depriving the patient of legal capacity, and are subject to supervision by public authorities.[32] At best, the role of nursing home staff in such situations could be described as auxiliary. Therefore, it does not meet the standard set out in the case law.

52. It is true that, by using the terms "even occasionally", Article 32 of the EEA Agreement and Article 51 TFEU accept that a particular body or person may engage in official authority functions only some of the time. The relevant question

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28 Judgment of June 21, 1974, Reyners , 2/74, EU: C: 1974: 68, paragraphs 51 and 53; Commission / Portugal, C - 438/08, EU: C: 2009 : 651, paragraphs 36 and 41

29 Judgment of the Court (Fourth Chamber) of 22 October 2009, *Commission of the European Communities v Portuguese Republic*, C-438/08, ECLI:EU:C:2009:651, para. 41.

30 Judgment of 29 November 2007, Commission / Germany, C - 404/05, EU: C: 2007: 723, paras. 38 and 44.

31 Judgment of 29 October 1998, Commission / Spain, C - 114/97, EU: C: 1998: 519, paragraph 37

32 In that respect, the reference order specifies at p. 10: "The relevant State official is the supervisory authority and may reverse a decision to administer coercive health care following a complaint or on the State official's own initiative."

is not precisely how often, but in what way those activities are engaged in. In other words, the question is whether even those occasional activities, seen as whole, constitute an exercise of official authority with all of the characteristics discussed above, such as independent decision-making powers. This does not appear to be the case in the circumstances of the main proceedings. Even if it was the case, the referring court would still need to assess, as the CJEU explained in Anker, whether the staff of nursing homes exercise such activities on a regular basis and whether they represent more than a very minor part of their overall activities.[33]

53. Contrary to the assumption in questions 1(a) and 1(b), these considerations are in no way affected by the non-profit or for-profit nature of the service provider.

IV.2.1. Conclusion

54. Based on the above, the Commission proposes to reply to the second set of questions posed by the referring court as follows:

Article 32 of the EEA Agreements should be interpreted as not applying to the activities of the contractors of the public authorities or their health personnel in circumstances such as those in the main proceedings, regardless of whether the activities of those contractors or other similar contractors in the same State are engaged in for profit or on a non-profit basis.

V. CONCLUSION: THE PROPOSED RESPONSES

55. In the light of the preceding discussion, the Commission proposes to respond to the questions from the referring court as follows:

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

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

On the reservation for non-profit organisations:

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[33] Judgment of 30 September 2003, Anker, C-47/02, EU:C:2003:516, para. 69.

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

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

Article 32 of the EEA Agreements should be interpreted as not applying to the activities of the contractors of the public authorities or their health personnel in circumstances such as those in the main proceedings, regardless of whether the activities of those contractors or other similar contractors in the same State are engaged in for profit or on a non-profit basis.

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